

Paper reforms

The prosecution is successfully maneuvering around constitutional and legal provisions that strengthen the independence of prosecutors

If something has graced the fight against corruption in Serbia in the last ten years, it is the impression that it has always been done with half strength. Arrests were made, indictments were written and convicting verdicts passed, but the other hand of justice rarely reached above the middle echelon of public officials and persons connected to them. Exceptions to this informal rule (the case of Aleksandar Jovičić) were few enough to confirm that there is a kind of glass ceiling in Serbia, a forbidden area on which the prosecution investigating corruption must not step. And there were a handful of indications that corruption was flourishing in that area. Dozens of well-argued and fact-based research texts pointing to examples of high corruption have been published in previous years, but without effect. Their findings were either ignored, or something was formally initiated, only for the evidence to be left to languish in the pre-investigation phase.

However, in recent months, something seems to be changing - the police are making arrests "by the kilo", and the anti-corruption departments of the prosecutor's office are working overtime. And what is even more surprising than this spring awakening of the prosecutor's office is the fact that among the dozens of detainees, names that are already known to the public can be found. Among the most prominent persons included in the investigations are Milorad Grčić, the president of the municipality of Obrenovac who was once identified as the culprit for the collapse of the country's electricity system, Dragana Sotirovski, the former mayor of Niš, as well as Aleksandar Papić, a businessman whose connection with certain high-ranking government officials is not a secret. Big names, however, are not a guarantee of big changes. On the contrary, everything that preceded the latest wave of the fight against corruption irresistibly points to the conclusion that nothing significant has changed in the way the prosecutor's office functions and its position in relation to the executive power.

A step towards independence

Ironically, in the last few years the position of the prosecution has changed a lot on paper. Serbia, fulfilling its obligations from the negotiations with the European Union, at the beginning of 2022, amended the Constitution in the part related to the judiciary. The common denominator of all amendments was strengthening the independence of the judiciary and distancing it from other branches of government. After the amendments to the Constitution, a series of judicial laws and by-laws were passed that specified these emancipatory provisions, and the wave of changes also affected the prosecution.

Thus, in Article 155 of the Constitution, it is defined that "no one outside the Public Prosecutor's Office can influence the Public Prosecutor's Office and the holders of the Public Prosecutor's office in acting and deciding on a particular case". However, the devil is in the details.

In order to elaborate the constitutional provisions in 2023, the Law on the High Prosecutorial Council was passed, as well as the Law on Public Prosecutions, followed by a number of by-laws. And although before the amendments to the Constitution and the adoption of judicial laws, there was a lot of polemic about whether they solve or only simulate the solution to the problem, there are few who would disagree that the changes, at least formally, improved the position of the prosecution.

Predrag Milovanović, a member of the Association of Prosecutors of Serbia, agrees that the legal provisions are better than they were.

"Constitutional amendments from 2022 in the part concerning the judiciary, then operationalized through the accompanying legal and by-law framework in 2023 and 2024, undoubtedly represent a normative step forward in relation to the previous rules. Numerous solutions have improved the position of public prosecutors, which distanced them, at least on paper, from the influence of the executive power, which through the Government could directly influence the selection of the former Republic Public Prosecutor and other managers. Taking into account the large number of objections of the international community to the provisions of the so-called "Vidovdan" Constitution, the authors of the Constitution "kicked out" the procedure for the election of the Prosecutor's Office. That body is now the only one responsible for the election of all the holders of the Public Prosecutor's office, and the National Assembly is entrusted with the election of a three-thirds majority of the People's Deputies, points out Milovanović.

Perhaps the most obvious change brought about by the amendments to the Constitution concerned the removal of the National Assembly from the process of electing public prosecutors. Under the old provisions, the State Council of Prosecutors tested and ranked candidates for election, but then sent them to the assembly, which had the final say. According to the new provisions, the entire election process was assigned to the High Prosecutorial Council of, the body that succeeded the State Council of Prosecutors, and in parallel with this, they were given a number of other responsibilities. With the change in jurisdiction came a change in composition, so now the HPC consists of the Minister of Justice, the Supreme Public Prosecutor, five prosecutors who are elected by their colleagues in the elections, and four "prominent lawyers" who are elected by the National Assembly. For most decisions, eight votes are required.

