

# REFORM OF PUBLIC PROSECUTION IN SERBIA IN LINE WITH EU ACCESSION REQUIREMENTS

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**Abstract:** For over the two decades Serbia is conducting reforms of the justice sector, including the reform of public prosecution. The main driver of the reform is European Union and accession process. All adopted national policy documents referred to the EU standards and requirements of the independence, impartiality, competence, efficiency, quality and access to justice. Although, some improvement was achieved in efficiency of justice, the main challenges remain in relation to the independence of the judiciary. The European Commission referred to the Opinion of the Venice commission and recommendations to remove avenues for influence on the judiciary. After six years of discussions, Serbia amended Constitution in February 2022 to ensure independence of judiciary. The authors will assess if adopted provisions can bring Serbian public prosecution closer to the EU standards and what are the other measures that need to be implemented to Serbia get public prosecution capable to fight crime, especially high-level corruption.

**Key words:** *public prosecution, European standards, Venice Commission, EU accession requirements, rule of law*

## 1 INTRODUCTION

For over two decades the EU accession process has been the main driver of legal reforms in Serbia, including reform of judiciary and public prosecution. In the area of rule of law, reform process was intensified after the European

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Council granted Serbia the status of candidate country on 1<sup>st</sup> March 2012,<sup>3</sup> while the opening of Serbia's accession negotiations in January 2014, increased the work on the alignment of national legislation with the EU *acquis*. In July 2016 the negotiations on Chapter 23 on Judiciary and Fundamental Rights were opened, and the Action Plan for Chapter 23 was adopted as an opening benchmark that presents an overarching strategic document for the reforms.<sup>4</sup>

Although Serbia adopted a new Constitution in 2006,<sup>5</sup> which in many aspects meet European standards, further adjustments were required to align provisions on judiciary and public prosecution with the European standards in this area.<sup>6</sup> Many recommendations stipulated in the 2005 Venice Commission Opinion were adopted and incorporated into the 2006 Constitution.<sup>7</sup>

However, the Venice Commission in its Opinion from 2007 underlined that there is still an overall impression of an excessive influence of the Parliament (National Assembly) as a legislative branch on the judiciary.<sup>8</sup> To address identified shortcomings, Serbian authorities envisaged in the Action plan for Chapter 23 amendments of the Constitution in the part of judiciary and public prosecution.

The process of drafting Constitutional amendments lasted for six years and was finalized on 9<sup>th</sup> February 2022 when Serbian Parliament promulgated Act amending Constitution of Serbia and Constitutional Law.<sup>9</sup> After introductory consultation organized in 2017, in January 2018 the Ministry of Justice published the first draft of the Constitutional amendments followed by a public

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<sup>3</sup> European Commission, Commission Opinion on Serbia's application for membership of the European Union, Brussels, COM (2011) 668, 12 October, 2011.

<sup>4</sup> On 10<sup>th</sup> July 2020, the Government of Serbia adopted a revised Action Plan with the aim to set more realistic goals, as the EU has been placing much greater emphasis on the quality of the implemented reforms in the rule of law.

<sup>5</sup> Official Gazette of the Republic of Serbia, No. 98/2006.

<sup>6</sup> Screening Report Serbia, Chapter 23 - Judiciary and Fundamental Rights, EU's Benchmarking within chapters 23 and 24 in accession negotiations with Serbia, Effects and Challenges, 2013, p. 3; Benchmarking in Serbia, Bencher, EU Policy Center, p. 10.

<sup>7</sup> Venice Commission, Comments on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia, CDL (2005) 072, Opinion No. 349/2005, 4 October 2005.

<sup>8</sup> Venice Commission, Opinion No. 405/2006, Opinion on the Constitution of Serbia, 19 March 2007, para. 60.

<sup>9</sup> See: [http://www.parlament.gov.rs/10th\\_Special\\_Sitting\\_of\\_the\\_National\\_Assembly\\_of\\_the\\_Republic\\_of\\_Serbia,\\_12th\\_Legislature.44377.537.html](http://www.parlament.gov.rs/10th_Special_Sitting_of_the_National_Assembly_of_the_Republic_of_Serbia,_12th_Legislature.44377.537.html)

discussion from which many stakeholders withdrew.<sup>10</sup> In June 2018, the Venice Commission issued an Opinion on draft text with many recommendations for changes of the draft provisions to meet European standards on the independent, fair and impartial judiciary.<sup>11</sup> In addition, opinions on the draft text were issued by the Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors (CCPE) with specific recommendations for ensuring the independence of judiciary and prosecution.<sup>12</sup> After, initial text and opinions of relevant Council of Europe bodies, the constitutional reform has been put on hold even though the Action Plan for Chapter 23 stipulates that the most crucial measure in the judiciary is the strengthening of its independence. The process was renewed in 2021 in the more transparent and inclusive manner and resulted by adoption of amendments in February 2022.

