

**RIGHT OF DEFENCE AND THE PRINCIPLE
OF EQUALITY OF ARMS
IN THE CRIMINAL PROCEDURE
IN BULGARIA**



**CENTER FOR
THE STUDY OF
DEMOCRACY**

The present publication analyses the regulation of the right of defence in Bulgaria and explores the principle of equality of the parties in the pre-trial phase. For the purposes of the study the authors present the system of judicial and investigative bodies as well as the most important characteristics of the criminal proceedings, in particular of the pre-trial proceedings. The study discusses the rights of the defence counsels and their procedural role and outlines a number of problems that attorneys face in defending their clients during the criminal proceedings.

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1. GENERAL OVERVIEW

1.1. JUDICIAL SYSTEM

The *Constitution of the Republic of Bulgaria*, adopted in 1991, shortly after the fall of the totalitarian regime, proclaims the fundamental principle of the division of powers and describes the organisation and functions of the three branches of power: the legislative branch, the executive, and the judiciary.

The judiciary is organised according to the *Constitution* and the *Law on the Judiciary*. It is independent and protects the rights and legitimate interests of the citizens, legal entities and the state. In realising their functions, judges, lay judges, prosecutors and investigators obey only the law.¹

The governing body of the judiciary is the **Supreme Judicial Council (SJC)**. The SJC represents the judiciary and ensures its independence. It determines the judiciary's composition and work organisation and manages its activities without infringing upon its independence. The SJC consists of 25 members: the chairperson of the Supreme Cassation Court, the chairperson of the Supreme Administrative Court, the Prosecutor General, eleven members elected by the Parliament and eleven members elected by the judiciary. The Parliament can elect its representatives from among all lawyers, including attorneys. The Minister of Justice chairs the sessions of the SJC but does not have the right to vote.

1.1.1. Court system

There are several types of **courts**: regional courts, district courts, administrative courts, military courts, courts of appeal, military court of appeal, Specialised Criminal Court, Specialised Criminal Court of Appeal, Supreme Cassation Court and Supreme Administrative Court. They adjudicate civil, criminal and administrative cases. Extraordinary courts are not permitted. Specialised courts can be established only by statute.

The **regional courts** are the main first-instance courts. They hear as first instance the majority of civil and criminal cases. The general rule is that all cases fall within the jurisdiction of the regional courts unless the law explicitly provides otherwise.

The **district courts** have a twofold function. On the one hand, they are first-instance courts as regards the civil and criminal cases that the two procedural codes (the *Criminal Procedure Code* and the *Civil Procedure Code*)

¹ For more information in English on the Bulgarian judicial system see Charbonnier, G. and O. Sheehy, *Panorama of Judicial Systems in the European Union*, Brussels: Bruylant, 2008, pp. 48-62.

have placed within their jurisdiction. On the other hand, the district courts operate as second-instance courts reviewing appeals against the convictions and judgements of the regional courts.

The **courts of appeal** operate only as second-instance courts. They review appeals against the convictions and judgements of the district courts when the latter are hearing cases as first instance courts.

The **military courts** are first-instance courts. They hear only criminal cases for offences committed by members of the armed forces. The **military court of appeal** is the second-instance court as regards appeals against convictions and judgements of the military courts.

The **Specialised Criminal Court** is a first-instance court and hears only criminal cases for crimes explicitly listed in the *Criminal Procedure Code*. The **Specialised Criminal Court of Appeal** is the second-instance court as regards appeals against convictions and judgements of the specialised criminal court.

The **Supreme Cassation Court** is the third and last instance on civil and criminal cases.

The **administrative courts** are the first-instance courts on the majority of administrative cases. The **Supreme Administrative Court** operates as a first-instance court on administrative cases explicitly assigned to it by the law. The Supreme Administrative Court is also the second and last instance for all administrative cases.

The **Constitutional Court of Republic of Bulgaria** is not part of the judiciary. Its main functions are to give obligatory interpretations of the Constitution; to resolve disputes of competence between the Parliament, the President and the government; to determine unconstitutionality of statutes and other acts of the Parliament and President.

1.1.2. Public prosecution system and investigating authorities

The structure of **public prosecutor's offices** corresponds to that of courts. The prosecution is led by the Prosecutor General and comprises the Supreme Cassation Prosecutor's Office, the Supreme Administrative Prosecutor's Office, the National Investigation Service, appellate prosecutor's offices, military appellate prosecutor's office, appellate specialised prosecutor's office, specialised prosecutor's office, district prosecutor's offices, military district prosecutor's offices and regional prosecutor's offices.

The public prosecutor's office is united and centralised. All public prosecutors and investigators are subordinate to the Prosecutor General.

The main aim of the public prosecutor's office is to uphold legality by, *inter alia*, guiding and supervising investigation; investigating; bringing those who have committed a crime to justice and prosecuting the criminal cases that are subject to public prosecution; overseeing the enforcement of criminal and other compulsory measures.

The **investigating authorities** are the investigators (who are part of the public prosecutor's office and as such – also part of the judiciary) and the investigating police officers (who are part of the Ministry of the Interior). The investigating police officers investigate the majority of crimes, while the investigators deal only with a limited number of cases for very serious crimes specified in the legislation. The investigating authorities perform the investigative actions under the guidance and the supervision of the public prosecutor.

The investigating authorities together with the public prosecutors are responsible for carrying out the pre-trial stage of the criminal proceedings.

1.2. CRIMINAL PROCEEDINGS

Criminal proceedings in Bulgaria take place according to the provisions of the *Criminal Procedure Code (CPC)*. They consist of two stages: pre-trial proceedings and trial.

During the **pre-trial proceedings** the investigating authorities investigate the case and collect evidence. The investigation is carried out under the supervision of the public prosecutor (Art. 52, par. 3 of the CPC). The public prosecutor is the *dominus litis* or master of the pre-trial stage. The public prosecutor oversees the work of the investigating authorities and examines all the materials collected in the course of the investigation. He/she can give instructions to the investigating authorities and can attend or personally conduct investigative actions (Art. 196, par. 1 of the CPC).

When there is sufficient evidence that a certain individual is guilty of committing the crime, the investigating authority reports to the public prosecutor and brings **charges against the alleged offender**. At this point the charged person receives the procedural status of **accused individual**. The accused individual has specific rights and obligations throughout the pre-trial stage, including right of defence.

After the bringing of the charges the pre-trial investigation continues with the **interrogation of the accused individual**. Based on the results of the interrogation **additional investigative actions** can be performed. When all investigative actions are completed the investigating authority **presents the case** to the accused individual. If necessary, additional investigative actions can be carried out, followed by a new presentation of the case to the accused individual.

The pre-trial investigation should be completed within two months (Art. 234, par. 1 of the CPC). In complicated cases the public prosecutor can grant a four-month extension. Further extension is possible only in exceptional cases (Art. 234, par. 3 of the CPC). Any evidence collected after this period cannot be used during the trial (Art. 234, par. 7 of the CPC).

Once all the investigative actions are completed the investigating authority forwards the case to the public prosecutor together with all the evidence gathered so far. Within one month the **public prosecutor has to decide how to proceed** with the case choosing among five alternative options: to temporarily suspend the case, to close the case, to make a proposal for administrative sanction (usually fine), to make a proposal for plea-bargaining or to bring the case to court for trial by submitting a bill of indictment.

There is a small group of less serious offences (e.g. insult, libel, light bodily injury, etc.) that are **not subject to public prosecution**. In such cases the victim can prosecute the alleged offender by calling him/her directly to court. The victim then becomes a **private prosecutor** and has similar rights and responsibilities to those of the public prosecutor, including the responsibility to prove the guilt of the alleged offender. In exceptional cases, when the victim is in a helpless state or is dependent on the alleged offender, the public prosecutor can prosecute the case even if the case is not subject to public prosecution (Art. 48, par. 1, Art. 49, par. 1 of the CPC).

When the case goes to court for **trial** the accused individual gets a new procedural status and becomes a **defendant**. Depending on the charges, the case may be heard by a single judge, by a panel of a judge and two lay judges, or by a panel of two judges and three lay judges. The trial usually consists of a preparatory stage (verification of the identity of the persons present at the trial), judicial investigation (collection and presentation of evidence), pleadings (presentation of the parties' statements), last word of the defendant, and sentencing stage.

In some cases specified by the law, the criminal proceedings can be carried out as **accelerated proceedings**. These are the cases when the alleged offender has been caught at the crime scene, obvious traces of the crime have been found on him/her or his/her clothes, he/she has confessed voluntarily the crime committed, etc. There are two types of accelerated proceedings: rapid proceedings and immediate proceedings. In both types of accelerated proceedings the pre-trial and the trial stage are conducted within considerably shorter periods of time compared to the general proceedings.

The sentence of the first instance court can be **appealed**. The right to appeal belongs to the public prosecutor, the defendant and his/her counsel, and the other parties and their legal representatives (e.g. the additional private prosecutor, the civil claimant, etc.). The second-instance court (the district court or the court of appeal depending on which court has heard the case as first instance) can uphold, modify or repeal the sentence. If the sentence is repealed the second instance court can return the case to the first instance court for a new hearing or to the investigating authorities for additional investigation, or can close the case.

The judgement of the second-instance court can be appealed before the Supreme Cassation Court. The Supreme Cassation Court is the third and last instance and its judgements are not subject to further appeal.

After all the appeal options are exhausted, the sentence **enters into force** and is subject to **execution**. Under some exceptional circumstances, a case that has been closed can be **re-opened**.

The criminal proceedings can also be concluded through **plea-bargaining**. Plea-bargaining is possible both during the pre-trial stage and the trial.

1.3. RIGHT OF DEFENCE

The *Bulgarian Constitution* proclaims the **right of defence as a fundamental right**. According to the *Constitution* everyone has the right of legal defence from the moment he/she is detained or charged (Art. 30, par. 4 of the Constitution). The *Constitution* also guarantees the confidentiality of the communications between the attorneys and their clients, proclaiming that everyone has the right to meet in private with the person defending him/her and the confidentiality of their communications is inviolable (Art. 30, par. 5 of the Constitution).

