Originalni naučni rad
DOI: 10.5937/gakv93-29896
UDC 343.132

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OPŠTA NEDELOTVORNOST ŽALBE NA REŠENJE O ZADRŽAVANJU**
Konačni rezultati istraživanja

SAŽETAK: Ovim radom se predstavljaju rezultati okončanog istraživanja koje se bavilo pitanjem delotvornosti žalbe na rešenje o zadržavanju iz čl. 294. Zakonika o krivičnom postupku. Istraživanje o kom se u radu izveštava sprovedeno je na teritoriji čitave Republike Srbije, obuhvatilo je sve osnovne i više sudove kao i anketno ispitivanje u kome je učestvovalo više od trista advokata. Mada većina kolega neće biti iznenađena rezultatima istraživanja, ono se pokazalo višestruko korisnim, a najpre iz razloga što ono činjenično i sveobuhvatno pokazuje stvarno stanje stvari u vezi sa delotvornošću pravnog leka koji je bio predmet istraživanja. Ovim istraživanjem dokumentuje se ono što je u dosadašnjoj pravnoj praksi bilo na nivou opšteg (ali empirijski neproverenog) utiska.

Ključne reči: rešenje o zadržavanju, delotvornost, pravni lek

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** Рад је примљен 17. 12. 2020, а прихваћен је за објављивање 28. 12. 2020. године.

UVOD

Pravna sigurnost, vladavina prava i pravna država, predstavljaju pravne vrednosti kojima teži (ili makar treba da teži) svaki racionalni pravni poredak. Ostvarenje ovih pravnih vrednosti ide ruku pod ruku sa garancijom osnovnih ljudskih prava. Kontrola poštovanja ljudskih prava stoga se poverava sudovima, jer sudovi pre svih drugih organa predstavljaju izraz vladavine prava i pravne države. Nije, međutim, dovoljno da se sudovima poveri kontrola poštovanja ljudskih prava, neophodno je i da su sudovi spremni da na sebe preuzmu zadatak da takvu kontrolu zaista i vrše.

Proteklih godina u stručnoj javnosti sve je prisutniji utisak da sudovi, u slučajevima kada odlučuju o žalbi na rešenje o zadržavanju, nisu spremni da na sebe preuzmu zadatak kontrole takvih rešenja, već da umesto toga odlučuju *pro forma*, tako što odbijaju gotovo sve žalbe uložene protiv rešenja iz čl. 294. Zakonika o krivičnom postupku.[1]

U vezi s tim utiskom, tokom 2019. godine objavljen je naučni rad u vidu prethodnog saopštenja, kojim je na uzorku od 7 sudova u Srbiji zaključeno da je žalba na rešenje o zadržavanju nedelotvorni pravni lek jer iz sudske prakse proizilazi da sudovi takve žalbe rutinski odbijaju.[2] Ovaj rad nadovezuje se na taj, upotpunjujući ga podacima prikupljenim u istraživanju koje je obuhvatilo sve osnovne i više sudove u Republici Srbiji, kao i anketno ispitivanje u kom je učestvovalo trista dvadeset i četiri advokata.

STANJE U POZITIVNOM PRAVU I TEORIJSKA DELOTVORNOST ŽALBE NA REŠENJE O ZADRŽAVANJU

Čl. 294. ZKP-a propisano je da lice uhapšeno u skladu sa čl. 291. st. 1. i čl. 292. st. 1. ZKP-a, kao i osumnjičenog iz čl. 289. st. 1. i 2. ZKP-a, javni tužilac može izuzetno zadržati radi saslušanja najduže 48 časova od časa hapšenja, odnosno odazivanja na poziv.[3]

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[1] Zakonik o krivičnom postupku (*Službeni glasnik RS*, br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013. i 55/2014).

[2] Todorović, A. (2018). Žalba na rešenje o zadržavanju kao nedelotvorni pravni lek. *Glasnik Advokatske komore Vojvodine*, 90 (5–8), 233–244.

[3] Podsećanja radi, čl. 291. st. 1. propisano je da policija može neko lice uhapsiti ako postoji razlog za određivanje pritvora; čl. 292. st. 1. propisano je da može biti uhapšeno lice zatečeno pri izvršenju krivičnog dela za koje se goni po službenoj dužnosti; dok na osnovu st. 1. i 2. čl. 289. ZKP-a proizilazi da može biti zadržano radi saslušanja i lice za koje postoje osnovi sumnje da je učinilo krivično delo i koje je od strane policije pozvano

Kada se lice lišava slobode hapšenjem, o tome se ne donosi posebno rešenje niti se u odnosu na taj akt može izjaviti neko pravno sredstvo.[4] Razlozi za to su više nego očigledni. Hapšenjem se lice zapravo fizički lišava slobode i sprovodi bez odlaganja nadležnom javnom tužilaštvu radi saslušanja.[5] U redovnom toku stvari, tužilaštvo će potom saslušati osumnjičenog. Po saslušanju osumnjičenog, tužilaštvo može ili narediti da se osumnjičeni pusti na slobodu, ili predložiti da sudija za prethodni postupak osumnjičenom odredi pritvor (ili neku od mera iz članova: 197, 199, 202. ili 208. ZKP-a).

Kratki rokovi ostavljeni za sprovođenje osumnjičenog tužiocu ne nude uslove da se u tako uskom intervalu omogući sudska kontrola osnovanosti hapšenja, dok, sa druge strane, relativno kratko vreme trajanja sprovođenja i samog saslušanja ne predstavlja po svom kvantitetu takvo narušavanje slobode kretanja koje bi opravdalo uvođenje sudske kontrole. Praktično vreme koje bi bilo potrebno da se uloži pravni lek i da se o njemu odluči duže je od vremena koje je potrebno da se osumnjičeni sprovede i sasluša.

Neretko u praksi tužilaštvo se, pak, odlučuje da pođe „izuzetnim" umesto redovnim putem i da iskoristi svoje ovlašćenje iz čl. 294. ZKP-a, određujući osumnjičenom zadržavanje u periodu do 48 sati radi saslušanja. Ograničenje slobode koje po rešenju iz čl. 294. ZKP-a može trajati do 48 sati svakako predstavlja vremenski dovoljno značajno ograničenje slobode da bi zaslužilo sudsku kontrolu osnovanosti takvog ograničenja. U tom smislu opravdano je zakonsko rešenje koje zadržanom licu i njegovom braniocu omogućava da pred nadležnim sudom pokrenu postupak kontrole osnovanosti zadržavanja.

Ostavljajući u ovom delu rada po strani pitanje da li je uopšte opravdano zakonsko rešenje kojim se tužilaštvu omogućava da osumnjičenog zadrži radi saslušanja, ovde treba istaći da sâm postupak kontrole takvog zadržavanja, na način koji propisuje ZKP, ispunjava sve uslove da bar teorijski može biti smatran delotvornim. Naime, čl. 294. ZKP-a u st. 3. predviđeno je da: „Protiv rešenja o zadržavanju osumnjičeni i njegov branilac imaju pravo žalbe u roku od šest časova od dostavljanja rešenja."[6] Istom odredbom određeno je da: „O žalbi odlučuje sudija za prethodni postupak u roku od četiri časa od prijema žalbe."[7] Uloženu žalbu, sudija za prethodni postupak može odbaciti, odbiti

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radi saslušanja u svojstvu osumnjičenog, ali i građanin pozvan radi prikupljanja obaveštenja u vezi sa krivičnim delom ukoliko policija u toku prikupljanja obaveštenja oceni da pozvani građanin može biti smatran osumnjičenim.

[4] Ilić, G., Majić, M., Beljanski, S., Trešnjev, A. (2012). *Komentar Zakonika o krivičnom postupku*. Beograd: Službeni glasnik, 674.

[5] U slučaju takozvanog građanskog hapšenja (čl. 292. st. 1) lice se može najpre predati policiji, koja je opet dužna da to lice dalje sprovede tužilaštvu.

[6] Zakonik o krivičnom postupku (*Službeni glasnik RS*, br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013. i 55/2014).

[7] *Ibid*.

ili usvojiti. U poslednjem od tri slučaja, sud će u rešenju kojim žalbu usvaja istovremeno narediti da se osumnjičeni pusti na slobodu.

Prilikom ocene (teorijske ili potencijalne) delotvornosti žalbe na rešenje o zadržavanju, potrebno je ceniti najmanje dva parametra: dostupnost pravnog leka i dovoljnost pravnog leka.[8] Dostupnost pravnog leka označava mogućnost zainteresovanog lica da samostalno ili uz stručnu pomoć pokrene postupak kontrole osporenog akta u kom će zahtevati zaštitu svojih prava. S aspekta dostupnosti može se zaključiti da žalba na rešenje ispunjava minimum uslova da bi se mogla označiti dostupnim pravnim sredstvom. Naime, uslovi za podnošenje žalbe nisu previše usko postavljeni i omogućavaju da se rešenje „napadne" po širokom frontu osnova (bitna povreda odredaba krivičnog postupka, pogrešna primena materijalnog prava, pogrešno ili nepotpuno utvrđeno činjenično stanje). Žalba se takođe može smatrati dostupnom i s aspekta ovlašćenih podnosilaca jer žalbu može najpre podneti zadržano lice (što je faktički malo verovatno) ili branilac tog lica, pri čemu treba naglasiti da je stručna odbrana uz pomoć branioca u slučaju zadržavanja obavezna, što doprinosi zaštiti prava zadržanog lica.[9]

Posmatrajući pozitivnopravno rešenje, žalba na rešenje o zadržavanju ne samo da je dostupna već je potencijalno i dovoljna, jer sudija za prethodni postupak, u slučaju da smatra da je ona osnovana, može odmah narediti da zadržano lice bude pušteno na slobodu čime prestaju negativna dejstva lišenja slobode. Takođe, rok za podnošenje žalbe je veoma kratak i, u sadejstvu sa kratkim rokom za odlučivanje po žalbi, omogućava relativno brzu „ispravku nepravde".

