PRIVILEGED WITNESSES

Abuse of Procedural Rights in Criminal Proceedings

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FOREWORD

Through the work of the informal coalition Judicial Base South, we sought to examine in greater detail certain procedural rights whose exercise may significantly affect the course and outcome of criminal proceedings. One such right is the right of a privileged witness to be exempted from the duty of testifying because of a family or other close relationship with the defendant.

Although this right serves an important protective purpose, its use in practice raises the question whether it may be exercised contrary to the purpose for which it was established. The research aimed to determine how often privileged witnesses exercise this right, at which stages of the proceedings and with what consequences, and whether safeguards exist against bad-faith conduct or abuse while maintaining the full legal protection afforded to witnesses.

The principal author of the study and head of the research was Prof. Ivan Ilić, PhD, Associate Professor at the Faculty of Law, University of Niš. The research and writing team also included Andrija Ivić, Public Prosecutor at the Higher Public Prosecution Office in Niš, and Miodrag Petković, an attorney-at-law from Niš. Their experience in academia, public prosecution and legal practice enabled the subject to be considered from different perspectives within criminal procedure. Staff of the Niš Human Rights Committee provided logistical, organizational and administrative support to the authors.

The research and preparation of the study were carried out in 2024 and 2025.

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Introduction

Procedural powers comprise the rights enjoyed by the parties and other participants throughout criminal proceedings. Different participants have different rights and duties depending on their procedural position and the stage reached by the proceedings.

Some rights may be exercised as soon as an individual case is initiated, while others may be exhausted at any point before the proceedings are finally concluded.

The rights of participants in proceedings are governed by the Criminal Procedure Code.[1] The Code establishes the procedural powers of the public prosecutor, the injured party, the defendant and defence counsel, witnesses and other participants. The following section presents the rights and duties of these participants.

The public prosecutor is required to institute criminal prosecution where there are grounds for suspicion that a criminal offence has been committed or that a particular person has committed an offence prosecuted ex officio. For certain criminal offences, where so prescribed by law, the public prosecutor may institute prosecution only on a motion by the injured party.

The public prosecutor directs the investigation, files the instrument of indictment with the court, represents the prosecution before the court and files legal remedies. As the authority conducting proceedings, the public prosecutor is

[1] Official Gazette of the Republic of Serbia, Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – Constitutional Court decision, and 62/2021 – Constitutional Court decision.

required to advise the defendant or another participant of the rights to which that person is entitled.

The public prosecutor's fundamental and most important right, as well as duty, is to prosecute perpetrators of criminal offences. In respect of offences prosecuted ex officio, the public prosecutor is competent to:

1) direct the pre-investigation proceedings;
2) decide whether to institute or defer criminal prosecution;
3) conduct the investigation;
4) conclude a plea agreement and an agreement on testimony;
5) file and represent charges before the competent court;
6) withdraw the charges;
7) appeal against non-final court decisions and file extraordinary legal remedies against final court decisions;
8) undertake other actions prescribed by law.

In addition, all authorities participating in pre-investigation proceedings are required to inform the competent public prosecutor of every action undertaken to detect a criminal offence or locate a suspect. The police and other state authorities competent to detect criminal offences are required to act on every request of the competent public prosecutor.

If the police or another state authority fails to act on a request of the public prosecutor, the public prosecutor shall immediately notify the head of that authority and may, where necessary, notify the competent minister, the Government or the competent working body of the National Assembly.

Finally, if the police or another state authority fails to act on the public prosecutor's request within 24 hours of receipt of such notice, the public prosecutor may request that disciplinary proceedings be instituted against the person considered responsible for the failure to act.

It follows from the foregoing that the powers conferred on the public prosecutor in relation to all other participants are intended to enable the conduct of criminal proceedings, the establishment of facts and the clarification of all material circumstances relating to a particular criminal matter.

An injured party is a person whose personal or property right has been violated or endangered by a criminal offence. Under the Criminal Procedure Code, the injured party is entitled to:

1) submit a motion and evidence for the realisation of a property claim and propose provisional measures to secure it;

2) draw attention to facts and propose evidence relevant to the subject matter of proof;

3) engage an attorney-at-law as representative;

4) examine the case file and inspect objects serving as evidence;

5) be notified of the dismissal of a criminal complaint or the public prosecutor's withdrawal from criminal prosecution;

6) file an objection against the public prosecutor's decision not to institute, or to withdraw from, criminal prosecution;

7) be advised of the possibility of assuming criminal prosecution and representing the charges;

8) attend the preparatory hearing;

9) attend the trial and participate in the presentation of evidence;

10) appeal against the decision on the costs of criminal proceedings and on the awarded property claim;

11) be notified of the outcome of the proceedings and receive the final judgment;

12) undertake other actions where prescribed by the Code.

The injured party may be denied the right to examine the case file and inspect objects until questioned as a witness. If, in respect of an offence prosecuted ex officio, the public prosecutor dismisses the criminal complaint, discontinues the investigation or withdraws from criminal prosecution before confirmation of the indictment, the prosecutor is required to notify the injured party and advise that party of the right to file an objection with the immediately higher public prosecutor.

If, after the indictment has been confirmed, the public prosecutor declares that the charges are being withdrawn, the injured party may assume the prosecution and represent the charges. The injured party may also file a motion with the competent public prosecutor in respect of offences prosecuted upon a motion by the injured party.

A defendant is a person against whom an indictment has been issued but not yet confirmed, or against whom a motion to indict, private prosecution or motion for the imposition of the security measure of compulsory psychiatric treatment has been filed, where the trial or hearing for the imposition of a criminal sanction has not yet been scheduled. The term is also used generically to refer to a suspect, accused person, person standing trial and convicted person.

The defendant is entitled to:

1) be informed, promptly and always before the first questioning, in detail and in a language the defendant understands, of the offence charged, the nature and grounds of the accusation, and that anything stated may be used as evidence in the proceedings;

2) make no statement, decline to answer a particular question, present a defence freely, and admit or deny guilt;

3) conduct the defence in person or with the professional assistance of defence counsel in accordance with the Code;

4) have defence counsel present during questioning;

5) be brought before a court as soon as possible and be tried impartially, fairly and within a reasonable time;

6) read the criminal complaint, the crime-scene inspection record, and the expert's findings and opinion immediately before the first questioning;

7) be afforded sufficient time and facilities to prepare the defence;

8) examine the case file and inspect objects serving as evidence;

9) collect evidence for the defence;

10) respond to all facts and evidence presented against the defendant and present facts and evidence in the defendant's favour; examine prosecution witnesses and require defence witnesses to be examined in the defendant's presence under the same conditions as prosecution witnesses;

11) avail himself or herself of procedural remedies and legal remedies;

12) undertake other actions provided for by the law in force.

Some of the defendant's rights also apply to an arrested person, who is entitled, among other things, to a confidential conversation with defence counsel that is monitored only visually and not by listening, and to request an examination without delay by a physician freely chosen by that person or, if that physician is unavailable, by a physician designated by the public prosecutor or the court.

A witness is a person likely to provide information about a criminal offence, its perpetrator or other facts being established in the proceedings. Any person capable of conveying knowledge or observations concerning the subject matter of testimony is competent to testify. An injured party, an injured party acting as prosecutor or a private prosecutor may be examined as a witness.

Any person summoned as a witness is required to respond to the summons of the competent authority and is also required to testify.

The following persons are excluded from the duty of testifying:

1) a person who, by testifying, would breach a duty to preserve classified information, until the competent authority or an authorised representative of a public authority revokes the classification or releases that person from the duty;
2) a person who, by testifying, would breach the duty to preserve a professional secret (a religious confessor, attorney-at-law, physician, midwife, etc.), unless released from that duty by a special regulation or by a declaration of the person for whose benefit confidentiality was established;
3) defence counsel, in respect of matters entrusted by the defendant in that capacity.

Exceptionally, upon a motion by the defendant or defence counsel, the court may decide to examine a person excluded from the duty of testifying.

