At their session of 19 February 2018, the State Prosecutors' Council, pursuant to art. 164, para 1 of the Constitution of the RS and art. 13, para 1, item 14 of the Law on the State Prosecutors' Council, considered the working version of draft Amendments to the Constitution and issued the following

OPINION

1. Draft amendment 1

Purview of the National Assembly

The National Assembly shall:
3. Elect and dismiss the Supreme Public Prosecutor of Serbia, five members of the High Judicial Council and five members of the High Prosecutorial Council;

The present Amendment shall supersede article 99 of the Constitution of the Republic of Serbia.

Comment

Para 2, item 3 implies that the Supreme Public Prosecutor[1] of Serbia is elected by the National Assembly. This solution is not unknown in many comparative systems.

However, with the given solution, the Republic of Serbia misses the opportunity to grant the public prosecution guarantees of a full and factual independence from the legislative and executive branches.[2] Namely, if election by the National Assembly gives democratic legitimacy to holders of prosecutorial function, still, in a society where the tradition of the rule of law is not at a remarkable level, this kind of solution may bring about not more than an increased risk of politicisation of the selection procedure for the HPC, and consequently of criminal prosecution under the shadow of politics. The risk of politicisation is also reflected in the fact that the proposed Draft text keeps the strictly monocratic, extremely hierarchic structure of the public prosecution[3], whereby the HPC would exercise the jurisdiction of the entire public prosecution in Serbia. Thus, the outdated organisational model of the prosecution which can be managed from one single point remains intact. In view of this, it is clear that the ruling majority in the parliament may govern the entire public prosecution service just through the supreme prosecutor, on whose election they also decide.

A model where the election of the Supreme Public Prosecutor is entrusted to the parliament caused concern of the Venice Commission and their suggestion about the necessity of developing additional safeguards against the risk of politicisation of the election procedure:

[1] Hereinafter, the HPC
[2] More on the concept of prosecutorial autonomy in the comments on amendment 14
[3] See amendments15 and 16 which retain the strict hierarchy and the concept of 'deputy public prosecutor'

36. In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. However one would need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock, [4]

The Venice commission expressed their concern in their Opinion:

"The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of democratic legitimacy of such appointments, on the one hand, and the requirement of depoliticisation, on the other. Thus, an appointment process which involves the executive and/or legislative branch has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office.
The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. […]
CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §19, 20 and 27

As regards the election of the members of the High Prosecutorial Council[5] by parliament, the Venice Commission is familiar with this model of election, while retaining certain reserve about it:

"[…] There is no European standard to the effect that members of a prosecutorial council cannot be elected by parliament. […] This position has not prevented the Venice Commission from subsequently questioning legislation providing parliament with very significant powers as to electing members of a prosecutorial council. […]"
CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§43 and 44

Although, the amendments, in principle, provide that the Supreme Public Prosecutor (SPP) and the members of the HPC are elected by a qualified majority in the parliament, it seems that the method of election, and the possibility of election by an unqualified majority do not allow for the implementation of the described standards for protection from politicization in the election procedure (more on this in the comments on amendment 2).

[4] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 36
[5] Hereinafter, the HJC

It should also be noted that this amendment is in contradiction to the National Judicial Reform Strategy which says that:

„Certain goals of this Strategy require amending of the Constitution. For instance, solutions like the exclusion of the National Assembly from the election procedure for presidents of courts, judges, public prosecutors/deputy prosecutors, as well as members of the High Judicial Council and the State Prosecutors' Council"[6]

2. Draft amendment II

Decision-making in the National Assembly

The National Assembly takes decisions by a majority vote of deputies in the session where a majority of the deputies are present. A 3/5 majority of all deputies is required to elect the five members of the HJC and of the HPC, as well as the Supreme Public Prosecutor of Serbia. If they are not elected in this manner, they will be elected within the following ten days by a 5/9 vote of all deputies, which is also required for their dismissal. This amendment shall supersede art. 105 of the Constitution of the RS.

Comment

The Draft provides for a 3/5 majority for the election of members of the HJC and HPC. We assume that the reason for this is to achieve a wider social and political consensus in the election procedure, or to ensure a democratic legitimacy for the election of the members. Nevertheless, said solution is only an illusion of the consensus, given that in case the 3/5 majority is not possible, the required majority goes down to a level just barely higher than a simple majority - 5/9 (which is in most cases sufficient for the ruling majority, or just 5% more than a simple majority). A 5/9 majority can in no way ensure the consensus necessary to give legitimacy to the procedure and earn public trust; on the contrary, under the veil of seeming consensus, there is a threat of increased politicisation of the selection procedure. Furthermore, the 5/9 majority, although introduced under the pretext of ensuring *anti-deadlock*, can by no means serve that purpose. Just the opposite, the ruling majority will have no single reason to try to reach a consensus – if they fail to elect the desirable candidates in the first round, they will easily do it in the second; all they need to do is just wait for another ten days.

The Draft is contrary to several opinions of the Venice Commission who explicitly warns about the risk of politicisation and the need for a qualified majority as a safeguard against politicisation:

The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments.

[6] The National Judicial Reform Strategy 2013-2018, p.6.
https://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 36

If members of such a council were elected by Parliament, preferably this should be done by qualified majority.
EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 66

"According to Article 65(2) of the draft revised Constitution, the Prosecutor General is elected for a six years term by a majority of the total members of the Parliament. The requirement of a qualified majority in Parliament for the election of the Prosecutor General is recommended."
CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §83

In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments. […]
CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§35-38, 40

"[…] [A]ll members of the prosecutorial council are appointed and dismissed by parliament with no qualified majority. The prosecutorial system […] is therefore totally under the control of the ruling party or parties: [t]his is not in conformity with European standards."
CDL-AD(2007)047, Opinion on the Constitution of Montenegro, §104;
See also CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro, §13

It is also contrary to the National Judicial Reform Strategy which says that it is necessary to exclude the National Assembly from the process of election of SPC members.[7]

Said solution raises additional concern due to the fact that just a slight majority of 5/9 is necessary for dismissal. It is not logical that one majority is required for selection (qualified 3/5), and another, insignificantly higher than simple majority (5/9) for dismissal. It should be particularly noted that the Draft provides that the minister of justice may initiate a dismissal procedure on his/her own.[8] This solution, along with the fact that the lever for dismissal may lie in the hands of the executive (minister of justice) may result in a dismissal of the SPP or HPC just if the executive branch loses trust in them. This is directly opposite to the opinion of the Venice Commission.

[7] The National Judicial Reform Strategy 2013-2018, p.6.

https://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf
[8] See amendment 23. More on this in the part related to amendment 23.

"[…] [It] seems inappropriate for a Prosecutor General removed from that position on a vote of no confidence."
CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §125

3. Draft amendment XIV

Public Prosecution Offices

Status

The public prosecution is an autonomous state organ which prosecutes perpetrators of criminal and other punishable acts and protects the constitutionality and legality, human rights, and civil freedoms.

The public prosecution shall perform their duty pursuant to the Constitution, ratified international agreements, laws, and other general acts.

