

STANDING POINTS FOR ADOPTING THE LAW ON PUBLIC PROSECUTOR'S OFFICE



Kingdom of the Netherlands

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STANDING POINTS FOR ADOPTING THE LAW ON PUBLIC PROSECUTOR'S OFFICE

I

Function and management of the Public Prosecutor's Office

The constitutional amendments bring an essential novelty in the functioning of the Public Prosecutor's Office (PPO). According to the previously valid constitutional provisions and statutes (that are still in force), the function of the PPO is performed by the Republic Public Prosecutor and other public prosecutors, while deputy public prosecutors are excluded, and according to the Law they are only "proxies" of public prosecutors, their superiors, which is in complete contrast to the engagement of the public prosecutor in the amended criminal procedure legislation.

The new Law should regulate that the function of the PPO is performed by the *Supreme Public Prosecutor* (the Republic Public Prosecutor must be renamed the Supreme Public Prosecutor, because the insufficiently precise name of the Supreme Court of Cassation is changed to the Supreme Court of Serbia, where the PPO of the appropriate rank should act), then the *main public prosecutor* (according to amendments to the Constitution, the current public prosecutors or heads of the PPOs become chief public prosecutors) and public prosecutors (according to the amended Constitution, the current deputy public prosecutors are renamed as public prosecutors).

Deputy public prosecutors have received a well-deserved "gift" of the function. Thus, the reality is acknowledged, given the authority and number of cases of deputy public prosecutors at all levels, and the fact that they can no longer be considered clerks and "surrogates" of their superiors, but will be far more visible in the system, which will contribute to their greater autonomy and responsibility at work.

The Constitution-maker opted for the "persistence" of the vertical hierarchy in the PPO, so the legislator must remain in line by regulating that *the Supreme Public Prosecutor and the Chief Public Prosecutor have hierarchical authority in managing the Public Prosecution Office related to the actions of lower public prosecutors and public prosecutors in a specific case*. However, it should be

admitted that worldwide, the hierarchical principle is inherent in the organization of all state bodies. Even in Europe, PPOs are organized according to the principle of vertical hierarchy, so our Constitution-maker did not go beyond European standards. In this paper, we could only add that if in the future it turns out that this different organization of the PPO does not provide adequate results, then, we should think about the Italian model of organizing the PPO. It is a specific example of a "horizontal hierarchy", which has excellent results in the fight against crime in Italy. That model does not have a classic pyramidal organization because there is no relationship of seniority among the PPOs. The Public Prosecutor, as the head of the PPO, has hierarchical authority, such as the authority to issue instructions, only in his/her PPO. In practice, this authority is also theoretical because the instructions for action are the result of discussions and consultations within the PPO.¹

It is noticeable that, in contrast to the previous Constitution and the current Law, the hierarchy is "softer", since the function of the PPO, apart from the Supreme Public Prosecutor and the chief public prosecutors, will also be performed by public prosecutors. From a monistically organized body, the PPO has been transformed by constitutional amendments into a *sui generis* collective body, where the heads of the bodies have certain hierarchical powers towards public prosecutors and lower public prosecutors, but those are limited by restrictive constitutional provisions on mandatory instructions, and related, the extended possibility of public prosecutors to object to them. It is interesting that, although the issuing of mandatory instructions does not represent *materie constitutionis*, but is, on the contrary, an organizational issue *par excellence* and a method of work of the PPO, which is normally regulated by law, the constitution-maker "raised" the regulation of that legal institute to the level of constitutional matter. *The occasio constitutionis* for such a solution must have been our social reality because the Constitution-makers were aware of the decision-makers' frequent actions of amending the law. Therefore, to avoid this, the institution of mandatory instruction was granted by the highest legal force. One also gets the impression that the Working Group for amending the Constitution was well aware of the circumstances in the PPO's system, in which there is a permeating and latent possibility that mandatory instructions issued orally or in writing can be easily abused.

¹ Marina Matić Bošković, Goran Ilić, *Javno tužilaštvo u Srbiji – Istorijski razvoj, međunarodni standardi, uporedni modeli i izazovi modernog društva*, Institut za kriminološka i sociološka istraživanja, Beograd 2019, 174; Report of the Council of Europe, Strasbourg, 10 November 2000 [PC-PR\Docs 2000\synthe.7] PC-PR (97) 1 REV 5.

