

## **Jurisdictions of State Prosecutorial Council and position of their members**

### **Introduction**

Constitution of Republic of Serbia from 2006<sup>2</sup> defines prosecutors' office as a „autonomous state organ which prosecute actors of criminal and other punishable acts and to take action of preventive measures to protect constitutionality and legality“. It is „historical“ definition that is taken over from previous Constitutions with minor changes, which do not define legal nature of public prosecutors office.

Even though public prosecutors' office is defined by Constitution through “historical” definition, at the same time it introduces a series of novelties in definition of public prosecutors' office. Basic novelty is introduction of State Prosecutorial Council (hereinafter SPC or Council) into Constitutional system. SPC is a special organ of National Assembly appointed to ensure and provide independence and autonomy of public prosecutors<sup>3</sup> and deputy public prosecutors. Article 164 of Constitution imposes that State Prosecutorial Council is an autonomous organ that provides and ensure autonomy and independence of public prosecutors and deputy public prosecutors. It could be concluded out of such a formulated text that this is an organ of prosecutorial administration. However, the fact that prosecutors do not have any influence on election of their members according to the Constitution and members of Council are elected by National Assembly<sup>4</sup> pointed out in constitutional term that this is a specific organ of National Assembly in which the public prosecutors and deputy public prosecutors are the majority.

The truth is , constitutional solution is „improved“ by Law on State Prosecutorial Council<sup>5</sup> which predicts procedure of election of members of State Prosecutorial Council out of public prosecutors

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<sup>1</sup> Author is a member of State Prosecutorial Council and Deputy Republic Prosecutor.

<sup>2</sup> "Official Gazette of RS", no. 98/2006.

<sup>3</sup> Though it is predicted that State Prosecutorial Council provides and ensures independence of public prosecutors. The Constitution did not norm the jurisdiction of this organ in the procedure of proposal and election of public prosecutors.

<sup>4</sup> Election members of SPC are elected directly by National Assembl, but Council members are elected by their function which is the base for their membership in the Council are also elected by National Assembly..

<sup>5</sup> "Official Gazette of RS", no. 116/2008, 101/2010, 88/2011, 106/2015.

and deputy public prosecutors, having in mind the idea that subsequent election in National Assembly is a kind of political confirmation or parliamentary legitimization of candidates who are previously trusted in election from their colleagues.

Range of constitutional and legal jurisdiction of SPC, method of members' election will be discussed hereinafter.

### **1.1. Elective jurisdictions**

Legislator in Article 2, para 1, Law on State Prosecutorial Council was resorted to the unusual legal technique and only partially took over the text of Constitution.<sup>6</sup> Out of constitutional text "State Prosecutorial Council is an autonomous organ that provides and ensure autonomy and independence of public prosecutors and deputy public prosecutors, in accordance with Constitution" the words "in accordance with Constitution" are omitted. The reason for that intervention of legislator might be in absurdity of the regulation of Article 164, para 1 of the Constitution which quotes that State Prosecutorial Council "provides and ensures" autonomy of public prosecutors "in accordance with the Constitution", though, according to the Constitution, State Prosecutorial Council does not have any jurisdiction regarding public prosecutors. Moreover, procedure of proposal and election of public prosecutors that should be in function of "insurance and providing" of autonomy is delegated to the Government and National Assembly, so the State Prosecutorial Council even does not have any constitutional competences in the process of proposal and election of public prosecutors, has the task to ensure the "autonomy" of public prosecutors.<sup>7</sup>

Law on State Prosecutorial Council "has put" the Council into the process of election of public prosecutors giving them the technical role and modest jurisdiction, which is only to determine the

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<sup>6</sup> Nomotechnical rules impose that constitutional regulations are not interpreted or repeated in the laws (See: Trifunović M. and other. *Methodology of law drafting*, Belgrade, 2002, page 10)

<sup>7</sup> State Prosecutorial Council has constitutional competences only regarding the election of deputy public prosecutors, who are elected on proposal of State Prosecutorial Council, National Assembly is competent only when elected for the first time, and after „trial period“ of 3 years they are elected for the permanent position and that election is completely under jurisdiction of State Prosecutorial Council.

list of candidates for Republic Prosecutor and public prosecutors. Thereby, the Council was delegated to determine the “pre-proposal” of one or more candidates from rang list of the candidates who fulfil the conditions for election of public prosecutors (Law on prosecutors’ office, Article 82)<sup>8</sup> and to deliver it to the Government who will later propose the candidate for public prosecutor to the National Assembly.