DELOTVORNOST ŽALBE NA REŠENJE O ZADRŽAVANJU U PRAKSI

Kako je istaknuto u prethodnom odeljku rada, u našem pozitivnom pravu ispunjeni su svi preduslovi da žalba na rešenje o zadržavanju bude delotvorni pravni lek. No, da bi ova žalba bila suštinski delotvorna nije dovoljno da je ona teorijski dostupna i dovoljna, potrebno je da ona i u stvarnosti bude (praktično) delotvorna. Procesne garancije, a posebno one date u cilju zaštite ljudskih prava, moraju biti „praktične i efikasne a ne teoretske i iluzorne"[10], u suprotnom obesmišljava se suština njihovog postojanja.

[8] Lee, A. „Focus on Article 13 ECHR", *Judicial Review* 20.1 (2015), 33–41.

[9] Čl. 74. Zakonika o krivičnom postupku (*Službeni glasnik RS*, br. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013. i 55/2014).

[10] *McKay v. The United Kingdom*, (App. No. 543/03), para. 47.

Između ostalog, pravni lek se smatra nedelotvornim: „onda kada je očigledno neefikasan, to jest onda kada iz sudske prakse proizilazi da je unapred isključena mogućnost uspeha u postupku po pravnom leku.“ [11] S tim da izraz „unapred isključena mogućnost uspeha“ ne treba shvatiti na način da se isključuje svaka mogućnost uspeha, već da se isključuje realna mogućnost uspeha. U tom smislu nedeltovorni pravni lek biće i onaj koji je po pravilu nedelotvoran u praksi, čak i ukoliko se mestimično mogu pronaći konkretni primeri da je neko od podnosilaca pravnog leka uspeo u svom zahtevu. Potrebna je, dakle, svakodnevna, odnosno redovna delotvornost pravnog leka, a ne teorijska ili ekscesna mogućnost uspeha. Tako treba razumeti i stav Evropskog suda za ljudska prava u presudi *Ananjev protiv Rusije* gde je sud istakao da je u praktičnom smislu nedelotvoran onaj pravni lek povodom kog se u dosadašnjoj sudskoj praksi države članice pokazalo da domaći *sudovi rutinski odbijaju* da pruže pravnu zaštitu koja se tim pravnim lekom zahteva.[12] Upravo ovaj standard iz presude *Ananjev* primeniće se na podatke prikupljene istraživanjem na način da se ispita da li sudovi u Republici Srbiji rutinski odbijaju žalbe na rešenja o zadržavanju ili to ipak nije slučaj.

U cilju prikupljanja podataka potrebnih za obavljanje istraživanja svim osnovnim i višim sudovi u Republici Srbiji upućen je identičan dopis, kojim se po osnovu Zakona o slobodnom pristupu informacijama od javnog značaja tražilo da svaki pojedinačni sud navede o koliko žalbi na rešenja o zadržavanju je odlučivano u 2019. i 2020. godini zaključno sa 31. 8. 2020. godine, kao i koliko takvih žalbi je usvojeno u odnosnim periodima.

Na zahtev za pristup informacijama odgovorilo je ukupno 86[13] sudova: 63[14] osnovna i 23[15] viša. S tim da ukupno 3 suda[16] nisu odgovorila na zahtev za pristup informacijama od javnog značaja, dok je jedan[17] sud poslao nepotpune informacije.

Rezultati istraživanja prikazani su posebno za osnovne, a posebno za više sudove u tabelama koje slede.

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[11] Sur, S. & Combacau, J. (1999). *Droit international public*. Montchrestien, 547.

[12] *Ananyev and others v. Russia*, (Apps. No. 42525/07, 60800/08), para. 116.

[13] Dopisi svih sudova dostupni su u okviru banke podataka objavljene na: http://www.glasnik.edu.rs/banka-podataka/

[14] V.: Tabela 1.

[15] V.: Tabela 2.

[16] U pitanju su: Osnovni sud u Brusu i Viši sudovi u Zrenjaninu i Sremskoj Mitrovici.

[17] Treći osnovni sud u Beogradu naveo je u svom dopisu podatak o broju izjavljenih žalbi, ali ne i podatak o broju usvojenih žalbi.

***Tabela 1*: Osnovni sudovi**

	2019.		2020.	
	Broj izjavljenih žalbi	Broj usvojenih žalbi	Broj izjavljenih žalbi	Broj usvojenih žalbi
Aleksinac	4	0	1	0
Aranđelovac	14	0	4	0
Bačka Palanka	37	0	29	0
Bečej	7	0	5	0
Bor	11	0	11	1
Bujanovac	39	0	13	0
Čačak	5	0	3	0
Despotovac	7	4	2	0
Dimitrovgrad	0	0	0	0
Drugi OS u Beogradu	14	1	14	0
Gornji Milanovac	8	0	2	0
Ivanjica	8	0	5	0
Jagodina	6	0	0	0
Kikinda	15	0	10	0
Knjaževac	0	0	0	0
Kragujevac	60	18	30	8
Kraljevo	5	0	2	0
Kruševac	0	0	9	0
Kuršumlija	3	1	2	0
Lazarevac	5	0	3	0
Lebane	4	0	0	0
Leskovac	0	0	4	0
Loznica	1	1	2	2
Majdanpek	2	1	1	0
Mionica	0	0	1	0
Mladenovac	0	0	1	1
Negotin	5	0	3	2
Niš	14	0	8	1
Novi Pazar	7	2	12	1
Novi Sad	81	5	131	9
Obrenovac	0	0	3	0

Pančevo	14	1	11	0
Paraćin	1	0	6	0
Petrovac na Mlavi	1	0	3	0
Pirot	7	1	3	2
Požarevac	6	0	6	0
Požega	3	0	2	0
Priboj	2	0	2	0
Prijepolje	12	3	13	1
Prokuplje	12	0	13	0
Prvi OS u Beogradu	16	1	17	1
Raška	0	0	0	0
Ruma	56	2	29	0
Senta	5	1	6	0
Sjenica	1	0	3	0
Smederevo	8	0	6	0
Sombor	6	0	3	0
Sremska Mitrovica	23	0	25	0
Stara Pazova	28	5	26	0
Surdulica	9	0	9	0
Šabac	4	0	5	0
Šid	2	0	4	0
Trstenik	13	1	9	4
Ub	0	0	1	0
Užice	26	0	20	0
Valjevo	6	1	0	0
Velika Plana	3	0	2	1
Veliko Gradište	1	0	1	0
Vranje	33	5	19	0
Vrbas	2	0	8	0
Vršac	7	0	1	0
Zaječar	0	0	1	0
Zrenjanin	252	0	195	0
		USVOJENO 5,86 %		USVOJENO 4,47 %
		ODBIJENO 94,14 %		ODBIJENO 95,53 %

Kako se može videti iz podataka iskazanih u Tabeli 1, tokom 2019. godine, pred osnovnim sudovima u našoj republici izjavljena je 921 žalba od kojih je usvojeno svega 54, iz čega proizilazi da procenat žalbi koje su odbijene ili odbačene iznosi 94,14 %. Procenat odbijenih ili odbačenih žalbi sličan je i za 2020. godinu gde iznosi 95,53 %.

***Tabela 2*: Viši sudovi**

	2019.		2020.	
	Broj izjavljenih žalbi	Broj usvojenih žalbi	Broj izjavljenih žalbi	Broj usvojenih žalbi
Čačak	13	12	1	1
Jagodina	21	19	5	2
Kragujevac	10	1	26	0
Kraljevo	0	0	3	0
Kruševac	0	0	2	0
Leskovac	6	0	2	0
Negotin	10	0	5	0
Niš	17	0	8	1
Novi Pazar	2	0	2	0
Novi Sad	26	0	28	0
Pančevo	8	2	2	0
Pirot	3	0	1	0
Požarevac	3	0	0	0
Prokuplje	9	2	8	0
Smederevo	0	0	1	0
Sombor	3	0	0	0
Subotica	5	0	3	0
Šabac	4	0	0	0
Užice	16	0	5	0
Valjevo	6	0	4	0
Vranje	36	0	19	0
Zaječar	2	0	3	0
		USVOJENO 13,78 %		USVOJENO 2,38 %
		ODBIJENO 86,22 %		ODBIJENO 97,62 %

Za razliku od podataka iskazanih u Tabeli 1, Tabela 2 nudi na prvi pogled nešto povoljnije rezultate u odnosu između izjavljenih i usvojenih žalbi, bar kada je u pitanju 2019. godina. Naime, rezultati za 2019. godinu pokazuju da je usvojeno čak 36 od ukupno 261 izjavljene žalbe, što procenat uspešnosti žalbi podiže na 13,78 %.