II

Autonomy of the Publisher Prosecutor's Office

Although the professional public argued that the amendments to the Constitution would go one step further to meet the general global trend that both PPOs and courts become independent, this did not happen. The Constitution-makers maintained that the PPO is still only an autonomous state body (a term used for the organization of state administrative bodies), so the distinction remained related to the independence of the courts. It should be mentioned that such an approach has a comparative legal foundation in modern doctrinal understandings and international standards. It could be summed up in the principle that there is no independent judiciary without an independent prosecution, and that an independent prosecution is the starting point of an independent judiciary. At the same time, it should be emphasized that these understandings clearly underline that the independence of judges and prosecutors is not an end in itself, but it was established for the sake of citizens who, if they need to exercise any of their rights, should do so before independent and impartial holders of judicial functions. However, it should also be mentioned that, according to the opinion of some legal theorists, a PPO, primarily due to its organizational structure, cannot be independent like a court, considering that there is a relationship of subordination in the PPOs, i.e. a relationship of seniority - subordination, which as such is not inherent in the organization of judicial power. However, one should be cautious and say that the nature of that hierarchical relationship, which is inherent to other state bodies and larger companies (moreover, hierarchies exist among legal norms) is established so that the order of things is respected, and the work is done more effectively, and not for the sake of generating obedience.

The Constitution-makers, nevertheless, stepped forward, so they introduced, behind the scenes, an implicit provision on the external independence of the PPO and its exponents in the constitutional amendments. Hence, para 3 of Amendment XVII, which replaces Article 155 of the RS Constitution, states that *no one outside the Public Prosecutor's Office shall influence the Public Prosecutor's Office and the holders of the office of Public Prosecutor in their actions and decision making in a specific case*. Such a provision, *mutatis mutandis*, already

exists in the currently valid Article 5, para 2 of the Law on Public Prosecution², whereas the legislator only "defends" the institutional, but not the personal, independence of the holders of the PPO. Therefore, it should be added that any influence on the work of the public prosecutors who act in a specific case is also prohibited, considering that they have become the holders of the public prosecutor's function.

III

Accountability

Recently adopted amendments proclaimed that the Supreme Public Prosecutor is accountable for the work of the Public Prosecutor's Office and his/her work to the National Assembly. The Constitutional provision that the Supreme Public Prosecutor shall not account to the National Assembly for acting in a particular case is a novelty in relation to the previous constitutional regulation on the accountability of the Republic Public Prosecutor, which was regulated in general, so it could have been interpreted that the Republic Public Prosecutor was also responsible to the Assembly for acting in a particular case. The precise provision strengthens the role of the Supreme Public Prosecutor, by strengthening his/her autonomy, and thus the autonomy of the entire PPO apparatus is increased, since the Supreme Public Prosecutor is at the top of the "pyramid". Therefore, the nature of his/her accountability has been reduced to political accountability to the National Assembly, but the Constitution-makers precisely drew the line that the Supreme Public Prosecutor does not "account" to the MPs for their work in a particular case. Undoubtedly, since the Supreme Public Prosecutor is elected in the National Assembly, this gives him/her a direct legitimacy, so it is also logical that s/he is responsible for his/her work and the work of the Public Prosecutor's Office to that body. This is not contrary to international standards, which support the fact that the Supreme Public Prosecutor represents the policy of the ruling majority in the implementation of the state policy of criminal prosecution, and that s/he can solely be responsible for the ineffectiveness of its implementation. Following international experience, the Constitution-maker also adopted a decision on the non-reelection of the Supreme Public Prosecutor, precisely to prevent the Supreme Public Prosecutor to "grovel" to political actors in the Assembly to be elected for another mandate. We believe that the legislator should simply take over that constitutional

² *The Official Gazette of RS* 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 – CC decision, 121/2012, 101/2013, 111/2014 – CC decision, 117/2014, 106/2015, 63/2016 – CC decision.

provision, together with the negative provision that says that the Supreme Public Prosecutor cannot be accountable to the MPs pertaining to a particular case, which clearly defines the limit between legal and political responsibility.

