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REVIEW PAPER

PROHIBITING MEASURES AS AN ALTERNATIVE TO PRE-TRIAL CUSTODY IF DANGER OF ITERATION EXISTS, YES OR NO?

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Abstract: *The measure of pre-trial custody as the most serve measure to secure the presence of the suspect or accused in criminal proceedings and its successful conduct has always attracted due attention of both legal doctrines and judicial practices at all levels due to the consequences concerning the imposed restriction on the right to freedom of movement. Hence, the interest of science and the judiciary was primarily aimed at defining very strict criteria in which the measure of pre-trial custody could be used and the rules that should be used by courts when considering the use of possible alternative measures to ensure the presence of the suspect or accused that may be the most appropriate, in the particular situation, without the need to apply a more severe measure if the purpose of the imposed measure can be achieved with a milder measure. Regarding the code of criminal proceedings in Bosnia and Herzegovina, all four laws on criminal procedure regulate, in a largely identical manner, when and under what circumstances the custody can be ordered, including the situation of custody order due to the danger of iteration (danger of repetition of criminal offense or completion of an attempted criminal offense or committing a threatened criminal offense).2 However, the reason of confusion and perplexities among the judicial practitioners at various levels of judicial decision-making*

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2 Article 132 Paragraph 1 Item c) of the *Criminal Procedure Code of Bosnia and Herzegovina* - CPC BiH ("Official Gazette of Bosnia and Herzegovina", No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05 , 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 and 65 / 18), Article 146 Paragraph 1Item c) of *Criminal Procedure Code of the Federation of Bosnia and Herzegovina* - CPC F BiH ("Official Gazette of the Federation of Bosnia and Herzegovina", No. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27 / 07, 53/07, 9/09, 12/10, 8/13 and 59/14), Article 197 Paragraph 1 Item v) of *Criminal Procedure Code of the Republika Srpska* - CPC RS ("Official Gazette of the Republic of Srpska", No. 53/12 and 91/17), Article 132 Paragraph 1 Item c) of *Criminal Procedure Code of the Brcko District of Bosnia and Herzegovina* - consolidated text - CPC BD ("Official Gazette of the Brcko District of BiH", No. 33/13 and 27/14)

is whether the pre-trial custody imposed due to the danger of iteration can be replaced by prohibiting measures, as milder measures, given that the purpose, in the specific case, is not ensuring the presence of the suspect or the accused in criminal proceedings, rather than the elimination of the danger of committing a (repeated) criminal offense.

It is precisely this problem that is the central point of author's interest of this scientific paper and the author will analyze the theoretical reasons that are for and the reasons against the possibilities of replacing the custody measure when the danger of iteration exists with the prohibiting measures, as well as the current judicial practice in Bosnia and Herzegovina regarding this issue.

Key words: *pre-trial custody, danger of iteration, prohibiting measures, criminal procedure code, judicial practice.*

1. PRELIMINARY CONSIDERATIONS

One of the important measures of criminal proceeding that the successful conduct of the criminal proceedings is based on is the ban of trial in absentia, i.e. the accused cannot be tried in absentia[3], which certainly is one of the consequence of the implementation of the principles laid down in Article 6 of the European Convention on Human Rights (hereinafter: the European Convention)[4] which enjoys supremacy in the legal system of Bosnia and Herzegovina in relation to domestic legislation. Thanks to specifically this criminal procedural ban, the legislator in Bosnia and Herzegovina regulated the whole set of options in all criminal proceedings available to the court for the purpose of securing the presence of the suspect and the accused and for the successful conduct of criminal proceedings, starting with a delivery of summons[5] and an order for apprehension[6] of the accused, to the application of prohibiting measures, bail[7]

3 See Art. 247 of the CPC BiH, Art. 262 of the CPC F BiH, Art. 262 of the CPC RS and Art. 247 BDC BD.
4 The text of the Convention is available at: https://www.echr.coe.int/Documents/Convention_BOS.pdf
5 Summons as the least invasive measure for securing the presence of the suspect or accused in criminal proceedings is done by delivering a sealed written summons (whit a content that is legally determined). For more on this, see Art. 124 CPC BiH, Art. 138 CPC F BiH, Art. 182 of the CPC RS and Art. 124 CPC BD.
6 Apprehension as the second measure for securing the presence of the suspect i.e. accused in the criminal proceedings refers to the situation when a decision on custody has been issued or if the duly summoned accused does not come and his absence is not justified or if the summons could not be properly performed and it is obvious that the accused avoids the receipt of a summons, and in what situation the court (and exceptionally the prosecutor) issues an order for bringing the execution by the judicial police. For more on this, see. Art. 127 CPC BiH, Art. 141 CPC F BiH, Art. 192 of the CPC RS and Art. 127 CPC BD.
7 The bail refers to the situation where the accused has been ordered to be detained or his custody is already determined solely because of the fear of flight, in that case he may be released or may be released if the accused or suspect, personally or someone else, provides the guarantee that until the end of the criminal

and in the end the custody[8] as the most severe measure, since it is not unusual for the suspect or accused not to be available to the judicial authorities during the criminal proceedings.