Ovde je interesantno obratiti pažnju na podatke koji su pristigli iz viših sudova u Čačku i Jagodini. Naime, tokom 2019. godine Višem sudu u Čačku izjavljeno je 13 žalbi na rešenje o zadržavanju od kojih je usvojeno 12, dok je Višem sudu u Jagodini izjavljena 21 žalba od kojih je usvojeno 19. Podaci prikupljeni od ova dva suda znatno se razlikuju od podataka prikupljenih od ostalih sudova. Procenat uspešnost žalbe na rešenje o zadržavanja u ova dva suda iznosi preko 90 %, dok kod svih drugih sudova ona u proseku iznosi svega 2,2 %. Štaviše, od ukupno 36 usvojenih žalbi u celoj Srbiji u 2019. godini čak 31 je usvojena u ova dva suda.

Da je u pitanju izuzetak u odnosnu na ukupnu statistiku, a ne pravilo, pokazuju podaci za 2020. godinu u kojoj su svi viši sudovi u Srbiji (uključujući i pomenuta dva) u proseku odbili ili odbacili čak 97,6 % izjavljenih žalbi. Ovaj procenat korespondira sa statistikom prikazanom za osnovne sudove iz Tabele 1. Prikazano u apsolutnim brojkama: od 168 izjavljenih žalbi usvojene su svega 4. Slično kao i u prethodnoj godini, viši sudovi u Čačku i Jagodini javljaju se kao svetli izuzetak jer od ukupno 4 usvojene žalbe u čitavoj Republici 3 otpadaju na ta dva suda. No, ove svetle primere viših sudova, čini se, ne prate osnovni sudovi u istim mestima, pa tako ni Osnovni sud u Čačku ni Osnovni sud u Jagodine tokom 2019. i 2020. godine nisu usvojili nijednu žalbu na rešenje o zadržavanju.

Imajući u vidu sve prikupljene podatke nameće se zaključak da sudovi u Republici Srbiji rutinski odbijaju žalbe na rešenja o zadržavanju. Dokaz u prilog takvoj tvrdnji je sama statistika koja za 2020. godinu za sve sudove (i osnovne i više) pokazuje da tek oko 4 % od ukupno izjavljenih žalbi bude usvojeno. Situacija je slična i zPoslala sam.

a 2019. godinu gde je taj procenat oko 8 %. Ukoliko se od svih usvojenih žalbi u 2019. godini izuzmu viši sudovi u Jagodini i Čačku, procenat uspešnosti u 2019. godini pada na približno 5 %. Ovom zaključku doprinosi i okolnost da je od 86 sudova u Republici njih čak 63 prijavilo da nije usvojilo nijednu žalbu u 2019. godini, dok je broj takvih sudova u 2020. godini čak 70 od 86.

S druge strane, treba primetiti da se mestimično javljaju i veoma pozitivni primeri koji pokazuju da u Republici Srbiji ima sudova koji su spremni da ozbiljno i suštinski pristupe preispitivanju osnovanosti rešenja o zadržavanju. Kod tih sudova, koji su istina samo izuzetak od opšteg pravila, žalba na rešenje o zadržavanju po svim kriterijumima ispunjava uslove potrebne da se označi kao delotvorni pravni lek. Uz već pomenute više sudove u Jagodini i Čačku, spisku takvih pozitivnih primera može se dodati i Osnovni sud u

Kragujevcu, gde je prema podacima i za 2019. i za 2020. godinu procenat uspešnosti takvih žalbi iznosio oko 28 %. Ovakvi podaci upravo govore o tome da žalba na rešenje o zadržavanju može biti delotvorna i u praksi, ali je isto tako očigledno da daleko najveći broj sudova u našoj republici uopšte nije zainteresovan da suštinski odlučuje o osnovanosti žalbe već, umesto toga, izjavljene žalbe rutinski odbija. Potpuno je, međutim, nejasno i sasvim zbunjujuće iz kojih razloga sudovi funkcionišu po opisanoj rutini.

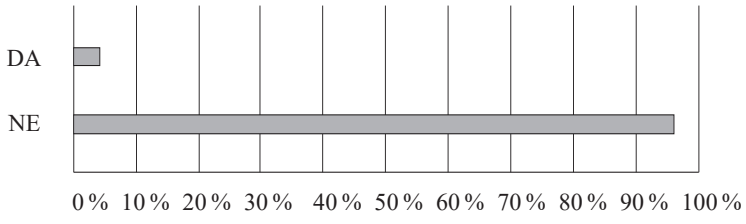
Praktična posledica takvog ponašanja domaćih sudova je to što lice lišeno slobode po osnovu rešenja o zadržavanju ne uživa nikakvu sudsku zaštitu, dok, sa druge strane, tužilaštvo očito ne podleže suštinskoj sudskoj kontroli u vršenju svojih ovlašćenja u vezi sa zadržavanjem. Sve to znači da, po pravilu, žalba na rešenje o izvršenju predstavlja pravni lek koji je potpuno nedelotvoran i zakonsku garanciju koja ne postoji praktično već samo „na papiru".

PERCEPCIJA STRUČNE JAVNOSTI O DELOTVORNOSTI ŽALBE NA REŠENJE O ZADRŽAVANJU

Drugi segment istraživanja u vezi sa delotvornošću žalbe protiv rešenja o zadržavanju odnosio se na percepciju stručne javnosti o tom pitanju. Odlučeno je da se pristupi ovoj vrsti ispitivanja jer svaki pravni poredak, koji pretenduje na uspeh, najpre mora uživati poverenje onih koji u njemu sudeluju. Istraživanje je sprovedeno anketnim ispitivanjem advokata na internet platformi posebno prilagođenoj za tu vrstu ispitivanja. Poziv za učešće u ispitivanju je bio javan i na njega je odgovorilo ukupno trista dvadeset četiri advokata iz cele Srbije, što je oko 3 % od ukupnog broja advokata u našoj državi, što upućuje na reprezentativnost uzorka ispitanih.

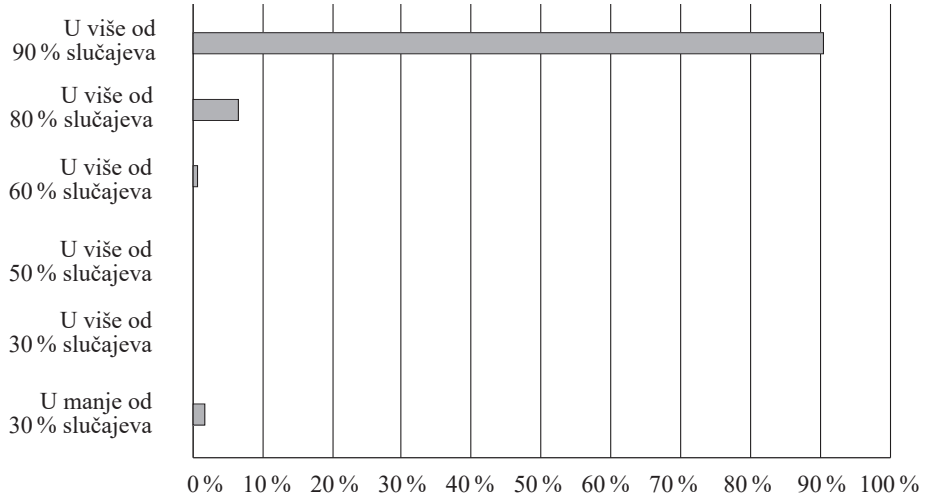
Osnovni je utisak da je percepcija kolega gotovo u procenat identična sa statistikom prikazanom u prethodnom odeljku rada, tako 96 % ispitanih advokata smatra da je žalba na rešenje o zadržavanju nedelotvorno pravno sredstvo (podsećanja radi u 2020. godini odbijeno je ili odbačeno upravo 96 % žalbi).

Grafikon 1: *Da li je, prema Vašem mišljenju, žalba na rešenje o zadržavanju delotvorni pravni lek?*



Slično tome, čak 90 % kolega se izjasnilo da, prema njihovom dosadašnjem iskustvu, sudovi odbijaju više od 90 % žalbi koje se izjave na rešenja o zadržavanju.

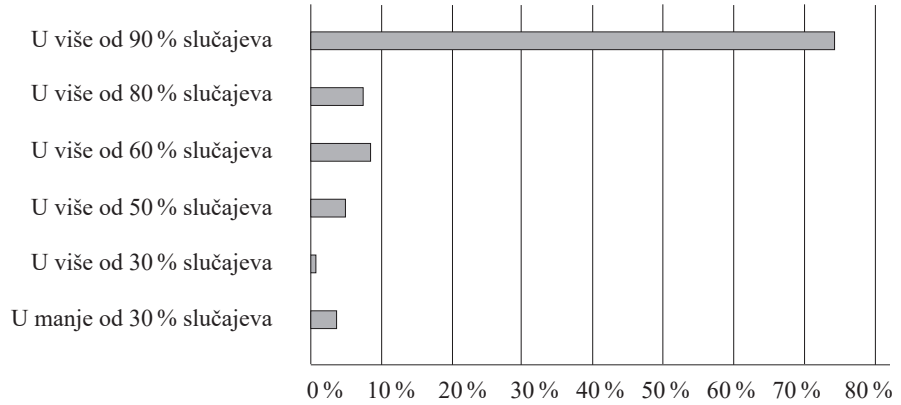
Grafikon 2: *Prema Vašem dosadašnjem iskustvu, koliko često sud odbija ili odbacuje žalbu na rešenje o zadržavanju?*



Daljim ispitivanjem kolega uočeni su i drugi problemi koji se javljaju u postupku određivanja zadržavanja kao i u postupku rešavanja po žalbi na rešenje o zadržavanju. Naime, u praksi je primećeno da vrlo često rešenje o zadržavanju uopšte ne donosi sâmo tužilaštvo, već da to čini policija po odobrenju tužilaštva. Glavna posledica toga je da policijski službenici, koji uglavnom ne poseduju adekvatna znanja za sačinjavanje takvog akta, rešenje sačinjavaju po principu formulara, tako što popunjavaju opšti „model" tog akta, koji se nalazi u njihovom računaru, ličnim podacima zadržanog, potom daju kratak opis dela, pobroje dokaze i navedu da iz tako pobrojanih dokaza proizilazi i sumnja i osnovanost zadržavanja, pri čemu tako popunjen „formular" uopšte nema adekvatno obrazloženje. Mada nije sasvim sigurno iz kojih razloga se tako postupa u praksi, čini se da je razumno pretpostaviti da su i sami tužioci, kao i policijski službenici koji postupaju po njihovoj naredbi, uočili da u odnosu na takve akte izostaje stvarna sudska kontrola i sudska sankcija (u vidu usvajanja žalbe), pa stoga nemaju ni potrebu ni motiv da rešenja zaista i obrazlože.