Considering that the Constitution-makers maintained the vertical hierarchical structure of the PPO's organization, the legislator will have to follow that narrative as well. For the system to be coherent, the Chief Public Prosecutor is responsible for the PPO's work and for his/her work to the Supreme Public Prosecutor and the immediate senior Chief Public Prosecutor. Eventually, public prosecutors are responsible for their work to the Chief Public Prosecutor. Unlike the previous constitutional solution, which provided for the accountability of the heads of PPOs according to a double key, more precisely the hierarchical-professional accountability of the lower to the higher and the political accountability to the National Assembly, the amended solution is more advanced because it excludes the latter. By abandoning the election of the heads of the PPOs on the proposal of the Government in the Assembly, that is, by depoliticizing the election of all holders of the PPOs, with the exception of the justified election of the Supreme Public Prosecutor (upon the proposal of the High Prosecutorial Council, s/he is elected by the Parliament according to a strict procedure with a qualified three-fifths majority of the total number of MPs), political responsibility of the heads of PPOs to the Parliament has been excluded. Such a solution, where only the professional accountability of the chief public prosecutors and public prosecutors dominates, constitutes another deviation of the Serbian prosecution from the relic of the Soviet prosecution. Thus, the "chiefs" of the PPOs can no longer formally be control "keys" in the hands of the political actors who elected them and to whom they report. To further strengthen their independence, the *legislator should decide on a solution that, like in the case of the Supreme Public Prosecutor, the chief public prosecutors should not be re-elected. Potentially, a provision could provide that the chief public prosecutor cannot be re-elected as the chief public prosecutor in the same PPO. Ratio legis* would be to prevent the formation of a privileged, static "caste of bosses as professional managers of the prosecution", to suppress the potential development of clientelism, which, by the nature of things, can manifest over time in the relationship of the seniority (chief public prosecutor) - subordination (public prosecutors).

IV

Hierarchical authorizations and mandatory instructions

We have mentioned that the mandatory instruction, which is currently regulated by the existing Law on Public Prosecution, was "transformed" by the Constitution-maker into a constitutional law institute. Therefore, the future legislator will have to stick to the letter of the Constitution in that part, because the highest legal act will not allow too much creativity. The Constitution-maker "generously" left to the legislator only to resolve *which body shall decide on the expressed objection to the mandatory instructions*.

Firstly, the Constitution assumes that the Supreme Public Prosecutor issues general mandatory instructions for the actions of all chief public prosecutors to achieve legality, effectiveness and uniformity of action. Of course, the Constitution does not go into the elaboration of that right of the SPP, while the current Law on Public Prosecution adds that the SPP can also issue that instruction on the proposal of the collegium of the SPP's Office.

Our proposal would be that, in the spirit of modern democratic societies, which insist on the transparency of the work of institutions, *the legislator adds a provision that the general mandatory instructions shall be **published** on the website of the Supreme Public Prosecutor's Office*. This is since, in the past, the professional public, especially the legal profession, was deprived of the legal facts arising from those acts. We believe that the unnecessary "secrecy" of those acts achieves nothing, given their general character and their purpose, and that the SPP's general mandatory instructions should be publicly available, so that all parties in certain proceedings can act accordingly. Moreover, the authors of this paper believe that the legislator should go one step further and stipulate in the Law that ***the mandatory instructions issued to the public prosecutors in a particular case shall be pasted into the prosecutor's file of the specific case***. This would be in accordance with the existing tendency of the legislator to make the work of the PPO as transparent as possible, and at the same time limit the potential hierarchical abuses of the "chiefs" of the PPOs. We are convinced that by introducing this provision, the chief public prosecutors will not unnecessarily and unreasonably issue mandatory instructions, as they would fear that other actors in the proceedings might know that, and therefore possibly the wider public could learn about the fact.

Since the public prosecution's hierarchy is elaborated in the Constitution, the legislator will also have to take it over in that form. It is prescribed that the immediately superior chief public prosecutor can issue a mandatory instruction

to a lower chief public prosecutor in a particular case *if there is doubt about the efficiency or legality of his/her acting*. The Supreme Public Prosecutor may issue such an instruction to any chief public prosecutor. The chief public prosecutor can issue mandatory instructions for work and conduct to the public prosecutor. The chief public prosecutor and the public prosecutor must act according to the mandatory instructions. We would like to point to a remark heard in the public debate on the draft text of the Constitution in the part concerning the intensity of doubt of the chief public prosecutor to the mandatory instruction. We think that the constitutional text should have included the degree of justified suspicion of illegal or unfounded actions of the prosecutor in a specific case, and that this would be another barrier for the unjustified "invasion" of a superior in the case of a subordinate public prosecutor. Since, unfortunately, the lowest degree of doubt, bordering on an indication or suspicion, remains determined in the Constitution, now the legislator cannot include in the act of lower legal force that kind of change, which would violate the hierarchy of norms.

Finally, the authors note that Article 21 of the current Law on Public Prosecution regulates that, to achieve superiority, the Republic Public Prosecutor has the right to inspect each case, and the immediately superior public prosecutor is given the right to review each case of a lower public prosecutor. The request for the review is submitted to the lower public prosecutor, who promptly submits the case to the higher public prosecutor.

