



## PROHIBITING MEASURES IN BOSNIA AND HERZEGOVINA CRIMINAL PROCEDURE CODE AND IN PRACTICE

### MJERE ZABRANE U BOSANSKOHERCEGOVAČKOM KRIVIČNOPROCESNOM PRAVU I PRAKSI

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#### ABSTRACT

Prohibiting measures are measures of a procedural nature that enable the suspect or the accused to remain at liberty during the criminal proceedings, i.e. to await the trial outside the institution, and yet the judicial institutions are certain that he will not interfere with the course of the criminal proceedings. These measures significantly contribute to the quality and speed of criminal proceedings. In this paper, we deal with the analysis of the quality of the Bosnian and Herzegovinian legislation regarding prohibiting measures, and the quality of the norm has been verified through empirical research within the judicial community. The results show that there are enough reasons to review the quality of the norm and to improve it.

**Key words:** prohibiting measures, custody, possibility of flight.

#### SAŽETAK

Mjere zabrane su mjere proceduralne prirode koje omogućavaju osumnjičenom, odnosno optuženom da boravi na slobodi tokom krivičnog postupka, odnosno da čeka suđenje van institucije, a da ipak pravosudne institucije budu sigurne da on neće ometati tok krivičnog postupka. Ovim mjerama se značajno doprinosi kvalitetu i brzini vođenja krivičnog postupka. U ovom radu se bavimo analizom kvaliteta bosanskohercegovačke norme u pogledu mjera zabrane, a kvalitet norme provjeren je i kroz empirijsko istraživanje unutar pravosudne zajednice. Rezultati pokazuju da postoji dovoljno razloga za preispitivanje kvaliteta norme i za njeno unapređenje.

**Ključne riječi:** mjere zabrane, pritvor, opasnost od bjekstva.

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## INTRODUCTION

According to the Criminal Procedure Code of Bosnia and Herzegovina<sup>2</sup> (hereinafter: CPC BiH), the Criminal Procedure Code of the Federation of Bosnia and Herzegovina<sup>3</sup> (hereinafter: CPC FBiH), the Criminal Procedure Code of the Republika Srpska<sup>4</sup> (hereinafter: CPC RS), and according to the Law on Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina<sup>5</sup> (hereinafter: CCP BD BiH), five measures are prescribed to ensure the presence of the suspect/accused and the successful conduct of criminal proceedings, namely: summons, apprehension, prohibiting measures, bail and custody.

The subject of interest of this paper is prohibiting measures, which refer to several different, interconnected prohibitions that limit certain rights of the suspect/accused person in order to ensure his/her presence in the criminal proceedings, i.e. in order for the criminal proceedings to proceed successfully.

These measures are closely related to the most severe measure from this palette, the custody. When deciding on ordering custody, the court is obliged to first consider the possibility of imposing milder measures in order to prevent the possibility of flight, the fear of re-committing a criminal offense, the fear of influencing the criminal proceedings or the disruption of public peace and order, and determine whether such measures have achieved the same purpose that is sought to be achieved by the custody measure. These measures can be imposed by the court, and in order to achieve certain goals, upon the proposal of the parties or the defense attorney.

According to Sijerčić-Čolić (2019: 270), prohibiting measures can be divided into three groups, considering the goal that their application is intended to achieve:

- a) Measures aimed at preventing the suspect/accused from fleeing, hiding or going to an unknown place or abroad. These measures are: house arrest; temporary confiscation of travel documents with a ban on issuing new travel documents, as well as a ban on the use of an identity card for crossing the state border of Bosnia and Herzegovina and a person's duty to periodically report to a certain authority,
- b) Measures intended to avoid conflict situations, and these measures are: prohibition to visit certain places (Pavišić, 2013: 311) and to meet with certain persons and
- c) Measures aimed at preventing the suspect/accused from undertaking certain actions that would be harmful to the wider social community. This means temporary confiscation of a driver's license and prohibition to perform certain business activities or official duties.

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<sup>2</sup> *Criminal Procedure Code of Bosnia and Herzegovina*, Official Gazette of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 29/07, 53/07, 58/08, 12/09, 16/09, 53/09, 93/09, 72/13, 65/18

<sup>3</sup> *Criminal Procedure Code of the Federation of Bosnia and Herzegovina*, Official Gazette of the Federation of Bosnia and Herzegovina, 35/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 08/13, 59/14, 74/20

<sup>4</sup> *Criminal Procedure Code of the Republika Srpska*, Official Gazette of the Republika Srpska, 53/12, 91/17, 66/18, 15/21

<sup>5</sup> *Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina*, Official Gazette of the Brčko District of Bosnia and Herzegovina, 34/13, 27/14, 3/19, 16/20

The subject of research of this paper is, therefore, the prohibiting measures in Bosnian and Herzegovinian Criminal Procedural Code, and it will include a theoretical analysis, normative-legal and analysis of practical achievements of these measures. We will examine the quality of norms and practices through empirical research.

In this sense, the hypothesis that we want to verify with this research has been determined, and it reads: *Prohibiting measures are not well-standardized in the Criminal Procedure Codes of Bosnia and Herzegovina and there is a need to improve the norm.*

## **PROHIBITING MEASURES IN BOSNIA AND HERZEGOVINA**

The end of the last century and the beginning of this century were marked, among other things, by problems with the increase in the prison population and overcrowded prisons. In an effort to solve this problem, the Committee of Ministers of the Council of Europe adopted on 30 September 1999 Recommendation no. R (99) 22 concerning prison overcrowding and inflation of the prison population, which recommends to member states "The widest possible use should be made of alternatives to pre-trial detention, such as the requirement of the suspected offender to reside at a specified address, a restriction on leaving or entering a specified place without authorization, the provision of bail or supervision and assistance by an agency specified by the judicial authority." The topicality of the matter and the recommendations received from the Committee of Ministers of the Council of Europe encouraged the member states of the Council of Europe to start introducing prohibiting measures in their legislation as alternative measures to custody.

