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THE CONTROL OF CRIMINAL PROSECUTION IN BOSNIA AND HERZEGOVINA AND CROATIA

The article deals with the critical assessment of the control of criminal prosecution in the legal systems of Bosnia and Herzegovina and the Republic of Croatia. For the purpose of this paper, criminal prosecution concerns only decisions to initiate, continue and discontinue criminal procedure but not to take individual investigative measures or other procedural actions. The normative and comparative methods are predominantly employed in the article to conduct a qualitative assessment of relevant provisions of criminal procedure acts of both countries. Additionally, the paper evaluates its subject through the lens of the jurisprudence of the European Court of Human Rights. Albeit the mentioned countries belong to the same legal tradition, they have adopted different legal solutions regarding the conception of the control of criminal prosecution. B&H law primarily relies on the internal control of criminal prosecution through the use of a complaint filed with the prosecutor's office. In contrast, besides establishing judicial control of criminal prosecution, Croatian law retained subsidiary prosecution as a form of external control of prosecutorial function. While the defendant has the right to be shielded from arbitrary criminal prosecution, the injured party as a person suffering harm from a criminal offense has the right to effective criminal prosecution in the case of serious violations of his/her human rights. Hence, the article aims to establish that the nonexistence of external control of criminal prosecution in B&H law violates the mentioned rights of the defendant and those of the injured person. The article also argues that the legal solutions in Croatian law regarding the external control of criminal prosecution could be used to some extent as a model for future reform of criminal procedure in B&H. Lastly, the article highlights that subsidiary prosecution as a corrective to prosecutorial function in Croatia has its shortcomings.

Keywords: Criminal procedure - the prosecutor - the injured party - criminal prosecution - control.

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1. INTRODUCTION

In addition to being neighbouring states, with the exception of approximately the last thirty years when they became independent states, Bosnia and Herzegovina and the Republic of Croatia (hereinafter: Croatia) were incorporated in the same state. Moreover, they belong to the same civil legal tradition as all other states of continental Europe. The criminal procedure of Bosnia and Herzegovina is regulated by the laws that entered into force in 2003.[299] The present-day Croatian criminal procedure is governed by the Criminal Procedure Act of the Republic of Croatia (hereinafter: the CPA of Croatia) adopted by the Parliament of the Republic of Croatia in 2008.[300] With the entry into force of the laws in question, the Bosnian and Croatian criminal procedure has been significantly reformed. It is worth observing that the chief objective of the reforms in question was the replacement of the judicial investigation with the prosecutorial investigation (Đurđević, 2014, p. 61). From the normative point of view, the criminal procedural legislation of Bosnia and Herzegovina recognizes and governs four distinct stages of criminal proceedings - investigation, indictment proceedings, the main hearing, proceedings on ordinary and extraordinary legal remedies (Sijerčić-Čolić, 2012b, p. 21).[301] Croatian criminal procedure is divided into two major stages: the pre-trial procedure and the main hearing, between which there are intermediate proceedings of judicial review of the indictment, and the proceedings on ordinary and extraordinary legal remedies.[302] The function of the criminal prosecution is entrusted to the prosecutor in Bosnia and Herzegovina, and to the state attorney in Croatia. The public prosecution service in the mentioned states is an autonomous and independent, hierarchically structured, monocratic judicial body authorized and bound to act against perpetrators of criminal offenses and to execute other duties in accordance with the law (Turković, 2008, p. 266). The function of public prosecution in mentioned

[299] The legal system of Bosnia and Herzegovina is a complex legal system comprising the legal systems of the state of Bosnia and Herzegovina and those of its entities - the Federation of Bosnia and Herzegovina and the Republic of Srpska, and the legal system of the Brčko District of Bosnia and Herzegovina, which is the *sui generis* administrative-territorial unit under the direct jurisdiction of Bosnia and Herzegovina. In Bosnia and Herzegovina, there are four laws in force governing the criminal procedure of the abovementioned legal systems. The Criminal Procedure Act of Bosnia and Herzegovina (hereinafter: the CPA of B&H) governs the criminal proceedings before the Court of Bosnia and Herzegovina. The Criminal Procedure Act of the Federation of Bosnia and Herzegovina governs the criminal proceedings before the courts of the Federation of Bosnia and Herzegovina. The Criminal Procedure Act of the Republic of Srpska governs the criminal proceedings before the courts of the Republic of Srpska. The Criminal Procedure Act of the Brčko District of Bosnia and Herzegovina governs the criminal proceedings before the courts of the Brčko District of Bosnia and Herzegovina.

[300] Unlike Bosnia and Herzegovina, Croatia is a unitary state in which criminal procedure is governed by a single criminal procedure law brought by the Parliament of the Republic of Croatia.

[301] However, from the structural point of view, the criminal procedure of Bosnia and Herzegovina consists of the pre-trial procedure comprising the investigation and the indictment proceedings, the main hearing, that is to say, the trial, and proceedings on legal remedies (Bubalović, 2008, p. 1133).

[302] Unlike the criminal procedure of Bosnia and Herzegovina, where there is no division between the pre-investigatory and the investigatory phase, a peculiar feature of the Croatian criminal procedure is the division of the preliminary proceedings into an informal phase—the inquiry of criminal offenses (pre-investigatory phase) — and the second formal phase: the investigation (Pavišić, 2013, pp. 503-526).

states operates on the basis of the principle of legality of criminal prosecution that obliges the prosecutor to institute and stay in the criminal proceedings as long as requirements for criminal prosecution exist (Bayer, 1972, p. 167). Besides the legality principle, the CPA of B&H and the CPA of Croatia also accept the principle of mutability under which the prosecutor may desist from prosecution if some of the factual or legal assumptions for prosecution cease to exist during proceedings (Pavišić, 2013, p. 192; Simović & Simović, 2016, p. 170). However, despite the abovementioned similarities, the legal systems of the states in question have adopted different solutions with regard to the control of criminal prosecution, which has significant implications, for the following reasons. Namely, even though the prosecutor in Bosnia and Herzegovina and Croatia is the professional enjoying the constitutional guarantees of independence and autonomy, bound by the principle of legality of prosecution, he/she may still wrongly (intentionally or unintentionally) assess the requirements for prosecution and violate the rights of certain persons if the prosecutor opts to institute or desist from criminal prosecution (Novokmet, 2017, pp. 378-379). First and foremost, citizens should not be subjected to criminal proceedings if requirements for prosecution are not met, since such action violates the rule of law and the principle of legal certainty, and the subjective right of the individual not to be subjected to criminal proceedings if all the factual and legal requirements for that are not fulfilled. On the other hand, from the perspective of the victim of serious human rights violations, the decision not to prosecute may violate his/her right to an effective investigation derived from international legal instruments such as the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR) and the standards developed in the jurisprudence of the European Court of Human Rights (hereinafter: the ECtHR) (Kamber, 2017; Ochoa, 2013; Seibert-Fohr, 2009). Namely, if the prosecuting authorities decide not to prosecute, there are different mechanisms aimed at being the corrective of such decisions ending the criminal proceedings that can exist in the form of: (1) limited authority for private parties to initiate or continue criminal prosecution as authorized prosecutors in the capacity of private or subsidiary prosecutors; (2) independent review of initial non-prosecution decisions, upon request from the victim; and (3) multiple, independent public prosecution agencies with independent authority to bring charges for the same wrongdoing - the last mechanism being a characteristic feature of the criminal justice system of the United States of America only (Brown, 2018, pp. 861-862). The prerequisite for the realization of the legal standing of the victim in the criminal proceedings is the existence of an adequate (effective) legal remedy with regard to the decision not to prosecute (the so-called negative prosecutorial decision) whereby the prosecutor desists from criminal prosecution (Beloof, 2005, pp. 258-259). In contrast, the absence of such a remedy precludes the realization of the legal standing of the victim, making rights belonging to the victim illusory and theoretical (Beloof, 2005, p. 259). Consequently, the right of the victim to an effective remedy, which would enable the victim to challenge the decision not to prosecute, occupies a prominent place in the jurisprudence of the ECtHR.[303] However,

[303] If the decision not to prosecute can violate certain human rights guaranteed in the ECHR, the state has to give the person concerned an effective remedy before a national authority. (Đurđević, 2013a, p. 1004)

in European national criminal justice systems there is no uniform approach with regard either to the availability of review of the decisions not to prosecute or, if available, the scope of that review. (*Armani Da Silva v. the United Kingdom* [GC], § 279). Nonetheless, it is worth emphasizing that the requirement of an effective investigation of serious human rights violations stemming from the procedural positive obligation includes the obligation in terms of accessibility of the investigation to the victim's family to the extent necessary to safeguard their legitimate interests (*Hanan v. Germany* [GC], § 208). Even though the procedural obligation concerning an effective investigation does not oblige national legislators to establish a judicial review of investigative decisions (*Hanan v. Germany* [GC], § 220), there is no doubt that the procedural mechanism standing at the disposal of the victim must satisfy the requirements of effectiveness with the aim of providing the victim with a realistic possibility to successfully challenge the decision not to prosecute (*Isayeva v. Russia*, §§ 209-223).