The establishment, organization, and jurisdiction of the public prosecution service are regulated by the law.

The highest public prosecution office in the Republic of Serbia is the Supreme Public Prosecution of Serbia.

The Supreme Public Prosecutor of Serbia shall exercise the jurisdiction of the public prosecution within the rights and obligations of the Republic of Serbia.

This Amendment shall supersede article 153 of the Constitution of the RS.

Comment

Para 1 – the prosecution is defined in a traditional way that does not reflect the real nature of this service. Public prosecution service is still just an autonomous body, without the guarantees of independence in relation to the executive and legislative branches[9], that is, the political influence. Autonomy, *per se*, without the guarantees of functional independence, i.e. independence from the legislative and executive in performing their duties, is not a sufficient safeguard against political influence, particularly in societies without a long tradition of rule of law and judicial independence. Thus, according to the European standards, not only that independence is not contrary to the nature and function of public prosecution, but rather

[9] See comments re Amendment 1., the request of the ECHR from the *Guja v. Moldova case (Grand Chamber), no. 14277/04, § 86.u* Kolevi v. Bulgaria, no. 1108/02, 05/02/2010, § 142., and The Role of Public Prosecutors in the Criminal justice System Rec (2000) 19 COUNCIL OF EUROPE (two requests for prosecutors)

necessary for the development of the rule of law in a democracy; although the independence of the judiciary and of the prosecution cannot be equated in all aspects.[10]

Although the European standards, largely contained in the Council of Europe Committee of Ministers (CM) Recommendation (2000) 19, allow for a plurality of models regarding the position of the public prosecution service, they do clearly point to what the Venice Commission also found:

"[…] The Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. […]"
CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §26

It is also useful to note the opinion of the Consultative Council of European prosecutors:

"on European norms and principles concerning prosecutors" encourages the tendency to enhance independence and states that the independence and autonomy of the prosecution services constitute an indispensable corollary to the independence of the judiciary. The general tendency to provide for the effective autonomy of the prosecution service also in financial terms is therefore to be encouraged.
CCPE Opinion 9 of 2014

The independence of the prosecution service is also important with regard to the right to fair trial, and the reasons for the prosecution to be independent are explained in the ECHR judgements *Moulin*[11] *and Medvedyev*[12]*, Kolevi*[13].

It is questionable whether the autonomy of the prosecution service is a sufficient barrier for politically motivated criminal prosecution or evasion of criminal prosecution. This was also an issue that the ECHR considered in the cases *Vera Fernandez Huidobro*[14] and *Salov v Ukraine*[15]. The ECHR concludes that the lack of prosecutorial independence has negative effects, especially regarding the effects in the phase preceding the trial, when evidence that sets up the framework of trial is collected. Bearing in mind the expanded powers of the public prosecution service in Serbia following the transfer of investigative phase from the court to the prosecution service, the requirement for independence becomes even more important, since the prosecution service is acquiring pseudo judicial powers which enter the domain of multiple human rights.

[10] „Still, independence or autonomy of the public prosecution is not that categorical as independence of courts. If the public prosecution service is independent, there can still exist a hierarchical control of decisions and activities of all except of the supreme prosecutor. " Report on European standards as regards the independence of the judicial system, Prosecutors Venice Commission, 2010., Part two – the prosecution service, pg 7.
[11] 37104/06), Judgment, 23 November 2010
[12] Medvedyev and others v. France (Application no. 3394/03), Judgment, 29 March 2010
[13] Kolevi v. Bulgaria (App. No. 1108/02), Judgment, 5 November 2009
[14] Vera Fernandez Huidobro v. Spain (App. No. 74181/01), Judgment, 6 January 2010
[15] Salov v. Ukraine (Application no. 65518/01), Judgment, 6 September 2005

On the independence of the prosecution service, European trends and forms of independence, the Venice Commission expressed their opinion in numerous papers, pointing out that there is a remarkable tendency towards independence of the prosecution service:

"Yet, certain more detailed standards and recommendations do exist. Thus, the Committee of Ministers of the Council of Europe requires member States to ensure that public prosecutors are free from 'unjustified interference' with their professional activities. The Rome Charter, adopted by the CCPE in 2014, proclaims the principle of independence and autonomy of prosecutors, and the CCPE encourages the general tendency towards greater independence of the prosecution system. In many member states of the Council of Europe, a tendency of giving more independence to the prosecution service may be seen, particularly as regards decisions reached by the prosecution in criminal cases. […] The Venice Commission further notes that in many countries 'subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful not to intervene in individual cases'."
CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §16

"There are no international standards that require the independence of the prosecution service. But, at the same time, it is clear that there is a general tendency towards introducing the independence of the prosecution service. […]."
CDL-AD(2013)006, Opinion on the Draft amendments to the Law on the Public Prosecution of Serbia, §20

"The fundamental principle which should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have confidence in the system which is essential in any healthy society."
CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

"While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution [...]
CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

CEPEJ[16] have also given their opinion on the functional independence of prosecutors:
„The principle of functional independence of prosecutors appears as a basic guarantee which became a truly European standard. This sort of independence is assessed in relation to the executive and legislative branches, but also to all other government authorities or factors within

[16] The European Commission for Efficiency of Justice, https://www.coe.int/T/dghl/cooperation/cepej/default_en.asp

the prosecutorial system (outer independence), as well as with regard to the organizational model of the prosecution (inner independence). Harmonization of national legislation is an increasingly evident tendency regarding both aspects. 32 states or entities stated that prosecutorial independence is guaranteed under the law, usually by the constitution. 13 states said that their prosecution system is under the auspices of minister of justice or other body of central government. Finally, only eight countries, of which some already positively answered the first question, stated that the situation is different in these countries."[17]

As regards the part where the purview of the public prosecution service is expanded to include the protection of constitutionality and legality, human rights and civil freedoms, we consider this a positive change. At the same time, our opinion is that the public debate should include discussion of the question as to what extent and in which manner the public prosecution service should carry out this new authority.

Para 2 - the opportunity has been missed to rectify the inconsistency from the current Constitution found in art. 156, para 2. Namely, this article, being a source of law concerning public prosecution, fails to quote the generally accepted rules of international law, although art. 16 para 2 of the Constitution implies that the generally accepted rules of international law and the ratified international agreements are an integral part of the legal system of Serbia. In regard to the foreseen new powers of the public prosecution related to the protection of human rights and civil freedoms, we are of the opinion that this should be done.[18]

Para 5 – it is provided that the Supreme Public Prosecution (SPP) carries out the competencies of public prosecution within the rights and duties of the Republic of Serbia. Therefore, a strictly monocratic structure has been kept which allows for an easy management and control of the system by the legislative or executive branches or for any other undue influence.[19] This implies that the SPP is the holder of the entire competence of the public prosecution service and the only "true" prosecutor, while all the others are 'surrogate' prosecutors with an incomplete capacity. In such a system, if there are no clear guarantees of independence and protection from political influence, there is a threat that the public prosecutor may have the role of an agent of the will of political majority.