Playing tricks around the Constitution

Nevertheless, problems with the independence of the HPC began to appear practically even before its constitution. The constitution specified that "prominent jurists" are elected by a two-thirds majority of the deputies' votes, in order to seek a compromise between the government and the opposition. Only exceptionally, if a two-thirds majority cannot be reached, the Constitution stipulates that "prominent lawyers" are elected by a five-member commission consisting of the presidents of the National Assembly, the Supreme Court, the Constitutional Court, the Supreme Public Prosecutor and the

Protector of Citizens. Already during the first selection of "prominent lawyers", this last option was resorted to.

What is an indisputable step forward is the fact that all Council sessions are recorded and broadcast live, but anyone who has watched one of those sessions cannot escape the impression that the main decisions are made before the sessions themselves. The council acts like a disciplined, well-oiled machine that has no problem reaching the required eight votes. Actual debates between members are rare, and dissonant tones mostly come from Predrag Milovanović, who is also a member of this body.

"Unfortunately, by remaining in that body the Minister responsible for justice and the Supreme Public Prosecutor left room for the influence of the executive power on the selection of public prosecutors, given the de facto power held by those two figures around whom other members of the Council gather in blocks, expressing opinions and voting mostly en bloc, and not autonomously. Therefore, even though the Council has eleven members and in which eight votes are needed to make the largest number of decisions, this body remains under the indirect influence of the two strongest levers from which it traditionally originates power in the judiciary. Therefore, these are still "neuralgic points" against the further independence of that body as the highest organ of prosecutorial self-governance, since that body is the guarantor of the institutional and personal independence of the public prosecutor's organization. After all, the Venice Commission pointed out this fact in one of its opinions on the amendments. A future constitution maker should think in this direction, because it would by excluding those agents from that body, the High Council made the prosecutor's office more immune to external influences. By that I mean, on the one hand, the possible hierarchical influence of the Supreme Public Prosecutor or, on the other hand, the influence of the minister responsible for justice," Milovanović points out.

He adds that the work of the HPC could be improved with a few more normative corrections.

"In the first place, elections for members of the HPC from among public prosecutors should be organized according to the principle that all levels of the public prosecutor's organization vote for all levels, and not separately as is the case now, which would democratize elections within the public prosecutor's office and thereby obtain the most representative representatives with the highest possible legitimacy. This would lead to greater balance and control of the work of the High Prosecutorial Council by those elected by the National Assembly. The goal is for the High Prosecutorial Council to match the power of the Supreme Public Prosecutor's Office, i.e. to redistribute power in which these two bodies can control and maintain a balance," says Milovanović.

Softening the hierarchy

And if the goal of the Law on the High Prosecutorial Council was to distance the prosecution from the executive power, the goal of the Law on Public Prosecutors was to soften the hierarchical structure of this organization. The prosecutor's office has a

pyramidal structure, and power is concentrated at its top. This system is designed to ensure efficiency and equality in treatment, and the main control mechanisms are the ability of prosecutors at the top to give mandatory instructions for treatment, inspect files and make a decision on the annual work schedule. However, although intended as a method to ensure efficiency, the hierarchical structure proved to be very useful for political control of the prosecution. Therefore, the new Law on Public Prosecutions, following the spirit of the new constitutional provisions, defined a series of provisions that should serve prosecutors to protect their autonomy in work.

This intention is visible from the constitutional provisions that changed the names of the prosecutors. For example, until the amendment of the Constitution, the heads of prosecution offices had the title of public prosecutors, while those below them who conducted investigations, wrote indictments and represented them in court, were deputy public prosecutors. Now that has been changed, so the deputies have become public prosecutors, while the head of the prosecution has been given the title of chief public prosecutor. It seems like pure semantics, but it confirms the authority of the prosecutors themselves on a symbolic level.

