Prosecutorial Discretion and Legal Predictability

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Abstract

The ability of every citizen to predict the outcome, but also the main parameters (e.g. length and costs) of judicial procedure constitutes the backbone of legal predictability, together with transparency of laws and court jurisprudence. However, widening competences of public prosecutors in order to allow them to dismiss a case based on application of the opportunity principle or just based on assess that there are no enough evidences that suspect committed a crime opens the floor for transferring a significant portion of cases out of judicial competences. Therefore, an issue of legal predictability and uniform application of law is not anymore reserved only for judicial decision-making processes. In this article, the authors analyses the modalities of prosecutorial discretion in light of legal predictability considering varieties of criminal procedure models as well as of public prosecution autonomy and/or independences. The special focus, authors put on efforts of the Council of Europe and its consultative bodies made in order to establish minimal standards that should ensure that prosecutorial discretion is not an act of arbitrariness. Finally, authors analyses the relevant provisions of Serbian legislation that deal with prosecutorial discretion and mechanisms to control it.

Keywords*: principle of opportunity, criminal procedure, prosecutorial discretion, legal predictability.*

1. Quality and uniform application of laws as guaranties of legal predictability

The analysis of prosecutorial discretion seems to be logically preceded by the issue of application of law in general context of the equality of citizens before law. Without any doubt, the process of application of law significantly overcame simple "put the facts under the legal provision" mechanism. (Kolaković-Bojović, Tilovska-Kechegi, 2018:115) *Rule of Law- not of men*, usually interpreted through the supremacy of law over arbitrary power and the universal application of law by courts, opens numerous questions related to relations between constitutive elements of the Rule of Law and their qualitative nature. The issue of discretion and possible injustice in the context application of law was well addressed by Radbruch (Radbruch, 1946:107) in form well-known as the Radbruch Formula (*Radbruchsche Formel*). Regarding the role and competences of the judge in case he/she rendering decision in

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certain case where there is a conflict between a statute and what he perceives as just, Radbruch argued that "the conflict between justice and the reliability of the law should be solved in favor of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law".[1] He concluded that positive law cannot be defined otherwise as a rule, that is precisely intended to serve justice. Among numerous authors who analyzed uniform application of law in the context of (in)justice it important to mention interpretation of Radbruch Formula given by Fuller, who identified eight basic principles of the rule of law necessary to ensure justice.[2] He concludes that, law is "the enterprise of subjecting human conduct to the governance of rules". When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke. (Murphy, 2005: 239-262)

In addition to the quality of laws that, (in obviously too optimistic view of Fuller) guarantees legal predictability, various legal instruments across the world have been developed with the same goal: Publicly available court jurisprudence; introduction of the court jurisprudence in the hierarchy of legal sources; establishment of various internal judicial procedures aimed at defining guidelines and rulebook for judges etc. Moreover, following the process of unification of rules and procedures in the European Union, comprehensive EU standards have been developed in this regard. The ECtHR jurisprudence also plays an important, dual role: through recognition of the importance of uniform application of law and equality before law as elements of the right to fair trial and access to justice. Also, the ECtHR jurisprudence serves as an orienteer for national courts in similar cases.

However, the situation is bit different when it comes to application of law by public prosecutors, despite the trend of widening competences of public prosecutors all around the world, but also the trend of strengthening their independence in the separation of power system. Both of these trends affecting the citizens' right to be equally treated in the same cases, but also to predict whether procedure is going to be initiated as well as to predict possible outcome of procedure already initiated.

2. The notion and modalities of prosecutorial discretion

Differently from application of laws by courts, the notion "prosecutorial discretion" is commonly used to describe power of public prosecutors on various matters including

[1] He admitted that is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content, but clearly stated that "where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all."