The following persons are exempted from the duty of testifying (privileged witnesses):

1) a person with whom the defendant lives in marriage, a non-marital union or another permanent union;
2) the defendant's direct blood relative, collateral blood relative up to and including the third degree, or relative by marriage up to and including the second degree;
3) the defendant's adoptive parent or adopted child.

A minor who, by reason of age and mental development, is incapable of understanding the significance of the right to be exempted from the duty of testifying may not be examined as a witness unless the defendant personally requests it.

Before examination, or as soon as it learns of the person's relationship with the defendant, the authority conducting proceedings is required to caution a person who may be exempted from the duty of testifying that he or she is not required to testify. The caution and the reply shall be entered in the record.

A person who has grounds to decline to testify in relation to one defendant is also exempted from the duty of testifying in relation to the other defendants if, by its nature, the testimony cannot be limited solely to those other defendants.

A witness shall be admonished to tell the truth and not to omit anything, and shall then be cautioned that giving false testimony constitutes a criminal offence. The witness shall also be cautioned that he or she is not required to answer a particular question if the answer would be likely to expose the witness or a member of the witness's family to serious disgrace, substantial material loss or criminal prosecution. This caution shall be entered in the record.

If a duly summoned witness fails to appear without justifying the absence, or leaves the place where the examination is to take place without permission, the authority conducting proceedings may order the witness's compulsory appearance, and the court may also impose a fine of up to 100,000 dinars.

If a witness appears but, after being cautioned about the consequences, refuses to testify without a lawful reason, the court may impose a fine of up to 150,000 dinars. If the witness continues to refuse, the court may impose the same fine once more.

Review of Cases from Judicial Practice

The following section presents several cases in which the courts hearing them interpreted the relevant provisions and adopted positions, thereby developing case law on the application of the Criminal Procedure Code provisions governing the examination of privileged witnesses.

The statutory provisions set out above are clear and precise: the statutory privilege to decline to answer a particular question where the answer would expose a close relative to criminal prosecution applies to witnesses, not defendants. Accordingly, a defendant's statement does not become unlawful evidence merely because the defendant was not advised of the right to decline to answer such a question. The reason is that the provisions on exemption from the duty of testifying apply to witnesses rather than defendants. Under the Criminal Procedure Code, the authority questioning a defendant is therefore not required to caution the defendant that a statement may be used as evidence against another defendant. That duty exists only when a witness is examined in the specific situations prescribed by the Criminal Procedure Code.

Where the evidentiary action of examining a witness is undertaken during pre-investigation proceedings against an

unknown perpetrator, the witness cannot at that point be exempted from the duty of testifying on the basis of the witness's relationship with the defendant. For example, a witness was questioned by the public prosecutor in pre-investigation proceedings against an unknown perpetrator in respect of a particular criminal offence, without the approval of the preliminary proceedings judge under Article 300 of the Criminal Procedure Code. The record stated that, under Article 94(1) of the Code, the witness had been cautioned that he was exempted from the duty of testifying in relation to his father, and the witness declared that he wished to testify even if his father were subsequently identified as the suspect. That caution and the witness's conditional consent to testify even if his father proved to be the suspect were without legal effect. This affected the lawfulness of the evidence because the statement had been given before it was established that the witness's father was the person against whom the proceedings were being conducted. The statement could not therefore be used as lawful evidence, nor could a judgment be based upon it.

Privileged witnesses may exercise their right not to testify whenever they are examined at any stage of criminal proceedings, until the judgment becomes final. The court is therefore required, before each examination, to caution them that they are not required to testify and to enter both the caution and the reply in the record.

According to the case law, a substantial violation of the provisions of criminal procedure occurs where a first-instance judgment is based on evidence on which it may not be based—

specifically, the statement of an injured party examined as a witness that was obtained contrary to Article 94 of the Criminal Procedure Code. The court committed such a violation by failing, when examining the witness at trial, to caution the witness that he or she was exempted from the duty of testifying and by failing to enter that caution in the record.

Under Article 94(1)(2) of the Criminal Procedure Code, the persons exempted from the duty of testifying include, among others, the defendant's relatives by marriage up to and including the second degree. The court, as the authority conducting proceedings, is therefore required to caution privileged witnesses before examination, or as soon as it learns of their relationship with the defendant, that they are not required to testify; the caution and reply must be entered in the record. Privileged witnesses may exercise this right whenever they are examined at any stage of criminal proceedings, until the judgment becomes final.

The conduct of the first-instance court described above was contrary to those provisions of the Criminal Procedure Code, which prohibit a court decision from being based on the statement of a privileged witness examined without having been cautioned that he or she was not required to testify, where the witness did not expressly waive that right, or where the caution or waiver was not entered in the record.

In that case, the first-instance court relied on the witness's statement in the reasoning of its judgment: it assessed the statement's probative value, accepted it in full and, together with

other evidence, used it as a basis for factual and legal conclusions on material facts concerning the perpetrator and the manner in which the criminal offence had been committed. The appellate court found that this constituted a substantial violation of the provisions of criminal procedure.

The foregoing supports the conclusion that a criminal court judgment may not be based on the statement of a privileged witness who is exempted from the duty of testifying and has exercised that right in the criminal proceedings.

In practice, a privileged witness may give an untruthful statement before the competent authority or the court. However, an untruthful statement given by a privileged witness before the competent public prosecutor does not constitute the criminal offence of giving false testimony if, later in the proceedings, at trial, the same witness declares that he or she does not wish to testify and the court is required to exempt that person from the duty of testifying as a privileged witness.

The Criminal Code in force provides for imprisonment of up to three years for a witness, expert witness, translator or interpreter who gives false testimony before a court, in disciplinary, minor-offence or administrative proceedings, or in other proceedings prescribed by law. The act constituting this criminal offence is therefore the giving of false testimony, meaning a statement that affirms untrue facts or denies true facts.

A situation may arise in practice in which a privileged witness gives a statement on the record before the competent public

prosecutor, after being cautioned that he is exempted from the duty of testifying in the proceedings against his brother, and that statement concerning the event in question is false; yet, at the trial before the competent court, the witness declares that he does not wish to testify in the proceedings against his brother, the defendant.

Since that witness is unquestionably exempted from the duty of testifying in the criminal proceedings against his brother, none of his earlier statements—especially the statement given before the public prosecutor that constitutes the act alleged as the criminal offence—may be used in any way in those proceedings.

A privileged witness may exercise the right whenever examined at any stage of criminal proceedings, until the decision becomes final. Records of statements made by privileged witnesses must be excluded from the case file once a witness declares at any examination that he or she does not wish to testify, and the court must give effect to that declaration.

Consequently, a witness statement that is not legally valid for the purposes of the criminal proceedings cannot form the basis of a charge—specifically, it cannot constitute the alleged act or subject matter of the criminal offence.

Finally, the question arises whether the statement of a person exempted from the duty of testifying may be read out where that person was examined by the prosecutor during the investigation but died before the trial was scheduled. According to the case law, records of earlier examinations of persons exempted from the duty

of testifying may not be admitted in evidence if those persons were never summoned to trial or stated at trial that they would not testify. Where it is established that a privileged witness has died and could have been exempted from the duty of testifying under the Criminal Procedure Code, records of the examination of such a witness may be read at trial only if the witness was duly summoned to trial, failed to appear and had not previously declared an intention not to testify. If a witness who could by law be exempted from the duty of testifying later dies, the record of the earlier examination may not be read; it must be excluded from the case file, and no judgment may be based on that statement.

The foregoing examples from judicial practice establish unequivocally that the courts have been consistent in applying the Criminal Procedure Code provisions on exemption from the duty of testifying—that is, the provisions governing privileged witnesses.

Definition of the Subject Matter of the Research

In general terms, the subject matter of the research is the possibility for the authority conducting proceedings and the parties to protect themselves from dishonest, unethical and malicious conduct by a privileged witness—more precisely, by a witness who may be exempted from the duty of testifying under Article 94 of the Criminal Procedure Code.

