Police as a subject of prosecutorial investigation and criminal procedure code of the Republic of Serbia

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Abstract

The subject of the analysis in the paper are the issues of the procedural position of the police (its rights and obligations) in conducting the investigation by the public prosecutor as its main subject. There are two groups of issues within which the subject matter in question was analysed. The first one relates to general remarks about the concept of prosecutorial investigation as one of the most important novelties brought by the Criminal Procedure Code of the Republic of Serbia from 2011. The second group of issues concerns the expert and critical theoretical, normative and practical role of the police as a subject of investigation. The key result of the analysis of this group of issues is that despite the fact that the current text of the CPC of the RS provides numerous opportunities for engaging the police as an active subject in conducting investigation, it is necessary to create a normative basis for the possibility of even more adequate police engagement during the investigation, thus creating a normative basis for a more efficient investigation, by carrying out interventions in the CPC that the authors offer in the proposals de lege ferenda.

1. Introduction

The process of reforming the criminal procedure legislation of the Republic of Serbia, and within it primarily the process of reforming the Criminal Procedure Code, began with the adoption of the Criminal Procedure Code from 2001[76] and its latest result is the CPC from 2011[77] with several (four) amendments even before the beginning of its full implementation (October 1, 2013), which in itself speaks not only about the complexity of the issue but also about the relevance of numerous new solutions brought by this legal text (Bejatović, 2013).

[76]"Official Journal of the FRY", No. 70/01 and 68/02 and "Official Gazette of the RS", No. 58/04, 85/05, 115/05, 49/07, 20/09, 72/09 and 76/10.
[77]"Official Gazette of the RS", No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.

There are several goals that need to be achieved by working on the reform of the CPC[78], the key among them being the creation of a normative basis for more efficient criminal proceedings (Djurdjic, 2012). Starting from the goal set in this way, as well as the indisputable importance of the legal norm for the efficiency of criminal proceedings in general, there are numerous novelties brought by the process of reforming this legal text. One of the most important is leaving the judicial investigation and moving to the prosecutorial concept of investigation (Bejatović, 2014). This novelty is the result of the almost dominant attitude of the expert public of Serbia, and not only Serbia (Jevsek, 2014; Simović, 2014; Fiser, 2014; Djurdjevic, 2014), that the prosecutorial concept of investigation is in the function of efficiency of criminal proceedings and thus in the function of practical realization of key the goal of the reform of the criminal procedure legislation of Serbia - creating a normative basis for a more efficient criminal procedure (Bejatović, 2016). Bearing this in mind, as well as the indisputable fact that an efficient investigation is a very important prerequisite for the efficiency of criminal proceedings as a whole, it is not surprising that in addition to legislation as regards the issue of investigation, especially its concept, some of the most present issues are the theories of criminal procedure law in the reform of the criminal procedure legislation of Serbia. Such a high degree of normative and theoretical relevance of this issue lies in the fact that the prosecutorial investigation itself is not unconditionally in function of what is expected of it - in the function of the key goal of the reform - in the function of efficiency of criminal proceedings (Cvorovic et al., 2016). On the contrary, the prosecutorial concept of investigation is in the function of the efficiency of criminal proceedings (Skulic, 2011), only if it is elaborated on the principles inherent in this concept, which is not easy to achieve. There are a number of open questions, the solving of which influences the degree of practical realization of this key goal of the prosecutorial concept of investigation. For example, the case of questions concerning: the degree of suspicion as a material condition for the possibility of initiating an investigation; active subjects of investigation (whether it should be only the public prosecutor or the prosecutor and the police together); specifying the conditions under which the police may appear as an active subject of investigation, as well as the types of investigative actions it can take in such a capacity; anticipation of specific mechanisms which ensure adequate cooperation between the public prosecutor and the police in the investigation; questions of the probative value of actions taken by the police in the investigation and monitoring their work during the investigation. These were also key issues during the Hungarian criminal procedure reform (Vári, 2019). Then there is the question of how to harmonize the legal nature of the investigation with its aim which is collecting material necessary for raising an indictment by the public prosecutor, etc. (Radulović, 2012).