[2] Laws must be general (specifying rules prohibiting or permitting behavior of certain kinds); Laws must also be widely promulgated or publicly accessible, that ensures citizens know what the law requires; Laws should be prospective (specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past); Laws must be clear in order to enable citizens to identify what the laws prohibit, permit, or require; Laws must be non-contradictory among themselves; Laws must not ask the impossible; Nor should laws change frequently; Finally, there should be congruence between what written statute declare and how officials enforce those statutes. (Murphy, 2005: 239-262)

those related to choose whether to (or not to) bring criminal charges; to defer criminal prosecution; to decide on the nature of charges, plea bargaining and sentence recommendation. In addition to these, typical sorts of prosecutorial discretion, public prosecutor is, depending on legal system where he/she acts, more or less free to decide on investigation strategies and techniques, but also on type and nature of alternative measures that follows deferring of prosecution. Since not every case falls within the literal terms of the law, but also no legal system can achieve a perfect congruence of formal rule and desired outcome, in practice, prosecutorial discretion includes "judgments about the social utility to be gained from the prosecution, as well as a moral evaluation of the wrongfulness of the defendant's conduct."[3]

The abovementioned power is recognized in most of modern legal systems. However, there are a few main factors that determinate a real range of prosecutorial power related to his/her discretion.

- The first of all, the prosecutorial discretion is limited by list of factors that prosecutor must take into account previous to rendering any of decisions included in the scope of prosecutorial discretion. These factors may be related to the nature and facts of the crime or to the content of provisions of penal legislation (the quantity and quality of evidence, the legality of procedure of collecting evidence, the legal definition of the crime, the range of sentence prescribe by law, relevant information about accused, deadlines etc.)

- The quality and transparency of laws are also important. Laws should be clear as much as possible to prevent prosecutors from transformation of discretion based on application of law on facts to arbitrary decision-making.

- In addition to this, prosecutorial discretion could be limited by the power of court to change and/or abolish decisions of the prosecutor. This power serves as corrective mechanism and could be initiated by injured party, accused of *ex officio*- by the court itself.

- Finally, the constitutional and legal mechanisms and guaranties of prosecutorial independence or autonomy play an important role in limitation of prosecutorial discretion.

The scope and content of prosecutorial discretionary powers varies considerably from one country to another and it is largely conditioned by the choice of the concept of criminal proceedings in particular legal system. It is well- known that the adversarial conception of criminal proceedings implies a stronger role and broader powers of the public prosecutor. Consequently, in countries that traditionally belong to the Common Law legal area, the authority of the public prosecutor in this regard is high. Nevertheless, as in recent decades there has been a trend of spreading the adversarial conception of proceedings in those countries that traditionally belong to the continental legal area, it can be said that strengthening the role of the public prosecutor and expanding his powers is a global trend. The reasons for this trend could be found in several facts:

- First of all, there is a need to improve the efficiency of criminal proceedings by extending the application of simplified of procedural forms, thereby, through the

[3] Prosecution: Prosecutorial Discretion - Controlling Prosecutorial Discretion http://law.jrank.org/pages/1867/Prosecution-Prosecutorial-Discretion-Controlling-prosecutorial-discretion.html, last accessed on December 10th 2108.

broader powers of the public prosecutor a significant number of proceedings are terminated without bringing the case before the court.

- Additionally, the range and scope of prosecutorial discretion are also related to the changes in domain of the organization of public prosecution and its position in the system of government and separation of power. In this regard, acceptance of the concept of prosecutorial autonomy or independence plays the main role.