Missing of parliamentary elective jurisdiction regarding public prosecutors is only partially in accordance with the opinion of Venice Commission in a comprehensive document. In this document “Report on European standard regarding judicial independence, part two-prosecutors’ office”, which is adopted at 85th plenary session of the Commission, it is stated that “ideal situation” will be if public prosecutors are appointed by independent body with “democratic legality” such as “prosecutorial council” or “council of high prosecutors”.<sup>9</sup> That means that Venice Commission has unambiguous attitude that election of public prosecutors in parliament is not an “ideal” solution.

Elective jurisdiction of prosecutorial councils is different in the councils in Europe. Particular “formula of elective jurisdiction” of prosecutorial boards or councils is created in the countries of ex-Yugoslavia. That „formula “means that prosecutorial council elects all public prosecutors and Heads of prosecutors’ offices except superior prosecutor who is elected in per excellence political procedure. Thereby election of prosecutors is allegedly assigned to the prosecutorial self-governement, with idea that political control over prosecutors’ office keeps through prosecutor who is on the top of the pyramid. It seems that control of prosecutors office through prosecutor on the top of the pyramid is very feasible idea, having in mind very strict hierarchy structure of the prosecutors offices in the countries of ex Yugoslavia formated like Soviet prokuratura, as well as

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<sup>8</sup> "Official Gazette of RS", no. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 (Decision of Constitutional Court), 121/2012, 101/2013, 111/2014 (Decision of Constitutional Court), 117/2014, 106/2015.

<sup>9</sup> EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) REPORT ON EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM: PART II – THE PROSECUTION SERVICE, Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010), Study N° 494 / 2008, on the basis of comments by, Mr. James HAMILTON (Substitute Member, Ireland), Mr. Jørgen Steen SØRENSEN (Member, Denmark), Ms Hanna SUCHOCKA (Member, Poland), Strasbourg, 2011, page 10, [www.venice.coe.int](http://www.venice.coe.int), (2.2.2021)

particular legal culture of submission to the superiors, formed in prosecutors offices in ex Yugoslavia just in the conditions of unrestricted hierarchy. Such a „formula“ is established in Croatia. Attorney general Council in Croatia appoints all deputy prosecutors, „municipal and county lawyers“, so all prosecutors except Principal state attorney of Republic of Croatia, who is appointed by Parliament on proposal of Government, in 4 years period.<sup>10</sup> In Montenegro, Prosecutorial Council elects and dismisses heads of state prosecutors' offices and state prosecutors, while in regard with Supreme state prosecutor, it determines proposal of one candidate and submit it to the Assembly to decide.<sup>11</sup> Republic of Macedonia has similar solution. Council of public prosecutors elects and dismisses public prosecutors except Public Prosecutor of Republic of Macedonia. Regarding the Public prosecutor of Macedonia, the Council has consultative jurisdiction, gives opinion to the Government on proposal for appointment and dismissal of Public prosecutor of Macedonia.<sup>12</sup>

Omission of elective jurisdiction of the Council versus public prosecutors could be observed not only from the point of range of the organ, but also from the point of inconsistency with international documents. Directions of UN on prosecutors' role propose that prosecutors promotion „should be based on objective criteria...professional qualification, capabilities, integrity and experience on which is decided in fair and impartial procedures“.<sup>13</sup> Recommendation 19th of the Ministry Committee of the Council of Europe proposes that countries have to „undertake measures which can ensure that promotion and transfer of public prosecutors performing in accordance with fair and impartial procedure that contains measures against any approach which favors interests of particular groups.“<sup>14</sup> Despite the generalization, two mentioned documents clearly establish fair and

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<sup>10</sup> <http://www.dorh.hr/Default.aspx?sec=648> ( 2 February 2021)

<sup>11</sup><http://www.sluzbenilist.me/PravniAktDetalji.aspx?tag=%7b5EB8A47D-5973-4B17-811A-0492E674F769%7d>  
(27 February 2016)

<sup>12</sup> <http://www.pravo.org.mk/> (1 March 2021.)

<sup>13</sup> *Basic Principles on the Role of lawyers*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August - 7 September 1990. Basic principles on roles of public prosecutors (lawyers), adopted at Eight Congress of UN on prevention of criminal and actors of criminal acts, held from 27 August – 7 September 1990 in Havana, Cuba.