[17] European Judicial Systems, Efficiency and quality of the judiciary, CEPEJ Report no.23, issue 2016 (data from 2014); pp. 26. https://www.coe.int/t/dghl/cooperation/cepej/profiles/20161%20-%20CEPEJ%Study%2023%20-%20Overview%20-%202016%202014BIH.pdf.

[18] See art. 18, para 2 of the Constitution

[19] See standard about the issue of hierarchy – decision *Kolevi v. Bulgaria*

4. Draft amendment XV

Responsibility

The Supreme Public Prosecutor of Serbia manages the Supreme Public Prosecution of Serbia, and s/he is accountable to the National Assembly both for the work of the Prosecution and his/her own work.

Public prosecutors in other public prosecution offices are accountable for the work of the prosecution office and their own work to the Supreme Public Prosecutor, and public prosecutors of lower-instance prosecution offices also to the public prosecutors in immediately higher prosecution offices.

Deputy public prosecutors are accountable to the public prosecutor.

The present Amendment shall supersede article 154 of the Constitution of the RS.

Comment

Para 1 is inconsistent, given that the SPP, pursuant to the previous article, performs the competence of public prosecutor as a whole, and pursuant to this paragraph, s/he only manages the SPP as the supreme prosecution office. On the other hand, amendment 16 implies that the public prosecutor carries out the function of public prosecution. The working text is inconsistent when it comes to the concepts of public prosecution, performance of the function of public prosecution and management of public prosecution. Namely, pursuant to proposed solutions, the SPP performs the competence of public prosecution only by managing the supreme prosecution office, but does not perform the function of public prosecution – all other prosecutors do this.

The working text failed to define guarantees of independence/autonomy of the SPP from the legislative or executive branches in performing their function (functional independence). The Venice Commission has stated the following:

It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be:
- A guarantee of the independence of the general prosecutor of the Republic in the performance of his functions;
- The method of his appointment;
-The method of his removal from office."
CDL(1995)073rev, Opinion on the Regulatory concept of the Constitution of the Hungarian Republic, chapter 11, p.6

Also, we think that the phrasing „accountable to the National Assembly for his/her work" is not appropriate, since this would mean the possibility that the accountability of the SPP may be founded on political and partisan reasons, which generally prevail in parliament over the professional and expert ones. By introducing political accountability of the SPP as the top of prosecutorial hierarchy, political accountability of the public prosecution service is indirectly introduced. The question of accountability to parliament is very complex and it has to ensure

guarantees of protection from politicisation and from accountability for acting and decision-making in individual cases:

[A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out."
CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §42
[A]ccountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out. In case the accountability leads to a dismissal procedure, a fair hearing should be guaranteed.
CDL-AD(2017)013, Opinion on the draft revised Constitution of Georgia, §82

Para 2 – it has kept the Soviet system of rigid hierarchy, which is outdated and unable to fight corruption. On the other hand, a system where each subordinate prosecutor is relying on the responsibility of the superior prosecutor in the hierarchy, and the top prosecutor on accountability to politics, is inappropriate if we want to develop the value of integrity as one of European standards in the judiciary.[20] Let us recall the ECHR decision in *Kolevi v. Bulgaria*[21], which deals with the issue of independence/autonomy of prosecutors. The Court states that it is necessary to have guarantees, of safeguards, such as guarantees for a functional independence of prosecutors not only from external influences but also from internal hierarchy.

Para 3 –the draft retains "deputy public prosecutors", although it is a relic of the Soviet system which has been abolished in most East European countries. In other words, a strictly monocratic structure of the prosecution service stays.[22]

5. Draft amendment XVI

Public prosecutors and deputy public prosecutors

A public prosecutor shall carry out the function of public prosecution.

A deputy public prosecutor shall substitute a public prosecutor in performing prosecutorial function and shall act upon instruction from the public prosecutor.

The present Amendment shall supersede article 155 of the Constitution of the RS.

Comment

Para 1 – the text is inconsistent. The distinction between carrying out competence and function is unclear. Thus, the SPP carries out the competence, and a public prosecutor carries out the function of public prosecution.

Para 2 - a deputy public prosecutor is defined not as the holder of function of public prosecution, but only as someone who substitutes the public prosecutor, or acts on his/her behalf. Therefore, a deputy public prosecutor derives their function from the function of public prosecutor. In view of that, a deputy public prosecutor is not the original holder of prosecutorial function, but only the public prosecutors. A deputy prosecutor, without the original prosecutorial

[20] ibid
[21] Kolevi v. Bulgaria, no. 1108/02, 05/02/2010, § 142.
[22] On deputy public prosecutors, see comments on amendment 16.

function, is no more than an ordinary civil servant with a low degree of accountability for their decisions. Given the fact that with the proposed solution, which we will reflect upon below in the text, a deputy public prosecutor also loses autonomy and criminal immunity, the idea of creating a bureaucratic/clerical prosecution service becomes evident. A prosecution service of this type will not be able to combat corruption or any serious form of crime. Furthermore, a bureaucratic prosecution service is not favourable ground to develop integrity, as an essential element of the rule of law. It is not clear why the outdated concept of the "deputy public prosecutor" has been kept, since it has been discarded in most systems. The rigid subordination system is clearly not a contemporary European trend. The European concept of hierarchy in the prosecution service significantly surpasses the proposed model:

a well-designed hierarchy, with no place for insidious bureaucracy, in which all members of the Public Prosecution service should feel responsible for their own decisions and capable of taking the initiatives needed to do their particular job (see also paragraphs 9 and 10 on this point);

The Role of Public Prosecutors in the Criminal justice System rec (2000)19 COUNCILE OF EUROPE, 36.

The Venice Commission gave their opinion on hierarchy in the prosecution service warning about the danger of rigid hierarchical instructions:

Autonomy must also be ensured inside the prosecution service. Prosecutors must not be submitted to strict hierarchical instructions without any discretion, and should be in a position not to apply instructions contradicting the law.
[…] *Bias on the part of public prosecution services could lead to improper prosecution, or to selective prosecution, in particular on behalf of those in, or close to, power. This would jeopardise the implementation of the legal system and is therefore a danger to the Rule of Law. Public perception is essential in identifying such a bias.*"
CDL-AD(2016)007, Rule of Law Checklist, §§91, 92 and 95 CDL-PI(2015)001 - 34 -

GRECO also gave their opinion on the issue of hierarchy suggesting a softer type which ensures a consultative and egalitarian approach and remedies in respect of issued instructions:

The independence (or autonomy) of prosecutors differs from the independence of judges due to the internal hierarchical structure of the prosecutor office which further subjects individual prosecutors to instructions by higher prosecutors. However there appears to be a trend within CoE members towards models based on consultative and egalitarian approaches within the prosecutor office's structure and to limit and regulate the types of instructions that can be issued. Remedies are also being developed in respect of illegal instructions.

The position expressed by GRECO in respect of the instructions is that they are in line with the CoE standards but nevertheless represent a risk of a strict understanding of the hierarchical system: the key goal of instructions should be ensuring consistency in the application of the law.

