Autonomy of Public Prosecution Service – The Impact of the "Checks and Balances" Principle and International Standards

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Abstract

The specific role and duties of the public prosecution service in representing state interests and defending human rights requires careful balancing its autonomy and/or competences stipulated by constitution and laws. Significant influence with this regard have international standards arising from the Venice Commission practice as well as the Committee of Ministries recommendations. The specific context where this process of balancing become more important and more visible exists within accession negotiations for the membership in the EU but also in the EU itself due to variety of national legal systems among member states and candidate countries and their obligation to adopt EU standards and ensure legal guaranties on prosecutorial autonomy in exercising its competencies. The importance and nature of these competences for the functioning of state but also for the wide range of fundamental rights raising an issue of the role that constitutional provisions should have in regulation of the public prosecution service position and jurisdiction in certain legal system, especially from the angle of its relationship with executive and legislative power as well as with judicial power in light of the checks and balances principle. Abovementioned issues the authors analysing from the angle of recent challenges related to constitutional amendments in Serbia within accession negotiations with EU.

Key words: *public prosecution, autonomy, constitution, EU standards, separation of powers, checks and balances.*

1. The influence of international standards on legislative framework dealing with public prosecution service

When it comes to international standards that should be considered as a milestone in designing national legislative framework that rules position, organization and functioning of the public prosecution service, there are two groups of documents and standards that should be taken into account: The first group of standards could be described as a core, common standards, applicable on judiciary as a whole (judges and public prosecutors) while the second group of standards deals exclusively with the role of public prosecution service.

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The main sources of international standards on the role of public prosecution service and jurisdiction could be found in the Council of Europe recommendations, consultative opinions of the special advisory body of the Council of Europe – Consultative Council of European Prosecutors and various documents adopted by the UN and ODIHR. The key role in tracing standards in this field has the Venice Commission which addresses various relevant issues through its opinions on (draft) constitutions and judicial laws.

The role and influence of the international standards in drafting national legislation vary in different regions and geo-political frameworks and depend on the internal decision of a certain state to follow its legal tradition or particular comparative model, but could also be determined by external influences and/political pressure coming from international organizations.

The second scenario is typical for transitional post-communist countries that are in focus of the Venice Commission but also for candidate countries in the process of the accession negotiations with the EU. The very nature of the EU could be explained through the idea of unification. This process grasps all the segments of a society, but it has particular importance when we talk about the reform of national legal systems. The degree of unification may vary from the complete – in the areas in which there is the acquis, to a broad one - based on the EU standards. Depending on the concrete area in question, standardization may range from a very wide scale of „desirable and/or permitted ", within which it is sufficient for the state candidate to reach a minimum level in order to meet the requirements for membership in the EU, but a decision may also be taken for the positioning in the middle or close to the top of the scale. In other areas, again, this scale has a particularly narrow range and, therefore, in such cases, the process of harmonization with relevant standards to a great extent is reminiscent of the transposition of the acquis.[3]

The decision of the EU on the level of unification it will request in a certain area (the acquis or standards), depends on several factors, like an *importance of specific area for the functioning of the EU.* If areas of essential importance for the EU are in question, they were mainly regulated by the *acquis* in the early phase of the formation of the EU. The sensitivity of a certain issue in the context of the readiness of the candidate countries to give up their own heritage plays also an important role. The constitutional system, competence, and functioning of the key institutions of the state, particularly the judiciary, is out of any doubt, one of the areas in which the states have difficulties to surrender their heritage.[4] The same tendency is noted in the Rec(2000)19 which says that although the European legal systems are still divided between two cultures – the split being evident both in the organisation of criminal procedure (which is either accusatorial or inquisitorial) and in the initiation of prosecutions (under either "mandatory" or "discretionary" systems), the traditional distinction is tending to blur as the different member states bring their laws and regulations more closely into line with what are now common European principles, in particular those laid down in the

[3] See more in: Kolaković-Bojović, M: Organisation of Judiciary in the Republic of Serbia and Chapter 23, (Organizacija pravosuđa u Republici Srbiji i Poglavlje 23) *European Integrations and Penal Legislations (Chapter 23- law, practice and measures of harmonization)* (ed. S. Bejatović)*:* Zlatibor: Serbian Society for Criminal Law and Practice, 2016, pp. 98-106.