2. Material and methods

In the analysis of the subject matter in question, in addition to the theoretical and normative method, the statistical method was used to collect and analyse statistical indicators of initiated investigations and filed indictments based on the Report of the Republic Public Prosecutor's Office in 2017, 2018 and 2019. The authors analyzed the statistical indicators regarding the initiated investigations in the area of basic and higher public prosecutor's offices, organized crime prosecutor's offices as well as prosecutor's offices of special jurisdiction.
When it comes to the filed indictments, the authors used the statistical method to process the data related to the number of accused persons, filed motions to indict, direct indictments and

[78]The CPC means the Criminal Procedure Code of the Republic of Serbia from 2011.

indictments for 2017, 2018, 2019 in the Republic of Serbia and then analyzed them. The analysis of data on these types of indictments is a consequence of the fact that they relate to various criminal matters and only in their entirety give a true picture of the state of crime in the Republic of Serbia from the aspect of this procedural moment. In view of this, the following should be borne in mind: first, motions to indict are a type of indictments filed for criminal offenses punishable by imprisonment for up to eight years, for criminal offenses that are not investigated but certain evidence collecting procedures can be undertaken before a motion to indict is filed (Ilić et al., 2013). Second, a direct indictment is filed in cases of criminal offenses for which an investigation is usually conducted, but it is absent in cases when even without conducting an investigation, the prosecutor has sufficient evidence for the indictment (Skulic, 2019), and it is for criminal offenses punishable by imprisonment for over eight years after the investigation was conducted (Cvorovic, 2014).

The collected data speak of two aspects of the subject matter: first, on the degree of efficiency of the police in the investigation and second, on the degree of adequacy of cooperation between the public prosecutor and the police as an important instrument for achieving the desired degree of efficiency of the investigation and thus the efficiency of the criminal procedure as a whole.

3. Results and evaluation

One of the most important characteristics of the investigation in the CPC of the RS is the number of subjects participating in its conduct. This characteristic is the result of the fact of the number and variety of actions that are undertaken. In accordance with this criterion, the characteristics of the subjects of investigation are different, they appear in the conduct of the investigation in different roles, with different rights and duties, but what they all have in common is that their activities contribute to achieving the purpose of investigation. In addition to the competent public prosecutor as a key subject of the investigation, there are other subjects, with the proviso that their participation in the investigation is primarily dependent on the attitude of the public prosecutor as its key actor. By issuing an order to conduct an investigation, which is within its exclusive jurisdiction, the public prosecutor may take all evidence collecting procedures that, in his or her opinion, are necessary for the successful conduct of the investigation, but may entrust their conduct to other entities (another public prosecutor and the police) (Cvorovic, 2015). In deciding whether or not to take a particular evidence collecting procedure, as well as whether to entrust its conduct to another entity, the public prosecutor is guided solely by the purpose to be achieved by its conduct and the efficiency of the investigation. Furthermore, with the possibility of entrusting the conduct of certain investigative procedures to another public prosecutor or the police, the public prosecutor may, if he or she deems it necessary, request the assistance of the police (forensic, analytical, etc.) or other state bodies in connection with the investigation which are obliged to provide him or her with that assistance at his request.

One of the subjects involved in the investigation is the police. There are several reasons for justifying this approach of both the legislator and the public prosecutor's practice in engaging the police as an active subject of investigation. Among the reasons, three are of special importance (Banović, 2018). First, the police, as a key subject of the pre-investigation procedure for the purpose of practical realization of its function related to the detection of criminal offenses and their perpetrators, has the possibility of undertaking operational and tactical measures and actions and the possibility of undertaking certain evidence collecting procedures, the results of which can be used in criminal proceedings as evidence. The end result of this activity is the filing of a criminal complaint with the public prosecutor as the most common basis in making a decision of the public prosecutor to initiate an investigation. This fact speaks for itself that already by issuing

an order to conduct an investigation, the police have a large amount of evidence on the criminal matter that is the subject of the investigation, so it is quite justified to participate in the subsequent investigation both in their concretization and in finding additional evidence with the aim of achieving basic function of investigations (Bugarski, 2014). Secondly, the personnel and technical component of the police also speaks in favor of its involvement in conducting the investigation. Third, the very nature of certain evidence collecting procedures that are undertaken in the investigation inevitably requires the involvement of the police (the case, for example, with: on the scene investigation, reconstruction of events, obtaining documents, special evidence collecting procedures, etc.) (Banović, 2012). Fourth, it is in the function of the efficiency of the investigation and thus the efficiency of the criminal procedure as a whole (Bejatović, 2018).

