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Prosecutor, court and justice: the Balkans' experience¹

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ABSTRACT

The most difficult thing in life is describing yourself and your position without subjectivity and impartiality. Professionals have to do that and to win that complicated game. In this article the authors will try to describe complicated role of public prosecutor during the investigation and before the court representing the indictment. In describing the legal position of public prosecutor, we will have a help from the academic point of view of professor who is objective and impartial, by default. When the crime is committed, gathering evidences is crucial for effective investigations and high quality indictment. The Balkans inherited continental law system and the judge was entitled for investigation until 2003 in Bosnia and Herzegovina and until October 2013 in Republic of Serbia. The experience is important, but there are a lot of questions and doubts related to public prosecutor's role in investigation before the court and after, gathering evidence in the investigation which he is conducting. Professional and ethical behavior of public prosecutors at all times and at all places, hinders the task, but it is an easily accomplished quality by real professionals.

Keywords: Public prosecutor. Investigation. Indictment. Serbia. Bosnia & Herzegovina.

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1 PUBLIC PROSECUTOR AND STATE OF CRIMINALITY ON THE BALKANS

The process of reform of criminal legal acts, including its three subsystems (material, process and executive) in the last two decades of this century in the area of former Yugoslavia, or it is better if we say on the Balkans, is recognizable by its effort to accomplish protection of human rights. Countries from this region are members of the Council of Europe and their judiciary is under control of the European Court of Human Rights in Strasbourg, France. Radical changes are connected with better protection of human rights of offenders in pre-trial investigation, before the court and after conviction. These countries have ratified number of the international conventions and they have to respect their international obligations. We will focus only on two countries of the Balkans: Republic of Serbia and Federation of Bosnia & Herzegovina. In other countries there are similar legal systems and identical problems and pressure.

Criminal procedural law has substantively changed, because the old concept of investigation has completely changed and now public prosecutor has the main role in pre-trial investigation. There are crucial changes like plea-bargain, something that was unique characteristic of Anglo-Saxon legal system. Those changes meant to improve our criminal procedure, to be an effective way for solving great number of criminal cases. Time will show what has been accomplished.

Organized crime is a complex problem without boundaries. The fight against organized crime has to be transnational. The effort has to be involved in suppression of ordinary crimes, too. Serbia and Bosnia & Herzegovina are small countries, but their geographical situation is suitable for criminal connections. Illegal money does not have nationality. There is one same quality for each organized crime. The element of organization gives strength to the organized

crime.⁴ Changes in criminal procedure started in 2003 in Bosnia & Herzegovina and in October 2013 in Serbia. First steps were made in proceedings of organized crimes, but for society every day's life is much more important and, citizens have to recognize improvements in the area of general criminality. "Democratic concept of working of subjects entitled for putting legal acts in practice...is based on proactive role of all social subjects and citizens who are involved in process of implementation and operational protecting function of modern criminal law in practical sense."⁵

2 PROSECUTORIAL INVESTIGATION

Basic right and basic duty of each public prosecutor is to reveal and prosecute criminal offenders. General jurisdiction of public prosecutor is defined under Article 3 of Serbian Law on Public Prosecution. "In prosecuting criminal offences, economic offences and minor offences, public prosecutors shall act before the court and other state authorities, undertaking actions for which they are authorized by law. Public prosecutors shall act in civil litigation, administrative, enforcement, non-contentious and other proceedings, performing actions for which they are authorized under separate laws. Public prosecutors shall act within the constraints of their material and territorial jurisdiction, within the framework of the jurisdiction of the authorities before whom they are proceeding."⁶

Similar definition has Law on the Prosecutor's Office of Bosnia and Herzegovina in Article 12:

The Prosecutor's Office shall be the authority competent to

4 Zoran Stojanovic, Politics of suppression of criminality, Faculty of Law, University of Belgrade, 2016, page 105.

5 Sadmira Karovic, Marina M. Simovic, Contemporary criminal law and possibilities of politics of suppression of criminality-current situation, perspectives and expectations (II part), Extract of case law, number 5/2019, "Glosarijum", Belgrade, 2019, page 65.