The *Criminal Procedure Code* envisages a number of rules governing in detail the right of defence and the different ways it can be exercised.

The **right of defence belongs to the accused individual**, i.e. the person who has been formally charged with a crime within the framework of criminal proceedings (Art. 15, par. 1 of the CPC). The right of defence differs from the rights of the other participants in the criminal proceedings. The other participants (private prosecutor, civil claimant, etc.) are provided with a number of procedural entitlements necessary for the protection of their rights and legitimate interests, but only the accused individual possesses the so-called “right of defence” in its full capacity.

In the Bulgarian legal doctrine, the right of defence of the accused individual is defined as a complex right consisting of three different components: personal defence, official defence and defence by a defence attorney.²

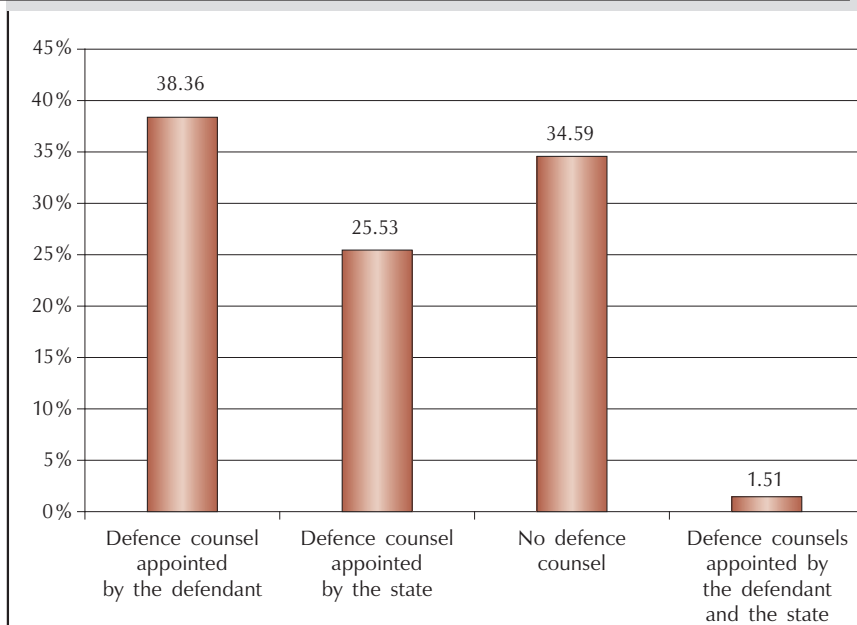
The right of **personal defence** means that the accused individual has his/her own procedural rights that he/she can exercise alone and not necessarily through a defence counsel. According to the law, the accused individual has the following set of procedural rights: to learn what crime he/she is charged with and on the basis of what evidence; to make or to refuse to make a statement on the charges; to examine the case file (including the information collected through the use of special intelligence means) and make excerpts; to present evidence; to participate in the criminal proceedings; to make requests, remarks and objections; to speak last; to appeal against the actions that infringe upon his/her rights and legitimate interests; and to have a defence counsel (Art. 55, par. 1 of

² See Павлов, С., Наказателен процес на Република България – обща част [Pavlov, S., Criminal Proceedings of the Republic of Bulgaria – General Part], Sofia: Sibi, 1996, pp. 220-229.

the CPC). In addition, during the trial, the defendant has the right to a last word (Art. 55, par. 2 of the CPC).

The right of **official defence** means that the criminal justice authorities (the court, the public prosecutor and the investigating authorities) are obliged by law to collect and examine not only incriminating but also exonerating evidence (Art. 107, par. 3 of the CPC). The court, the public prosecutor and the investigating authorities are also obliged to explain to the accused individual (and the other participants in the proceedings) the procedural rights available to them and to provide them with the opportunity to exercise these rights (Art. 15, par. 3 of the CPC).

FIGURE 1. ACCESS TO LEGAL AID DURING THE PRE-TRIAL PROCEEDINGS (2000 – 2002)



Source: Open Society Institute – Sofia.³

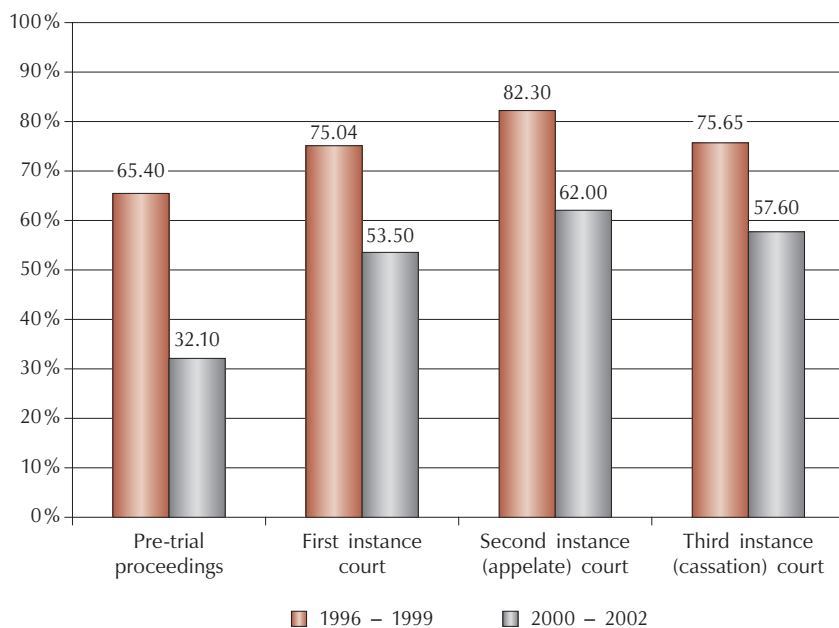
The right of **defence by a defence counsel** means that throughout the criminal proceedings the accused individual can have a defence counsel. The defence counsel can be a professional attorney or a close relative of the accused individual (Art. 91, par. 1 and 2 of the CPC). A person who has participated in the proceedings in another role (e.g. as public prosecutor, investigator, judge, etc.) cannot take part in the same case as a defence counsel of the accused individual. The same restriction applies to the close relatives of the public prosecutor, the judge or the investigating authority on the case (Art. 91, par. 3 of the CPC).

The defence counsel has specific **rights and obligations** listed in the law. The defence counsel can meet the accused individual in private; examine the case file and make the necessary excerpts; present evidence; participate in the criminal proceedings; make requests, remarks and objections and appeal the decisions of the pre-trial authorities infringing upon the rights of the accused individual; and attend all the investigative actions with the participation of the accused individual (Art. 99, par. 1 of the CPC). As long as the accused individual has the right of personal defence, the participation of a defence attorney does not prevent him/her from exercising his/her procedural rights alone (Art. 99, par. 2 of the CPC).

The defence counsel is obliged to provide legal assistance to the accused individual and to contribute to the establishment of all facts and

³ See Граматиков, М., Изследване на достъпа до правна помощ в България [Gramatikov, M., Study of the Access to Legal Aid in Bulgaria], Sofia: Open Society Institute – Sofia, 2005, p. 13.

FIGURE 2. SHARE OF DEFENDANTS WHO HAVE HAD A DEFENCE COUNSEL (ANALYSIS OF ARCHIVED CRIMINAL CASES)



Source: Open Society Institute – Sofia.⁴

circumstances in his/her favour (Art. 98, par. 1 of the CPC). The defence counsel must coordinate the defence strategy with the accused individual. If the strategy of the defence counsel differs substantially from the one suggested by the accused individual the defence counsel must duly inform the accused individual and continue with the defence unless removed from the case (Art. 98, par. 2 CPC). The defence counsel cannot refuse to provide assistance only because the accused individual has authorised another counsel to assist him/her on the same case (Art. 98, par. 3 of the CPC).

The defence counsel cannot abandon the accepted defence, unless it becomes impossible for

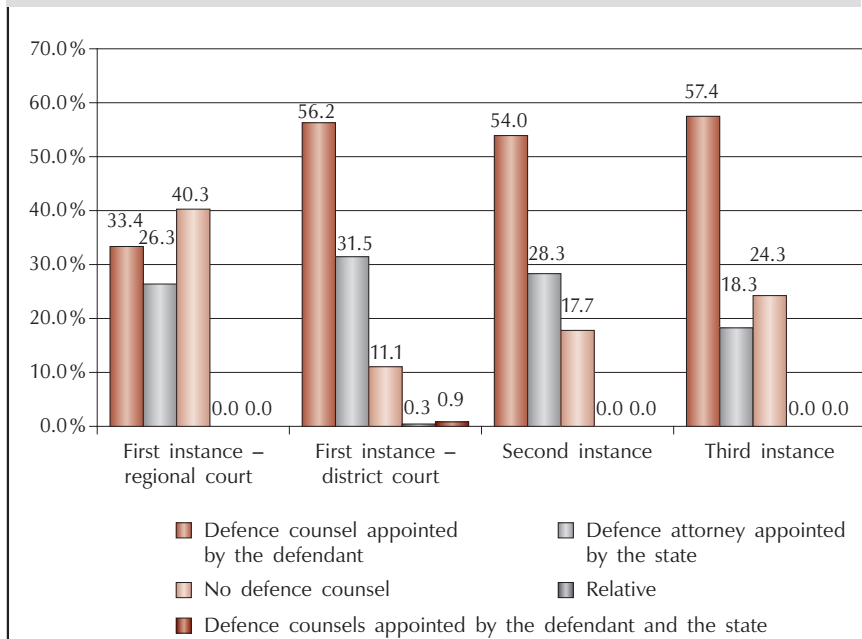
him/her to perform his/her duties for reasons beyond his/her control. In the latter case he/she is obliged to promptly notify the accused individual and the appropriate authority (Art. 95 of the CPC). As a guarantee of the right of defence, the law provides the accused individual with the right to dismiss his/her defence counsel at any time during the proceedings except in a limited number of cases when the participation of a defence counsel is obligatory (Art. 96, par. 1 of the CPC). For the same reason, the replacement of one defence attorney with another can only be done at the request or with the consent of the accused individual (Art. 96, par. 2 of the CPC).