<sup>14</sup> Recommendation No (2000) 19 on the Role of Public Prosecutors in the Criminal Justice System. – available at [www.legislationline.org/legislation.php?tid=155&lid=5002](http://www.legislationline.org/legislation.php?tid=155&lid=5002). (21 January 2016.)

impartial procedure of election of public prosecutors as a standard. On the opposite, Constitution by delegating the election of Heads of prosecutors offices to the Assembly on the proposal of Government, practically, in advance excludes the possibility of politically impartial procedure, because the „decision on the election is discretionary act of Parliament where political reasons instead of objective and substantial ones play main role“.<sup>15</sup>

Jurisdictions of State Prosecutorial Council regarding election of public prosecutors are not in line with the document of Consultative Council of European prosecutors from 2018. In the Opinion „Independence, responsibility and ethic of prosecutors“ from 2018, Consultative Council of European prosecutors recommends that internal and external independence of prosecutors is provided by „independent body such as prosecutorial council“ connecting independence of prosecutors with method of their appointment, career and disciplinary procedure. Thereby, Consultative Council of European prosecutors recommends at the same that appointment and disciplinary procedure should be in control of prosecutorial council, referring to conclusion that elective jurisdictions of State Prosecutorial Council are not in line with the recommendations of that body.<sup>16</sup>

Having in mind that disciplinary authority of the Council derived from their elective jurisdiction, then disciplinary jurisdiction of the Council in broader sense are classified into the range of elective jurisdiction. Range of disciplinary jurisdictions of the Council is very important because the Council elects all disciplinary organs (disciplinary prosecutor, deputy prosecutors, president and the members of disciplinary commission and their deputies) and decides on instance procedure regarding the complaint to the decision of first instance of disciplinary organ.

State Prosecutorial Council, also decides in the first and the second instance in the procedure for dismissal of public prosecutors and deputy public prosecutors. Having in mind that the procedure for dismissal is particularly standardized, separated from disciplinary procedure, it can be concluded that procedure for dismissal itself represent special kind of procedure for determination of professional responsibility, which comes from disciplinary responsibility. Let me explain this,

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<sup>15</sup> Marković R., *Constitutional Law*, Belgrade, 2012, page. 513.

<sup>16</sup> <https://rm.coe.int/opinion-13-ccpe-2018-2e-independence-accountability-and-ethics-of-pros/1680907e9d>

(2. February 2021)

procedure for dismissal is initiated just after completed disciplinary procedure where heavy disciplinary offence is detected. Decision on dismissal of public prosecutor or deputy public prosecutor is in effect when it is confirmed in the procedure after complaint or after deadline for complaint and complaint was not pledged.

Decision on dismissal has different effect for public prosecutors and deputies. Decision on dismissal represents for public prosecutors a base for startup of procedure where Government proposes, and National Assembly brought the decision on dismissal. Regarding the deputy public prosecutors, decision of the Council on dismissal has constitutional effect and on the basis of the decision, function of the public prosecutors comes to the end. The truth is that against the decision on dismissal there is a constitutional protection, so the dismissed public prosecutor or deputy public prosecutor can submit special complaint to the Constitutional Court.

## **1.2. Financial jurisdictions**

According to the Article 3, Law on State Prosecutorial Council, financial means for State Prosecutorial Council are provided in budget of Republic of Serbia, on the proposal of the Council, which then autonomously has disposal with it in accordance with the Law. Article 13, para 1, indent 10 of the Law imposes that the Council should propose the scope and the structure of budget resources required for prosecutors offices for current expenditures and to supervise it, in accordance with the Law. Therefore, Article 3 and 15 establish a kind of a financial autonomy of the Council having in mind that financial resources for Council work are defined on the proposal of the Council, meaning that it proposes budgets of public prosecutors' offices and supervise budget disposal. This is an advanced solution, because comparative normative solutions regarding financial independence of prosecutorial councils and prosecutors' offices are different. For example, public prosecutors' office in Austria does not have its own budget. In Denmark and Norway, public prosecutors office is sharing its budget with the police. Financial resources are

assigned on request of public prosecutors' office or public prosecutors' office is being consulted in Czech republic, Finland, Iceland, Spain, Sweden, Scotland (UK).<sup>17</sup>

Despite the jurisdiction to propose its own budget, State Prosecutorial Council did not use its jurisdiction, meaning it did not propose its own budget or budget of other public prosecutors' offices. In the previous period, proposal of the budget of State Prosecutorial Council and public prosecutors' office was defined by unilateral decision of the competent Ministry. Representatives of the Council were sometimes consulted during the budget composition in an informal way.