The foregoing examples from judicial practice indicate that privileged witnesses have considerable scope to abuse the right. They may shield themselves in law from liability for the criminal

offence of giving false testimony; they may exercise the right until the judgment becomes final, potentially causing substantial and unnecessary costs; and the judicial authorities handling the case must comply with the prescribed rules, since a breach constitutes a substantial procedural violation and ultimately represents one of the most common grounds of appeal.

The specific subject of the research is the frequency with which privileged witnesses exercise their right; the frequency with which they abuse it in order to prevent the criminal prosecution of an offender; and the criminal offences in the investigation and prosecution of which privileged witnesses resort to an abuse of their rights.

Research Aim and Research Tasks

The ultimate aim of the research is to determine whether a party to the proceedings can effectively protect itself from unethical and malicious conduct by a privileged witness, and whether witnesses who engage in such conduct are sanctioned by the imposition of fines.

Given the number of proceedings involving persons who may be exempted from the duty of testifying, it would not be practicable to examine a larger number of cases. The research will therefore cover the period from January 2020 to December 2023.

Accordingly, the initial objective is to obtain specific data and information necessary to achieve the ultimate aim and reach conclusions on the questions set out above.

The research tasks undertaken in pursuit of those objectives are: examining court and public prosecution case files; collecting and analysing data and information on individual cases; and obtaining additional individual and aggregate data relevant to the subject of the research from courts and public prosecution offices under the Law on Free Access to Information of Public Importance.

Scope of the Analysis

The research will cover cases before the Basic Courts in Niš, Leskovac, Vranje and Pirot, as well as the basic public prosecution offices with territorial jurisdiction over the areas served by those courts. The requested data will be collected by direct inspection of case files, through interviews, and from the responses of courts and public prosecution offices to requests for access to information of public importance.

Research Method

The research will be carried out in five stages.

During the first stage, the relevant legislation will be collected and examined using the analytical method.

The second stage comprises: (1) submitting requests for access to information of public importance to basic courts and public prosecution offices; (2) inspecting and analysing case files in which a privileged witness exercised the right; and (3) interviewing judges of the basic courts and public prosecutors who have encountered cases involving the exercise and abuse of the right by a privileged witness.

The third stage comprises analysis of the data collected, preparation of statistics and formulation of conclusions.

The fourth stage will consider the need for legislative amendments and, where appropriate, formulate proposals for improvement in the area concerned.

The fifth and final stage comprises preparation of the draft report, its review and presentation of the final report.

Implementation of each subsequent stage depends on the cooperation of the basic courts and public prosecution offices, including their administrative staff, judges and public prosecutors.

Research Ethics

The research report will be written without including any personal data concerning participants in the proceedings.

Data Collection Instruments

Data will be collected using a questionnaire for extracting data from case files, requests for access to information of public importance, and an interview questionnaire.

QUESTIONNAIRE FOR COLLECTING DATA FROM CASE FILES

Date of data collection: _____

Case number: _____

Questionnaire number: _____

1. Criminal offence with which the defendant is charged:
   _____
2. Relationship between the privileged witness and the defendant:
   _____
3. Stage of the proceedings at which the privileged witness exercises the right: _____
4. Did the privileged witness change his or her statement?
   _____
5. Was a fine imposed on the privileged witness?
   _____
6. Was an order issued for the compulsory appearance of the privileged witness? _____
7. Was the privileged witness cautioned about the possibility of exemption from the duty of testifying? _____

QUESTIONNAIRE FOR COLLECTING DATA FROM JUDGES AND PUBLIC PROSECUTORS HANDLING THE CASES

Date of data collection: _____

Court: _____

Questionnaire number: _____

1. How frequently do privileged witnesses exercise their right?

2. What do privileged witnesses most commonly cite as the immediate reason for declining to testify?

3. Does the frequency with which privileged witnesses exercise their right differ depending on whether they reside in an urban or a rural area?

4. Do privileged witnesses exercise their right more frequently during the investigation or at trial?

5. Do privileged witnesses duly respond to summonses issued by the competent authorities?

6. How frequently are privileged witnesses fined for failing to respond to a summons issued by the competent authority?

7. How frequently do privileged witnesses change their statements?

8. How frequently do privileged witnesses exercise their right before the court after giving a statement to the public prosecutor?

9. Which criminal offences most commonly involve the appearance of privileged witnesses during prosecution?

10. What number/percentage of proceedings are discontinued for lack of evidence other than the statement of a privileged witness where that witness decides to exercise the right?

11. Can you quantify the costs incurred in the proceedings before the privileged witness exercised the right, resulting in discontinuance of the proceedings?

12. Does the court always verify whether the privileged witness previously gave a statement on the record before the public prosecutor and declared a willingness to testify?

13. Can you identify the most common family or other relationship between the defendant and the privileged witness (spouses, parent, child, etc.)?

14. Do privileged witnesses exercise their right more frequently upon first contact with the prosecuting authorities or at a later stage, including retrial following an appellate decision where such a retrial takes place?

15. How frequently is a breach of Article 94 of the Criminal Procedure Code raised as a ground of appeal against a first-instance decision?

PRIVILEGED WITNESSES – THEORETICAL FRAMEWORK

Among the means of proof available in modern criminal proceedings, witness testimony is regarded as one of the most important. Witnesses are therefore participants in criminal proceedings whose procedural position receives particular legislative attention. Historically, the procedural position of witnesses was characterised primarily by the duty to comply with a summons from the authority conducting proceedings and to appear at trial, backed by the possibility of procedural sanctions, including detention. Witnesses later acquired certain rights in criminal proceedings, above all protection against harassment by the defendant and other participants. Modern criminal procedure has increasingly focused on comprehensive witness protection, both within and outside the proceedings. This development was prompted by numerous international instruments advocating that protection traditionally afforded to defendants be extended to witnesses. It was also supported by the case law of the European Court of Human Rights, which has made clear in numerous decisions that certain guarantees forming part of the right to a fair trial also apply to witnesses.[2] One standard reflecting this trend in modern criminal procedure is the exclusion of certain categories of witness from the duty of testifying. The reasons vary and include the protection of important state and other interests that outweigh the need to establish facts in criminal proceedings through witness testimony. The protection of family interests and relationships, as

[2] For more on this, see Ivan Ilić, monograph.

well as considerations of fairness, likewise justify exceptions from the general duty to testify for certain categories of witness. The need to protect a witness, and the resulting absence of testimony, assumes particular importance where the injured party appears as a witness. In many cases, the accurate and complete establishment of the facts depends decisively on the testimony of the injured party acting as a witness, especially where that person is also the direct victim of the offence. The absence of such testimony may make it impossible to establish the commission of the offence with the necessary degree of certainty, ultimately leaving offenders without a conviction and deserved sanction. This raises the question of the scope and effect, over the course of criminal proceedings, of a witness's reliance on the privilege not to testify. It also raises the question how to balance the protection of private interests within close family relationships against the interest in establishing facts in criminal proceedings and protecting the injured party—more specifically, the direct victim of the offence.