Aim of the article is to assess if adopted provisions can bring Serbian public prosecution closer to the EU standards and what are the other measures that need to be implemented to Serbia get public prosecution capable to fight crime, especially high-level corruption.

## 2 REFORMS OF PUBLIC PROSECUTION IN SERBIA

The judicial reform in Serbia has been recognized as one of the main objectives of the state democratization. The aim of the judicial reforms was to align legislation and organization of the judiciary, including prosecution service, with relevant European standards.<sup>13</sup> For the past 20 years, relevant government and state bodies, representatives of the judiciary, various international and national

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<sup>10</sup> European Commission, Report on Serbia's progress in the process of European integration for 2018, p. 14, see: <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-serbia-report.pdf> (date of access 7.9.2022).

<sup>11</sup> Venice Commission, Opinion No. 921/2018, Opinion on the draft amendments to the constitutional provisions on the judiciary, 25 June 2018.

<sup>12</sup> Consultative Council of European Judges (CCJE), Opinion CCJE-BU(2018)9, 21 December 2018. For the opinion on reconsidering the composition of the HPC, preservice of its autonomy and jurisdiction see CCPE, Opinion CCPE-BU(2018)3, 25 June 2018; Opinion CCPE-BU(2019)2, 27 March 2019.

<sup>13</sup> MATIĆ BOŠKOVIĆ, M. Role of Court of Justice in Establishment of EU Standards on Independence of Judiciary, In *EU and Comparative Law Issues and Challenges Series* (ECLIC), 2020, No. 4, pp. 329 – 351.

government agencies and non-governmental organizations have been involved in the reform process framed by several national policy documents.

The prosecution of criminal suspects is an integral part of any country's criminal justice system. The status and organization of prosecution services differ widely across Europe. However, all prosecution services are empowered to prosecute a case in criminal court. Prosecutors are central actors in implementing the rule of law and serve as the link between police investigations and court adjudications.<sup>14</sup> The European integration process has provided direction for reforms, but also resulted in frequent changes in organization, position, and competence of Serbian prosecutors.<sup>15</sup>

Prior to the adoption of the Constitution in 2006 the reforms were guided by the governmental programs. Only after adoption of the new Constitution in 2006 the first strategic document on judicial reform was adopted to ensure direction and systemic approach to the reforms. From 2006 till 2022 several policy documents on judiciary were adopted and implemented with the mixed results. The first National Judicial Reform Strategy covered the period 2006 – 2011. Under this policy document, a new legal and institutional framework for the judiciary was established, as well as the process of significant reorganization of court network and re-appointment of judges and public prosecutors in 2009,<sup>16</sup> which was carried out in unconstitutional manner.<sup>17</sup> The High Judicial Council (HJC) and State Prosecutorial Council (SPC) were established in 2009 with the aim to guarantee independence and autonomy of judges and public prosecutors. However, some key issues had not been resolved, such as inadequate restructure of judicial network, reform of procedural laws and unequal distribution of cases among judges and public prosecutors.

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<sup>14</sup> LUNA, E. & WADE, M. The Prosecutor as Policy Maker, Case Manager, and Investigator. Introduction, In *The Prosecutor in Transnational Perspective*, Oxford, Oxford University Press, 2012, pp. 1 – 19.

<sup>15</sup> ILIĆ, G. & MATIĆ BOŠKOVIĆ, M. *Javno tužilaštvo u Srbiji – Istorijski razvoj, međunarodni standardi, uporedni modeli i izazovi modernog društva*, Beograd : Institut za kriminološka i sociološka istraživanja, 2019, pp. 254 – 261.

<sup>16</sup> RAKIĆ VODINELIĆ, V., RELJANOVIĆ, M. and KNEŽEVIĆ BOJOVIĆ, A. *Reforma pravosuđa u Srbiji 2008-2012*, Belgrade : Službeni glasnik, 2013, pp.79-104.