Generally speaking, there are two possible ways for the police to participate in the investigation. First, the police can undertake certain evidence collecting procedures. Secondly, the police can provide professional assistance to the public prosecutor when undertaking certain evidence collecting procedures and other actions of the investigative procedure in general (for example, obtaining data on the suspect before the end of the investigation). The common characteristic of both types of police participation in the investigation is that its engagement can only take place at the request of the public prosecutor. Unlike the pre-investigation procedure where the police undertake on their own initiative not only operational and tactical measures and actions, but also evidence collecting procedures (Lazić, 2017), there is no self-initiative action in the investigation. The issue of (mal)function of such a solution seems justified, in those situations when the police, at the request of the public prosecutor, undertakes a concrete evidence collecting procedure and during its undertaking there is a need for urgency of undertaking some other evidence collecting procedure. It seems that in such a situation it would be far more justified to envisage the possibility of the police acting the same as in the pre-investigation procedure on this issue. In other words, it should be provided that the police, in cases when conducting the evidence collecting procedure entrusted to them by the public prosecutor, may on their own initiative undertake evidence collecting procedure that is not covered by the already received request of the public prosecutor if reasons of urgency require it and it stands in connection with or proceeds from already undertaken evidence collecting procedure and the police should then inform the public prosecutor about the obtained results. Of course, such a possibility should be envisaged only in the case of simultaneous fulfillment of two conditions (that during the undertaking of evidence collecting procedure by the police at the request of the public prosecutor there is a need for urgency of undertaking some other evidence collecting procedure that is related to the already taken evidence collecting procedure or proceeds from it). There are two reasons for justifying such a solution. First, it provides for the possibility of undertaking an evidence collecting procedure that could not be undertaken later in time or would be associated with greater difficulty. Secondly, it is in the function of the principle of efficiency of the investigation as one of its most important features (Marković, 2019).

When it comes to the police as a subject of undertaking evidence collecting procedures in the investigation, first of all, it should be noted that the public prosecutor can entrust the police with any evidence collecting procedure. The public prosecutor can entrust them with even those evidence collecting procedures that the police could not undertake in the pre-investigation procedure (for example, examination of witnesses or experts). Even despite the legal possibility that the public prosecutor may entrust any evidence collecting procedure to the police during the investigation, in practice those evidence collecting procedures are entrusted to the police that they cannot undertake on their own initiative in the pre-investigation procedure (the case is primarily with the actions of on the scene investigations, reconstruction of events, search, sampling, etc.) (Kiurski, 2014).

When it comes to evidence collecting procedures that require court approval (in the case of, for example, special evidence collecting procedure of secret surveillance of communication, these actions are entrusted to the police, but the police cannot be entrusted with obtaining the court's approval to apply the action as an indispensable condition for its realisation because it is in the sole jurisdiction of the public prosecutor). In cases of this category of evidence collecting procedures, despite the fact that their conduct is within the jurisdiction of the police, the police can only propose (initiate) the public prosecutor to ask the court for permission to conduct such an evidence collecting procedure. The exception to this rule is the case when during the implementation of the entrusted special evidence collecting procedure (for example, secret surveillance of communication) it becomes known that the suspect uses another telephone number or address, then the police and other competent authority (Security Information Agency or Military Security Agency) expand secret surveillance of communications to that telephone number or address and shall immediately inform the public prosecutor of that matter, who shall then immediately submit a proposal to the court (pre-trial judge) to subsequently approve the extension of secret surveillance of communication.[79]

