DEFERRING OF CRIMINAL PROSECUTION IN THE CRIMINAL PROCEDURAL LAW OF SERBIA, MONTENEGRO AND CROATIA WITH SPECIAL REFERENCE TO THE INSTRUCTIONS OF THE PROSECUTOR'S ORGANIZATIONS[1]

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Abstract: Deferring of criminal prosecution belongs to so-called diversion methods of resolving criminal proceedings. This institute was introduced into the criminal procedure systems of the Republic of Serbia, Montenegro, and Croatia at approximately the same time. As this was an entirely new institute, there was no previous prosecutorial practice or criteria that would help in the concretization and implementation of the legal provisions themselves. This resulted in the issuance of bylaws – instructions for improving the implementation of this institute by the prosecutor's organizations. Therefore, although the legal regulation of this institute is of primary importance, the fact that it is also regulated by instructions issued by the prosecutor's organizations, which provide additional guidelines in its implementation, should not be ignored. Aiming to offer a complete review of this topic, this paper will present and analyze the provisions found not only in the laws but also in the bylaws of the above countries and point out their similarities and differences while providing specific suggestions *de lege ferenda* in relation to Serbian procedural law.

Keywords: the principle of opportunity, deferring of criminal prosecution, legal regulations, instructions of the prosecutor's organization.

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INTRODUCTION

In the theory of criminal procedure, the principle of legality is defined as the obligation of the prosecuting authority to prosecute criminal cases as soon as all the conditions prescribed by law are met.[3] On the other hand, the principle of opportunity is the antithesis of the principle of legality, and it essentially prescribes that the public prosecutor may decide not to prosecute a criminal case even though both real and legal conditions have been met. Instead, they may assess the expediency of prosecution with regard to the public interest in each individual case. Thus, the core of the principle of opportunity is the public prosecutor's discretionary assessment, which must not be arbitrary or partial (Бркић: 2013: 77).

In the past, the principle of legality used to be applied without exception: criminal offenses which by their gravity, manner of execution or consequences did not pose great danger from the perspective of public interest could not be excluded from the regular criminal procedure. However, modern criminal procedure is also characterized by certain diversion methods which "deviate" from the path of the obligatory general procedure. One of these methods is the conditional deferring of criminal prosecution, which is also in theory referred to as conditional opportunity. Essentially, it refers to the public prosecutor's authority to defer criminal prosecution against suspects by ordering them to meet one or more legally prescribed obligations within a certain period and, when a suspect agrees and complies voluntarily with the prosecutor's order, the public prosecutor is obliged to dismiss the criminal charges.

The principle of opportunity was introduced into the criminal procedure systems of the Republic of Serbia, Montenegro, and Croatia at approximately the same time, at the end of the 20th and the beginning of the 21st century. It is important to note that since it was a new procedural institute, there was no direct experience in its application, and therefore no prosecutorial practice, nor guidelines or criteria that would help in the implementation of legal provisions. For that purpose, and in order to ensure the legality, efficiency, and uniformity of the practices of all public prosecutors, prosecutorial organizations adopted bylaws in the form of instructions. Therefore, although the law is the main grounds for the application of conditional deferring of criminal prosecution, we should also consider the bylaws adopted by the prosecutorial organizations of these countries, which contain additional conditions, criteria, and guidelines for prosecutors regarding the application of this institute.

In this sense, the next sections of this paper are dedicated to the content and analysis of laws and bylaws related to the deferring of criminal prosecution in Serbia, Montenegro, and Croatia. We believe that we will provide a comprehensive analysis of this important topic in this manner, while the breakdown of comparative regulations in this area will specify potential shortcomings in our procedural law and offer better, more accurate, and more efficient solutions.

DEFERRING CRIMINAL PROSECUTION IN THE REPUBLIC OF SERBIA

Deferring criminal prosecution of adult criminal offenders was introduced into the criminal procedure legislation of the Republic of Serbia by the Criminal Procedure Code from 2001, which entered into force on 28 March 2002.[4] Pursuant to this law, a criminal prosecution could be deferred in the case of criminal offenses for which a fine or imprisonment of up to three years is prescribed (Art.