The order of measures for securing the presence of the suspect or the accused in the law is not coincidental, since it rests on two rules of criminal proceedings:

- When deciding on measures to be used in the particular case, the competent authority must not use a more severe measure if the purpose can be achieved by a less severe one (the rule of priority of a milder measure over a more severe one) and
- The competent authority is obliged to replace ex officio a more severe measure with a milder one as soon as the conditions are met (the emergency replacement rule)

Although in the judicial practice, by frequency of application, summons and apprehension are the most applied measures that ensure the presence of the suspect or accused in criminal proceedings, unlike the least-used measure, they do not cause as many doubts or ambiguities in daily judicial practice as the prohibiting measures and the measure of custody, especially when these measures are brought into mutual correlation and conditionality.

I.e., when it comes to prohibiting measures, the legislator categorized them in two groups, the basic prohibiting measures (house arrest and travel ban) and other prohibiting measures (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)[9]. Each of these measures, depending on the particular case, can be ordered as a separate or as an additional with one or more prohibiting measures.

Unlike prohibiting measures which, in order to limit the freedom of movement, work and use of the means of transport, do not imply the temporary custody of the suspect or the accused under twenty-four hours of supervision of the prison guards (relative restriction of freedom)[10], the measure of custody nec-

proceedings will not escape, and the accused himself promises that he will not be hiding and that he will not leave his residence without authorization. For more on this, see Art. 125 CPC BiH, Art. 139 CPC F BiH, Art. 183 of the CPC RS and Art. 125. CPC BD. More about this see in Chapter X of the BiH CPC, Chapter X of the CPC F BiH, Chapter XIV of the CPC RS and Chapter X of the BCC BD

8 More on this in Chapter X of the BiH CPC, Chapter X of the CPC F BiH, Chapter XIV of the CPC RS and Chapter X of the CPC BD

9 More on prohibiting measures in Art. 126 and 126a CPC BiH, Art. 140 and Art. 140a CPC F BiH, Art. 184 and Art. 185 CPC RS and Art. 126 and Art. 126a CPC BD.

10 Although, in the past few years, the decision of ordering the house arrest where the suspect or accused is restricted to moving within his home (house arrest) provokes additional dilemmas in legal doctrine

essarily implies the temporary detention of the suspect or the accused in penal correctional institutions (absolute limitation of freedom of movement) and it is pronounced if two cumulatively set conditions are met:

2. GENERAL GROUNDS FOR PRE-TRIAL CUSTODY (EXISTENCE OF A REASONABLE SUSPICION[11] THAT A PERSON HAS COMMITTED A CRIMINAL OFFENSE) AND

2.1 Special grounds for pre-trial custody:[12]

- if he hides or if other circumstances exist that suggest a possibility of flight (danger of flight),
- if there is a justified fear to believe that the accused or suspect will destroy, conceal, alter or falsify evidence or clues important to the criminal proceedings or if particular circumstances indicate that the inquiry will be hindered by influencing witnesses, accessories or accomplices (danger of spoliation of evidence)
- if particular circumstances justify a fear that the accused or suspect will repeat the criminal offense or complete the criminal offense or commit a threatened criminal offense, and for such criminal offenses a prison sentence of three (3) years may be pronounced or more (danger of iteration)
- in exceptional circumstances, related to criminal offence for which a prison sentence of ten years or more severe punishment may be pronounced, which is of particular gravity taking into account the manner of perpetration or consequence of the criminal offense, if the release would result in an actual threat to disturbance of public order (pre-trial custody in extraordinary circumstances).

Given the correlation between the prohibiting measures and the pre-trial custody, it can be concluded that certain prohibiting measures, by their nature, content and complementarity, represent a milder measure in comparison with the specific measure of pre-trial custody. I.e., for example, the situation involv-

and judicial practice as to whether the time spent in house arrest should be included in time served by a sentenced prisoner or not.