The proposed solution, by which a deputy prosecutor is bound by instructions from the public prosecutor, is contradictory to item 10 of the Council of Europe Committee of Ministers (CM) Recommendation No. 19 regarding the role of public prosecution in the criminal justice system. The Recommendation provides for a procedure under which a prosecutor may ask to be replaced in a case, if they deem that they are issued an instruction that is contrary to the law or against their conscience.[23] Hence, the international standards provide for functional independence of prosecutors, not only from the executive and legislative branches, but also from internal hierarchy. Nevertheless, we are of the opinion that said provision is not a constitutional

[23] Ibid, item 10

but legal matter and that the law should precisely define the manner of issuing instructions and of guarantees for protection from abuse of the same. Also, it should be noted that this should not possibly concern individual instructions to a public prosecutor in individual cases, but only general instruction. Both the Venice Commission and GRECO expressed their opinion on this:

"[…] [T]he power to give instructions [to a junior prosecutor] extended only to general instructions but not to giving instructions how to deal with particular cases. […] Such a limitation should be clearly spelled out in the Law."
CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §19

More recently in its IV evaluation round the GRECO, while in principle acknowledging their admissibility as long as there were sufficient guarantees of transparency and impartiality, expressed a strong negative view of individual instruction. (While allowing general instructions) as it became evident that they have been mostly used exactly in politically sensitive cases to exert influence on the proceedings.

6. Draft amendment XVII

Election of the Supreme Public Prosecutor of Serbia and Public Prosecutors

The National Assembly shall elect the Supreme Public Prosecutor to a term of office of five years, upon the proposal of the High Prosecutorial Council, after having conducted a public competition, by a three-fifth vote of all deputies. In case s/he is not elected in this manner, s/he shall be elected within the next ten days by a five-ninths vote of all deputies, or otherwise the entire election procedure shall be repeated after 15 days.

The same person cannot be reelected as the Supreme Public Prosecutor of Serbia.

The High Prosecutorial Council elects public prosecutors to a five-year term of office.

The Supreme Public Prosecutor of Serbia and public prosecutors who are relieved of duty shall carry on as a deputy prosecutor in the public prosecution office which they managed.

The Supreme Public Prosecutor of Serbia and public prosecutors may file an appeal to the Constitutional Court against the decision on dismissal, which rules out the possibility of constitutional appeal.

The present Amendment shall supersede article 156 of the Constitution of the RS.

Comment

Para 1- see the comment on the method of election in the National Assembly. It refers to the viability of a qualified majority as a source of democratic legitimacy and to mechanism for preventing blockade. Technically, it is unacceptable to have the provision on the manner of election more than once in the Constitution.

Regarding the proposal about the term of office of five years for the SPP, we are of the opinion that this is an unnecessary risk of politicising the function, since the term is too short and

almost coinciding with the mandate of the government. It is also contrary to the opinion of the Venice Commission:

"[…] Article 122 of the Constitution should be amended to provide for a longer mandate than the current five years and should exclude re-election in order to protect persons appointed as Prosecutor General from political influence."
CDL-AD(2013)025, Joint Opinion on the Draft Law on the Public Prosecutor's Office of Ukraine, §117

"[…] [T]he proposed seven year term of the Prosecutor General rather than the current five years is to be welcomed as this is both a sufficiently long period that goes beyond the term of any one government or of the President, and it also removes a significant threat to independence by excluding re-appointment. This gives effect to the Venice Commission's general recommendation concerning the term of office for a Prosecutor General."
CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §89
"[…] for the institution to be in line with Council of Europe standards, the Prosecutor General should be appointed for a single term, either considerably longer than five years or until retirement. The grounds for dismissal (serious violations of the law) should be laid down in the constitution."
CDL-AD(2015)026, Opinion on the Amendments to the Constitution of Ukraine regarding the Judiciary as proposed by the Working Group of the Constitutional Commission in July 2015, §41

Para 2 – it is proposed that the same person cannot be reelected as the Supreme Public Prosecutor, which implies that, unlike this, the same person may be reelected as a public prosecutor. We think that this is a bad solution and that it would be beneficial for strengthening functional autonomy of the prosecution service if a public prosecutor could not have more than one term of office. By preventing creation of "professional bosses", the influence of politics on their work and consequently the work of deputy prosecutors would be smaller.

Para 4 – in any case, this provision should not have the level of constitutional matter. It is also rather vague. It may be interpreted, which certainly was not the intention of the author(s), as it means that the public prosecutor who has committed a criminal offence (reason for dismissal) continues their function as a deputy public prosecutor, and the public prosecutor whose office ends due to the end of the term of office (and was not dismissed, for instance, due to committing a criminal offence) cannot continue office as a deputy public prosecutor. It is clearly nonsense. Also, through evident omission, the Draft fails to govern the situation where a public prosecutor takes office coming from a hierarchically higher public prosecution office. According to this solution, after the term of office ends, the prosecutor could not go back to the position of deputy public prosecutor with the hierarchically higher public prosecution office where they previously worked as deputy public prosecutor.

Para 5 – non constitutional matter

7. Draft amendment XVIII

Life Tenure, Transfer and Interim Assignment of Deputy Public Prosecutors

The function of deputy public prosecutor lasts from the appointment till the retirement age.

The function may end earlier only if a deputy public prosecutor requests so, in case s/he becomes permanently disabled to perform the function, or in case of dismissal.

A deputy prosecutor in prosecution offices of lowest instance may only be a person who has completed special training in a judicial training institution established by the law.

A deputy prosecutor shall be dismissed if they are sentenced to prison, or in case of committing a crime that renders them unworthy of prosecutorial function; if they incompetently perform prosecutorial function, or in case of imposing a disciplinary measure of termination of prosecutorial function.

A deputy public prosecutor may file a complaint to the Constitutional Court against a decision on termination of function, which rules out the right to constitutional complaint.

A deputy public prosecutor may be transferred or temporarily assigned to another prosecution office without their consent, under a decision of the Supreme Public Prosecutor in accordance with the law.

The present Amendment supersedes article 157 of the Constitution of the RS.

Comment

Para 1 – here the function of deputy public prosecutor is mentioned for the first time, although, previously in amendment 16, it is explicitly said that public prosecutor carries out the function of public prosecution, and deputies only act as a replacement. Thus, according to amendment 16 – a deputy public prosecutor does not hold the original function, but only the derivative one, and according to this amendment – a deputy public prosecutor becomes the holder of the original function. Although it might seem irrelevant and confusing, we think that it is necessary to clearly define who the holders of prosecutorial function are, since the text of the amendment implies that not even the SPP does carry out the function of public prosecution – they carry out the competence of public prosecution and manage the Supreme Prosecution Office. This issue may also have practical ramifications – what happens when the public prosecution office is left without the prosecutor, like in case of death? Can in this case, and until the new prosecutor is appointed, deputy prosecutors perform the prosecutorial function?