[4] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 194.

Convention for the Protection of Human Rights. However, in the same document the Committee of Ministers of CoE (hereinafter: Committee) admitted that it is fair to say that, to date, the status, role and operating methods of authorities responsible for prosecuting alleged offenders have not been scrutinised in detail with a view to their harmonisation at European level.[5] Furthermore, the Committee approaches to the harmonization/unification at European level without ambitions to draw on features of both traditions in order to come up with some type of third option, nor to propose the unification of existing systems, nor to suggest a supranational model, nor did it believe that it should merely seek the lowest common denominator. The idea of the Committee is just to identify the major guiding principles - common to different types of system and to recommend practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend.[6]

However, even within circle clearly surrounded by European standards, positioning of particular country is also determined by Venice Commission assessment on belonging the certain country to the cluster of "old democracies" or to the category of "a new or young democracies"[7], where Republic of Serbia has been placed in the second category[8] and criticized due to weak guaranties of judicial independence.[9] This classification criteria is important for the level of tolerance regarding the permitted influence of the legislative and/or executive branch of power on the public prosecution service but also when it comes to place of the guaranties of prosecutorial service autonomy in the legislative framework (constitutional or provisions stipulated by law). That is obvious from the Opinion of the Venice Commission CDL-AD(2007)028 (§ 5-6)[10] from 2007

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[5] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 12.

[6] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 13

[7] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 196.

[8] The fact that the Republic of Serbia had been classified in the category of young democracies became obvious after the opinion of the Venice Commission on the 2005 Draft Constitution, in which the Commission insisted on complete elimination of the role of the legislative and the executive power in the management of the judiciary. See more in: European Commission for Democracy through Law (Venice Commission) *Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia*, adopted by the Commission at its 64th plenary session (Venice, 21-22 October 2005) and European Commission for Democracy through Law (Venice Commission), CDL-AD(2007)004, Opinion on the Constitution of Serbia, adopted by the Venice Commission at its 70th Plenary Session (Venice, 17-18 March 2007).

[9] The Commission stated that the proposed solution was not in compliance with the EU standards that proclaim independence of the judiciary, specifically in the part that is related to the role of the National Assembly in the procedure of election of members of the HJC and of the SPC, presidents of courts, and public prosecutors, as well as of judges and deputy public prosecutors who are first time elected to three-year term, but also with respect to the fact that a representative of the authorized parliamentary committee and the minister of justice are members of the HJC and of the SPC *ex officio*. In addition, the existence of the 'probationary' three-year tenure on the occasion of the first election was criticized.

[10] European Commission for Democracy through Law (Venice Commission), CDL-AD(2007)028, *Judicial Appointments Report* adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

according to which a differentiation is made between the so-called traditional and young democracies. „In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive power is restrained by legal culture and tradition, which have grown over a long time. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges." (CDL-AD(2007)028, § 45-46). Especially interesting is tendency visible is some recently joint member states that could be described as some kind of reform regression.[11]

Without contesting the *ratio* of such an approach, it remains quite unclear: who, when, and based on what criteria made the decision on the classification of European states into the two qualitative groups? Moreover, although it is clear that there are no „lists" of previously classified states, raising of such a question is still deemed to be some kind of a taboo, and classification is mainly made when formulating individual opinions of the Venice Commission on the draft constitutions and judicial laws of individual states.[12]

Repercussions of putting Serbia in the cluster of young democracies got their concrete shape in the European Commission recommendations[13] contained in the Screening Report for Chapter 23[14] and reflected in the Action Plan[15] for the same Chapter (hereinafter: the AP23).[16]

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[11] See more in: Stanila, L.M: The True Face of the Constitutional Court: SnowWhite or Evil Queen?, *Journal of Eastern-European Criminal Law No.* 1/2017, pp. 199-207.

[12] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 196.

[13] The High Judicial Council (hereinafter: HJC), and the State Prosecutorial Council (hereinafter: SPC), should be strengthened in a way that would imply taking over of the leading role in the management of the judiciary. Their composition should be mixed, without participation of the National Assembly (except exclusively in the declaratory role) with minimum half of the members from the judiciary who represent different levels of jurisdiction. The elected members should be elected by their peers, and the legislative or the executive power should not have the authority to control or oversee the work of the judiciary. Additionally, the recommendation calls for the re-examination of the probationary period lasting three years for candidates for judges and deputy prosecutors, precise stipulation of the reasons for termination of office of judges, as well as of the rules related to the termination of tenure of judges of the Constitutional Court. Additionally, the EC insists on the adoption and effective implementation of criteria for election to judicial functions, as well as on striking a balance between the growing powers of the HJC and the SPC, their capacities, as well as on the transparency and accountability in their work.