3. The EU standards on prosecutorial discretion

The unification and standardization within EU legal area, affect to some extent the issue of prosecutorial discretion. It is true that a degree of unification and/or standardization in various fields may vary from the complete – in the areas in which there is the acquis, to a broad one – based on the EU standards.[4] Organization and functioning of judiciary, in general, belong to the group of issues where there is no *acquis*. Moreover, when it comes to public prosecution, the level unification is even a lower and standards are vague. This is understandable, having in mind that the constitutional system, competence, and functioning of the key institutions of the state, particularly the judiciary, is out of any doubt, one of the areas in which the states have difficulties to surrender their heritage.[5] The same tendency is noted in the Rec(2000)19 which says that, although the European legal systems are still divided between two cultures[6], the traditional distinction is tending to blur as the different member states bring their laws and regulations more closely into line with what are now common European principles, in particular those laid down in the Convention for the Protection of Human Rights. However, in the same document the Committee of Ministers of CoE (hereinafter: Committee) admitted that it is fair to say that, to date, the status, role and operating methods of authorities responsible for prosecuting alleged offenders have not been scrutinized in detail with a view to their harmonization at European level.[7] Recommendation (2000)19 defines that "public prosecutors are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal

[4] See more in: Kolaković-Bojović, M: Organisation of Judiciary in the Republic of Serbia and Chapter 23, (Organizacija pravosuđa u Republici Srbiji i Poglavlje 23) *European Integrations and Penal Legislations (Chapter 23- law, practice and measures of harmonization)* (ed. S. Bejatović)*:* Zlatibor: Serbian Society for Criminal Law and Practice, 2016, pp. 98-106.

[5] Kolaković-Bojović, M., Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 194.

[6] The split being evident both in the organization of criminal procedure (which is either accusatorial or inquisitorial) and in the initiation of prosecutions (under either "mandatory" or "discretionary" systems) (See more in: Rec (2000)19)

[7] Recommendation Rec (2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 12-13. Furthermore, the Committee approaches to the harmonization/ unification at European level without ambitions to draw on features of both traditions in order to come up with some type of third option, nor to propose the unification of existing systems, nor to suggest a supranational model, nor did it believe that it should merely seek the lowest common denominator. The idea of the Committee is just to identify the major guiding principles - common to different types of system and to recommend practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend.

sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. Operating neither on behalf of any other (political or economic) authority nor on their own behalf, but rather on behalf of society, public prosecutors must be guided in the performance of their duties by the public interest." They must observe two essential requirements concerning, on the one hand, the rights of the individual and, on the other, the necessary effectiveness of the criminal justice system, which the public prosecutor must, to some extent, guarantee.[8]

The Committee recognizes differences between models of public prosecution services. Throughout the World, there is no uniform model for all states.[9] However, in spite of differences, it is possible to identify features and values which are common to virtually all modern criminal justice systems. The Venice Commission sees it, primarily, in the criminal prosecution as a core function of the state. A crime is a wrong against society, although in many cases the same act will also amount to a private wrong against the individual victim. (CDL-AD(2010)040, par. 10-11)

Considering the seriousness of prosecutorial discretion power, the Commission also underlined importance of judicial control of prosecutor's actions which affect human rights, that should not function like a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole. (CDL-AD(2010)040, par. 73-74)

In addition to what the Committee and the Commission stated, the Consultative Council of European Prosecutors (hereinafter: CCPE), also recognized differences among European states when it comes to (non)mandatory prosecution. The CCPE emphasized that some member states have the discretionary prosecution system. Other member states have the mandatory prosecution system, but their codes of criminal procedure provide for such exceptions as: – cases where prosecution is plainly inexpedient having regard to the stated objectives, one of which is to prevent the recurrence of the offence; – cases where financial or other redress is made; – cases involving a juvenile offender. In some countries, the obligation to prosecute can only be avoided for juveniles (CCPE, Opinion No. 2:11-12)

The CCPE specially analyzed issue of prosecutorial discretion from the perspective of alternatives to prosecution, excluding from the "list" of alternatives the procedure of "pleading guilty" before a curt, as it does not obviate criminal proceedings and leads to a conviction.[10] The CCPE concluded that recourse to alternative measures to prosecution is

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[8] Recommendation Rec (2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 14.