3 For example: Cigler (1995: 22-23).

4 Official Gazette of the FRY, 70/2001 and 68/2002 and the Official Gazette of RS.

236, par. 1). If the suspect agreed to comply with one or more of the measures imposed by the public prosecutor, and if they did so within a maximum period of six months, the criminal charges would be dismissed by a ruling. The suspect could be ordered to comply with one or more of the following measures (Art. 236, par. 1, item 1 - 4): 1) to remove the harmful consequence caused by the criminal offense or to provide compensation for the damage caused; 2) to pay a certain amount of money to a humanitarian organization, fund, or public institution; 3) to perform certain socially useful or humanitarian work or 4) to fulfill maintenance obligations which have fallen due. The consent of the injured party for deferring criminal prosecution was required for the measures from items 2 and 3, while the consent of the injured party for the obligations from items 1 and 4 was not required. If the suspect fulfilled the obligations within the given deadline, the public prosecutor would issue a ruling to dismiss the criminal charges. In such a case, the injured party could not continue the criminal prosecution after that, nor were they entitled to any appeal against such a decision of the public prosecutor.

Several changes to this law followed after that, and we will discuss the most important ones. The amendments from 2004[5] prescribe that a criminal prosecution may be deferred only with the consent of the court. Such amendments to Art. 236 of the CPC brought into question the operation of the principle of opportunity as the public prosecutor's discretionary right (Киурски, 2015: 108). The two new measures prescribed that the suspect may be subjected to alcohol or drug abuse treatments (Art. 236, par. 1, item 5), or undergo psychosocial treatment (Art. 236, par. 1, item 6). The amendments from 2009[6] expand the possibilities for deferring criminal prosecution to criminal offenses carrying a sentence from three and five years in prison, but only with the consent of the court, while the consent of the court was not required for criminal offenses punishable by up to three years in prison. The list of measures that can be imposed on a suspect was additionally expanded (Art. 236, par. 1, item 6–8): 1) to undergo psychosocial treatment; 2) to fulfill the obligation prescribed by the final court decision, i.e. to comply with the restriction determined by the final court decision, 3) to pass the driving test, attend additional driving training or complete another appropriate course. This amendment also introduced the possibility of substituting the injured party's consent by the fulfillment of the measures from items 2 and 3 of the CPC. Namely, when the public prosecutor assesses that the injured party, who was fully compensated for the damage caused, for obviously unjustified reasons does not agree that the suspect may fulfill such obligations, and the public prosecutor finds that the performance of such obligations is expedient, they will ask the court council to prescribe those obligations. If the council prescribes these obligations, and the suspect fully complies with them, the prosecution will be deferred, and the injured party cannot continue the criminal prosecution after the decision to dismiss the criminal charges. A significant change/extension of the scope of the public prosecutor's discretionary assessment, and of the procedure after the indictment, was the possibility of the public prosecutor to, with the consent of the court in charge of the trial, drop the criminal charges for criminal offenses punishable by a fine or jail time of up to three years, if the defendant fulfills one or more of the above-mentioned measures (Art. 236, par. 6). This is actually a conditional deferring of the already initiated criminal procedure. For criminal offenses punishable by between three and five years in prison, the prosecutor was allowed to act in the manner described, but only with the consent of the extra-procedural council (para. 7). Additionally, we would like to point out another significant change which was a radical modification of the regulation of criminal charges, by which the principle of opportunity became the main principle for certain crimes, and not a deviation from the principle of legality (Bejatović *et al.*, 2012: 14). Namely, when criminal charges were filed for a criminal offense for which a fine or prison sentence of up to three years is prescribed as the principal penalty, the public prosecutor was obliged to examine the possibility of deferring the criminal prosecution before filing the motion to indict or the motion for investigation before the mo-

5 Official Gazette of RS, 58/2004.

6 Official Gazette of RS, 72/2009.

tion to indict. For this purpose, the prosecutor was allowed to speak to the suspect and the injured party, as well as other persons, i.e. to collect other necessary information. Additionally, the prosecutor was obliged to compile an official report on these matters (Art. 236, par. 9 of the CPC). We believe such a provision was introduced with two goals in mind: on the one hand, it required the application of Art. 236 of the CPC in the case of criminal offenses punishable by up to three years in prison. On the other hand, it ensured that the public prosecutor's decisions on the application of the principle of opportunity are monitored (Mirkov: 2012: 489).