[14] The Screening Report for the Negotiation Chapter 23, available at: http://seio.gov.rs/upload/documents/eu_dokumenta/Skrining/Screening%20Report%2023_SR.pdf, 25 May 2016.

[15] Action Plan for Chapter 23, http://www.mpravde.gov.rs/files/Action%20plan%20Ch% 2023.pdf, October 16th 2016.

[16] The EC criticized the role of the National Assembly in the election and termination of office of judges as a significant deficiency that creates risks of a political influence on the judiciary. The same is also stated for the relationship with the HJC, bearing in mind that the National Assembly also elects eight out of eleven members of the HJC, while the other three members are elected *ex officio*, including the president of the Supreme Court of Cassation (appointed by the National Assembly), the Minister of Justice, and the chairman of the authorized parliamentary committee. The EC confirmed that the described appointment is not in compliance with the EU standards through the comment that "Serbia

Based on above-mentioned critiques and recommendations, we will analyse several key issues that determine the position and role of public prosecution service in national legislation:

The first of all, there is an issue of public prosecution autonomy, reflected through the level of prescribed guaranties in the national legislation (constitutional of just guaranties stipulated by laws) as well as through institutional mechanism to implement them.

Equally important is issue of balancing powers and relationships between other branches of power but also within judiciary.

Not less important are issues of career which includes mechanisms of selection, appointment, evaluation, promotion, competence, accountability and termination of mandate for public prosecutors.

2. The role of public prosecution service

Understanding the role that public prosecution service has within legal and institutional framework is of the key importance for answering all relevant questions regarding its constitutional and legal position. In that sense, it should be noted that the Recommendation (2000)19 defines that "Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. Operating neither on behalf of any other (political or economic) authority nor on their own behalf, but rather on behalf of society, public prosecutors must be guided in the performance of their duties by the public interest. They must observe two essential requirements concerning, on the one hand, the rights of the individual and, on the other, the necessary effectiveness of the criminal justice system, which the public prosecutor must, to some extent, guarantee.[17]

So, the public interest is the main context shaping the public prosecution role, but systems of criminal justice vary throughout the World and there is no uniform model for all states. The main classifications could be made on systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. In parallel, there are systems where prosecution is mandatory in accordance with the legality principle and others where the prosecutor has discretion

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should ensure that when amending the Constitution ... professionalism and integrity become the main drivers in the appointment process, while the nomination procedure should be transparent, and merit based. Serbia should ensure that a new performance evaluation system is based on clear and transparent criteria, excludes any external and particularly political influence, is not perceived as a mechanism of subordination of lower court judges to superior court judges and is overseen by a competent body within the respective Councils." The EC also contests the role of the Ministry of Justice related to its role in the judiciary, as well as in the part of the Report in which the EC says that „The judicial reform process should lead to tasking both Councils with providing leadership and managing the judicial system." Also, the probationary three-year period for candidate judges is contested and described as „very long".

[17] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p.14.

not to prosecute where the public interest does not demand it (the opportunity principle). Differences exist also between systems which allow private prosecution while others do not do so or limit it. The same goes for position of a victim who, in some systems, has opportunity to take part in criminal proceedings as a "partie civile" while others recognise only a contest between the prosecutor representing the public or the state and the individual accused. (CDL-AD(2010)040-7) However, in spite of differences, it is possible to identify features and values which are common to virtually all modern criminal justice systems and the Venice Commission see it, primarily, in the criminal prosecution as a core function of the state. A crime is a wrong against society, although in many cases the same act will also amount to a private wrong against the individual victim. (CDL-AD(2010)040, par. 10-11)