2. THE CONTROL OF CRIMINAL PROSECUTION IN BOSNIA AND HERZEGOVINA

2. 1. The Decision to Prosecute

In the judicial concept of the investigation that had been in force in Bosnia and Herzegovina and Croatia before the already mentioned reforms of the criminal procedural legislations of the countries in question, if the prosecutor deemed that all the factual and legal requirements for the criminal prosecution exist, he/she could not unilaterally initiate investigation, and consequently the criminal procedure; instead, the prosecutor, in that case, could only file the request for the conducting of investigation with the investigative judge (Bayer, 1972, p. 140). Afterward, the investigative judge had the obligation to examine the prosecutorial request for the conducting of the investigation in order to determine whether such a request was grounded. If the investigative judge considered that the prosecutorial request is grounded, he/she would render the decree for the conducting of the investigation. Accordingly, when proceeding upon the request of the prosecutor for the conducting of the investigation, the investigative judge exercised *ex officio* control of the legality of all the assumptions for criminal prosecution. Therefore, the control exercised by the investigative judge was mandatory. Additionally, the judicial concept of the investigation established the twofold control of the legality of criminal prosecution. The judicial control over the legality of the initiation of the investigation went one step further (Đurđević, 2010, p. 15). Namely, the decree for the conducting of the investigation had to be delivered to the accused. The reason for this lay in the fact that the accused, that is, the person against whom the decree for the conducting of the investigation was brought, was entitled to lodge an appeal against such a decree. In the latter case, the control over the initiation of the investigation was optional and dependent upon the request of the accused, expressed in the appeal. Hence, in view of the fact that the investigation commenced with the decision of the court, the investigation itself was a constitutive part of court proceedings in structural and functional terms. Further, deciding upon the submitted appeal was within the competence of a panel

of three judges, while the investigative judge who brought the challenged decree for the conducting of the investigation could not be a member of this panel, with the aim of ensuring the impartiality and objectiveness of the court. Besides, it is worth emphasizing that the twofold judicial control over the initiation of the investigation satisfied the requirement stemming from the principle of equality of arms and the adversarial principle, in view of the fact that the accused was on equal footing with the prosecutor with regard to the issuing of the decree for the conducting of the investigation, that is to say, the initiation of the investigation and consequently the initiation of the criminal procedure.

However, according to the present-day procedural solutions in force in Bosnia and Herzegovina, the prosecutor opens the investigation[304] by rendering the order on conducting the investigation if grounds for suspicion that the criminal offense has been committed exist (Article 216, paragraph 1 of the CPA of B&H), where the CPA of B&H only stipulates the content of the order in question.[305] Hence, the reform of the criminal procedural legislation of Bosnia and Herzegovina has significantly exacerbated the legal standing of the person against whom criminal proceedings are being conducted when it comes to the commencement and the conducting of the investigation.[306] This is because the prosecutor has the right to unilaterally open the investigation on the one hand, while the suspect does not have any procedural mechanisms at disposal to challenge the prosecutorial decision, on the other. Accordingly, criminal prosecution has become the monopoly of the prosecutor, deprived of any form of judicial or other effective control during the investigation. Furthermore, according to the prevailing view adopted in domestic legal scholarship, the order to conduct the investigation is an internal act of the prosecutor that does not affect the legal standing of the suspect during the investigation (Sijerčić-Čolić *et al*., 2005, p. 587). What is more, such a view has been embraced by the Constitutional Court of Bosnia and Herzegovina in one of its decisions brought in 2017 (The Partial Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina, no. U-5/16, §§ 68-72). Namely, in the case in question, the Constitutional Court of Bosnia and Herzegovina has taken the view that the order for the conducting of the investigation is an internal and preparatory act of the prosecutor. In support of this view, the Constitutional Court of Bosnia and Herzegovina held that the order for the conducting of the investigation does not have to be delivered to the suspect, where the suspect does not have to be notified on the initiation of the investigation nor on any of procedural actions executed against him/her in the

[304] The investigation is the first stage not only within the general (ordinary) criminal proceedings but also within some special criminal proceedings, such as the proceedings for rendering the penal order and the criminal proceedings against legal persons. What is more, the investigation is the only mandatory stage of the criminal proceedings in Bosnia and Herzegovina, given that the criminal procedure can advance to its next phase only on the condition that the investigation is completed, whereby the suspect must be examined during the investigation if the prosecutor intends to file the indictment.

[305] In accordance with the provision of Article 216(2) of the CPA of B&H, the order on conducting the investigation must contain: data on perpetrator if known, descriptions of the act pointing out the legal elements which make it a crime, legal name of the criminal offense, circumstances that confirm the grounds for suspicion for conducting an investigation and existing evidence. Besides, the prosecutor shall list in the order in question which circumstances need to be investigated and which investigative measures need to be undertaken.

[306] In that regard, „the change of the subject with investigative function from the judge to prosecutor results in the loss of implicit judicial protection of individual rights". (Đurđević, 2013a, p. 1002)

course of the investigation. The Constitutional Court has further observed that the mere issuance of an order to conduct the investigation does not generate any consequences for the suspect in terms of restriction of certain rights. Finally, following the preceding arguments as regards the order for the conducting of the investigation, the Constitutional Court of Bosnia and Herzegovina has concluded that the provision of the CPA of B&H regulating the content of the order on conducting the investigation is in line with Article III(3)(e) of the Constitution of Bosnia and Herzegovina, as well as with Articles 6 and 13 of the ECHR (The Partial Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina, no. U-5/16, §§ 71-72).

However, these arguments are unpersuasive, since the criminal procedure itself, in the first place, is a repressive measure of the state directed against the affected individual (Grubač, 2014, p. 222). Moreover, it is an undeniable fact that the opening of the criminal procedure imposes certain obligations upon the citizen and limits his/her rights and freedoms, and for this reason, the decision initiating criminal procedure must be susceptible to judicial review with the aim of protecting the individual against unfounded or unlawful criminal prosecution (Grubač, 2014, *ibid.*). Also, even though during the investigation there is no formal indictment act upon which the court would make a decision, the order on conducting the investigation, nonetheless, constitutes a criminal charge (an indictment act) in a substantive sense, considering that the order in question contains the description of the criminal offense for which a certain person is charged (Škulić, 2015, p. 40). Besides, according to the provisions of Article I(2) of the Constitution of Bosnia and Herzegovina (democratic principles), Bosnia and Herzegovina shall operate under the rule of law. With regards to this, an element inherent to the rule of law, despite not being explicitly stipulated by the Constitution of Bosnia and Herzegovina, is the principle of legal certainty, which is a view confirmed in numerous decisions of the Constitutional Court of Bosnia and Herzegovina (Steiner *et al.*, 2010, pp. 88-93). Furthermore, the principle of legal certainty requires that individuals have effective legal protection from the arbitrariness of the bodies of state authority when the latter execute their competences (Steiner *et al.*, 2010, pp. 90-92), whereby judicial protection plays a crucial role when shielding individuals from such unconstitutional or unlawful proceedings.

Turning back to the issue of the power of the prosecutor to unilaterally initiate the investigatory stage of the criminal procedure, the question is why the procedural behaviour of the prosecutor would not be susceptible to the same level of scrutiny as is the case with the court, whose decisions brought in the first instance are, as a rule, susceptible to the review of the second-instance court, thus enabling a higher authority to examine the disputed decision in an impartial and objective manner, ensuring, in doing so, the observance of the rule of law and the principle of legal certainty. In other words, there are no convincing reasons why different standards should apply to the prosecutor when it comes to his/her procedural behaviour. Namely, the requirements derived from the rule of law and the principle of legal certainty incorporated in the Constitution of Bosnia and Herzegovina can hardly be achieved and maintained if the individual is not shielded from ungrounded or unlawful criminal prosecution being exercised by the prosecutor during the investigation. Therefore, following this line of thought, in light of the above considerations,

in addition to obliging the prosecutor to notify the defence of the commencement of the investigation through the delivery of the order on conducting the investigation to the defence, the Bosnian legislator should bestow the suspect and his/her defence attorney with the right to lodge an appeal against the order on conducting the investigation (Pilić & Rajić, 2021, p. 182).