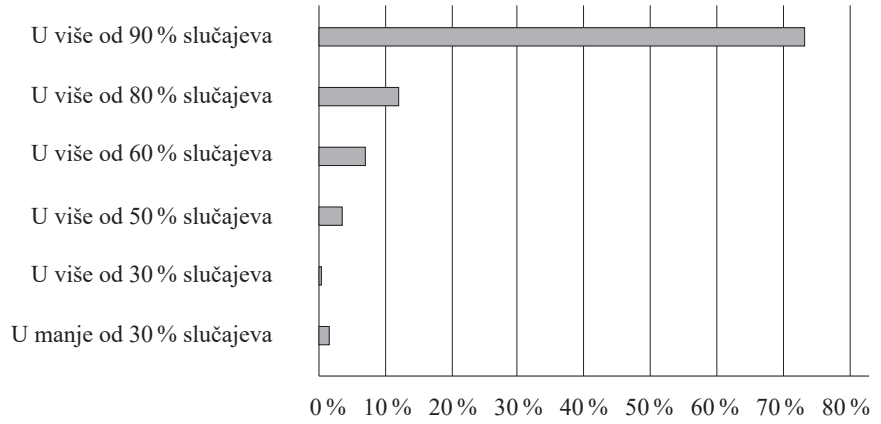
U istraživanju je čak 3/4 advokata navelo da, prema njihovom dosadašnjem iskustvu, rešenje o zadržavanju u 90 % slučajeva donosi policija po odobrenju tužilaštva a ne samo tužilaštvo.

Grafikon 3: *Prema Vašem dosadašnjem iskustvu, koliko često rešenje o zadržavanju donosi policija po odobrenju nadležnog javnog tužioca?*



Možda upravo iz tih razloga, isti broj kolega (njih 3/4) ističe da više od 90 % rešenja o zadržavanju prema njihovom dosadašnjem iskustvu ne sadrži suštinsko obrazloženje o razlozima određivanja zadržavanja.

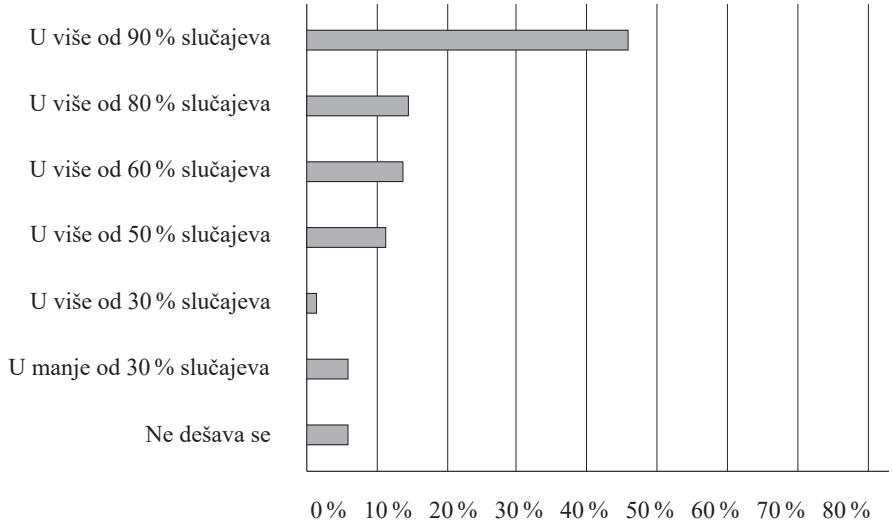
Grafikon 4: *Prema Vašem dosadašnjem iskustvu, koliko često rešenje o zadržavanju ne sadrži suštinsko obrazloženje o razlozima određivanja zadržavanja?*



Situacija u pogledu adekvatnosti obrazloženja nije mnogo bolja ni kada se postavi pitanje o kvalitetu obrazloženja kojim sudija za prethodni postupak odbija žalbu branioca. Ispitanicima je postavljeno pitanje koliko često im se u praksi dešava da sudija za prethodni postupak u rešenju kojim odbija žal-

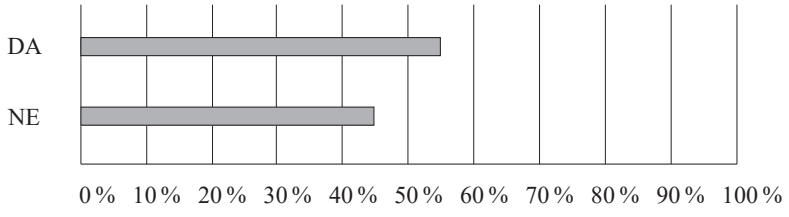
bu izjavljenu protiv zadržavanja ne odgovori na sve argumente iznete u žalbi. Gotovo polovina ispitanika je izjavila da se sa takvom situacijom sreće u više od 90 % slučajeva, dok je samo nešto više od 5 % advokata odgovorilo da se u svojoj dosadašnjoj praksi nisu susreli s odbijajućim rešenjem sudije za prethodni postupak kojim nije odgovoreno na sve žalbene razloge.

Grafikon 5: *Koliko često Vam se u praksi desilo da sudija za prethodni postupak u rešenju kojim odbija žalbu izjavljenu protiv zadržavanja ne odgovori na sve argumente iznete u žalbi?*



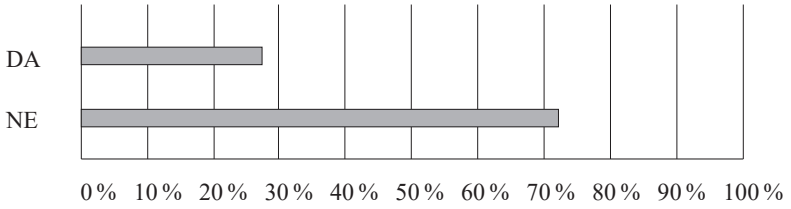
Kada je u pitanju način na koji postupaju sudije za prethodni postupak, uočena je još jedna negativna pojava. Naime, više od polovine kolega je izjavilo da im se u dosadašnjoj karijeri bar jednom desilo da odluka po žalbi na rešenje o zadržavanju ne bude doneta u zakonskom roku ili da ne bude uručena u zakonskom roku.

Grafikon 6: *Da li Vam se ikada desilo da odluka suda o žalbi na rešenje o zadržavanju ne bude doneta i/ili uručena u zakonskim rokovima?*

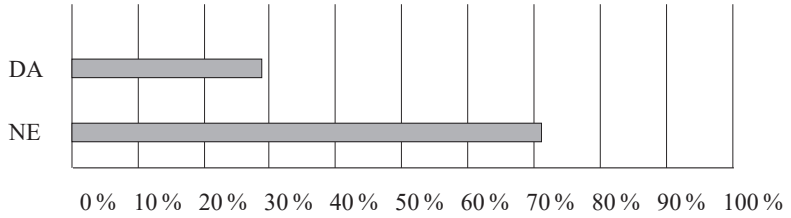


Jednako je zabrinjavajuće i to da je nešto više od četvrtine kolega odgovorilo da im se bar jednom desilo da nadležni organ odbije da primi žalbu na rešenje o zadržavanju, dok je njih 29 % izjavilo da im se bar jednom desilo da im nije omogućen razgovor sa zadržanim licem prilikom ili neposredno nakon uručenja rešenja o zadržavanju.