Having that in mind, the Committee tried to define list of concrete public prosecutor's duties universal for all existing systems but also to identify some additional that could be found in various states. According to the Committee, in all criminal justice systems, public prosecutors: decide whether to initiate or continue prosecutions; conduct prosecutions before the courts; may appeal or conduct appeals of all or some court decisions. In certain criminal justice systems, public prosecutors also: implement national crime policy while adapting it, where appropriate, to regional and local realities; conduct, direct or supervise investigations; see to it that victims are effectively assisted; decide on alternatives to prosecution; supervise the execution of court decisions; etc.[18]

The Venice Commission also tried to connect role of public prosecution service to the question of what powers the prosecution service should have. The Commission challenged any sort of general supervisory powers of public prosecution service commonly found in "prokuratura" type systems, typical for ex -Soviet countries. The Commission also underlined importance of judicial control of prosecutor's actions which affect human rights, that should not function like a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole. (CDL-AD(2010)040, par. 73-74)

One of the commonly raised issues is role of the prosecution service outside of criminal law and procedure. This issue was in the focus of the Consultative Council of European Prosecutors which stated that "[t]here are no common international legal norms and rules regarding tasks, functions and organisation of prosecution service outside the criminal law field", but also noted that "it is the sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests ..."[19] In the same manner concluded the Parliamentary Assembly of the Council of Europe, which points out that the various non-penal law responsibilities of public prosecutors "give rise to concern as to their compatibility with the Council of Europe's basic principles" and that "it is essential ... that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal

[18] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 15.

[19] Opinion no. 3 (2008) on the Role of Prosecution Services outside the Criminal Law Field.

justice system, with separate, appropriately located and effective bodies established to discharge any other function" (paragraph 7).[20]

3. Checks and balances and its influence on the prosection service

The main issue when we are talking about autonomy of prosecution service is "autonomy from whom"? In this regard, it is important to make distinction between external and internal independence/autonomy as well as between judicial independence and prosecutorial autonomy.

An external independence/autonomy are terms connected to relation between separation of power on three branches – legislative, executive and judicial. In that context, the principle of *Checks and balances* is usually understood as the striking a balance in the mutual influence between different branches of power whereby each of them has impact on the others to a certain extent, to allow appropriate process of adoption, application of and supervision over the application of legislation.[21] From the angle of Montesquieu, freedoms are best protected exactly through the separation of powers.[22] That has been confirmed through experiences of many democratic societies so far. The same principle is incorporated in the Article 4 of the Constitution of the Republic of Serbia, which provides that the legal system is unique, and the government system shall be based on the separation of powers into legislative, executive and judiciary. "Relation between three branches of power shall be based on balance and mutual control." The Constitution in the same article also stipulates that the judiciary power shall be independent.

3.1. External independence/autonomy

Interesting and useful view of the external independence could be found in the Rec(2010)12 where independence was reviewed from the angle of the judicial organization as well as from the angle of individual judge. The Committee noted that the independence of the judiciary has both an objective component, as an indispensable quality of the judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts".[23]

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[20] Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe.

[21] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 193.

[22] Montesquieu, C: The Spirit of Laws: 1748, p. 30.

[23] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges,* § 11.

Having this in mind, prescribing guaranties of judicial independence in the constitution is pretty common practice[24] but situation is quite different when it comes to guaranties of prosecutorial independence/autonomy. Reasons for that could be found in long tradition of organizational connections between prosecution service and executive power and consequently, in tradition of political interference. The Committee noted that legal Europe is divided on this key issue between the systems under which the public prosecutor enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. The Committee also concluded that inasmuch as this is an institutional question – concerned with the fundamental distribution of power in the state – and currently, in many countries, a key factor in internal reforms occasioned either by changes in the historic context or by the existence of problems in the relationship between justice and politics, the very notion of European harmonisation around a single concept seemed premature. Therefore, the committee sought, by analysing the two types of system currently in operation, to identify the elements for achieving the balance that is necessary if excesses in either direction are to be avoided.[25]

According to Serbian Constitution status and jurisdiction of Public Prosecution Service are determined through provisions that regulate rules and procedures for appointment of the Republic Public Prosecutor, public prosecutors and deputy public prosecutors. In addition to this, the Constitution rules composition and jurisdiction of the State Prosecutorial Council as well as sources of law that oblige public prosecutors and deputy public prosecutors in their work. The Article 156 stipulates that "Public Prosecutor's Office shall perform its function on the grounds of the Constitution, Law, ratified international treaty and regulation passed on the grounds of the Law." This provision, unlike similar provisions on the courts, does not mention generally accepted rules of the international law. If the generally accepted rules of the international law remain with regard to the courts, then they should be added with regard to the public prosecutor's offices as well.[26]