2. 2. The Decision not to Prosecute

2. 2. 1. The Decision not to Prosecute in the Investigation

In addition to significantly reducing the role of the suspect in the first stage of the criminal procedure - the investigation (Dodik, 2012, p. 30), the reform of the criminal procedural legislation of Bosnia and Herzegovina also marginalized the procedural legal standing of the victim of the criminal offense (hereinafter: the victim) in each stage of criminal proceedings, considering that the role of the victim[307] in the criminal procedure is practically confined to the role of the witness on the condition that the prosecutor deems that it is necessary to hear the victim in that capacity (Dautbegović & Pivić, 2010, pp. 13-32). The present-day criminal procedural legislation does not contain the definition of the victim. The term victim is only sporadically mentioned in few provisions of the CPA of B&H. It is worth observing that the victim can participate in the criminal procedure only in the capacity of the injured party, which is defined as a person whose personal or property rights have been threatened or violated by the criminal offense (Article 20(h) of the CPA of B&H), whereby the notion of the injured party refers to both natural and legal persons (Sijerčić-Čolić, 2012a, p. 231). As a result of the reform of the criminal procedure of Bosnia and Herzegovina, notwithstanding the fact that one of the principal aims was the democratization of the criminal procedure as a whole and the enhancement of human rights of its participants, the victim has lost the possibility to acquire the status of a party to the criminal procedure in the roles of the subsidiary prosecutor and the private prosecutor, since the (public) prosecutor has completely monopolized the function of criminal prosecution (Novokmet, 2015, p. 416).

The weakened legal standing of the injured party is clearly perceived when one takes into account the injured party's possibilities and rights in the case of the decision not to prosecute. The injured party has the following rights during the investigation: to file a report on the committed criminal offense, to file the claim under property law, to be notified of

[307] The Criminal Procedure Act of Bosnia and Herzegovina, the Criminal Procedure Act of the Federation of Bosnia and Herzegovina, the Criminal Procedure Act of the Brčko District of Bosnia and Herzegovina contain identical provisions with regard to the procedural standing of the victim of the criminal offense in the event of the decision not to prosecute. The procedural solutions examined in this paper are those of the Criminal Procedure Act of Bosnia and Herzegovina. Nonetheless, this analysis is relevant to the criminal procedural legislation of the Federation of Bosnia and Herzegovina and those of the Brčko District of Bosnia and Herzegovina. However, the procedural solutions contained in the Criminal Procedure Act of the Republic of Srpska are different in that respect. Hence, the analysis of this paper and conclusions does not refer to the legal system of the Republic of Srpska, since its legal system grants the victim of the criminal offense different (broader) rights in the event of the decision not to prosecute.

the non-conduct and discontinuation of the investigation, and to file a complaint against such decisions, and the right to be heard as a witness (both in the investigation and at the main hearing) (Simović, 2014, p. 51). The decision not to prosecute may occur in the investigation in two procedural situations. As a corollary of the right and duty to issue the order on conducting the investigation, the prosecutor also has the right to issue the order not to conduct the investigation. Furthermore, only the prosecutor may discontinue the investigation by rendering the order to discontinue the investigation (Simović & Šikman, 2017, p. 381). It is worth observing that grounds for the nonconduction and the discontinuation of the investigation are factual and legal (Sijerčić-Čolić, 2012b, pp. 35-36, 55). When the prosecutor orders that the investigation shall not be conducted, he/she must notify the injured party and the person who reported the offense within 3 (three) days of the fact that the investigation shall not be conducted, as well as of the reasons thereof (Article 216, paragraph 4 of the CPA of B&H). In such a case, the injured party and the person who reported the offense have the right to file a complaint with the chief prosecutor's office within 8 (eight) days (Article 216, paragraph 4 of the CPA of B&H). The same procedure applies after the prosecutor renders the order to discontinue the investigation, but the person who reported the offense does not have the right to file a complaint in this case (Article 224, paragraph 2 of the CPA of B&H).[308]

However, the complaint is regulated in an inappropriate and too superficial manner, given that the legislator left out a number of issues related to the complaint from the CPA of B&H (Barašin & Hasanspahić, 2009, p. 513). Namely, when regulating the complaint against the order not to conduct the investigation and the order to discontinue the investigation, the criminal procedural legislation prescribes only: 1) subjects to which the right to file the complaint belongs - the injured party and the person who reported the offense, while the right to file the complaint against the order to discontinue the investigation belongs exclusively to the injured party; 2) the obligation of the prosecutor to notify in writing the aforementioned persons of the reasons for non-conduct and the discontinuation of the investigation within (3) three days from the day of issuing the order on non-conduct, i.e. the discontinuation of the investigation; 3) the body to which the complaint is submitted which is the office of the chief prosecutor; 4) the deadline for filing the complaint, which is eight days from the day of the delivery of the notification that the prosecutor has decided not to conduct the investigation or that he/she decided to discontinue the investigation (Janković, 2018, p. 217). The shortcomings of the complaint consist in the following. In the first place, the law in question does not determine within whose competence it is to decide on the submitted complaint of the injured party. The CPA of B&H only stipulates that the complaint is submitted to the office of the chief prosecutor, but this does not mean that bringing the decisions regarding the complaint is within his/her competence (Dodik, 2012, pp. 27-28). Besides, the CPA of B&H does not stipulate the composition of the office of the chief prosecutor. In summary, the Bosnian legislator does not regulate who should decide upon the submitted complaint of the injured party.

[308] It is worth observing that the order not to conduct the investigation and the order to discontinue the investigation become final if the complaint is not filed or if the complaint is dismissed as inadmissible or rejected as ungrounded.

All things considered, the question arises as to whether the complaint against the order not to conduct the investigation, that is, the complaint against the order to discontinue the investigation should be the responsibility of the acting prosecutor, the chief prosecutor, the chief prosecutor's office, or whether it should be decided on by the college of prosecutors of the relevant prosecutor's office (Dodik, 2012, *ibid.*). Therefore, it is clear that the law in question does not ensure that the complaint of the injured party is examined objectively and impartially, due to the fact that there is no guarantee that the authority or the official person exercising review of the decision not to prosecute is different from the authority or the official person making such a contested decision in the first place (Novokmet, 2015, p. 418). In the second place, the law also does not stipulate the deadline for making decisions with regard to this legal remedy. In the third place, the provisions of the criminal procedural legislation of Bosnia and Herzegovina also do not prescribe nor govern the procedure that follows after the submission of the complaint. In the fourth place, the CPA of B&H does not regulate the admissibility and the groundedness of the complaint. In the fifth place, the additional omission of the Bosnian legislator consists in the fact that the prosecutor is not obliged to notify the injured party about the outcome of the procedure upon the submitted complaint. In the sixth place, the CPA of B&H does not regulate whether the prosecutor must bring a formal decisions upon the submitted complaint of the injured party, nor the form of such decisions, namely, whether it is a ruling or an order. Hence, all of these questions regarding the complaint are left to each individual prosecutor's office to determine by its internal regulations, which leads to turning the procedure triggered by the complaint into an administrative matter (Grubač, 2005, p. 535). Such a procedural solution is unacceptable, since this legal remedy is the only form of control over the decision not to prosecute in the investigative stage of the criminal proceedings. Considering all these omissions of the Bosnian legislator when it comes to the procedure that follows after the submission of the complaint, the legal remedy in question does not satisfy the requirement of an effective legal remedy. In other words, the criminal procedural legislation does not regulate the legal destiny of the submitted complaint. Hence, all things considered, the complaint against the order not to conduct the investigation and the order to discontinue investigation remains a dead letter of the law (Novokmet, 2015, *loc. cit.*). It seems therefore that the right to file the complaint is the right of a purely declarative nature that does not bear any practical consequences to the outcome of the criminal proceedings (Halilović, Adžajlić-Dedović & Budimlić, 2019, p. 84).

What is more, it is worth pointing out that the complaint, as envisaged by the Bosnian legislator, is not considered an effective legal remedy in light of the jurisprudence of the ECtHR for the purposes of Article 35 of the ECHR (Schabas, 2015, p. 552). Namely, according to the well-established case-law of the ECtHR, as regards an appeal to a higher prosecutor, such a hierarchical appeal does not give the person making it a personal right to the exercise by the state of its supervisory powers (*Horvat v. Croatia*, § 47, *Belevitskiy v. Russia*, § 59). Furthermore, the ECtHR observed that a hierarchical complaint presents an information statement followed by a request to that authority to make use of its power to order an additional inquiry if it deems appropriate to do so. Hence, the higher prosecutor is not obliged to hear the complainant, and the subsequent proceedings are entirely a

matter between the supervising prosecutor and his subordinates. Consequently, the complainant does not have a role of a party to any proceedings and is entitled only to obtain information about the way in which the supervisory body has dealt with his hierarchical appeal (*Belevitskiy v. Russia*, § 60). Hence, taking into account the above analysis of the provisions of the CPA of B&H regulating the complaint, and the cited judgments of the ECtHR, it is an undeniable fact that the complaint against the order not to conduct the investigation, that is, the complaint against the order to discontinue the investigation is not effective legal remedy that would enable the victim to challenge the decision not to prosecute rendered in the investigation.