11 The term "grounded suspicion" refers to a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal offense may have been committed

12 Special grounds are fulfilled in the case of any of the aforementioned situations, but the pre-trial custody may be oredered or prolonged even in the event of two or more of these situations arisen (multiple special grounds for pre-trial custody).

ing the danger of flight and the danger of spoliation of evidence, the prohibiting measures and pre-trial custody can be ordered equally depending on the given situation that the court decides in each individual case.

For danger of flight as a special ground for pre-trial custody, and provided that a general ground for pre-trial custody (the existence of a reasonable suspicion) is fulfilled, the court may determine or extend the detention measure against the suspect or the accused. However, depending on the circumstances of the particular case[13] and in spite of the fact that the conditions for ordering or prolonging the custody measure are undeniably fulfilled, the court may conclude that the purpose for which the detention is proposed (the availability of the suspect or the accused in the criminal proceedings) can be achieved by milder measures, in this case, some of the prohibiting measures are, for example, the prohibition of leaving the place of residence[14], the travel ban[15] or the measure ordering the suspect or accused to report occasionally to a specified body.[16]

When it comes to the danger of spoliation of evidence (danger of destruction of evidence and influencing the participants in criminal proceedings), the court may also order or prolong the pre-trial custody measure against the suspect or accused, while in this case, and given the circumstances of the specific case[17], instead of the custody measure the court may impose any of the prohibiting measures ordered by law (so-called "other prohibiting measures"), finding that by alternative (milder) measures the purpose for which pre-trial custody measure is proposed in this case (unhindered collection of evidence i.e. documentation of criminal offense) can be attained, such as measures of prohibition

13 For example, the search for the suspects was not complex or long lasting, the suspects did not cross the borders of Bosnia and Herzegovina, nor the escape was planned, etc.

14 In a decision ordering the house arrest for the suspect or accused, the Court shall specify the place where the suspect or accused shall stay for as long as the 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 (more on this in Art. 126.c CPC of BiH, Art. 140c CPC F BiH, Art. 187 CPC RS and Art. 126c CPC BD).

15 In the case of a travel ban, the court will order a temporary withdrawal of travel documents together with the prohibition of issuance of new travel documents, as well as the prohibition to use the identity card for crossing the State border of Bosnia and Herzegovina (travel ban). (More on this, see Art. 126 (2) CPC BiH, Art. 140 (2) CPC F BiH, Art. 184 (2) CPC RS and Art. 126 (2) CPC BD).

16 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 (more on this, Art. 126 c (5) CPC BiH, Art. 140c (5) CPC F BiH, Art. 187 (5) CPC RS, and Art. 126c (5) CPC BD).

17 E.g., the suspect was suspended from work and the offense was committed in connection with the affairs of his job, and then a large number of witnesses were examined until a small number of witnesses were heard, or, for example, the suspect or the accused is prone to abusive behavior after getting into an alcoholic state in catering facilities.

from performing certain business or official activities, prohibition from visiting certain places or areas[18] or prohibition from meeting with certain persons.[19]

However, despite the fact that the correlative relationship between the prohibiting measures and the custody measure due to the danger of flight and spoliation of evidence is quite clear and as such does not cause particularly significant concerns and problems in everyday judicial practice, this cannot be said when it comes to danger of iteration and custody in extraordinary circumstances[20], given the specificity of the purpose surrounding the grounds for proposed custody[21]. The reason for this, and what decisions the courts ordered in specific situations that involved pre-trial custody will be the subject of special elaboration in this paper. The author will analyze *pro et contra* reasons for the situation if the pre-trial custody measure when the danger of iteration exists can be replaced by prohibiting measures as a milder measures and the situation when that it is not possible.

3. REASONS "FOR" THE REPLACEMENT OF THE PRE-TRIAL CUSTODY MEASURES WITH THE PROHIBITING MEASURES WHEN THE DANGER OF ITEARION EXISTS

Analyzing the mutual relationship of the pre-trial custody measure when the danger of iteration exists and the prohibiting measures, it can be concluded that despite a number of reasons *contra*, which will be thoroughly discussed in further elaboration, the truth is, there are several reasons *pro* which, by its strength and foundation in criminal procedural rules, legal logic and judicial practice, make an important argument that confirms the thesis that there are no restrictions to the possibility of using prohibiting measures as alternative measures, even when it comes to deciding on ordering or prolonging the pre-trial custody measure when the danger of iteration exists.