The legal provision on entrusting evidence collecting procedures to the police is an exception to the regular situation, so it should be interpreted in this way, which specifically means that not all or most of the evidence collecting procedures could be entrusted to the police. Using this legal possibility, there is almost no criminal case in which an investigation is conducted without the public prosecutor engaging the police in its implementation, either entrusting it with the implementation of certain evidence collecting procedures or engaging it as a subject of providing professional assistance to the public prosecutor. Having in mind the above arguments of the necessity of engaging the police by the public prosecutor during the investigation, the public prosecutors use the mentioned legal possibilities in practice on a daily basis in almost all criminal matters of this nature, and there are quite a number of them. Thus, for example, if the data of charts 1, 2 and 3 are observed, then there is an extremely high number of investigations initiated by the public prosecutor and thus an extremely large number of police engagements on this basis by the public prosecutor. Three key results were obtained by analyzing the data obtained on this basis, and on the basis of charts 1, 2 and 3. These are:

First of all, there is a large number of investigations conducted or certain investigative actions undertaken before the indictment is submitted to the court by the public prosecutor. Observed by individual years, it ranges from 5,180 orders issued to conduct an investigation in 2017 to 5,281 in 2019. If we add to this a large number of motions to indict (2328 in 2017 to 2920 in 2019) in which, as a rule, certain evidence collecting procedures are taken before the indictment is filed, then that number is 51.3% higher. Such a large number of orders issued to conduct an investigation is the result of the fact of an extremely wide range of criminal offenses for which an investigation is being conducted. These are all criminal acts for which a general criminal procedure is conducted, i.e. criminal offenses punishable by imprisonment of eight years or more. Exceptions are cases of direct indictment in which the investigation is absent, despite the fact that it is a general criminal procedure. In the summary criminal procedure (Ilić, 2013), the investigation is excluded, with the proviso that, if necessary, only certain evidence collecting procedures can be taken or certain evidence collected. There is also no investigation in the criminal procedure against juveniles, but a preparatory procedure is being conducted.

Secondly, the order to conduct an investigation is issued in all public prosecutor's offices in the territory of the Republic of Serbia. True, having in mind the actual competence of public prosecutor's offices, the number of issued orders is different. Most orders to conduct investigations are issued by higher public prosecutor's offices (64.3%) and the least by the prosecutor's office for

[79] Article 169 of the CPC

organized crime (3.9% of all issued orders to conduct investigations), which is a result of the fact that they have only the most difficult criminal offenses in their jurisdiction (the case primarily with organized criminal offenses).

Thirdly, observed by individual years, the differences in the received orders on conducting the investigation are minimal, and this is observed both collectively and by individual prosecutor's offices. Collectively, they range from 5,180 in 2017 to 5,281 in 2019. Or observed from the aspect of higher public prosecutor's offices from 3119 in 2017 to 3584 in 2019, and from the aspect of the prosecutor's office for organized crime from 265 in 2017 to 180 in 2019.

Fourth, the analysis of cases selected by the method of random sampling shows that there is almost no case of conducting an investigation without the involvement of the police, most often at the same time as a subject of undertaking the evidence collecting procedures entrusted to it and as a subject of providing professional assistance to the public prosecutor during investigations.