### **1.3.Organisational jurisdictions**

Organizational jurisdictions to public prosecutors' office are splitted between State Prosecutorial Council and Republic Prosecutor and Minister who is in charge of judiciary.

Assignment of public prosecutors' office where public prosecutor and deputy public prosecutors will continue to work as deputy public prosecutor in case of closure of that public prosecutors' office and relocation of deputy public prosecutor, without their consent are two comprehensive organisational jurisdiction of the Council (Article 13, para 1, indent 7, Law on SPC and Article 62, para 2, Law on Public Prosecutors' Office)<sup>18</sup>

In order to complete the image of organizational jurisdiction of the Council, it is necessary to compare it with the jurisdiction of Republic Prosecutor. As a highest prosecutorial instance in the country, Republic Prosecutor has many hierarchic jurisdictions. Branched hierarchic authority of

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<sup>17</sup> Council of Europe, (PC-PR\Docs 2000\synthe.7) PC-PR (97) 1 REV 5, EUROPEAN BOARD OF CRIMINAL ISSUES, (CDPC), SUMMARY OF THE QUESTIONNAIRE: *STATUS AND ROLE OF PROSECUTORS OFFICE*, Strasbourg, 2000, page 113. Idea of financial autonomy of the Council is supported by the majority of public prosecutors and deputy public prosecutors. Questioning of public prosecutors and deputy public prosecutors of this and some other issues is done under the project „Strengthening of independence and integrity of public prosecutors“. The research carries out by the Association of Public Prosecutors and Deputy Public Prosecutors and Agency for public research (CeSID) was organized under this project. During the research, 521 public prosecutors were interviewed. Even 57% of interviewed consider that the Council should take over planning and organizing of the budget of public prosecutors offices as soon as possible, while 8% of interviewed consider that Council should not take over this organization. .

<sup>18</sup> "Official gazette of RS", no. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 (Decision of Constitutional Court), 121/2012, 101/2013, 111/2014 (Decision of Constitutional Court), 117/2014, 106/2015.

Republic Prosecutor just confirm the thesis that Republic Prosecutor is sui generis public prosecutor with extended and special hierarchic jurisdiction. Range of hierarchic jurisdiction could be an argument for shortening its organizational jurisdiction. In that case, the remark of experts of the Council of Europe will seem less convincingly given in the preparation phase of Law on public prosecutors' office regarding the jurisdiction of Republic Prosecutor which can consequently have „excessive power“, not very much compatible with jurisdiction disposal in a democratic society.<sup>19</sup> However, an issue is also the fact that Republic Prosecutor is given organizational jurisdictions as well which were not coming from hierarchic jurisdiction of the prosecutor. Reallocation with consent, as well as all kind of referrals (Article 63 and 64 Law on Public Prosecutors' office) are the jurisdictions of Republic Prosecutor, even though those jurisdictions are personal not hierarchic kind of. Many systems are more cautious while assigning organizational jurisdiction to the Republic Prosecutor. A good example could be Slovenia where State Prosecutorial Council decide on relocation and organization of public prosecutors in general<sup>20</sup>

Special issue is also the fact that Law on public prosecutors' office imposes wide range of jurisdiction of Republic Prosecutor that he can refer deputy public prosecutor to the other public prosecutors' office, because the decision on referring should not be explained in detail nor following by the special procedure which will explain the reasons for this implementation.

Referring itself, beside representing temporary change of public prosecutors' office, at the same time it represents change of address of referred deputy public prosecutor. In the situation when jurisdictions were not previously formulated precisely, accommodation and other status issues concerning referring deputy public prosecutor, implementation of this institute can be easily converted into type of punitive measure for those who were not desirable for Republic Prosecutor. Widely discretionary jurisdiction of Republic Prosecutor for decisions of referring represents in its essence even threat to the proclaimed independence of public prosecutors.<sup>21</sup> However, there should

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<sup>19</sup> Cornu P. Prosecutor Canton of Neuchatel, *Comments on Draft Law on State Prosecutorial Council and Draft Law on Public Prosecutors Office*, Neuchatel, 2007, page 18.