In addition, according to the ECtHR, the victim must be notified of the decision not to prosecute and be provided with access to the investigation and court documents in order to participate effectively in proceedings aimed at challenging the decision not to prosecute (*McKerr v. the United Kingdom*, §§ 111-115; *Ramsahai and Others v. the Netherlands* [GC], § 349). In the case of *Khamzayev and Others v. Russia*, the ECtHR found the violation of the right to life with regard to an effective investigation, since the applicants were only notified of the outcome of the criminal proceedings, but did not have the access to the decision not to prosecute (*Khamzayev and Others v. Russia,* §§ 205-207). The ECtHR held in the same case that the applicants could have hardly identified possible defects in the investigation and brought them to the attention of a domestic court, or presented, in a comprehensive appeal, any other arguments that they might have considered relevant. In other words, taking into account the circumstances of the case in question, the applicants were left without a realistic opportunity to effectively challenge the decision not to prosecute (*Khamzayev and Others v. Russia,* § 205). In the same vein, in the case of *Anık and Others v. Turkey,* the ECtHR found the violation of the procedural obligation regarding an effective investigation because the applicants were deprived of the opportunity to effectively challenge the decisions not to prosecute, given they could only have the access to their own statements but not to any other documents from the investigation file (*Anık and Others v. Turkey*, §§ 75-79). Consequently, the Bosnian law does not satisfy the requirements stemming from the jurisprudence of the ECtHR, since the injured party is not entitled to inspect the case file, and the decision not to prosecute rendered in the investigation does not have to be delivered to the injured party, whereby the latter does not have the right to request to be provided with the copy of such a decision.

2. 2. 2. The Decision not to Prosecute in the Indictment Proceedings

After the prosecutor completes the investigation, he is obliged to prepare and refer the indictment to the preliminary hearing judge (Article 226, paragraph 1 of the CPA of B&H). These procedural actions mark the termination of the investigation and the beginning of the next stage of the criminal proceedings - the indictment proceedings. The prosecutor may employ the principle of mutability in the course of the indictment proceedings and desist from prosecution. In this stage of the procedure, the prosecutor desists from prosecution by withdrawing the indictment. The conditions, as well as the consequences of the withdrawal of the indictment, are stipulated in Article 232 of the CPA

of B&H, under which the prosecutor may withdraw the indictment without prior approval before its confirmation, or after the confirmation and before the commencement of the main hearing, only with the approval of the preliminary hearing judge who confirmed the indictment in question. Hence, the prosecutor may desist from prosecution both before the confirmation of the indictment, and after the confirmation of the indictment. However, bearing in mind the cited provision, there is no doubt that conditions for the withdrawal of the indictment are not the same in both cases, considering that the withdrawal of the indictment after its confirmation is conditional upon the approval of the preliminary hearing judge who previously confirmed the indictment in question. Before the confirmation of the indictment, the prosecutor may withdraw the indictment by simply filing the request for withdrawal with the court, without having to provide reasons for doing so. In contrast, after the confirmation, the prosecutor must provide the reasons for withdrawal, since providing reasons enables the preliminary hearing judge to establish whether such a prosecutorial action is in accordance with the law governing criminal procedure (Sijerčić-Čolić, 2012b, p. 79). At first glance, the mandatory review over the decision not to prosecute after the confirmation of the indictment offers significant protection to the injured party. However, on close examination, it can be concluded that this is not the case. Namely, even if the preliminary hearing judge finds that the request for the withdrawal of the indictment is ungrounded and decides not to adopt such a request, the prosecutor may unilaterally desist from prosecution in the course of the main hearing without any restrictions. The consequences of the withdrawal are the same in both cases, since the court issues the decree discontinuing the criminal proceedings, which is delivered to the suspect (if the withdrawal occurred before the confirmation of the indictment), the accused (if the withdrawal occurred after the confirmation of the indictment and before the commencement of the main hearing), the defence attorney, the injured party (Article 232, paragraph 2 of the CPA of B&H). In that case, an interesting situation arises. In this connection, the posed question is whether the injured party has the right to file the appeal against the decree discontinuing the criminal proceedings. According to the provision of Article 318, paragraph 1 of the CPA of B&H, the parties, the defence attorney, and persons whose rights have been violated may always file the appeal against the decree of the court rendered in the first instance unless when it is explicitly prohibited to file the appeal under the CPA of B&H. When it comes to the right to appeal against the first-instance judgment, the injured party may only submit the appeal with respect to on the costs of the criminal proceedings and with respect to the decision on the claim under property law (Article 293, paragraph 4 of the CPA of B&H). For this reason, it would be difficult to argue that the injured party has more extensive rights regarding the appeal against the decree of the court discontinuing the criminal proceedings than in the case of appeal against the first-instance judgment. Hence, the injured party does not have the right to appeal against the decree discontinuing the criminal proceedings in view of the fact that the law in question does not recognize such a possibility (Halilović, Adžajlić-Dedović & Budimlić, 2019, p. 85). Therefore, with regard to the injured party, the purpose of the delivery of the decree discontinuing the criminal proceedings is only the notification of the final outcome of the proceedings (Pivić, 2017, p. 40).

2. 2. 3. The Decision not to Prosecute in the Main Hearing

The principle of mutability also applies in the course of the main hearing, that is to say, the trial as the main and the central stage of criminal proceedings (Sijerčić-Čolić, 2012b, p. 101). Consequently, the prosecutor may desist from criminal prosecution before the end of the main hearing (Article 38 of CPA of B&H) by dropping the charge. In such a case, the court has no other option but to hand down the judgment rejecting the charge (Article 283(b) of the CPA of B&H). Therefore, given that the prosecutor has the right to desist from prosecution during the main hearing, the posed question is when this stage of the criminal procedure commences and ends. While the main hearing commences with the reading of the indictment (Article 260, paragraph 1 of the CPA of B&H), the end of this stage of the criminal proceedings is associated with the closing arguments. Upon the completion of the evidentiary proceedings, the judge or the presiding judge shall call for the prosecutor, injured party, defence attorney, and the accused to present their closing arguments (Article 277, paragraph 1 of the CPA of B&H). When all closing arguments are completed, the judge or the presiding judge shall declare the main hearing closed, and the court shall retire for deliberation and voting for the purpose of reaching the verdict (Article 278 of the CPA of B&H). Considering the provisions of the criminal procedural legislation of Bosnia and Herzegovina dealing with the commencement and the closing of the main hearing, the prosecutor may desist from criminal prosecution after reading the indictment and before presenting his/her closing arguments (Sijerčić-Čolić *et al*., 2005, p. 726). Hence, the prosecutor may desist from criminal prosecution in the closing arguments, since the main hearing is still not closed in this procedural moment (Simović & Simović, 2014, p. 160).

In addition to having the right to desist from prosecution in each stage of the first-instance criminal proceedings, the prosecutor may also desist from prosecution in the course of the second-instance proceedings (Sijerčić-Čolić *et al*., 2005, *loc. cit*.). Turning back to the provision of Article 38 of the CPA of B&H governing the principle of mutability, the prosecutor may desist from criminal prosecution during the proceedings before the second-instance panel, when so envisaged by the CPA of B&H. Nevertheless, the CPA of B&H does not offer a clear answer when it comes to the right of the prosecutor to desist from prosecution during the second-instance proceedings. However, the provisions applying to the main hearing in the first-instance proceedings also apply to the hearing in the second-instance proceedings (Article 317, paragraph 1 of the CPA of B&H). Hence, the prosecutor may drop the charge during the second-instance proceedings upon the condition that the hearing is being held in this stage of the criminal procedure.

If the prosecutor desists from criminal prosecution during the main hearing, the court does not have any possibility to proceed with the main hearing, since one of the main prerequisites for the conducting of criminal proceedings - the request of the authorized prosecutor is missing. In that case, furthermore, the accused also does not have the right to request the further conduct of proceedings. Last but not least, the injured party does not have any procedural instruments at his/her disposal to prevent the prosecutor from dropping the charge. Therefore, speaking of the considered provisions, it is unclear why the withdrawal of the indictment after its confirmation is conditional upon the approval of the

court, while the dropping of the charge that has the same consequence is not susceptible to any restrictions or control even though it comes into play immediately after the reading the indictment (Grubač, 2005, p. 540).