Along with the efforts to become a member of the Council of Europe, Bosnia and Herzegovina was also preparing for the implementation of the obligations that will result from that process, in terms of the subject of this paper, and for the implementation of recommendations related to the introduction of measures that are alternatives to custody. The criminal legislation reform that was carried out in 2003 and in which, among other things, completely new laws on criminal procedure at the level of Bosnia and Herzegovina, the entities and the Brčko District of Bosnia and Herzegovina were enacted, also introduced prohibiting measures as a measure to guarantee the presence of the suspect/accused and the successful conduct of criminal proceedings (Perić, 2018: 2-3). Primarily, a house arrest measure was prescribed, within which a number of measures, that try to prevent the suspect/accused from fleeing, are determined.

In addition to this measure with an unclear goal, to prevent flight and/or for other custody reasons, other measures appeared: the accused may be prohibited from visiting certain places or from meeting with certain persons, or be ordered to report occasionally to a specific authority, or his travel document or driver's license may be temporarily confiscated or he may also be prohibited from performing certain business activities.

Although they found their place in the norm as early as 2003, these measures began to be applied only in 2006, thanks to the international judges who then worked in the Court of Bosnia and Herzegovina.

With the aim of applying prohibiting measures as widely as possible and achieving the goal for which they were introduced, the amendments to the law on criminal procedures from

2007 made them more clearly and precisely standardized, and the range of them was expanded, thus in addition to the house arrest and travel ban, the following were also introduced: prohibition from performing certain business or official activities, prohibition from visiting certain places or areas, prohibition from meeting with certain persons, order to report occasionally to a specified body, and temporary withdrawal of the driver's license. All of these new prohibiting measures could be imposed in addition to the house arrest as well as the travel ban, or as separate measures<sup>6</sup>. By looking at these legal solutions, it can be clearly seen that prohibiting measures can be imposed for all custody reasons, and house arrest and travel ban only to prevent flight.

As prescribed by Article 123 of the CPC of BiH, and analogous articles of the entities' and CPC of BD BIH, the application of measures to ensure the presence of the suspect/accused and the successful conduct of criminal proceedings, including the prohibiting measure, is possible with the application of the following principles: legality, which consists in the obligation of the court to comply with the conditions specified by law for the application of certain measures; proportionality, which is expressed by the court's obligation to be careful not to apply a more severe measure, if the same purpose can be achieved with a milder measure, and the principle of limited duration of the measure. When it comes to the limited duration of these measures, then it refers to the mandatory abolition of a certain measure *ex officio* when the reasons that dictated its application cease and the mandatory replacement (substitution) of the taken measure with a milder measure, when the conditions are met (Sijerčić-Čolić, H et al., 2005: 380).

Prohibiting measures in criminal procedure codes in Bosnia and Herzegovina are classified in a special Section (4.) within Chapter X (or XIV in the Republika Srpska) and include eight articles regulating: house arrest and travel ban; other prohibiting measures; imposing the prohibiting measures; content of the prohibiting measures; limitations in the content of the prohibiting measures; enforcement of prohibiting measures; verification of prohibiting measures and obligation to submit report; special provision on travel ban<sup>7</sup>.

Pursuant to Article 126, paragraph (1) of the CPC of BiH, and analogous provisions of the entities' codes and CPC of the Brčko District, the prohibiting measure of house arrest can be determined by the court only if there are circumstances indicating that the suspect or accused might flee, hide or go to an unknown place or abroad (Škulić, 2008: 153). Given that prohibiting measures limit basic human rights in accordance with the European Convention on Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights, when deciding on the prosecutor's proposal to determine a house arrest, the court will consider and be convinced of the existence of a well-founded suspicion of execution of the criminal offense, the existence of a real risk of flight<sup>8</sup> and whether the

<sup>6</sup> Article 126a. CPC BiH, Article 140a. CPC FBiH, Article 185. CPC RS, Article 126a. CPC BD BiH

<sup>7</sup> Article 126 – 126g CPC BiH, Article 140 – 140g CPC FBiH, Article 184 – 191 CPC RS, and Article 126 – 126g CPC BD BiH

<sup>8</sup> The house arrest measure and travel ban are a substitute for custody only in situations where there are circumstances that indicate that the suspect/accused could flee, hide, and go to an unknown place or abroad, and the court considers that the same purpose could also be achieved with these measures as well as with milder measures compared to custody. *Decision of the Supreme Court of the Federation of Bosnia and Herzegovina*,

prohibiting measure is proportionate to the legitimate goal and necessary in a democratic society (Perić, 2019: 4).

As Perić states in his analysis, the courts in Bosnia and Herzegovina, under the influence of the defense of the suspects, i.e. the accused, who sought to replace custody with this measure at all costs and considered such a decision to be their great success, accepted the practice of easily imposing prohibiting measures, especially the house arrest (Perić, 2019: 4). This situation allowed the courts to not explain in detail the explanations used to determine prohibiting measures, and according to Perić, those explanations mainly contained the type and severity of the criminal offense, the number of charges in the indictment, awareness of the severity of the punishment and possible dual citizenship, and the cases that judge Perić analyzed did not at all contain explanations of the real flight risk, nor explanations on whether milder prohibiting measures could ensure the same goal (Perić, 2019: 4-5)<sup>9</sup>. The Constitutional Court of Bosnia and Herzegovina resolves more and more appeals, which are mainly related to violations of the rights of the appellants due to the determination of measures of house arrest, travel ban, obligation to report occasionally to a specified authority, prohibition from meeting with certain persons and prohibition from performing certain business or official activities. These appeals point to the practice of ignoring the control of prohibiting measures by the courts, failure to decide on appeals within the statutory deadline, ignoring appeal reasons, and vague and superficial explanations (Perić, 2019: 34).

Previous legal solutions determined that only the house arrest was independent, and other measures could only be imposed together with the basic measure. Based on the experience, this approach has evolved so that positive legal solutions provide that prohibiting measures can be imposed along with house arrest, as well as with the travel ban or as separate measures<sup>10</sup>.

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no: 03 0 K 011261 13 Kž from 16 September 2013, Bulletin of the court practice of the Supreme Court of the Federation of Bosnia and Herzegovina, Sarajevo, no 1-2, January-December 2013, pp. 12.