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18 In a decision prohibiting the suspect or accused from visiting certain places or areas, the Court shall specify places and areas and the distance within which the suspect or accused may not approach them (more on this, see Art. 126c (3) CPC BiH, Art. 140c (3) CPC F BiH, Art. 187 (3) of the CPC RS and Art. 126.c (3) CPC BD)

19 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 (more on this, see Art. 126c (4) CPC BiH, Art. 140c (4) CPC F BiH, Art. 187 (4) CPC RS and Art. 126c (4) CPC BD).

20 Considering the complexity and scope of the issue of a special ground for ordering pre-trial custody in Art. 132 (1) (d) CPC BiH, Art. 146 (1) (d) CPC F BiH, Art. 197 (1) (g) CPC RS and Art. 132 (1) (d) BD BD - so-called. pre-trial custody in extraordinary circumstances, the same will not be the subject of special elaboration in this paper

21 Danger of repetition of criminal offense or completion of an attempted criminal offense or committing a threatened criminal offense (the danger of iteration) or the prevention of violation of public order in case of release of the suspect or the accused (custody in extraordinary circumstances).

Firstly, at the very beginning of the elaboration of the subject, it should be kept in mind that, by its criminal proceeding codes, the legislator did not impose any formal limitations on the possibility of using prohibiting measures, as alternative measures, instead of ordering or prolonging the pre-trial custody. The confirmation of the statement, the author finds in the relevant provision of the criminal procedure code, which reads: "When *deciding on custody*, the Court may impose the house arrest, travel ban and other prohibiting measures ex officio, instead of ordering or prolonging the custody."[22] By a linguistic and targeted interpretation of the aforementioned provision, it is clear that the legislator, using the language syntagm "deciding on custody" in no way limited the possibility of using the prohibiting measures as an alternative to the pre-trial custody for (only) specific procedural goals (e.g. the danger of flight , the danger of influencing the witnesses, etc.), but this procedural opportunity can be used for all four procedural purposes for which custody can be ordered or prolonged, including the danger of iteration, and especially when it comes to the fact that legislator, applying the principle *in dubio pro reo*[23], regulated that the court would resolve any doubt regarding the application of the provisions of the criminal legislation in a way that is more favorable for the accused, which certainly is the situation with the application of the prohibiting measures as an alternative to the custody in the case of danger of iteration.

Secondly, when standardizing common provisions relevant to all measures used for ensuring the presence of the suspect i.e. the accused and the successful conduct of criminal proceedings, the legislator, as one of the mandatory rules applicable to the choice, severity and content of the measure, provided, inter alia, that the competent authority is obliged to ex officio replace a more severe measure with a milder measure as soon as the conditions are met (the emergency replacement rule)[24], which leads to conclusion that the legislator did not formally limit the possibility of replacing the custody with milder measures - prohibiting measures even in the case of the danger of iteration, nor did he leave, to the disposition of the court, any procedural limitations on the application of the alternative measures.

Thirdly, the procedural aim of ordering or prolonging the pre-trial custody due to the danger of iteration (danger of repetition of criminal offense or completion of an attempted criminal offense or committing a threatened criminal offense), in its internal and external manifestation, could be successfully altered by certain prohibiting measures, depending on the circumstances of the specif-

22 Art. 126b (2) CPCBiH, Art 140a (2) CPC F BiH, Art. 186 (2) CPC RS and Art, 126b (2) CPC BD.
23 Art. 3 CPC BiH, Art. 3 CPC F BiH, Art. 3 CPC RS and Art. 3 CPC BD.
24 More on this, see Art. 123 (3) CPC BiH, Art. 137 (3) CPC F BiH, Art. 181 (3) CPC RS and Art. 123 (3) CPC BD.

ic case, so, for example, in a situation where there is reasonable doubt that the suspect committed a criminal offense in the field of traffic with a fatal consequence, and in doing so is a returnee in the commission of serious criminal and misdemeanor acts in the field of traffic, the danger of iteration may be reduced and even completely amortized, and by applying the prohibiting measure - by temporary withdrawal of the driver's license[25] as an appropriate substitution for the pre-trial custody measure. Such is the situation in the case where a suspected is a repeat offender is involved in committing crimes with an element of violence against a particular victim (e.g. a wife) and is suspected of committing a serious form of domestic violence to spouse as a member of the family. In this case, the danger of iteration can be successfully eliminated by applying a prohibiting measure of visiting a family home or a wider area of residence[26] where the wife lives, as well as applying a prohibiting measure of meeting with the wife.[27] Consequently, it is logical that (certain) prohibiting measures as substitutions for ordering or prolonging the custody when the danger of iteration exists, depending on the particular circumstances of each individual custodial case, can very successfully and without the need to order the custody measure as the most severe measure, eliminate the danger of iteration and achieve the procedural goal for which the ordering or prolonging the custody in the mentioned situation is proposed.