In addition, according to the well-established case-law of the ECtHR, the procedural requirements derived primarily from Article 2 and Article 3 of the the ECHR oblige national authorities to institute and conduct an investigation capable of leading to the establishment of the facts and identifying and – if appropriate – punishing those responsible (*Sabalić v. Croatia*, § 96). Furthermore, in the case when the official investigation has led to the institution of criminal proceedings in the national courts, the proceedings considered as a whole, including the trial stage, must satisfy the requirements of Article 2 and Article 3 of the ECHR (*M.C. and A.C. v. Romania*, § 112; *Sabalić v. Croatia*, § 96). Accordingly, the requirement of effective investigation developed in the jurisprudence of the ECtHR is not exclusively confined to the investigation, but is applicable in the entire criminal proceedings, including indictment proceedings, the main hearing, and proceedings before the court of the second instance, that is to say, appeals proceedings (Đurđević, 2014, p. 75). Hence, taking into account the above considerations, the possibility of the prosecutor to unilaterally withdraw the indictment during the indictment proceedings and to drop the charge during the main hearing without any form of external control is contrary to the requirement stemming from the positive procedural obligation of an effective investigation that applies during the entire criminal proceedings (*Öneryildiz v. Turkey*, § 95), including the trial stage (Seibert-Fohr, 2009, p. 137). Having regard to this, it is worth pointing out that the victim cannot realize his/her legal standing in the criminal proceedings if the prosecutor can unilaterally make the decision not to prosecute that is not susceptible to any review mechanism, as is the case in the criminal procedural legislation of Bosnia and Herzegovina during the indictment proceedings, the main hearing, and the hearing (the trial) before the second-instance panel.[309]

3. THE CONTROL OF CRIMINAL PROSECUTION IN THE REPUBLIC OF CROATIA

3. 1. The Decision to Prosecute

The CPA of Croatia adopted in 2008 is still in force, albeit it has gone through significant amendments with the purpose of correcting its many flaws stemming from its contradictoriness to the Constitution of the Republic of Croatia and the ECHR (Đurđević, 2012, pp. 409-438). With regard to the institution of the investigation, the Croatian legislator at first adopted the same procedural solution, according to which the state attorney had

[309] According to Myers (2003, p. 253), among other things, the elimination of prosecutorial discretion coupled up with the strong victim participation in the criminal procedure, as well as an active judicial role in pre-trial decision-making process expressed in the power of the court to control the criminal proceedings in sense that the court may investigate when the prosecutor declined to do so, and the power of the court to exercise the review of the decision not to prosecute, can contribute to effective criminal prosecution of serious human rights violations while they offer the protection to the victim at the same time. As we have seen in the above analysis, all these procedural instruments are missing from the criminal procedural legislation of Bosnia and Herzegovina.

the right to unilaterally assess the legal and factual requirements for criminal prosecution without any form of external control. Nevertheless, such a construction of the investigation that left the accused without any protection against groundless and unlawful criminal prosecution in the course of this stage of criminal proceedings encountered harsh criticism as being unconstitutional (Đurđević, 2010, pp. 7-23). Therefore, with the aim of rendering the criminal procedure legislation compliant with the decision of the Constitutional Court of the Republic of Croatia that struck down numerous provisions of the CPA of Croatia, the original text of the CPA was comprehensively amended in 2013 (Novokmet, 2017, p. 382). The significance of the adopted amendments consists in the fact that they present the constitutionalization and the judicialization of the pre-trial proceedings considering that they have reintroduced judicial control of criminal prosecution (Đurđević, 2013b). In so doing, the Croatian legislator has abolished the monopoly of the state attorney in terms of criminal prosecution on the one hand, while returning the investigation in the framework of the criminal procedure in the narrow sense, on the other hand. In the abovementioned decision, the Constitutional Court of the Republic of Croatia has confirmed that judicial protection from unlawful criminal prosecution is inherent to the spirit of the Croatian Constitution, thereby constitutionalizing the right to judicial protection during the entire criminal proceedings (Đurđević, 2012, p. 425).[310]

According to the amendments of the CPA of Croatia in question, the investigation commences with the decree on the investigation (Article 217, paragraph 1 of the CPA of Croatia). Rendering of the decree on the investigation is within the competence of the state attorney (Article 217, paragraph 1 of the CPA of Croatia). Under the present solutions of the criminal procedural legislation with regard to the conducting of the investigation, the state attorney may initiate and conduct the investigation only against the identified individual against whom there is a reasonable suspicion that he/she has committed the criminal offense (Article 217, paragraph 1 of the CPA of Croatia). What is more, unlike its Bosnian counterpart, the Croatian legislator took care that the individual subjected to criminal proceedings has the right to be notified of the initiation of criminal proceedings, that is to say, of criminal charges understood in a substantive sense. More precisely, the public prosecutor is under the obligation to provide the suspect with a decree of investigation accompanied with the information on his or her rights within 8 days after the issue of the decree, and the suspect may lodge an appeal against the decree and submit it to the investigative judge within the subsequent 8 days (Article 218, paragraphs 1 and 2 of the CPA of Croatia). Consequently, the appeal against the decree on the investigation ensures judicial control over the legality of criminal prosecution in the investigative stage of criminal

[310] It is worth emphasizing that the Constitutional Court of the Republic of Croatia relied on many constitutional provisions when it established the requirement of judicial control of criminal prosecution during the investigation, which had been absent from the domestic criminal legislation since the adoption of the original CPA of Croatia. Among other things, the Constitutional Court of the Republic of Croatia has derived the requirement of judicial protection from criminal prosecution from the rule of law as one of the highest values of the constitutional order of the Republic of Croatia (Article 3 of the Constitution of the Republic of Croatia), the principle of constitutionality and legality (Article 5 of the Constitution of the Republic of Croatia), the general guarantees of Article 29 of the Constitution of the Republic of Croatia and those of Article 6 of the ECHR (Đurđević, 2012, p. 426).

proceedings, since it enables the court to establish whether the state attorney has properly assessed the existence of the assumptions for criminal prosecution - reasonable doubt and procedural impediments (Novokmet, 2017, p. 383).[311] In other words, this legal remedy enables judicial control over the function of the criminal prosecution in the investigative stage of criminal proceedings, at the beginning of the investigation. Besides, it is an undeniable fact that such an approach of the Croatian legislator is in accordance with the requirements stemming from the right to a fair trial, considering that the accused must be notified about the criminal charge having in mind that the decree on the investigation is the criminal charge understood in substantive sense.

Therefore, taking into account the provisions of the criminal procedural legislation of Croatia relating to the control of criminal prosecution in the course of the investigation, it is clear that the Croatian legislator has succeeded in reconciling the prosecutorial investigation, as one of the defining features of criminal procedure, with the legal requirement of strong judicial control of the legality of criminal prosecution, derived from the letter and the spirit of the Constitution of the Republic of Croatia. Consequently, on the one hand, the control over the initiation and conduct of the investigation has remained in the hands of the state attorney, that is to say, the public prosecutor, while, on the other, the person affected by the criminal proceedings gained the right to request the judicial control of the legality of criminal prosecution if he/she considers that some legal or factual assumptions from criminal prosecution are missing. Accordingly, in terms of the decision to prosecute made during investigation, Croatian criminal procedure satisfies the requirement of effectiveness while, at the same time, it prevents the state attorney from being a monopolist with regard to the function of the public criminal prosecution, thereby shielding the accused from unlawful and ungrounded criminal prosecution during the investigation.

3. 2. The Decision not to Prosecute

If some of the factual or legal assumptions for the institution of criminal prosecution stipulated by the CPA of Croatia are missing, the state attorney shall desist from criminal prosecution. Consequently, the state attorney may desist from criminal prosecution in different stages of criminal proceedings, until the completion of the main hearing before the criminal charge is consumed by the decision of the competent court (Pavišić, 2013, p. 192). However, the Croatian legislator has protected the victim from the arbitrariness of the state attorney when it comes to his/her right to desist from prosecution. It is worth observing that Croatian law provides the victim with broad possibilities to participate in the course of criminal proceedings in different roles. The victim may participate in the course of criminal proceedings in the role of the injured party, the role of the subsidiary

[311] The court shall revoke the decree on the investigation if: (1) the offense the defendant is charged with is not an offense subject to public prosecution; (2) there are circumstances that exclude the defendant's culpability unless he or she committed the offense in the state of diminished mental capacity; (3) the period of limitation for the institution of prosecution has expired, the offense is amnestied or pardoned, or other circumstances exist barring prosecution, and; (4) there are no reasonable grounds that the defendant committed the offense (Article 218, paragraph 3(3) of the CPA of Croatia).