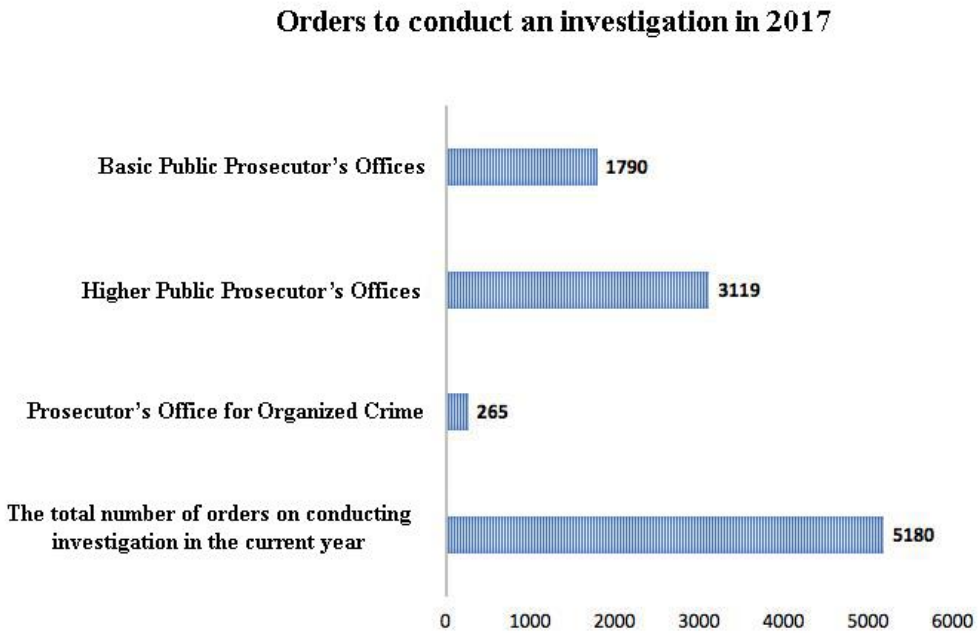

Chart No 1. *Issued orders to conduct investigations in 2017 (In total and by individual public prosecutor's offices) Source: The Report of the Republic Public Prosecutor's Office for 2017.*

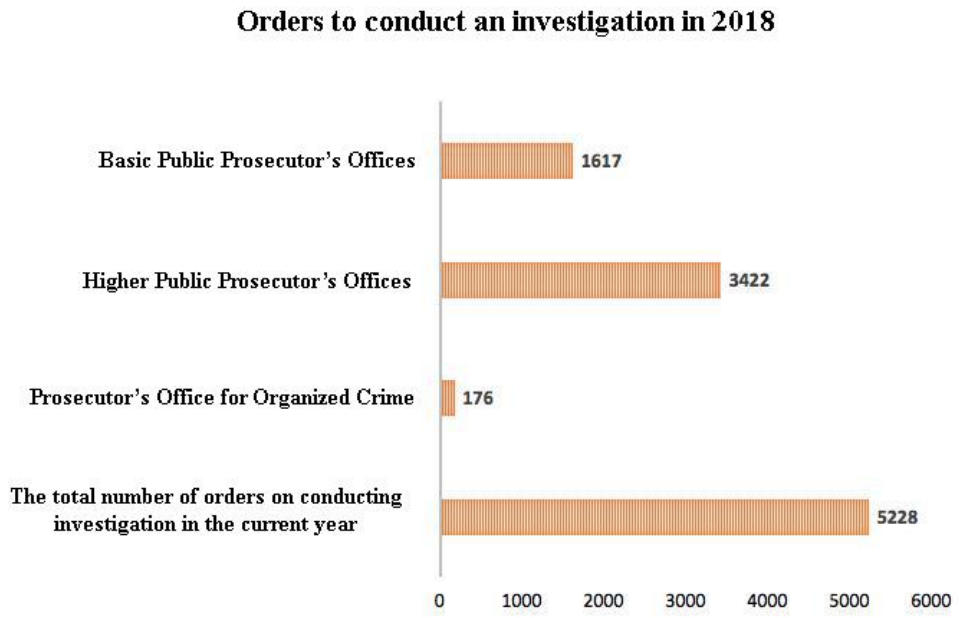

Chart No. 2. *Issued orders to conduct investigations in 2018 (In total and by individual public prosecutor's offices). Source: The Report of the Republic Public Prosecutor's Office for 2018.*

Chart No. 3. *Issued orders to conduct investigations in 2019 (In total and by individual public prosecutor's offices). Source: The Report of the Republic Public Prosecutor's Office for 2019.*

If the above presented data on the number of initiated investigations are observed together with the data on the number of indictments filed after the conducted investigation (Charts 4, 5 and 6), then we can notice an extremely high number of filed indictments after the investigation. Thus, for example, in 2017, 2328 (44.95%) indictments were filed after the investigation, in 2018 - 284 (54.3%) and in 2019 - 2920 (55.2%) indictments. Such a high

number of filed indictments after the investigation is the result not only of the activity of the public prosecutor but also of the activity of the police, which the public prosecutor usually engages in all cases of conducting the investigation.