The opposite position was taken by the Constitutional Court of Bosnia and Herzegovina in the Decision No.: AP-1758/15 of 30.06.2015 (Decision available on the website of the Constitutional Court of Bosnia and Herzegovina), point 115, where it observed that the Court of Bosnia and Herzegovina took into account that a house arrest is primarily imposed in the event of a risk of fleeing, but in practice so far it has proven to be effective in eliminating the risk of influencing witnesses, because by restricting the movement of suspects and banning communication with witnesses, suspects are completely prevented from influencing witnesses and thereby thwarting or making further investigation impossible.

<sup>9</sup> As an obvious example, Perić points out the *Decision of the Cantonal Court in Sarajevo no: 09 0 K 026343 17 Kps* from 22 May 2017 in which the house arrest was determined after the indictment was filed against seven defendants. In the explanation of the Decision the Court refers to the legal basis with only one sentence: "*Considering that there are circumstances that indicate the danger that the accused could flee or hide and try to avoid criminal responsibility in the following criminal proceedings, because they are charged with serious crimes, for which a penalty of long-term imprisonment may be pronounced, the preliminary hearing judge accepted the proposal of the Cantonal Prosecutor's Office for the imposition of a house arrest*".

<sup>10</sup> One or more prohibiting measures may be imposed on the suspect or the accused. Prohibiting measures can be imposed along with a house arrest or a travel ban, but the court is obliged to take into account the content and purpose of the measures it intends to impose so that they can be implemented without mutual exclusion. *Decision of the Supreme Court of the Federation of Bosnia and Herzegovina, no: 03 0 K 011261 13 Kž* from 16 September 2013, *Bilten sudske prakse Vrhovnog suda Federacije Bosne i Hercegovine*, Sarajevo, no 1-2, January-December 2013, pp. 11.

In accordance with the usual practice in comparative law, the legislation of Bosnia and Herzegovina prescribes the imposition of prohibiting measures at the proposal of the party or defense counsel and *ex officio*<sup>11</sup>. Determining prohibiting measures according to the proposal should be clear and the court considers the determination of these measures when there is a proposal from the party or the defense attorney. Determining these measures *ex officio* is possible when the court decides on the custody (ordering or extending custody), the court is obliged to consider and, if the same goal pursued by custody can be achieved, to order house arrest, travel ban and other prohibiting measures. In any case, the suspect, that is, the accused, will be warned in the decision on the imposition of prohibiting measures that he may be ordered into custody if he violates the obligation from the imposed measure (Simović, M.N., Simović, V.M, 2019: 11).

However, the suspect/accused can leave the place of residence with the approval of the court, which gives this measure a relative character<sup>12</sup>. With this measure, the suspect/accused's freedom of movement is restricted - Simović, N. M, 2019: 113)<sup>13</sup>, but he is not deprived of his liberty.

Prohibiting measures are imposed by a court decision. In the course of an investigation, the prohibiting measures shall be ordered and revoked by the preliminary proceedings judge and after the issuance of an indictment – by a preliminary hearing judge and after the case has been referred to the judge or the Panel for the purpose of scheduling the main trial – by that judge or the presiding judge.

The party, that is, the defense attorney, can file an appeal against the decision ordering, extending or canceling the measures, and the prosecutor against the decision rejecting his proposal for the application of the measure. The mentioned appeal is decided by a panel of three judges<sup>14</sup> within three days from the date of receipt of the appeal<sup>15</sup>.

The prohibiting measures may last as long as they are needed<sup>16</sup>, but not later than the date on which the verdict becomes legally binding if a person was not pronounced the sentence of

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<sup>11</sup> Articles 126b paragraphs (1) – (3) CPC BiH, Article 140b paragraphs (1) – (3) CPC FBiH, Article 186 paragraphs (1) – (3) CPC RS, and Article 126b paragraphs (1) – (3) CPC BD BiH

<sup>12</sup> When a suspect leaves his place of residence in the course of criminal proceedings without notifying the competent authority, and during the interrogation he was instructed that he must inform the competent authority of any change of address or intention to change his place of residence and was warned of the consequences, this behavior on his part constitutes an act of concealment. *Decision of the Cantonal Court in Travnik*, no: Kž. 121/05 from 25 April 2005, Available from: [https://ksudnt.ba/sudska\\_praksa/SUDSKA-PRAKSA-KZ-121-05.doc](https://ksudnt.ba/sudska_praksa/SUDSKA-PRAKSA-KZ-121-05.doc), accessed 31 January 2023.

<sup>13</sup>By the decision of the Court of Bosnia and Herzegovina, the appellant was imposed, and later extended, prohibiting measures of house arrest, travel ban, visiting certain places, meeting with certain persons and mandatory reporting to a certain state authority. The appellant appealed on the violation of the right to freedom of movement and residence, however, the Constitutional Court found that the interference with the appellant's right to freedom of movement was in accordance with the law, that it was undertaken with the aim of preventing crime, and that, considering all the circumstances and the duration of the imposed measures, there was a proportionality between the restriction of the appellant's right to freedom of movement and the legitimate interest that was being protected.

<sup>14</sup> In the Brčko District of Bosnia and Herzegovina, the Court of Appeal decides on the appeal.

<sup>15</sup> Article 126b paragraphs (4) and (7) CPC BiH, Article 140b paragraphs (4) and (7) CPC FBiH, Article 186 paragraphs (4) and (7) CPC RS, Article 126b paragraphs (4) and (7) CPC BD BiH

<sup>16</sup> The Constitutional Court established that the Court of Bosnia and Herzegovina, in the explanation of the first-instance decision, gave clear and complete reasons that were guidelines when making a conclusion that in the specific case there were no changed circumstances due to which the appellant, as well as the other suspects, was

imprisonment and at the latest until the person has been committed to serve the sentence if a person was pronounced the sentence of imprisonment. The preliminary hearing judge, the judge, or the presiding judge must review every two months<sup>17</sup> whether the imposed prohibiting measure is still needed<sup>18</sup>.