To have a defence counsel is a right and not an obligation of the accused individual. In general, the accused individual is free to decide whether to exercise this right and to have a defence counsel. However, in some cases the participation of a **defence counsel is obligatory**. According to the law, these are the cases when the accused individual is a juvenile or suffers from a physical or mental disability or when the committed crime is a very serious one (punished by not less than ten years of imprisonment).

When the accused individual does not speak Bulgarian or when there are several accused individuals and one of them has a defence counsel, the participation of a defence counsel is also obligatory but in these cases the accused individual can refuse to have a defence counsel by

⁴ See Граматиков, М., Оценка на въздействието на закона за правната помощ [Gramatikov, M., Impact Assessment of the Law on Legal Aid], Sofia: Open Society Institute – Sofia, 2007, pp. 6-8.

FIGURE 3. ACCESS TO LEGAL AID DURING THE TRIAL (2000 – 2002)



Source: Open Society Institute – Sofia.⁵

making an explicit statement in this respect. The participation of a defence counsel is also obligatory when the accused individual is not able to pay the attorney's fees but wants to have a defence attorney and the interest of justice so require (Art. 94, par. 1 and 2 of the CPC). When the participation of a defence counsel is obligatory and the accused individual does not have one the relevant authority is obliged to appoint an attorney *ex officio* (Art. 94, par. 3 of the CPC).⁶

A recent amendment to the CPC (in force as of 28 May 2010) provides that in cases of serious crimes the public prosecutor or the court can appoint a **reserve defence counsel** to the accused individual when this is essential for the completion of

the criminal proceedings within a reasonable time (Art. 94, par. 4 of the CPC). The appointment of a reserve defence counsel does not depend on whether the accused individual has authorised his/her own counsel. In the cases of obligatory defence, the defence attorney appointed by the court or the pre-trial authorities continues to participate in the proceedings as a reserve defence counsel when the defendant authorises or dismisses his/her own defence counsel (Art. 94, par. 5 of the CPC).

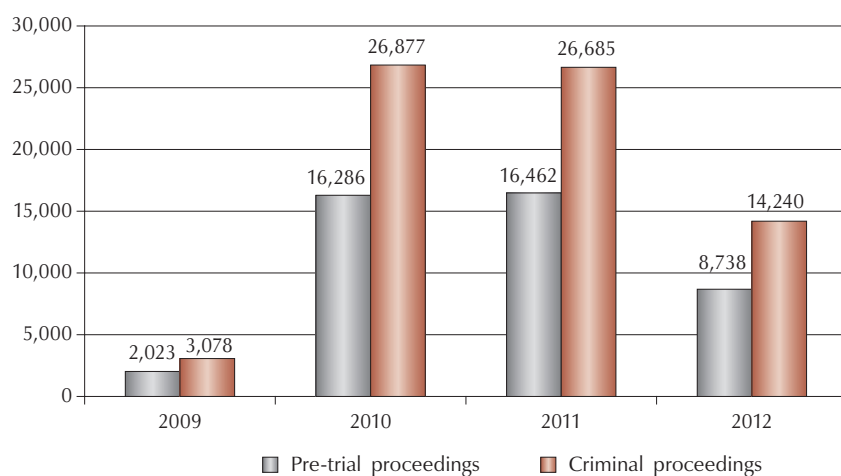
The **reserve defence counsel** has the right to review the case file, to make the necessary excerpts and to take part in the procedural actions involving the accused individual. The reserve defence counsel has all the other rights of the regular defence counsel as well, but can exercise them only at the request or with the consent of the accused individual. The consent of the accused individual is not necessary only in cases of obligatory defence when the authorised defence counsel has been duly summoned but fails to appear without a valid reason (Art. 94, par. 6 of the CPC).

The provisions governing the participation of a reserve defence counsel were introduced with the aim to speed up the criminal proceedings

⁵ See Граматиков, М., Изследване на достъпа до правна помощ в България [Gramatikov, M., Study of the Access to Legal Aid in Bulgaria], Sofia: Open Society Institute – Sofia, 2005, pp. 18-25.

⁶ For more detailed information on the different cases of obligatory defence see Тодорова, М., Правна помощ. Участието на защитник в наказателния процес [Todorova, M., Legal aid. The participation of a defence counsel in the criminal proceedings], Sofia: National Institute of Justice, pp. 6-18.

FIGURE 4. NUMBER OF CASES WHERE LEGAL AID HAS BEEN PROVIDED (2009 – 2012)



Note: Pre-trial proceedings include all cases of police detention, prosecutorial inquiry, police investigation, rapid police proceedings, immediate proceedings and investigation by investigating magistrate. Criminal proceedings include also private criminal proceedings of general nature (initiated by the victim but prosecuted by a public prosecutor). Data for 2009 cover only the period between September and December. Data for 2012 cover only the first half of the year.

Source: National Legal Aid Bureau.

and prevent the numerous postponements caused by the unjustified failure of the defence counsel to attend investigative actions or court hearings. However, some defence attorneys have seriously criticised the amendments for unreasonably restricting the right of defence and violating Article 6, par. 3, “c” of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, which proclaims among the minimum rights of everyone charged with a criminal offence the right to “defend himself in person or through legal assistance of his own choosing”.⁷

Every time the public prosecutor or the investigating authority summons the accused individual the subpoena must explicitly indicate his/her right to appear

accompanied by a defence counsel (Art. 179, par. 2 of the CPC). According to the legal doctrine, the appearance of the accused individual without a counsel does not automatically mean that he/she has refused to have one. The public prosecutor or the investigating authority must obtain an explicit statement from the accused individual that he/she does not want to have a defence counsel for the particular procedural action. Otherwise, the absence of a defence counsel can be interpreted as a serious procedural violation.⁸

⁷ See Недева, Е., Законопроектът за изменение и допълнение на Наказателно-процесуалния кодекс в светлината на Конвенцията за защита на правата на човека и основните свободи [Nedeva, E., The draft Law Amending and Supplementing the Criminal Procedure Code in the light of the European Convention on Human Rights], Sofia: *Bar Review*, N 10-11, 2009, pp. 76-79.

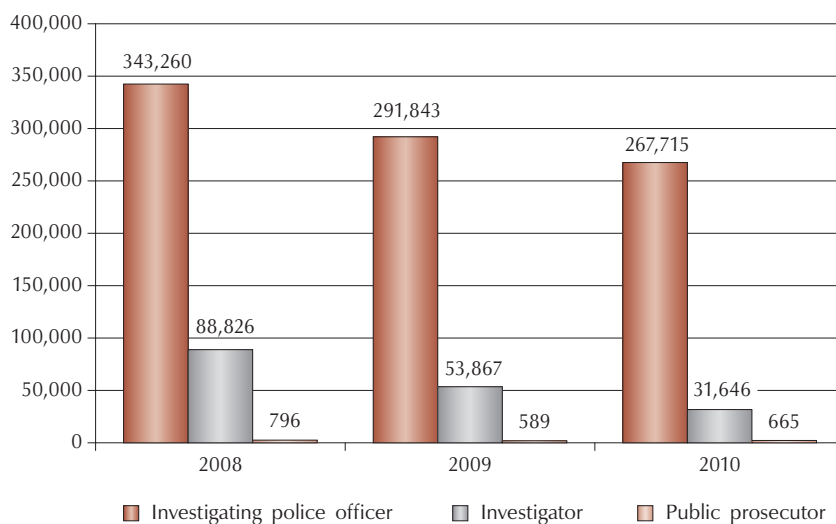
⁸ See Тодорова, М., Правна помощ. Участието на защитник в наказателния процес [Todorova, M., Legal aid. The participation of a defence counsel in the criminal proceedings], Sofia: National Institute of Justice, p. 2.

2. ROLES, RIGHTS AND DUTIES OF THE PUBLIC PROSECUTOR, THE INVESTIGATING AUTHORITIES AND THE ACCUSED INDIVIDUAL

2.1. AUTHORITIES RESPONSIBLE FOR CONDUCTING THE INVESTIGATION

In Bulgaria, the authorities responsible for carrying out the pre-trial stage of the criminal proceedings are the public prosecutor and the investigating authorities. They are collectively referred to in the law as **pre-trial authorities**.

FIGURE 5. INVESTIGATING AUTHORITIES DURING THE PRE-TRIAL STAGE (2008 – 2010)



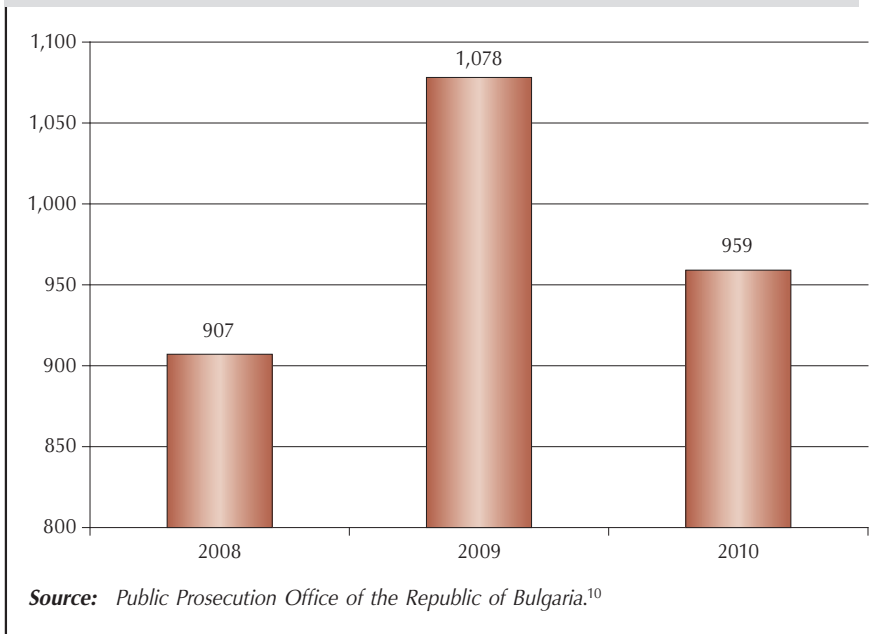
Source: Public Prosecution Office of the Republic of Bulgaria.⁹

The investigating authorities are the investigators (who are part of the judiciary) and the investigating police officers (who are part of the Ministry of the Interior). The **investigating police officers** investigate the majority of crimes. The **investigators** deal only with a limited number of cases for very serious crimes specified in the legislation. These are the crimes against the Republic and against peace and humanity, the crimes committed abroad, and the crimes committed by senior public officials or members of the judicial and law enforcement bodies (members of Parliament, ministers, judges, prosecutors, police officers, etc.). Apart from these crimes, the investigators

can investigate other crimes only upon assignment by the public prosecutor when the particular case reveals legal and factual complexity (Art. 194, par. 1 of the CPC). In all other cases the investigating authorities are the investigating police officers (Art. 194, par. 2 of the CPC). Other **police officers** can perform individual investigative actions only upon assignment by the public prosecutor, the investigator or the investigating police officer (Art. 194, par. 3 of the CPC).