<sup>20</sup> <http://www.drzavnotozilski-svet.si/pristojnosti.html> (1 March 2016)

<sup>21</sup> Similar regulation was also a part of Draft Law on public prosecutors' office and that solution was criticized by experts of Council of Europe. The experts considered that in case of referring with no consent of deputy public prosecutor, complaints to referring should be predicted or the period of referring should be shortened. Anyway, the referring is formatted in a very similar way as formatted in the Law on public prosecutors' office of Kingdom of Yugoslavia in 1929 (*Official Journal of Kingdom of Yugoslavia*, no. 73/1929).

be said that precise and clear standards for dislocation are not found even in international documents. Recommendation (2000) 19 is the only document claiming in point C that “mobility of prosecutors” must be provided in accordance with “services’ needs” and mobility must not have to be “arbitrarily” and only on the basis of the decision of the authority.<sup>22</sup>

Defining the number of deputy public prosecutors is the jurisdiction, which is seemingly divided between State Prosecutorial Council and Minister who is in charge of judiciary, because the decision on number of deputies public prosecutors is brought by the Council with the previous consent of the responsible Minister (Article 75, Law on public prosecutors’ office). Jurisdiction is divided only at the first sight, but it is all about illusory division of jurisdiction, because the Minister of Judiciary has double influence on sistematization, firstly giving consent on the proposal of the decision and then bringing the decision in the Council, whose member is according to his function.

#### **1.4. Normative jurisdictions**

Following normative jurisdictions were described in the Law on State Prosecutorial Council (Article 13). The Council is giving opinion on ammendments of existing laws or adoption of new laws which determine position and work of public prosecutors, organization of publis prosecutors as well as other laws which are applied by public prosecutors office brought by Code of Ethics and brought Rulebook on measures for work estimation of public prosecutors and deputy public prosecutors. According to the Law on public prosecutors, the Council is authoritative also to assign the function and works which are opposite to the dignity, meaning that they infringe the independence or violate the dignity of public prosecutors’ office (Article 65.) Determination of function incompatibility with prosecutorial works had to be proceeded by Act which contains the list or determine the type of works and functions opposite to the dignity or which infringe the independence and dignity of public prosecutor or deputy public prosecutor.

Rulebook on work which is also brought by the Council determines the work of the Council (Article 18, Law on State Prosecutorial Council). Except typical business regulations, the current Rulebook proposes that Deputy President of the Council works at the same time as a Commissioner for independence of public prosecutors’ office.<sup>23</sup>

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<sup>22</sup> P. Cornu, Public Prosecutor of canton Neuchâtel, Switzerland, *Opinion of experts on Law on public prosecutor’s office of Republic of Serbia*, 10 (document in possession of the Author G.I.)

<sup>23</sup> <http://www.dvt.jt.rs/akti-veca/>, 25 August 2018

Commissioner for independence is very much required but normatively it is insufficient attempt of mechanism for protection of independence of public prosecutors and deputies. Article 9, Rulebook on work proposes that “existence of political or other unsolicited influence on prosecutorial work, the Council informs Deputy President, who in that case works as a Commissioner for independence”. After adoption of Rulebook on work, State Prosecutorial Council brought the Decision on Commissioner for independence<sup>24</sup> where precise competences of the Commissioner and method of work and so the concluded normative framework for establishing and work of Commissioner for independence of public prosecutors’ office. This decision also enables Commissioner works on the basis of “general authority” of the Council which to some extent exceed contradiction between composition of the Council and its jurisdictions. The Council protects and ensures the independence of public prosecutors and deputies, even though the Council composition is consisted of “active” politicians, representatives of governing coalition from which comes attempts for independence threatening very often. In order to avoid that the whole procedure of independence protection is trusted to the Council, where the representatives are of whom the threats to the independence are coming, by mentioned decision information for public and the Council on pressures and infringements to the independence was passed from the Commissioner and thereby part of “protection procedure” was extracted from the Council which makes this protection more effective.

### **1.5. Composition and method of Council members election**

State Prosecutorial Council is consisted of 11 members (Article 5). Members of State Prosecutorial Council are Republic Prosecutor, Minister in charge of judiciary and the President of competent board of National Assembly, as well as members of the positions and eight election members who are elected by National Assembly in accordance with the new Law. Election members are six public prosecutors or deputy public prosecutors with permanent function, out of which at least one is from territory of autonomous provinces and two respectable and prominent function lawyers with at least

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<sup>24</sup> A no. 393/17. of 7 April 2017, <http://www.dvt.jt.rs/wp-content/uploads/2017/09/Odluka-DVT-A-br.-39317-od-7.4.2017.pdf>, 25 August 2018

15 years of experience, out of which one is a lawyer, and other is professor of Faculty of Law. Elective members are elected by National Assembly.