The court<sup>19</sup>, by means of which it imposes a measure prohibiting the suspect/accused from leaving the place of residence, must determine the place where the suspect/accused must stay while this measure lasts, as well as the boundaries beyond which the suspect or accused may not go. The place may be restricted to the suspect's or accused's home<sup>20</sup>. In a decision ordering the house arrest the Court has limited communication to a person with the outside world, but he/she can freely use his/her permanent or temporary residence. When ordering this prohibiting measure, the limitation related to the fact that the right of the suspect/accused to live in a home in Bosnia and Herzegovina or to see family members or close relatives without hindrance can be restricted when the proceedings are conducted due to a criminal offense committed to the detriment of a family member or close relatives.

If the proceedings are conducted due to a criminal offense committed in connection with the performance of the professional activity, the right of the suspect/accused to perform his/her professional activity may be restricted (Kosović, 2015: 35-36)

In addition to a house arrest, the Court may also order a travel ban, or these can be ordered as separate measures. In a decision imposing the travel ban, the Court shall order temporary withdrawal of travel documents together with the prohibition of issuance of new travel documents, as well as the enforcement of the prohibition to use the identity card for crossing the State border of Bosnia and Herzegovina. The decision shall contain personal data of the suspect or accused, and may contain other information as necessary.<sup>21</sup>

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imposed a travel ban, in which the Constitutional Court does not find arbitrariness. *Decision of the Constitutional Court* no. AP-5093/13 from 14 May 2015, para. 31.

<sup>17</sup> In the *Decision* no: AP - 3840/17 from 15 November 2017, para. 48, the Constitutional Court of Bosnia and Herzegovina established that it cannot be concluded from the explanations of the contested decisions that during the duration of the prohibiting measures there were circumstances that made it impossible to conduct an investigation in the specific case, that there were insurmountable obstacles that made it impossible to expose possible accomplices and helpers, and potential witnesses. In addition, from the explanation of the contested decisions, it cannot be concluded that there were difficulties and irremovable obstacles in the collection of possible material evidence. In this sense, just referring to the reasons from the time when the prohibiting measures were determined, with the statement that they have not changed even after ten months, with the indisputable fact that the regular court in the same period did not act in accordance with the legal obligation of a two-month control of the further justification of prohibiting measure, points to the absence of the necessary diligence in handling.

<sup>18</sup> Article 126b paragraphs (5) – (6) CPC BiH, Article 140b paragraphs (5) – (6) CPC FBiH, Article 186 paragraphs (5) – (6) CPC RS, Article 126b paragraphs (7) – (8) CPC BDBiH

<sup>19</sup> Article 126c para. (1) CPC BiH, Article 140c para. (1) CPC FBiH, Article 187 para. (1) CPC RS, and Article 126c para. (1) CPC BD BiH

<sup>20</sup> In a *Decision* no: AP - 1758/15 from 30 June 2015, para. 117, The Constitutional Court concluded that the appellant groundlessly objected to the misinterpretation of the term "residence", since the term residence refers to the residential address, and the appellant's movement is limited to the area of the local community, which means that the appellant was given broader rights, i.e. the possibility of imposing the so-called measure of house arrest was not accepted, because the Court of Bosnia and Herzegovina took care not to impose a measure that is not necessary to achieve the purpose for which the measure was imposed.

<sup>21</sup> Article 126c paragraph (2) CCP BiH, Article 140c paragraph (2) CPC FBiH, Article 187 paragraph (2) CPC RS, and Article 126c paragraph (2) CPC BD BiH

A measure prohibiting the suspect or accused from visiting certain places or areas seeks to prevent the suspect/accused from going to certain places or areas. The Court shall specify places and areas and the distance within which the suspect or accused may not approach them. In a decision prohibiting the suspect or accused from meeting with certain persons, the Court shall specify the distance within which the suspect or accused may not approach a certain person<sup>22</sup>.

In a decision ordering the suspect or accused to report occasionally to a specified body, the Court shall appoint an official person that the suspect or accused must report to, the time limit in which the suspect or accused must report and the manner of keeping records of reporting<sup>23</sup>.

The decision ordering temporary withdrawal of a driver's license<sup>24</sup>, shall specify categories for which a driver's license shall be suspended and shall contain personal data of the suspect or accused, and may contain other information as necessary.

The decision ordering the house arrest<sup>25</sup> is delivered to the authority that executes the measure. The decision imposing the travel ban is submitted to the Border Police, and the temporary withdrawal of travel documents together with the prohibition of issuance of new travel documents, as well as the enforcement of the prohibition to use the identity card for crossing the State border, will be entered into the main data processing center. The decision shall contain personal data of the suspect or accused, and may contain other information as necessary. Measures ordering house arrest, travel ban, prohibiting visiting a certain place or area, prohibiting meeting with certain persons and temporarily revoking a driver's license are carried out by the Police Authority, while the measure of the obligation of the suspect or the accused to periodically report to a certain authority is carried out by the Police Authority or the authority to which the suspect /accused must report.

In emergency cases<sup>26</sup>, in particular in cases involving a criminal offense for which a prison sentence of ten years or more severe punishment may be pronounced, the order for a temporary withdrawal of travel documents and the identity card together with prohibiting the issuance of new documents that might be used for crossing the State border, may be issued by the Prosecutor. The Prosecutor may issue this order when ordering the conduct of an investigation; when questioning the suspect/accused; when issuing an apprehension order; or whenever the emergent action is needed for the effective conduct of the process until the beginning of the main trial. In the course of an investigation, the Prosecutor immediately informs the preliminary proceedings judge and after the issuance of an indictment – a preliminary hearing judge and after the case has been referred to the judge or the Panel for the purpose of scheduling the main trial – that judge or the presiding judge, who shall decide about the order within 72 hours. In case the judge fails to issue the order, the travel documents and the identity card shall be returned.

