Maja Iveljić[1]
Dževad Mahmutović[2]
Vedad Gurda[3]

BAIL IN BOSNIA AND HERZEGOVINA AND IN COMPARATIVE LAW

Abstract

Bail represents one of the measures to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings. This paper analyzes the quality of the Bosnian-Herzegovinian (hereinafter: BiH) norm for standardizing the bail, and as a hypothesis that was tested, the statement was defined that the bail is not well standardized in the laws of Bosnia and Herzegovina and there is a need for improvement. The aim of the paper and hypothesis testing was conducted through the analysis of the norm in Bosnia and Herzegovina and in comparative law, and finally empirical research has been conducted within the judicial community on the quality of the norm.
The analysis of the norm shows the differences between the standard of Bosnia and Herzegovina and the norm of the surveyed countries in terms of bail. Special differences were observed in terms of detention grounds for which bail can be imposed as a substitute for detention, the existence of a conditional bail and some other specifics that are defined in the analyzed countries in a way different from the BiH norm. The conducted empirical research showed that the judicial community is not satisfied with the quality of the norm and that it needs to be improved, which is a confirmation of the research hypothesis.

Key words: bail, detention, risk of absconding.

1. Introduction

In any criminal procedure, its successful conduct is of crucial importance, which is ensured by certain measures prescribed by procedural laws, the aim of which is to ensure the presence of the suspect or accused during the entire criminal proceedings. Measures to ensure the presence of a suspect or accused in criminal proceedings restrict the right to personal liberty of an individual to a greater or lesser extent. The goal of measures of procedural coercion is not only the successful conduct of criminal proceedings, but also the apprehension of the

[1] Viša asistentkinja na Pravnom fakultetu Univerziteta u Tuzli; maja.hadzihasanovic@gmail.com
[2] Vanredni profesor na Pravnom fakultetu Univerziteta u Tuzli; mahmutovicdzevad@gmail.com
[3] Vanredni profesor na Pravnom fakultetu Univerziteta u Tuzli; vedad.gurda@untz.ba

perpetrator to justice, the prevention of new crimes, the provision of evidence, and the protection of the rights and freedoms of citizens.

According to the Criminal Procedure Code of Bosnia and Herzegovina [4] (hereinafter: CPC BiH), the Criminal Procedure Code of the Federation of Bosnia and Herzegovina[5] (hereinafter: CPC FBiH), the Criminal Procedure Code of Republika Srpska [6] (hereinafter: CPC RS), and according to the Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina[7] (hereinafter: CPC BD BiH), five measures have been prescribed to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings, namely: summons, apprehension, prohibiting measures, bail and custody.

This paper is dedicated to the analysis of bail as a measure to ensure the presence of the suspect/accused and successful conduct of criminal proceedings in domestic and comparative law, but also to exploring the opinion of the BiH judiciary regarding the quality of the norm and its practical application. Based on these analyzes, the intention is to assess the quality of the BiH norm and its practical application, and to make certain proposals *de lege ferenda* if necessary.

In this sense, a hypothesis has been determined that needs to be tested by this research, and it reads: The bail is not well regulated in the laws of Bosnia and Herzegovina and there is a need for improvement.

For the sake of better and more systematic presentation, the paper will first focus on general considerations on measures which ensure the presence of the suspect/accused and the successful conduct of criminal proceedings, especially on bail, and on bail in BiH and comparative law.

2. General information on measures which ensure the presence of the suspect or accused and successful conduct of criminal proceedings

For the criminal proceedings to proceed as required by law, it is necessary to ensure the presence of the suspect/accused, witnesses and experts, but also that the court may dispose of items that serve as evidence for the verdict. Sometimes it is necessary that the presence of persons and evidence be carried out through means of force. However, forceful measures are applied only in exceptional situations, as they significantly restrict human rights and freedoms. They are

[4] *Criminal Procedure Code of Bosnia and Herzegovina,* Official Gazette of BiH, numbers: 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 29/07, 53/07, 58/08, 12/09, 16/09, 53/09, 93/09, 72/13, 65/18.

[5] *Criminal Procedure Code of the Federation of Bosnia and Herzegovina,* Official Gazette of the Federation of Bosnia and Herzegovina, numbers: 35/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 08/13, 59/14, 74/20.

[6] *Criminal Procedure Code of the Republika Srpska,* Official Gazette of the Republika Srpska, numbers: 53/12, 91/17, 66/18, 15/21.

[7] *Criminal Procedure Code of the Brčko District of Bosnia and Herzegovina,* Official Gazette of the Brčko District of Bosnia and Herzegovina, numbers: 34/13, 27/14, 3/19, 16/20.

applied exclusively with the aim of preventing non-fulfillment of procedural duties of the participants in the procedure.[8]

For procedural forceful measures to be applied, it is necessary, first of all, that there is a certain concrete danger of possible detriment, which should be eliminated by the forceful measures and that there is a suspicion that the person subject to procedural coercion is a perpetrator.

Measures of procedural coercion are divided into those that are taken against persons and those that are taken against things. According to the goal to be achieved, they are divided into measures to provide evidence and measures to ensure the smooth running of the proceedings. [9] In this paper, we will deal with measures to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings.

Criminal proceedings are being conducted against a specific person, ie. the suspect or the accused, and it is necessary for that person to attend the criminal proceedings. However, if the suspect or accused does not want or avoids coming, measures may be taken against that person to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings. These measures range from simpler to those that encroach on the freedom of the suspect or accused. These measures are not sanctions, as they serve solely to ensure that criminal proceedings are conducted smoothly. [10]

We emphasize that when applying measures to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings, care should be taken not to apply a more severe measure, if the same purpose can be achieved by applying milder measures. As soon as the reasons that led to the application of some of the measures to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings cease to exist, it will be abolished *ex officio* or replaced with milder ones when the conditions are met. When circumstances so require, the court may order two or more measures. [11]

Forceful measures undoubtedly restrict the rights and freedoms of citizens. Therefore, the justification for the application of these measures is based on the provisions of Article 9 of the International Covenant on Civil and Political Rights [12] and Article 5 of the European Convention on Human Rights and

[8] Simović, MN and Simović, VM (2019) *Krivično procesno pravo, Uvod i opšti dio,* fifth amended edition, Faculty of Law, University of Bihać, Bihać, pp. 565.
[9] *Ibid*, pp. 565-566.
[10] Bejatović, S (2016) *Krivično procesno pravo*, Službeni glasnik, pp. 212.
[11] *Ibid*.
[12] International Covenant on Civil and Political Rights (ICCPR) is an international treaty of the United Nations which obliges member states to include in their legal systems provisions for protection of civil and political human rights, including the right to life, freedom of religion, freedom of speech, freedom of political association and fair trial. The Covenant was adopted by

Fundamental Freedoms (hereinafter: the ECHR).[13] In domestic law, the application of these measures is based on Article II paragraph (1), Article II paragraph (2), and Article II paragraph (3) point d) of the Constitution of Bosnia and Herzegovina[14] (hereinafter: the Constitution of BiH), to which Bosnia and Herzegovina (hereinafter: BiH) and its entities must ensure the highest level of internationally recognized human rights and fundamental freedoms, and guarantee every person the right to personal liberty and security. As defined in Article II/1 and Annex I to the Constitution of BiH, the rights and freedoms provided for in the ECHR and its Protocols are directly applicable in BiH. These acts take precedence over all other laws.[15]

3. Bail in general

Bail is a measure in criminal proceedings by which a suspect or accused, for whom there are conditions for ordering custody, is released to defend himself, provided that he gives a certain bail. If we look through history, we will see that bail has long been the only measure of criminal procedure that could replace detention. In England, the right to a bail is as old as English law itself. In the United States, the right to a bail was originally taken from English law, and after the Declaration of Independence of 1776, it was constitutionalized through the U.S. Constitution and the laws of individual states. In continental Europe, the constitutional protection of the right to liberty and the right to bail was established during the 19th century after the civil revolutions, and in the 20th century.[16]

In some European countries, the institute of bail does not exist at all, e.g. in Italy, Sweden, Hungary, while in many, as a minimum required by the Convention, the possibility of replacing detention with bail is prescribed only when there is a risk of absconding, e.g. in Austria, Switzerland, Bosnia and Herzegovina, Macedonia. In Germany, it is possible to replace detention with bail in case of risk of

---

the United Nations General Assembly on 19 December 1966 and entered into force on 23 March 1976.