It is more than obvious that the legislator thereby "deified" the Republic Public Prosecutor, and hence, we believe, additionally and unnecessarily overemphasized the strict military hierarchy in the PPO. Direct experiences of individual prosecutors who acted in certain cases in the past, some of which were particularly interesting for the public, were faced with that legal provision in practice. Thus, some cases ended up in the immediately senior PPOs, but were never sent back or remained there for an unreasonably long time, waiting for the "judgment" of the higher instance authority. We think that this creates a danger of the so-called information leak and can also be a form of pressure on the public prosecutor. Due to such a broad discretionary position, we find that *a reason for the review (public interest, control of work, work on another or related subject, etc.) must be stated, and a deadline of an instructional nature by which the case should be sent back after the review should be set*.

V

Objection to mandatory instructions

We have already stated that the mandatory instruction became a constitutional category, which is why, according to the logic of things, the Constitution-makers had to regulate the possibility of a legal remedy against the issued mandatory instruction. The legislator will therefore only have to "copy" that constitutional provision, which says that *a junior chief public prosecutor or a public prosecutor who considers that the mandatory instruction is unlawful or unfounded shall have the right to object*.

There is a noticeable difference compared to the existing legal solution, which is ambiguous - to say the least, so it is good that the Constitution-makers amended that legal institute. Namely, the current Law foresees the possibility that the public prosecutor can file an objection if s/he considers that the mandatory instruction is unlawful *and* unfounded. This restricts the right of the prosecutors to express an objection to the issued mandatory instruction, and only if both conditions are met - that it is both unlawful and unfounded, which renders the scope of the objection meaningless and endangers the principle of legality. Practically speaking, it is a contradiction in terms, because an unlawful instruction cannot be refuted by an objection, unless the issuance of the instruction was unfounded. Only then could the objection be accepted, and the instruction annulled. Additionally, it should be noted that this solution is contrary to international standards. Namely, in paragraph 10 of the Recommendation of the Committee of Ministers of the Council of Europe on the "Role of Public Prosecutors in the Criminal Justice System" Rec (2000) 19³ it is said that a relevant internal procedure should be provided to release the prosecutor who "believes an instruction is either illegal or runs counter to his or her conscience" from further action in the specific case and that there should be an appropriate internal procedure for its possible replacement. That's why in the constitutional text, by alternately setting those two reasons, a clear distinction was made between unlawful or unfounded mandatory instruction, so the way was paved that in the new Law, by normalizing the objection against the unfounded mandatory instruction, it will get its purpose, as *sui generis* "professional conscientious objection" of the public prosecutor acting in a specific case. It is an additional type of personal protection, i.e., the internal autonomy of each public prosecutor. We should, perhaps, go a step further, and in the elaboration of legal solutions, foresee the obligation of public prosecutors that, if they are issued an unlawful

³ Recommendation No (2000) 19 on the Role of Public Prosecutors in the Criminal Justice System, www.legislationline.org/legislation.php?tid=155&lid=5002, 24. 6. 2018.

mandatory instruction, they get *ex lege* obliged to lodge an objection. On the other hand, in the case of an unfounded mandatory instruction, their right would be optional, i.e. the law would allow a discretionary possibility for them to lodge an objection. We are of the view that the current Criminal Code of the Republic of Serbia⁴, more specifically, Article 360, which incriminates the criminal responsibility of judges and prosecutors who break the law, is not a sufficient guarantee that the mandatory instruction will not be abused by its issuer and used in violation of law. Namely, that act contains a subjective feature of a crime, for which, in addition to intent, it is necessary to prove the intention of the perpetrator to gain some benefit or cause some damage, which is extremely difficult in practice.

We come to the very essence of the open constitutional question of who should decide on the objection. According to the current legal solution, the immediately senior public prosecutor decides on the objection of the deputy public prosecutor, and the Republic Public Prosecutor on the objection of the public prosecutor. In its Opinion on the Draft Amendments to the Law on Public Prosecution of 2013, the Venice Commission presents guidelines on how the legislation should be amended, stating that the replacement of the prosecutor who acts according to the instructions "is not sufficient", nor a new instruction which may reverse the view of an inferior prosecutor and that on the legality of the instruction against which the objection was filed *an independent body like a Prosecutorial Council* should decide.⁵

We believe that the future Law should follow those guidelines because the objection would become a more effective legal tool, which would further soften the inherited rigid hierarchy in the PPO. In this sense, it is most important to make changes, because in practice it is well known that the biggest influence comes from the hierarchically superior structure of the PPO, and not from outside, from the legislative or executive authorities. In fact, the PPO hierarchy exerts a more direct influence on public prosecutors, and very rarely on acting deputy public prosecutors, and then such influence is transferred hierarchically to the deputy public prosecutor who works on a specific case. In support of a softer hierarchy,

⁴ *The Official Gazette of RS* RS 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016, 35/2019.