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<sup>22</sup>Article 126c paragraphs (3) – (4) CPC BiH, Article 140c paragraphs (3) – (4) CPC FBiH, Article 187 paragraphs (3) – (4) CPC RS, Article 126c paragraphs (3) – (4) CPC BD BiH

<sup>23</sup>Article 126c paragraph (5) CPC BiH, Article 140c paragraph (5) CPC FBiH, Article 187 paragraph (5) CPC RS, Article 126c paragraph (5) CPC BD BiH

<sup>24</sup>Article 126c paragraph (6) CPC BiH, Article 140c paragraph (6) CPC FBiH, Article 187 paragraph (6) CPC RS, Article 126c paragraph (6) CPC BD BiH

<sup>25</sup>Article 126e CPC BiH, Article 140e CPC FBiH, Article 189 CPC RS, Article 126e CPC BD BiH

<sup>26</sup>Article 126g CPC BiH, Article 140g CPC FBiH, Article 191 CPC RS, Article 126g CPC BD BiH



The order for a temporary withdrawal of travel documents and the identity card together with prohibiting the issuance of new documents that might be used for crossing the State border, shall be executed by a Police body, and may also be executed by Judicial police. If a suspect or accused refuses to surrender the travel documents and/or the identity card, the order shall be executed by force, and the suspect/accused will be issued a certificate of seized documents. For the identity card, the suspect or accused shall be issued a special certificate or card that shall replace the identity card in all respects, but it may not be used for crossing the State border.

A problem that may arise during the implementation of a travel ban measure and that may call into question the effectiveness of this measure is certainly the fact that the suspect/accused in order to be on the run or in hiding does not necessarily have to cross the State border, but can also hide in the territory of Bosnia and Herzegovina and in such a way hinder the efficient conduct of criminal proceedings.

During the actual implementation of these measures, it is evident that there may be difficulties in their implementation, in terms of controlling and monitoring the movement of the suspect/accused, which is the essence of these measures. Thus, in the case of a measure prohibiting visiting certain places or areas, the question can be raised as to how and by what mechanisms the Police Authorities could effectively execute this measure, because effective execution would probably imply constant surveillance of both the suspect/accused and the place or area to which the measure applies, and it is not realistic to expect that the Police Authorities have enough resources for this kind of supervision. As per the measure of prohibiting meetings with certain persons, the problem of executing this measure is even more pronounced, both due to the insufficient resources of the Police Authorities, which we talked about previously, and when taking into account today's modern technology, which in various ways enables uninterrupted and unnoticed communication between the suspect/accused and the person to whom the measure applies, without having to meet at all in the sense that they are physically in the same place, but can be tens or even hundreds of kilometers away from each other.

## **PROHIBITING MEASURES IN COMPARATIVE LAW**

In order to better analyze the Bosnian and Herzegovinian norm regarding prohibiting measures, we decided to review the regulation of these measures in our neighboring countries (the Republic of Croatia and the Republic of Montenegro) and analyze them in comparative law.

The Criminal Procedure Code of the Republic of Croatia from 1997 introduced the institute of precautionary measures, which is equivalent to prohibiting measures in Bosnia and Herzegovina law. The valid criminal procedural legislation of the Republic of Croatia recognizes eleven precautionary measures that can be imposed on natural persons. The catalog of measures from the Criminal Procedure Code of the Republic of Croatia was expanded in 2013 and 2019. The goal of expanding the catalog of precautionary measures is to reduce the need for pretrial detention (Pleić, Budimlić, 2021: 274-275).

Precautionary measures are a substitute for optional pretrial detention on all grounds.

Precautionary measures are milder measures and the Court will apply them in cases where they can achieve the goal of pretrial detention. Precautionary measures may not entail the restriction of a defendant's right to his own apartment, to unimpeded connections with members of his household, spouse or common-law spouse, parents, children, adopted child or adoptive parent, except where the proceedings are conducted on account of a criminal offence committed to the detriment of any of these persons (Pavišić, 2013: 309).

The Criminal Procedure Code of the Republic of Croatia<sup>27</sup> (hereinafter: the CPC of the Republic of Croatia) stipulates that if there are certain circumstances that make it possible to order pre-trial detention or that detention has already been ordered (Pavišić, 2013: 311), the Court and the State Attorney will order the application of one or more precautionary measures in a reasoned decision if the same purpose can be achieved by applying them. If the defendant does not comply with the imposed measure, it will be replaced by pretrial detention. The same article, paragraph 2, prescribes eleven precautionary measures, and those are: prohibition to leave residence, prohibition to visit a certain place or a territory, obligation of the defendant to report periodically a certain person or authority, prohibition to approach a certain person and prohibition to establish or maintain contacts with a certain person, prohibition to engage in a certain business activity, temporary seizure of a passport or other document which serves to cross the state border, temporary seizure of a license to drive a motor vehicle, prohibition on stalking or harassing the victim or another person, removal from the home and prohibition of Internet access.

A simple insight shows that Croatian legislation provides more prohibition measures than legislation of Bosnia and Herzegovina, and the following stand out in particular: a prohibition on stalking or harassing the victim or other people, removal from the home and prohibition of Internet access.

According to the Rulebook for the Execution of Precautionary Measures<sup>28</sup>, the police is responsible for supervising the execution of the precautionary measure for the prohibition on stalking or harassing the victim or another person according to the location of the person for the purpose of whose protection the measure has been determined. The verification is carried out by talking to the person for the purpose of whose protection the measure has been determined.

The Rulebook also stipulates that the verification of the execution of the precautionary measure of removal from the home is entrusted to the competent police according to the place where the home is located, and the verification is carried out directly on the ground: by the arrival of a police officer at the address of the defendant's home, by talking to the defendant's family members and neighbors or in another appropriate way. This measure is adequate for perpetrators of domestic violence, and given the growing trend of these crimes, it seems reasonable to have it in the catalog of measures that can achieve the same goal as pre-trial detention.

The precautionary measure of prohibiting Internet access was added to the existing precautionary measures by amendments to the CPC of the Republic of Croatia in 2019.