⁹ See Доклад за прилагането на закона и за дейността на прокуратурата и на следващите органи през 2010 г. [Report on the Implementation of the Law and on the Activities of the Public Prosecution Service and the Investigating Authorities in 2010], Sofia: Public Prosecution Service of the Republic of Bulgaria, 2011, p. 50.

FIGURE 6. PRE-TRIAL PROCEEDINGS WITHDRAWN FROM ONE INVESTIGATING AUTHORITY AND ASSIGNED TO ANOTHER (2008 – 2010)



The investigating authorities perform the investigative actions under the guidance and the supervision of the **public prosecutor**. The public prosecutor controls the investigation and gives instructions to the investigating authorities. The written instructions of the public prosecutor are binding for the investigating authorities (Art. 197 of the CPC). The public prosecutor can participate in investigative actions or undertake such actions himself/herself. He/she can dismiss the investigating authorities or withdraw the case from one investigating authority and assign it to another (Art. 196, par. 1 of the CPC).

When the investigating authorities collect sufficient evidence against a particular individual they report to the public prosecutor and bring charges against this person. Immediately after charges are brought the public prosecutor or the investigating authority interrogate the accused individual. The interrogation can also take place before a judge.

For crimes that are not subject to public prosecution and are prosecuted by the victim there is no pre-trial investigation.

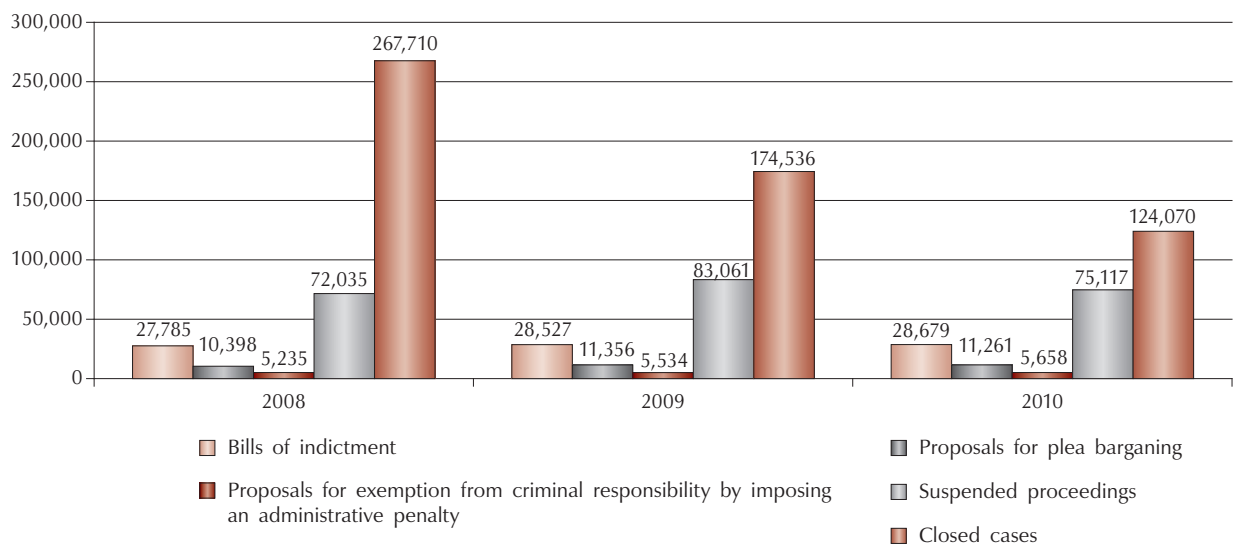
2.2. FINAL DECISION TO BRING THE CASE BEFORE THE COURT OR TO DISMISS CHARGES

The final decision to bring or dismiss charges belongs to the public prosecutor. After the completion of the investigation the **investigating authority forwards the case to the public prosecutor** together with a written opinion (Art. 235 of the CPC). The **public prosecutor is responsible for making the final decision** as to how to proceed with the case.

The public prosecutor has several alternative **options**. He/she can temporarily suspend the proceedings, close the case, submit a proposal for exemption from criminal responsibility by imposing an administrative penalty, submit a proposal to the court for resolving the case through

¹⁰ See Доклад за прилагането на закона и за дейността на прокуратурата и на следващите органи през 2010 г. [Report on the Implementation of the Law and on the Activities of the Public Prosecution Service and the Investigating Authorities in 2010], Sofia: Public Prosecution Service of the Republic of Bulgaria, 2011, p. 58.

FIGURE 7. COMPLETED PRE-TRIAL PROCEEDINGS (2008 – 2010)



Source: Public Prosecution Office of the Republic of Bulgaria.¹¹

plea bargaining, or bring the case to court for trial by filing a bill of indictment (Art. 242, par. 1 of the CPC).

If the investigating authority has committed serious procedural violations when presenting the case file to the accused individual and his/her defence counsel, the public prosecutor can return the case back to the investigating authority to rectify the violations or can rectify them himself/herself (Art. 242, par. 2 of the CPC).

The **deadline** for the public prosecutor to decide how to proceed with the case is **one month** (Art. 242, par. 3 of the CPC).

2.3. APPEAL AGAINST THE DECISION TO DISMISS CHARGES

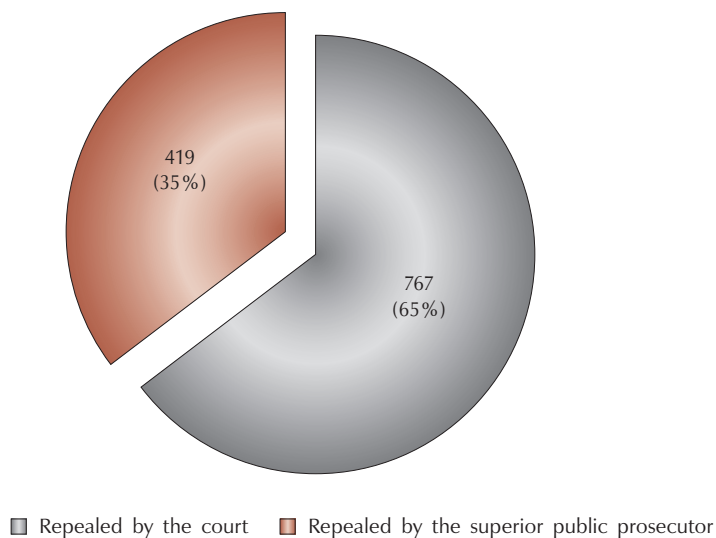
The public prosecutor can **close the case** when one of the conditions for terminating the proceedings listed in the law prevents further prosecution (e.g. when the incident is not a criminal offence, when the statute of limitation has expired, when the alleged offender has passed away, etc.) or when he/she believes that the collected evidence does not support the charges (Art. 243, par. 1 of the CPC).

A copy of the public prosecutor's resolution for **closing the criminal proceedings** is sent to the accused individual and the victim or his/her

¹¹ See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Implementation of the Law and on the Activities of the Public Prosecution Service and the Investigating Authorities in 2010], Sofia: Public Prosecution Service of the Republic of Bulgaria, 2011, pp. 46-57.

heirs. They are entitled to **appeal the resolution before the respective first-instance court** within seven days of its receipt (Art. 243, par. 3 of the CPC). The court reviews the appeal within seven days examining both the legality and the justification of the public prosecutor's resolution (Art. 243, par. 4 of the CPC). If the judge finds that the proceedings were closed unlawfully or unreasonably, he/she can repeal the resolution and return the case to the public prosecutor together with obligatory instructions for the correct implementation of the law. Otherwise the judge can uphold the public prosecutor's resolution (Art. 243, par. 5 of the CPC).

FIGURE 8. REPEALED RESOLUTIONS FOR CLOSING THE PROCEEDINGS (2010)



Source: Public Prosecution Office of the Republic of Bulgaria.¹²

The ruling of the first-instance court can be **further challenged before the respective second-instance court** (Art. 243, par. 6 of the CPC). The ruling of the second-instance court, which is due within seven days, is final and further appeal is not possible (Art. 243, par. 7 of the CPC).

The public prosecutor's resolution for closing the proceedings, which the accused individual or the victim or his/her heirs has not appealed, can be **repealed by the superior public prosecutor** upon his/her own initiative (Art. 243, par. 9 of the CPC).

In case of **temporary suspension** of proceedings (e.g. when the accused individual is suffering from a short-term mental disorder or another disease that hampers the investigation) the public prosecutor sends copies of the resolution to the accused individual and the victim or his/her heirs and they are entitled to appeal it before the respective first-instance court within seven days of its receipt (Art. 244, par. 3 and 5 of the CPC). The ruling of the court is final and no further appeal is possible.