Since there is no dispute on the need for mutual influence[27] the situation is quite different regarding political interference on prosecution service. The Venice

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[24] Article 149, paragraph 1 of Serbian Constitution stipulates that a judge in performance of the judicial function shall be independent and responsible only to the Constitution and the law. Further on, in paragraph 2, the same Article prescribes that any influence on a judge while performing his/her judicial function shall be prohibited. Such a formulation seems to be too wide. Namely, although the intention of the legislator to sanction only unpermitted and/or undue influences is clear, the impression is that this should have to be visible from the actual constitutional norm, as well as that, at this place, it is appropriate to refer to the law which would more precisely stipulate what type of influence is prohibited.

[25] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 22.

[26] Analysis of the constitutional framework on the judiciary in the Republic of Serbia, available at: http://www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php, accessed on 23 May 2017, p. 22.

[27] The Venice Commission insists on accountability as a way of mutual influence in order to ensure checks and balances principle and stated that "like any state authority, including judges, the prosecutor's office needs to be accountable to the public. A traditional means to assure accountability is control by the executive, which provides indirect democratic legitimacy through the dependence of the executive on the elected Parliament. Another means is control by a prosecutorial council, which cannot be an

Commission recognized the political interference as literally traditional modus operandi of various monarchs and autocrats to use the public prosecution as a method to fight their political enemies.[28] As the most typical sort of abuses, the Commission identified bringing of prosecutions which ought not to be brought, either because there is no evidence or because a case is based on corrupt or false evidence, and probably commoner, where the prosecutor does not bring a prosecution which ought to be brought. Victims' rights to seek judicial review of cases of non-prosecution may need to be developed to overcome this problem. (CDL-AD(2010)040, par. 20-21) However, it is important to notice that, as it has been noted by the Committee when it analyzed judicial independence, guaranties of judicial independence secure for every person the right to a fair trial and, therefore, is not a privilege for judges, but a guarantee of respect of human rights and fundamental freedoms, allowing every person to have confidence in the justice system.[29] The same goes for guaranties on prosecutorial independence or autonomy (depending on particular model of organization). The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, exclusively on legal grounds only and without any improper influence.[30]

When it comes to external relations of prosecution service with legislative and/or executive powers, comparative legislation provides form various models, but it is important to notice that only small number of European countries have a prosecutor's office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Venice Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. In par. 26 and 27 of the CDL(2010)040 notes that there is a tendency of leaving the model of subordination to executive power. Anyway, position of the public prosecution service/prosecutor's offices are often referred to as 'autonomous' and individual prosecutors would be referred to as 'independent'. However, 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). That's not the case if we are talking about general instructions that do not refer to individual cases, having in mind that they could be seen as a measures of a state criminal policy adopted by parliament or government. (CDL(2010)040, par. 29-30)

The useful base for proper shaping relations between public prosecution service and two other branches of power in order to promote a fair, consistent and efficient activity of public prosecutors, the Committee of Ministries see in duty of the states to: give prime consideration to hierarchical methods of organisation, without letting such organisational methods lead to ineffective or obstructive bureaucratic structures; define

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instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament. "CDL-AD(2010)40, par. 41.

[28] See more in: Józan, F. & Kőhalmi, L: Rule of Law and Criminal Law Thoughts about the criminal justice of the Millennium Era, Journal of Eastern-European Criminal Law No. 1/2017, 209.

[29] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges,* preamble.

[30] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges,* § 6.

general guidelines for the implementation of criminal policy; define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making. According to the Committee, three elements should take precedence in the pursuit of consistency: a well-designed hierarchy, with no place for insidious bureaucracy, in which all members of the public prosecution service should feel responsible for their own decisions and capable of taking the initiatives needed to do their particular job; general guidelines on the implementation of crime policy, setting out priorities and the means of pursuing them having account of the discretionary powers recognised to the public prosecutor; a set of criteria to guide decision-making in individual cases, with the aim, for example, of preventing inconsistencies such as that of certain offences systematically attracting prosecution in certain public prosecutors' offices and not in others or being dealt with under different procedures or categorised differently. [31]

3.2. Appointment and dismissal of public prosecutors and the role of prosecutorial councils

Some of concrete points that reflect level of autonomy of prosecution service as well as of the independence of public prosecutors are mechanisms of their appointment, promotion and dismissal, especially (non)existence, composition and role of the prosecutorial councils.