prosecutor, or the role of the private prosecutor (Pavišić, 2013, p. 195). As we can see, Croatian law has retained the institution of the subsidiary prosecutor that enables the victim of the criminal offense to acquire party capability on the side of prosecution and to become the authorized prosecutor during criminal procedure. According to the provision of Article 2, paragraph 4 of the CPA of Croatia, if the state attorney finds that there are no grounds for the institution or the continuation of criminal prosecution, the victim may assume the role of the authorized prosecutor in the capacity of the injured party as the prosecutor on the condition of satisfying certain requirements. Hence, in Croatian law, the review of the proceedings of the state attorney is exercised through the institution of the subsidiary prosecution (Tomašević & Pajčić, 2008, p. 835). Accordingly, the possibility of the injured party to assume the role of the authorized prosecutor has been introduced with the aim of ensuring supervision over the decision-making of the state attorney with regard to the decision not to prosecute or the decision to desist from criminal prosecution (Krapac, 2015, p. 226). Thus, the injured party is entitled to institute or to continue criminal prosecution in the course of the preliminary proceedings, the process of accusation, and judicial review of the indictment, as well as in the course of the main hearing (Novokmet, 2016, p. 103). With the aim of enabling the injured party to exercise the role of the prosecutor properly, the Croatian legislator has provided the injured party with adequate procedural instruments. Among other things, the injured party has the right to inspect the case file (Article 51, paragraph 1(7) of the CPA of Croatia). Also, the injured party has to right to be notified of the outcome of criminal proceedings (Article 51, paragraph 1(11) of the CPA of Croatia). If the state attorney decides that there are no grounds for the institution of criminal procedure and consequently desists from criminal prosecution, he/she must notify the victim of such a decision (Article 55, paragraph 1 of the CPA of Croatia). The same obligation arises when the court discontinues the criminal proceedings by its decree on the basis of the state attorney's desistance from criminal prosecution in other cases (Article 55, paragraph 1 of the CPA of Croatia). In such cases, among other things, the state attorney and the court must notify the victim of his/her right to take over the prosecution from the state attorney in the role of the subsidiary prosecutor (Article 55, paragraph 1 of the CPA of Croatia). The victim may undertake or continue criminal prosecution within eight days from receiving such notification (Article 55, paragraph 2 of the CPA of Croatia). Therefore, the request of the injured party becomes the procedural assumption for the initiation or the continuation of the criminal procedure in the case of the decision not to prosecute rendered by the state attorney.[312]

Upon assuming the role of the authorized prosecutor, the victim acquires the possibility to independently and autonomously prosecute the case before the competent criminal court, regardless of the opinion of the state attorney in terms of the groundedness of criminal prosecution in that particular case (Kamber, 2017, p. 469). It follows that in such cases

[312] With the aim of preventing possibly vindictive prosecutions on the part of the injured party, the CPA of Croatia restrains his/her right to assume the prosecution in two ways: 1) by fixing the time period (generally, eight days) within which he/she ought to overtake criminal prosecution (if he/she fails to do so, he/she is deemed to have desisted from prosecution; and 2) by providing that the court must agree with the injured person's overtake of criminal prosecution (Krapac, 2002, pp. 160-161).

the function of criminal prosecution is entirely in the hands of the victim, who, unlike the state attorney, is not bound by the principle of legality of prosecution (Kamber, 2017, *ibid.*). Hence, the procedural solution that turns the injured party into an authorized prosecutor functions as a counterbalance and corrective of the monopoly of the state attorney over the criminal prosecution (Krapac, 2015, *loc. cit.*). What is more, on assuming criminal prosecution from the state attorney, the victim becomes a party to criminal proceedings in the capacity of the subsidiary prosecutor, with all the rights of the state attorney except for those belonging to him/her as a body of state authority (Article 55, paragraph 1 of the CPA of Croatia). In so doing, the injured party becomes an ally of the state to whom the state entrusts the execution of the public function of criminal prosecution, for the reason that the state attorney was not willing to do so even though he/she was obligated to undertake prosecution in accordance with the principle of legality of criminal prosecution (Novokmet, 2015, p. 420).[313] Consequently, it is clear that the institution of the subsidiary prosecutor, to some extent, contributes to the observance of the principle of legality of criminal prosecution. In summary, the right to participate in criminal proceedings in the capacity of the subsidiary prosecutor provides the victim with the right to realize the right to punishment independently of the state attorney who has previously decided that the given case did not require criminal prosecution. With regards to this, the ECtHR holds the view that the possibility of the victim to act in the capacity of the subsidiary prosecutor may fulfil the requirements of an effective investigation; hence, in so doing, the victim, through his procedural activity in the role of the authorized prosecutor, may assist the state in the realization of its procedural obligation under the ECHR, on the condition that the victim has adequate procedural instruments at disposal when pursuing criminal prosecution (*Otašević v. Serbia*, §§ 34-37). Following this line of thought, the institution of subsidiary prosecution abandoned in 2003 should be reintroduced in the criminal procedural legislation of Bosnia and Herzegovina.

On the other hand, the review model of the decision not to prosecute based on the concept of the injured party as a prosecutor (the subsidiary prosecutor) has certain shortcomings. Specifically, the reason for this lies in the fact that the criminal procedural legislation of Croatia, when it comes to the control of the negative decisions of the state attorney, places the burden on the victim, given that there are no other mechanisms to control or review of the decision not to prosecute. Thus, it seems that the Croatian legislator expects that the victim will regularly make the right assessment in terms of the groundedness of criminal prosecution if the state attorney, who is a professional bestowed with significant authority over law enforcement agencies, which enables him to properly assess the facts of the case,

[313] However, in criminal proceedings conducted upon the request of the victim acting in the role of the subsidiary prosecutor, the state attorney is entitled to assume and to represent criminal prosecution prior to the conclusion of the main hearing (Article 55, paragraph 2 of the CPA of Croatia). Hence, the possibility of the state attorney to change his initial opinion and assume criminal prosecution from the injured party, depriving him/her of the role of a party to criminal proceedings is an argument in support of the view that the right to punish is not a right of the victim but the right of the state, exercised through the state attorney or other authorized prosecutor (Novokmet, 2016, p. 104). If that is the case, the victim loses his/her position as the subsidiary prosecutor, but may continue to participate in the proceedings by performing other victim participatory rights (Kamber, 2017, *loc. cit.*).

desists from criminal prosecution without grounds. Nonetheless, such an approach leaves room, to some extent, for the actual privatization of criminal prosecution, which is a public function belonging to the state itself, and which should be consequently exercised by the bodies of the state authority. The argument presented above is in line with the views taken in the jurisprudence of the ECtHR. For instance, the ECtHR emphasized in the case of *Remetin v. Croatia* that the investigation and prosecution of serious human rights violations is primarily the task of the bodies of state authority (*Remetin v. Croatia*, § 112). Besides, the state should not expect from the victim to overtake criminal prosecution if the prosecutor desists from criminal prosecution since the latter is by all accounts better equipped to perform the function of criminal prosecution, having in mind his expertise and the powers which he possesses as the body of state authority (*Otašević v. Serbia*, § 25; *Stojnšek v. Slovenia*, § 79). What is more, the ECtHR has made it clear that the omissions or inactivity on the part of investigating authorities or criminal prosecuting authorities can impede the possibility of the victim to realize criminal prosecution in the capacity of the subsidiary prosecutor (*Aksoy v. Turkey*, § 98; *Jasar v. "the former Yugoslav Republic of Macedonia"*, § 59). Hence, in light of the above considerations, the Croatian legislator should reconsider the aptness of its review model of negative decisions of the state attorney, which is entirely based on the concept of subsidiary prosecution. Therefore, in the future, the victim should be provided with additional procedural instruments in the case when the state attorney decides not to prosecute or desists from criminal prosecution in the course of criminal procedure, such as the introduction of the possibility of judicial review of the above mentioned decisions at the request of the victim.

4. CONCLUSION

Bearing in mind the above considerations, it is clear that criminal prosecution in Bosnia and Herzegovina has become the monopoly of the prosecutor who completely independently and autonomously decides whether and when to open the investigation, as well as against whom the investigation will be opened and conducted. Therefore, the suspect, as a person against whom the investigation is being conducted, is left without judicial or any other protection from unlawful criminal prosecution in the investigatory stage of the criminal proceedings. Such a construction of the investigation opens the possibility for the arbitrariness of the prosecutor when it comes to the initiation and the conducting of criminal prosecution, which is unacceptable from the perspective of the principle of the rule of law and principle of legal certainty which are incorporated in the Constitution of Bosnia and Herzegovina. Besides, the prosecutor is also empowered to unilaterally decide not to undertake criminal prosecution, or to desist from criminal prosecution in the course of criminal procedure. As we have seen, such power of the prosecutor violates the requirements derived from the jurisprudence of the ECtHR in terms of the notion of an effective investigation, which is a fundamental right of the victim of serious human rights violations under the ECHR.