The applicable Criminal Procedure Code from 2011[7] brought changes in relation to previous laws. First of all, deferring criminal prosecution is possible for criminal offenses for which a fine or imprisonment of up to five years is prescribed, and the suspect may be required to fulfill one or more of the following obligations (Art. 283): 1) to remove the harmful consequence caused by the criminal offense or to provide compensation for the damage caused; 2) to pay a certain amount of money to the account specified for the payment to the public funds, used for humanitarian or other public purposes; 3) to perform certain socially useful or humanitarian work; 4) to fulfill maintenance obligations which have fallen due; 5) to undergo withdrawal from alcohol or drugs; 6) to undergo psychosocial treatment in order to treat the causes of violent behavior; 7) to comply with the obligation established by a final court decision, i.e. to comply with the restriction determined by a final court decision. Therefore, it can be concluded that the option of deferring criminal prosecution has been extended to criminal offenses punishable by up to five years in prison, whereby the public prosecutor is no longer obliged to seek the consent of the court or the injured party in any part of the procedure, so the application of this institute now depends entirely on the public prosecutor's discretionary assessment. Starting from the idea that procedural roles should be separated, we believe that the decision on criminal prosecution, and thus on deferring criminal prosecution, is justifiably left to the public prosecutor's exclusive jurisdiction. On the other hand, we believe that the public prosecutor, as the person whose jurisdiction is the protection of the injured party's rights, among other things, will adequately protect the interests of the injured party (Илић *et al.*, 2013: 652). It is noticeable that the list of measures that can be imposed on the suspect does not include the obligation to take a driving test, attend additional driving training or complete another appropriate course. Also, the form of the document in which the public prosecutor defers the criminal prosecution was prescribed for the first time (Art. 283, par. 2): in the order for deferring criminal prosecution, the public prosecutor will determine the deadline within which the suspect must comply with the assumed obligations; the deadline has been extended to a maximum of one year, instead of six months. If the suspect fulfills the obligations imposed by the order within the deadline, the public prosecutor will dismiss the criminal charges and notify the injured party. In this case, the provision that allows that an objection to this decision may be filed directly to the higher prosecutor will not apply. It is important to note that the applicable Code no longer prescribes that the public prosecutor is obliged to examine the possibility of deferring criminal prosecution for a criminal offense punishable by a fine or imprisonment of up to three years, which made the principle of opportunity an exception again, and not the main principle that coexists with the principle of legality of criminal prosecution (Bejatović *et al.*, 2012: 14). Finally, a significant change is also the fact that, according to the applicable law, there is no possibility of conditional withdrawal from criminal prosecution which has already commenced. Formally, this had never been the typical application of the principle of opportunity in criminal prosecution (Шкулић, 2013: 81).

In order to achieve legality, efficiency, and uniformity in the practices of public prosecutors, the Public Prosecutor's Office of the Republic of Serbia (Serbian: RJT)[8] has issued several instructions regulating

7 Official Gazette of RS, Nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 and 62/2021.

8 Hereinafter: RJT.

deferred criminal prosecutions. They provide important guidelines for the application of this institute, achieve uniformity in conduct, unification of prosecutorial practice, greatly facilitate control in these cases, while limiting arbitrariness and reducing the possibility of abuse in this type of case.

The RJT's instruction no. A 246/08-01 dated 28 March 2019 prescribes that starting from 1 April 2019, public prosecutor's offices may independently and directly enter information on persons to whom Art. 283 and Art. 284, par. 3 of the CPC apply into the database of the Judicial Information System, and it specifies the obligation to enter these data without delay, i.e. to update the database daily.[9] Starting from that date, public prosecutor's offices are obliged to independently and directly, using this database, check whether the reported person has already been entered into the electronic record database of deferred criminal prosecutions and dismissed criminal charges. Pursuant to the Instruction, the principle of opportunity cannot be applied to the reported person if that measure has already been applied twice for the same criminal offense. Additionally, if the reported person has been entered in the records for another criminal offense, the public prosecutor will make a decision considering all circumstances. In this way, the procedure for checking the reported person was greatly streamlined. In the past, the prosecutor's office considering the application of the principle of opportunity sent a letter with the reported person's information to the RJT office (which was undoubtedly swamped with requests of this type, because this office was the only one authorized to decide on them). After that, the report on whether the person is in the records was sent, also by mail, to the prosecutor's office which requested the check. The whole procedure lasted for several days, while the information requested by the new system is obtained within a few minutes.