But there are far more specific provisions. One of them obliges the chief prosecutors to give mandatory instructions, that is, direct instructions on what to do in a specific case, in written form. This avoids the abuse of this institute, where all kinds of instructions are given without a paper trail. If a case is urgent, the chief prosecutor can give an instruction orally, but within three days a written version must also come. A prosecutor who does not agree with the given instruction can file an appeal with the High Council, which considers its justification and legality. A special commission of the High Council decides on these appeals.

Prosecutors also have the option of submitting a request for protection from undue influence, external or internal, and the Commissioner for the Protection of Independence at the High Prosecutorial Council decides on the merits. There is also an objection to the decision on the annual schedule of cases, when it is suspected that the chief prosecutor assigns a prosecutor only to remove him from a case.

Just in the period when these laws were being adopted, the prosecutor's office was rocked by an affair after the prosecutors Bojana Savović and Jasmina Paunović were transferred out of the anti-corruption department by the decision of the chief prosecutor of the Higher Prosecutor's Office in Belgrade, Nenad Stefanović. The decision followed immediately after the warrant for the arrest of the suspects was issued in the EPS abuse case, on which both prosecutors worked. The plaintiffs used their legal protection options, but the transfer decision remained in force.

Bojana Savović points out that people at the top of the prosecutor's office found a way to bypass the legal provisions that resulted from the constitutional amendments.

"The first time we were transferred against our will from the Special Department for Suppression of Corruption and when we appealed to the Commissioner for

Independence, we were refused and told that according to the current legal solutions we have no right to object. When our colleague and I were again transferred against our will from the first-instance department for general crime, we filed an objection, because it was now possible, but we were refused with the explanation that it was the right of the Chief Public Prosecutor, which made the regulation of this institute pointless. Unfortunately, together with the transfer from the department, the acting prosecutor is also removed from all the cases he worked on. In my opinion, the new Law on Public Prosecution and the Administration in the Public Prosecutor's Office deliberately failed to provide for the computer distribution of cases, so the greatest influence of the chief public prosecutor is precisely in the extreme voluntaristic assignment and confiscation of cases. For example, recently a colleague who works on the case of a female student being trampled on the roadblocks was transferred to the High-Tech Crime Department, and thus was 'removed' from working on this 'media' case. As for the objections to the Mandatory Instructions of the Chief Public Prosecutors, they are stated, but, as far as I know, they are rejected in turn by a commission appointed by the High Council of Prosecutors. The election of that commission is non-transparent, there is no public competition, and no explanation as to why someone was chosen and someone was not, and according to what criteria they were chosen. Unfortunately, we do not even have published anonymized data about all the objections that were made, and why and on what grounds they were rejected, Savović points out.

Referring to this case, Predrag Milovanović notes that the prosecutors addressed the Commissioner for Independence, but that his work is insufficiently noticed.

"Some pointed to external inappropriate influences, but there were also those who pointed to the internal pressures they suffer from hierarchically superior prosecutors. This was especially visible in the example of the actions of the chief public prosecutor of the Higher Public Prosecutor's Office in Belgrade, Nenad Stefanović, who undertook various hierarchical powers towards certain public prosecutors in that prosecutor's office. Due to the enormous pressure from the professional and general public, the Commissioner reacted, but in my opinion, insufficiently convincingly, failing to condemn one evident unequivocal abuse of authority. Some of the members of the Council, including me, asked for a more resolute stance at the session, but the majority at that time prevailed to go with a more timid announcement for the public. All this, together with some other indecisive reactions of the Commissioner for Independence, led to the fact that his work was insufficiently noticed in such social and political circumstances. And they are increasingly attacking the work of public prosecutors from outside, where the untimely and sluggish responsiveness of the Commissioner led to a serious drop in public prosecutors' trust in his work, and therefore in the work of the Council," emphasizes Milovanović.