[13] European Convention on Human Rights (ECHR); fr. *Convention européenne des droits de l'homme - CEDH*) is an international treaty for protection of human rights and freedoms in Europe and as such is the oldest and most effective system for protection of human rights in the world. It was signed in Rome on 4 November 1950 by the twelve member states of the newly established Council of Europe, and entered into force on 3 September 1953.

[14] Constitution of Bosnia and Herzegovina, Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and Official Gazette of BiH, no. 25/09 - Amendment I

[15] Sijerčić-Čolić, H (2019) *Krivično procesno pravo, Knjiga I, Krivičnoprocesni subjekti i krivičnoprocesne radnje,* fifth amended edition, University of Sarajevo, Faculty of Law, Sarajevo, pp. 267.

[16] See more: Đurđević, Z (2015) *Pravna priroda, pravni okvir i svrha jamstva u kaznenom postupku: mogu li preživjeti odluku Ustavnog suda RH U-III-1451/2015 o ukidanju istražnog zatvora za gradonačelnika grada Zagreba i vraćanju jamčevine njegova branitelja?,*Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 22, no. 1/2015, pp. 11-12.

absconding, but also on other grounds of detention, while e.g. in the Netherlands, although there is a bail as a legal institute, it does not apply at all.[17]

The right to liberty before trial should enable the unhindered preparation of the defense and serve to prevent pre-trial punishment. Therefore, it is considered that if the right to bail is guaranteed before the trial, it guarantees the presumption of innocence. In relation to bail in other areas, where it is in the service of fulfilling the property obligations of a certain person, in criminal proceedings the bail is determined to ensure the presence of the suspect or accused and successful conduct of criminal proceedings.[18]

The advantages of bail over detention are manifold. Primarily, the bail ensures the presence of the suspect or the accused and the successful conduct of criminal proceedings while avoiding the harmful effects to which detainees are exposed. Among the advantages of bail over detention are; no costs that are significant during detention; there is no danger that the suspect, accused person will request possible compensation for unjustified deprivation of liberty; the overcrowding of institutions where detention is maintained is reduced, etc.[19]

The ECHR, Article 5 paragraph (3), provides for the possibility of a person being released from custody, with certain guarantees that he or she will appear at trial. When we talk about the guarantee of appearing at trial, and in the context of this paper, then we certainly mean the bail. As set out in the ECHR Case Law Guide, Article 5 paragraph (3) of the ECHR expressly provides that release may be conditioned by guarantees to appear for trial. This bail can be financial, and when talking about this type of bail, it should be borne in mind that the amount of this guarantee should be determined taking into account various factors, including the financial capabilities of the person paying the bail (financial situation[20]) and the

[17] *Proposal of the Law on Amendments to the Criminal Procedure Code* (February 2016) Club of Representatives of the Social Democratic Party of Croatia, Zagreb

[18]Banović, B (2019) *Jemstvo kao mera obezbeđenja prisustva okrivljenog u krivičnom postupku - norma, praksa i dosadašnja iskustva u primeni,* Collection of papers „Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku (međunarodni pravni standardi, regionalna zakonodavstva i primena)“, OEBS Mission in Serbia, Belgrade, pp. 202.

[19] *Ibid*., pp. 202-203.

[20] As the amount of bail must be determined on the basis of the defendant's financial situation, he cannot claim that his detention was extended because an excessively high amount of bail was required, if he did not provide essential information to determine that amount. In other words, the defendant for whom the court expresses readiness to be released on bail must conscientiously provide sufficient information on the value of his property, which can be verified if necessary, so that the authorities can estimate the amount of bail to be determined. *Bonnechaux v. Switzerland*, 8224/78 of 5 December 1979, DR 18, 100 [DH (80) 1], MacBride, J (2009), *Human Rights and Criminal Procedure: The Case Law of the European Court of Human Rights*, Belgrade, pp. 72. Bail is not determined by the amount of damage caused by the defendant, but by his personal and property circumstances, and by his relationship with persons who would post bail instead. (Verdict in the case *Neumeister v. Austria*), 1936/63 of 7 May 1974, taking into account the defendant's willingness to pay the costs of the proceedings and the fines (verdict in the case of

context of the case. This type of bail should be sufficient to deter a person from fleeing without being an excessive amount.[21]

The bail consists of a moral obligation which implies a statement by the suspect or the accused, or some other person, that the suspect or the accused will not escape until the end of the criminal proceedings, but also the promise of the suspect or the accused not to hide and not to leave the residence without permission and a material guarantee, which always reads the amount of money[22], given by the suspect or the accused or another person or both.

However, the case law of the ECHR has established that the court does not always have to comply with a request for release on bail, and in this regard has identified five grounds that can serve to break the bail: a) the risk that the accused will fail to appear for trial; b) the risk that the accused, if released, would take action to prejudice the administration of justice, c) commit further offences, d) cause public disorder and e) in exceptional circumstances, for the safety of the person under investigation. In the event of a refusal of bail, judges in national laws should always explain the reasons why they refused to grant bail. The case law of the ECHR requires that each of the above reasons for refusing bail must be reasoned *in concreto*, and that reasons *in abstracto* are not acceptable.[23]

4. Bail in Bosnia and Herzegovina

Pursuant to Article 127 of the CPC of BiH, Article 141 of the CPC of FBiH, Article 192 of the CPC of RS, and Article 127 of the CPC of BD BiH, a suspect or accused who is to be to be placed in custody or has already been placed in custody only for a flight risk may be allowed to remain at liberty or may be released if he personally or someone else[24] on his behalf furnishes a surety that

Kemmache v. France, Nos. 012325/86 and 14992/89 of 2 November 1993). Krapac, D et al. (2014) *Kazneno procesno pravo, Prva knjiga: Institucije*, Sixth Amended Edition, Narodne novine, Zagreb, pp. 368.

[21] *The right to liberty and security of the person, Article 5 of the European Convention on Human Rights*, Handbook of Case Law of the European Court of Human Rights (2015) The Aire Center, pp. 33 and Banović, B (2008) *Krivično procesno pravo*, Faculty of Security Studies, University of Belgrade and Public Enterprise " Službeni glasnik", Belgrade, pp. 113-114.

[22] The amount of money refers to the domestic currency, and not to the foreign one, so in case of returning the bail, the guarantor will be refunded the currency he *de facto* handed over or movables. Konjić, Z and Pavičić, A (2008) *Prisilne radnje i mjere - mjere osiguranja i dostava*, Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 15 No. 2/2008, pp. 897.

Prior to determining the amount of money, the court has no obligation to determine whether the suspects, ie the accused or a third party are willing to deposit this amount in the name of bail. If the court assesses that it is unlikely that the suspect, ie the accused or a third party will deposit the amount of money, it should not dissuade the court from determining the amount of money.

[23] *The right to liberty and security of the person, Article 5 of the European Convention on Human Rights*, op.cit., pp. 32.

[24] Someone else may be a member of the suspect's or accused's family, defense counsel, a company that owns a ship whose captain is accused of committing an environmental crime, a

he will not flee[25] before the end of the criminal proceedings and the accused himself pledges that he will not conceal himself and will not leave his residence without permission. It follows from the said provision that bail can be determined only if there is a risk of absconding, in no way for other reasons for detention.