<sup>27</sup> Official Gazette of Republic of Croatia no: 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22, Article 98, para. (1)

<sup>28</sup> Official Gazette of Republic of Croatia no: 92/09, 66/14 i 73/21

The aforementioned measure, as a security measure, is already regulated by the Criminal Code of the Republic of Croatia, and its goal is to disable criminals who carry out criminal activities via Internet. If we take into account the number and type of crimes that can be committed via Internet and the need for this precautionary measure to be applied during criminal proceedings, the need for its introduction is pointed out, in order to reduce the need for pre-trial detention by expanding the catalog of precautionary measures, when the same purpose can be achieved by the precautionary measure of prohibiting access to Internet<sup>29</sup>. According to the Rulebook for the Execution of Precautionary Measures, the police and the Croatian Regulatory Agency for Network Activities are responsible for verifying the execution of this measure. This Agency will forward to the operators of electronic communication services that provide internet access a certain precautionary measure of internet access ban along with a notice of the need to suspend the provision of internet access service, as well as a ban on entering into a new subscription contract for that service, for the duration of the precautionary measure. The operator must immediately, upon receiving the notification, suspend the provision of services to the offender and inform the Agency about the suspension, i.e. notify that he/she does not have a contract with the defendant. Verification is carried out by the police during the performance of police duties, by direct observation and collection of information from citizens.

The State Attorney shall order, extend or vacate precautionary measures by his decision before indictment and investigating judge when deciding on pretrial detention.

After the indictment has been filed and until the finality of the verdict, that is, the execution of the verdict, these measures are ordered, extended and terminated by the Court before which the proceedings are conducted<sup>30</sup>.

Precautionary measures may last as long as they are necessary and at the longest until the judgment becomes final, if it comes to precautionary measures that are ordered due to the existence of special circumstances that point to the danger that the person will flee or is already on the run; if special circumstances support the concern that he shall repeat the offence, or complete the attempted one, or perpetrate the offence he threatens to commit, for which, according to the law, it is possible to impose a prison sentence of five years or a more severe punishment; and when it comes to a criminal offense for which a sentence of long-term imprisonment is prescribed and in which the circumstances of the commission of the criminal offense are particularly grave, i.e. the longest until the verdict becomes final when it comes to precautionary measures that are ordered due to the existence of special circumstances that point to the danger that the person will destroy, hide, change or forge items of evidence and traces of importance for criminal proceedings or that will hinder the criminal proceedings by influencing witnesses, experts, participants or concealers, and when the defendant who has been duly summoned avoids coming to the hearing.

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<sup>29</sup> *Proposal of the Code on Amendments to the Criminal Procedure Code*, Government of the Republic of Croatia, Zagreb, October 2019, 3 - 4 Available at: [https://www.sabor.hr/sites/default/files/uploads/sabor/2019-10-25/103907/PZE\\_776.pdf](https://www.sabor.hr/sites/default/files/uploads/sabor/2019-10-25/103907/PZE_776.pdf), access date: 1 February 2023

<sup>30</sup> Article 98. para (5) CPC RH

Counting from the effective date of the previous decision on the precautionary measure, every two months, the authority that determined the precautionary measure before indictment, i.e. the first-instance court, will ex officio examine whether there is still a need for the precautionary measure, and by decision extend it or vacate it if it is no longer required. If the precautionary measure is determined as a condition of the bail, the control of the extension of the measure will not be carried out<sup>31</sup>.

Although criticized by the professional public, in the criminal legislation of the Republic of Croatia there is also a solution that gives the possibility of ordering precautionary measures as independent measures, that is, the possibility of ordering precautionary measures even when the longest terms of investigative detention have expired (Article 98a of the CPC of the Republic of Croatia). In order to be able to implement the aforementioned, given that precautionary measures determined in this way can no longer, in the event of the defendant's non-compliance, be replaced by pre-trial detention, it is normalized that the defendant's non-compliance with the precautionary measure as an independent measure determined for him constitutes a criminal offense within the existing criminal act of non-execution of a court decision, which is prescribed by Article 311, paragraph 3 of the Criminal Code of the Republic of Croatia.

The Criminal Procedure Code of *Montenegro*<sup>32</sup> (hereinafter: CPC of Montenegro) stipulates that the court may, either ex officio or at the proposal of the prosecutor or the injured party, impose one or more surveillance measures on the defendant in a reasoned decision if there are circumstances that indicate that the defendant could flee, hide, go to an unknown place or to another country or obstruct the conduct of criminal proceedings.

Obstruction of criminal proceedings refers to the potential obstruction of evidence by the defendant. A total of seven surveillance measures are prescribed, and they are: prohibition to leave one's dwelling; prohibition to leave place of residence; prohibition to visit particular places or areas; prohibition of access or meeting with certain persons; duty to occasionally report to a certain public authority; provisional seizure of a travel document; and provisional seizure of a driving licence.

The most significant among these measures is the prohibition to leave one's dwelling, and its purpose is not reflected in creating the possibility for some additional repression in relation to the defendant, but with this measure, it is intended that the determination of classic detention due to the flee risk be, to a certain extent, substituted in this way, because the measure of supervision for the defendant is a far better solution than custody (Radulović, 2019: 165).

Measure of prohibition to leave one's dwelling, prohibition to leave the place of residence, prohibition of visiting a certain place or area, prohibition of access to or meeting a certain person, provisional seizure of a travel document, and provisional seizure of a driving license shall be enforced by the police authorities<sup>33</sup>. Moreover, the implementation of measures of prohibition to leave one's dwelling, prohibition to leave the place of residence, prohibition of visiting a certain place or area, prohibition of access to or meeting a certain person and the

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<sup>31</sup> Article 98, paragraph (6) CPC RH

<sup>32</sup> Official Gazette of Montenegro, 57/09, 49/10, 47/14, 2/15, 35/15, 58/15, 28/18, 116/20, 145/21, Article 166, paras. (1) – (5).

<sup>33</sup> Article 168. CPC Montenegro

obligation to periodically report to a certain state authority can be controlled through electronic monitoring.