Autolustration or the fight against corruption

In such circumstances, where the top prosecutor's office tries to circumvent the legal provisions that limit their power, and the Council hesitates to "become independent", a

well-advertised anti-corruption action was launched. However, in order to see its effects and scope correctly, it is necessary to see the social context. And the fact is that the action of the prosecutor's office was started in the midst of student and civil protests that point to corruption as the primary reason for the demolition of the canopy at the reconstructed railway station in Novi Sad, which resulted in the death of 16 people. It is also an indisputable fact that the highest representatives of the authorities announced the beginning of the action, even though there is no legal basis on which the president or the prime minister could have insight into the course of certain investigations. Finally, it should be noted that arrests on suspicion of corruption have always been a powerful propaganda tool. In the end, the Serbian Progressive Party came to power announcing an uncompromising fight against corruption, and the rating of Aleksandar Vučić jumped the most after the arrest of businessman Miroslav Mišković.

The propaganda aspect of the fight against corruption stands out in the context of the announcement of the formation of the Movement for the People as a kind of refreshing of the authority and image of the ruling parties. In this context, the arrests of individuals close to the SNS could be seen as a kind of self-examination, but with a very clear scope and goal.

Bojana Savović points out that pompous arrests are good for ratings, because citizens perceive it as instant justice. However, as she adds, it is far from justice.

"Partial justice comes only through final convictions for high-ranking officials and powerful businessmen to long-term prison terms and permanent confiscation of property, and we don't have that," says Savović.

Lawyer Sarah El Sarag has a similar view of the character of the latest arrests as part of the fight against corruption.

"It is pure marketing, because the focus of the action is on the weakest links. It is particularly problematic that the arrest actions are announced by the highest representatives of the authorities, which shows that, although they are absolutely incompetent, they have certain information about the course and direction of the investigations. And as for the announcements themselves, I rather interpret them as a kind of warning to their people," says El Sarag.

When things are looked at from a distance, it can be seen that a good part of the provisions that on paper authorize the prosecution remain unused. As Predrag Milovanović points out, the extent to which prosecutors will use the mechanisms granted by the Constitution is a matter of the integrity of each prosecutor.

„Hence, the constitutional changes were only a small but necessary step towards the further mental redefinition of the prosecuting individual, still largely trapped in the time of the Soviet prosecutor's office. In this regard, past changes to the current regulatory framework represent a normative support in changing the current political and legal culture. And it is evident that it is not good, because politicians continue to attack the

holders of judicial positions without fear of being punished in the elections, while judges and prosecutors have largely maintained the mentality of 'anticipatory compliance' when making their decisions, considering the traditionally dominant power of the executive power in these areas over other branches of government. In other words, the amendments to the Constitution and the current legal framework are ahead of their time. Let's hope that they will 'push' a change in the individual and collective consciousness of citizens and all branches of government," concludes Milovanović.

Finally, this analysis points to some potential solutions:

- Improve the transparency of the work of the Commissioner for the independence of the prosecution, the Commission for deciding on objections to mandatory instructions and the Commission for monitoring the proper distribution of cases. Publish their decisions, as well as the explanation of the decisions, on the website of the High Council of Prosecutors.
- To reform the method of electing members of the High Prosecutorial Council from among prosecutors by organizing the elections so that all prosecutors can vote for all members, instead of the current rule that one can only vote for a candidate from their rank in the prosecutor's office.
- Apply more consistently the constitutional provision on the election of "prominent lawyers" through the National Assembly, so that these members of the judicial councils have greater legitimacy. Consider the possibility of introducing into the law a provision according to which two "prominent lawyers" would be nominated by members of the government, and two by representatives of the opposition.
- Affirm the role of the High Council of the Prosecutor's Office and the Commissioner for Independence through proactive action on public statements by power holders in which external pressure is openly exerted on the Prosecutor's Office and its independence is called into question.
- Consider a normative change in the composition of the High Prosecutorial Council so that it does not include the Minister of Justice and the Supreme Public Prosecutor, as a way to reduce the influence of the executive power on the process of selection and career advancement of public prosecutors.

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