The court is obliged to instruct the suspect or the accused about the right to seek bail. The bail cannot be determined by the court *ex officio*, but only on the initiative of the suspect, ie the accused, his defense counsel or third parties. If the bail is offered by a third party, then the consent of the suspect or accused is required. Regardless of which of the above persons gives a guarantee, in addition to the given bail, it is necessary that the suspect or the accused himself promises not to hide and not to leave the residence without permission.[26]

Bail is a milder measure than detention.[27] It ensures the presence of the suspect or accused during the entire duration of the criminal proceedings, and it is possible to determine it for each suspect or accused and for every criminal offense.[28]

In the course of an investigation, the decision on bail[29] and its cancellation is issued by the preliminary proceedings judge and after the issuance of an indictment - by a preliminary hearing judge and after the case has been submitted

local government unit or a foreign state whose secret service pays bail for its agent. Martinović, I and Bonačić, M (2015) *Jamstvo kao zamjena za istražni zatvor: otvorena pitanja,* Hrvatski ljetopis za kazneno pravo i praksu (Zagreb), vol. 22, No. 2/2015, pp. 421.

[25] When the only remaining reason for continuing detention is the fear that the accused will escape and thus avoid appearing at trial, he must be released if he is able to provide adequate guarantees that he will appear, for example by posting bail. *Letellier v. France*, no. 12369/86, 26 June 1991, § 46.

[26]Sijerčić-Čolić, H et al (2005) *Komentari zakona o krivičnom/kaznenom postupku u Bosni i Hercegovini,* Council of Europe / European Commission, pp. 393.

[27]In the case *Mamedova v. Russia*, no. 7064/05, 1 June 2006, § 78, throughout the applicant's detention, the authorities did not consider securing her presence with a milder preventive measure, although many times the applicant's lawyers requested her release on bail or under the guarantee that she would not leave the city. Nor have the domestic courts in their decisions explained why alternatives to deprivation of liberty would not ensure that the trial goes in its proper course. This failure is made even more inexplicable by the fact that the new Criminal Procedure Code explicitly requires domestic courts to consider less restrictive domestic measures as an alternative to detention.

[28]See more: Bubalović, T and Pivić, N (2016) *Krivično procesno pravo – opći dio*, Faculty of Law, University of Zenica, Zenica, pp. 183.

[29]There are several forms of bail solutions. These are: a) a decision rejecting the application for a bail; b) a decision rejecting the request for the application of the bail; c) the decision determining the bail; d) a decision cancelling the bail; e) a decision declaring the bail void and f) a decision deciding on the appeal lodged against some of the above decisions. Each decision on the bail must contain an introduction, dispositive and explanation, and a transcript of the decision delivered to the parties must also contain an instruction on the legal remedy. For more details, see: Sijerčić-Čolić, H et al (2005) *Komentari zakona o krivičnom/kaznenom postupku u Bosni i Hercegovini*, op.cit., pp. 402.

to the judge or the Panel for the purpose of scheduling the main trial - by that judge or the presiding judge. A decision setting the bail and a decision cancelling the bail shall be taken following the hearing of the Prosecutor. [30]

The bail is terminated in two ways: confiscating or repealing.

The bail is cancelled if the suspect or accused flees. According to Article 128, paragraph (4) of the CPC of BiH, Article 142, paragraph (4) of the CPC of FBiH, Article 193, paragraph (4) of the CPC of RS and Article 128, paragraph (4) of the CPC of BD BiH, a decision shall be issued ordering that the amount posted as bail shall be credited to the Budget of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, the Republika Srpska, and the Brčko District of Bosnia and Herzegovina.[31] The bail is canceled in its entirety, but it will not parish if the suspect or the accused is hiding, because it is not given for this case. [32]

Article 129 of the CPC of BiH, Article 143 of the CPC of FBiH, Article 194 of the CPC of RS, and Article 129 of the CPC of BD BiH stipulate that the bail will be cancelled and custody will be ordered: a) the suspect or accused shall be placed in custody if without justification he fails to appear when duly summoned; b) if he is preparing to flee; or c) if there occurs another legal ground for his custody after he has been released. By cancelling the bail, the deposited amount money, valuables, securities or other personal property deposited shall be returned, and the mortgage shall be removed. The same procedure shall be followed when the criminal proceedings terminate with a legally binding decision to dismiss proceedings or with a verdict. If a prison sentence is pronounced in the verdict, the bail bond shall be cancelled only when the convicted person begins to serve the sentence.

5. Bail in Comparative Law

To gain a better insight into the quality of the BiH norm related to the bail, the paper analyzes the norms of this institute in our neighboring countries, countries with similar legal traditions such as the Republic of Croatia, the Republic of Serbia and the Republic of Montenegro.

[30]Article 130 CPC BiH, Article 144 CPC FBiH, Article 195 CPC RS, Article 130 CPC BD BiH

[31] If, when determining the bail, the amount given as bail was given for the accused by another person, then the court is obliged, in case of a later decision on the void of the bail due to the escape of the accused, to deliver the decision to the person who gave the amount in order to enable that person to file an appeal against the decision on the failure of the bail, since he, too, enters the circle of persons authorized to file an appeal against the decision. See *Decision of the Supreme Court of the FBiH*, No. 02 0 K 000307 12 Kž dated 9 October 2012, *Bulletin of Judicial Practice of the Supreme Court of the Federation of Bosnia and Herzegovina*, Sarajevo, No. 1-2, January-December 2012, pp. 26.

[32]See more: Simović, MN and Simović, VM, *Krivično procesno pravo, Uvod i opšti dio,* op.cit., pp. 587.

a. Bail in the Republic of Croatia

Pursuant to Article 102, paragraph (1) of the Criminal Procedure Code of the Republic of Croatia[33] (hereinafter: CPC of the Republic of Croatia) investigative detention is determined if there exists reasonable suspicion that a person committed an offence, or the person is on the run or there are special circumstances indicating a danger of flight; [34] it may be terminated provided that the defendant[35] personally, or another person on his behalf, gives bail and the defendant personally promises that he will not hide or leave his place of residence without permission.

Under Croatian law, a court can order an unconditional and conditional bail. Unconditional bail is pronounced when the court considers that it is sufficient to determine the bail to eliminate the danger, ie to threaten to seize the bail, if the defendant does not adhere to the rules of conduct, ie the given promise. Conditional bail is imposed when the court considers that, in addition to determining bail, it is necessary to impose additional precautionary measures imposing supervision, obligations or restrictions on him while he is at large. [36]

The bail measure represents the realization of the principle of proportionality, which obliges the court to abolish investigative detention and instead imposes a milder measure as soon as there are conditions that the same purpose can be achieved by such a measure. Bail cannot be determined if there is no basis for ordering investigative detention. Moreover, the replacement of investigative detention with bail is not possible before a decision is made to order investigative detention. Because of the links between bail and investigative detention, bail is often referred to as a substitute for investigative detention.[37]

---

[33] *Criminal Procedure Code of the Republic of Croatia*, Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19

[34] Đurđević Z., op.cit., 19. The case law of the ECHR also confirms that the legislator's obligation to prescribe bail as a substitute for investigative detention applies only in the event of a danger of absconding. However, if the legislator still prescribes the possibility of replacing investigative detention with bail, not only in case of danger of escape but also in case of other investigative detention grounds, then the national court is obliged to consider bail on those grounds as well. Đurđević, Z op.cit., pp. 19.

[35] The law uses other terms for the defendant, depending on the stage or form of criminal proceedings in which he appears, as follows: a suspect is a person against whom criminal charges have been filed, or investigations are being conducted, or urgent evidentiary action has been taken, the indictment has been confirmed or a hearing has been ordered in connection with a private lawsuit, and the convict is a person who has been found guilty of a certain criminal offense by a final judgment. *Criminal Procedure Code of the Republic of Croatia*, op cit, Article 202, paragraph (2), points 1), 2), 3) and 4).