DEFINITION, ACQUISITION OF WITNESS STATUS AND PROCEDURAL POSITION

Within the range of means of proof used in modern criminal proceedings, witness testimony is considered indispensable. Witnesses are therefore highly important participants, particularly where they witnessed the offence. The prevailing view in procedural theory is that witnesses are natural persons who perceived through their senses facts relevant to criminal proceedings and who testify about those facts when summoned by

the authority conducting the proceedings. Some authors also include natural persons who learned of the commission of an offence indirectly.[3] These are so-called hearsay witnesses, whose testimony is accepted as a means of proof in Serbian criminal procedure. The perceived facts may concern the offence, the perpetrator, or both components of the criminal matter.[4] The Serbian legislature has also addressed the issue: Article 91 of the Criminal Procedure Code[5] defines a witness as a person likely to provide information about a criminal offence, the perpetrator or other facts being established in the criminal proceedings. In its effort to define every element, the legislature introduced, quite unnecessarily, a degree of certainty into the definition—the likelihood that the witness may provide 'information'. If the authority conducting proceedings were to adhere strictly to that statutory definition, it could reject evidentiary motions by the parties on the ground that there was no likelihood that the witness would be able to testify about the facts. In other words, the parties could be burdened with proving that likelihood before their evidentiary motion would be accepted. The term 'information' is inadequate from the perspective of criminal procedural terminology, since what is involved is a statement by a participant in the proceedings, not merely information. Finally, as regards the relevant facts, the statutory definition might be read as requiring a witness to be able to testify both to decisive facts (concerning the

[3] Saša Knežević, *Krivično procesno pravo – opšti deo*, Niš, 2015, p. 288.
[4] Vojislav Đurđić, *Krivično procesno pravo – opšti deo*, Niš, 2014, p. 279.
[5] Official Gazette of the Republic of Serbia, Nos 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – Constitutional Court decision, and 62/2021 – Constitutional Court decision.

offence or the perpetrator) and to other facts established in criminal proceedings, namely circumstantial facts and verification facts. A witness may therefore be defined as a natural person who, when summoned by the authority conducting proceedings, testifies to facts established in criminal proceedings.[6] The summons issued by the authority conducting proceedings is thus an essential feature of witness status and distinguishes a witness from a so-called presumptive witness: a person who may likewise possess knowledge of facts being established in criminal proceedings but has not been summoned to testify about them. Who is summoned as a witness depends on the initiative to adduce evidence, which under Serbian procedural law lies primarily with the parties and, subsidiarily, with the court (Article 15(3) and (4) of the Criminal Procedure Code).

The procedural law imposes no condition relating to age or mental health for acquiring witness status. Any natural person may therefore appear as a witness in criminal proceedings, including a child, an elderly person, a person with a mental illness or a person with a particular physical impairment. Witnesses may be Serbian or foreign nationals. Under the Criminal Procedure Code, no person is absolutely incapable of being a witness by reason of any personal characteristic. The Code does, however, provide that only a person capable of conveying his or her own knowledge or observations is competent to testify. Competence to testify is therefore a rebuttable presumption in criminal proceedings. If doubt arises as to a

[6] For different definitions of the term witness, see Saša Atanasov, DD, pp. 23–28.

witness's ability to convey knowledge or observations, that competence may be assessed during the proceedings. The legislature accordingly provided for the possibility of a psychiatric expert examination where a witness's ability to convey personal observations and knowledge is in doubt (Article 131(2) of the Criminal Procedure Code). This is an innovation in comparison with earlier procedural legislation, which traditionally provided only for psychiatric expert examination of the defendant. A witness who can convey his or her own knowledge and observations thus has procedural competence. The question then arises what procedural consequences follow where a psychiatric expert examination establishes that the witness is unable to convey that knowledge and those observations. The current Code does not regulate this issue. It is clear that an initiative for a psychiatric assessment of competence to testify may come from the parties or the court. A finding that a person is not competent to testify may lead to the rejection of a party's motion to adduce that evidence. If a witness found not competent nevertheless gives testimony in the criminal proceedings, the court will take that finding into account when assessing the testimony.

One of the traditional principles of continental criminal procedure was the prohibition on testifying in one's own case—that is, the prohibition on combining the roles of witness and defendant in the same criminal proceedings. By contrast, in adversarial criminal proceedings a defendant may be examined as a witness and may therefore testify in his or her own case. An

exception to the absolute prohibition on combining the roles of witness and defendant is the institution of the so-called crown witness (cooperating witness), referred to in the statutory terminology as a cooperating defendant. For organised crime offences (specified in Article 162(1)(1) of the Criminal Procedure Code), the public prosecutor may conclude an agreement on testimony with a defendant at any time from the commencement of the investigation until the conclusion of the trial. The key condition for this type of agreement is the importance of the defendant's testimony for detecting, proving or preventing offences categorised as organised crime. The importance of the testimony must outweigh the consequences of the offence committed (Article 320(2) of the Code). The organiser of a criminal group is excluded from this possibility. In return, a defendant who becomes a cooperating defendant enters into an agreement with the public prosecutor on the type and severity of the criminal sanction, or on exemption from punishment, or obtains the public prosecutor's withdrawal from prosecution. At trial, the cooperating defendant is examined after the defendants have been questioned and before the remaining witnesses, and is then removed from the courtroom. This consensual form therefore qualifies the prohibition on combining the roles of defendant and witness, but not in the manner characteristic of adversarial criminal proceedings. In the adversarial model, a defendant testifies in the proceedings against him or her on the defendant's own initiative, strengthening the defence by assuming a duty to tell the truth. In the case of a

cooperating witness, by contrast, the defendant is transformed into a witness because of the importance of the testimony for detecting and proving organised crime offences.

Other participants are also subject to the prohibition on combining procedural functions. Judges, lay judges and public prosecutors may not perform their functions in criminal proceedings in which they have been examined as witnesses. By contrast, an injured party appearing as a subsidiary prosecutor or private prosecutor, or as a witness with or without a property claim, may be examined as a witness (Article 92(2) of the Criminal Procedure Code).

The procedural position of a witness comprises both rights and duties. Historically, it was characterised by numerous duties and very few rights. In modern criminal proceedings, the witness's fundamental duty derives from every citizen's obligation to comply with a summons from the authority conducting proceedings. This is the general duty to testify. Every citizen is required to respond to a summons from the public prosecutor or the preliminary proceedings judge during the investigation, or to a court summons to appear at trial and testify as a witness. Failure to comply may result in procedural compulsion in the form of compulsory appearance or a fine. A witness also bears the costs occasioned by postponement of the evidentiary action. In addition, a witness is required to take an oath before testifying. Persons incapable of understanding the significance of the oath—under the wording of the statute, minors and persons with mental illness—are exempted

from that obligation (Article 92 of the Criminal Procedure Code). Finally, a witness has a duty to testify truthfully. Before examination, the witness is advised that he or she must tell the truth and omit nothing, and that giving false testimony constitutes a criminal offence (Article 335 of the Criminal Code). A witness who refuses to testify is liable to a fine.

As ideas concerning the humanisation of criminal proceedings gained ground, the procedural position of witnesses evolved towards gradual recognition of a right to protection. Article 23 of the Constitution of Serbia requires the authorities conducting proceedings to treat witnesses humanely and protect their dignity. This is the basic protection of witnesses against harassment in criminal proceedings. It also protects witnesses against impermissible influence on their free will when giving testimony. Torture, inhuman or degrading treatment, the use of force, threats or deception, and the use of medical procedures intended to influence a witness's will are prohibited (Article 9 of the Criminal Procedure Code). In addition to basic protection, systems of procedural and non-procedural witness protection have gradually developed, including in Serbian law. A witness enjoys additional procedural protection beyond the basic level. This protection is available to especially vulnerable witnesses and protected witnesses (Articles 103–112 of the Code). Protective measures for these two categories concern special methods of examination designed to protect witnesses from secondary victimisation and, more generally, from any impermissible attack on their physical or

psychological integrity. Unlike procedural protection, non-procedural witness protection is regulated by the Law on the Protection Programme for Participants in Criminal Proceedings.[7] This is the broadest form of witness protection and applies where testimony in criminal proceedings gives rise to a danger to the life, health, physical integrity, liberty or property of the witness or a person close to the witness.

In addition to the right to protection, a witness is entitled to reimbursement of expenses, including travel, meals and accommodation, as well as compensation for time lost and lost earnings.[8]

EXEMPTION FROM THE DUTY OF TESTIFYING

One of the specific rights granted to witnesses concerns exemption from the duty of testifying. This is not an exemption from the general duty to testify incumbent upon all citizens, but an exemption from testifying in a particular case. The reasons that lead the legislature to grant this right include the duty to preserve state, official or professional secrets; the need to protect family relationships; the protection of the witness's personal dignity, honour and reputation; and the protection of the witness's property rights. Procedural theory most commonly distinguishes between exclusion from testifying, exemption from testifying for

[7] Official Gazette of the Republic of Serbia, No. 85/2005.
[8] Rulebook on the Reimbursement of Costs in Court Proceedings (Official Gazette of the Republic of Serbia, Nos 9/2016, 62/2016 and 13/2020), Article 1.

so-called privileged witnesses, and partial exemption from testifying.