In addition to the above, several other results can be seen from graphs 4, 5 and 6, which speak of the role of the police in raising indictments by the public prosecutor in general. Those are:

First, observed from the aspect of the total number of criminal charges filed, the indictment as one of the three possible types of criminal charges of the public prosecutor accounts for 76.2%, which speaks, among other things, of the scope of police involvement in the investigation bearing in mind the already stated fact that there is almost not a single case of conducting an investigation without the police being engaged in its implementation.

Secondly, the number of filed indictments after the investigation is approximately identical in the observed years (2017-2019) - ranging from 2328 in 2017 to 2920 in 2019.

Third, motions to indict and direct indictments as special indictments of the public prosecutor are also present. In 2017, these two types of indictments account for 14.5% of indictments, in 2018 28.2% and in 2019 28.3%. However, when it comes to these indictments, one should keep in mind the fact of the possibility of taking certain evidence collecting procedures before filing the indictments, and thus the possibility of the public prosecutor to engage the police in such criminal matters, which he usually does.

Fourth, the percentage of indictments filed in relation to the initiated investigations speaks of the high degree of efficiency of conducting investigations by the public prosecutor and thus the contribution of the police to the efficiency of the investigation, given the fact that the police is an indispensable subject of investigation in almost every criminal matter.

Finally, when it comes to the police as an active subject of the investigation, the following should be kept in mind:

First, when entrusting the performance of evidence collecting procedures to the police, the public prosecutor in his request for taking evidence collecting procedures indicates the entrusted evidence collecting procedures and the facts that need to be established by those actions. In addition, in his request sent to the police on this occasion, the public prosecutor provides information on the accused person and the criminal offense for which the investigation is being conducted and the precise determination of the evidence collecting procedures to be taken, with data on persons who should attend the presentation of evidence i.e. to be informed about it, as well as what facts and circumstances need to be clarified with it.

Second, the police cannot refuse to perform the evidence collecting procedures entrusted to them. However, in case the police do not act upon the request of the public prosecutor, the public prosecutor will immediately inform the head who manages the body, and if necessary, he can inform the competent minister, the government or the competent working body of the competent assembly. Also, if within 24 hours of receiving the request, the police do not act on the request, the public prosecutor may request the initiation of disciplinary proceedings against the person he considers responsible for failure to act on his request.

Third, the cooperation between the public prosecutor and the police during the investigation must be active and characterized by a professional relationship, and must be based on a law or an appropriate bylaw. Only the professional mutual relationship and active cooperation of these two subjects is in the function of a fast and well-conducted investigative procedure.

Fourth, in cases of engagement in the investigation, the police are obliged to conduct the entrusted evidence collecting procedures in accordance with the relevant provisions of the Code and respect all other legal provisions related to the undertaking of evidence collecting procedures by the public prosecutor in the investigation. Thus, for example, when undertaking

the evidence collecting procedure entrusted to it, the police must ensure the openness of its undertaking - it must provide the possibility of participation of subjects in its implementation who have the right to do so according to the law.

Fifth, the lowest degree of suspicion - grounds for suspicion is sufficient for initiating an investigation and thus for the possibility of engaging the police in its implementation which is the same degree of suspicion that is required for the conduct of the police in the pre-investigation procedure, which in itself speaks of the breadth of authority of the subjects conducting the investigation, including the police.

Sixth, the law allows for the possibility of initiating an investigation against an unknown perpetrator as well, which is a highly debatable issue for both theory and practice.

Seventh, the basic task of the investigation is to gather the evidence and data needed to decide whether to file an indictment or suspend the proceedings, the evidence needed to establish the identity of the perpetrator, evidence that is in danger of not being able to be repeated at the main trial or their presentation would be difficult, as well as other evidence that may be useful for the procedure, and the presentation of which, given the circumstances of the case, proves to be expedient. With such a specific task, the scope of the investigation was also determined. The investigation does not present all the evidence and does not establish all the facts. The investigation must not be such that the main trial is reduced to a simple repetition and verification of the investigation material. On the other hand, it must not contain certain omissions that would lead to procrastination, frequent and multiple interruptions or postponements of the main trial, or poor judgment. In a word, the investigation must be neither summary nor too extensive. It must be sufficient, it must correspond to its purpose, and it must always be kept in mind by the bodies conducting the investigation, i.e. and police.