[36] *Ibid*., pp. 24. and Pavišić, B (2013) *Komentar Zakona o kaznenom postupku*, second edition, Rijeka, pp. 319-320.

[37] Martinović, I and Bonačić, M op.cit., pp. 411-412.

In the decision on ordering investigative detention, the court may determine the amount of bail that may replace investigative detention. Bail is always set in a pecuniary amount determined with regard to the gravity of the criminal offence, personal circumstances and financial situation of the defendant.[38] Article 103 of the CPC of the Republic of Croatia stipulates that the court will determine the amount of bail and the form of bail, and according to the same provision these forms are: a) deposit of cash, b) surrender of securities, c) surrender of valuables, d) surrender of other movables of higher values that can be easily cashed and kept, and d) mortgaging the amount of the bail[39] on the real estate of the person providing the bail.

If the court finds that the bail cannot replace investigative detention, it will state the circumstances due to which it considers that the replacement of investigative detention with bail is excluded. This occurs when there is a basis for ordering investigative detention that precludes the application of a bail measure, or when specific circumstances preclude the application of a bail. [40]

The parties have the right to appeal against the decision on the amount of the bail within three days. After the decision on bail becomes final and the defendant promises not to hide and not to leave his place of residence without permission, and the bail is posted, the court will issue a decision on the abolition of investigative detention stating the grounds for imprisonment and the conditions to which the defendant must comply. After the decision on the abolition of investigative detention becomes final, the court decision on the bail must be submitted to the police for action. Pursuant to Article 104, paragraph (1),[41] the police shall supervise the conduct of the defendant and report any circumstance indicating a possible breach of bail to the Attorney General and the court.

[38] The bail must be set at a high enough level that the threat of deprivation will deter the detainee from committing acts prohibited by the court when ordering bail and which will exercise mental coercion so that he prefers to participate in the proceedings and subject himself to possible deprivation of liberty by imprisonment, rather than risking losing the bail. The ECHR took the position that the degree of security must be taken into account that this person, due to the possibility of losing property, gives up any desire to escape. Đurđević, Z op.cit., pp. 22.

[39] Martinović I., Bonačić M., op.cit., 421. In court practice, dilemmas have arisen about the possibility of placing a mortgage on residential buildings that are not condominiums, do not have a use permit or in a certain ideal part there is a record of prohibition of disposal to ensure confiscation of illegally acquired property. *The Decision of the Supreme Court of the Republic of Croatia*, No. II Kž-384/15 resolved the above dilemma: a bail on such real estate can be determined only if their market value corresponds to the amount of the established bail. Martinović, I and Bonačić, M op cit., pp. 421.

[40] *Criminal Procedure Code of the Republic of Croatia,* op cit, Article 102 paragraph (3))

[41] *Ibid*., op cit

If the defendant acts contrary to the terms of the ruling on bail, a ruling shall be rendered to collect the amount of bail in favor of the budget and investigative detention shall be ordered against the defendant. [42]

Article 105 of the CPC of the Republic of Croatia regulates changes in the amount of the bail and the form of bail if this is justified by subsequently determined circumstances. The same provision prescribes the possibility of cancellation of bail in case of subsequent circumstances. If it is established that the defendant concealed true circumstances which are taken into consideration when setting bail or forms of bail, or if a reason for investigative detention other than the one he was held in investigative detention for and made bail for shall be established and the amount of the bail given is not appropriate for the new circumstances, if there is a serious likelihood[43] that the defendant will act contrary to the terms of the bail order; if the criminal proceedings end with a final judgement on the suspension of the proceedings or a verdict; except when a sentence of imprisonment has been imposed by a judgment, in which case the bail shall be vacated when the convicted person enters into service of the sentence.

From the overall legal norm on bail, it can be seen that there are four types of cancellation of bail: to the detriment of the defendant, in favor of the defendant, if there are no longer grounds for investigative detention and if there are grounds for investigative detention but the purpose can be achieved by some precaution measure. The cancellation of the bail to the detriment of the defendant is accompanied by the imposition of investigative detention. In this case, the bail is cancelled not because its purpose has been successfully achieved, but because it can no longer achieve the purposes for which it was determined, so it is necessary to determine investigative detention as a more severe measure. The cancellation of bail in favor of the defendant occurs when there is no longer a need for him, i.e., in the case of the termination of criminal proceedings, and when a prison sentence is imposed, when the convicted person starts to serve his sentence.

In addition to these reasons, the bail will be cancelled before the criminal proceedings are completed, when the legal conditions for the application of investigative detention no longer exist, as well as when these conditions formally exist, but the purpose of investigative detention can be achieved with some precaution measure.[44]

[42] *Ibid*., op cit, Article 104 paragraph (2)

[43] Serious likelihood exists when evidence indicates a certain condition. This evidence must be pointed out by the public prosecutor and decided by the court. Pavišić, B *Komentar Zakona o kaznenom postupku*, op cit, pp. 322.

[44] See more: Martinović, I and Bonačić, M op cit, 431-432.

b. Bail in the Republic of Serbia

According to the Criminal Procedure Code of the Republic of Serbia [45] (hereinafter: the CPC of the Republic of Serbia), a defendant[46] who is to be placed in custody or is already in custody due to specially defined detention grounds may remain at liberty, i.e. may be released if he personally, or another person, offers bail guaranteeing that he shall not abscond until the end of proceedings with further proviso that the defendant personally, before the court which conducts the proceedings, [47] promises not to hide or leave his place of residence without permission. [48]

When it comes to detention reasons that can be used to replace bail, then it can be said that the Serbian legislator sets them significantly wider than the BiH legislator. Thus, it is determined that bail may replace detention ordered because of the danger of absconding, i.e., if the defendant is hiding or his identity cannot be established or when he obviously avoids coming to the main trial as a defendant or if there are other circumstances indicating danger of absconding or if the criminal offense he is charged with is punishable by imprisonment for more than ten years, or imprisonment for more than five years for a criminal offense with elements of violence or the verdict of the first instance court sentenced him to five years in prison or more, and the manner of execution or severity of the consequences of the criminal offense have led to public disturbance[49] that may jeopardize the smooth and fair conduct of criminal proceedings. Thus, in the Republic of Serbia, the bail has a substitutive character in relation to detention.

Article 202, paragraph (2) of the CPC of the Republic of Serbia stipulates that bail shall always be set in a pecuniary amount[50] considering the degree of danger

[45] *Criminal Procedure Code of the Republik of Serbia*, Official Gazette of RS, Nos: 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, 35/19, 27/21, 62/21

[46] Given the provision of Article 205, paragraph (1), which determines the jurisdiction to issue a decision on bail in the investigation phase, after confirmation of the indictment and at the main trial, the following may be considered defendants: suspects, defendants and accused from Article 2, paragraph (1), item 1 , 2 and 3 of the *Criminal Procedure Code of the Republic of Serbia.*

[47] The promise of the defendant that he will not hide and that he will not leave his residence without the approval of the court can be given before the court and during the appeal procedure. *Decision of the Court of Appeals in Belgrade*, Kž2 Po1 number: 310/13 of 30 July 2013, Ibid., pp. 495 and *Alternative pritvoru u pravnom sistemu Srbije - osnovna prava okrivljenog*, pp. 17. Available from: https: //www.partners- serbia.org/public/documentations/Alternative-pritvoru.pdf [27 April 2020]

[48] Article 202, paragraph (1) of the CPC RS

[49] It is assumed that the legislator's goal in determining this basis on which bail could be determined was primarily to offer another alternative to detention, in situations where public harassment is not of such intensity that the defendant would have to be imprisoned. Ilić, PG, et al (2024) *Komentar Zakonika o krivičnom postupku*, seventh amended edition, Official Gazette, pp. 494.