Para 3 – provides that training completed in a judicial training institution is a requirement to be selected as a deputy public prosecutor in the basic prosecution office. This implies that the High Prosecutorial Council, in the selection procedure, is bound by the prior decision of the judicial training institution (decision on admission and completion of training) which enjoys no single guarantee of independence from the executive and legislative branches. Therefore, a body to which the Constitution tends to guarantee independence is bound by decisions of an institution that is neither autonomous nor independent. This solution might work if such institution were a working body of the HJC or HPC.

In any case, this is not a constitutional matter, and the question is why it is included in the Constitution. In many countries there are training institutions within the judiciary, but they are not a constitutional category, but legal or even a by-law matter found in the decisions of judicial councils. There is concern that this institution serves to establish direct control of entry into the judiciary and thus additionally weaken the position of the HJC and HPS which will essentially have no possibility of choice but only of confirmation of already made decision of the training

institution. The Ministry of Justice supported this solution by item 7 of Council of Europe Committee of Ministers (CM) Recommendation No. 19 which implies that training is the right and obligation of prosecutors. The purpose of said Recommendation is to support improvement of quality of work. However, if this was the intention of the authors, one wonders why the Draft fails to define mandatory training after taking office, or mandatory training in case of promotion, that is, a general right and obligation of judicial officers to continuous professional training. It is also surprising that the Draft mentions this requirement and fails to mention, for instance, the requirement of possessing a degree in law and the bar exam.

This provision is also contradictory to item 5 of the same Recommendation which explicitly states that the procedure for selection, transfer and promotion has to be fair and impartial and prevent favouring the interests of any possible group. Since in the Serbian system, there have long since been two major groups of candidates – judicial assistants and candidates who completed initial training at the Judicial Academy, the introduction of such a rule in the selection procedure would directly favour one group at the detriment of the other.

The working group which produced draft Legal Analysis of the Constitutional Framework related to the Judiciary in Serbia also stated their opinion on possible introduction of a judicial training institution into the Constitution. It reads as follows:

„The Working Group supports the position taken by the Working Group for reforming and developing the Judicial Academy, which states that the Judicial Academy should not be a constitutional category (session of 02 April 2014). The requirement of Judicial Academy training as mandatory condition for first appointment of judges and prosecutors could become a realistic strategic goal only after a thorough reforming of the concept of the Judicial Academy.“[24]

Para 6 – this solution is not a constitutional matter, but legal. It should be noted, though, that in our legal system, for a long time, non-transferability has been an achieved standard of inviolability of prosecutorial function, and therefore there is no reason to diminish this standard. Furthermore, in a politicized system, there is concern that the mechanism of transfer could be used as a means of influencing the work and decision-making of prosecutors. Item 5 of the Council of Europe Committee of Ministers (CM) Recommendation No. 19 implies that promotion and transfer should be founded on objective and pre-defined criteria based on competence and experience[25]. Said standard leaves no room for interpretation that transfer can be used for punishment purposes.

Although the opinions of the Venice Commission say that public prosecutors, unlike the judges, do not have guarantees of irremovability, the Commission is of the opinion that certain guarantees should still exist, at least the possibility of complaint. The Draft does not allow for this possibility:

[24] Draft Legal Analysis of the Constitutional Framework related to the Judiciary in Serbia, p.5. https://www.mpravde.gov.rs/files/analiza%20Ustava%20(2).doc

[25] Council of Europe Committee of Ministers (CM) Recommendation No. 19, 2000, on the role of public prosecution in the criminal justice system, and Explanatory Memorandum https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804be55a

"[…] The principle of irremovability applies to judges and not to prosecutors. Nonetheless, prosecutors should have a possibility to appeal against compulsory transfers."
CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §80

8. Draft amendment XIX

Immunity and Incompatibility

A public prosecutor and/or deputy prosecutor cannot be held accountable for an opinion expressed or a decision made in performing prosecutorial function, unless they have committed a criminal offence.

The function of a public prosecutor and deputy prosecutor is incompatible with other public or private function, a legally defined activity or job, or political commitment.

The present Amendment shall supersede article 158 of the Constitution of the RS.

Comment

Para 1 – the existing guarantee of a narrow functional immunity has been further decreased. Till now, there has been immunity for opinion and decision making, except if a prosecutor/ deputy prosecutor has committed a criminal offense – *Breach of law by a judge, public prosecutor or deputy prosecutor*. With the proposed solution, this extends to any criminal offense. Thus, a prosecutor may be held accountable upon a private lawsuit filed by the defendant for *Libel*, since the defendant found that the text of the indictment that the prosecutor wrote is offensive. On the other hand, it should be noted that in our legal system there are full functional immunities for various categories, such as for the employees of the Securities Commission (not only for members).

Opposite to this proposal, the Venice Commission supports a wider concept of functional and procedural immunity:

"It is important for their independence that prosecutors enjoy inviolability, although this should not be absolute (an exception may be made, for example, in cases of corruption). As stated in Article 35.1, inviolability (partial or full) of prosecutors is meant to contribute to the protection of prosecutors' independence in decision-making. Article 35 actually appears to cover both functional (substantial) immunity and procedural guarantees (judicial inviolability). The restriction on powers of search and seizure in Article 35.2 aimed at protecting the inviolability of a prosecutor is in principle appropriate. However, the restriction extends only to 'his/her' goods, objects, documents or correspondence rather than what is in his or her possession. This could lead to unjustified interference with the right to respect for private life under Article 8 of the ECHR and to a breach of the prohibition on self-incrimination under Article 6(1) as a result of undue emphasis on who has title to the items in question at the time of the search and seizure. Hence, the inviolability mentioned in Article 35 should cover all items in the prosecutor's possession. Article 35.3 notes that a prosecutor 'cannot be held legally liable for his/her opinion expressed within criminal prosecution and in the process of contributing to justice'. Whilst this provision appears to cover some aspects of the prosecutorial function, e.g. statements by the prosecutor that in his/her opinion, a person is guilty of a crime, it does not cover the entire range of actions undertaken by prosecutors in the fulfilment of their duties, such as ordering various investigative activities, procedural actions, etc. The provision should be phrased more widely, for example by stating that the prosecutor enjoys inviolability/immunity for lawful official actions taken in the course of his/her duties."

CDL-AD(2015)005, Joint Opinion on the draft Law on the Prosecution Service of the Republic of Moldova, §§110-112

Para 2 - this provision does not deserve to be constitutional matter. It is not fully clear either, particularly because it uses a boundless term of "private function". "Private function" is a known term, but it is not fully clear. Using such a boundless term in the supreme legal act is potentially dangerous and opens the door for the law to use the term of "private function" as comprising a wide array of activities, which may be opposite to the national and European standards achieved. The right to association is a basic human right and it can be limited for holders of judicial functions/prosecutors only in one, smaller part, for the purpose of safeguarding the principle of impartiality.[26].

The following standard regarding immunity of a public prosecutor and appropriate activities should be noted:

Prosecutors should not benefit from a general immunity, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.
There are various standards on the acceptability of involvement of civil servants in political matters. A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality."
CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, §§17, 19, 22, 61-62;
See also CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§33 and 34

We also note item 6 of Recommendation 19 which states that prosecutors have an effective right to association, assembling and freedom of expression[27].