Therefore, all things considered, the Bosnian legislator should follow the example of the criminal procedural legislation of Croatia, and reintroduce judicial control of

the initiation of the investigation. Additionally, the criminal procedural legislation of Bosnia and Herzegovina should be amended to enable the victim to undertake or take over criminal prosecution in the capacity of the subsidiary prosecutor in the case when the (public) prosecutor desists from criminal prosecution. As it has been demonstrated, the ECtHR took the view that the possibility of the victim to proceed in the role of the subsidiary prosecutor is an effective procedural mechanism for the purpose of correcting the flaws of prosecuting authorities when the latter decide not to prosecute. All in all, as regards the criminal procedural legislation of Bosnia and Herzegovina, the rejudicialization of the investigation expressed through the ability of the court to control the existence of assumptions for criminal prosecution during the investigation, coupled with the reintroduction of the institute of the subsidiary prosecutor would bring a number of benefits. First and foremost, in so doing, criminal prosecution would no longer be the monopoly of the prosecutor. Secondly, the suspect would gain protection from the arbitrariness of the prosecutor in terms of the initiation of the investigation. Thirdly, the right of the victim to an effective investigation as a requirement stemming from the jurisprudence of the ECtHR would not be susceptible to the discretionary assessment of the prosecutor regarding the decision not to prosecute. Fourthly, the principle of legality of criminal prosecution, which is currently degraded and devalued, would be restored. Last but not least, the proposed amendments would make the criminal procedural legislation in line with the provisions of the Constitution of Bosnia and Herzegovina and jurisprudence of the ECtHR as well.

LIST OF REFERENCES

Barašin, M. & Hasanspahić, Ć. 2009. Način rješavanja prigovora/pritužbi na odluke tužilaca u kontekstu unutrašnjeg funkcionisanja tužilaštva [Manner of Resolving Complaints against Prosecutors' Decisions in the Context of the Internal Functioning of Prosecutor's Office]. *Pravna riječ*, 19, pp. 513-517.

Bayer, V. 1972. *Jugoslavensko krivično procesno pravo: Knjiga prva: Uvod u teoriju krivičnog procesnog prava* [Yugoslav Criminal Procedure Law: Book One: An Introduction to the Theory of Criminal Procedure Law.]. Zagreb: Školska knjiga.

Beloof, D. E. 2005. The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review. *Brigham Young University Law Review*, 2005(2), pp. 225-265.

Brown, D. K. 2018. Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute. *Minnesota Law Review*, 103(66), pp. 843-914.

Bubalović, T. 2008. Novela Zakona o kaznenom postupku BiH od 17. juna 2008. godine - pozitivna rješenja i iznevjerena očekivanja - [Amendments to the Criminal Procedure Act of Bosnia and Herzegovina of 17 june 2008: - Positive Solutions and Betrayed Expectations -]. *Hrvatski ljetopis za kazneno pravo i praksu*, 15(2), pp. 1129-1157.

Dautbegović, A. & Pivić, N. 2010. Položaj oštećenog u krivičnom postupku Bosne i Hercegovine [Position of the Injured Party in the Criminal Procedure of Bosnia and Herzegovina]. *Anali Pravnog fakulteta Univerziteta u Zenici*, 3(5), pp. 7-34.

Dodik, B. 2012. Tužiteljska istraga - iskustva Bosne i Hercegovine [Prosecutorial Investigation - the Experiences of Bosnia and Herzegovina]. In: Petrović, A. & Jovanović, I. (eds.), *Savremene tendencije krivičnog procesnog prava u Srbiji i regionalna krivičnoprocesna zakonodavstva (normativni i praktični aspekti)*. Beograd: Misija OEBS u Srbiji, pp. 23-42.

Đurđević, Z. 2010. Sudska kontrola državnoodvjetničkog kaznenog progona i istrage: poredbenopravni i ustavni aspekt [Judicial Control of Criminal Prosecution and Investigation: Comparative and Constitutional Aspects]. *Hrvatski ljetopis za kazneno pravo i praksu*, 17(1), pp. 7-24.

Đurđević, Z. 2012. Odluka Ustavnog suda RH o suglasnosti Zakona o kaznenom postupku s Ustavom [Decision of the Constitutional Court of the Republic of Croatia on the Compliance with the Constitution of the Criminal Procedure Act], *Hrvatski ljetopis za kazneno pravo i praksu*, 19(2), pp. 409-438.

Đurđević, Z. 2013a. Judicial Control in Pre-Trial Criminal Procedure Conducted by the European Public Prosecutor's Office. In: Ligeti K. (ed.), *Toward a Prosecutor for the European Union, Volume 1: A comparative Analysis*. London: Hart Publishing, pp. 986-1110.

Đurđević, Z. 2013b. Rekonstrukcija, judicijalizacija, konstitucionalizacija, europeizacija hrvatskog kaznenog postupka V. novelom ZKP/08: prvi dio? [Reconstruction, Judicialization, Constitutionalisation, and Europeanisation of the Croatian Criminal Procedure with the 5th Amendment of the Criminal Procedure Act/08: Part One?]. *Hrvatski ljetopis za kazneno pravo i praksu*, 20(2), pp. 313-362.

Đurđević, Z. 2014. Glavna obilježja tužiteljske istrage prema hrvatskom ZKP od 2008. do 2013. godine [Main Characteristics of the Prosecutorial Investigation according to the Croatian CPA from 2008 to 2013]. In: Jovanović, I. & Petrović-Jovanović, A.

(eds.), *Tužilačka istraga regionalna krivičnoprocesna zakonodavstva i iskustva u primeni*. Beograd: Misija OEBS u Srbiji, pp. 59-77.
Grubač, M. 2005. Novo krivično procesno zakonodavstvo u Bosni i Hercegovini [New Criminal Procedural Legislation in Bosnia and Herzegovina]. *Glasnik Advokatske komore Vojvodine*, časopis za pravnu teoriju i praksu, 65(11), pp. 531-547.
Grubač, M. 2014. Otvaranje istrage prema novom Zakoniku o krivičnom postupku Srbije [Commencement of the Criminal Investigation according to the New Serbian Criminal Procedure Code]. *Pravni zapisi*, 5(1), pp. 217-234.
Halilović, H., Adžajlić-Dedović, A. & Budimlić, M. 2019. Krivični postupak u Bosni i Hercegovini: Osvrt na procesni položaj oštećenog krivičnim djelom [Criminal Procedure in Bosnia and Herzegovina: a Review on the Procedural Standing of the Injured Party]. *Kriminalistička teorija i praksa*, 6(1), pp. 77-94.
Janković, R. 2018. Pritužba protiv naredbi o nesprovođenju i obustavi istrage [Complaint Against Orders on the Nonconducting and the Discontinuation of the Investigation.]. *Godišnjak Fakulteta pravnih nauka*, 8(8), pp. 206-227.
Kamber, K. 2017. *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law*. Leiden/Boston: Brill.
Krapac, D. 2002. The Victim's Procedural Role in the Croatian Criminal Procedure. *Revue internationale de droit pénal - International Review of Penal Law*, 73(1), pp. 155-166.
Krapac, D. 2015. *Kazneno procesno pravo: Knjiga prva: Institucije* [Criminal Procedure Law: Book One: Institutions.]. Zagreb: Narodne novine.
Myers, M. S. 2003. Prosecuting Human Rights Violations in Europe and America: How Legal System Structure Affects Compliance with International Obligations. *Michigan Journal of International Law*, 25(1), pp. 211-264.
Novokmet, A. 2015. Pravo žrtve da zahtijeva kontrolu nepokretanja kaznenog postupka prema čl. 11. Direktive o minimalnim pravima žrtava i usklađenost bosanskohercegovačkog i hrvatskog prava [Victims' right to Review in the Event of a Decision not to Prosecute under article 11th of the Directive 2012/29/EU and Compatibility of Bosnian-Herzegovinian and Croatian Law]. *Zbornik radova „Odnos prava u regionu i prava Evropske unije" Tom II*, pp. 408-430.
Novokmet, A. 2016. The Right of a Victim to a Review of a Decision not to Prosecute as Set Out in Article 11 of Directive 2012/29/EU and an Assessment of its Transposition in Germany, Italy, France and Croatia. *Utrecht Law Review*, 12(1), pp. 86-108.
Novokmet, A. 2017. The European Public Prosecutor's Office and the Judicial Review of Criminal Prosecution. *New Journal of European Criminal Law*, 8(3), pp. 374-402.
Ochoa, J. C. 2013. *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations*. Leiden/Boston: Martinus Nijhoff Publishers.
Pavišić, B. 2013. *Komentar Zakona o kaznenom postupku* [Commentary on the Criminal Procedure Act]. Rijeka: Dušević & Kršovnik d.o.o.
Pilić, M. & Rajić, Z. 2021. Instrumenti zaštite procesnih prava obrane u istrazi prema Zakonu o kaznenom postupku Bosne i Hercegovine [Instruments for Protection of the Procedural Rights of Defense in the Investigation under the Criminal Procedure Act of Bosnia and Herzegovina]. *Pravni vjesnik*, 37(2), pp. 167-187.