[50] Prior to determining the amount of money, the court has no obligation to determine whether the defendants or a third party are willing to deposit this amount in the name of bail. If the court

to abscond, personal and family circumstances of the defendant and the financial situation of the person providing bail. [51] The content of the bail is prescribed by

finds it that the defendant or a third party is unlikely to deposit the amount of money, it should not in itself dissuade the court from determining the amount of money. In the *Decision of the Court of Appeals in Belgrade*, Kž2 Po1 number: 315/13 of 2 August 2013 the court took the position that it is authorized that in addition to determining the amount of the bail, it can also determine the content of the bail, which means that in this case the bail must be made in cash, without any possibility to do so on any of the alternative provided ways. Ilić, PG et al., op cit, pp. 499.

[51] In the specific case, the property of the defendant, members of his family and friends was given as bail. The case file shows that these are real estates worth 534,996.98 euros and that the means of securing the presence of the defendant in the criminal proceedings in this case should be the registration of a mortgage on this property, whereby, if the defendant escaped, the property would go to the judicial budget. Therefore, the first instance court, to conclude whether the property is a sufficient guarantee that the defendant will not escape or hide, assessed the property status of the defendant and appointed persons, the gravity of the crime, personal and family circumstances of the defendant. The court judges those facts as interrelated and based on that it concludes whether in the specific case the purpose for which the procedural measure of detention is applied to the defendant can be achieved by applying the procedural measure of bail in the above amount, or not. It is not enough to point out that there is no monetary equivalent that would guarantee that the defendant will not escape, without a clear and concrete assessment of these facts, with a detailed explanation of the facts and circumstances due to which the procedural measure of detention is applied. On the other hand, that made the decision in question incomprehensible, since it is not clear on the basis of what the first instance court came to that specific conclusion. In all this, the first instance court, in addition to the value of the said property, had the authority to assess the personal and family circumstances of the defendant, and thus whether the real estate proposed as a guarantee that the defendant will not escape is real estate inhabited by bailiffs and whether in the case of the so-called "vacation of bail" calls into question the accommodation of persons living in these properties. Finally, the first-instance court should have assessed the facts in question in the context of the amount of illegal property gain for which there is a grounded suspicion that it is obtained and the consequences in the case of the so-called "vacation of bail" for property given as guarantee, consequences for the defendant's family and relatives if the property was confiscated, but also regarding the fact that the defendant reported himself to the prosecution, that he expressed a clear position that he wanted to be tried in the territory of the Republic of Serbia, and that he promised not to hide during the criminal proceedings in question. It follows from the explanation of the disputed decision that the first instance court did not take into account the family circumstances of the defendant, his financial situation and the financial situation of his family, as well as where his family lives. Only on the basis of a comprehensive and appropriate analysis of all these facts could the first instance court correctly and lawfully conclude whether in this particular case the purpose of ensuring the presence of the accused in criminal proceedings and its unhindered implementation can be achieved only by detention, or possibly by some other measure. *Decision of the Court of Appeals in Belgrade*, Kž2 No. 1211/2011 of 20 April 2011. *The Decision is available on the website of the Court of Appeals in Belgrade*

The first-instance court took into account that the defendant personally testified before the notary that he would not run away and that he would not hide until the end of the criminal proceedings, as well as the fact that his wife offered bail, so he correctly found that the offered bail amount was 538,061.22 euros, as well as the form in which this bail will be given, adequate to the intensity of the circumstances that justify the existence of grounds for ordering custody of the defendant, having in mind the specific material gain charged in the indictment. Moreover, the Special

Article 203 of the CPC of the Republic of Serbia and it can be: depositions of cash, securities, valuables or other movables of more considerable value which can easily be kept and cashed or mortgages[52] of real estate of the person posting bail in the amount of bail or personal obligation of one or more persons that they will, in case of defendant's escape, pay for determined amount of bail.

The court may order bail, and the same may be determined at the proposal of the parties and the defense counsel or the person who provides bail for the defendant.[53]

When deciding on ordering custody, the court may, after obtaining the opinions of the parties, determine the amount of money that in this case can be provided as bail. If it has not determined the amount of bail by a decision ordering custody, and the defendant is already in custody, the court may determine this amount by a special decision. When deciding on ordering custody, the preliminary proceeding judge, after hearing the defendant about the reasons for ordering custody, may simultaneously determine the amount of bail that would replace custody, without the proposal of the parties. Based on the data from the file, but also with the additional documentation required to be submitted by the defense, the preliminary proceeding judge could have a complete insight into the degree of danger of escape, personal and family circumstances of the defendant and his financial situation. The provision on bail thus issued would refer, given its circumstances regarding the bail, to the bail that would be given personally by the defendant, but not to third parties who may do so on his behalf. [54] Although very rare in practice, this kind of court action could significantly shorten the duration of detention and lead to a simpler and more economical procedure regarding the determination of bail. Bail is determined at the proposal of the

Prosecutor's Office, in its act declaring a motion to bail the defendant's attorney, did not dispute the amount of bail offered, but only the fact that the defendant did not give a statement before the court that he would not hide and would not leave his residence without court approval. Therefore, in the opinion of the Court of Appeals, the conclusion of the first instance court is correct that securing the presence of the defendant in this case can be achieved by replacing the measure of detention with bail, which is why he correctly accepted the bail offered by the defendant's counsel. The appellate allegations of the Prosecutor for Organized Crime, which point out that the first instance court did not analyze the property of the defendant's wife who gave bail for him, are unfounded, bearing in mind that the first instance court correctly assessed all circumstances relevant to the bail and found that the conditions for determining the bail are met.
Decision of the Court of Appeals in Belgrade, Kž2-Po1 number: 310/2013 of 30 July 2013 *Decision is available on the website of the Court of Appeals in Belgrade*

[52] For the registration of the mortgage, it is necessary to provide proof of ownership and assessment by a construction expert, and after that the registration of the mortgage in the real estate cadastre based on the decision to accept the bail. Only after the registration, the court will terminate the detention, ie replace it with bail. *Alternative pritvoru u pravnom sistemu Srbije - osnovna prava okrivljenog*, op cit, pp. 16.

[53] Code of Criminal Procedure, op cit Article 204

[54] *Alternative pritvoru u pravnom sistemu Srbije - osnovna prava okrivljenog*, op cit, pp. 17.

parties and the defense counsel or the person who provides bail for the defendant. The bail can also be determined at the proposal of the public prosecutor, which in practice almost does not happen. The prosecutor mainly requests the ordering and extension of custody and declares on the motion of the defense to determine bail, and if bail was not proposed by the public prosecutor, and the proceedings are being conducted in connection with a criminal offence prosecutable *ex officio*, before issuing a decision the court will seek the opinion of the public prosecutor.[55] After considering the proposal, the court may decide to accept or reject the bail.

During the investigation a reasoned ruling ordering or repealing bail or confiscating bail is issued by the judge for preliminary proceedings, and after the indictment is filed, by the president of the panel, and at the trial, by the panel. The same judges will also decide on the confiscation or repealing of the bail.[56]

If the court rejects the proposed bail due to insufficient amount, then it should determine the amount of bail that would be acceptable and sufficient, and the most economical would be for the court to issue a decision accepting the motion of the defendant or defense counsel which rejects the amount offered and determines another higher amount.[57] Such an approach would significantly speed up the proceedings and shorten the defendant's detention.