Measures of supervision may not entail the restriction of the accused persons' right to live in their dwelling, to meet freely with members of their family and close relatives, except when the procedure is conducted for a criminal offence committed to the detriment of a family member or close relatives, as well as to perform their professional activity, except when the procedure is conducted for a criminal offence committed with relation to the performance of that activity, and the right of the defendant to contact his lawyer without hindrance.

In the course of the investigation surveillance measures are ordered and abolished by the investigative judge, and after the indictment has been brought by the Chair of the Panel within 24 hours following the submission of the motion. If the measure was not proposed by the State Prosecutor, and the proceedings are conducted for a criminal offense for which he is prosecuted *ex officio*, before rendering the ruling by which a measure is ordered or abolished, the court will request the opinion of the State Prosecutor. The court will proceed in the same manner when it finds that the measure proposed by the State Prosecutor should be abolished. Supervision measures may last as long as they are necessary, and at the longest until the verdict becomes final. The investigative judge or the Chair of the Panel shall examine every two months whether the applied measure is necessary. Parties may file an appeal against a ruling ordering, prolonging or abolishing measures and the State Prosecutor may file an appeal against the ruling rejecting his/her motion for enforcement of the measure, as well. The panel decides on the appeal within a term of three days from the day the appeal has been filed<sup>34</sup>.

Some earlier studies show that surveillance measures are not applied sufficiently in Montenegro. The practice of the State Prosecutor's Office in proposing measures and the practice of the court in ordering measures to ensure the presence of the accused is dominantly related to determination of custody (Akcija za ljudska prava, 2014: 33-34).

The set goal of checking the quality of the Bosnian and Herzegovinian norm that regulates the prohibiting measures and the hypothesis based on it that the prohibiting measures are not qualitatively standardized in the Bosnian criminal procedure laws and that there is a need for improvement will also be verified through empirical research.

## **MATERIAL AND METHODS**

### **Sample of respondents**

The sample of respondents consisted of members of the judicial community (prosecutors, judges and defense attorneys). 204 respondents participated. Out of that number 56 (27.5%) were prosecutors, 62 (30.4%) judges and 86 (42.2%) defense attorneys. Most respondents, 79 of them (38.7%) had work experience of 10 to 20 years, while the average work experience was  $21.21 \pm 10.92$  years. The average age was  $48.50 \pm 11.58$  years. The sample consisted of 129 (63%) men and 75 (36%) women.

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<sup>34</sup> Article 166, paras. (7) – (9) CPC Montenegro

## Measuring instruments

The paper used a part of the measuring instrument "Questionnaire for examining the attitudes of members of the judicial community on the imposition of a detention measure", which was constructed for the needs of wider research within the framework of the doctoral dissertation of the co-author of this paper entitled *Detention in Criminal Legislation and Practice in Bosnia and Herzegovina - Status and perspectives*". To the statements made in the survey questionnaire, respondents were supposed to choose one of the offered answers that best reflects their attitude. Answers to the statements are graded on a Likert-type scale from 1 to 5 (5 - I completely agree; 4 - I mostly agree; 3 - I can't decide; 2 - I mostly disagree; 1 - I don't agree at all). The research was conducted online, that is, with the help of an electronic questionnaire - where Google Forms was used. It was conducted in the period from January to May 2022.

## Data processing methods

When processing the data, a descriptive analysis was applied, i.e., the frequency distribution and percentages of respondents' answers to the statements were determined. In the case of graphic displays, responses of agreement and disagreement with the statements were added up. Chi-square test was used to compare the answers obtained from the research with randomly distributed answers. When using the chi-square test, the data was recorded for the third claim.

## RESULTS AND DISCUSSION

Table 1 shows the results of the responses of the members of the judicial community in relation to certain segments of the Bosnian norm regarding prohibiting measures.

The answers show that the majority of respondents completely or mostly agree with the first and third statements, i.e. that prohibiting measures, according to the conditions prescribed by law, are an adequate substitute for detention and that police authorities cannot adequately monitor and verify the application of prohibiting measures against visiting certain places or areas and ban on meeting certain people, given today's development of sophisticated technologies and methods of communication (viber, facebook, etc.). The majority of respondents completely or mostly disagree that the measure of house arrest and the measure of travel ban as a substitute for custody occurs only in situations where there are circumstances that indicate that the suspect could flee, hide, and go to an unknown place or abroad.

Table 1. Distribution of the responses of members of the judicial community to claims on the standardization of prohibiting measures

Variables	I completely agree		I mostly agree		I can't decide		I mostly disagree		I don't agree at all	
	f	%	f	%	f	%	f	%	f	%
1.	34	16,67	92	45,1	19	9,31	45	22,06	14	6,86
2.	7	3,4	30	14,7	9	4,4	97	47,6	61	29,9
3.	67	32,84	85	41,67	12	5,88	27	13,24	13	6,37

Chart 1 presents a comparative presentation of the summary responses of members of the judicial community to individual claims. Taking into account the content of the claims and the process of creating the chart, it is observed that a significant number of respondents opt for the improvement of standardization of prohibiting measures, that is, 59 respondents for the first, 158 for the second and 152 respondents for the third claim.

Based on an insight into the norming of prohibiting measures in the environment and the world, which established a wider application of alternatives to custody, which have positive effects in this area, the reason for the answer to the first claim can be connected to the fact that members of the judicial community in Bosnia and Herzegovina, especially prosecutors and judges, tend to deal mainly with the adequate implementation of existing laws, and not with their analysis for the purpose of standardization and improvement. With regard to the second claim, the respondents' thinking probably goes in the direction of improving legal norms in such a way that prohibiting measures of house arrest and travel ban could be applied to all special reasons for detention. As for the third claim, it can be concluded that the introduction of electronic monitoring for certain prohibiting measures would, first of all, make it much easier for police authorities to control the implementation of prohibiting measures.