[9] The main classifications could be made on systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. In parallel, there are systems where prosecution is mandatory in accordance with the legality principle and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). Differences exist also between systems which allow private prosecution while others do not do so or limit it. The same goes for position of a victim who, in some systems, has opportunity to take part in criminal proceedings as a "partie civile" while others recognize only a contest between the prosecutor representing the public or the state and the individual accused. (CDL-AD (2010)040-7)

[10] Consultative Council of European Prosecutors (CCPE), Opinion N°2 (2008) of the Consultative Council of European Prosecutors on "Alternatives to prosecution" adopted by the CCPE at its 3rd Plenary Meeting (Strasbourg, 15 – 17 October 2008), par. 9. For the purposes of this Opinion,

not in contradiction with Europe's mainstream system of mandatory prosecution (CCPE, Opinion No. 2:10) The CCPE insisted that alternative measures have to be consistent with the goals by which the action of criminal justice must be guided, namely to prevent re-offending, assist redress of the damage incurred by society, have regard to the interest of victims, uphold the rights of the defence, form a valid response to illegal acts, and to avoid the repetition of the offence. The CCPE also concluded that legislation in some countries stipulates that alternative measures should be used when a criminal sanction appears unnecessary to avert repetition of the offence. (CCPE, Opinion No. 2: 15-16)

An alternative measure not making offenders social outcasts, and instead encouraging their rehabilitation. "Alternative measures often make redress more visibly meaningful to society than mere payment of money (too superficially conscience-salving) or imprisonment. As alternatives to imprisonment, they lower the prison population in a Europe where many prisons are overcrowded and the prison budget often takes up a crippling proportion of the justice budget. Alternative measures can reduce the workload of courts, but often present the prosecution departments with a very large amount of work in arranging them." (CCPE, Opinion No. 2: 20-23)

When it comes to restrictions/limitations of the cases where alternative measures can be applied, the Committee recognized both- legal systems where this is done through precise enumeration/list of cases, but also systems that use non-binding legal instruments. In accordance with Recommendation Rec(2000)19 and with a view to promoting a fair, consistent and efficient activity of public prosecutors in this field, members states should seek to: – define general guidelines for the implementation of this criminal policy; – define general principles and criteria to be used by way of references against which decisions of individual cases should be taken, in order to guard against arbitrary decision making. In addition to this, the CCPE emphasized that the public must be informed of the above-mentioned system, guidelines, principles and criteria. It is advisable that specific arrangements be drawn up aimed at giving an account of the concrete implementation of the above-mentioned guidelines. In addition to transparency and accessibility of the rules and guidelines, the CCPE insists evaluation the economic, administrative and structural conditions prior to adoption of alternative measures to prosecution, in order to check the ability to implement these measures in a practical and concrete manner. (CCPE Opinion No. 2:26-27)

Finally, together with clear and transparent rules/guidelines that limit prosecutorial discretion and enable predictability of prosecutorial conduct, the CCPE recognizes importance of judicial and/or victim intervention. More precisely, the CCPE stated that alternative measures are conducive to acceptance of the judicial response by the offender and possibly the victim, if the latter is suitably associated with them. "Sometimes the code provides that the victim can object to a prosecution being dropped. This is done through a review of the decision taken by the prosecution authority, either to the hierarchical superior of the prosecutor or to the higher instance court. In some member states, there is no alternative measure without the victim's agreement." (CCPE, Opinion No. 2:19)

"alternative measures to prosecution" are understood to mean measures which go together with final, temporary or conditional discontinuation of prosecution where an offence has been committed, that would otherwise render the perpetrator liable to a criminal sanction such as a suspended or unsuspended prison sentence or fine, together with ancillary penalties such as deprivation of certain rights. (CCPE, Opinion No 2: 7)

4. Prosecutorial discretion in serbian criminal justice system

When it comes to the scope of prosecutorial discretion in Serbian justice system, the Criminal Procedure Code[11] (hereinafter: CPC) provides for basic list of the rights and duties of the public prosecutor in the Article 43. According to this provision, the basic right and the basic duty of the public prosecutor is 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 against final court decisions;
8) conduct other actions when specified by CPC.