2.4. AUTONOMOUS ACTION BY THE INVESTIGATORS

In Bulgaria, the investigating authorities conduct the **pre-trial investigation under the instructions and supervision of the public prosecutor**

¹² See Доклад за прилагането на закона и за дейността на прокуратурата и на следващите органи през 2010 г. [Report on the Implementation of the Law and on the Activities of the Public Prosecution Service and the Investigating Authorities in 2010], Sofia: Public Prosecution Service of the Republic of Bulgaria, 2011, p. 57.

(Art. 52, par. 3 of the CPC). They cannot act autonomously, without the consent or subsequent control of the public prosecutor.

The right to **institute a pre-trial investigation** belongs to the **public prosecutor**. The public prosecutor institutes the pre-trial investigation by issuing a written ruling (Art. 212, par. 1 of the CPC). The content of the written ruling, as specified in the law, has to indicate *inter alia* the investigating authority responsible for conducting the investigation (Art. 214, par. 1 of the CPC).

Only in **exceptional cases** the **investigating authority** can institute a pre-trial investigation directly, without any prior instructions from the public prosecutor. These are the cases when certain investigative actions (e.g. search of premises, interrogation of witnesses, etc.) are urgently needed and their immediate performance is the only way to collect and preserve the evidence. In these cases, the pre-trial investigation is considered officially instituted with the drawing up of the minutes for the first investigative action performed by the investigating authorities (Art. 212, par. 2 of the CPC). However, the investigating authorities are not fully autonomous in these cases either, because they are obliged to notify the public prosecutor immediately, but not later than 24 hours (Art. 212, par. 3 of the CPC).

Once the pre-trial investigation is instituted, the investigating authorities conduct the investigative actions under the **guidance and supervision of the public prosecutor**. The public prosecutor exercises constant control over the investigation by examining and verifying all the materials relevant to the case. He/she has the right to give instructions to the investigating authorities (written instructions are obligatory and cannot be objected); to participate in investigative actions; to conduct investigative actions himself/herself; to repeal the rulings of the investigating authority (either upon a complaint or upon his/her own motion); to remove the investigating authority from the case if the latter has violated the law or cannot properly conduct the investigation; and to replace the investigating authority (Art. 196, par. 1 of the CPC).

The investigating authority is responsible for ensuring the timely, lawful and successful performance of the investigation (Art. 203, par. 1 of the CPC) and for the collection of the necessary evidence within the shortest possible period of time (Art. 203, par. 2 of the CPC).

When performing the investigation the investigating authorities must be guided only by the law, their inner conviction and the instructions of the public prosecutor (Art. 203, par. 2 of the CPC). In the course of the investigation, the **investigating authority regularly reports to the public prosecutor** and discusses with him/her the different versions and any other issues relevant to the case (Art. 203, par. 4 of the CPC).

The investigating authorities can perform the majority of **investigative actions without prior authorisation** from the public prosecutor. However, there are some **investigative actions** (e.g. examination of a person without his/her consent, search of premises and seizure of objects,

search and seizure of correspondence) that can be conducted only when **authorised by the court** upon request by the public prosecutor (Art. 158, par. 3, Art. 161, par. 1, Art. 165, par. 2 of the CPC). In urgent cases, the investigating authorities can perform some of these investigative actions without prior authorisation but the public prosecutor is obliged to present the minutes to the court for approval immediately within the next 24 hours (Art. 158, par. 4, Art. 161, par. 2 of the CPC).

The investigating authorities are allowed to use **special intelligence means** (surveillance, interception, undercover agent, etc.) only with the **prior authorisation by the court** upon a written request by the public prosecutor (Art. 173, par. 1 of the CPC).

The investigating authority can impose on the accused individual only some of the **coercive measures** listed in the law. Such measures are the subscription and the bail. The decision of the investigating authority is subject to subsequent judicial control because the accused individual can challenge the measure before the court. The investigating authority can also order the forced bringing of the accused individual for interrogation when the latter has not appeared without a valid reason (Art. 71, par. 4 of the CPC).

The investigating authority cannot impose the heaviest coercive measures such as preliminary detention or house arrest. Only the court, upon request by the public prosecutor, can order the imposition of such measures on the accused individual. The court is also the only authorised institution to issue a restraining order, to remove the accused individual from office, to place the accused individual in a psychiatric facility for examination (Art. 67, par. 1, Art. 69, par. 1, Art. 70, par. 1 of the CPC).

2.5. ACTION OF THE PUBLIC PROSECUTOR AND THE INVESTIGATING AUTHORITIES IN FAVOUR OF THE SUSPECT

According to the *Criminal Procedure Code* one of the fundamental principles of criminal proceedings is the so-called “**establishment of the objective truth**”. According to this principle, the court, the public prosecutor and the investigating authorities are obliged to undertake all necessary measures to ensure the establishment of the objective truth on the case (Art. 13, par. 1 of the CPC).

The law also proclaims the principle of making decisions upon inner conviction based on an **objective, comprehensive and full scrutiny of all facts and circumstances** relevant to the case (Art. 14, par. 1 of the CPC). This principle means that the court and the pre-trial authorities must investigate all possible hypotheses, examine all evidence supporting or refuting a given hypothesis, and study each piece of evidence from all possible angles.¹³

¹³ See Павлов, С., Наказателен процес на Република България – обща част [Pavlov, S., Criminal Proceedings of the Republic of Bulgaria – General Part], Sofia: Sibi, 1996, pp. 114-116.

In line with these principles, the court and the authorities responsible for carrying out the pre-trial proceedings are **obliged to collect and examine both incriminating and exonerating evidence** (Art. 107, par. 3 of the CPC), unlike the defence counsel, who is obliged to focus only on establishing the facts and circumstances that are favourable for the accused individual (Art. 98, par. 1 CPC). The defence counsel does not have the right to bring forward facts and circumstances supporting the charges.¹⁴

The obligation to collect evidence in favour of the defendant **does not apply to the private prosecutor** in cases prosecuted by the victim. The private prosecutor (the victim) can present only evidence in support of the charges he/she has brought against the defendant.

2.6. DIFFERENCES IN GATHERING EVIDENCE IN THE PRE-TRIAL PHASE AND IN THE TRIAL

In general, criminal proceedings in Bulgaria are based on the principle that the court and the pre-trial authorities must make their decisions on the basis of **evidence** that they have **collected and examined personally** (Art. 18 of the CPC). As a consequence, most of the evidence the public prosecutor and the investigating authorities have collected during the pre-trial stage of the proceedings are presented again before the court during the trial.

There are several exceptions to this principle:

- The court *ex officio* or upon request by the defendant can conduct the so-called **“expedited judicial investigation”** (Art. 370, par. 1 of the CPC). Under this procedure the parties can agree that some of the witnesses and expert witnesses do not need to be interrogated by the court and instead the court can use the respective minutes and expert reports drafted during the pre-trial stage. Also, within the framework of the expedited judicial investigation the defendant can confess the facts described in the bill of indictment and give his/her consent that no evidence be collected for these facts (Art. 371 of the CPC).
- The **statement of the defendant given at the pre-trial stage** can be used during the trial when the trial is conducted in the absence of the defendant or the defendant refuses to make a statement before the court. The statement at the pre-trial stage must have been made before a pre-trial authority in the presence of a defence counsel or before a judge (Art. 279, par. 1 and 2 of the CPC).
- The **testimony of a witness given at the pre-trial stage** can be used during the trial when the witness refuses to be interrogated during the trial, cannot appear before the court for a long period of time, cannot be found to be summoned, or is a minor. The interrogation

¹⁴ See Тодорова, М., Правна помощ, Участието на защитник в наказателния процес [Todorova, M., Legal aid. The participation of a defence counsel in the criminal proceedings], Sofia: National Institute of Justice, p. 18.

at the pre-trial stage must have been performed before a judge or in the presence of the accused individual and his/her defence counsel (Art. 281, par. 1 and 3 of the CPC).

- The court can decide **not to interrogate an expert witness** if the latter does not appear at the hearing and the parties give their explicit consent (Art. 282, par. 3 of the CPC).

The defence counsel has a **broader scope of rights** in the collection and presentation of evidence **during the trial**. At the pre-trial stage the defence counsel can only attend the investigative actions carried out by the pre-trial authorities while during the trial he/she can actively participate in the judicial investigation, e.g. by asking questions to the witnesses (Art. 280, par. 2 of the CPC) and the expert witnesses (Art. 282, par. 2 of the CPC).

A major difference between the pre-trial stage and the trial is that the trial, unlike the pre-trial investigation, is based on the so-called **“principle of competition”** and the parties have equal rights (Art. 12 of the CPC). During the trial the defendant and his/her defence counsel can participate in each investigative or other procedural action. The trial has a separate stage called **“judicial pleadings”** where all parties to the proceedings, including the defendant and his/her defence counsel, can comment on the presented evidence and on the other parties' statements. The court cannot limit the time of the judicial pleadings (Art. 296, par. 1 of the CPC).

According to legal practitioners, the fact that most evidence is presented and reviewed during the trial irrespective of whether it has already been examined at the pre-trial stage gives little incentive to defendants and defence counsels to actively participate in the collection of evidence during the pre-trial investigation. Instead, they prefer to **present evidence and/or to request the collection of evidence directly before the court** during the trial.

2.7. PRINCIPLE OF EQUALITY OF ARMS VS. THE PRIVILEGED POSITION OF THE INVESTIGATORS AND/OR THE PUBLIC PROSECUTOR

In Bulgaria, the principle of equality of arms is explicitly proclaimed by the law only as regards the trial. The *Criminal Procedure Code* states that the **parties in the trial have equal procedural rights** unless otherwise provided in the law (Art. 12, par. 2 of the CPC).