<sup>17</sup> International Commission of Jurists, Serbia's Judges and Prosecutors: The Long Road to Independent Self-Governance, A Mission Report, 2016, p. 5. Retrieved from: [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/SRB/INT\\_CCPR\\_ICO\\_SRB\\_23561\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/SRB/INT_CCPR_ICO_SRB_23561_E.pdf) (date of access 7.9.2022.).



The second National Judicial Reform Strategy 2013-2018 was adopted with the aim to increase the quality of justice, efficiency, effectivity, and independence. The new court network was established in January 2014<sup>18</sup> to enable a reduction of the case backlog, and to provide more equitable case distribution and increase access to justice. During the implementation of the 2013 Strategy, new judicial professions were introduced (notaries and bailiffs). In addition, to address shortcomings recognized in the European Commission reports,<sup>19</sup> transparency of the judicial system increased, through the publishing of the HJC and the SPC decisions, and development of courts and public prosecutor offices (PPOs) websites.<sup>20</sup>

In 2020, the new Judicial Development Strategy was adopted to ensure further advancement of judiciary reforms in the next five-year period.<sup>21</sup> The Strategy's priorities remain similar to the previous policy documents: strengthening of judicial independence and prosecutorial autonomy; strengthening of integrity of judicial office holders; and the quality and efficiency of the judicial system.<sup>22</sup> Document was designed on the basis of directions and recommendations, issued by the European Commission in the Chapter 23 Screening Report,<sup>23</sup> and interim benchmarks contained in the negotiation position.<sup>24</sup> The aim was to enable full alignment with the EU standards and requirements and ensure closing of negotiations on Chapter 23.

It could be concluded that the 2006 and 2013 Judicial Reform Strategies, as well as 2020 Judicial Development Strategy were shaped by the European Union (EU) requirements for an efficient, quality, and independent judicial system. However, the application of the Strategies was mostly focus on improvement

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<sup>18</sup> Official Gazette of the Republic of Serbia, No. 101/2013.

<sup>19</sup> European Commission, Report on Serbia's progress in the process of European integration for 2015, SWD(2015) 211 final, p. 49; European Commission, Serbia 2016 Report, SWD(2016) 361 final, p. 55.

<sup>20</sup> USAID, Rule of Law Project, Assessment of the Implementation of the National Judicial Reform Strategy 2013-2018, 1 November 2018, pp. 5-6.

<sup>21</sup> Judicial Development Strategy 2020-2025, Official Gazette of the Republic of Serbia, No. 101/2020.

<sup>22</sup> *Ibid.*, pp. 6-7.

<sup>23</sup> Screening Report Serbia, Chapter 23 - Judiciary and Fundamental Rights, EU's Benchmarking within chapters 23 and 24 in accession negotiations with Serbia, Effects and Challenges, 2013.

<sup>24</sup> European Union Common Position, Chapter 23: Judiciary and fundamental rights, AD 20/2016, Brussels, 8 July 2016. Retrieved from: <https://data.consilium.europa.eu/doc/document/AD-20-2016-INIT/en/pdf> (date of access 7.9.2022.).

of efficiency, which is confirmed by the World Bank 2021 Judicial Functional Review.<sup>25</sup> In addition, the 2016 Action Plan for Chapter 23<sup>26</sup> is a strategic document which focuses on independence and efficiency of the judiciary, as well as impartiality, accountability, and professionalism/competence of its key players. The activities set forth in the Action Plan centered on the transfer of competences from the Ministry of Justice to the State Prosecutorial Council (SPC) and improvement of the capacities of the SPC.<sup>27</sup> The EU requirements called for amending Serbia's Constitution to ensure judicial independence and prosecutorial autonomy and remove any possibility of political influence over the justice system.<sup>28</sup>

### 3 PUBLIC PROSECUTION IN 2006 CONSTITUTION AND LEGISLATION

The 2006 Constitution guaranteed the autonomy and the unitary nature of Serbia's prosecution system.<sup>29</sup> The principal purposes of the system were the prosecution of perpetrators of criminal offenses and other punishable actions (e.g., misdemeanors and commercial offenses), and taking measures to protect constitutionality and legality.<sup>30</sup>

Prosecution service is not formally part of the judicial or executive branch, instead occupying a *sui generis* position. According to the Law on Public

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<sup>25</sup> World Bank, (2022) 2021 Serbia Judicial Functional Review, report no. AUS0002939.