6 Law on Public Prosecution, „Official Gazette of the Republic of Serbia“, No. 116/08, 104/2009, amended by Law on amendments and supplements to the Law on Public Prosecution, published in "Official Gazette of RS", no. 101/2010.

investigate the offences for which the Court of Bosnia and Herzegovina is competent, and to prosecute offenders before the Court of Bosnia and Herzegovina, in accordance with the Criminal Procedure Code of Bosnia and Herzegovina and other applicable laws. 2. The Prosecutor's Office shall be the authority competent to receive requests for international legal assistance in criminal matters as stipulated by law, multilateral and bilateral treaties and conventions, including requests for extradition or surrender of persons sought, from Courts or authorities within the territory of Bosnia and Herzegovina and from other States or International Courts or Tribunals. Where a court decision is necessary to carry out the request, the Prosecutor's Office shall be competent to make application for such decision. 3. The Special Departments shall *inter alia* undertake measures defined by law with a view to investigating and prosecuting the perpetrators of War Crimes, Organized Crime, Economic Crime and Corruption offences as provided by Law, when provision is made in the said laws that the Court of Bosnia and Herzegovina has such jurisdiction."⁷

The new concept of investigation in both countries for important investigative actions entitles police which helps public prosecutor in his work.

Rights and duties of public prosecutor in the Republic of Serbia are defined in Article 43: "The basic right and the basic duty of the public prosecutor are to prosecute the perpetrators of criminal offences. In the case of criminal offences prosecutable *ex officio*, the public prosecutor is authorized to: 1) manage pre-investigation proceedings; 2) decide on not undertaking or deferring criminal prosecution; 3) conduct investigations; 4) conclude plea agreements and agreements on giving testimony; 5) file and represent an indictment before a competent court; 6) abandon charges; 7) file appeals against court decisions which are not final and submit extraordinary legal remedies

⁷ Law on the Prosecutor's Office of Bosnia and Herzegovina, published in "Official Gazette" of Bosnia and Herzegovina, 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, 61/04.

against final court decisions; 8) conduct other actions when specified by this Code.”⁸

In Bosnia and Herzegovina public prosecutors rights and duties are defined by Article 35:” The basic right and the basic duty of the Prosecutor shall be the detection and prosecution of perpetrators of criminal offenses falling within the jurisdiction of the Court. (2) The Prosecutor shall have the following rights and duties: a) as soon as he becomes aware that there are grounds for suspicion that a criminal offense has been committed, to take necessary steps to discover it and investigate it, to identify the suspect(s), guide and supervise the investigation, as well as direct the activities of authorized officials pertaining to the identification of suspect(s) and the gathering of information and evidence; b) to perform an investigation in accordance with this Code; c) to grant immunity in accordance with Article 84 of this Law d) to request information from governmental bodies, companies and physical and legal persons in Bosnia and Herzegovina; e) to issue summonses and orders and to propose the issuance of summonses and orders as provided under this Code; f) to order authorized officials to execute an order issued by the Court as provided by this Code; g) to establish facts necessary for deciding claim under property law in accordance with Article 197 and for forfeiture of property gain obtained by commission of criminal offense in accordance with Article 392 of this Law, h) to propose the issuance of a warrant for pronouncement of the sentence pursuant to Article 334 of this Code; i) to issue and defend indictment before the Court; j) to file legal remedies; k) to perform other tasks as provided by law. (3) In accordance with Paragraphs 1 and 2 of this Article, all bodies participating in the investigative procedure are obligated to inform the Prosecutor on each undertaken action and to act in accordance with every Prosecutor’s request.”⁹

8 The Criminal Procedure Code, “Official Gazette of RS”, no 72/2011 and 101/2011, Article 43.

9 Criminal procedure code of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08,

Rights and duties are similar just like problems in practice. According to law, many subjects have duty to act upon public prosecutor's request. In Serbia: "All authorities participating in the pre-investigation proceedings are required to notify the competent public prosecutor of all actions taken with the aim of detecting a criminal offence and locating a suspect. The police and other public authorities responsible for discovering criminal offences are required to comply with every request of the competent public prosecutor. Where the police or other public authority does not comply with a request of the public prosecutor referred to in paragraph 1 of this Article, the public prosecutor will immediately notify thereof the head of that authority, and may, if needed, also notify the competent minister, the Government or the competent working body of the National Assembly. If within 24 hours of the time when the notification referred to in paragraph 2 of this Article was received, the police or other public authority fails to comply with the request of the public prosecutor referred to in paragraph 1 of this Article, the public prosecutor may request the institution of disciplinary proceedings against the person who he believes is responsible for not complying with his request."¹⁰