The RJT also adopted the General Mandatory Instruction no. A 2/19 dated 22 July 2019, which prescribes that when applying the institute of deferring criminal prosecution for the crime of unauthorized possession of narcotics under Art. 246a, par. 1 of the Criminal Code[10], public prosecutors may offer the suspect to accept an obligation (or one of them) to undergo drug withdrawal if required by the circumstances of the case and when the conditions are met. This instruction is based on the RJT Instruction no. A 478/10 dated 24 February 2011, which prescribes that it is necessary to examine the conditions for deferring criminal prosecution in the case of the above mentioned criminal offense, but only if the narcotic in question is marijuana in the amount of up to 5 grams. This instruction from 2019 stipulates that for the criminal offense of construction without a construction permit from Art. 219a of the CC and the criminal offense of tax evasion under Art. 229, par. 1 of the CC (now Art. 225, par. 1 of the CC) it is no longer possible to defer criminal prosecution[11], because these are criminal offenses for which a sentence of imprisonment and a fine are stipulated cumulatively, which excludes the application of Art. 283 of the CPC.

In the first years after the introduction of this institute into our legal system, criminal prosecutions were not deferred at all[12] or were deferred rarely. Today, it is a generally accepted institute and is applied by all public prosecutors' offices on the territory of the Republic of Serbia. In 2020, a total of

9 The above-mentioned instruction amended the RJT Instruction no. A 246/08 of 28 August 2008, which prescribed that these records shall be maintained by the RJT, so the public prosecutor was obliged to check whether the reported person was entered into the records of the Public Prosecutor of the Republic of Serbia.

10 Official Gazette of RS, Nos. 85/2005, No. 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019. Hereinafter referred to as: CC.

11 Pursuant to the opinion of RJT from 26 November 2010, in the case of the criminal offense of tax evasion under Art. 229, par. 1 of the CC, it was possible to defer criminal prosecution after the tax obligation was subsequently discharged.

12 The institute of conditional deferred criminal prosecution, for example, was not applied in the Basic Public Prosecutor's Office in Kikinda in the period from 2003 to 2005 (Mirkov, 2012: 490), nor was it applied in the prosecutor's offices in Mladenovac, Obrenovac, and Lazarevac (Kiurski, 2009) between 1 January 2003 until 31 December 2007.

57,629 criminal charges were dismissed in the territory of the Republic of Serbia, out of which 15,152 charges (26.29%) were dismissed pursuant to Art. 283 of the CPC, and a total of 506,051,761.00 dinars were paid.[13] According to the 2011 amendments, the funds received in terms of the provision of Art. 283, par. 1, item 2 of the CPC, shall be granted to the humanitarian organizations, funds, public institutions or other legal entities and natural persons, upon conducted public tender, which shall be announced by the ministry competent for the judiciary.