<sup>26</sup> Action Plan for Chapter 23, Republic of Serbia, Negotiation Group for Chapter 23, April 2016, Retrieved from: <https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf> (date of access 7.9.2022.).

<sup>27</sup> Recommendation 1.1.3. Action Plan for Chapter 23. Screening report Serbia – Chapter 23 – Judiciary and Fundamental Rights, MD 45/14, 15.05.14. “A fair and transparent system of promotion of judges and prosecutors needs to be established, together with a periodical professional assessment of judges and prosecutors’ performance. A system to monitor and evaluate the application of those standards in practice should be established. The Councils should bear the responsibility for taking decisions on promotion, demotion or dismissal”.

<sup>28</sup> Screening Report Serbia – Chapter 23: “With the support of external experts, Serbia should make a thorough analysis of the existing solutions/possible amendments to the Constitution bearing in mind the Venice Commission recommendations and European standards, ensuring independence and accountability of the judiciary.”

<sup>29</sup> Article 156 of the Constitution of the Republic of Serbia, Official Gazette, No. 98/2006.

<sup>30</sup> Article 156 of Constitution of Serbia.

Prosecution,<sup>31</sup> the key principles guiding prosecutors' work are constitutionality, legality, independence, impartiality, and transparency. The Law also provides that all prosecutors are to be independent in their work, and that influence by the legislative or executive branch is prohibited.<sup>32</sup>

The 2006 Constitution led to changes in the organizational structure of the prosecutorial system, which includes public prosecutor offices (PPOs) of both general and specialized jurisdiction. General jurisdiction offices include the Republic Public Prosecutor's Office (RPPO), Appellate Public Prosecutors' Offices, Higher Prosecutors' Offices, and Basic Prosecutors' Offices. The specialized jurisdiction offices have been established for war crimes and organized crime.

The prosecution structure in Serbia is highly hierarchical. The RPPO is the highest prosecutors' office in the country and supervises all lower-level prosecutors to ensure their work is efficient and in accordance with the law. It also handles the application of extraordinary legal remedies.<sup>33</sup> The Law on Public Prosecution<sup>34</sup> makes lower-ranked Public Prosecutors subordinate to their immediately higher-ranked Public Prosecutors. The Republic Public Prosecutor is superior to all other prosecutors, and the RPPO is superior to all other PPOs, including the special jurisdiction PPOs. According to the 2006 Constitution every PPO was heading by a Public Prosecutor and all other prosecutors within a PPO are Deputy Public Prosecutors, which had as a consequence the exclusive responsibility of the public prosecutor for the work of the prosecution office while responsibility of the deputy prosecutor is weakening.<sup>35</sup> This is especially pronounced in prosecutor's offices with a large number of deputies, where the public prosecutor is responsible for the actions of deputies in whose decisions he has no real insight nor control.

The State Prosecutorial Council (SPC) was created by the 2006 Constitution to ensure autonomy of all public prosecutors. The SPC is chaired by the Republic

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<sup>31</sup> Official Gazette of the Republic of Serbia, No. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012, 121/2012, 101/2013, 111/2014, 117/2014, 106/2015, 63/2016.

<sup>32</sup> Article 5 of the Law on Public Prosecution.

<sup>33</sup> Extraordinary legal remedies are requests for reopening of criminal proceedings and requests for protection of legality and are regulated in the Criminal Procedure Code, articles 470-494.

<sup>34</sup> Article 16 of the Law on Public Prosecution.

<sup>35</sup> ILIĆ, G., MATIĆ BOŠKOVIĆ, M. and LAZIĆ, R. *Jačanje položaja, nadležnosti i integriteta Državnog veća tužilaca*, Belgrade : Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 2015, p. 19.