The right of public prosecutor to dismiss charges is regulated by Article 49 of the CPC which stipulates that a public prosecutor may dismiss charges:

1) from the confirmation of the indictment until the conclusion of the trial;
2) at a hearing before a second-instance court.

The highest level of discretion is regulated by Article 284 of CPC, which stipulated that the public prosecutor will dismiss a criminal complaint by a ruling if it proceeds from the complaint that:

1) the reported offence is not a criminal offence which is prosecutable ex officio;
2) the statute of limitations has expired, or the offence is encompassed by an amnesty or a pardon, or there exist other circumstances which permanently exclude prosecution;
3) there are no grounds for suspicion that a criminal offence which is prosecutable ex officio has been committed.

According to Article 51 of CPC, if in connection with a criminal offence prosecutable *ex officio* the public prosecutor dismisses a criminal complaint, discontinues the investigation or abandons criminal prosecution until the indictment is confirmed, he is required to notify the injured party thereof within eight days and to advise him that he is entitled to submit an objection to the directly higher public prosecutor within eight days of receiving the notification and advice. If the injured party has not been notified, he is entitled to submit an objection within three months of the date when the public prosecutor dismissed the complaint, discontinued the investigation or abandoned criminal prosecution. A directly higher public prosecutor will within 15 days of receiving the objection, deny or uphold the objection by a ruling against which an appeal or objection is not allowed. By the ruling upholding the objection, the public prosecutor issues a mandatory instruction to the competent public prosecutor to conduct or resume criminal prosecution.

[11] Criminal Procedure Code, Published in the Official Gazette RS, Nos. 72/11 of 28 September 2011, 101/11 of 30 December 2011, 121/12 of 24 December 2012, 32/13 of 8 April 2013, 45/13 of 22 May 2013, 55/14 of 23 May 2014 and 35/19 of 21 May 2019

In the case of criminal offences punishable by a term of imprisonment of up to three years, the public prosecutor may dismiss a criminal complaint if the suspect, as a result of genuine remorse, has prevented the occurrence of damage or has already indemnified the damage in full, and in view of the circumstances of the case the public prosecutor finds that pronouncing a criminal sanction would not be fair. In this case the injured party is not allowed to assume prosecution.

When it comes to right of the injured party in case of dismissal of charges by prosecutor, differently from situation in which public prosecutor dismisses charges before conformation of indictment, where this decision cannot be appealed, when the public prosecutor dismisses charges from the confirmation of the indictment until the conclusion of the trial, the injured party is entitled to assume criminal prosecution (Article 52 of CPC).

Contrary to assumption of criminal prosecution by the injured party, according to Article 62, in proceedings conducted on the basis of charges brought by a subsidiary prosecutor, the public prosecutor is entitled to assume criminal prosecution and representation of the prosecution no later than the end of the trial.

The CPC also regulates the mechanism of deferring Criminal Prosecution. According to Article 283 of this Code, the public prosecutor may defer criminal prosecution for criminal offences punishable by a fine or a term of imprisonment of up to five years if the suspect accepts one or more of the following obligations:

1) to rectify the detrimental consequence caused by the commission of the criminal offence or indemnify the damage caused;

2) to pay a certain amount of money to the dedicated account for financing a humanitarian or other public purpose;

3) to perform certain community service or humanitarian work;

4) to fulfil maintenance obligations which have fallen due;

5) to submit to an alcohol or drug treatment program;

6) to submit to psycho-social treatment for the purpose of eliminating the causes of violent conduct;

7) to fulfil an obligation determined by a final court decision, or observe a restriction determined by a final court decision.

In order to defer criminal prosecution, the public prosecutor will determine a time limit during which the suspect must fulfil the obligations undertaken, with the proviso that the time limit may not exceed one year. Oversight of the fulfilment of obligations is performed by an officer of the authority in charge of the execution of criminal sanctions, in accordance with a regulation issued by the minister responsible for the judiciary.