The greatest number of complaints of professional public is concerning of composition and method of election of State Prosecutorial Council's members. This composition is controversial because of membership of actual politicians which raise a question of political neutrality of State Prosecutorial Council. The Constitution envisages that composition of the Council should be the members out of public prosecutors and deputy public prosecutors, members according to their function, as well as external members of SPC. Regarding the composition of judicial boards, there is no doubt that a significant number of members should be elected by judiciary itself, in order to ensure that the Council has democratic legitimacy. Remaining members, out of judiciary, should be "elected by the Parliament out of professional persons, having in mind possible conflict of interest".<sup>25</sup> Election of these members should be done by qualified majority meaning this as "compromising election of candidates between the majority and the opposition".<sup>26</sup>

On the other hand, in favour of the conclusion that method of Council members election in National Assembly is not suitable and this is an obstacle to the Council to realize its constitutional role in order to protect the independence of public prosecutors' office, there is an expertise of Venice Commission members on judicial organizational draft laws pointing out that High Judicial Council should be an independent judicial organ which is democratically elected by all judicial members with no exception".<sup>27</sup> Venice Commission, in its Opinion on Serbian Constitution from 2006, did not strictly consider the composition and method of election of SPC.<sup>28</sup> However, the Commission

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<sup>25</sup> EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *JUDGES APPOINTMENT*, adopted at pre-commission for judiciary (Venice, 14<sup>th</sup> March 2007), CDL-JD (2007)001rev, Venice, 2007, page. 7, available at [www.venice.coe.int](http://www.venice.coe.int)

<sup>26</sup> V. Petrov, Proposals for reform of Constitution regarding judiciary, *Works collection of Law Faculty in Niš*, no. 68, LIII Niš, 2014, page. 104

<sup>27</sup> OBERTO G., *Opinions of experts on amendments of Law on High Judiciary Council, Law on Judges and Law on courts organization of Republic of Serbia*, page 14-15.

<sup>28</sup> EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW,(VENICE COMMISSION), *OPINION ON CONSTITUTION OF SERBIA*, adopted by Commission at 70th plenary session, (Venice, 17-18 March 2007), no. 405/2006 on the basis of comments of C. GRABENWARTER (member, Austria), J. JOWELL (member, United

comprehensively explained High Judicial Council in the Republic of Serbia, having in mind that election and composition of both organs are made according to the same model, comments on High Judicial Council are applied also to the State Prosecutorial Council. Experts of Venice Commission concluded that the composition is “deficient” and it is only “illusory pluralistic”, because all members of Council are directly or indirectly elected by the National Assembly. Judges are not elected by their colleagues but National Assembly. Representative of advocacy and professorship are not elected by competent and professional organs or organization, but also the Assembly. Regarding the High Judicial Council, experts concluded that procedure of election in the judiciary (same applies to the prosecutorial), under double control of National Assembly. Proposals are given by the Council which is elected by the Assembly, then the Assembly decides on these proposals, which is the “recipe for politization” of judiciary, experts concluded.<sup>29</sup>

Declaration on principles of public prosecutors (so called Napoli declaration) of European Association of judges and prosecutors for freedom and democracy “MEDEL” is the only document that describes precisely the composition and method of election of prosecutors’ councils. Appointment, organization and disciplinary sanctions should be under jurisdiction of the council, that could be common one together with judges or just one separate prosecutorial council. Prosecutors elected by the prosecutors on certain period should compose the council, this is written in the Declaration.<sup>30</sup>

Out of comparative solutions and opinions of experts of the Council of Europe arises that method of election of Council members does not apply to the method of election of members of prosecutorial self-government, having in mind that composition of that organ in predominant or significant part should be consisted of prosecutors who are elected by their colleagues. The fact, that prosecutors according to the Constitution do not have any influence on election of SPC members as well as the fact that elective members of the Council are elected by National Assembly points out that method of the election of “elective” members in Parliament should be replaced by

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Kingdom), H. SUCHOCKA (member, Poland), K. TUORI (member, Finland), J. VELAERS (member, Belgium), Strasbourg, 2007, page 18, available at [www.venice.coe.int](http://www.venice.coe.int)

<sup>29</sup> Ibidem, page 17-18

<sup>30</sup> MEDEL DECLARATION OF PRINCIPLES CONCERNING THE PUBLIC PROSECUTOR, available at, <http://medelnet.eu/images/stories/docs/naples%20eng%20rev.pdf>.(2,12,2015)

solution which proposes that majority of Council members should be elected by prosecutors themselves.