The impression is that the provisions of the CPC referring to the deferral of criminal prosecution do not adequately regulate the rights and position of the injured party. Their consent to the implementation of this institute is no longer sought, nor are they able to seek a review of the public prosecutor's decision to implement this institute through a legal remedy. The law does not even provide for the obligation of the public prosecutor to notify the injured party about their decision to implement this institute or that the deferring of criminal prosecution is in progress. Given that the maximum deadline for the execution of measures imposed on the suspect is one year, the injured party may find themselves in a situation where they are oblivious to the stage of the criminal proceedings, or whether this institute has been implemented at all, which may, in turn, affect their other rights, primarily their right to compensation. If the suspect complies with the ordered measures, the legal obligation of the public prosecutor consists only of notifying the injured party that the suspect had acted on the order of the prosecution and that the criminal charges have been dismissed. Therefore, the public prosecutor is under no obligation to deliver to the injured party the decision terminating the procedure or to inform them that they have the option of pursuing their restitution claim through civil action. The ruling on a dismissal of the criminal complaint, as a document terminating the procedure of deferring the criminal prosecution, bears significance for the injured party, as it contains the basis for the dismissal of criminal charges, identifies the suspect, and qualifies their actions legally in terms of the criminal offence that injured or endangered the personal or property rights of the injured party. Such legislation regarding the position of the injured party is not in line with some international sources, such as the Council of Europe Recommendation No. R (87) 18 concerning the simplification of criminal justice (adopted by the Council of Ministers on 17 September 1987)[14], according to which one of the obligations of the authority conducting proceedings, when implementing the deferral of criminal prosecution, is to consider the position of the victim. Likewise, Directive No. 2012/29 of the European Parliament and of the Council of 25 October 2012[15] establishing minimum standards on the rights, support, and protection of victims of crime, stipulates, in Art. 11, that the injured party may request a review of the decision not to prosecute and that they have the right to obtain additional information in writing, without delay, based on which they will decide whether to request a revision of the decision not to prosecute. One of the aspirations of this Directive is to take significant steps towards raising the level of protection of victims throughout the European Union, especially in criminal proceedings, so it is evident that improving the position of the injured party when it comes to the deferring of criminal prosecution will be necessary to harmonize the normative framework of Serbia with the requirements of the EU accession process.

13 RJT Report on the performance of public prosecutor's offices in crime prevention and upholding the Constitution and legality in practices in 2020 (http://www.rjt.gov.rs/docs/rad_javnih_tuzilastava_2020_0421.pdf, accessed on 15 July 2021).

14 https://rm.coe.int/16804e19f8 (accessed on 29 September 2021).

15 https://eur-lex.europa.eu/eli/dir/2012/29/oj (accessed on 29 September 2021).

DEFERRING CRIMINAL PROSECUTION IN THE REPUBLIC OF MONTENEGRO

The reform of criminal procedural law in Montenegro began even before its independence from the State Union of Serbia and Montenegro, so that at the end of 2003, Montenegro adopted its Code of Criminal Procedure[16] which was mainly modeled on the 2001 Criminal Procedure Code. The new Code retains all of the good solutions from the previous criminal procedural legislation, so in a sense, it continues the evolution of the previous criminal procedural legislation (Radulović, 2015: 59).

This Code introduced the possibility for the public prosecutor to defer criminal prosecution for criminal offenses punishable by a fine or up to three years in prison if the suspect accepts to fulfill one or more of the following obligations (Art. 244, para. 1): 1) to remove the harmful consequence caused by the criminal offense or to provide compensation for the damage caused; 2) to pay a certain amount of money to a humanitarian organization, fund, or public institution; 3) to perform certain socially useful or humanitarian work or 4) to fulfill maintenance obligations which have fallen due. The measures from items 1 and 2 do not require the consent of the injured party, while the measures from items 3 and 4 require such consent. This article provides additional conditions that must be met in order for this institute to be applied: the prosecutor must decide that it will not be expedient to conduct criminal proceedings, depending on the nature of the crime and the circumstances under which it was committed, the perpetrator's previous life and his personal qualities. Therefore, some of the conditions are objective in nature and refer to the crime, while others are subjective in nature and refer to the suspect's personality (Radulović, 2017: 298).

The public prosecutor determines the above-mentioned obligations by a ruling which must be delivered to the suspect, the injured party (if any), or to the humanitarian organization or public institution to which the decision pertains. The injured party and the suspect may file an objection to this decision of the public prosecutor directly with a higher public prosecutor's office within eight days from the receipt of the decision (Art. 244, para. 3). If the suspect complies with the prescribed obligation(s) within the maximum period of six months, the public prosecutor will dismiss the criminal charges, the injured party will have no right to undertake or continue criminal prosecution, and the public prosecutor shall notify the injured party about the above-mentioned fact before they accept the settlement (Art. 244, para. 6).

The provisions on deferring criminal prosecution were amended in 2009[17], by adopting a new and currently applicable Code of Criminal Procedure. The most significant changes included the extension of the scope of this principle's application to criminal offenses punishable by up to 5 years in prison, and allowing the injured party or suspect to file an objection directly to a higher public prosecutor's office.