Exclusion from the duty of testifying implies absolute exclusion and, in principle, that the persons concerned cannot be examined as witnesses in criminal proceedings. The Criminal Procedure Code identifies three categories of persons excluded from the duty of testifying (Article 93). The first comprises persons bound by a duty to preserve information designated as classified. They are excluded from testifying, but not absolutely: the exclusion is limited in time until the competent state authority removes the classification or releases the person from the duty to preserve secrecy. The authority conducting proceedings may therefore initiate the release of a person bound to preserve classified information from that duty in order to establish facts in criminal proceedings. The second category comprises persons who would breach professional confidence by giving testimony in criminal proceedings. It includes physicians, clergy, midwives, attorneys-at-law and others who learn certain facts in the course of professional work. These persons may be examined as witnesses if released from the duty of confidence by special regulations or by a declaration of the person for whose benefit professional confidentiality was established. The legislature included attorneys-at-law in this category, while a separate provision establishes that defence counsel is excluded from testifying about matters entrusted to counsel in the course of defending the defendant (Article 93(1)(3)). The first reference presumably concerns facts

learned by attorneys in professional practice that are unrelated to the defendant and the defence in the particular case. As regards the relationship between defence counsel and the defendant, the wording of the statutory provision might suggest that no exception to the prohibition on testifying is possible. That conclusion is nevertheless contradicted by Article 93(2) of the Code, which provides that, exceptionally and notwithstanding the exclusion, all three categories may be examined in criminal proceedings by decision of the court upon the initiative of the defendant or defence counsel. In our view, there is no room for such a decision where the duty to preserve classified information is concerned, since an individual judge or the presiding judge of the panel could thereby commit a criminal offence. Caution is also required in relation to professional confidence, as a court decision to examine particular persons in criminal proceedings could likewise result in a breach of confidentiality. The utility of examining a person as a witness can be envisaged only in the case of the defendant's own defence counsel, where the defence strategy is to strengthen the factual argument by relying on matters learned by counsel while performing the defence function.

In addition to witnesses excluded from testifying, there is a category of persons exempted from the duty of testifying. The rationale for this right differs from that underlying exclusion. Here, the legislature is guided by the protection of family relationships. Under Article 94(1) of the Criminal Procedure Code, persons exempted from testifying include those who are married to the

defendant, live with the defendant in a non-marital union or live with the defendant in another permanent union. The exemption also covers the defendant's direct blood relatives without limitation, collateral blood relatives up to the third degree and relatives by marriage up to the second degree. Adoptive relationships are protected as well, since the defendant's adoptive parent and adopted child are exempted. The legislature thus chose a fairly broad circle of relatives and took account of modern non-discrimination standards concerning forms of partnership. Domestic procedural law also exempts minors who, by reason of age and psychological development, cannot understand the significance of the exemption from testifying. This prohibition is not absolute, however, because those persons may be examined if the defendant so requests, which undermines the purpose of Article 94(2) of the Code. A further difficulty concerns assessment of the minor's capacity to understand the institution of exemption from testifying. Since a court lacks the necessary specialist knowledge, that capacity could be established only through an expert assessment of the minor's psychological and physical development.

The scope of exemption from the duty of testifying is further extended where proceedings involve several co-defendants. A person exempted from testifying in relation to one co-defendant is also exempted in relation to the others if the witness's testimony cannot be confined to only one of them (Article 94(4) of the Criminal Procedure Code). The authority conducting proceedings

is required to caution every person exempted from the duty of testifying about the right not to be examined in the criminal proceedings. The caution is given after the witness's family or other relationship with the defendant has been established during identification. This may occur when the witness is examined by the public prosecutor during the investigation or by the court at trial. Failure to caution a witness that grounds for exemption exist, or examination of the witness despite those grounds, produces inadmissible evidence within the meaning of Article 16(1) of the Code, on which a court decision may not be based. A witness's reliance on the right to exemption is not limited to any particular stage of the criminal proceedings. The witness may invoke the right only at trial even after having given a statement to the public prosecutor during the investigation or having been examined by the presiding judge outside the trial (Article 357 of the Code). For that reason, the advice concerning the right to exemption must be repeated at trial, regardless of whether it was given earlier and regardless of whether the witness, aware of the right, nevertheless gave a statement at an earlier stage. Where the witness invokes the right at trial and refuses to testify, a court decision may not be based on the earlier statements. Otherwise there is a substantial violation of the provisions of criminal procedure under Article 438(2)(1) of the Code—a judgment based on evidence on which, under the Code, it may not be based. This constitutes a ground of appeal.

From the perspective of procedural theory, one may ask whether invoking exemption from testifying at trial, after the witness gave a statement at an earlier stage, constitutes an abuse of procedural rights. The question is legitimate, particularly from the standpoint of the public prosecutor, who frequently bases the instrument of indictment on a witness statement, especially where the witness is also the person directly injured by the offence. In such a case, the loss of crucial evidence at trial often makes it impossible to prove the offence with the required degree of certainty, resulting in an acquittal under Article 423(1)(2) of the Criminal Procedure Code.

Abuse of rights is an antisocial phenomenon contrary to fundamental legal principles, the protection of the legal order and the rules of morality. A right or legal power is abused when it is not exercised in accordance with its social or economic purpose. A distinction is made between objective and subjective conceptions of abuse of rights. Under the objective conception, conduct that defeats the meaning and purpose of a statutory provision is sufficient. Under the subjective conception, an intention to circumvent the legal rule is also required.[9] Abuse of rights is a legal standard serving as a general and fundamental criterion for assessing the proper enjoyment and exercise of subjective rights in all areas of a legal system. The principle prohibiting abuse of rights is a fundamental legal principle taken into account by both

[9] Marija Salma, 'Zabrana zloupotrebe procesnih ovlašćenja', *Zbornik radova Pravnog fakulteta u Novom Sadu*, No. 2/2009, p. 282.

legislators and judges.[10] Applying the basic propositions of legal theory concerning abuse of rights to a witness's right to exemption from testifying by reason of a family relationship with the defendant raises the question whether exercising that right at trial, after the witness did not exercise it in the preliminary proceedings, amounts to an abuse of rights. In seeking to answer that question, we use the comparative method and examine the legal framework governing exemption from the duty of testifying in the states of the former Yugoslavia.

North Macedonia

Under North Macedonia's Law on Criminal Procedure, persons likely to be able to testify about a criminal offence, the perpetrator and other material circumstances are summoned as witnesses (Article 212(1) of the LCP-NM). As in Serbian procedural law, there are persons who may not be witnesses in criminal proceedings and a category of persons exempted from the duty of testifying. North Macedonian procedural law defines a broader class of persons excluded from testifying. It includes persons who would breach the duty to preserve a state or military secret by testifying; the defendant's defence counsel in respect of facts learned while performing that function; and persons who would breach professional confidence by testifying. Exclusion from the duty of testifying also covers minors unable to understand the significance of this right and persons who, because of mental illness, health or

[10] Gordana Stanković, 'Načelo zabrane zloupotrebe procesnih ovlašćenja u parničnom postupku Republike Srpske', *Pravo – teorija i praksa*, No. 11/2004, p. 47.

age, are unable to testify. As regards exemption from the duty of testifying, the North Macedonian legislature covers almost the same categories as the Serbian Criminal Procedure Code. The only difference is that spouses and non-marital partners are exempted, but not persons in other permanent unions as under the Serbian Code. A witness entitled to exemption may invoke the privilege more than once during the proceedings.[11] If the witness does so at trial, a court decision may not be based on an earlier statement given to the public prosecutor during the investigation.

Croatia

The Croatian Criminal Procedure Act defines a witness in the same terms as North Macedonian procedural law. A person likely to be able to provide information about the criminal offence, the perpetrator and other material circumstances is summoned as a witness in criminal proceedings (Article 283(1) of the CPA-HR). Several categories of witness are excluded from testifying: persons who would breach a statutory duty to preserve classified information; the defendant's defence counsel; a religious confessor; and a defendant in joined proceedings involving several co-defendants.