9. Draft amendment XX

High Prosecutorial Council

Purview

The High Prosecutorial Council is an autonomous state body that guarantees the autonomy of public prosecution offices by deciding on the issues pertaining to the position of public prosecutors and deputy prosecutors, which are determined under the Constitution and the law.

The High Prosecutorial Council shall elect and dismiss public prosecutors; elect deputy public prosecutors and decide on their dismissal; propose to the National Assembly to elect or dismiss the Supreme Public Prosecutor; evaluate the performance of public prosecutors and deputy prosecutors; appoint and dismiss members of disciplinary bodies; submit to the National Assembly the annual report on the work of the public prosecution; propose to the government the

[26] See: Council of Europe Committee of Ministers (CM) Recommendation No. 19, 2000, on the role of public prosecution in the criminal justice system, and Explanatory Memorandum, item 5.
https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804be55a
[27] The Role of Public Prosecutors in the Criminal justice System rec (2000)19COUNCILE OF EUROPE , item 6

resources required for the operation of the public prosecution in matters from its purview, and decide on other issues related to the position of the Supreme Public Prosecutor, public prosecutors, and deputy prosecutors provided by the law.

The present Amendment shall supersede article 159 of the Constitution of the RS.

Comment

Para 1 –the Draft changes the name of the prosecutorial council – instead of the State Prosecutors' Council the new name is the High Prosecutorial Council. Still, the Draft explains the nature of this body and states precisely that it is a state body. We think that the term „state" associates with a body of the executive branch and tehrefore this determination is unnecessary; particularly due to the fact that the public prosecution service represents public interests which are not necessarily those of the executive.

The Venice Commission also stated their opinion on the relationship of state power and public interest:

*A distinction needs to be made between the interests of the holders of state power and the public interest. The assumption that the two are the same runs through quite a number of European systems. Ideally the exercise of public interest functions (including criminal prosecution) **should not be combined or confused with the function of protecting the interests of the current Government,** the interests of other institutions of state or even the interests of a political party*[28]

The proposed solution reduces the existing guarantees. Namely, the present competence to ensure and guarantee the autonomy of public prosecutors and deputy prosecutors is reduced to the competence of guaranteeing the autonomy of public prosecution offices as institutions, insofar as it (the Council) decides on the issues related to the position of public prosecutors and deputy prosecutors. Thus, the SPC does no longer have the obligation to ensure and guarantee, but a milder obligation of guaranteeing. As for the object of protection by the HPC, it has shifted from public prosecutors and deputy prosecutors to public prosecution service as a state body. Consequently, autonomy is warrantied for public prosecution offices (institutions) and not for the holders of prosecutorial function. With this provision, public prosecutors and deputy prosecutors lose autonomy and guarantees of autonomy. Institutions are autonomous, but not those who carry out the function of prosecutorial institution. Personal autonomy is revoked and institutional autonomy introduced.

Above said is also corroborated in the part where it is stated that the HPC decides on the position of public prosecutors and deputy prosecutors, but not on their status. As already mentioned, this provision reinforces the idea of a bureaucratic prosecution service. In a strictly hierarchical organisation of public prosecution with the subordination principle where deputy prosecutors are not holders of prosecutorial function, one can conclude that the institutional autonomy protects only the top one in the hierarchy – the SPP. On the other hand, the manner of selection of the SPP opens the door for politicisation of the entire system. The competencies of the HPC described in the Draft can in no way protect any public prosecutor or deputy prosecutor

[28] EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 71

from political influence or other undue unfluence, or offer a framework for strengthening of integrity.

Para 2 is unclear and largely a matter to be governed by a law or by-law. Yet, it should be noted that the HPC does not conduct disciplinary procedure but only selects bodies which do that. In practice, this means that disciplinary proceedings may be conducted before a body designated by the legislator, which opens the door for removal of disciplinary bodies from the HPC and thus for undue influence and possibility of abuses. Also, the part referring to resources is not in line with the Chapter 23 Action Plan, item 1.1.4.7, which clearly provides for the obligation of transfer of this competence from the ministry of justice to the State Prosecutors' Council.

10. Draft amendment XXI

Composition of the High Prosecutorial Council

The High Prosecutorial Council has eleven members: four deputy public prosecutors who are elected by public prosecutors and deputy prosecutors; five distinguished lawyers who are elected by the National Assembly, the Supreme Public Prosecutor, and the minister in charge of the judiciary.

The National Assembly shall elect five members of the HPC upon the proposal of the competent parliamentary committee after conducting a public competition, by a three-fifth vote of all deputies. In case they are not all elected in this manner, the remaining members shall be elected within the next ten days by a five-ninth vote of all deputies, or otherwise the election procedure is repeated for the number of missing members.

The requirement of equal representation of public prosecution offices shall be taken into account in electing deputy prosecutors into the High Prosecutorial Council.

Public prosecutors may not be members of the High Prosecutorial Council.

The present Amendment shall supersede article 160 of the Constitution of the RS.

Comment

Para 1 – the number of prosecutors in the HPC is decreased and the composition changed. Currently, the SPC has 6 representatives of public prosecutors/ deputies. The ofered solution is a step backwards or diminishing of the level of prosecutorial autonomy achieved. The current constitutional provision results in the majority of prosecutors in the Council, and the new one in a minority. It is unclear why the drafters chose this composition of the Council, particularly in light of the fact that in the prosecutorial councils of all former Yugoslav countries, prosecutors make the majority. The proposed composition where a significant majority is made of members elected by parliament (5 distinguished lawyers, SPP and minister of justice) is potentially problematic from the point of view of depoliticisation of the prosecution service. Also, the term of "distinguished lawyer" is boundless and potentially problematic.

The proposal is not in line with the report of the Venice Commission which suggests that the composition of the council should be balanced and that preference should be given to a composition including prosecutors, lawyers and representatives of civil society as it can „relatively ensure protection from political influence"[29].

The proposed solution is also not in accordance with the opinions of the Venice commission regarding the majority of prosecutors, participation of the minister and the manner of election:

"It is recommended that a substantial element or a majority of the members of the HJPC be elected by their peers and, in order to provide for democratic legitimacy of the HJPC, other members be elected by the Parliamentary Assembly among persons with appropriate qualifications. […]"
CDL-AD(2014)008, Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, §45

"[…] The balance proposed for the Council, in which prosecutors have a slight majority but which contains a significant minority of eminent lawyers also seems appropriate. It is also welcome that the power to appoint half of the members of the Prosecutorial Council be given to different bodies: it helps to avoid a corporatist management of the prosecution service and can provide a democratic legitimacy to it. Furthermore, it is wise that the Minister of Justice should not him- or herself be a member but it is reasonable that an official of that Ministry should participate."
CDL-AD(2014)042, Interim Opinion on the Draft Law on the State Prosecution Office of Montenegro, §38

[…] The self-governing nature of the SCP might be questioned given the ex officio membership of the Minister of Justice and of the President of the Superior Council of Magistracy. It is suggested to consider their membership being one without voting rights.
Regarding the civil society members of the SCP, it could be useful to specify, in the light of their relevance to the functioning of the criminal justice system, the most relevant sectors that they should come from (the bar, human rights NGOs etc.) and their suitable legal training/experience. In addition, their appointment by the Parliament seems problematic if the goal is really to have a Council free of political influence. If this system is maintained, one option could be to establish a committee within Parliament, on which all parties are represented equally, to deal, according to a transparent procedure, with the issue of appointment of civil society members. Another solution could be to provide for their appointment by representatives of their profession - Lawyers' Union, assembly of university senates, etc."
CDL-AD (2015), Joint opinion on the Draft Law on the Prosecution Service of the Republic of Moldova, 131-133

The proposal is neither in compliance with the requirements of the ECHR which state that the public prosecution should not only be free from political influence, but should seem to be independent from political influence to a viewer.[30]The participation of minister of justice in person in the HPC, as a strong political figure, does not leave room for such possibility.