In addition to the provisions of the CPC, deferring criminal prosecution is specified in more detail by bylaws. Pursuant to the provisions of the CPC from 2003, this document was issued in the form of an instruction by the Supreme Public Prosecutor, while the amendments from 2009 stipulate that the Ministry of Justice shall closely regulate the fulfillment of obligations, the content of the decision on deferring, as well as the application of these provisions. Accordingly, the Rulebook on deferred criminal prosecution was adopted in 2010.[18] The provisions of this Rulebook closely regulate various issues that are important for deferring criminal prosecution. For example, the Rulebook contains provisions relating to the manner of summoning a suspect to accept an obligation, which may also be done by

16 Official Gazette of the Republic of Montenegro, 71/2003.

17 Official Gazette of the Republic of Montenegro, 57/2009.

18 Official Gazette of the Republic of Montenegro, 60/2010.

telephone or other means of electronic communication, at which point the suspect is notified that criminal prosecution will be initiated should they fail to comply with the summons. The Rulebook also regulates the manner in which suspects may give statements, the manner in which the injured party is summoned to give consent and obtain consent, as well as the content of the ruling on deferring criminal prosecution. It is interesting that the Rulebook stipulates that if the suspect and injured parties are not able to respond to the summons, due to illness or other justified reasons, the statement or consent will be obtained in the place where the suspect or the injured party are located, or they will be provided transportation to the building of the competent public prosecutor's office or another place where the statement or consent can be given. Additionally, the Rulebook regulates mediator assignment for determining certain obligations, as well as the manner in which the obligations in the deferred procedure are fulfilled, for each prescribed obligation. Special records are kept for the cases of deferred criminal prosecutions.

When analyzing the frequency of application of deferring criminal prosecution against adults in Montenegro, it can be concluded that this institute was almost never applied until 2007 (on these grounds, only 4 rulings on dismissal of criminal charges were issued in 2005, while 26 such rulings were adopted in 2006). The records show that in the period between 2005 and 2015, this institute was most often applied in 2012, when out of a total of 4345 dismissed charges, 1000 charges were dismissed on the grounds of the principle of opportunity, which amounts to 23.01%. In 2015, out of a total of 3038 dismissed charges, 437 charges were dismissed by deferring criminal prosecution, i.e. 16.13% of charges (According to: Radulović, 2017: 301, 302).

DEFERRING CRIMINAL PROSECUTION IN THE REPUBLIC OF CROATIA

This institute was first introduced into the Croatian criminal procedure system by the provision of Art. 175 of the 1997 Criminal Procedure Code.[19] Pursuant to the provisions of this Article, the public prosecutor was able to defer the commencement of criminal proceedings if the suspect agreed to fulfill one or more of the following obligations: 1) to perform any action that will help repair or compensate for the damage caused by the criminal offense; 2) payment of a certain amount to a public institution, for humanitarian or charitable purposes, or to a fund for compensation of damages to victims of criminal offenses; 3) fulfillment of the maintenance obligations which have fallen due; 4) performing work for the common good (in case of suspects who are not jailed); 5) undergoing treatment for drug or other addiction in accordance with special regulations. The law did not specify a deadline for meeting the prescribed obligation. It is interesting that the law determined the scope of criminal offenses to which this institute can be applied in a qualitative way, and not quantitatively, e.g. by specifying the duration of the stipulated penalty (Burić, Pleić, Radić, 2021: 85). Thus, a criminal prosecution could be deferred if criminal charges were filed for a lesser offense whose harmful consequences are absent or insignificant, which means that the criminal prosecution is not in the public interest. However, the decision to defer criminal prosecution did not depend only on the prosecutor's assessment and the suspect's consent. The competent court's council was also required to approve the prosecutor's decision to defer a criminal prosecution (Art. 175, par. 2 and 3).When the suspect fulfilled the obligation imposed on them, the public prosecutor issued a ruling dismissing the criminal charges, and the decision was delivered to the injured party and the person/institution which filed the charges, while the injured party was notified that they may pursue their restitution claim through civil action (Art. 175, par. 5). This

19 Official Gazette of RH, No. 110/97.

institute could be applied even after the prosecutor filed the indictment, at the stage of lodging objections against the indictment. Following its development, it can be concluded that the new changes in this legal document have continuously prolonged the stages of its application. Pursuant to the 2002 amendments, a criminal prosecution could also be deferred at the stage of preparation for the main hearing. The applicable CPC[20] has extended its application until the end of the main hearing (Gjoni, Sirotić, 2016: 160), so that the public prosecutor shall, if the suspect/defendant fulfills the imposed obligation, dismiss the criminal charges by a ruling, or decide not to prosecute, and inform the court about it (Art. 206d, par. 4). *Argumentum a contrario*, if the obligation is not fulfilled, the public prosecutor shall commence or continue the criminal prosecution (Pavlović, 2017: 582).