Article 6 of the Law imposes that Republic Prosecutor is according to the position also the President of State Prosecutorial Council. President of the State Prosecutorial Council represents the Council, manages its work and performs other obligations in accordance with the Law. The fact that Republic Prosecutor is at the same time the President of the Council can influence the nature of that organ. In countries of young democracy, such as Serbia, where judicial and prosecutorial councils are new institutions, it is very often misunderstood the role and the nature of these organs. Great number of judges and prosecutors and also members themselves, understand “new organs in old system” with the task that “from above” and in an “old way” manage the judicial and prosecutorial system. With regard to this, presidency and managing of State Prosecutorial Council from prosecutor who is the highest prosecutorial instance strengthening the idea that SPC is a kind of “prosecutorial presidium”, there should be predicted that president is elected out of Council members, prosecutors, which will be more appropriate to the idea of the Council as an organ of prosecutorial self-governing.<sup>31</sup>

#### **1.6. Election of candidates for SPC members out of public prosecutors and deputy public prosecutors**

Election of candidates for elective members of SPC out of public prosecutors and deputy public prosecutors is formulated in detail in the Law. Even though it is “election of candidates”, because election of candidates in jurisdiction of National Assembly it is necessary to made remarks to the election rules from the point of international documents, comparative practice and requirements of democratic procedure.

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<sup>31</sup> Venice Commission in its Opinion consider that members of the Council could elect the President, but in this case, it is recommended that the President should be elected among the members who are not judges and that is the way to avoid „possible corporatist tendency in the Council “. (See: EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), JUDICIAL APPOINTMENTS, Report adopted by the Venice, Commission at its 70th Plenary Session, Venice, 16-17 March 2007, pag. 8. [\(7.12.2015.\)](http://www.venice.coe.int))

Article 24, para 1 imposes that “public prosecutors and deputy public prosecutors elect the candidates for SPC on the basis of their free, general, equal and direct elective right by secret voting.” However, Law imposes free declaration in the procedure of candidate election, particular rules of elective procedure could raise a question regarding freedom of speech. The risk for freedom of elective right arises from the circumstance that the special role is given to the public prosecutors in the procedure of election,<sup>32</sup> in conducting of particular elective undertakings, which could represent a method that influences the elective will of voters.

Although the Law formulates equal elective right, it also imposes at the same time in Article 24, para 4 that “public prosecutor and deputy public prosecutor vote only for the candidate out of the list of candidates of prosecutors of the same instance of public prosecutors office”. Having in mind that number of prosecutors is quite different at different levels of public prosecutors’ offices, regulation of Article 24, para 4, it substantially infringes the equality of voting right and introduces different value of voting. For example, there are 12 voters in Republic Prosecutors office at the moment who vote for one candidate, while in Basic Prosecutors’ offices there are a couple of hundreds of voters who vote for two candidates. Except for establishing of inequality of voting right, Article 24, para 4 of the Law, it also infringes representativeness of the composition of the Council. Public prosecutors and deputy public prosecutors as members of the Council with equal jurisdiction decide on public prosecutors and deputy public prosecutors of all instances, so they are not representatives of the prosecutors of the office where they belong but the representatives of all public prosecutors and deputy public prosecutors who has active voting right. Model that determines active voting right of all prosecutors for all candidates, regardless of type and level of prosecutors’ office where the candidates belong, is known in comparative legislations.

The law imposes in detail the procedure of election of the candidates out of public prosecutors and method of determination of election result. In short, the proposed list of candidates on voting day must be transparent at all voting places according to the level and type of prosecutors’ offices, respectively public prosecutors of an autonomy province that vote for the candidate out of this list. Date and time of election are determined by Election Commission and inform all public prosecutors of that 10 days before election. Public prosecutors are obliged to inform deputy public prosecutors of date and time of election 7 days before election. Voting for candidates for elective members out of public prosecutors and deputy public prosecutors is performed at polling places in prosecutors’

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<sup>32</sup> Article 27, para 3, Article 31, para 2, Law on State Prosecutorial Council

offices determined by Election Commission (Article 31). Every public prosecutor and deputy public prosecutor votes by themselves and secretly. Polling board is conducting the voting in the premises of public prosecutors' office which is determined by public prosecutor in due time.

Jurisdiction of Election Commission to determine number of polling places with no restriction, can result in the decision of the Commission that almost every prosecutors' office can be polling place, which can compromise the secrecy of voting, because the voting will be conducted in the polling places with just a couple of voters.

### **1.7. Prosecutors office in the following Constitution of Republic of Serbia**

There is no doubt that new Constitution of RS should define at very different way the public prosecutors' office. Unlike the Constitution from 2006, the following Constitution should comprise so-called "functional definition" of public prosecutors' office, by which position of public prosecutors' office will be determined in the system of state authority and to determine at the same time legal nature of public prosecutors' office on the basis of its prevailing jurisdiction (judicial state organ).