The Committee based on the Venice Commission opinion, a special attention paid on the manner in which the Prosecutor General is appointed and having in mind a significant role in the system guaranteeing the correct functioning of the prosecutor's office. The Venice Commission stated that professional, non-political expertise should be involved in the selection process, but admitted that is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government." Commission also analysed the role of parliament in the appointment of the prosecutor general and concluded that, in countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The Commission suggested the use of a qualified majority for the election of a Prosecutor General as a mechanism to achieve consensus on such appointments but emphasized that there is a need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock. The Committee also supported principle of appointment just for one, relatively long mandate, to ensure that prosecutor general does not follow inappropriate instructions of executive or legislative power in order to ensure re-appointment. (CDL-AD(2010)040 par. 34-37)

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[31] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, pp. 34-35.

The Article 158 of Serbian Constitution stipulates that "the Republic Public Prosecutor shall be elected by the National Assembly, on the Government proposal and upon obtaining the opinion of the competent committee of the National Assembly." (paragraph 2) "The Republic Public Prosecutor shall be elected for the period of six years and may be re-elected." (paragraph 3) Venice Commission has expressed an objection only in part which refers to the possibility of re-election, citing that such a possibility does not exist with regard to the President of the Supreme Court of Cassation. It seems that the election of the Republic Public Prosecutor for a limited term in office (of six years) is debatable. It is unclear why the position of the public prosecutor is not permanent, the way the judge's tenure is.[32]

The paragraph 4 of the same article stipulates that "tenure of office of the Republic Public Prosecutor shall terminate, if he/she is not re-elected, at his/her own request, upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the Law." Such an provision is in line with the Venice Commission opinion (CDL-AD(2006)029, par. 34) and Committee standpoint (CDL-AD(2010)040 par. 39 that recommend that the grounds for such dismissal would have to be prescribed by law or even more in the Constitution itself. However, there are some opinions in Serbian academic circles that the grounds for the termination of office and for the relief of duty of a public prosecutor should be specified under the Constitution.[33] The same opinions could be found considering termination of office of public prosecutors other than general prosecutor as well as deputy public prosecutors (article 161 of the Constitution). Such opinions are justified in part that ensures legal predictability and disables political influence and frequent legislative amendments. However, it should be noted that Constitution as the main legislative act should include only the key principles and guaranties but not too detailed.

Not less disputable is issue of the authority competent for rendering decision on termination of tenure of office of the Republic Public Prosecutor. According to paragraph 5, article 158 of Serbian Constitution it shall be adopted by the National Assembly, in accordance with the Law, bearing in mind that it shall pass a decision on relief of duty at the Government proposal". The similar as it for decision on appointment, we think that the decision on the termination of tenure of office of the Republic Public Prosecutor should be passed by the National Assembly whereas the role of the Government should be eliminated. Similar disputes exist regarding the role of the National Assembly in appointment of the public prosecutors and deputy public prosecutors for the first (three years) mandate.

This issue brings us to the role of the prosecutorial councils that have been recognized by the Venice Commission as an ideal institutional framework for appointment of prosecutors together with a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment.[34] Opinion of the Commission is that prosecutors should be appointed until retirement to avoid risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her. (CDL-AD(2010)040,

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[32] Analysis of the constitutional framework on the judiciary in the Republic of Serbia, available at: http://www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php, accessed on 23 May 2017, p. 25.

[33] *Ibidem.*

[34] CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova, par. 44.

par. 50) In Serbia, the position of the public prosecutor is no longer permanent as it used to be according to the ex- Constitution of the Republic of Serbia from 1990.[35] On the other hand, the deputy public prosecutors, who are not autonomous holders of powers performing the duties of the public prosecutor's office, are elected to serve first three years and then to a permanent office.