Grafikon 7a: *Da li Vam se bar jednom desilo da nadležni organ odbije da primi žalbu na rešenje o zadržavanju?*

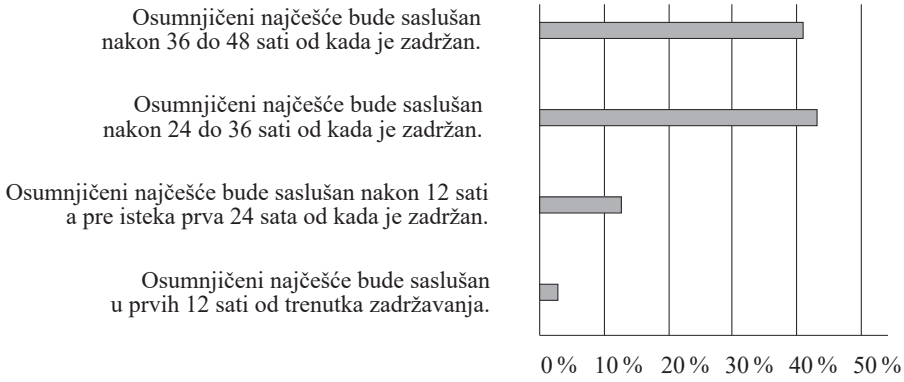


Grafikon 7b**:** *Da li Vam je ikada odbijen zahtev za obavljanje razgovora sa zadržanim licem prilikom (ili neposredno nakon) uručenja rešenja o zadržavanju?*



Na kraju, kolege su upitane koliko vremena najčešće protekne od trenutka kada je zadržavanje određeno do trenutka saslušanja osumnjičenog. Njih oko 41 % odgovorilo je da prema njihovom iskustvu osumnjičeni najčešće bude saslušan nakon 36 do 48 sati od kada je zadržan. Sličan procenat (približno 43 %) odgovorio je da osumnjičeni najčešće bude saslušan nakon 24 do 36 sati od kada je zadržan. Da osumnjičeni najčešće bude saslušan nakon 12 sati a pre isteka prva 24 sata od kada je zadržan odgovorilo je 13 % kolega, dok su ostale kolege (njih 3 %) navele da prema njihovom iskustvu osumnjičeni najčešće bude saslušan u prvih 12 sati od trenutka zadržavanja.

Grafikon 8: *Prema Vašem dosadašnjem iskustvu, koliko vremena najčešće protekne od trenutka kada je zadržavanje određeno do trenutka saslušanja osumnjičenog?*



ZAKLJUČAK

Rezultati obavljenog istraživanja pokazuju da u Republici Srbiji, mada teorijski postoji delotvoran pravni lek protiv rešenja o zadržavanju, on nije delotvoran u praksi.

Nedelotvornost tog pravnog leka demonstriraju činjenice koje proizilaze iz prikupljenih statističkih podataka sudova u našoj državi, a koje svedoče o tome da se približno 95 % svih žalbi izjavljenih protiv rešenja o zadržavanju ili odbijaju ili odbacuju. Tako visok procenat odbijenih i odbačenih žalbi daje opravdani povod zaključku da domaći sudovi rutinski odbijaju takve žalbe.

S druge strane, uočeno je i par pozitivnih primera koji pokazuju da se kod malog broja sudova delotvornost sporne žalbe zaista i ostvaruje u praksi. Prema tome, argumenti koji se u stručnoj raspravi mestimično javljaju o tome da praktično sprovođenje kontrole u odnosu na rešenja o zadržavanju nije stvarno moguće, nisu osnovani. Viši sudovi u Jagodini i Čačku kao i Osnovni sud u Kragujevcu upravo potvrđuju da se efikasna kontrola osnovanosti zadržavanja lica može ostvariti u praksi.

Nepostojanje stvarne sudske kontrole, čini se, izazvalo je domino efekat negativnih posledica u pogledu poštovanja prava zadržanih lica. Tako je iz iskustva kolega koje su učestvovale u anketnom ispitivanju utvrđeno da tužilaštva najčešće ne donose sama rešenja o zadržavanju, već da to po njihovom odobrenju uobičajeno čini policija. Kada to čini, policija postupa na način da zadovolji formu ali ne i suštinu rešenja o zadržavanju, pa vrlo često u praksi

rešenja o zadržavanju više liče na nevešto popunjeni formular, nego na obrazloženi pravni akt kojim se zadire u jedno od osnovnih ljudskih prava. Jednako tako primećeno je iz odgovara ispitanika da i same sudije za prethodni postupak ne ulažu posebne napore da obrazlože svoje odluke kojima odbacuju ili odbijaju izjavljene žalbe.

Sve ovo za posledicu ima da se u stručnoj javnosti, sasvim opravdano, stvorilo nepoverenje kako u pogledu delotvornosti ovog pravnog sredstva, tako i u pogledu načina na koji nadležni organi postupaju u postupku zadržavanja i kontrole zadržavanja lica.

LITERATURA

Naučni članci i monografije

Ilić, G., Majić, M., Beljanski, S. i Trešnjev, A. (2012). *Komentar Zakonika o krivičnom postupku*. Beograd: Službeni glasnik.

Lee, A. „Focus on Article 13 echr." *Judicial Review* 20.1 (2015), 33–41.

Sur, S. & Combacau, J. (1999). *Droit international public*. Montchrestien.

Todorović, A. (2018). Žalba na rešenje o zadržavanju kao nedelotvorni pravni lek. *Glasnik Advokatske komore Vojvodine*, 90 (5–8), 233–244.

Sudska praksa

Ananyev and others v. Russia, (Apps. No. 42525/07, 60800/08).

McFarlane v. Ireland, (App. No. 31333/06, 10).

Original Scientific Article
DOI: 10.5937/gakv93-29896
UDC 342.736

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THE GENERAL INEFFECTIVENESS OF THE APPEAL AGAINST THE CUSTODY ORDER**
Final Research Results

ABSTRACT: This paper will present the results of the completed research which relates to the issue of the effectiveness of the appeal against the custody order pursuant to Article 294 of the Serbian Criminal Procedure Code. The research which the paper reports on was conducted on the entire territory of the Republic of Serbia, encompassed all Basic and Higher Courts, as well as a survey of more than 300 lawyers. Even though most colleagues will not be surprised by the results, the research has proven to be useful in multiple ways, primarily because it factually and comprehensively demonstrates the concrete situation regarding the effectiveness of the legal remedy in question. This research documents what was the general (but not empirically tested) impression in legal praxis.

Keywords: custody order, effectiveness, legal remedy

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** The paper was received on December 17, 2020, and accepted for publishing on November 28, 2020. The translation of the original article into English is provided by the *Glasnik* of the Bar Association of Vojvodina.

INTRODUCTION

Legal security and the rule of law are legal values towards which every rational legal order strives (or should strive). Realizing these legal values goes hand in hand with guaranteeing fundamental human rights. Thus, oversight over the respect of human rights is entrusted to the courts, as they, before all other state bodies, represent the rule of law. However, it is not enough to entrust courts with control over the respect of human rights, it is necessary for the courts themselves to be prepared to take on the task of actually exercising that control.

In recent years, among the professional community, the impression that courts, when ruling on an appeal against a custody order, are not prepared to take on the task of controlling such solutions, but instead make *pro forma* decisions by dismissing nearly all appeals submitted against the solution from article 294 of the Criminal Procedure Code (hereinafter: CPC),[1] has been enhanced.

In relation to this impression, a scientific article in the form of a preliminary communication was published in 2019, wherein using 7 Serbian courts as a sample, it was concluded that the appeal against the custody order was an ineffective legal remedy, as court praxis demonstrates that such appeals are routinely dismissed.[2] This paper builds on that one, supplementing it with data obtained via a research that encompassed all Basic and Higher Courts in the Republic of Serbia, as well as a survey in which three hundred and twenty-four attorneys participated.

THE SITUATION IN POSITIVE LAW AND THE THEORETICAL EFFECTIVENESS OF THE APPEAL AGAINST THE CUSTODY ORDER

Article 294 of the CPC prescribes that a person arrested in accordance with art. 291, para. 1 and art. 292, para. 1 of the CPC, as well as a suspect referred to in art. 289, paras. 1 and 2 of the CPC, can be held in custody for questioning by the public prosecutor for a maximum of 48 hours since the time of arrest or response to the summons.[3]

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[1] Criminal Procedure Code (*Official Gazette of the RS,* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014).

[2] Todorović, A. (2018). Appeal against the custody order as an inefficient legal remedy. *Glasnik of the Bar Association of Vojvodina,* 90 (5–8), 233–244.

[3] As a reminder, art. 291, para. 1 prescribes that the police may arrest a person if a reason to order detention exists; art. 292, para. 1. prescribes that a person found while

When a person is deprived of liberty by an arrest, no special resolution is necessary nor can a legal remedy be applied in relation to the act.[4] The reasons are more than obvious. By an arrest, a person is physically deprived of freedom and with no delay brought to the competent public prosecutor's office for questioning.[5] In a regular course of events, the prosecutor's office will then question the suspect. After the questioning, the prosecutor's office can either order for the suspect to be released or recommend that the judge of preliminary proceedings order detention (or one of the measures prescribed by articles: 197, 199, 202, or 208 of the CPC).

The short time frame provided for the suspect to be brought to the public prosecutor's office does not enable court oversight of the grounds for the arrest in such a short interval, while, conversely, the relatively short time needed for the suspect to be brought to the public prosecutor's office and the questioning itself is, quantitatively, not such an infringement on the right of freedom of movement that would justify judicial control. In practice, the time needed to put forth a legal remedy and for a ruling to be made on it would exceed the time the suspect spends in custody.

It is not uncommon in practice, however, for the public prosecutor to decide to take "exceptional" actions instead of regular ones, and apply their powers from art. 294 of the CPC, detaining the suspect for up to 48 for questioning. This restriction on the suspect's freedom, that can last a maximum of 48 hours in accordance with art. 294 of the CPC, is certainly a timewise important enough restriction to merit judicial oversight of the grounds for such a restriction. In that sense, a legal solution which enables the detained person and their defence counsel to initiate proceedings before the authorized court for controlling the grounds for the detainment is justified.

Setting aside in this section of the paper the issue of whether the legal solution by which the public prosecutor can keep the subject in custody for questioning is justified, it should be noted that the very procedure for controlling such a detainment, in the manner prescribed by the CPC, meets all the conditions to be considered effective in theory. Namely, art. 294, para. 3 of the

committing an offence which is prosecutable *ex officio* may be arrested; while based on art. 289, paras. 1 and 2 of the CPC, a person may be detained for questioning in relation to whom there is grounds to suspect that they have committed a criminal offence and which has been summoned in their capacity as a suspect by the police, but also a citizen summoned in the information-gathering process regarding the criminal act if the police, during the information-gathering process, deem the citizen to be a suspect.