At the pre-trial stage the pre-trial authorities (the public prosecutor and the investigating authorities) have a privileged position. The public prosecutor is usually proclaimed *dominus litis* – the master of the pre-trial proceedings. His/her procedural acts, which are not subject to judicial control, can be appealed before the higher prosecutor, whose decree is final. All this, potentially combined with an inquisitorial mindset on the part of some prosecutors, may lead to them being in a privileged

position and to impairing the equality of arms principle, when collecting evidence.

To ensure the necessary balance between the positions of the accused individual and the pre-trial authorities the law envisages a set of **guarantees for the rights of the accused individual**.

The law explicitly proclaims that the **trial is the central stage** of the criminal proceedings while the pre-trial investigation is only a preparatory stage (Art. 7, par. 1 and 2 of the CPC).

Both the accused individual and his/her defence counsel have a number of **procedural rights** that the pre-trial authorities need to observe and to ensure their effective exercise. The accused individual and his/her defence counsel can take part in the pre-trial proceedings by, *inter alia*, producing evidence and making requests, comments and objections. Still, the right and duty to collect evidence, both incriminating and exonerating, belongs to the authorities, as representatives of the state.

The accused individual and his/her defence counsel have the right to be present at procedural and investigative actions. If the law does not provide for their presence at an investigative action, the pre-trial authority may allow their presence, if this would not hamper the investigation (Art. 224 of the CPC).

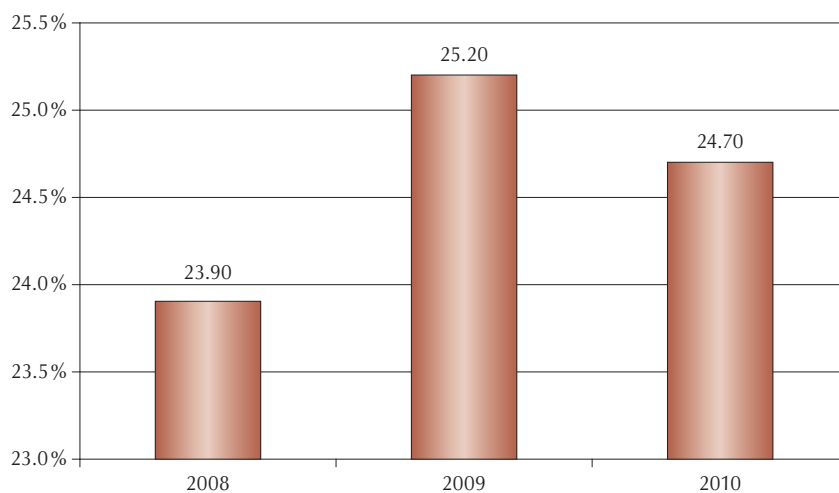
The accused individual and his/her defence counsel have the right to **appeal the decisions of the pre-trial authorities** that infringe upon their rights and legitimate interests (Art. 55, par. 1 of the CPC). The public prosecutor reviews the appeals against the decisions of the investigating authorities, while the superior public prosecutor reviews the rulings of the public prosecutor (Art. 200 of the CPC). Some decisions of the public prosecutor are also subject to judicial review.

3. MAIN PROBLEMS ENCOUNTERED BY THE DEFENCE ATTORNEYS DURING THE PRE-TRIAL INVESTIGATION AND SOLUTIONS ADOPTED

3.1. LEGAL FORMS FOR COOPERATION BETWEEN THE INVESTIGATIVE AGENCIES AND THE DEFENCE IN THE PRE-TRIAL STAGE

The main form for cooperation between the pre-trial authorities and the defence in the pre-trial stage is the **plea-bargaining**.

FIGURE 9. PERCENTAGE OF PLEA-BARGAIN AGREEMENTS OUT OF ALL PROSECUTORIAL ACTS SUBMITTED TO COURT (2008 – 2010)



Source: Public Prosecution Office of the Republic of Bulgaria.¹⁵

After the completion of the pre-trial investigation, the public prosecutor and the defence counsel can reach an agreement on the outcome of the case (Art. 381, par. 1 of the CPC). Plea-bargaining is possible only after the accused individual has compensated the property damages caused with the offence (Art. 381, par. 3 of the CPC). The plea-bargaining procedure is excluded for cases of serious crimes, listed in the law as well as for any crime as a result of which death has occurred (Art. 381, par. 2 of the CPC).

The agreement should address all the issues that would otherwise be solved with the

sentence, including the type and amount of the punishment to be imposed on the defendant. The public prosecutor and the defence counsel sign the agreement first, followed by the accused individual if the latter agrees with its content (Art. 381, par. 6 of the CPC). The agreement is then submitted to the court for approval. The approved agreement is equal to a sentence that has entered into force (Art. 383, par. 1 of the CPC). A plea-bargaining procedure can take place during the trial as well (Art. 384, par. 1 of the CPC).

¹⁵ See Доклад за прилагането на закона и за дейността на прокуратурата и на разследващите органи през 2010 г. [Report on the Implementation of the Law and on the Activities of the Public Prosecution Service and the Investigating Authorities in 2010], Sofia: Public Prosecution Service of the Republic of Bulgaria, 2011, p. 52.

3.2. START OF THE PARTICIPATION OF THE DEFENCE COUNSEL IN THE PRE-TRIAL STAGE

According to *the Constitution*, it is a fundamental right of every citizen to be accompanied by an attorney when appearing before a state institution (Art. 56 of the Constitution). In line with the constitutional provision, a person can always have counsel, irrespective of the type or stage of the proceedings. This principle is also valid in the framework of criminal proceedings. Every individual has the right to be accompanied by a lawyer each time he/she has to get in contact with the court, the public prosecutor or the investigating authorities.

However, in order to benefit from the full scope of rights available to the **defence counsel** in criminal proceedings, the attorney has to obtain the status of defence counsel and this is possible from the **moment the alleged offender is detained or charges has been brought** against him/her (Art. 97, par. 1 of the CPC). The investigating authority brings the charges when there is sufficient evidence that the alleged offender has committed the crime (Art. 219, par. 1 CPC). When the accused individual is summoned for the presentation of the charges the subpoena must include an explanation that he/she can appear with a defence counsel (Art. 219, par. 3 of the CPC).

The pre-trial authority is obliged to explain to the accused individual that he/she has the right of a defence counsel and to provide him/her with the possibility to contact one immediately. Before performing these obligations, the pre-trial authority cannot carry out any investigative actions or other procedural steps that involve the accused individual (Art. 97, par. 2 of the CPC).

3.3. RIGHT OF THE DEFENDANT (ACCUSED) TO PARTICIPATE INDEPENDENTLY IN COLLECTING EVIDENCE

Both the accused individual and his/her defence counsel have the **right to present evidence** (Art. 55, par. 1, and Art. 99, par. 1 of the CPC). However, this right concerns only evidence that is in possession of the accused individual or the defence counsel, or evidence that they can easily obtain or produce. This rule does not empower the accused individual to collect evidence that he/she does not possess.

If the accused individual wishes some specific evidence to be collected that is not in his/her possession, he/she has to make a **request to the public prosecutor or the investigating authority during the pre-trial stage, or to the court during the trial**. All interested parties, including the accused individual, have the right to request the collection of evidence. The law explicitly states that depending on the phase of criminal proceedings, collection of evidence is done by the pre-trial authorities or the court *ex officio* or upon request of the interested

parties (Art. 107, par. 1 and 2 of the CPC). The collection of evidence requested by the accused individual or another interested person cannot be rejected solely because the request has not been made within the specified period of time (Art. 107, par. 4 of the CPC).

Different rules apply on **cases prosecuted by the victim** as a private prosecutor. Since the private prosecutor bears the burden of proof and has to present evidence in support of the charges he/she as well as the defendant can request assistance from the police for the collection of information they cannot collect themselves (Art. 83 of the CPC).

3.4. PROCEDURE FOR THE DEFENCE COUNSEL TO BRING EVIDENCE TO THE CASE

The law explicitly provides the defence counsel with the **right to present evidence** (Art. 99, par. 1 of the CPC).

The *Criminal Procedure Code* does not provide for a special procedure for bringing evidence to the case by the defence counsel. During the pre-trial stage the defence counsel can present evidence to the public prosecutor or the investigating authorities. In the trial stage evidence is presented to the court. All collected evidence is subject to due scrutiny.

The *Criminal Procedure Code* envisages several rules aimed to **facilitate the participation of the defendant and the defence counsel in the collection and presentation of evidence**. When the defendant and/or his/her defence counsel wish to present a document, which is not in their possession, they can use the assistance of the investigating authority (during the pre-trial stage) or the court (during the trial). The law allows all interested parties to request from the court or the pre-trial authorities a **certificate**, based upon which **state authorities or other legal entities should supply them with the documents** they need within their competence (Art. 133, par. 1 of the CPC). If the respective official does not fulfil the duty of supplying the documents without a valid reason, he/she will be subject to a fine that can reach 100,000 Bulgarian leva or approximately 50,000 EUR (Art. 133, par. 2 of the CPC).

3.5. TERMS AND PROCEDURE FOR THE PRESENTATION OF EVIDENCE

Both the accused individual and his/her defence counsel can present evidence during the pre-trial stage of the proceedings. Evidence is presented to the respective pre-trial authority – the public prosecutor or the investigating authority.

There is **no specific procedure** envisaged in the law for the presentation of evidence. In practice, evidence is usually presented during the

interrogation of the accused individual or afterwards accompanied by a written application.

3.6. DISTRIBUTION OF THE BURDEN OF PROOF BETWEEN THE PROSECUTION AND THE DEFENCE

Bulgarian criminal law, like many other modern criminal justice systems, is based on the **presumption of innocence**. The presumption of innocence, defined among the fundamental principles of the criminal proceedings in Bulgaria, means that the defendant is presumed not guilty until the court rules the opposite through a conviction that has entered into force (Art. 16 of the CPC).