Very important issue is also question of the composition of prosecutorial councils. The main principle that should guide legislators when deciding on the composition of council should be competence of this body. The Commission took position that where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. (CDL-AD(2010)040, par. 66) Explaining standards on composition of judicial councils, the Venice Commission recognized the need that other members of the council are not a part of the judiciary and that they represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management". In a mixed composition of the Council's performance of this control, the Commission perceives the mechanism for strengthening of the confidence of citizens in the judiciary. (CDL-AD(2007)028, par. 46).

Similar argumentation could be found among academics. Paterson deems that, no doubt, separation of powers must play an important role in appointment of judges and performance of their functions but emphasizes unacceptability of absolute validity of that principle when appointment of judges is in question, because then the fact of the matter here is some kind of self-appointment through a body composed exclusively of judges. The same author looks at the appointment through such a body as the opportunity for some sort of *self-replication*, or election, from the aspect of such judges, of suitable candidates, as much as possible like themselves.[36] On the same path is the Venice Commission opinion dealing with judicial councils in which is stated that there is a need to provide a solution that includes democratic legitimacy of the judicial council, as well as to find a balance between judicial independence and self-management on the one hand and accountability of the judiciary on the other, whereby negative effects of corporatization within the judiciary would be avoided. In compliance with the above is actually the recommendation of the Venice Commission that the president of the judicial council should be elected from among non-judicial the members of the council (CDL-AD(2007)028, par. 35). [37]

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[35] Constitution of the Republic of Serbia, "Official Gazette No. 1/1990".

[36] Paterson, A & Paterson, C: Guarding the guardians? Towards an independent, accountable and diverse senior judiciary, CentreForum, 2012 (See also: Le Sueur, A: Developing mechanisms for judicial accountability in the UK, *Legal Studies,* 1-2/2004.), 30.

[37] The Venice Commission also stated that When participation of the executive power, or its representatives (e.g. the minister of justice) is in question, the Venice Commission, taking into consideration the practice of numerous European states, in principle allows for the possibility that a minister is a member of the council but proposes that he/she should not be involved in decisions concerning the transfer of judges or disciplinary measures against judges as this could lead to inappropriate interference by the Government. (CDL-AD(2007)028, par. 34).

When it comes to composition[38] and jurisdiction[39] of the State Prosecutorial Council in Serbia, the jurisdiction of the SPC refers solely to the electoral powers regarding the deputy public prosecutors and the procedure of rendering a decision on the termination of the tenure of office of the deputy public prosecutors. This body performs other duties stipulated by the Law but it is obvious that they may not be related to the public prosecutors, since the Constitution does not mention such duties at all. Therefore, unlike the High Judicial Council for which it may be said that it has a partially adequate scope of constitutional jurisdiction, in view of its position and role as defined by the Constitution, the SPC is a state body whose constitutional jurisdiction is not in accordance with its constitutional definition for the most part. Therefore, its jurisdiction should be completely redefined.[40]

3.3. Relationship between prosecutorial autonomy and judicial independence

Apart from those tendencies, there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court.[41] The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general. (CDL-AD(2010)040, par. 28)

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[38] According to article 164 of Serbian Constitution, the State Prosecutors Council is an autonomous body which shall provide for and guarantee the autonomy of Public Prosecutors and Deputy Public Prosecutors, in accordance with the Law. The State Prosecutors Council shall have 11 members. The State Prosecutors Council shall be constituted of the Republic Public Prosecutor, the Minister responsible for justice and the President of the authorized committee of the National Assembly as members *ex officio* and eight electoral members elected by the National Assembly, in accordance with the Law. Electoral members shall include six Public Prosecutors or Deputy Public Prosecutors holding permanent posts, of which one shall be from the territory of autonomous provinces, and two respected and prominent lawyers who have at least 15 years of professional experience, of which one shall be a solicitor, and the other a professor at the law faculty. Tenure of office of the State Prosecutors Council's members shall last five years, except for the members appointed *ex officio*. A member of the State Prosecutors Council shall enjoy immunity as a Public Prosecutor.

[39] According to article 165 of Serbian Constitution, the State Prosecutors Council shall propose to the National Assembly the candidates for the first election of a Deputy Public Prosecutor, elect Deputy Public Prosecutors to permanently perform that function, elect Deputy Public Prosecutors holding permanent posts as Deputy Public Prosecutors in other Public Prosecutor's Office, decide in the proceedings of termination of Deputy Public Prosecutors' tenure of office in the manner stipulated by the Constitution and the Law, and perform other duties specified in the Law.