[4] Ilić, G., Majić, M., Beljanski, S., Trešnjev, A. (2012). *Komentar Zakonika o krivičnom postupku*. Belgrade: Službeni glasnik, 674.

[5] In case of, so-called, citizen's arrest (art. 292, para. 1), the arrested person may be brought before the police, which is required to bring the person before the public prosecutor's office.

CPC prescribes that: "The suspect and their defence counsel shall be entitled to appeal against the ruling on custody within six hours of the delivery of the ruling."[6] The same provision states that: "A decision on the appeal shall be issued by the judge for the preliminary proceedings within four hours of receiving the appeal."[7] The judge for the preliminary proceedings can dismiss, deny, or uphold the appeal. In the lattermost case, the judge will order for the suspect to be released by the same ruling upholding the appeal.

While assessing the (theoretical or potential) effectiveness of the appeal against a custody order, at least two parameters need to be considered: the accessibility of the legal remedy and the sufficiency of the legal remedy.[8] The accessibility of the legal remedy signifies the possibility of an interested person, independently or with professional assistance, to initiate proceedings for controlling the disputed act wherein they will demand protections for their rights. From the accessibility aspect, it can be concluded that the appeal against the custody order satisfies the minimum conditions necessary to be designated as an accessible legal remedy. Namely, the conditions for submitting the appeal are not overly limited and enable an "attack" on the solution on multiple grounds (significant violation of the provisions of criminal procedure, incorrect application of substantive law, incorrect or incomplete finding of fact). The appeal can also be considered accessible from the aspect of persons who are authorized to submit it, as, before all else, the appeal can be submitted by the person in custody (which is unlikely) or their defence counsel, and it should be noted that professional assistance by a defence counsel is mandatory if the person is taken into custody, which contributes to the protection of their rights.[9]

In view of the positive-law solution, the appeal against the custody order is not only accessible but potentially sufficient, as the judge of the preliminary proceedings, in case they find the appeal well-founded, can immediately order the release of the person, which eliminates the negative effects of their deprivation of liberty. Furthermore, the time-frame to submit the appeal is very short and, in combination with the short time-frame provided to issue a ruling on the appeal, can "right a wrong" in a relatively timely manner.

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[6] Criminal Procedure Code (*Official Gazette of the RS,* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013. and 55/2014).

[7] *Ibid*.

[8] Lee, A. "Focus on Article 13 ECHR." *Judicial Review,* 20.1 (2015): 33–41.

[9] Art. 74 of the Criminal Procedure Code (*Official Gazette of the RS,* no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013. and 55/2014).

THE EFFECTIVENESS OF THE APPEAL AGAINST THE CUSTODY ORDER IN PRACTICE

As it was pointed out in the previous section, all of the preconditions necessary for an appeal against a custody order to be an effective legal remedy are met in Serbian positive law. Yet, for this appeal to be fundamentally effective it is not enough for it to be accessible and sufficient in theory, it also needs to be effective in practice. Procedural guarantees, and especially those with the purpose of protecting human rights, must be "practical and effective, not theoretical and illusory"[10], or otherwise the purpose of their existence is nullified.

Among other factors, a legal remedy is considered ineffective: "when it is obviously ineffective, that is, when it is demonstrated by case law that the possibility of success is precluded in a procedure in accordance with the legal remedy."[11]; with the caveat that the phrase "possibility of success is precluded" should not be understood with the meaning that any possibility for success is excluded, but that a realistic chance of success is excluded. In that sense, an inefficient legal remedy is the one that is, as a rule, inefficient in practice, even if sporadic examples exist that someone applying the legal remedy was successful. Thus, what is needed is a commonplace, regular demonstration of the effectiveness of the legal remedy, and not a theoretical or exceptional one. In such a way should the position of the European Court of Human Rights in its judgement in *Ananyev v. Russia* be understood, wherein the Court noted that, in a practical sense, an ineffective legal remedy is the one in relation to which contemporary judicial praxis of a member state demonstrates that domestic courts routinely refuse to provide the legal protections which are demanded by the legal remedy.[12] Precisely this standard set by the Anayev v. Russia judgement will be applied to the research data in this paper, in order to examine whether courts in Serbia routinely deny appeals against custody orders or not.

For the purpose of gathering data needed for the research, all basic and higher courts were sent an identical correspondence, which requested, in compliance with the Law on Free Access to Information of Public Importance, that each individual court list how many appeals against the custody order were decided on in their institution in 2019 and 2020, up to August 31, 2020, and how many of those appeals were upheld in the given time-frame.

[10] *McKay v. The United Kingdom*, (App. No. 543/03), para. 47.

[11] Sur, S. & Combacau, J. (1999). *Droit international public*. Montchrestien, 547.

[12] *Ananyev and others v. Russia*, (Apps. No. 42525/07, 60800/08), para. 116.

Eighty-six courts[13] answered the request for access to information: 63[14] Basic and 23[15] Higher courts. Three[16] courts did not reply to the request, while one17 court sent incomplete information.

The research results are presented separately for basic and higher courts in the following tables.

***Table 1*: Basic courts**

	2019.		2020.	
	No. of appeals submitted	No. of appeals upheld	No. of appeals submitted	No. of appeals upheld
Aleksinac	4	0	1	0
Aranđelovac	14	0	4	0
Bačka Palanka	37	0	29	0
Bečej	7	0	5	0
Bor	11	0	11	1
Bujanovac	39	0	13	0
Čačak	5	0	3	0
Despotovac	7	4	2	0
Dimitrovgrad	0	0	0	0
First Basic Court in Belgrade	16	1	17	1
Gornji Milanovac	8	0	2	0
Ivanjica	8	0	5	0
Jagodina	6	0	0	0
Kikinda	15	0	10	0
Knjaževac	0	0	0	0
Kragujevac	60	18	30	8
Kraljevo	5	0	2	0
Kruševac	0	0	9	0
Kuršumlija	3	1	2	0

[13] The communications of all the courts are available within the data bank published at: http://www.glasnik.edu.rs/banka-podataka/

[14] See: Table 1.

[15] See: Table 2.

[16] The courts in question are: the Basic Court in Brus and the Higher Courts in Zrenjanin and Sremska Mitrovica.

[17] In their communication, the Third Basic Court in Belgrade included the data on the number of appeals submitted, but not the data on the number of the appeals upheld.

Lazarevac	5	0	3	0
Lebane	4	0	0	0
Leskovac	0	0	4	0
Loznica	1	1	2	2
Majdanpek	2	1	1	0
Mionica	0	0	1	0
Mladenovac	0	0	1	1
Negotin	5	0	3	2
Niš	14	0	8	1
Novi Pazar	7	2	12	1
Novi Sad	81	5	131	9
Obrenovac	0	0	3	0
Pančevo	14	1	11	0
Paraćin	1	0	6	0
Petrovac na Mlavi	1	0	3	0
Pirot	7	1	3	2
Požarevac	6	0	6	0
Požega	3	0	2	0
Priboj	2	0	2	0
Prijepolje	12	3	13	1
Prokuplje	12	0	13	0
Raška	0	0	0	0
Ruma	56	2	29	0
Second Basic Court in Belgrade	14	1	14	0
Senta	5	1	6	0
Sjenica	1	0	3	0
Smederevo	8	0	6	0
Sombor	6	0	3	0
Sremska Mitrovica	23	0	25	0
Stara Pazova	28	5	26	0
Surdulica	9	0	9	0
Šabac	4	0	5	0
Šid	2	0	4	0
Trstenik	13	1	9	4
Ub	0	0	1	0
Užice	26	0	20	0

Valjevo	6	1	0	0
Velika Plana	3	0	2	1
Veliko Gradište	1	0	1	0
Vranje	33	5	19	0
Vrbas	2	0	8	0
Vršac	7	0	1	0
Zaječar	0	0	1	0
Zrenjanin	252	0	195	0
		UPHELD 5.86 %		UPHELD 4.47 %
		DENIED 94.14 %		DENIED 95.53 %

As can be observed from the data in Table 1, during 2019, 921 appeals were submitted to the basic courts in Serbia, out of which only 84 were upheld, which makes the percentage of denied or dismissed appeals 94.14 %. The percentage of denied or dismissed appeals for 2020 is similar and stands at 95.53 %.

***Table 2*: Higher courts**

	2019.		2020.	
	No. of appeals submitted	No. of appeals upheld	No. of appeals submitted	No. of appeals upheld
Čačak	13	12	1	1
Jagodina	21	19	5	2
Kragujevac	10	1	26	0
Kraljevo	0	0	3	0
Kruševac	0	0	2	0
Leskovac	6	0	2	0
Negotin	10	0	5	0
Niš	17	0	8	1
Novi Pazar	2	0	2	0
Novi Sad	26	0	28	0
Pančevo	8	2	2	0
Pirot	3	0	1	0
Požarevac	3	0	0	0
Prokuplje	9	2	8	0
Smederevo	0	0	1	0
Sombor	3	0	0	0

Subotica	5	0	3	0
Šabac	4	0	0	0
Užice	16	0	5	0
Valjevo	6	0	4	0
Vranje	36	0	19	0
Zaječar	2	0	3	0
		UPHELD 13.78 %		UPHELD 2.38 %
		DENIED 86.22 %		DENIED 97.62 %

Unlike the data presented in Table 1, at first impression, Table 2 presents somewhat more favourable results regarding the ratio between denied and upheld appeals, at least as far as 2019 is concerned. Namely, the results for 2019 show that 36 out of 261 appeals were upheld, which raises the success rate of appeals to 13.78 %.