The parties, defense counsel or the person providing bail for the defendant may file an appeal against the decision rejecting the proposal for determining the bail or the decision on determining, confiscating or repealing the bail, which does not delay the execution of the decision.[58]

According to the CPC of the Republic of Serbia, the bail can be terminated by confiscation and repealing.[59]

If the defendant breaks his promise and hides or leaves his residence without the court's approval, the court will by a ruling confiscate the value deposited as bail towards the budget of the Republic of Serbia,[60] while the defendant will be

[55] Code of Criminal Procedure, op cit Article 205, paragraph (2) and In *The Decision of the Higher Court in Kraljevo*, Kž. number: 96/10 from 2 August 2010 the court took the view that the failure of the court to seek the opinion of the public prosecutor in the case of a criminal offense prosecuted *ex officio* constitutes a violation of the provisions of criminal procedure. However, in *The Decision of the Court of Appeals in Belgrade*, Kž.2 Po1 number: 343/12 of 8 August 2012 the court stated that although obtaining the opinion of the public prosecutor is a mandatory formal precondition for decision-making, the court is not obliged to require the public prosecutor to explain the position, nor is the method of reasoning relevant for court decision. Ilić, PG et al, op cit, pp. 500.

[56] Code of Criminal Procedure, op cit Article 205, paragraph (1).

[57] *Alternative pritvoru u pravnom sistemu Srbije - osnovna prava okrivljenog*, op cit, pp. 17-19.

[58] Code of Criminal Procedure, op cit Article 205.

[59] Code of Criminal Procedure, op cit Articles 206 and 207.

[60] This is also called a vacation of bail.

remanded in custody.[61] It is presumed that the decision on confiscating the bail also cancels the decision by which the bail was determined, because then the bail is replaced by the decision on ordering detention.[62] In practice, there are various situations that are considered a violation of the promise not to leave the place of residence. According to the practice of courts in the Republic of Serbia, the departure of the defendant to work abroad, [63] for treatment abroad [64] are considered such cases.

The bail may also be terminated by its repealing, by ordering detention,[65] when the criminal proceedings are terminated with a final decision on the suspension of the proceedings or the rejection of the accusation or a verdict. If a custodial criminal sanction has been pronounced by the judgment, bail is repealed only after the defendant begins to serve the criminal sanction.

The difference between confiscation and repealing bail is that the defendant's conduct is not a consequence of omission or negligence, but his voluntary action aimed at avoiding or hindering further criminal proceedings, while repealing bail the defendant's conduct does not indicate unequivocally his intention to avoid conducting proceedings.[66]

c. Bail in Montenegro

Pursuant to Article 170 of the Criminal Procedure Code of Montenegro [67] (hereinafter: CPC of Montenegro), accused persons[68] who shall be detained or have already been detained only for a flight risk or risk of avoiding coming to the main trial, may be allowed to remain at liberty or may be released if they personally or someone else on their behalf furnish a surety that they would not flee before the conclusion of the criminal procedure and the accused persons themselves pledge that they would not conceal themselves and they would not leave their residence without permission. The same norm stipulates that the bail

[61] Code of Criminal Procedure, op cit Article 206.
[62] Škulić, M, *Krivično procesno pravo,* op cit, pp. 139.
[63] *Decision of the District Court in Belgrade*, Kž. number: 1485/02 dated 30 July 2002 , Ilić, PG et al, op cit, pp. 501.
[64] *Decision of the District Court in Belgrade*, Kž. number: 1137/00 dated 19 June 2000, Ibid.
[65] Code of Criminal Procedure, op cit Articles 207, paragraph ((1) and (2).
[66] Ilić, PG et al, op cit, pp. 502.
[67] *The Criminal Procedure Code*, Official Gazette of Montenegro, Nos: 57/09, 49/10, 47/14, 2/15, 35/15, 58/15, 28/18, 116/20
[68] The accused person is the one against whom an order on the conduct of investigation, indictment, bill of indictment or private action was issued or person against whom a special procedure was initiated for the enforcement of security measures of mandatory psychiatric treatment and confinement in a medical institution and mandatory psychiatric treatment while at freedom; the term accused person may be used in the criminal proceedings as a general term for the accused, defendant and convicted person. *Criminal Procedure Code of Montenegro*, op cit, Article 22, paragraph (1), point 2))

may be determined in addition to the imposed supervision measure, to ensure compliance with that measure.

This norm contains doubts about the simultaneous existence of two court decisions that essentially concern the same procedural situation, and with completely opposite content. Namely, the part of the norm that speaks about the accused person who should be placed in custody and the one who is already in custody, it follows that in both situations a decision on detention has already been made, and the court does not terminate custody by ordering bail. Based on that, it can be said that the decision on ordering detention is in a state of dormancy, and whether that decision will be activated and how depends on the fulfillment of the undertaken obligations, i.e., the fate of the bail.[69]

Bail shall always be expressed as an amount of money[70] that is set on the basis of the seriousness of the criminal offence, personal and family circumstances of the accused person, and the financial situation of the person posting bail. The amount of bail should be determined in a way that removes the suspicion that the

[69] Radulović, D (2019) *Pritvor i druge mjere za obezbeđenje prisustva okrivljenog i nesmetano vođenje krivičnog postupka u krivičnoprocesnom zakonodavstvu Crne Gore (norma i praksa),* Collection of papers „Pritvor i druge mere obezbeđenja prisustva okrivljenog u krivičnom postupku (međunarodni pravni standardi, regionalna zakonodavstva i primena)“, OEBS Mission in Serbia, Belgrade, pp. 166.

[70] The conclusion of the first instance court is correct, that the offered amount of bail of 10,000 euros is a sufficient guarantee that the defendant will respond to the court summons, bearing in mind the promise given by the defendant to the court that he will not hide and will respond to court summons until the final conclusion of the proceedings against him, as well as the fact that he has not been previously convicted, that he is a family man and the father of two minor children, and that he has been in custody since 20 May 2020. According to the higher court, contrary to the allegations of the state prosecutor's appeal, the first instance court acted correctly when accepting the offered bail of the accused's defense counsel and determined that he be released after the decision becomes final and the court deposit of 10,000 euros be placed. *Decision of the High Court in Podgorica*, number: Kž 573/2020 of 3 September 2020. *Decision available on the website of the Court of Appeals in Montenegro*. On the other hand, in the *Decision of the Basic Court in Podgorica*, number: Kv 229/2016 of 29 March 2016, the investigating judge acted correctly when he refused the bail offered by the accused's defense counsel. The fact that the accuse is a foreign national, has no permanent employment, is not married and has no children, as well as the owner of another property in the opinion of the panel, indicates that the bail offered is not a sufficient guarantee that he will respond to any court summons, especially when the amount of the threatened punishment for the criminal offense he is charged with is viewed. Moreover, the allegations of the appeal related to the mention of other real estate owned by the accused in the reasoning of the challenged decision are unfounded, because the investigating judge clearly stated that he refused the offered bail consisting in mortgaging the real estate described in the excerpt from the real estate list, while in the explanation of the decision the fact that the defendant is the owner of another property in Podgorica is mentioned only as another circumstance which indicates that the proposed bail *is not a sufficient guarantee* that the accused will respond to every summons. *Decision available on the website of the Court of Appeals in Montenegro*

defendant will escape. The value of the real estate is determined according to the market value, and the collection of the claim on which the mortgage was placed should be easily feasible. The content of the bail is regulated by the provisions of Article 171 of the CPC of Montenegro, namely: depositions of cash, securities, valuables, or other movables of more considerable value that can be easily cashed and kept or placing a mortgage for the amount of bail on real estate of the person posting bail.[71] A person posting bail must submit evidence on their financial position and ownership of the property posted as bail.