Pivić, N. 2017. *Koncept istrage prema krivičnoprocesnom zakonodavstvu Bosne i Hercegovine* [The Concept of the Investigation in the Criminal Procedure Legislation of Bosnia and Herzegovina]. *Anali Pravnog fakulteta u Zenici*, 10(19), pp. 9-45.

Schabas, W. 2015. *The European Convention on Human Rights: A Commentary*. New York: Oxford University Press.

Seibert-Fohr, A. 2009. *Prosecuting Serious Human Rights Violations*. New York: Oxford University Press.

Sijerčić-Čolić, H. 2012a. *Krivično procesno pravo: Knjiga I: Krivičnoprocesni subjekti i krivičnoprocesne radnje* [Criminal Procedural Law: Book I: Criminal Procedural Subjects and Criminal Procedural Actions]. Sarajevo: Pravni fakultet Univerziteta u Sarajevu.

Sijerčić-Čolić, H. 2012b. *Krivično procesno pravo: Knjiga II: Tok redovnog krivičnog postupka i posebni postupci* [Criminal Procedural Law: Book II: The Course of Ordinary Criminal Procedure and Special Procedures]. Sarajevo: Pravni fakultet Univerziteta u Sarajevu.

Sijerčić-Čolić, H. *et al*. 2005. *Komentar Zakona o krivičnom/kaznenom postupku Bosne i Hercegovine* [Commentary on the Criminal/Penal Procedure Acts of Bosnia and Herzegovina]. Sarajevo: Savjet/Vijeće Evrope/Evropska komisija.

Simović, M. N. & Simović, V. M. 2014. *Krivično procesno pravo II (Krivično procesno pravo - posebni dio)* [Criminal Procedural Law II (Criminal Procedural Law - Special Part)]. Istočno Sarajevo: Pravni fakultet Univerziteta u Istočnom Sarajevu.

Simović, M. N. & Simović, V. M. 2016. *Krivično procesno pravo: Uvod i opšti dio* [Criminal Procedural Law: Introduction and General Part]. Bihać: Pravni fakultet Univerziteta u Bihaću.

Simović, M. N. & Šikman, M. 2017. *Krivičnopravno reagovanje na teške oblike kriminaliteta* [Response of Criminal Law to Grave Forms of Crime]. Banja Luka: Pravni fakultet Univerziteta u Banjoj Luci.

Simović, M. N. 2014. Koncepcija tužilačke istrage u Zakonu o krivičnom postupku Bosne i Hercegovine: stanje i problemi [Concept of Prosecutorial Investigation in the Criminal Procedure Act of Bosnia and Herzegovina: Situation and Problems]. In: Jovanović, I. & Petrović-Jovanović, A. (eds.), *Tužilačka istraga regionalna krivičnoprocesna zakonodavstva i iskustva u primeni*. Beograd: Misija OEBS u Srbiji, pp. 43-58.

Steiner, C. *et al*. 2010. *Ustav Bosne i Hercegovine: Komentar* [Constitution of Bosnia and Herzegovina: A Commentary]. Sarajevo: Fondacija Konrad Adenauer/e.V./Program pravna država/Jugoistočna Evropa.

Škulić, M. 2015. Istraga: Zakonsko rešenje, sporna pitanja i dileme [Investigation: Legal Solution, Disputing Issues and Dilemmas]. In: Škulić, M., Ilić, G. & Matić Bošković, M. (eds.), *Unapređenje Zakonika o krivičnom postupku de lege ferenda predlozi 2015*. Beograd: Udruženje tužilaca i zamenika javnih tužilaca Srbije/Misija OEBS u Srbiji, pp. 29-53.

Tomašević, G. & Pajčić, M. 2008. Subjekti u kaznenom postupku: pravni položaj žrtve i oštećenika u novom hrvatskom kaznenom postupku [Subjects in the Criminal Procedure: the Legal Position of the Victim and Injured Party in the New Croatian Criminal Procedure]. *Hrvatski ljetopis za kazneno pravo i praksu*, 15(2), pp. 7-24.

Turković, K. 2008. The Prosecution Service Function within the Croatian Criminal Justice System. *European Journal on Criminal Policy and Research*, 14(2-3), pp. 263-287.

Legal Sources

Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), access at: https://www.echr.coe.int/documents/convention_eng.pdf (1 September of 2021).

Ustav Bosne i Hercegovine [Constitution of Bosnia and Herzegovina], access at: https://www.ustavnisud.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_bos.pdf (1 September of 2021).

Ustav Republike Hrvatske [Constitution of the Republic of Croatia], *Narodne novine RH* [Official Gazette of the Republic of Croatia], no. 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14.

Zakon o kaznenom postupku Republike Hrvatske [Criminal Procedure Act of the Republic of Croatia], *Narodne novine RH* [Official Gazette of the 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.

Zakon o krivičnom postupku Bosne i Hercegovine [Criminal Procedure Act of Bosnia and Herzegovina], *Službeni glasnik BiH* [Official Gazette of Bosnia and Herzegovina], no. 3/2003, 32/200, 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 29/2007, 53/2007, 58/2008, 12/2009, 16/2009, 53/2009, 93/2009, 72/2013, 65/2018.

Decisions of the European Court of Human Rights

Aksoy v. Turkey, ECtHR, application no. 21987/93, Judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI (*Aksoy v. Turkey*).

Anık and Others v. Turkey, ECtHR, application no. 63758/00, Judgment of 5 June 2007 (*Anık and Others v. Turkey*).

Armani Da Silva v. the United Kingdom [GC], ECtHR, application no. 5878/08, Judgment of 30 March 2016 (*Armani Da Silva v. the United Kingdom* [GC]).

Belevitskiy v. Russia, ECtHR, application no. 72967/01, Judgment of 1 March 2007 (*Belevitskiy v. Russia*).

Hanan v. Germany [GC], ECtHR, application no. 4871/16, Judgment of 16 February 2021 (*Hanan v. Germany* [GC]).

Horvat v. Croatia, ECtHR, application no. 51585/99, Judgment of 26 July 2001, ECHR 2001-VIII (*Horvat v. Croatia*).

Isayeva v. Russia, ECtHR, application no. 57950/00, 24 February 2005 (*Isayeva v. Russia*).

Jasar v. "the former Yugoslav Republic of Macedonia", ECtHR, application no. 69908/01, Judgment of 15 February 2007 (*Jasar v. "the former Yugoslav Republic of Macedonia"*).

Khamzayev and Others v. Russia, ECtHR, application no. 1503/02, Judgment of 3 May 2011 (*Khamzayev and Others v. Russia*).

M.C. and A.C. v. Romania, ECtHR, application no. 12060/12, Judgment of 12 April 2016 (*M.C. and A.C. v. Romania*).

McKerr v. the United Kingdom, ECtHR, application no. 28883/95, Judgment of 4 May 2001, Reports of Judgments and Decisions 2001-III (*McKerr v. the United Kingdom*).

Öneryildiz v. Turkey [GC], ECtHR, application no. 48939/99, Judgment of 30 November 2004, Reports of Judgments and Decisions 2004-XII (Öneryildiz v. Turkey [GC]).

Otašević v. Serbia, ECtHR, application no. 32198/07, Judgment of 5 February 2013 (*Otašević v. Serbia*).
Ramsahai and Others v. the Netherlands [GC], ECtHR, application no. 52391/99, Judgment of 15 May 2007, Reports of Judgments and Decisions 2007-II (*Ramsahai and Others v. the Netherlands* [GC]).
Remetin v. Croatia (no. 2), ECtHR, application no. 7446/12, Judgment of 24 July 2014 (*Remetin v. Croatia*).
Sabalić v. Croatia, ECtHR, application no. 50231/13, Judgment of 14 January 2021 (*Sabalić v. Croatia*).
Stojnšek v. Slovenia, ECtHR, application no. 1926/03, Judgment of 23 June 2009 (*Stojnšek v. Slovenia*).

The Decisions of the Constitutional Court of Bosnia and Herzegovina

Djelimična Odluka o dopustivosti i meritumu br. U-5/16 [The Partial Decision on Admissibility and Merits no. U-5/16], Ustavni sud Bosne i Hercegovine [Constitutional Court of Bosnia and Herzegovina], *Službeni glasnik BiH* [Official Gazette of Bosnia and Herzegovina], no. 49/2017.