The results from the Higher Courts in Čačak and Jagodina are especially interesting. Specifically, in 2019, 13 appeals against the custody order were submitted to the Higher Court in Čačak, and 12 were upheld, while 21 appeals were submitted to the Higher Court in Jagodina, out of which 19 were upheld. The data obtained from these two courts significantly differs from the data obtained from other courts. The success rate of an appeal against the custody order for these two courts is over 90 %, while the average success rate for the other courts is only around 2.2 %. Moreover, out of the 36 appeals that were upheld in Serbia in 2019, a full 31 came from these two courts.

The data for 2020 demonstrates that this is an exception regarding the general statistics and not the rule, as all the courts in Serbia (including the aforementioned two) denied or dismissed 97.6 % of submitted appeals in 2020. This percentage corresponds to the statistic for basic courts presented in Table 1. Presented in total numbers: out of 168 appeals submitted only 4 were upheld. Similar to the previous year, the courts in Čačak and Jagodina are a positive exception, as out of the 4 appeals that were upheld in Serbia, 3 of them were in these courts. Yet, these bright examples of the higher courts, it appears, are not followed by the basic courts in the same locations, so neither the Basic Court in Čačak nor the Basic Court in Jagodina upheld a single appeal against the custody order in 2019 and 2020.

Considering the data obtained, the conclusion that imposes itself is that courts in the Republic of Serbia routinely deny appeals against the custody order. Evidence to support the claim is the statistic that demonstrates that in 2020, the courts (both basic and higher) upheld only about 4 % of the submitted appeals. The statistics are similar for 2019, as the success rate is about 8 %.

If the Higher Courts in Jagodina and Čačak are excluded, the success rate for 2019 falls to around 5 %. This conclusion is contributed to by the fact that out of 86 courts in the Republic of Serbia, 63 of them reported not to have upheld an appeal in 2019, while that number rises to 70 out of 86 for 2020.

However, it should be noted that sporadic positive examples of courts in the Republic of Serbia willing to take a serious and substantial approach to examining the grounds of the custody order do exist. Before these courts, although it is true that they are only an exception to the rule, the appeal against the custody order meets the conditions to be designated an effective legal remedy, in accordance with all of the necessary criteria. Alongside the abovementioned Higher Courts in Jagodina and Čačak, the Basic Court in Kragujevac could be added as another positive example, as the success rate for such appeals was around 28 %, both for 2019 and 2020. This data shows that the appeal against the custody order can be an effective legal remedy in practice, but it also makes obvious that a large majority of the courts in Serbia are not interested in making fundamental decisions regarding the grounds for the appeal but, instead, routinely deny the appeals submitted. It is, however, absolutely unclear and confounding why the courts operate in such a manner.

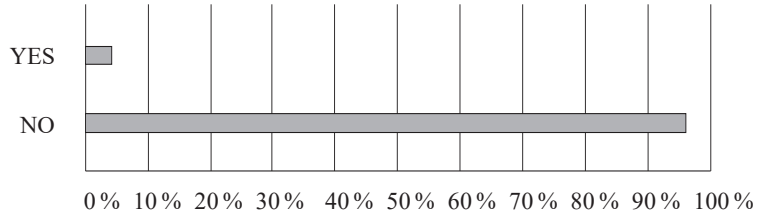
The practical consequence of such behaviour by the domestic courts is that a person deprived of liberty based on a custody order enjoys no judicial protection, while, on the other hand, there is no true judicial control over the prosecution when using their authority in regards to detainment. Put together, this means that, as a rule, the appeal against the custody order is a legal remedy that is completely ineffective and a legal guarantee which only exists “on paper”.

THE PERCEPTION OF THE EFFECTIVENESS OF THE APPEAL AGAINST THE CUSTODY ORDER IN THE PROFESSIONAL COMMUNITY

The second segment of the research on the effectiveness of the appeal against the custody order is its perception in the professional community. This type of research was conducted due to the belief that every legal order that wishes to be successful first has to be trusted by the participants. The research was conducted by a survey, on an online platform specifically suited for this type of research. The call to participate was public and three hundred and twenty-four attorneys from the entire territory of Serbia responded, which is around 3 % of the attorneys in the country; this indicates a representative sample.

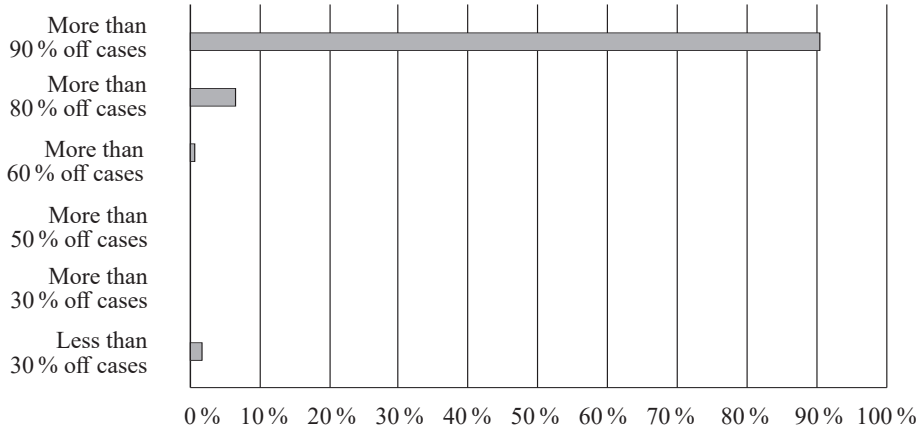
The basic impression is that the perception of the colleagues is nearly to a point identical to the statics presented in the previous section, so 96 % of attorneys believe that the appeal against the custody order is an ineffective legal remedy (as a reminder, in 2020, precisely 96 % of appeals were denied or dismissed).

Chart 1: *In Your opinion, is the appeal against the custody order an effective legal remedy?*



Similarly, 90 % of colleagues stated that, in their experience, the courts deny more than 90 % of appeals that are submitted against the custody order.

Chart 2: *In Your experience, how often do the courts deny or dismiss the appeal against the custody order?*

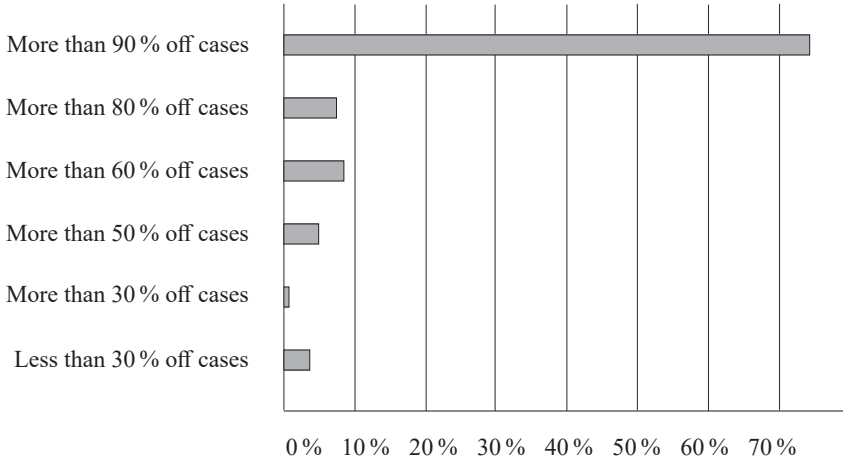


Further questioning of the participating colleagues brought to light other issues which occur during the process of determining custody, as well as during the process of making a ruling regarding the appeal against the custody order. Namely, in practice it has been observed that the decision on custody

is commonly not made by the prosecutor's office, but is done by the police with permission from the prosecutor. The main consequence of such actions is that police officers, who mostly do not have adequate knowledge to compose such an act, take a formulaic approach when composing the order, by filling out a general "template" of the act found on their computers; they insert the personal information of the person in custody, then give a short description of the actions, list the evidence and list it in such a way that it raises doubt about the grounds for the custody, the consequence of which is that a "template" filled out this way provides no adequate explanations. Although it is not fully clear why this is being done in practice, it seems reasonable to assume that the prosecutors themselves, as well as the police officers who act on their orders, have noticed that such acts lack true judicial oversight and sanctions (in the manner of upholding the appeal), and thus have no need nor motive to give the rationale for the custody orders.

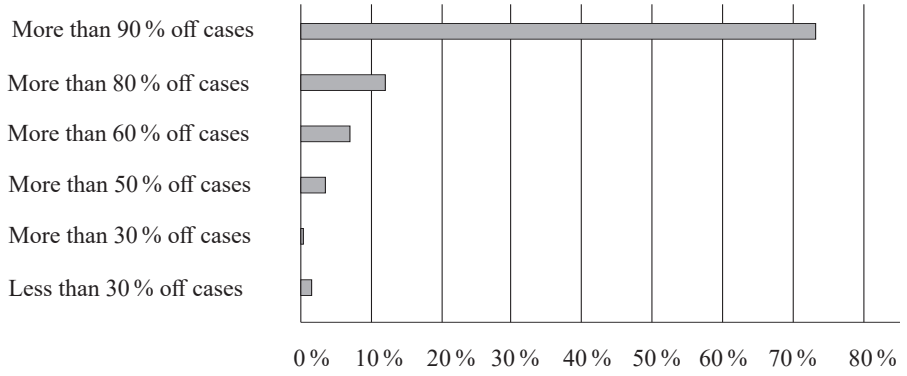
In the survey, a full ¾ of attorneys have stated that, in their experience, in 90 % of cases the custody order is made by the police with permission from the prosecutors, and not the prosecutor's office itself.