In Bosnia and Herzegovina, public prosecutor supervises the work of authorized officials according to the Article 218: " (1) If there are grounds for suspicion that a criminal offense has been committed that carries a prison sentence of more than five (5) years, an authorized official shall immediately inform the Prosecutor and shall, under the Prosecutor's direction, take the steps necessary to locate the perpetrator, to prevent the suspect or accomplice from hiding or fleeing, to detect and secure the clues to the criminal offense and objects which might serve as evidence and to gather all information that might be of use for the criminal proceedings. (2) If there are grounds for suspicion that the criminal offense referred to in Paragraph 1 of

58/08, 12/09, 16/09, 93/09, 72/13.

10 The Criminal Procedure Code, "Official Gazette of RS", no 72/2011 and 101/2011, Article 44.

this Article has been committed, and the delay would pose a risk, an authorized official is obligated to carry out necessary actions in order to fulfill the tasks referred to in Paragraph 1 of this Article. When carrying out these actions, the authorized official is obligated to act in accordance with this Code. The authorized official shall be bound to inform the Prosecutor on all taken actions immediately and deliver the collected items that may serve as evidence. (3) If there are grounds for suspicion that a criminal offense has been committed that carries a prison sentence of up to five (5) years, an authorized official shall inform the Prosecutor of all available information, actions and measures performed no later than seven (7) days after forming the grounds for suspicion that a criminal offense has been committed.”¹¹

A Public prosecutor in his work has to act objectively and impartially. He collects evidence against the offender and in his favor. His legal role is to seek justice.

Public prosecutor has professional and ethical obligations and has to conduct under Ethical Code¹² and International standards¹³. There are a lot of prosecutorial qualities defined by IAP Standards. Impartiality is crucial for performing duties without fear, favor or prejudice, unaffected by individuals or media, with regard only to the public interest and specially: in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect; and always search for the truth and assist the court to arrive at the truth, and to do justice between the community, the victim and the accused according to law and the dictates of fairness.¹⁴

11 Criminal procedure code of Bosnia and Herzegovina, “Official Gazette” of Bosnia and Herzegovina, 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13.

12 Ethical Code of Public Prosecutors and Deputy Public Prosecutors in Republic of Serbia, „Official Gazette of RS“, no 87/2013 and Code of Prosecutorial Ethics, „Official Gazette“ of Bosnia and Herzegovina, 13/06, 32/15.

13 Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors by International Association of Prosecutors (IAP-Standards), 23/04/1999, [www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-\(1\)/IAP-Standards_Oktober-2018_FINAL_20180210.pdf.aspx](http://www.iap-association.org/getattachment/Resources-Dokumentation/IAP-Standards-(1)/IAP-Standards_Oktober-2018_FINAL_20180210.pdf.aspx)

14 IAP Standards, Article 3.

Public prosecutor shake at all times maintain the honor and dignity of their profession, always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession, at all times exercise the highest standards of integrity and care, keep themselves well-informed and abreast of relevant legal developments, strive to be, and to be seen to be, consistent, independent and impartial, always protect an accused person's right to a fair trial, and in particular ensure that evidence favorable to the accused is disclosed in accordance with the law or the requirements of a fair trial, always serve and protect the public interest, respect, protect and uphold the universal concept of human dignity and human rights.

After collecting evidence, it is expected from public prosecutor to decide cases only on well-founded evidence, reasonably believed to be reliable and admissible. His struggle before the court is more difficult now in this changed system. Maybe, sometimes, he can act like public prosecutor in Germany where the public prosecutor "... may take a case to trial even where he is not fully convinced of the suspect's guilt as long as he thinks that the court will be able to resolve remaining doubts at the trial."¹⁵

The Court has taken procedural role just to hear evidence from both parties without any active role even when it has opportunity and reasonable chance to involve in procedure.