⁵ Strasbourg, 11 March 2013, Opinion no. 709/2012. CDL-AD(2013)006 Or. Engl. European Commission for Democracy through Law (Venice Commission) Opinion on the draft amendments to the law on the public prosecution of Serbia, Adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013) on the basis of comments by Mr Nicolae Esanu (Member, Moldova) Mr James HAMILTON (Substitute member, Ireland) § 23, [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)006-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)006-e), 22. 7. 2018.

we point to the European trend of limiting mandatory instructions in individual cases, which goes so far as to deprive superior prosecutors of this authority in some systems.

Therefore, we believe that all objections should be decided by the *High Prosecutorial Council, or a higher-level court compared to the level of the PPO*. However, that solution can be disputed because it raises the question of whether another body can decide on an organizational issue of one body. It seems more correct that the High Prosecutorial Council decides on this, as an autonomous state body that safeguards and guarantees the autonomy of the PPO (guarantor of institutional autonomy), the Supreme Public Prosecutor, chief public prosecutors and public prosecutors (guarantor of personal autonomy). Nevertheless, it is a collective state body, whose decision-making is such that the plurality of different interests must be respected, given that it is composed of five elected members, directly elected by the holders of the PPO function, four distinguished lawyers elected by the National Assembly, which gives it greater democratic legitimacy and two *ex officio* members - the Supreme Public Prosecutor and the Minister responsible for justice. In support of the latter point of view, we note that Article 312 of the Criminal Procedure Code⁶ regulates the institute of complaints due to irregularities during the investigation and that in paragraph 3 of that Article the legislator opted for a very interesting solution that defies the logic of the first two paragraphs of that Article. Practically, the solution is introduced that the court, i.e. the judge for the preliminary proceedings, as an external authority, decides on the submitted complaint if the immediately superior public prosecutor rejected the complaint of the defendant and his attorney, due to a delay of the proceedings and other irregularities during the investigation. If the judge for the preliminary proceedings decides that the complaint of the defence is well-founded, s/he will order to the public prosecutor, who is, in fact, according to the Code, exclusively authorized to conduct the investigation, to take measures to eliminate the irregularities. It seems that the legislators wanted to "restrict" one party in the proceedings to completely arbitrarily decide on each procedural action undertaken, guided by the principle of "equality of arms", thus giving the defence a chance to work more actively to prove their position at that stage of the proceedings. However, it could also be an answer for the potential reasoning that the court can still decide on other issues that may be of importance for the criminal proceedings, and that is also the objection to the mandatory instruction, since the content of that act may concern the very course of the proceedings and

⁶ The Official Gazette of RS 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – CC decision, 62/2021 – CC decision.

affect the rights and obligations of the other party in the proceedings, which could be a justification for possible court intervention.

The previous good legal solution, which provided for the remonstrating effect of the objection, should certainly remain, and be adopted to the new constitutional provision. Thus, the chief public prosecutor who issued a mandatory instruction would be obliged to review the mandatory instruction s/he issued within three days from the day of receiving the complaint and to decide to revoke his/her mandatory instruction, before a complaint is submitted to the High Prosecutorial Council.

On the other hand, the current legal solution has a rather disincentive effect on prosecutors who want to object against a mandatory instruction, because the submitted objection does not have a suspensive effect, but the public prosecutor, regardless of the stated objection, is obliged to continue to act according to the issued instruction until immediately senior public prosecutor, i.e., the Republic Public Prosecutor, makes a decision. *That is why the suspensive effect of the objection should be introduced so that the chief public prosecutor and the public prosecutor who objected are obliged to act according to the instructions, **but only in actions that must not be delayed.***

Then, the Law should provide for the possibility of lodging an objection to the mandatory instructions of the Supreme Public Prosecutor issued for handling a specific case, but according to the logic of the matter, **the Law should regulate that the Supreme Public Prosecutor, as an ex officio member of the High Prosecutorial Council, is exempted from deciding on that objection.** However, that issue is regulated in an abstract way by Article 43, para 1 of the Rules of Procedure of the State Council of Prosecutors⁷, which states that "the president and member of the SPC must exempt themselves from the discussion and decision-making that concern themselves...", but it is a by-law that is passed and can be changed at a session of the SPC. For this reason, it would be most convenient to regulate the issue by law, given that laws are enacted and amended in the National Assembly in a strict procedure, so it is therefore impossible by using an act of lower legal force to "achieve" that all members are participating in the decision-making process on the objection, including the one whose mandatory instruction is being discussed.