If the suspect fulfils the obligation ordered by prosecutor within the prescribed time limit, the public prosecutor will dismiss the criminal complaint by a ruling and notify the injured party thereof. In this case, the injured party does not have right to assume prosecution.

5. Means to ensure uniformity of prosecutorial practice in Serbia

When it comes to tools and mechanisms aimed to ensure uniformity of prosecutorial practice in Serbia, it is important to emphasize that they are mostly

related to hierarchy principle as a backbone of prosecutorial organization according to the Constitution[12] and Law on public prosecution[13]. Following this principle, a public prosecution consists of a public prosecutor, deputy public prosecutors and public prosecution staff. The function of the public prosecution is performed by the public prosecutor. Everyone in the public prosecution is subordinate to the public prosecutor. (Article 12 of LPP) According to Article 16 of LPP, a lower ranked public prosecutor shall be subordinate to the immediately higher ranked public prosecutor, and a lower ranked public prosecution to the immediately higher ranked public prosecution. In parallel, every public prosecutor shall be subordinate to the Republic Public Prosecutor and every public prosecution to the Republic Public Prosecution.

According to hierarchy principle, the LPP recognizes instrument of mandatory instructions of higher ranked public prosecutor to lower. More precisely, a higher ranked prosecutor may issue to a directly lower ranked prosecutor mandatory instructions for proceeding in particular cases when there is doubt in respect of the efficiency and legality of his actions, and the Republic Public Prosecutor may issue such instruction to any public prosecutor.

When it comes to form of the mandatory instructions, they must be issued in writing and must contain the reasons and substantiation for their issuance. A lower ranked prosecutor who deems mandatory instructions unlawful and unjustifiable may submit a substantiated objection to the Republic Public Prosecutor within eight days of the date of receiving the instructions. This objection is filed through the public prosecutor who issued the mandatory instruction, who is required to review the mandatory instruction he issued within three days from the day of receiving the objection. However, the public prosecutor filing the objection is required to act in accordance with the instructions until the decision of the higher ranked public prosecutor or the decision of the Republic Public Prosecutor. The directly higher public prosecutor may set aside the mandatory instructions and in such case the objection shall not be forwarded to the Republic Public Prosecutor. The Republic Public Prosecutor is required to issue a decision within fifteen days from the date of receiving the objection to the mandatory instructions. This decision is final.

Article 24 of the LPP regulates mandatory instructions of public prosecutors to deputy public prosecutors and stipulates that a public prosecutor may issue to his deputy mandatory instructions for work and action. The instruction shall be in writing and shall contain substantiation for the issuance thereof. A deputy public prosecutor who deems the mandatory instruction unlawful and unjustified may file an objection with an explanation to a directly higher public prosecutor within eight days from the date of receiving the instruction. A decision on the objection shall be rendered within three days from the day of receiving the objection. The same as in case where mandatory instruction issued to lower prosecutor, the public prosecutor may during the reconsideration procedure set aside the mandatory instruction and, in such case, shall not forwarded the objection to the higher public prosecutor. However, the deputy public prosecutor filing the objection is required to act on the instruction until the decision of the higher public prosecutor. The directly higher public prosecutor is

[12] Constitution of the Republic of Serbia, "Official Gazette of the RS" no. 98/2006.

[13] Law on Public Prosecution, "Official Gazette of the RS" no. 116/2008, 104/2009, 101/2010, 78/2011 – other law, 101/2011, 38/2012 – CC decision, 121/2012, 101/2013, 111/2014 - CC decision, 117/2014, 106/2015 and 63/2016 - CC decision)

required to issue a decision (which is final) within eight days from the day of receiving the objection to the mandatory instruction.

Different from two scenarios described above, where directly higher prosecutors issuing mandatory instructions to directly lower prosecutors or prosecutors doing the same to their deputies, Republic Public Prosecutor has the power (according to Article 25) to issuing, in written form, general mandatory instructions for all public prosecutors aimed at achieving legality, efficiency and uniformity in proceeding. The Republic Public Prosecutor may issue in written form general mandatory instructions upon a proposal of the Collegium of the Republic Public Prosecution.