Chart 3: *In Your experience, how often is the custody order made by the police with permission from the competent public prosecutor's office?*



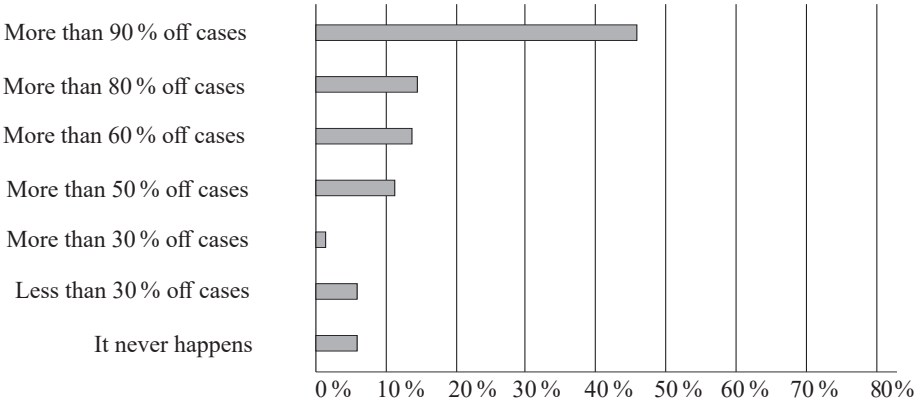
Potentially for these reasons, the same number of colleagues (¾ of them) stresses that, in their experience, more than 90 % of custody orders do not contain a fundamental rationale about the reasons for ordering custody.

Chart 4: *In Your Experience, how often does the custody order not contain an explanation of the reasons for ordering custody?*



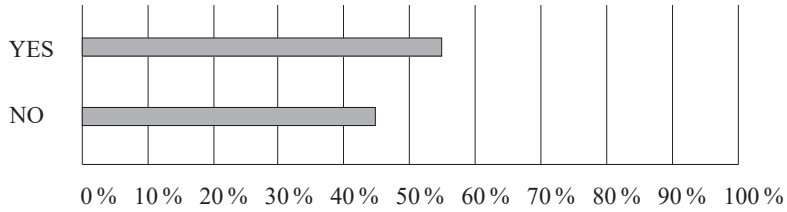
The situation regarding the adequacy of the rationale is not much better when the question is related to the quality of the rationale that the judge for the preliminary proceedings provides when denying an appeal. The survey participants were asked how often it happens in practice that the judge for preliminary proceedings does not address all of the arguments made in the appeal, in the ruling to deny the appeal against the custody order. Close to half of the respondents stated that they encounter such a situation in more than 90 % of cases, while only a fragment above 5 % of attorneys responded that they have not encountered a ruling to deny by the judge of preliminary proceedings which did not address all of the arguments made.

Chart 5: *In practice, how often did it happen to You that the judge of the preliminary proceedings did not address all of the arguments made in the appeal against the custody order in their ruling to deny the appeal?*



Regarding the manner in which the judges for the preliminary proceedings act, an additional negative occurrence was observed. Namely, over half of the colleagues surveyed stated that, at least once in their careers, the ruling on the appeal against the custody order was not made or served in the provided legal time-frame.

Chart 6: *Did it ever occur that the court ruling on the appeal against the custody order was not made and/or served in the provided legal time-frame?*



It is equally concerning that over a quarter of the colleagues surveyed stated that the authorized body refused to receive the appeal against the custody order at least once in their careers, while 29 % stated that they were not allowed to speak with the person in custody during or immediately after the custody order was served, at least once.

Chart 7a: *Did it ever occur that the authorized body refuses to receive the appeal against the custody order?*

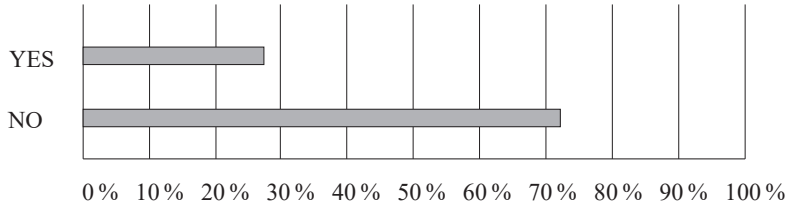
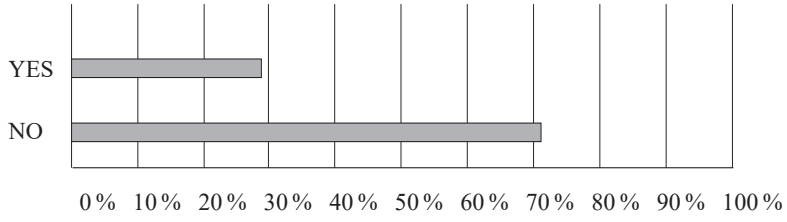
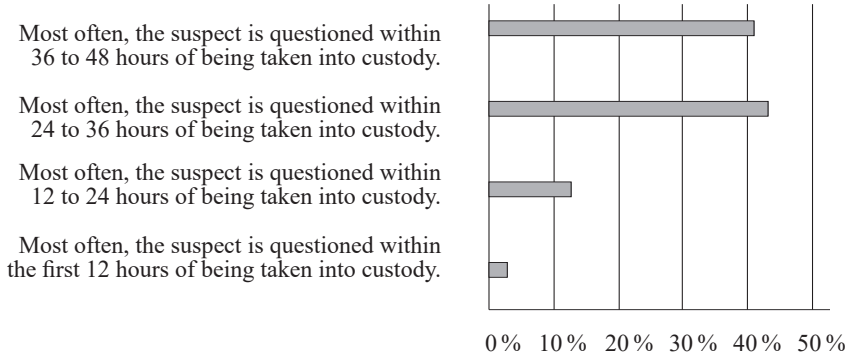


Chart 7b: *Were you ever refused a request to speak with the person in custody when (or immediately following) the custody order was being served?*



Finally, the survey participants were asked how long it usually takes from the time that custody is ordered until the questioning of the suspect. Around 41 % of them responded that, in their experience, questioning usually occurs within 36 to 48 hours after the time that they are taken into custody. A similar percentage (nearly 43 %) responded that questioning usually occurs within 24 to 36 hours from the time they are taken into custody. That questioning of the suspect occurs after 12 hours but before the initial 24 hours are over from the time that the suspect is taken into custody, was the answer of 13 % of the participants, while the other participants (around 3 %) stated that, in their experience, questioning occurs in the first 12 hours after the suspect is taken into custody.

Chart 8: *In Your experience, how long does it usually take from the time that custody is ordered to the time that the suspect is questioned?*



CONCLUSION

The results of the research illustrate that in the Republic of Serbia, although a theoretically effective legal remedy against the custody order exists, it is not effective in practice.

The ineffectiveness of the legal remedy is demonstrated by the facts that result from the statistical data obtained from the courts in Serbia, and which show that nearly 95 % of appeals submitted against the custody order are either denied or dismissed. Such a high percentage of denied or dismissed appeals provides justified grounds to conclude that domestic courts routinely deny such appeals.

However, a few positive examples that demonstrate that in a few courts the effectiveness of the appeal in question is realized in practice were

observed. Accordingly, arguments that practical control regarding the custody order is not possible, which occasionally occur in professional discussions, are not well-founded. The examples of the Higher Courts in Jagodina and Čačak, as well as the Basic Court in Kragujevac, confirm that efficient control over the grounds for ordering the custody of a person can be realized in practice.

The non-existence of true judicial control has caused, it appears, a domino effect of negative consequences regarding the rights of persons in custody. Thus, via the experiences of colleagues who participated in the survey, it was determined that prosecutor's offices usually do not themselves order custody, but that it is done by the police, with their permission. In this process, the police act in such a way so as to satisfy the form but not the essence of the custody order, which leads to the custody orders appearing, in practice, as clumsily filled templates, and not well-founded legal acts that encroach on one of the fundamental human rights of a person. It was equally observed that the judges for the preliminary proceedings do not put special effort into providing the rationale for their decisions that deny or dismiss the appeals submitted.

All of the abovementioned results in the professional community, justifiably, not having trust in the effectiveness of this legal remedy, nor in the manner in which the authorized bodies act in the custody process or in controlling the custody process.

BIBLIOGRAPHY

Scientific articles and monographs

Ilić, G., Majić, M., Beljanski, S. and Trešnjev, A. (2012). *Komentar Zakonika o krivičnom postupku*. Belgrade: Službeni glasnik.

Lee, A. (2015). "Focus on Article 13 ECHR", *Judicial Review,* 20.1 (2015), 33–41.

Sur, S. & Combacau, J. (1999). *Droit international public*. Montchrestien.

Todorović, A. (2018). Appeal against the custody order as an inefficient legal remedy. *Glasnik of the Bar Association of Vojvodina,* 90 (5–8), 233–244.

Case law

Ananyev and others v. Russia, (Apps. No. 42525/07, 60800/08).

McFarlane v. Ireland, (App. No. 31333/06, 10).