Fourthly, even the highest legal authorities in Bosnia and Herzegovina in their custody decisions, had the opportunity to take relevant positions on the subject matter, so "... some Court councils, even before July amendments, issued compulsory residence and house arrest orders regardless of the custody ground asserted by the prosecution, reasoning that Article 126 must be read in light of other provisions of the Criminal Procedure Code and of the European Convention. In other words, they concluded that the measures provided for, in domestic law, should be applicable in any of the circumstances warranting custody, even when there is no risk of flight."[28] In that sense, the Court of Bosnia and Herzegovina, during 2017, in custodial case S1 2 K 025190 17 Kž 2 took the position that "*When deciding on prolonging the custody, the court, in accordance with the provisions of Article 123, paragraphs 2 and 3 of the CPC BiH,*

25 Art. 126a (1) (e) CPC BiH, Art. 140a (1) (e) CPC F BiH, Art. 185 (1) (d) CPC RS and Art. 126a (1) (e) CPC BD.

26 Art. 126.a (1) (b) CPC BiH, Art. 140a (1) (b) CPC F BiH, Art. 185 (1) (b) CPC RS and Art. 126a (1) (b) CPC BD.

27 Art. 126a (1) (c) CPC BiH, Art. 140a (1) (c) CPC F BiH, Art. 185(1) (c) CPC RS and Art. 126a(1) (c) CPC BD.

28 The Law and the Practice in the Application of Restrictive Measures: Justification on Custody in Bosnia and Herzegovina, Organization for Security and Cooperation in Europe, Mission in Bosnia and Herzegovina, Sarajevo 2008, 15.

is obliged to consider whether due to the length of the detention, the measure of custody is still necessary as the most severe measure to ensure the presence of the accused and successfully conduct criminal proceedings, and if it finds that it is no longer necessary, it shall be replaced by prohibiting measures, as well as in custody based on the pre-trial custody grounds referred to in Article 132, paragraph 1, item c) of the CPC BiH."29 In this context, the Court of Bosnia and Herzegovina has unambiguously provided a legal basis for the legal aspect of the part of the judicial community that argues that the court, without any limitations, is always obliged to decide when ordering or prolonging the pre-trial custody measure, as well as where the danger of iteration exists, whether the procedural objective for which the detention is proposed can be achieved by milder (alternative) measures, including prohibiting measures, taking into account the establishment of balance and proportionality between the interests of the state and society on the one hand, and restrictions on the freedom and rights of the suspect or accused on the other.[30]

4. REASONS "AGAINST" THE REPLACEMENT OF THE PRE-TRIAL CUSTODY MEASURES WITH THE PROHIBITING MEASURES WHEN THE DANGER OF ITEARION EXISTS

Although prima facie indicates that there is a number of reasons *pro* unobstructed replacement of the custody measure by prohibiting measures even when there is the danger of iteration, which by their strength and validity in the legal logic and judicial practice certainly deserve full doctrinal attention and the attention of the academic community, nevertheless as well as for the reasons for *pro*, there is a number of reasons *contra* the legal reasoning that this situation is legally possible. Analyzing the *contra* argumentation of the subject, there are certain conclusions which, when related, greatly undermine the arguments *pro*, which were discussed more in the previous part. However, before approaching the analysis of the reasons *contra*, it is necessary, with particular attention, firstly to analyze the nature of the risk of iteration and the content of the specific processing aim of the custody measure when risk of iteration exists.

Namely, the danger of iteration, as previously defined, implies a situation when the danger of repetition of criminal offense or completion of an attempted criminal offense or committing a threatened criminal offense exists, and for such criminal offenses a prison sentence of three (3) years may be pronounced

29 Decision of the Council of the Appellate Division of the Court of Bosnia and Herzegovina No. S1 2 K 025190 17 Kž 2 dated 30 October 2017.

30 More on this see Bulletin of the Court Practice of the Court of Bosnia and Herzegovina, No. 7/2017, Sarajevo, 71 - 73.

or more. By analyzing the legal definition of the danger of iteration, it can be concluded that the legislator did not even give a practical indication in the context of which life or personal circumstances were considered "special circumstances" on the basis of which the conclusion on the existence of the danger of iteration was carried out.