In 2002, amendments to the CPC were adopted,[21]and they brought several changes: 1) deferring criminal prosecution became limited to criminal offenses that carry a fine or up to three years in prison; 2) judicial review was excluded from the application of this institute, but the injured party's consent was now required; 3) a new measure was introduced – obligatory psychosocial therapy in order to treat violent behavior, in which case the suspect consents to live separately from their family during the treatment.

In 2008, a new CPC was adopted[22], and we would like to point out the most important changes. First of all, the institute of deferring criminal prosecution was moved from the section dedicated to pre-investigation proceedings to the section of the law that regulated the summary proceedings, in Art. 522 of the CPC. Additionally, the scope of application was extended to criminal offenses which carry a fine or up to 5 years in prison, and for the first time, the law formally stipulated that there must be a reasonable suspicion that a criminal offense has been committed. Finally, for the first time, the law stipulated that the deadline for complying with the prescribed obligation cannot be longer than one year.

The amendment to the CPC from 2013[23] gave the institute of deferring criminal prosecution a legal form in which it is still applied today. Its systematics has been changed again so that it is now listed with the provisions for preliminary proceedings and regulated by Article 206d of the CPC. However, there have been no other changes of the formal conditions for its application, application procedures, lists of measures that may be imposed on the suspect, or the deadline for their fulfillment which we have already mentioned. The suspect's consent and the injured party's prior consent are the constitutive elements for the public prosecutor's decision on conditional deferring of criminal prosecution (Krapac, 2020: 105).

In order to collect data on bylaws regulating the conditional deferred criminal prosecution of adults, we sent a request to the Public Prosecutor's Office of the Republic of Croatia to exercise the right to access information, and we were informed that no special instructions had been issued to prosecutors for this field[24], and that this matter is regulated by the Handbook for Public Prosecutors (2012: 173-175). Pursuant to this handbook, the public prosecutor may defer criminal prosecution only if he/she assesses that the purpose of the proceedings can also be achieved in that manner. Whether the principle of opportunity will be applied depends on the specific case and the prosecutor's analysis of the finding of fact in the file, and no degree of culpability (intent, negligence) is excluded in advance when making a decision. When deciding on this matter, there should be a high degree of certainty that

20 Official Gazette of RH, Nos. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13,145/13,152/14 and 70/17.

21 Official Gazette of RH, No. 58/02.

22 Official Gazette of RH, No. 152/08.

23 Official Gazette of RH, No. 145/13.

24 The Public Prosecutor's Office of the Republic of Croatia issued special instructions for this institute in relation to the practices of public prosecutors for minors and to criminal charges filed against legal entities. See: Sirotić: 2012: 166.

the suspect has committed the criminal offense with which they have been charged. In order for the public prosecutor to be able to make a decision on deferring the commencement of criminal proceedings, they must take a written statement in writing, i.e. the prior consent of the victim or injured party. Also, the public prosecutor must verbally inform the victim/injured party that if they give their prior consent, they lose the right to continue the prosecution under this article, but that they may pursue their restitution claim through civil action. The next step includes the suspect accepting the obligation, and a separate record must be made in the form of a statement before the public prosecutor, which will specify the deadline for the fulfillment of these obligations. The supervision over the obligations is entrusted to the Probation Offices, the exception being the case when the suspect is ordered to pay a one-time fee. In that case, the public prosecutor will require from the suspect to provide them with proof that the obligation has been met. It is recommended to interview the suspect first, and then to take a statement from the injured party.