Furthermore, the proposed composition of the HPC is in contrast with the result of the activity 1.1.1. from Chapter 23 Action Plan which states that the result *inter alia* is: "The roles of the High Judicial Council and the State Prosecutors' Council in managing the judiciary and in overseeing and controlling of the work of the judiciary have been strengthened; there is at least

[29] Report on European standards as regards the independence of the judicial system, Prosecutors Venice Commission, 2010., Part two – the prosecution service, стр.12
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)040-e
[30] See cases: Moulin v. France, Kolevi v. Bulgaria

50% of members from among the judges and/or prosecutors who are elected by their peers who represent different levels of jurisdiction (while the role of the national Assembly is but declaratory) ".

Para 2 – See comments on amendment 2. They refer to whether qualified majority is justified and to the *anti-deadlock* mechanism. Also, the following should be noted:

If members of such a council were elected by Parliament, preferably this should be done by qualified majority. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), Report on European Standards as regards the independence of judicial system, Part II – The Prosecution service, par 66

In view of nomotechnic discipline, it is unacceptable that the same provision (in this case on the election and dismissal of members of the HPC) appears more than once in the Constitution.

Para 3 – it is not clear why public prosecutors are not allowed to be members of the HPC, especially in light of the fact that, according to the Draft, they are the holders of public prosecutorial function.

11. Draft amendment XXII

Term of Office of Members of the High Prosecutorial Council and President of the HPC

The term of office of a member of the HPC is five years.

The same person may not be reelected into the HPC.

The term of office of an elected member of the HPC shall cease for reasons determined by the law and under a legally prescribed procedure.

The Supreme Public Prosecutor is *ex officio* President of the HPC.

The present Amendment shall supersede article 161 of the Constitution of the RS.

Comment

Para 3 – the Draft fails to provide for constitutional guarantees of autonomy and permanence of office for the function of member of the HPC, as well as grounds for termination of office. With regard to the provision under which members of the HPC are releived from office by a 5/9 majority in parliament (only 5% more than a simple majority), it is necessary to explicitly state legal grounds for such a decision, so as to avoid the situation where members are dismissed due to a loss of trust from the ruling political majority. If such a thing were possible, it would be clasiccal political responsibility. The opinion of the Venice commission on this is as follows :

"A procedure on the preservation of confidence is specific to political institutions such as governments which act under parliamentary control. It is not suited for institutions, such as the SPC, whose members are elected for a fixed

term. The mandate of these members should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons.
A disciplinary procedure can only be applied in cases of disciplinary offences and not on grounds of 'lack of confidence'. Article 41 clearly defines the reasons that can lead to a dismissal of the SPC members. The disciplinary procedure must therefore only focus on the question whether the SPC member failed to perform his or her duties 'in compliance with the constitution and law'. This question must not be confused with the question whether said member still enjoys the confidence of the public prosecutors and deputy public prosecutors who participated in his or her election. The disciplinary procedure has to guarantee the SPC member a fair trial. While a reference to a fair trial is made under Article 46a, details on related guarantees should be provided.
In addition, it is not clear whether this procedure would only be allowed in cases of an illegal action or also in cases of immoral, unprofessional or unethical behaviour (which may not be illegal, but contrary to the spirit of the Constitution and the law). It is also not clear whether the proportionality factor is taken into account, for instance, an 'impeachment' of a member is allowed in case of a violation of any legal act, regardless of the gravity of the violation, for instance in cases of a violation of traffic regulations. It is also not clear how and through what procedure the factual circumstances of the illegal or unconstitutional actions should be established or assessed. In fact, the draft Law lacks specific provisions on disciplinary issues in respect of SPC members and merely focuses on dismissal. An appeal to a court of law should also be provided.
[…] Members of prosecutorial councils are autonomous (see Article 164 of the Constitution) and subjecting them to a vote of no confidence makes them too dependent on the wishes of the prosecutors and effectively means that an elected member of the SPC may be dismissed at any given moment without objective reasons. The Venice Commission strongly recommends for such a procedure not to be introduced."
CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§52-54 and 56

"Furthermore, elected members of the SPC may be dismissed by the National Assembly (even if on proposal by the SPC in the case of public prosecutors or deputy public prosecutors, by the Bar Association for lawyers, by deans of faculties of law for professors). This role of the National Assembly could easily lead to the politicisation of the work of the SPC as its decisions are not strictly based on objective grounds. The danger of politicisation in this situation is clear when compared to a system of an independent Prosecution Service, but it is even more pronounced than in the case of a Prosecution Service that comes under the Executive (where the decisions on dismissal made by a minister – or other state official – and the political accountability of the minister are, in principle, separate from each other).
There is an additional factor that increases the danger of politicisation: the proposed vote of confidence in the dismissal procedure. A vote of confidence has its place in the political sphere and is a tool that should only apply in the political decision-making process. […]
A vote of confidence should be seen as specific to political institutions and is not suited for institutions such as the SPC. The members of the SPC are elected for a fixed term and their mandates should only end at the expiration of this term, on retirement, on resignation or death, or on their dismissal for disciplinary reasons (see comments under Chapter V below). The Venice Commission therefore strongly recommends that the amendment to Article 9a on the suspension of office due to a vote of confidence not be kept."
CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§27, 28 and 38

"The exemption (dismissal) of members of the prosecutors' council without any criteria is problematic. As per Section 9.2 ASPGPOPEPC more than one half of the valid votes cast shall be required for exemption from membership. The council can dismiss one of its members by simple majority. The cases when a member of a prosecutor's council can be dismissed should be specified in the Act. Such a provision of course deserves having the status of cardinal act."
CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary,

Para 4 – the idea of having the SPP for the *ex officio* president of the HPC is dubious. The Venice Commission supports the idea of selecting the president from within the Council itself.

"The election of the chairman by of the Council by its members is welcomed (Article 85)."