This working group finds that the legislator should consider the fact that the Minister responsible for justice, in addition to not having the right to vote at the session of the Supreme Prosecutorial Council in the procedure for determining the disciplinary responsibility of public prosecutors, ***should also be limited the***

⁷ The Official Gazette of RS 29/2017, 46/2017, 39/2021.

competencies when deciding on the objection to a mandatory instruction for a public prosecutor. The *ratio legis* for such a decision is reflected in a *danger from illegitimate influence of the Minister as a representative of the executive power in the Supreme Prosecutorial Council, especially since the case may be of a sensitive political nature.* This should be prevented, thus preserving faith in the impartiality of that body. Certainly, that solution would be consistent with the constitutional provision that no one outside the PPO can influence the work of the PPO and the holders of the PPO. This especially applies to the executive power as, unfortunately, the dominant branch of government in our political-legal system, which is a distinctive feature of "young democracies".

The authors believe that it should be considered that only elected members of the High Prosecutorial Council, i.e. five of them, should decide on the objection against the mandatory instruction, since it is a specific legal issue, the content of which is best known to elected members from among public prosecutors. This way, the decision of an individual who is an immediately higher body in the hierarchy, would be replaced by the decision of an independent collective body, which would give greater legitimacy to the decision on the objection, as it would be made by collective reasoning.

In order to act on the mandatory instruction, it is necessary to amend the legislative framework and to provide that, in the event that the High Prosecutorial Council does not accept an objection against the mandatory instruction, the chief public prosecutor and the public prosecutor who expressed the objection will be obliged to act according to the mandatory instruction, whereby an exception *should be provided that they shall not act according to the mandatory instructions for reasons of professional disagreement, which they must explain.* Then the chief public prosecutor would have to assign the case to another chief public prosecutor or a public prosecutor.

VI

Administration in the Public Prosecutor's Office and the Act on Administration in the Public Prosecutor's Office

In our opinion, the legislator should solve the issue of the functioning of the PPO's administration in terms of the allocation of cases. Unlike the courts, where

Article 49, para 2 of the Court Rules of Procedure⁸ precisely prescribes that the cases in the court are allocated by manual entry in the registry by the order of receipt and serial number, i.e. by the *application of a business software for case management*, whereas the group of new cases is allocated first, and then the cases that arrived at the court in another way, in the PPOs, the anachronistic principle of case allocation is still applied, by which the first deputies "assign" the cases to the deputies at their own discretion (*sic*), although taking into account the equal workload of the deputies and the complexity and scope of the case. When one looks more closely at the Rulebook on Administration in PPOs⁹, a direct provision on such assignment of the first deputies cannot be found, but it is said that the public prosecutor, when determining the annual calendar of tasks, can entrust it to one or more first deputies. It is interesting that Article 43 of the Rulebook stipulates that in the PPOs where there are conditions to use electronic registries, by using information and communication technologies, the allocation of new cases will be carried out by a special program (mathematical algorithm), which ensures that at the end of one allocation cycle all deputy public prosecutors have an equal number of new cases and are equally burdened. However, that provision is virtually a "dead letter" in practice.

Therefore, citizens, in addition to the right to a "natural judge", should also have the right to a "*natural prosecutor*", in the context of Article 32, para 1 of the Constitution of the RS, which guarantees the right to a fair trial, i.e. an impartial decision on the citizens' rights and obligations, about *the validity of the suspicion that was the reason for initiating the proceedings and about the accusations against them*. Therefore, we believe that the Law on Public Prosecutor's Office should regulate that the Supreme Public Prosecutor and the Chief Public Prosecutor, as holders of the administration in the Public Prosecutor's Office, should also consider the ***impartial allocation*** of cases to public prosecutors, for the sake of the efficient work of the Public Prosecutor's Office. Also, we find that the legislator should, like in the current Law on Judges¹⁰, introduce a provision on ***the annual calendar of tasks in the PPO*** which would be made by the chief public prosecutor, while *the public prosecutor who believes that the tasks were*

⁸ The Official Gazette of RS 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015, 113/2015 – corr., 39/2016, 56/2016, 77/2016, 16/2018, 78/2018, 43/2019, 93/2019 and 18/2022.

⁹ The Official Gazette of the RS 110/2009, 87/2010, 5/2012, 54/2017, 14/2018, 57/2019.

¹⁰ The Official Gazette of RS 116/2008, 58/2009 – CC decision, 104/2009, 101/2010, 8/2012 – CC decision, 121/2012, 124/2012 – CC decision, 101/2013, 111/2014 – CC decision, 117/2014, 40/2015, 63/2015 – CC decision, 106/2015, 63/2016 – CC decision, 47/2017 i 76/2021.

assigned, added, or taken away from him/her without justifiable reasons, could file an objection against such a decision to the High Prosecutorial Council.