The rules governing the distribution of the burden of proof are based on the presumption of innocence placing the **burden of proof entirely on the party bringing the charges**. Thus, in cases prosecuted *ex officio* the public prosecutor and the investigating authorities are obliged to prove the crime and the guilt of the defendant. In cases prosecuted by the victim acting as private prosecutor, he/she has to prove the offence (Art. 103, par. 1 of the CPC).

The defendant can but is not obliged to present evidence to prove his/her innocence (Art. 103, par. 2 of the CPC). Furthermore, no conclusions to the detriment of the defendant can be made solely because of the fact that the defendant has not made or refuses to make a statement, or has not proven his/her objections (Art. 103, par. 3 of the CPC). The same, although not explicitly formulated in the law, applies for the defence counsel. The failure of the defence counsel to prove beyond any doubt the innocence of the defendant does not automatically lead to the conclusion that the defendant is guilty of committing the crime. The obligation of the defence counsel to collect evidence in support of the defendant is part of the right of defence but is not equal to the burden of proof that lies with the pre-trial authorities.¹⁶

3.7. INVOLVEMENT OF THE DEFENCE COUNSEL IN THE PROCEDURAL ACTIVITIES CARRIED OUT BY THE INVESTIGATOR

In Bulgarian criminal law, there is no general rule allowing the participation of the defence counsel in all investigative actions performed by the investigating authority. Indeed, depending on whether the defence counsel is allowed to take part in the investigative action, there are three different groups of such actions: investigative actions involving

¹⁶ See Павлов, С., Наказателен процес на Република България – обща част [Pavlov, S., Criminal Proceedings of the Republic of Bulgaria – General Part], Sofia: Sibi, 1996, pp. 307-308.

the accused individual where the defence counsel is generally allowed to participate; investigative actions not involving the accused individual where the defence counsel can participate only when the respective pre-trial authority so permits; and specific investigative actions where the participation of the defence counsel is subject to special rules.

In general, the **defence counsel can attend all the investigative actions that are performed with the participation of the accused individual.**

According to the law, the participation of the defence counsel in such investigative actions is defined not only as a right of the defence counsel himself/herself (Art. 99, par. 1 of the CPC), but also as a right of the accused individual (Art. 55, par. 1 of the CPC). The participation of the defence counsel is not an obligatory prerequisite for the performance of the investigative actions involving the accused individual. On the one hand, the law states that the defence counsel has the right to participate in investigative actions unless the accused individual has explicitly given up this right (Art. 55, par. 1 of the CPC). On the other hand, the absence of the defence counsel is not an obstacle for the lawful performance of the respective investigative action (Art. 99 of the CPC).

The **defence counsel can attend investigative actions that do not involve the accused individual only with the permission of the public prosecutor or the investigating authority** performing the action provided that his/her attendance will not hamper the investigation (Art. 224 of the CPC). The right to decide whether to allow the defence counsel to attend an investigative action that does not involve the accused individual belongs to the public prosecutor or the investigating authority. Neither the public prosecutor, nor the investigating authority is obliged to give such permission. The decision not to allow the defence counsel to attend can be appealed according to the general rules for challenging the decisions of the pre-trial authorities. The rulings of the investigating authority are appealed before the public prosecutor and the rulings of the public prosecutor are appealed before the superior public prosecutor (Art. 200 of the CPC). The appeal does not suspend the effect of the decision unless the public prosecutor rules otherwise (Art. 202, par. 1 of the CPC). This means that in most cases the investigative action will be carried out in the absence of the defence counsel irrespective of his/her appeal against the decision rejecting his/her attendance.

There are several **investigative actions** where **special rules** apply as regards the participation of the defence counsel. This is the case, for instance, when there is a **protected witness whose identity is kept confidential.** As a rule, the defence counsel can have direct access to such a witness only if the witness has been brought by him/her or by the accused individual. Otherwise, only the court and the pre-trial authorities are allowed direct access to the witness (Art. 123, par. 5 of the CPC). The defence counsel cannot attend the interrogation of a witness with confidential identity. However, the minutes from the interrogation (without the witness's signature) are immediately presented to the accused individual and his/her defence counsel who can pose their questions to the witness in writing (Art. 141, par. 2 of the CPC).

When a **witness interrogation** is taking place **before a judge** during the pre-trial investigation the investigating authority is obliged to provide the accused individual and his/her defence counsel with the opportunity to attend the hearing (Art. 223, par. 2 of the CPC). A witness is interrogated before a judge during the pre-trial investigation when there is a risk that the witness may not be able to appear before the court during the trial because of serious illness, prolonged absence from the country or another reason (Art. 223, par. 1 of the CPC). The accused individual and the defence counsel can also request the interrogation of a witness before a judge (Art. 223, par. 4 of the CPC). However, the pre-trial authority can reject the request. The rejection is done in writing and must be signed by the pre-trial authority, the accused individual and the defence counsel.

3.8. RIGHT OF THE DEFENCE COUNSEL TO REVIEW EVIDENCE OBTAINED BY THE PROSECUTION

When **charges are brought**, the investigation authority is obliged to allow both the accused individual and his/her defence counsel to **get acquainted with the full content of the decree** and in case of necessity to give them additional clarifications (Art. 219, par. 4 of the CPC). The decree includes information about the time and place of its issuance, the investigating authority, the name of the accused individual, the crime of which he/she is charged, and any coercive measures if such are imposed. Information about the evidence supporting the charges can also be included if this does not hamper the investigation (Art. 219, par. 3 of the CPC). The law says nothing about the presentation of the evidence collected so far, so it is assumed that **at this stage the investigating authority is not obliged to present any evidence.**¹⁷ Bulgarian legal doctrine also supports the conclusion that at this stage the accused individual and his/her defence counsel do not have unlimited access to the case file, but can examine the file and make the necessary excerpts only to the extent permitted by the respective pre-trial authority.¹⁸

Later in the course of the investigation, when all investigative actions are completed, the **investigating authority presents the whole case**

¹⁷ This rule, allowing the investigating authority not to disclose evidence, if this would hamper the investigation, is criticised as not complying with Article 6(3)(a) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, stating that everyone charged with a criminal offense has the right to be informed promptly and in detail of the nature and cause of the accusation against him/her. See Кънчев, Д., Новият Наказателно-процесуален кодекс и правото на обвиняемия по чл. 6, т. 3, б. "а" от Европейската конвенция за защита на правата на човека и основните свободи [Kanchev, D., The new Criminal Procedure Code and the right of the charged with a criminal offence under Article 6(3)(A) of the European Convention for the Protection of Human Rights and Fundamental Freedoms], available in Bulgarian with summary in English at: http://www.blhr.org/media/documents/Новият_НПК_и_правото_по_чл._6_т._3-а_ЕКПЧ.doc (last visited on 27 March 2011).

¹⁸ See Павлов, С., Наказателен процес на Република България – особена част [Pavlov, S., Criminal Proceedings of the Republic of Bulgaria – Special Part], Sofia: Sibi, 1996, pp. 61-62.

file to the accused individual and his/her defence counsel, if they have requested so (Art. 227, par. 1 and 2 of the CPC). This is the moment, when they can actually review all the evidence, gathered by the public prosecutor and the investigating authorities (Art. 227, par 8 of the CPC). The investigating authority specifies the time available to the accused individual and the defence counsel for reviewing the evidence. The time must correspond to the factual and legal complexity of the case, its volume and any other relevant circumstances (Art. 228, par. 1 of the CPC). Usually, the review of the case file takes place at the premises of the investigating authority in the presence of the person presenting the case or another official. When the accused individual, his/her defence counsel or another person attending the presentation is not able to review the evidence, the investigating authority must explain it to this person or, if necessary, read it to him/her (Art. 228, par. 2 of the CPC). The accused individual and his/her counsel can take notes or even transcribe entire documents.¹⁹

BOX 1. EQUALITY OF ARMS

As a practical matter, obtaining access to court files remains cumbersome and uneven. In criminal cases, there is typically a single file which is passed between the judge, prosecutor and attorney for the defendant. Frequently, the file is not available to counsel for the accused a few days before trial because it is with the prosecution office or the court. The common practice is that an attorney must file a request with the court to make copies and it may take a day or two before the judge acts on the request. Additionally, some courts will impose significant fees for the copies. In some instances, attorneys are required to make a request for access to the file, then a separate request to the court to make copies.

...

Although there has been some improvement, poor courthouse facilities and sometimes uncooperative courthouse personnel continue to impede free and easy access to court documents. While conditions vary around the country, attorneys frequently must review files in small, congested clerks' offices or file rooms that do not have tables or desks available for reviewing large files or records. Copying equipment varies significantly in availability and quality. Sometimes attorneys are required to sign registries or present a copy of a power of attorney before they are allowed to review court records.

There is a sense among many attorneys that the prosecutors have better access to court files than counsel for the accused. As a practical matter, prosecution offices are typically in the same building as the courts and clerks' offices making the files more readily accessible. Additionally, under the Bulgarian legal system, prosecutors, like judges, carry the status of magistrates and are not part of the executive branch of government. Many attorneys perceive the courts (and their corresponding clerks' offices) as showing deference to their fellow magistrates and that this bias is reflected in easier access to court files by the prosecution.

Source: *The Legal Profession Reform Index for Bulgaria, American Bar Association, May 2006.*

¹⁹ See Павлов, С., Наказателен процес на Република България – особена част [Pavlov, S., Criminal Proceedings of the Republic of Bulgaria – Special Part], Sofia: Sibi, 1996, pp. 63-64.

After the accused individual and his/her defence counsel have reviewed the case file they can make **requests, remarks and objections**, including such on evidentiary matters (Art. 229, par. 1 of the CPC). The public prosecutor examines the requests, remarks and objections and rules upon them by a decree, which is not subject to appeal (Art. 229, par. 3 of the CPC). This leaves him/her with a wide discretion as to whether to honour the evidentiary requests of the defence. If the accused individual or the defence counsel has requested additional investigative actions and their request has been accepted, they can be present during the performance of these actions (Art. 230, par. 1 of the CPC). The performance of additional investigative actions is followed by a new presentation of the whole case file (Art. 230, par. 2 of the CPC).