[40] Analysis of the constitutional framework on the judiciary in the Republic of Serbia, available at: http://www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php, accessed on 23 May 2017, p. 27.

[41] A separate issue is relationship between police and public prosecutor. See more in: Soković, S, Čvorović, D, Turanjanin, V: Cooperation between the Public Prosecutor and Police in Serbia, *Zbornik radova Pravnog fakulteta u Novom Sadu (Proceedings of Novi Sad Faculty of Law)*, L, 3, 843-860.

It is not rare, especially in post-communist, transitional countries, so called "young democracies" that professional public (mostly professional associations of public prosecutors) insist on equal constitutional and legal provisions on judicial and prosecutorial independence. Such an approach ignores differences that exist in very nature and jurisdiction of these to authorities, that also was noted by the Committee. Therefore, the Committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status and certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterised by mutual respect, objectivity and the observance of procedural requirements.[42] However, it does not mean that there should not be such guaranties at all. Contrary, the Venice Commission stated that the qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place. Of necessity, a prosecutor, like a judge, will have on occasion to take unpopular decisions which may be the subject of criticism in the media and may also become the subject of political controversy. For these reasons it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision. (CDL-AD(2010)040, par. 18)

Differences in nature of judicial and prosecutorial function, the Committee recognized also when it comes to other guaranties of their independence/autonomy, considering tenure, mobility and salary. Unlike judges, public prosecutors must not be guaranteed tenure in a particular position or post, although decisions to transfer them from one post to another must be based on verified needs of the service and not simply on arbitrary decisions by the authorities. However, the mobility should not induce any prioritising temporary recruitments or appointments that may carry damaging effects. The status of public prosecutors and their salaries and pension must take account of the need to maintain a certain balance between members of the judiciary and the prosecution service, as both - despite the different nature of their duties - play a part in the criminal justice system as well as the importance and dignity of the office.[43]

3.4. An internal independence of public prosecutors

As it had been earlier said, the independence or autonomy of the prosecution service as such has to be distinguished from any "internal independence" of individual prosecutors as well as from regime for deputy public prosecutors in systems like Serbian that tittle public prosecutors have only the heads of prosecutors' offices while all other office holders are their deputies. Having in mind hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their

[42] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 26.

[43] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 17.

superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for noninterference from their hierarchical superior. (CDL-AD(2010)040, par. 31) The main issue in this regard is status of instructions to subordinate prosecutors in individual case within prosecutorial hierarchy. The Committee clearly stated that relationship between the different layers of the hierarchy must be governed by clear unambiguous rules so that personal considerations do not play an unwarranted role. Additionally, the Committee see putting instructions in writing as an ideal protective mechanism that should prevent abuse of power and hierarchy that are unacceptable in human terms, and potentially dangerous in terms of civil liberties. The Committee recommend that in case of some prosecutor consider instruction unlawful or have an objection, in addition to right to request it written, it should exist an internal procedure enabling subordinates, at their own request, to be replaced in order to allow the disputed instruction to be carried out.[44] The Venice Commission goes even a further by opinion that any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction. In opinion of the Commission, the right on appeal should also exist in cases where transfer to another prosecutor's office without contest of prosecutor is used as a mean of influencing a prosecutor. (CDL-AD(2010)040, par 59-60)

Conclusions

From the standards analysed above it is clear that their range is much wider compared to standards relevant for judicial independence. That could be explained by variety of models of public prosecution service organization in comparative law, but also by strong influence of tradition of prosecution service subordination to executive power. Additional reason for that lies in specific role that public prosecution service has when it comes to protection of public interests. Significant deviation from the path that exist in the field of judicial EU standards could be found in lower expectations regarding level of legislative acts that contain provisions on prosecutorial independence/autonomy having in mind that they are mostly placed in laws not in constitution. Finally, introduction of prosecutorial councils as guardians of prosecutorial independence/autonomy are reform tendency supported by the Committee of Ministries and the Venice Commission, especially in states declared as new democracies. From the angle of Serbian accession negotiation process with the EU, abovementioned principles should be applied on currently ongoing process of Constitutional amendments that already opened a wide debate on novelties that could contribute autonomy of public prosecution service as well as to independence of individual public prosecutors and deputy public prosecutors.

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[44] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, par. 9-10.

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