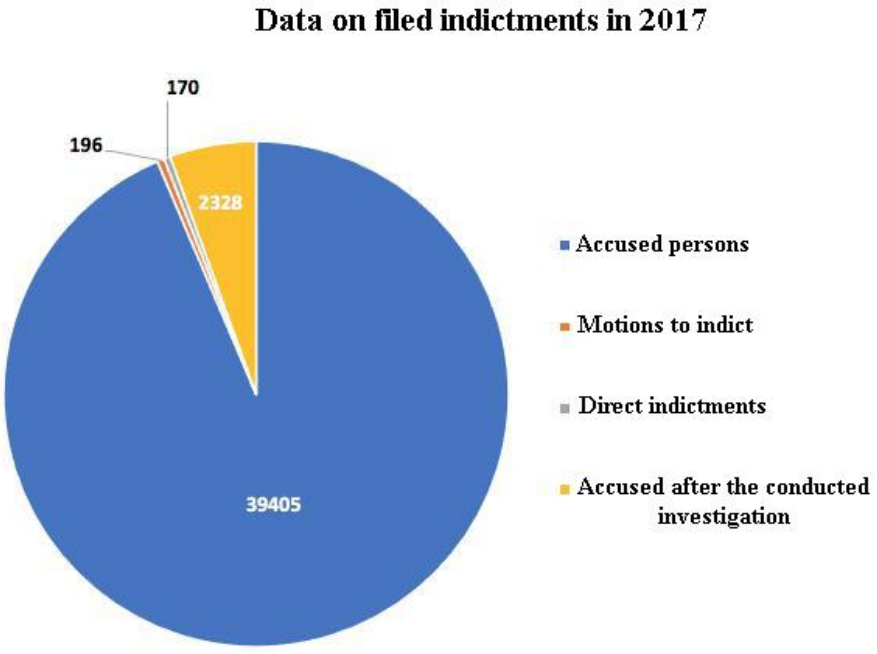

Chart No. 4. *Charges in 2017 (In total and by individual indictments) Source: The Report of the Republic Public Prosecutor's Office for 2017.*

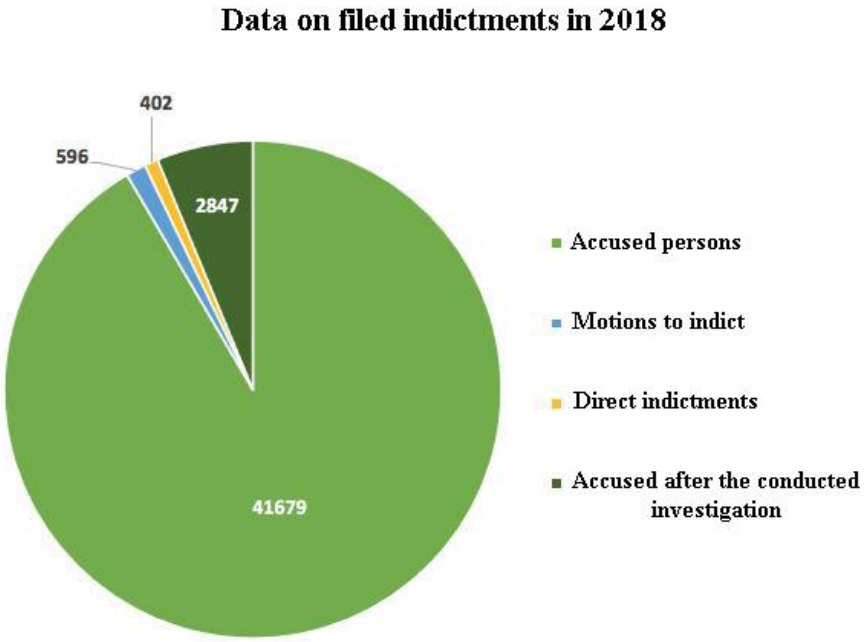

Chart No. 5. *Charges in 2018 (In total and by individual indictments) Source: The Report of the Republic Public Prosecutor's Office for 2018.*