The initiative to determine bail comes from the accused, his defense counsel or third parties, which means that the state prosecutor cannot appear as the initiator, nor can the court *ex officio* order this measure. However, some authors believe that the authorized prosecutor can propose this measure, but also that the court can draw the defendant's attention to the fact that by providing bail in a particular case, a more difficult measure could be avoided, and that is detention, since the court must consider that a more severe measure shall not apply if the same purpose can be achieved by a milder measure.[72]

As for the competence to determine bail, before and during the investigation, the decision on bail is made by the investigative judge, after the indictment, by the president of the panel, and at the main trial by the panel. The decision on determining the bail and the decision vacating the bail shall be made upon the obtained opinion of the State Prosecutor, if the procedure is conducted upon his indictment.[73]

If the accused flees, a ruling shall be issued ordering that the amount posted as bail be credited to a special budget allotment for the work of courts.[74]

The bail is terminated by vacation as prescribed by Article 172 of the CPC of Montenegro, which means that the deposited amount of money, valuables, securities, or other movable property will be returned, the mortgage will be

[71] The first-instance court correctly inspected the real estate certificate and determined that the defendant's mother-in-law was the owner of the residential space, with the right of ownership 1/1, without encumbrances and restrictions, inspecting the expert's finding on the assessment of the market value of the real estate, it found that it amounted to 114,750 euros, thus allegations in the appeal that the court did not determine the property status of the defendant and whether he still owns real estate, and whether the amount in the form of a mortgage on real estate is a sufficient guarantee that the defendant will respond to all court summonses are unfounded. Moreover, the first instance court correctly determined the property status of the defendant's mother-in-law and accepted the estimated value which is proportional to the gravity of the criminal offenses charged against the defendant, as well as the amount of EUR 5,000 to be paid to the Basic Court in Kotor. *Decision of the High Court in Podgorica*, number: Kž 521/2020 of 9 July 2020. *Decision available on the website of the Court of Appeals in Montenegro*

[72] Radulović, D op cit, pp. 166.

[73] *The Criminal Procedure Code*, op cit, Article 173.

[74] *The Criminal Procedure Code*, op cit, Article 171, paragraph (4)

removed, and custody will be ordered against the defendant. Notwithstanding the bail posted, detention shall be ordered if duly summoned accused persons fail to appear and fail to justify their absence, or if following a decision that they remain at liberty, some other legal ground for detention occurs against them; accused persons for whom bail was posted on the grounds for detention shall be detained if they fail to appear at the main hearing being duly summoned for the first time and do not justify their absence; if judgment imposed a sentence of imprisonment, bail shall be vacated when the convicted persons begin to serve their sentence.[75]

6. Empirical research

The set goal, to check the quality of the BiH norm which regulates the bail and the hypothesis based on it that the bail is not well regulated in the laws of Bosnia and Herzegovina and that there is a need for improvement will be verified by empirical research.

6.1. Methodological framework of research

The sample of respondents was formed from the population of members of the judicial community, direct participants in criminal proceedings (prosecutors, judges and defense counsels). A total of 204 respondents participated in the research, of which 56 (27.5%) were prosecutors, 62 (30.4%) were judges and 86 (42.2%) were defense attorneys. According to the institution in which they are employed, the majority of respondents are from judicial institutions of the Federation of Bosnia and Herzegovina, 72 of them (35.3%), then from private practice 68 (33.3%), while 30 (14.7%) respondents are from judicial institutions at the state level of Bosnia and Herzegovina and the Republika Srpska entity. Only four (2.2%) respondents are from Brcko District institutions. The largest number of respondents, i.e., 79 (38.7%) have work experience of 10 to 20 years, while the average work experience is 21.21 ± 10.92, and the average age of respondents is 48.50 ± 11.58 years. In relation to gender, 129 (63%) men and 75 (36%) women were represented in the sample.

The paper uses a part of the measuring instrument "Questionnaire for examining the views of members of the judicial community on imposing a measure of detention", which was constructed for wider research within the doctoral dissertation of the co-author of this paper entitled "Pritvor u krivičnom

[75]The first-instance court correctly determined, which follows from the minutes of the main trial, that the accused responded to the summons of the court and that she finally started serving her sentence on 9 March 2016, according to the final judgment. Having in mind the above, the first instance court correctly concluded that the conditions for vacating the bail were met. *Decision of the High Court in Podgorica*, number: Kvž 115/2017 dated 10 April 2017. *Decision available on the website of the Court of Appeals in Montenegro*

zakonodavstvu i praksi u Bosni i Hercegovini – stanje i perspektive/Detention in criminal law and practice in Bosnia and Herzegovina - status and perspectives".
Three variables were used to test the hypothesis of this study: the bail is, under the conditions prescribed by law, an adequate substitute for detention; bail, as an alternative to detention, should be used for other special reasons for detention, not just the danger of absconding; the minimum and maximum amount of bail should be determined by the criminal procedure laws of Bosnia and Herzegovina. Respondents were tasked to choose one of the offered answers to the statements made in the survey questionnaire, which best reflects their position. The answers to the statements are graded on a Likert-type scale from 1 to 5 (5 - I completely agree; 4 - I mostly agree; 3 - I can't decide; 2 - I mostly disagree; 1 - I don't agree at all).
The research was conducted via an online link, i.e., an electronically prepared survey questionnaire - using the Google Forms (respondents were provided with a link to participate in the research via e-mail or Viber application). The research period lasted from January to May 2021.
The data were processed by descriptive analysis, i.e., the distribution of frequencies and the percentages of respondents' responses to the set claims were determined. For the graphic presentation, the answers of agreement or disagreement with the statements were added up. Moreover, considering the wording and content of the claims, the answers to the disagreement with the first statement meant that there was a need for improvement, and contrary to the second and third claims, i.e., agreeing with these claims meant the need to improve the standardization of the bail. The chi-square test was applied to compare the responses obtained with the research with randomly distributed responses. When using the chi-square test, the data for the first statement was sorted.

6.2. Research results

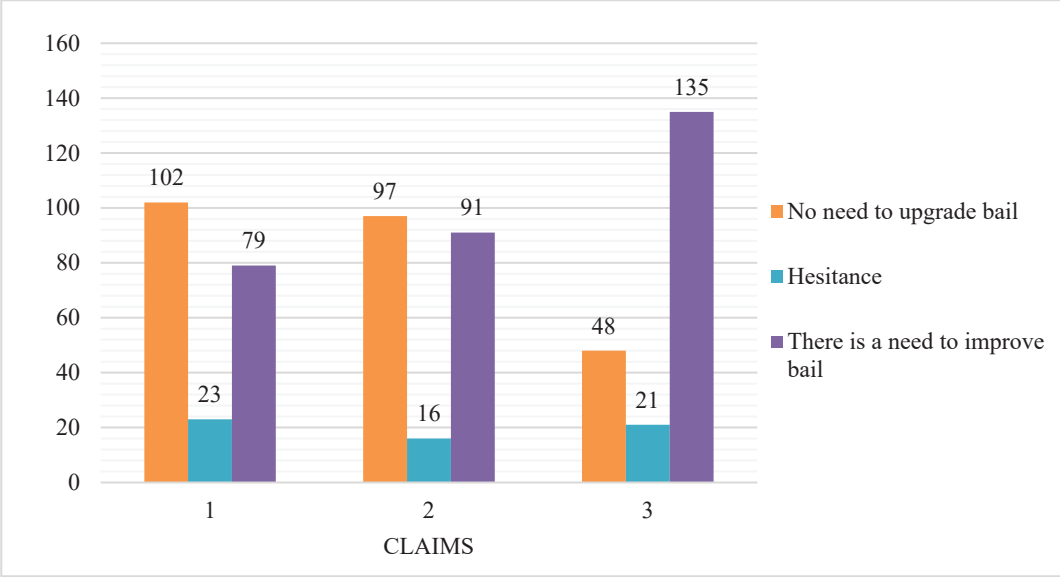
Table 1 shows the frequencies and percentages of the response of the judicial community in relation to certain segments of the BiH norm regarding the bail. Based on the results, it is evident that the views of the members of the judicial community are divided, regarding the quality of the norm according to which bail is a substitute for detention. The answers indicate that most respondents agree with the statement that the bail is, under the prescribed conditions, an adequate substitute for detention. There is almost equal representation of the answer that bail should be used for other reasons of detention, not only for the danger of absconding, and most agree that specific amounts of bail should be specified in criminal procedure laws.