The Croatian legislature has defined a very broad range of privileged witnesses. In addition to persons married to, or living in a non-marital union with, the defendant; direct blood relatives without limitation; collateral blood relatives up to the third degree;

[11] G. Kalajdžiev, G. Lažetić, L. Nedelkova, M. Denkovska, M. Trombeva, T. Vitlarov, P. Jankulovska and D. Kadiev, *Komentar na zakonot za krivičnata postapka*, Skopje, 2018, p. 509.

relatives by marriage up to the second degree; adoptive parents; and adopted children, several other categories are exempted from testifying. First, notaries public and tax advisers are exempted on the ground of preserving professional confidence. Privileged witnesses also include physicians, dentists, psychologists, social workers, probation officers and defence counsel in respect of matters entrusted to them by the defendant. Journalists and editors of media outlets are also exempted from testifying about the sources of information used. This exemption is relative and does not apply in criminal proceedings for offences against honour and reputation committed through the media. It appears unnecessary for the Croatian legislature to have singled out these three groups, since all three concern professional confidence. This is confirmed by Article 283(2) of the CPA-HR, which limits the exemption where these persons have been released from the duty to preserve professional confidence. Finally, persons to whom material gain has been transferred are exempted from testifying about how that gain was acquired. Through this legislative technique, with its extensive enumeration of categories exempted from the duty of testifying, the differentia specifica between exclusion from and exemption from testifying appears to have been lost. Legislatures in the states of the former Yugoslavia generally blur that distinction, making the criterion for the division difficult to discern. As regards invoking the privilege, Croatian law permits it only at the first examination in the criminal proceedings. The caution that a witness is entitled to decline to testify also includes a caution that,

if the witness decides to testify, that testimony will be used in the proceedings regardless of any later decision to invoke the privilege not to testify. A witness may therefore invoke the privilege only at the first examination. This rule applies, however, only to spouses and non-marital partners and to blood relatives and relatives by adoption or marriage. Unlike Serbian criminal procedure, in which a witness may be examined by the public prosecutor during the investigation, a witness in Croatian criminal proceedings may be examined during the investigation only at a special evidentiary hearing before a judge, and not by the public prosecutor (Article 236 of the CPA-HR). Children who, by reason of age and mental development, cannot understand the significance of exemption from testifying are also included among the persons exempted. It is nevertheless possible to examine professionals, relatives and other persons who have been in contact with the child about information received from the child, thereby conferring statutory evidentiary significance on hearsay witnesses. Finally, none of the categories exempted from the duty of testifying may decline to testify in criminal proceedings concerning an offence committed against a child (Article 285(6) of the CPA-HR).

Montenegro

The Montenegrin legislature adopted a definition of witness corresponding to the tradition of the former common state. Under Article 107(1) of the Montenegrin Criminal Procedure Code (CPC-

ME),[12] a witness is a person likely to be able to provide information—and who is therefore summoned by the authority conducting proceedings—about the criminal offence, the perpetrator and other material circumstances. Four categories of witness are excluded from the general duty to testify. First are persons who would breach a duty to preserve classified information by testifying in criminal proceedings. This exclusion is relative, since those persons may testify if the competent authority releases them from the duty to preserve the classified information. The defendant's defence counsel is also excluded from testifying about the subject matter of the defence. Exclusion further covers persons who would breach professional confidence by testifying in criminal proceedings. According to the statute, that category includes religious confessors, attorneys-at-law, physicians and other medical professionals, journalists and other persons (Article 108(1)(3) of the CPC-ME). Finally, minors are excluded if, by reason of age and mental development, they are unable to understand the significance of the exclusion.

In addition to persons excluded from testifying, there are persons exempted from the duty of testifying. These include the defendant's spouse and a person living with the defendant in a non-marital union. Blood relatives covered by Montenegrin procedural law are, as is customary, direct blood relatives without limitation, collateral blood relatives up to the third degree and relatives by

[12] Official Gazette of Montenegro, Nos 57/2009, 49/2010, 47/2014 – Constitutional Court decision, 2/2015 – Constitutional Court decision, 35/2015, 58/2015 – other law, 28/2018 – Constitutional Court decision, and 116/2020 – Constitutional Court decision.

marriage up to the second degree. As regards adoptive or comparable family relationships, the defendant's adoptive parent, adopted child, foster parent and foster child are exempted. None of these categories is exempted where an offence has been committed against a minor. The Montenegrin legislature identifies neglect and abuse of a minor, domestic violence and incest (Article 109(2) of the CPC-ME). In order to prevent 'abuse' of procedural rights, the Montenegrin legislature provides that the authority conducting proceedings is to advise a witness of the right to decline to testify when the witness is examined for the first time in the criminal proceedings. If the witness does not then exercise the privilege not to testify, the statement may subsequently be used regardless of a later change of mind. The privileged witness's declaration of intent is therefore irrevocable. Depending on the course of the proceedings, the first examination may occur during the preliminary inquiry before the public prosecutor (Article 262(1) of the CPC-ME) or during the investigation, likewise before the public prosecutor (Article 282(4) of the CPC-ME).

Where criminal proceedings are conducted against several co-defendants, the scope of the privilege not to testify depends on the nature of the witness's evidence and whether it can be confined to only some of the co-defendants. Failure by the authority conducting proceedings to comply with the Code's provisions on exemption renders the evidence unlawful. This occurs if a person exempted from testifying is examined as a witness without having been advised of the privilege, if that person has not expressly

waived the privilege not to testify, or if the caution or waiver is not entered in the record (Article 110 of the CPC-ME). A court decision may not be based on such evidence.

Bosnia and Herzegovina

Under the Criminal Procedure Code of Bosnia and Herzegovina,[13] witness status requires a likelihood that the person will be able to provide information about the perpetrator, the criminal offence and other material circumstances (Article 81(1) of the CPC-BiH). As is customary in the procedural laws of states formed after the dissolution of Yugoslavia, the Code provides that certain categories are excluded from the duty of testifying. First are persons who would breach a duty to preserve an official, state or military secret by testifying. They may nevertheless testify if released from the duty of secrecy. Exclusion also covers persons who would breach professional confidence if examined in criminal proceedings, including religious confessors, journalists, attorneys-at-law, physicians, midwives and notaries public. Their exclusion is likewise relative: they may be examined if released from the duty of professional confidence or on the basis of a declaration by the person for whose benefit that duty was established. The defendant's defence counsel is also excluded from testifying in respect of matters learned while performing the defence function in criminal proceedings. Finally, minors who cannot understand the significance of exclusion from testifying are excluded (Article

[13] Official Gazette of Bosnia and Herzegovina, Nos 3/2003, 32/2003 – corrigendum, 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 29/2007, 53/2007, 58/2008, 12/2009, 16/2009, 53/2009 – other law, 93/2009, 72/2013 and 65/2018.

82(1) of the CPC-BiH). Examination of these categories as witnesses constitutes unlawful evidence on which a court decision may not be based. Equivalent provisions on exclusion from testifying appear in Article 96 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina,[14] Article 147 of the Criminal Procedure Code of Republika Srpska,[15] and Article 82 of the Criminal Procedure Code of the Brčko District.[16]

The Criminal Procedure Code of Bosnia and Herzegovina also identifies witnesses who may decline to testify. Compared with the other states of the former Yugoslavia, Article 83 of the CPC-BiH defines a considerably narrower class of privileged witnesses: spouses and persons living in a non-marital union with the suspect or defendant, as well as the defendant's parents, children, adopted children and adoptive parents. The same scope is prescribed by Article 97 of the CPC-FBiH and Article 83 of the CPC-BD, while Article 148 of the CPC-RS also includes direct blood relatives without limitation, collateral blood relatives up to the third degree and relatives by marriage up to the second degree. Children injured by the commission of a criminal offence may not decline to testify (Article 148(1)(b) of the CPC-RS). As regards reliance on the privilege not to testify, all four procedural codes in force in Bosnia and Herzegovina require that a witness be advised of the right immediately before every examination. A witness may therefore

[14] Official Gazette of the Federation of Bosnia and Herzegovina, Nos 35/2003, 56/2003 – corrigendum, 78/2004, 28/2005, 55/2006, 27/2007, 53/2007, 9/2009, 12/2010, 8/2013, 59/2014 and 74/2020.