In the specific case, the legislator has only pointed out to the competent judicial authorities that these practical circumstances must have the force of "special" circumstances, and not ordinary, regular circumstances, which corresponds to the rule that the measure of custody is determined restrictively and only when the processing aim cannot be achieved by milder, alternative measures..

The answer to the question, what circumstances can be considered for determining the existence of the danger of iteration and how serious they must be, exceeds the scope of the subject of this scientific work, which is why the author will not make a special elaboration in this direction, except for the purpose of better understanding the subject matter, in particular the reasons *contra*, the author will summarize that the iterative circumstances may relate both to *the circumstances of the personal nature* [31]*of the suspect or the accused*, as well as to *the circumstances of the particular criminal offense* [32]as well as *the socio-economic circumstances*[33]. In that sense, and as the legislator did not specifically state the nature and severity of the iterative circumstances, the burden of assessment is on the judicial authorities, in the particular the burden is on the prosecution proposing a measure of custody and a court that decides on the proposed custody measure.

After the conceptual definition of the iterative circumstances on which the danger of iteration depends, the logical question is whether the prohibiting measures can in fact achieve the procedural aim for which the pre-trial custody measure is proposed for when the iteration danger exists (danger of repetition of criminal offense or completion of an attempted criminal offense or committing a threatened criminal offense). More precisely, is any prohibiting measure, by its nature and its content, of *sufficient capacity* to, by its existence, as an alternative measure achieve the stated procedural aim when there is the danger

31 The prior conviction of the suspect or accused, in particular the criminal conviction for the same or identical offenses in the same time frame, are generally regarded as special circumstances that lead to the danger of iteration.

32 Number of criminal acts that constitute the construction of an extended criminal offense, persistence and arrogance in the commission of a criminal offense, number of aggrieved parties, amount of damage or unlawfully acquired property gain, previous planning of the commission of a criminal offense, etc.

33 Unemployment, poverty, lack of regular income, etc. are the circumstances that cannot, as a rule, lead to the existence of the danger of iteration, but that the circumstances in question correlate with other iterative circumstances (personal circumstances or the circumstances of a particular criminal offense) give them additional iterative intensity.

of iteration? The answer is not straightforward, and according to the state of affairs, the answer cannot be generalized as it depends on the whole set of circumstances of the particular custodial case, and in which the courts have the final judicial word, whether they accept or reject the possibility of the replacement of the custody measure when the danger of iteration exists by milder measures i.e. prohibiting measures.

"In the wake of these amendments to the Criminal Procedure Code of BiH, prosecutors and judges working in the state court have increased their use of non-custodial measures. Entity and Brcko District prosecutors and judges, however, still tend to conclude that prohibiting measures and bail can only be applied when the sole ground for custody is the risk of flight. Such measures probably would not be considered at all were it not for persistent defense counsel. Even in cases where bail was applied, the underlying custody ground remained the same - the risk of flight. There seems to be many reasons behind the infrequent use of less restrictive measures. The Criminal Procedure Codes of both entities and Brcko District still do not explicitly permit any less restrictive measures when custody is considered for reasons other than the risk of flight."[34]

In that regard, and when it comes to the subject matter, it should be borne in mind that the same subject was on several occasions the matter of consideration of the Supreme Court of the Federation of Bosnia and Herzegovina, when this highest judicial body of the Federation of Bosnia and Herzegovina took the position that the danger of iteration cannot be eliminated by the prohibiting measures, so in the explanation of this court's decisions (one of the relevant) it is stated *"the understanding of the first instance court that the presence of the accused in the successful conduct of criminal proceedings instead of the measure found in Article 146, paragraph 1, item c) of the CPC F BiH can be achieved by prohibiting measures from Article 140 and 140a item b) of the CPC F BiH is wrong, because of the fact that the aforesaid custody ground does not have the sole aim of ensuring the presence of the accused at the main trial, but to eliminate the danger of iteration on the basis of 21 specific criminal offenses, i.e., to use its preventive nature to eliminate the danger (among other dangers) that the accused shall repeat the criminal offense for which a sentence of imprisonment of three years or more can be imposed."35* By analyzing the taken position of the Supreme Court of the Federation of Bosnia and Herzegovina, the fact that in a particular custodial case the accused is charged with 21 crimi-

34 The Law and the Practice in the Application of Restrictive Measures: Justification on Custody in Bosnia and Herzegovina, Organization for Security and Cooperation in Europe, Mission in Bosnia and Herzegovina, Sarajevo 2008, 14 – 15.