Table 1. Distribution of frequencies and percentages of responses of the judicial community on the standardization of bail

	I don't agree at all		I mostly disagree		I can't decide		I mostly agree		I completely agree	
	F	%	f	%	F	%	f	%	f	%
The bail is, under the conditions prescribed by law, an adequate substitute for detention.	21	10.29%	58	28.43%	23	11.27%	72	35.29%	30	14.71%
Bail, as an alternative to detention, should be used for other special reasons for detention, not just the danger of absconding.	38	18.63%	59	28.92%	16	7.84%	69	33.82%	22	10.78%
The minimum and maximum amount of bail should be determined by the criminal procedure laws of Bosnia and Herzegovina.	18	8.82%	30	14.71%	21	10.29%	75	36.76%	60	29.41%

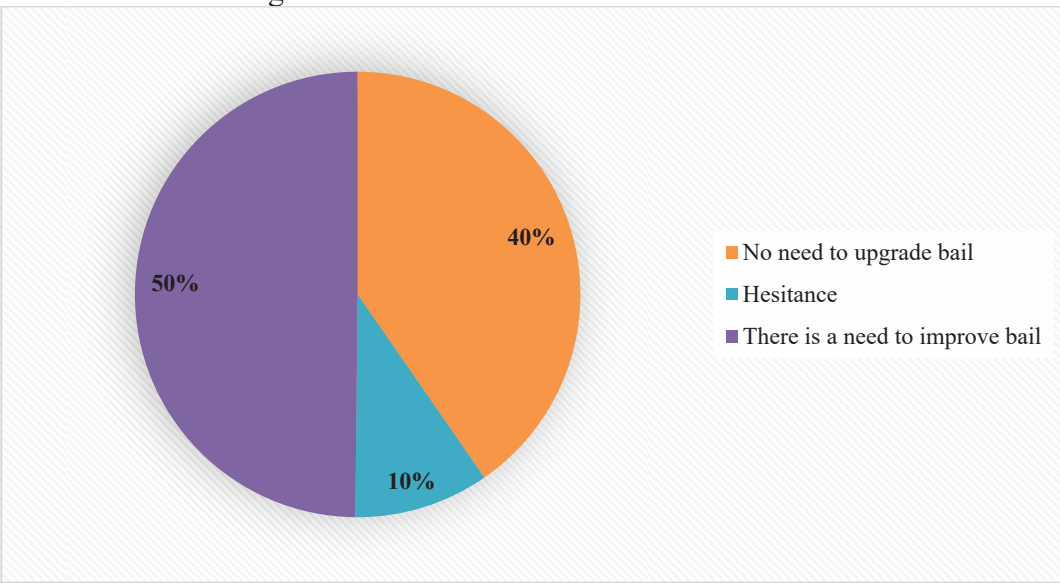
To have a clearer insight into the need to improve the standardization of bail, Graph 1 provides a comparative overview of the representation of summary responses of the judicial community to individual claims. Considering the content of the claims, and the process of making the chart, it is evident that a significant number of respondents are in favor of improving the standardization of the bail for all claims. That there is a real need for improvement is further confirmed by a significant number of indecisive answers to the first and second claims, with slightly fewer consensus answers. Therefore, the mere knowledge of the division of the judicial community is a sufficient reason to reconsider the quality of the norm according to which bail is a substitute for detention.

Based on the insight into the standardization of bail in the environment and the world, which shows that alternatives to detention and even bail are more applied and give positive effects in this area, and a significant number of respondents satisfied with our normative framework, which our judicial community shows in the first and second claim, and this can be related to the fact that members of the judicial community in BiH, especially prosecutors and judges, try to deal mainly with the adequate implementation of existing laws, rather than their analysis for standardization and improvement.



Graph 1. Representation of summary responses of the judicial community on standardization of bail

Graph 2 presents the percentage of the total summary responses of the judicial community for the three claims used. Taking into account the content of claims and the procedure of charting, it can be seen that 50% of respondents are in favor of improvement, which, along with 10% of hesitant, is also another indicator of the need for better regulation of the bail norm.



Graph 2. Percentage of total summary responses of the judicial community on bail norm

The chi-square test revealed a statistically significant difference between the obtained and randomly distributed answers ($\chi 2 = 109.64$; df = 4; $p < 0.01$), i.e., it was confirmed that the answers obtained by the research were not random but based on the attitudes of respondents with certain professional knowledge on the subject of research (bail norm) and many years of work experience.

Table 2. Hi - square test of the assessment of the attitudes of the judicial community on the bail standardization

f_o	f_t	$f_o - f_t$	$(f_o - f_t)^2$	$\frac{(f_o - f_t)^2}{f_t}$
103	122,4	-19,4	376,36	3,07
202	122,4	79,6	6336,16	51,77
60	122,4	-62,4	3.893,76	31,81
161	122,4	38,6	1.489,96	12,17
86	122,4	-36,4	1.324,96	10,82
$\chi^2 = 109,64$; df = 4; $p < 0,01$)				

7. Conclusions

Bail is one of the measures to ensure the presence of the suspect or accused and the successful conduct of criminal proceedings.

The analysis of the standard shows significant differences between the BiH standard and the norm of the surveyed countries in terms of bail.

Particular differences were noted with regard to the grounds for detention for which bail could be imposed as a substitute for detention. The BiH legislature has reduced this mechanism to replacing detention only if detention is to be ordered for fear of absconding. Other legislators set this condition much more broadly, and even that bail can be imposed as a substitute for detention to be ordered for any detention reason. There is certainly room for improvement of this norm in future.

Particularly interesting is the approach of some countries that prescribe a conditional bail, a bail which, in addition to the amount of money and promises not to violate the terms of the bail, also prescribes additional obligations to that person, whose fulfillment is controlled by the competent authorities.

Empirical research has shown that the judicial community is divided over the quality of the norm according to which bail is a substitute for detention. The answers indicate that the majority of respondents agree with the statement that the bail is, under the prescribed conditions, an adequate substitute for detention. There is almost equal representation of the answer that bail should be used for other reasons of detention, not only for the danger of escape, and most agree that specific amounts of bail should be specified in criminal procedure laws. Such attitudes and divisions of the judicial community are sufficient reason to question the quality of the norm which prescribes the bail as a substitute for detention and its improvement.

JAMSTVO U BOSNI I HERCEGOVINI I UPOREDNOM PRAVU

Sažetak

Jamstvo predstavlja jednu od mjera za obezbjeđenje prisustva osumnjičenog, odnosno optuženog i uspješno vođenje krivičnog postupka. Ovaj rad analizira kvalitet bosanskohercegovačke norme kojom se normira jamstvo, a kao hipoteza koja se provjeravala definirana je tvrdnja da jamstvo nije kvalitetno normirano u bosanskohercegovačkim zakonima i postoji potreba za unapređenjem. Cilj rada i provjera postavljene hipoteze provedena je kroz analizu norme u bosanskohercegovačkom i u uporednom pravu, a u konačnici je provedeno i empirijsko istraživanje unutar pravosudne zajednice na temu kvalitete norme.
Analiza norme pokazuje razlike između bosanskohercegovačke norme i norme istraživanih zemalja u pogledu jamstva. Posebne razlike su uočene u pogledu pritvorskih razloga za koje se može odredit jamstvo kao zamjena pritvoru, postojanja uslovnog jamstva i nekih drugih specifičnosti koje su definirane u analiziranim zemljama na način drugačiji od bosanskohercegovačke norme. Provedeno empirijsko istraživanje je pokazalo da pravosudna zajednica nije zadovoljna kvalitetom norme i da istu treba unaprijediti što predstavlja potvrdu istraživačke hipoteze.

Ključne riječi: jamstvo, pritvor, opasnost od bjekstva.