According to the existing Law, the public prosecutors' office is an organ with monocratic structure. The core of monocratic principles is that the prosecutor is the titular of all works, while the deputy prosecutors are the kind of "general prosecutorial authority", so, they are representatives of public prosecutor with delegated processing and other jurisdiction. The following Constitution could announce and consequently the Law can formulate in detail completely different concept of internal functioning of public prosecutors' office. According to the new model, function of public prosecutors' office will be in equal possession of all public prosecutors (public prosecutor and deputy public prosecutors). The model will comprise new titles of prosecutors' jurisdictions. Instead of title of deputy public prosecutor, new title will be public prosecutor or only prosecutor, while the existing public prosecutor will be renamed in principal public prosecutor or principal prosecutor. In such an organized prosecutors' office, public prosecutor (or principal prosecutor) will manage the work, representing the prosecutors' office and has hierarchic jurisdictions, but he will not be the only one in possession of prosecutorial jurisdiction. Change of management, from monocratic organ into the collective organ with clear hierarchy, this would mean the change in method of election of prosecutors' office head. Out of public prosecutors, the principal prosecutor

will be elected, who will continue, after his mandate, to perform his function as public prosecutor in the prosecutors' office from which he was elected.

Excessive hierarchy and centralization from existing Law on public prosecutors' office is not the consequence of need to provide that prosecutors office efficiently perform his function of prosecution as well as other jurisdictions. To some more extent, subordination in public prosecution office is result of permanent implementation of organizational model taken from Soviet procuratorate. Tight hierarchy and centralism have many negative effects for system of public prosecutors' office. First of all because centralism and hierarchy put individual capabilities on the second place, pretending public prosecutors and deputy public prosecutors in sui generis clerks. Because of that, new Constitution should reduce principle of hierarchy and centralisation and affirm principle of cooperation and coordination in realization of jurisdiction of public prosecutors' office.

Explicit constitutional formatting of independence of public prosecutors' office in relation to the executive and legislative authority will be also necessary. On the other hand, public prosecutors' office is realizing its processing activity mainly before courts, only the courts can have an influence on acts of public prosecutors' office which can "profile" public prosecutors' office as a part of judicial system.

Future High Prosecutorial Council could be defined as an independent judicial organ, which task is to prevent every influence, especially influence of other state organs on public prosecutors' office. So, this organ will provide functional independence and autonomy of public prosecutors' office in Serbia. The majority of Council members will be elected by prosecutors at general, direct election, on the basis of equal voting right from list of candidates for every level separately.

Recommendation R (2000) 19, Council of Europe does not consider whether the prosecutor should be elected or appointed on indefinite term. However, widely spread professional opinion that the most important condition of independence of public prosecutors' office is the permanence, which is the reason that regulation on permanence of duty of public prosecutor be in the text of the following Constitution of RS.

Constitutional imposing of condition for access the prosecutorial service or to dismissal of prosecutors, as a kind of "protective constitutional clausula" that the Constitution will oblige legislator to mentioned conditions put into the Law on public prosecutors' office, will be also necessary.

Finally, new constitutional concept will determine public prosecutors' office as an independent and autonomous judicial organ which function is to work on "justice" within its jurisdiction, limited by court jurisdiction. Such a position should have an effect on status of prosecutors. Constitution will impose that principal public prosecutors and public prosecutors, as judicial officials have the same material and general status like judges of the same range.

### **Conclusions**

Despite generalization of international documents and different comparative legislative solutions on prosecutorial advices, there is not doubt that even the international documents and advanced legislations refer to the conclusion that elective jurisdiction and method of election in State Prosecutorial Council inappropriate. Elective jurisdiction of SPC are limited, even in comparison with prosecutorial councils in the region. State Prosecutorial Council , on the other hand, has wide range of normative and financial jurisdictions similar to the considerable number of prosecutorial councils in Europe.

Regarding the election of members of self-governing bodies of prosecutors, it is common sense that considerable number of Council members out of prosecutors offices are elected by the prosecutors and deputy prosecutors, at democratic election, as well as members out of prosecutors are the majority in the Council.

Jurisdiction and position of SPC give us an idea that expected constitutional reform has to reshape public prosecutors office into the judicial organ who is independent in their performance and to expand their elective jurisdiction at the same time that will inherit from State Prosecutorial Council.

**Apstract**

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