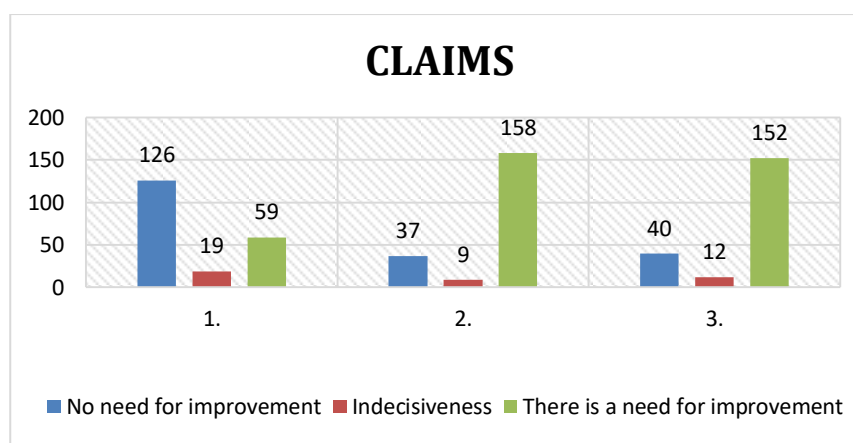


Chart 1. Representation of summary responses of members of the judicial community to claims about the standardization of prohibiting measures

Chart 2 represents the percentage representation of the total summary responses of the members of the judicial community for the statements made. Taking into account their content and the process of making the chart, it is evident that 60% of the respondents opt to improve the norm of prohibiting measures.

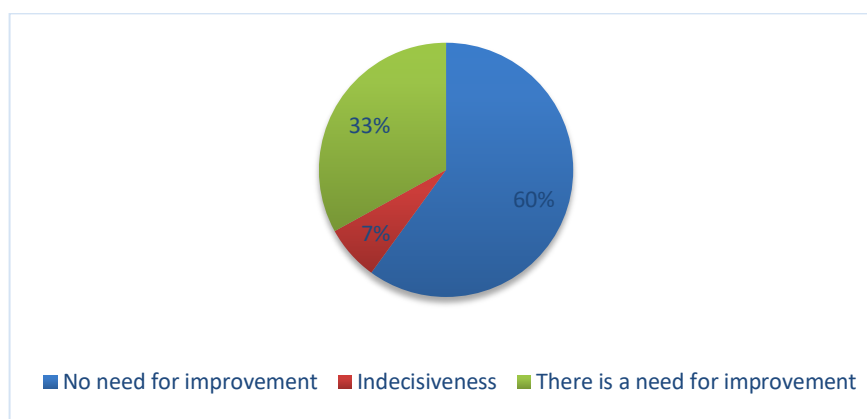


Chart 2. Percentage representation of the total summary responses of members of the judicial community to claims about the standardization of prohibiting measures

The chi-square test revealed a statistically significant difference between the received and randomly distributed answers of the respondents ( $\chi^2 = 192.003$ ;  $df = 4$ ;  $p < 0.00$ ), i.e. it was confirmed that the answers obtained from the research are not random, but are based on the views of respondents with relevant professional knowledge on the subject of research (standardization of prohibiting measures) and long-term work experience (Table 2).

Table 2. Chi-square test of the assessment of the views of members of the judicial community on the norming of prohibiting measures

$f_o$	$f_t$	$f_o - f_t$	$(f_o - f_t)^2$	$\frac{(f_o - f_t)^2}{f_t}$
54	122,4	-68,4	4678,56	38,22
149	122,4	26,6	707,56	5,78
40	122,4	-82,4	6789,76	55,47
227	122,4	104,6	10941,16	89,39
142	122,4	19,6	384,16	3,14

$\chi^2 = 192,003$ ;  $df = 4$ ;  $p < 0,00$ )

## CONCLUSIONS

The analysis of the norm shows the differences between the Bosnia and Herzegovina norm and the norm of the researched countries in terms of prohibiting measures. Particular differences have been observed regarding the types of prohibiting measures that can be imposed as a substitute for detention. Thus, in the Criminal Procedure Code of the Republic of Croatia, in addition to the prohibiting measures contained in our domestic criminal procedure legislation, the prohibition of stalking or harassing the victim or another person, removal from home and prohibition of Internet access are also standardized, and in the



Criminal Procedure Code of Montenegro, the prohibition of leaving the dwelling. Bearing in mind the argumentation used by comparative legislators when introducing prohibiting measures and the results achieved by them, which are not standardized in Bosnian law, it seems meaningful to conduct research and check the possibility of their introduction into Bosnian legislation. In support of such a proposal, there is also the argument that by expanding the catalog of prohibiting measures in Bosnia and Herzegovina, the application of detention measures would be reduced, because the courts would have a better and more diverse selection of prohibiting measures that would be an adequate substitute for detention, especially in the case of some specific criminal offenses (e.g. Domestic violence, criminal acts committed via the Internet, etc.).

It is particularly interesting, and deserves special analysis before taking a final position on the introduction into the legislation of Bosnia and Herzegovina, the solution in the legislation of Montenegro in which the house arrest, the prohibition of leaving the place of residence, the prohibition of visiting a certain place or area, the prohibition of access to or meeting with certain persons and obligation to periodically report to a certain state authority can be carried out with the help of electronic monitoring.

Empirical research has shown that the judicial community is divided regarding the quality of the norm according to which prohibiting measures are a substitute for detention. The answers show that the majority of respondents completely or mostly agree that prohibiting measures, according to the conditions prescribed by law, are an adequate substitute for detention, and with the claim that the police authorities cannot adequately monitor and verify the application of the prohibition of visiting certain places or areas and the prohibition of meeting with certain people, given today's development of sophisticated technologies and methods of communication (viber, facebook, etc.). The majority of respondents completely or mostly disagree that the measure of house arrest and the measure of travel ban as a substitute for custody occur only in situations where there are circumstances that indicate that the suspect could flee, hide, and go to an unknown place or abroad. Such attitudes and the division of the judicial community are reason enough to reconsider the quality of the norm according to which prohibiting measures are a substitute for detention and for its improvement.

Therefore, the hypothesis of this paper, which reads, *Prohibiting measures are not well-standardized in the Criminal Procedure Codes of Bosnia and Herzegovina and there is a need to improve the norm*, has been confirmed, and we suggest continuing the research with the aim of improving the Bosnian and Herzegovinian norm.

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