35 Decision of the Supreme Court of the Federation of Bosnia and Herzegovina No. 03 0 K 015375 16 Kž 6, dated16 December 2016.

nal offenses and that the Supreme Court concludes that in such circumstances the procedural aim that is achieved by the custody grounds referred to in Article 146, Paragraph 1, Item c) of the CPC F BiH (prevention of the repeated commission of a criminal offense for which a sentence of imprisonment of three years or a more severe sentence can be imposed) cannot be achieved by prohibiting measures, because, in the event of the danger of iteration, the problem is not that the accused avoids arriving at the main trial, or avoids taking part in criminal proceedings (as is the case with the danger of flight from Article 146, Paragraph 1, Item a) of the CPC F BiH), but the problem is that the accused would continue to commit serious crimes. Hence, the fear of society of allowing the suspect i.e. accused of serious criminal offense to continue their legal fight out of the pre-trial custody and to believe that despite a serious criminal activity in the past, the suspect i.e. accused will not continue to commit crimes is justified.

Also, it is important to analyze another decision of the Supreme Court of the Federation of Bosnia and Herzegovina in relation to the mentioned issue, so the explanation of the specific decision states: "*The Court may, pursuant to Article 140b Paragraph 2 of the CPC F BiH when deciding on custody to execute ex officio the prohibiting measure of leaving the place of residence, the prohibition of travel and other restrictions, instead of ordering or prolonging the custody. Considering the provision of Article 140, Paragraph 1 of the CPC F BiH, which prescribes that the court may impose a prohibiting measure of placing the accused under house arrest if there are circumstances indicating that the accused might flee, hide or go to an unknown place or abroad. It is obvious that the mentioned prohibiting measures are a substitute for custody pursuant to Article 146, Paragraph 1, Item a) of the CPC F BiH. Thus, these measures can only be imposed if there are reasons for pre-trial custody from the above-mentioned legal basis and the court considers that the same purpose could be achieved by these prohibitions as milder measures in relation to custody*."[36] By analyzing the said position of the Supreme Court of the Federation of Bosnia and Herzegovina, it can be concluded that (though!) there is no possibility of pronouncing prohibiting measures of leaving the place of residence or travel ban if, in a particular custodial case, the custody is not proposed for fear of flight, while that, according to the attitude of the first-instance Court in the Federation of Bosnia and Herzegovina, is not legally possible in a situation in which the custody measure is proposed for other pre-trial custody grounds (danger of spoliation of evidence, danger of iteration and pre-trial custody in order to preserve the safety of citizens or property).

36 Decision of the Supreme Court of the Federation of Bosnia and Herzegovina No. 03 0 K 011261 13 Kž dated 16 September 2013

5. CONCLUSION

Once the subject elaboration, about the possibility of replacing the custody measure with milder measures when the danger of iteration exists, is brought to an end, it is possible to approach concluding considerations, which can be useful both in terms of possible legislative interventions (*de lege ferenda*), and in terms of making certain guidelines for the courts' approach to ruling in the aforesaid custodial cases.

Regarding the positive criminal procedural regulations in Bosnia and Herzegovina, a comparative legal analysis of the relevant provisions leads to the conclusion that the legislator in all four criminal procedural laws regulated, mainly in the same manner, the issues of measures used to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings, establishing the same procedural rules that the prosecution and courts must use in proposing or deciding which of the legally prescribed measures shall be applied in the given case. In that regard, according to the law, judicial actors must always take into account not to use a more severe measure if the purpose can be achieved with a milder measure and that they regularly (both ex officio and at the request of the parties) control whether, in the meantime, the conditions for replacing the imposed measure with a more milder, alternative measure, are met.

What remains a dilemma, and what was discussed more in the previous elaboration, is the question of whether each of the legally prescribed measures for ensuring the presence of the suspect or the accused and the successful conduct of criminal proceedings can be used without restriction in any possible procedural situation. Thereby, the legislator has remained rather vague, and in some way imprecise, which makes it necessary to point out that, inter alia, the future changes of criminal proceeding laws are clearly defined by the legislator when it comes to the subject matter, that is, if the intent of the legislators is that the pre-trial custody measure, regardless of the custody grounds (even in the case of the danger of iteration), can be replaced without restriction by prohibiting measures, this should be explicitly regulated by law.