[15] Official Gazette of Republika Srpska, Nos 53/2012, 91/2017, 66/2018 and 15/2021.

[16] Official Gazette of the Brčko District of Bosnia and Herzegovina, Nos 34/2013 – consolidated text, 27/2014, 3/2019 and 16/2020.

invoke the right not to testify at trial even if the right was not exercised during the preliminary proceedings. If the witness was not advised of the right to decline to testify, did not expressly waive that right, or the caution or waiver was not entered in the record, the statement constitutes unlawful evidence and cannot form the basis of a court decision (Article 83(4) of the CPC-BiH, Article 97(4) of the CPC-FBiH, Article 148(4) of the CPC-RS and Article 83(4) of the CPC-BD).

Slovenia

The Slovenian Criminal Procedure Act[17] follows the customary definition of witnesses as persons likely to be able to provide information about the criminal offence, the perpetrator and other circumstances. As an exception to that rule, Article 235 provides that persons who would breach a duty to preserve classified information may not be examined as witnesses unless the competent authority releases them from that duty. The defendant's defence counsel is likewise excluded from the duty of testifying in respect of circumstances entrusted to counsel in that capacity. This exclusion is also relative, since the defendant may request that defence counsel be examined as a witness. Compared with the other procedural codes of the former Yugoslav states, Slovenian procedural law defines the broadest class of privileged witnesses. It includes spouses and non-marital partners, direct blood relatives without limitation, collateral blood relatives up to the third degree,

[17] Official Gazette of the Republic of Slovenia, Nos 176/21 – official consolidated text, 96/22 – Constitutional Court decision, 2/23 – Constitutional Court decision, 89/23 – Constitutional Court decision, and 53/24.

relatives by marriage up to the second degree, and the defendant's adoptive parent and adopted child (Article 236(1)(2) and (3) of the CPA-SI). In addition to blood relatives and relatives by marriage or adoption, the class includes a religious confessor in respect of matters confessed by the defendant or another person, as well as attorneys-at-law, physicians, social workers, psychologists and others in respect of facts learned in the course of their professional work. Except in the case of a religious confessor, the privilege not to testify is relative for these categories, and they may testify in criminal proceedings if released from the duty to preserve confidential information or if required to transmit confidential information to the competent authorities.

Privileged witnesses also include editors, journalists and authors of media contributions in relation to disclosure of the source of information (Article 236(1)(6) of the CPA-SI). Here too, the privilege not to testify is relative. Media professionals may testify if disclosure of the source is necessary to avert an imminent danger to life or health, to prevent the commission of a criminal offence punishable by imprisonment for three years or more, to prevent certain sexual offences under Articles 173a and 176, or to prevent the offence of abuse of office or official rights under Article 257 of the Slovenian Criminal Code.[18] Finally, privileged witnesses include minors unable to understand the significance of the privilege not to testify. Even in this case, however, the right is

[18] Official Gazette of the Republic of Slovenia, Nos 50/12 – official consolidated text, 54/15, 6/16 – corrigendum, 38/16, 27/17, 23/20, 91/20, 95/21, 186/21, 105/22 – ZZNŠPP, 16/23, and 107/24 – Constitutional Court decision.

qualified: minors who, by reason of age or psychological development, cannot understand the significance of the privilege may be examined as witnesses if the defendant so requests or if the authority conducting proceedings considers this to be in the minor's best interests (Article 236(3) of the CPA-SI).

Before each examination, the authority conducting proceedings is required to advise a witness within a privileged category that he or she is not required to testify. The witness is cautioned that the statement will be taken into account as evidence at trial if the privilege not to testify is not exercised during the preliminary proceedings (Article 236(2) of the CPA-SI). This means that the witness's declaration concerning the privilege is irrevocable and that the right may be exercised only once, at the first examination in the criminal proceedings.

Analysis of Court Decisions

Because the courts and public prosecution offices did not respond to the questionnaire sent to them, we decided to analyse cases from prosecutorial and judicial practice. This part of the research covers five cases before the Basic Court in Niš.

Case No. 1

In this case, the Basic Public Prosecution Office in Niš filed a motion to indict[19] against the defendant on justified suspicion that he had committed the criminal offence of domestic violence under

[19] KT No. 562/21.

Article 194(1) of the Criminal Code. The criminal complaint was filed by the defendant's former wife after he came to her apartment and, following a brief argument, inflicted several cuts and struck her several times with a closed fist, causing minor bodily injuries. During the investigation, the injured party was examined by the public prosecutor and gave a statement. At that time, there were no grounds for exemption from the duty of testifying because the defendant was her former husband, not a person with whom she was living in marriage or a non-marital union. In her statement during the investigation, the injured party confirmed the allegations in the criminal complaint concerning physical violence by her former husband. The defendant's sister, an eyewitness to the incident, was also examined as a witness during the investigation. After being cautioned that grounds existed for exemption from the duty of testifying, she gave a statement in which she denied that any physical violence had occurred. When questioned during the investigation, the defendant likewise denied physical violence and stated that there had only been a verbal argument. The defendant was detained during the investigation because of a risk of absconding: he had repeatedly failed to comply with the public prosecutor's summons to appear for questioning, and an order for his compulsory appearance had been issued but not executed. A medical expert examination of the injured party's bodily injuries was also conducted. The expert found that several bodily injuries existed and that, taken together, they qualified as a minor bodily injury. In the opinion, the expert stated that the injuries could have

been caused by the means and in the manner described by the injured party. At trial, after twice failing to appear despite having been duly summoned, the injured party declared that she did not wish to testify because she was living with the defendant in a non-marital union. The criminal proceedings ended in an acquittal.

Case No. 2

Criminal proceedings in this case were initiated on the basis of a criminal complaint filed by the suspect's daughter, on grounds for suspicion that the criminal offence of domestic violence under Article 194(1) of the Criminal Code of the Republic of Serbia had been committed. It was alleged that the suspect, while visibly intoxicated, threatened and insulted his wife, after which he threw a mobile telephone at her and twisted her arm. During the pre-investigation proceedings, the suspect's minor daughter and his wife were interviewed as citizens. The suspect was also questioned and held for up to 48 hours. The public prosecutor issued an order to conduct an investigation[20] on grounds for suspicion that the suspect had committed the criminal offence of domestic violence under Article 194(3), in conjunction with paragraph 1, of the Criminal Code against the minor injured party, his daughter, in concurrence with the criminal offence of domestic violence under Article 194(1) against the injured party, his wife. During the investigation, the suspect underwent a neuropsychiatric expert examination to assess his mental capacity at the time of the offence.

[20] KT No. 1111/21, KTI 26/21.

The suspect's wife, as the injured party, was examined as a witness during the investigation and did not exercise the privilege not to testify. On that occasion she also submitted a property claim. When questioned during the investigation, the suspect admitted the offence. The proceedings concluded with a judgment of conviction by the Basic Court in Niš.