Public prosecutor often has a feeling that he is the only one procedural subject who is interested in rule of law and getting the justice from usually unjustified legal situation. He has to be a good orator, maybe almost perfect orator, to think quickly and to ask the right question each time he has the opportunity.

¹⁵ Weigend, *Toward a Prosecutor for the European Union*, Volume 1 A: Comparative Analysis, ed. Ligeti (Hart publishing 2013), page 292.

3 PROSECUTORIAL PERSUE FOR JUSTICE FROM PROFESSIONAL AND ACADEMIC VIEW

Reform process of criminal procedural law in the area of former Yugoslavia did not pass national criminal procedural systems in Serbia and Bosnia and Herzegovina. There were a strong trend for efficiency of the criminal procedure and recognizing of human rights as imperative of nowadays. Academics would always say that professionals could do more, but reality brings complicated situations and solving those problems, often, is difficult task. Practice make case law and professionals learn from each case to conduct thorough and objective investigations, to write firm based indictment. A Prosecutor has to give a brief presentation of case, to secure the highest standards of impartiality, objectivity and high ethical approach. He or she must be an excellent investigator, presenter of evidence and orator, no matter in which country, and which legal system he or she is entitled for public prosecution. A courtroom is not a classroom. There are lives of people and their interests which public prosecutor has to protect. He must be highly educated, well trained and prepared for constant professional trainings. It is a lifelong learning and it is important for judicial professions. After he has done everything that is possible, then no one can blame him if anything goes wrong, neither professional nor academic colleagues. He is seeking for justice, but justice has many faces. From the eyes of criminal and victim it is not the same thing. Public prosecutor has its own justice, which has to be the only right one based on the evidence. The crime scene is the laboratory and courtroom, the battlefield.

4 FINAL CONSIDERATIONS

This is a short review of prosecutorial profession from our point of view in the Balkans, were the judiciary role of public prosecutor has

been changed completely recently and, it takes time for our colleagues, public prosecutors, to adjust to the new prosecutorial system. We tried to explain the legal obligations and rights of public prosecutor, what he has to do and what he could do in order to accomplish all his or hers professional tasks. The judiciary in the Balkans' countries has the same legal roots and "suffers" from the same "child illness". Process of legal reforms has started several years ago. Prosecutorial practice has been made each day. We have presented legal acts in both countries, practical work of public prosecutors, ethical behavior, their investigation and their "struggle" before the court in order to reach justice. This article has aim to give an insight of prosecutorial work in our countries to our colleagues all around the world.

PROMOTOR, TRIBUNAL E JUSTIÇA: A EXPERIÊNCIA DOS BALCÃS

RESUMO

A coisa mais difícil da vida é descrever você mesmo e sua posição sem subjetividade e imparcialidade. Profissionais têm que fazê-lo e ganhar esse complicado jogo. Neste artigo os autores tentarão descrever o papel complicado do Promotor Público durante a investigação e ao representar uma acusação em tribunal. Descrevendo a posição legal de um Promotor Público, teremos a assistência de um professor acadêmico que é, em regra, objetivo e imparcial. Quando o crime é cometido, reunir evidências é crucial para uma investigação eficaz e uma acusação de alta qualidade. Os Balcãs herdaram o sistema do direito continental e os juízes estavam encarregados de conduzir a investigação até 2003 na Bósnia e Herzegovina e, até outubro de 2013, na República da Sérvia. A experiência é importante, mas há muitas perguntas, e dúvidas, relativas ao papel do Promotor Público na investigação, e perante o tribunal, depois de reunir evidências

durante a investigação, que ele está conduzindo. Conduta profissional e ética do Promotor Público, a qualquer momento, e em qualquer lugar, dificulta a tarefa, mas uma esta é facilmente realizada por um verdadeiro profissional.

Palavras-chave: Promotor Público. Investigação. Acusação. Sérvia. Bósnia e Herzegovina.

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32/15 Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors by International Association of Prosecutors (IAP-Standards), [www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-\(1\)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx](http://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/IAP_Standards_Oktober-2018_FINAL_20180210.pdf.aspx)