The analysis of the application of this institute in the procedural law of the Republic of Croatia established that its application is extremely rare. For example, in the period from 2003 to 2010, the total percentage of charges that were dismissed on these grounds was only 1.1%, although this percentage increased year on year (Sirotić, 2012: 196). In 2017, out of a total of 15,557 dismissed criminal charges, only 260 (1.7%) were dismissed after the criminal prosecution was deferred. In theory, the reason for the almost non-existent application of this institute is the relatively complicated and lengthy procedure (Carić, 2009: 611; Sirotić, 2012: 206; Garačić, Novosel, 2018: 538).

CONCLUSION

The institute of deferring criminal prosecution was introduced into the criminal procedure systems of the listed countries within a few years – first in Croatia in 1997, then in Serbia in 2001, and finally in Montenegro in 2003.

The analysis of this institute's development in the above-mentioned countries shows that the initial regulations changed to expand the list of crimes for which it is possible to defer a criminal prosecution. In Serbian procedural law, a criminal prosecution is deferred by an order, and by a ruling in the legal systems of the other two countries. With regard to the measures that can be imposed on the suspect, Montenegrin law specifies only four measures, Croatian law recognizes six, while Serbian law stipulates seven.

An important difference is the status of the injured party with regard to the public prosecutor's decision to defer a criminal prosecution. Namely, pursuant to applicable Serbian law, this institute is completely under the jurisdiction of the public prosecutor, and neither the injured party nor the court has any influence on it. On the other hand, Croatia has a completely different law: a criminal prosecution cannot be deferred unless the victim or the injured party has previously given their consent. This also might be the reason why the institute is rarely implemented, because it follows that, if there is no consent, the criminal prosecution shall be continued. Additionally, Croatian law does not stipulate whether the injured party's consent can be substituted in any way if they withhold their consent for an unjustified reason, as was the case, for example, in Serbian law after the adoption of the 2009 amendment to the CPC. This regulation in Montenegrin law is somewhere between the two solutions mentioned above: the injured party's consent is necessary for the fulfillment of certain measures, but not for all. Therefore, in that case, the prosecutors decide using their discretion.

Analyzing the bylaws of prosecutorial organizations, we can conclude that there is only one Rulebook in Montenegro, and its adoption resolved all the most important issues related to deferring criminal prosecutions in one place. On the other hand, the legal systems of Croatia and Serbia include several instructions and guidelines. Thus, we believe that it would be useful, for the purposes of practicality and uniformity of practice, to consolidate all instructions into one document, as is the case with the plea agreement institute, which is regulated in detail in a single regulation in both countries.

Having in mind the regulations on deferring criminal prosecutions in the legal systems of Croatia and Montenegro, which might improve the quality of regulations of this institute in our law, we would like to point out the provision stipulating that the ruling on deferring criminal prosecutions is also delivered to the injured party (Montenegro), i.e. to the injured party, victim and the person/institution which raised the criminal charges, with the notice that the injured party may realize their restitution claim through civil action (Croatia). Since Serbian law stipulates that the injured party may be notified only after the ruling to dismiss the criminal charges has been made, we believe that it would be expedient, for the purpose of protecting their rights, to inform the injured party as soon as the procedure of deferring criminal prosecution has begun. In this way, the injured party would know the stage of the proceedings, and since the deadline for fulfilling the obligation can be quite long (up to a year), they would know the suspect's deadline for fulfilling the obligation and the estimated time of resolution of the proceedings, so that they may pursue their rights through civil action. In order to protect the injured party's rights, we believe that the injured party should be provided with a copy of the ruling to dismiss the criminal charges, which clearly identifies the person whose criminal prosecution was deferred, the event that was the subject of the criminal charges and the legal qualification of the suspect's actions. Additionally, we believe that the provision by which this institute can be applied until the end of the trial (Croatia), should be re-introduced into our law and that it was unjustifiably omitted by the previous amendments to the law. Although, formally speaking, in this case charges are being dismissed and the criminal prosecution is not deferred (because it has already begun), we believe that this would help lessen the excessive burden of the judiciary and relieve the courts' caseload. If in the meantime the prosecution and the suspect reach an agreement on the fulfillment of some of the obligations, the procedure could be shortened, whereby material and human resources would be redirected to the prosecution for more severe criminal offenses. Of course, when regulating this option legally, care should be taken to protect the injured party's interests.

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