However, as long as the legislator does not execute the aforementioned legal amendment to the criminal procedural regulations in Bosnia and Herzegovina, the courts, when deciding on replacing the pre-trail custody when the danger of iteration exists with prohibiting measures, as alternative measures, must not be exclusive, since, as the matters stand, there are more reasons *for* and *against* the possibility of replacing the pre-trail custody when the danger of iteration exists with prohibiting measures, on the one hand, while, on the other hand, there are no formal legal restrictions on the limitation of this possibility, which ultimately leads to the conclusion that the courts' decision solely depends on

the circumstances of the particular custodial case. In that sense, the courts must take into account, first and foremost, the type, content, number and intensity of circumstances that can lead to iteration, and in particular whether the suspect or accused is a repeat offender of serious criminal offenses, whether the offenses are the same or similar, whether criminal offenses are committed from the same motives or incentives, and whether there is a temporal and spatial connection between the criminal offenses for which he had been previously convicted and the criminal offense charged in the custodial case, thus given that in particular situation a suspect or an accused has not been previously convicted of a criminal offense, while the criminal offense for which he was suspected in a particular custodial case was not committed in a particularly harsh and insolent manner and with particularly serious consequences for the protected property and values, it is logical that there are no obstacles for, in that specific case, to replace proposed or pronounced pre-trial custody measure (even if the danger of iteration exists) with prohibiting measures complementary to the given custodial case.

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МЈЕРЕ ЗАБРАНЕ КАО АЛТЕРНАТИВА МЈЕРИ ПРИТВОРА КОД ИТЕРАЦИЈСКЕ ОПАСНОСТИ, ДА ИЛИ НЕ?

Роберт Јовић[37]

Апстракт: *Мјера притвора као најстрожа мјера за обезбјеђивање присуства осумњиченог односно оптуженог у кривичном поступку те његово успјешно вођење, због посљедица своје манифестације које се огледају у ограничењу права на слободу кретања, одувијек је привлачила дужну пажњу како правне доктрине тако и судске праксе на свим нивоима. У том контексту, интересовање науке и правосудне заједнице се прије свега кретало у смјеру дефинисања врло строгих критерија у којима би се мјера притвора могла користити те правила којима се судови морају користити приликом разматрања која од алтернативно постављених мјера за обезбјеђивање присуства осумњиченог односно оптуженог, у конкретној ситуацији, може бити најсврсисходнија без потребе да се користи строжија мјера уколико се сврха због које се мјера изриче може остварити и блажим мјерама. Када је у питању кривично процесно законодавство у Босни и Херцеговини, сва четири закона о кривичном поступку, на углавном идентичан начин, регулишу када и под којим условима се може одредити мјера притвора укључујући и ситуацију одређивања притвора због итерацијске опасности (опасност од понављања кривичног дјела односно довршења покушаног кривичног дјела или учињења кривичног дјела којим се пријети).*[38] *Међутим, оно што се у теорији показало као недоумица и око чега се судска пракса на различитим нивоима судског одлучивања подијелила огледа се у питању да ли се мјера притвора која је одређена због итерацијске опасности може замијенити мјерама забране, као блажим мјерама, обзиром да сврха због које се мјера притвора одређује у конкретном случају није обезбјеђивање присуства осумњиченог односно оптуженог у кривичном поступку него отклањање опасности од (поновног)*

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38 Чл. 132. ст. 1. тач. ц) *Закона о кривичном поступку Босне и Херцеговине* - ЗКП БиХ („Сл. гласник Босне и Херцеговине“, број 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13 и 65/18), чл. 146. ст. 1. тач. ц) *Закона о кривичном поступку Федерације Босне и Херцеговине* – ЗКП Ф БиХ („Сл. новине Федерације Босне и Херцеговине, број 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13 і 59/14), чл. 197. ст. 1. тач. в) *Закона о кривичном поступку Републике Српске* – ЗКП РС („Сл. гласник Републике Српске“, број 53/12 и 91/17), чл. 132. ст. 1. тач. ц) *Закона о кривичном поступку Брчко дистрикта Босне и Херцеговине* – пречишћен текст - ЗКП БД („Сл. гласник Брчко дистрикта БиХ“, број 33/13 и 27/14)

чињења кривичног дјела? Управо ова проблематика представља фокус интересовања аутора у овом научном раду и за које потребе ће аутор анализирати теоријске разлоге за и против могућности замјене мјере притвора код итерацијске опасности са мјерама забране као и актуелну судску праксу у Босни и Херцеговини у вези ове проблематике.

Кључне ријечи: *мјера притвора, итерацијска опасност, мјере забране, Закон о кривичном поступку, судска пракса.*