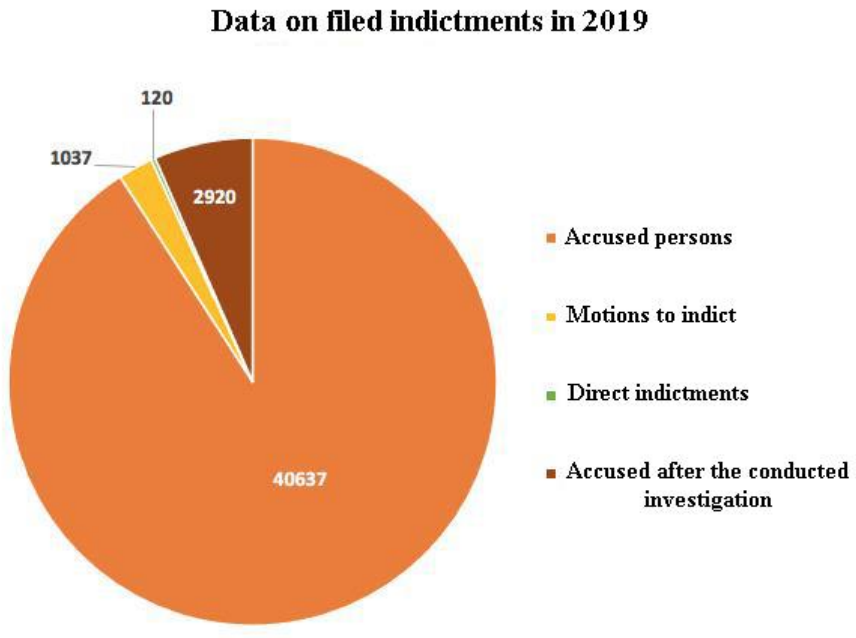

Chart No. 6. *Charges in 2019 (In total and by individual indictments) Source: The Report of the Republic Public Prosecutor's Office for 2019.*

3. Conclusion and suggestions de lege ferenda

There are two basic conclusions of the analysis of the issues that make up the content of the paper. First, despite the fact that the conduct of the investigation is in the exclusive competence of the public prosecutor, this does not in any way mean that he is the only subject of undertaking both evidence collecting procedures and other actions undertaken in the investigation. On the contrary, in addition to the public prosecutor as the main holder of the investigation, there are other entities, and the police occupy a special place among them. The basis for the correctness of this statement lies primarily in the fact that the public prosecutor may engage the police in conducting the investigation as a subject of undertaking certain evidence collecting procedures and as a subject of professional assistance to the public prosecutor in undertaking certain evidence collecting procedures and other investigative actions in general. The work of the police will mostly influence the public's opinion on the effectiveness of the investigations (Vári, 2016). These legal possibilities are widely used by the public prosecutor in practice - there is an extremely high degree of police involvement in conducting the investigation. This approach of the legislator and the practice regarding the police as an active subject of investigation is not only justified but also necessary.

Secondly, despite the fact that the current text of the CPC of the RS provides ample opportunities for engaging the police as an active subject of the investigation, this does not mean that there is no need for interventions in it. On the contrary, in order to create a normative basis for the possibility of even more adequate police engagement during the investigation, and thus create a normative basis for a more efficient investigation, it is necessary to: provide the possibility that when acting according to the entrusted evidence collecting procedure by the public prosecutor, the police may on their own initiative undertake evidence collecting procedure not included by the request if the reasons of urgency require its undertaking and it stands in connection with or proceeds from the already taken action of proving and then inform the public prosecutor about the obtained results; precisely regulate the status of the police as an expert in conducting investigations; more adequately resolve the issue of the responsibility of police officers in cases of non-compliance with the requests of the public prosecutor during the investigation.

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