In addition to mandatory instructions, Article 19 of the LPP regulates acting of public prosecutor according to devolution principle. A higher ranked public prosecutor may undertake all actions for which a lower ranked public prosecutor is competent, and is required to issue a substantiated ruling thereof. If a lower ranked public prosecutor deems the decision of the higher ranked public prosecutor unjustifiable may file an objection with the Republic Public Prosecutor within eight days from the date of receiving the decision. The objection shall be filed through the prosecutor who had issued the decision, who is required to review the ruling issued within three days from receiving the objection. The lower ranked public prosecutor may not undertake any case-related actions until the decision on the objection is issued. In the course of reconsideration, the public prosecutor may issue a decision setting aside his ruling, in which case the objection shall not be forwarded to the Republic Public Prosecutor. The Republic Public Prosecutor shall decide on the objection within 15 days from receiving the objection to the ruling.[14]

The third mechanism- reflection of the hierarchy principle is substitution of public prosecution, regulated by Article 20 of the LPP. The substitution of public prosecution means that a directly higher ranked public prosecutor may authorize a lower ranked public prosecutor to proceed in a matter under the jurisdiction of another lower ranked public prosecutor when the competent public prosecutor is prevented by legal or material reasons from proceeding in a particular case, and shall in such case issue a substantiated ruling.

Finally, in the Article 21 of the LPP, the mechanism of inspection of cases of lower ranked prosecutor. Namely, the Republic Public Prosecutor is entitled to inspect any case, and a higher ranked prosecutor is entitled to inspect any case of a directly lower ranked prosecutor. The request for inspection shall be submitted to the lower ranked public prosecutor, who shall thereafter promptly forward the case to the higher ranked public prosecutor.

6. Conclusions

Considering the importance of both- the uniform application of law, but also certain level of prosecutorial discretion in order to adapt to specificity of each particular case, it seems that several factors appear as important to ensure a proper balance between those two sides of the same coin, so called access to justice.

[14] See more in: Kolaković-Bojović, M. (2018) Organisation of Judiciary in the Republic of Serbia- Reform Framework and EU standards (Organizacija pravosuđa u Republici Srbiji - reformski okvir i EU standardi), Institute of Criminological and Sociological Research, Belgrade.

On the one hand, the discretionary right of the plaintiff must ensure, but at the level of legal provisions, sufficient power to decide, based on the assessment of the facts of a particular case, on:

- Rejecting criminal charges because there are no grounds for prosecution;
- The postponement of criminal prosecution conditioned by the use of some alternatives to prosecution, provided that alternative measures can adequately affect the defendant but also provide reparation to the victim;
- Conducting proceedings in one of the simplified procedural forms (most often a plea agreement).

However, in order to prevent arbitrary decision making by prosecutor, it is necessary to ensure protection mechanisms on several levels:

First, when it comes to the legal framework, the relevant provisions of the law must be precise, clear and publicly available to citizens. In addition, control mechanisms that are reflected in the victim's right to a remedy, as well as in the judicial control of the key public prosecutor's decisions, are of great importance. Finally, in systems where there is a hierarchical arrangement of the public prosecutor's office, prosecutorial discretion is limited by the binding instructions of superior prosecutors, as well as by the principles of devolution and substitution. In such systems, the power of the supreme prosecutor to influence the uniformity of prosecution practice, even within the broad legal framework of prosecutorial discretion, is high. This is of particular importance if monitoring of the prosecution practice shows significant inconsistency of prosecutorial practice in a particular category of crimes or perpetrators.

Finally, the availability of prosecutorial practice in various databases (which is although traditionally out of focus) plays an important role- both for public prosecutors, when deciding on the future course and / or outcome of the proceedings, as well as for lawyers, defendants and victims, enabling them to take an early view of prosecutors' similar cases and anticipate the further course and / or outcome of the proceedings in which the party is a party.

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