The *Law on the Bar* gives additional rights to the defence counsel proclaiming that he/she has free access to the case file and can make inquiries and receive copies of documents and information from the court and the pre-trial authorities only upon presenting his/her attorney's ID card (Art. 31 of the *Law on the Bar*).

3.9. LEGAL CONSEQUENCES IN CASE THE DEFENDANT'S RIGHTS TO BE INVOLVED IN GATHERING EVIDENCE ARE VIOLATED

According to the law, the accused individual can be involved in gathering evidence by exercising the rights that are made available to him/her. These rights include the right to examine the case file and make the necessary excerpts, the right to participate in the proceedings, the right to present evidence, and the right to make requests, remarks and objections (Art. 55, par. 1 of the CPC).

If the accused individual believes that his/her rights or legitimate interests have been violated during the pre-trial stage of the proceedings, he/she can **appeal the decisions of the pre-trial authorities** (Art. 55, par. 1 of the CPC). The decisions of the investigating authority can be appealed before the public prosecutor, while the decisions of the public prosecutor can be appealed before the superior public prosecutor (Art. 200 of the CPC).

The **public prosecutor**, who is responsible for the lawful performance of the investigation, can also intervene if the rights of the accused individual have been violated. The public prosecutor can repeal the decisions of the investigating authority upon his/her own motion, remove the investigating authority from the case or give obligatory instructions to the investigating authority (Art. 196, par. 1 of the CPC). Before the presentation of the case file to the accused individual and his/her defence counsel, the investigating authority is obliged to report the case to the public prosecutor who must check if the investigation was performed lawfully, objectively, entirely and comprehensively (Art. 226, par. 1 and 2 of the CPC). If the public prosecutor identifies procedural

irregularities, including violations of the rights of the accused individual, he/she must instruct the investigating authority to perform the necessary actions or perform them himself/herself. The same rule applies when the public prosecutor believes that the evidence necessary to reveal the objective truth on the case has not been collected (Art. 226, par. 3 of the CPC). The public prosecutor is also obliged, before bringing the case to the court for trial, to make sure that the investigation has been conducted without any serious procedural violations or irregularities, including violations of the right of the accused individual (Art. 246, par. 1 of the CPC).

During the trial, before scheduling the first court hearing, the **judge also examines the case** for, *inter alia*, serious procedural irregularities that have occurred during the pre-trial investigation and that have resulted in **restrictions of the rights of the accused individual and/or his/her defence counsel** (Art. 248, par. 2 of the CPC). If the judge identifies such irregularities, he/she returns the case to the public prosecutor listing all irregularities that have to be rectified (Art. 249, par. 2 of the CPC). The same applies when the court establishes such irregularities in the course of the trial (Art. 288 of the CPC).

A violation of the rights of the accused individual during the pre-trial stage can be a reason for **repealing the sentence of the first-instance court**. When the accused individual, his/her defence counsel or another party to the proceedings appeals the sentence, the second-instance court conducts a thorough examination of the case irrespective of what reasons for appeal the parties have pointed out (Art. 314, par. 1 of the CPC). When the second-instance court establishes that a serious procedural irregularity has occurred at the pre-trial stage of the proceedings that has restricted the procedural rights of the accused individual and/or his/her legal counsel, it returns the case to the public prosecutor for re-examination (Art. 335, par. 1 of the CPC).

A serious procedural irregularity that has led to restriction of the procedural rights of the accused individual or another party of the proceedings is a valid reason for **appealing the ruling of the second-instance court** before the Supreme Cassation Court (Art. 348, par. 1 and 3 of the CPC). According to the law, the public prosecutor can appeal the ruling of the second-instance court not only when this is in favour of the prosecution but also when it benefits the accused individual (Art. 349, par. 2 of the CPC). If the Supreme Cassation Court establishes serious procedural irregularities it returns the case to either the first or the second instance court with obligatory instructions for rectifying the irregularities (Art. 354, par. 3 and Art. 355, par. 1 of the CPC).

In exceptional cases, when very serious procedural violations against the rights of the accused individual or his/her defence counsel have been established, the Supreme Cassation Court can **re-open a criminal case** that has already been closed (Art. 422, par. 1 of the CPC).

3.10. RESPECT OF THE EQUALITY OF ARMS WHEN EVIDENCE IS GATHERED, VERIFIED, SUBMITTED BEFORE AND EVALUATED BY THE COURT

Evidence is collected by the pre-trial authorities *ex officio* or upon request of the interested parties. The court collects evidence upon requests made by the parties and on its own initiative.

The transparency of gathering evidence and the equality of arms are guaranteed by the compulsory presence of **certifying witnesses** during the investigative actions at the pre-trial stage (Art. 137 of the CPC). They are chosen by the body performing the respective investigative action, among persons who have no other procedural capacity and are not interested in the outcome of the case. They are entitled to, *inter alia*, make comments and objections against any deficiencies or violations of the law committed, to request corrections, amendments and complements to the report on the relevant investigative action.

Another rule that guarantees equality is that the court and the pre-trial authorities collect and examine both incriminating and exonerating evidence.

In addition, evidence and the means for its establishment cannot have a predetermined force and are subject to due scrutiny, which also guarantees the equality of arms.

The defendant has an express right to examine the case file, to make the necessary statements, to submit evidence, to participate in the proceedings, to make requests, comments and objections and appeal authorities' acts violating his/her rights and legitimate interests.

3.11. EVALUATION OF CONTRADICTORY OR DOUBTFUL EVIDENCE BY THE COURT

As a guiding principle in the *Criminal Procedure Code*, related to gathering evidence, the court, the public prosecutor and the investigating authorities are obliged to take all measures within their competence to ensure the discovery of the **objective truth** (Art. 13, par. 1 of the CPC).

The law also proclaims the principle of making decisions based on inner conviction. According to this principle, the court, the public prosecutor, and the investigating authorities are obliged to make all their decisions upon their inner conviction based on an **objective, comprehensive and full scrutiny of all facts and circumstances** relevant to the case (Art. 14, par. 1 of the CPC). All collected evidence relevant to the case should be carefully examined (Art. 107, par. 5 of the CPC).

The law allows the court to re-open the judicial investigation before issuing the sentence if it finds that the facts and circumstances related to the case have not been sufficiently clarified (Art. 302 of the CPC).

All decisions of the court and the investigating authorities are based on the evidence they have collected and checked **personally**.

The sentence cannot be grounded upon assumptions (Art. 303, par. 1 of the CPC). The defendant can be found guilty only if the indictment has been **proved beyond doubt** (Art. 303, par. 2 of the CPC).

In case of **contradictory evidence**, the court must state in the reasoning of the sentence the reasons for admitting some and rejecting other evidence (Art. 305, par. 3 of the CPC).

3.12. HIERARCHY AND PRIORITISATION OF EVIDENCE

The law does not provide for any hierarchy or prioritisation of the collected evidence. Indeed, the *Criminal Procedure Code* explicitly states that **neither the evidence nor the means for their collection can have a predetermined weight** (Art. 14, par. 2 of the CPC).

However, there are some rules indicating the relative **weight of specific evidence**:

- Neither the charges nor the conviction can be based solely on data collected through the use of **special intelligence means** (Art. 177, par. 1 of the CPC) or solely on the statements of **witnesses with confidential identity** or **undercover agents** (Art. 124 of the CPC).
- The **confession of the defendant** alone cannot lead to a conviction either. The law explicitly proclaims that neither the charges nor the conviction can be based solely on the defendant's confession (Art. 116, par. 1 of the CPC) and the confession does not relieve the responsible authorities from their obligation to collect other evidence on the case (Art. 116, par. 2 of the CPC).
- The **report of the external expert** assigned to perform a specific task in relation to the case is not binding on the court or the pre-trial authorities (Art. 154, par. 1 of the CPC). However, when the respective authority does not agree with the conclusions of the expert, it is obliged to provide justification for its decision (Art. 154, par. 2 of the CPC).

Bulgarian legal doctrine divides evidence, *inter alia*, into direct and indirect as well as primary and derivative. **Direct evidence** proves a given fact directly (e.g. a witness seeing the commission of the crime), while **indirect evidence** has to be compared and linked with other evidence (e.g. a witness seeing the defendant leaving the crime scene). This means that direct evidence alone is usually sufficient for proving a certain fact relevant to the case, while indirect evidence can be used only when there are other pieces of evidence supporting it. As a reflection of the principle of immediacy, stipulating that all decisions should be based on evidence authorities have collected and checked personally, direct evidence cannot be substituted for indirect. Indirect evidence usually

serves for verifying direct evidence when both types of evidence are available. When there is no direct evidence in the case, the case can be solved based only on indirect evidence, but this is a long process and poses a high risk of errors. Leading Bulgarian case law states that the charge can be proved beyond doubt only by means of indirect evidence, but all its pieces, separately and in their aggregation, must lead to only one possible conclusion about the guilt of the defendant and exclude all other possible versions.²⁰

Primary evidence comes directly from the source (e.g. eyewitness) while **derivative** evidence is linked to the source through an intermediary (e.g. a witness telling the story heard from an eyewitness). Primary evidence cannot be substituted for derivative evidence, again pursuant to the principle of immediacy. Derivative evidence usually serves for verifying primary evidence. When there is no primary evidence, the case can be solved only by means of derivative evidence, but this, again, is a long process which poses a high risk of errors.²¹

In sum, direct and primary evidence must be given priority in criminal proceedings.

²⁰ See Павлов, С., Наказателен процес на Република България – обща част [Pavlov, S., Criminal Proceedings of the Republic of Bulgaria – General Part], Sofia: Sibi, 1996, pp. 349-353.

²¹ See Павлов, С., Наказателен процес на Република България – обща част [Pavlov, S., Criminal Proceedings of the Republic of Bulgaria – General Part], Sofia: Sibi, 1996, pp. 353-354.

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