Our view is that the Law on Judges can really serve as a good model for the legislator to simply take over and, of course, adjust it to the needs of the PPO's organization. In that Law, in para 1 of Article 24, the title of which is "Random Allocation of Cases", it is said that a judge is allocated cases according to a schedule that is independent of personality of parties and circumstances of the legal matter. The Law elaborates on this general norm in the following articles, and Article 26 provides that a judge has the right to complain to the president of the directly superior court, about the annual calendar of tasks, change of type of work, derogation from the order of received cases and removal of cases. It is extremely significant that the Law additionally regulates that a party in proceedings also has the right to object to the removal of the case. Article 27 of the Law on Judges stipulates the obligation of the president of the court to inform the president of the immediately higher court in writing of any derogation from the order of received cases.

As mentioned, there are valid solutions for the courts, which could, by "mirroring", be applied in laws and accompanying by-laws on prosecution. An example is the provisions of the Court Rules of Procedure¹¹, which is the equivalent of the Rulebook on Administration in the PPO, Article 54, Paragraph 1 of which states that a special decision of the president may deviate from the order of allocation of cases due to a justified incapacity of the judge to act (temporary inability to work, absence in accordance with special regulations, etc.). Therefore, a separate decision is made on this matter, and the reasons for the deviation refer only to the inability of the judge to act, due to absence from work.

Paragraph 2 of the same Article stipulates that only in the cases of: 1. termination of a judge's office, 2. promotion, 3. transfer of a judge to another court or body and 4. change in the regulations on the jurisdiction and organization of the court, the pending cases shall be distributed in the manner as regulated in Article 49 of the Rules of Procedure (by the method of random allocation of judge).

To conclude: The mechanisms stipulated by the Law on Judges and the Court Rules of Procedure contain a series of solutions aimed at assigning cases to judges by the method of random allocation, which is why it would be convenient to standardize the same distribution principles for prosecutors as well.

¹¹ *The Official Gazette of RS* 110/2009, 70/2011, 19/2012, 89/2013, 96/2015, 104/2015, 113/2015, 39/2016, 56/2016, 77/2016, 16/2018, 78/2018, 43/2019, 93/2019, 18/2022.

That would not affect the hierarchical organization of the PPO, because the prosecutor can always issue mandatory instructions on how to proceed in each specific case, which the president of the court cannot and must not do.

We find that the organizational autonomy of the PPO would be improved by amending the legal text, according to which the Rulebook on Administration in the PPOs would be adopted by the Minister responsible for justice, *but with the prior approval of the High Prosecutorial Council*. We think that this is in accordance with the competences of the future High Prosecutorial Council, as the highest body of the prosecutorial self-governance, which should safeguard and guarantee the independence of PPOs. This might influence the required number of staff in the PPO. It is noticeable that PPOs are "dying off" because in the last few years the interest of the younger generation of law graduates to start a career in the PPO has significantly decreased. That has become a trend, and the reasons for it are apathy and the lack of employment possibilities (in Belgrade's basic PPOs there have been no open positions in the last five years), little opportunity for career development and dissatisfaction with financial status. It seems that the only right solution is to consult the public prosecutor's organization itself regarding its estimates and real needs, while respecting the financial possibilities of the Ministry of Justice, which should be interested in raising the "legal service" of the PPO, as a public service. There is no high-quality public service without strategic human resources planning, and the judiciary is particularly sensitive to the drain of personnel, given the need for special knowledge and skills of all holders of judicial functions in the exercise of judicial power. It used to be a privilege to get a job in the judiciary after graduating, as to gain professional practice there. Nowadays, things have changed, and from having been a desirable job, the job in the judiciary has become hopeless volunteering for most young people, with the aim of meeting the condition to take the bar exam, after which few of them return to their original post. That is why the approach needs to be changed, and this normative intervention would also contribute to the change of that provision, which would put the responsibility for the situation in the PPO organization in the hands of the body that is indeed in charge.

Our solution that the High Prosecutorial Council should approve of the Act on Administration in the PPO, would lead to changes in Article 40 of the Law on Public Prosecution, which now states that the Ministry responsible for justice supervises the implementation of the Rulebook on Administration in the PPOs, so that would lead to a dual supervision by the Ministry and the High Prosecutorial Council regarding clearly defined parts of the Rulebook.