Case No. 3

The criminal proceedings were initiated on the basis of a criminal complaint filed by the injured parties, the defendant's father and brother, on grounds for suspicion that the criminal offence of domestic violence under Article 194(1) of the Criminal Code had been committed by endangering the defendant's father's peace of mind, physical integrity and mental state through violence and insolent and reckless conduct. The defendant had previously received a suspended sentence for the same offence and the security measure of compulsory treatment for alcohol dependence had been imposed. In the present case, upon a motion by the Basic Public Prosecution Office in Niš, the Basic Court in Niš imposed measures under the Law on the Prevention of Domestic Violence: temporary removal from the apartment and a temporary prohibition on approaching and communicating with the protected persons. During the investigation, the defendant was detained because of the risk of reoffending and the risk of interference with evidence, under Article 211(1)(2) and (3) of the Criminal Procedure Code. An order was issued for the compulsory appearance of the injured parties, the defendant's father and son,

because they had failed to comply with duly served summonses from the Basic Public Prosecution Office in Niš to be examined as witnesses. During the investigation, both injured parties exercised their statutory right not to testify because of their blood relationship with the defendant. The Basic Public Prosecution Office in Niš filed a motion to indict against the defendant on justified suspicion that he had committed the criminal offence of domestic violence under Article 194(1) of the Criminal Code.[21] The evidentiary basis cited in the motion included the defendant's statement, in which he partly confirmed that he had been intoxicated at the relevant time but denied the insults and profanities; the domestic-violence risk assessment; and the emergency measures imposed under the Law on the Prevention of Domestic Violence. The public prosecutor also relied on a non-final judgment against the defendant in other proceedings in which the security measure of compulsory treatment for alcohol dependence and a prohibition on communicating with the injured party had been imposed, as well as on the expert assessment of the defendant's mental capacity conducted in those proceedings.

Case No. 4

In this case, the criminal complaint was filed by the defendant's wife after verbal and physical violence occurred outside her parents' home and several bodily injuries were inflicted. During the pre-investigation proceedings, the defendant's

[21] KT No. 2419/23.

wife and her father, both injured parties, were interviewed. In their statements they described the incident and the physical violence against them in detail. The suspect stated that no physical violence had occurred. The injured party had a physician's report concerning the bodily injuries sustained. On the basis of the risk assessment, an emergency measure prohibiting the suspect from approaching the victims of domestic violence was imposed. The Basic Public Prosecution Office in Niš then undertook investigative actions. During the investigation, the suspect was questioned and denied that physical violence had occurred, stating that he and his wife were together again. The injured party who was the father of the defendant's wife was examined as a witness and described in detail the physical violence against his daughter and himself. An expert examination of the wife's bodily injuries was conducted. The expert opined that the injuries could have been caused in the manner described by her father. During the investigation, however, the defendant's wife invoked the privilege not to testify. The Basic Public Prosecution Office in Niš filed a motion to indict[22] against the defendant on justified suspicion that he had committed the criminal offence of domestic violence under Article 194(1) of the Criminal Code by endangering the peace of mind and mental state of the injured party who was his wife's father, and by endangering the physical well-being of the injured party who was his wife and inflicting minor bodily injuries on her. One year later, while the trial was in progress, the Basic Public Prosecution Office in Niš declared

[22] KT No. 2747/22.

that it was withdrawing from prosecution. A judgment dismissing the charges was subsequently rendered.

Case No. 5

In this case, minor-offence proceedings were initiated for an offence under Article 36(1) of the Law on the Prevention of Domestic Violence. The proceedings were instituted on grounds for suspicion that the defendant had breached an emergency measure prohibiting him from contacting and approaching the victim of domestic violence by repeatedly telephoning his wife. Before the minor-offence proceedings were initiated, the defendant's wife gave a statement to the Police Directorate as a citizen, alleging that she had been subjected to domestic violence over a prolonged period. The Police Directorate subsequently prepared two official notes recording information received from citizens, in which the defendant's wife stated that he had repeatedly harassed her by telephone and made verbal threats and insults. She also gave two statements to the Social Welfare Centre, describing in detail the repeated telephone harassment to which the defendant had subjected her. In response to his wife's allegations, the defendant stated at the premises of the Police Directorate that he had harassed her but that he had uttered the insults and profanities because he had been provoked. The Police Directorate conducted a risk assessment and concluded that there was a risk of domestic violence. On the basis of all the evidence, it imposed an emergency measure prohibiting contact with and approach to the victim of domestic violence, pursuant to the Law on the Prevention of

Domestic Violence. The emergency measure covered the defendant's wife, her father, and the minor child of the injured party and the defendant. The measure was later extended by a decision of the Basic Court in Niš.

CONCLUSIONS

Abuse of procedural rights occurs in Serbian criminal proceedings. This is unsurprising in view of the nature of criminal proceedings and the opposing interests of the defendant and the authorised prosecutor. Abuse of procedural rights is not confined to only some participants; nor are the authorities conducting proceedings immune from it. Witnesses, however, are participants who ordinarily have no primary interest in acting in bad faith. Their procedural position may be highly delicate, especially where an injured party appears as a witness. At the same time, the injured party's testimony will very often be crucial evidence without which the existence of a criminal offence cannot be established with the necessary degree of certainty. Privileged witnesses form part of the tradition of criminal procedure, and their right to decline to testify reflects the level of human-rights protection that has been achieved. From a theoretical perspective, the justification for that right is not in question. From the standpoint of the public prosecutor's interest as a party to criminal proceedings, however, the question arises whether a witness abuses a procedural right by invoking the privilege not to testify after agreeing to give a statement at the first examination. The research produced the following conclusions.

From a comparative-law perspective, the states that emerged from the former common state, the Socialist Federal Republic of Yugoslavia, have adopted differing legal frameworks. The first group comprises North Macedonia, Serbia and the four systems of criminal procedure in force in Bosnia and Herzegovina. In those jurisdictions, a witness may invoke the right to decline to testify more than once. If that occurs, a statement given earlier in the proceedings may not form the basis of a court decision. The second group comprises Croatia, Montenegro and Slovenia. In those jurisdictions, a witness may invoke the right only once, meaning that a privileged witness may exercise it only when summoned for the first time. The three jurisdictions differ, however, as to the authority before which the witness is first examined. In Croatia the witness is examined by a judge, and in Slovenia by an investigating judge. In Montenegro the witness may be examined during the preliminary inquiry or the investigation, in both instances by the public prosecutor.

The questionnaire prepared by the research team was sent to courts and public prosecution offices in South-Eastern Serbia. Yet, over a period of almost one year, not a single court responded or supplied the requested data. This demonstrates a complete lack of awareness of this important issue, particularly given that a public consultation on the Law Amending the Criminal Procedure Code was taking place at the same time.

The empirical research consisted of an in-depth analysis—a case study—of five cases from the practice of the Basic Public

Prosecution Office in Niš. All five concerned the criminal offence of domestic violence. The analysis readily shows that it is common for a privileged witness who is also the injured party to change his or her decision at a later stage of criminal proceedings. The most frequent reason is secondary victimisation, namely fear for one's own safety. It is evident that even the Law on the Prevention of Domestic Violence and the measures prescribed by it have not fully achieved their purpose. Public prosecutors face the prospect that months of work on a case will be rendered futile when the injured party invokes the privilege not to testify at a later stage. In that situation, it becomes very difficult for the public prosecutor to prove the prosecution case to the required degree of certainty. The further consequence may be an acquittal under the principle *in dubio pro reo*, or the public prosecutor may withdraw the charges, resulting in a judgment dismissing them.

The Law Amending the Criminal Procedure Code does not provide for any change to the provisions governing the rights of privileged witnesses, although proposals for amendments in this area were made during the public consultation. Having considered all the arguments and material available to us, it appears appropriate to make certain legislative changes concerning the privilege to decline to testify. A rule should be introduced under which the privilege not to testify may be exercised only once in the proceedings, exclusively when the witness first gives a statement, irrespective of whether this occurs during pre-investigation proceedings or the investigation. Adequate safeguards would,

however, be necessary. A theoretically consistent solution would be to permit privileged witnesses, including injured parties appearing as witnesses, to be examined only by a judicial authority—the preliminary proceedings judge. Before the statement is given, the preliminary proceedings judge would be required to caution the witness about the right and the consequence of giving a statement, namely that the right may be exercised only once in the proceedings. A statement obtained in this manner could form the basis of a court decision, which would be fully justified because it would have been obtained before a judicial authority. Greater attention should also be devoted to effective witness-protection measures, particularly after a witness has given evidence in criminal proceedings. This would fulfil the purpose of criminal proceedings proclaimed in Article 1 of the Criminal Procedure Code: '…that no innocent person is convicted and that the perpetrator of a criminal offence is pronounced a criminal sanction under the conditions prescribed by criminal law, based on lawfully and fairly conducted proceedings.'