CDL-AD(2008)019, Opinion on the draft law on the Public Prosecutors' service of Moldova, §62

"[…] [T]here are no common European standards on who should preside a prosecutorial council […]. However, the introduction of an election-based system may be seen as a step towards improving the autonomy (guaranteed by Article 164 of the Constitution) and the legitimacy of the SPC […]".
CDL-AD(2014)029, Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia, §§31 and 32 CDL-PI(2015)001 - 63 -

"Even if the Minister is a member of the Prosecutorial Council ex officio, having him/her chair the Council may raise doubts as to the independence of this body. It would be advisable to have the Chairperson elected by the members of the Prosecutorial Council from their ranks (with the Minister him/herself ideally being excluded as a possible nominee). The Council shall be given opportunity and time (e.g., one month from the date when all members have been appointed and it is fully functional), to elect its own Chair by simple majority"
CDL-AD(2015)039, Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia, §40

12. Draft amendment XXIII

Work and Decision-making of the High Prosecutorial Council

The High Prosecutorial Council shall take decisions by the votes of at least six members of the Council in a session with at least eight members present.

The High Prosecutorial Council shall publicly announce and explain their decisions, and shall found their decisions on the election and termination of office of public prosecutors and deputy prosecutors; decisions on proposal to elect or dismiss the Supreme Public Prosecutor, and decisions on the appointment and dismissal of members of disciplinary bodies, on the criteria determined in accordance with the law and under a legally prescribed procedure.

The minister in charge of the judiciary and the Supreme Public Prosecutor of Serbia may institute disciplinary proceedings and proceedings for dismissal against public prosecutors and deputy prosecutors, but cannot take part in the disciplinary procedure or dismissal procedure if they have instituted the same.

The present Amendment shall supersede article 162 of the Constitution of the RS.

Comment

Para 1 – this is a matter for a law or by-law. The question of majority and quorum is certainly not a constitutional matter.

Para 2 – this is a matter for a law or by-law, not a constitutional matter.

Para 3 – this is also a matter for a law and not the Constitution. Still, it is worth commenting . The right of minister of justice and the HPC to institute disciplinary proceedings is dubious. It is justifiable that they have the right to initiate the proceedings, but the right to institute should be strictly within the competence of the disciplinary prosecutor. The possibility for the minister of justice and the SPP to institute disciplinary proceedings indicates that the

disciplinary prosecutor as an independent body has no longer exclusive powers of disciplinary prosecutor. This is contrary to the opinion of the Venice Commission on Two Sets of Draft Amendments to the Constitutional Provisions Relating to the Judiciary of Montenegro[31] which says that the parity of members of a judicial council and lay-persons does not refer to disciplinary proceedings where the minister has the right of vote. Hence, this opinion states that the minister should not decide on disciplinary accountability, and the draft Amendments tend to go in the opposite direction – strengthening the role of the minister in disciplinary proceedings.

On the other hand, it is totally unclear in what way the minister of the HPC can institute disciplinary proceedings and dismissal procedure and what that means. We assume that instituting of disciplinary proceedings could mean bypassing the disiplinary prosecutor and direct presentation of the disciplinary case to the disciplinary commission for adjudication. It could also mean bypassing of the entire disciplinary proceedings and directly presenting the case to the HPC for adjudication. In the case of dismissal procedure, it could mean that the minister also has the right to initiate the dismissal procedure before the parliament against any holder of judicial function only due to a loss of trust in their work, and a decision on dismissal requires a simple majority of plus 5% (as proposed - 5/9). This solution potentially introduces direct political accountability of each prosecutor/deputy prosecutor for any action in any individual case. This is highly concerning with a view to politicisation of the prosecutorial system.

13.Draft amendment XXIV

Immunity of Members of the High Prosecutorial Council

Members of the High Prosecutorial Council cannot be held accountable for an opinion or vote given in decision-making within the Council, unless they have committed a criminal offense.

The members cannot be deprived of liberty in the proceedings against a criminal offence they have committed as members of the HPC, without the approval of the Council.

The present Amendment shall supersede article 163 and revoke articles 164 and 165 of the Constitution of the RS.

Comment

Para 1 – Functional criminal immunity of the members of the HPC is lifted. This provision introduces a backward solution even compared to the current Constitution. This is contrary to many opinions of the Venice Commission related to immunity of prosecutors, which we have commented with reference to amendment 19. If this proposal is accepted, we will be facing absurd situations, such as that a candidate may conduct criminal proceedings upon a private lawsuit against a member of the HPC only because the member of the HPC gave a

[31] Strasbourg, 17 December 2012, Opinion No. 677 / 2012, CDL-AD(2012)024Engl.only. EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, (VENICE COMMISSION), OPINIONON TWO SETS OF DRAFT AMENDMENTS TO THE CONSTITUTIONAL PROVISIONS RELATING TO THE JUDICIARYOF MONTENEGRO, Adopted by the Venice Commission at its 93rd Plenary Session, (Venice, 14-15 December 2012). http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)024-e (30.1.2018).

negative opinion on the work of the candidate in a discussion about the candidate's job vacancy application.

14. Constitutional Act

The Introduction of the MoJ draft Amendments says that amendments I through XXIV are an integral part of the Constitution of the RS and shall enter into force on the day of promulgation by the National Assembly. To implement the amendments I through XXIV to the Constitution of the RS it is necessary to pass the Constitutional Act.

We are of the opinion that the Constitutional Act deserves particular attention of the professional and wider public and that the debate on the subject matter of the Constitutional Act should be part of the public debate. The reason for this is the experience with the Constitutional Act passed for the 2006 Constitution, which served as the basis for the general re-election of all judges and prosecutors. The Constitutional Act should contain unambiguous norms about continued office of judges, prosecutors and deputy prosecutors, that is, it should clear any doubt as to the permanency of office. Possible change of the title of a body should in no case be a reason for any sort of general election or re-election[32], because it is under no condition acceptable that the prosecutors who were lawfully appointed may lose their jobs due to changes in the Constitution.[33] On the other hand, the Constitutional Act should include an unambiguous norm that would confirm the continuation of term of office started under the current Constitution, in accordance with the practice of the ECHR as in *Baka v. Hungary*[34].

CONCLUSION

In view of the scope and essence of the comments presented in this Opinion, the State Prosecutors' Council proposes that the draft Amendments be withdrawn from the public debate. The State Prosecutors' Council deems that it is necessary to set up a working group that would include relevant representatives of the profession, such as professors of constitutional law, representatives of judges, prosecutors, lawyers and the civil sector, who would prepare a new draft Amendments to the Constitution taking into account all the comments presented to date. The new Draft would serve as the basis for a quality, meaningful and comprehensive public debate conducive to strengthening the rule of law. The SPC will take an active and constructive role in the public debate with their own proposal for the future constitutional position of the public prosecution service.

DEPUTY PRESIDENT OF
THE STATE PROSECUTORS' COUNCIL
Dr Goran Ilić

[32] See: Opinion dealing with the status of prosecutors following amendments to the law concerning the State Prosecutor's Office in Montenegro vis-a-vis the standards developed by the CCPE and Recommendation Rec(2000)19. https://rm.coe.int/168074779f

[33] ibid

[34] Baka v. Hungary, App.no20261/12, https://hudoc.echr.coe.int/eng#{"itemid":["001-115532"]}