VII

Relationship between the Public Prosecutor's Office and the Police

The Constitution, as the highest and general legal act of a state, does not deal with the relationship between the PPO and the Police in the section on the organization of government because it does not represent *materia constitutionis*. That relationship is regulated by the procedural Criminal Procedure Code. It is an issue of nomotechnics whether systemic laws, in particular the Law on Public Prosecutor's Office, whose drafting is in progress, and the Law on Police¹² (a draft withdrawn from public discussion some time ago), should also specifically regulate the relationship. The impression created in public by the specific relationship between these authorities, due to frequent "crossed wires", determines that the role of each competence should be clarified, in terms of their basic activity in the fight against crime.

The criminal procedural legislation regulates that the public prosecutor is competent to manage the pre-investigation procedure for the crimes which are prosecuted *ex officio*. That provision is further elaborated so that all the authorities participating in the pre-investigation procedure must inform the competent public prosecutor about every action undertaken with the aim of identifying a crime or finding a suspect. The formal, i.e. procedural, supremacy of the PPO in that stage of the procedure is highlighted by a special provision that the Police, as well as other state authorities responsible for detecting crimes, are obliged to act upon every request of the competent public prosecutor.

However, it is problematic that in the Law, the factual superiority of the public prosecutor over the Police is absent, since the legislator did not provide that the public prosecutor may impose adequate sanctions for not acting on his/her request. This is apparent in Article 44, paras 2 and 3 of the Criminal Procedure Code, which prescribes that the public prosecutor, if the Police or another state body fails to comply with his/her request, shall immediately *notify* thereof the head of that authority, and, if needed, notify the competent minister, the Government or the competent working body of the National Assembly. Next, if, within 24 hours from the receipt of the notification, the Police and other state authorities do not act on the request, the public prosecutor can request the institution of disciplinary proceedings against the person s/he considers responsible for not complying with his/her request.

¹² *The Official Gazette of RS* 6/2016, 24/2018, 87/2018.

In the so far practice, it has been unequivocally shown that the mechanisms for "disciplining" police officers, if they do not act according to the orders of public prosecutors, are ineffective. In some cases, informing the competent inspector's superior about the failure to act, in practice means constant urging. However, if there is no will of the police establishment to respond to the prosecutor's request, which is the most common case in politically sensitive cases, the prosecutor will not even get a response, or it will consist of various excuses for not acting. On the other hand, the entire process becomes meaningless, as the prosecutor can only request the institution of disciplinary proceedings from the competent inspector's supervisor, without the right to initiate it him/herself before a competent authority.

The above arguments require redefining the relationship between the PPO and the Police, so that the real supremacy of the PPO over the Police is established. By that, we do not mean that the prosecutor should have actual control over the entire police system, because that would be inconsistent with the constitutional role s/he performs in the society, but only in the part related to the work of the criminal police, which helps him/her in resolving crimes. That is the operative part of the Ministry of the Internal of the Republic of Serbia, which represents the "arms and legs" as well as the "eyes and ears" of the prosecutor in the proceedings, whose work is predominantly of a cabinet character. It is possible that our society is not yet mature for that kind of change, so a compromise could be that the chief public prosecutor to whom a police department is subordinate can influence the appointment of the head of that police department.

The substantial change in the relationship between the PPO and the Police is conditioned by the fact that the rights and duties of the public prosecutor in the pre-investigation procedure are somewhat expanded in comparison with the rights and duties of the public prosecutor in the former pre-criminal procedure, which was regulated in the earlier Criminal Procedure Code. That was necessary in order to harmonize the rights and duties with the new role of the prosecutor, the authority that conducts the investigation and has the primary evidence initiative.¹³ Therefore, the PPO is no longer just a passive entity that waits for criminal charges from the Police without much opportunity to influence their content, but an authority that actively participates in creating and preparing the

¹³ S. Beljanski, G. P. Ilić, M. Majić, *Predgovor za Zakonik o krivičnom postupku*, Beograd 2011, 16.

evidence and data basis for the charges.¹⁴ By the nature of things, this should be done by amending the Criminal Procedure Code, but from the point of view of the author of this text, it would be good if such a legal wording were inserted into the Law on Public Prosecutor's Office and the Law on Police. In these two laws, in one article, the legislator would emphasize this relationship of superiority, with the reference that the relationship between these two authorities will be more tightly regulated by the Criminal Procedure Code. We think that in this way, excessive legislation, i.e. legal proliferation would be avoided in our legal system, and the main role of the public prosecutor in the fight against crime would be unequivocally highlighted, as it should be in a country with the rule of law.

¹⁴ Marina Matić Bošković, Goran Ilić, *Javno tužilaštvo u Srbiji – Istorijski razvoj, međunarodni standardi, uporedni modeli i izazovi modernog društva*, Institut za kriminološka i sociološka istraživanja, Beograd 2019, 282–283.