Public Prosecutor and its composition,<sup>36</sup> selection, mandate, organization, and manner of work are regulated by the Law on the State Prosecutorial Council.<sup>37</sup> The SPC proposes candidates to the National Assembly for the initial appointments of Deputy Public Prosecutors and the election of Public Prosecutors. It also determines whether a given Deputy Public Prosecutor receives a permanent appointment; prepares budgets for PPOs and the SPC, submits an annual report on its work to the National Assembly, and performs other tasks as prescribed by legislation. Although the selection procedure of the SPC members was not specifically criticized by the Venice Commission, the Venice Commission provided opinion on the selection of the High Judicial Council members, which is applicable also to the SPC. According to the position of the Venice Commission, the fact that all members of the Council are directly or indirectly elected by the National Assembly supports the understanding that the composition gave appearance of pluralism that is deceptive, that seems as a recipe for the politization of the judiciary.<sup>38</sup>

The prosecutorial system has undergone two significant reorganizations the past 12 years. The prosecutor's office network was reduced from 109 municipal PPOs to 34 in 2010, which also was the year that Appellate PPOs were introduced. Starting in 2014, the number of PPOs was increased to 58 Basic PPOs, while number of higher and Appellate PPOs remain the same.<sup>39</sup> Each reorganization of the network influenced on efficiency of the public prosecution due to disruption in the work organization, while mass transfer altered the incentives for the public prosecutors to commence or continue cases.<sup>40</sup>

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<sup>36</sup> There are 11 members: the President of the Supreme Court of Cassation, the Minister of Justice, the President of the authorised committee of the National Assembly as members ex officio as well as 6 judges (among them 1 from an Autonomous Province), 1 practising lawyer and 1 professor at a law faculty as elective member.

<sup>37</sup> Official Gazette of the Republic of Serbia, No. 116/2008, 101/2010, 88/2011 and 106/2015.

<sup>38</sup> Venice Commission Opinion No. 405/2006 CDL-AD(2007)004, para 70: "The 6 judges are not to be elected by their peers but by the National Assembly, the lawyer not by the Bar Association but by the National Assembly, the professor not by the Law Faculty but by the National Assembly. The judicial appointment process is thus doubly under the control of the National Assembly: the proposals are made by the High Judicial Council elected by the National Assembly and the decisions are then made by the National Assembly itself."

<sup>39</sup> Articles 9-11 of the Law on Seats and Territories of Courts and Prosecution Offices, Official Gazette of the Republic of Serbia, No. 101/2013.

<sup>40</sup> World Bank, (2014), Serbia Judicial Functional Review, p. 3 and 101.

Legislative amendments introduced substantial changes in the responsibilities of prosecutors, as well as instability in the system. The philosophical basis for the Criminal Procedure Code was changed three times – in 2001, 2006, and 2011, as Serbia went from an inquisitorial system to the introduction of adversarial elements. During the last decade, the Criminal Code has been amended seven times<sup>41</sup> to align criminal acts with the requirements from international treaties or the recommendations given by international organizations and bodies (GRECO, MONEYVAL, FATF, etc.). All these changes were also welcomed and closely monitored by the EU.

As of October 1, 2013, when the 2011 Criminal Procedure Code (CPC) took effect, prosecutors, rather than investigative judges, became responsible for supervising the investigation of criminal cases.<sup>42</sup> One objective of the 2011 Code was to shorten the investigative phase of a case by giving prosecutors specific authority over several aspects of case management. These include managing pre-investigation proceedings and giving directions to the police; deciding whether to undertake or defer criminal prosecution; conducting investigations; concluding plea agreement, agreements on alternative sentences and agreements on the testimony of a defendant against other perpetrators; filing and pursuing indictments before a competent court; dropping charges; filing appeals and submit extraordinary legal remedies against final court decisions.

The 2011 CPC also gave Public Prosecutors and Deputies Public Prosecutors discretion to make prosecutorial decisions, deferring prosecution for all charges that could result in up to five years of imprisonment.<sup>43</sup> These provisions of the CPC are not in line with the Constitutionally protected position of a prosecutor to act independently and resist undue influences, by initiating and pursuing proceedings when politicians or other powerful people are involved in a case.

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<sup>41</sup> Official Gazette of the Republic of Serbia No. 5/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016.

<sup>42</sup> ŠKULIĆ, M., ILIĆ, G. and MATIĆ BOŠKOVIĆ, M. *Unapređenje Zakonika o krivičnom postupku: de lege ferenda predlozi*, Belgrade : Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, 2015, pp. 12 – 14.

<sup>43</sup> KOSTIĆ, J. MATIĆ BOŠKOVIĆ, M. Diversion, Restorative Justice and Mediation in PIF Crimes – National Report Serbia, In LANCIOTTI, A., PISANI, M. M., BRIZIOLI, S. AND MARTE, S. (ed.) *The DRAMP Project Diversion, Restorative and Mediation Procedures*, National Reports, Università di Perugia, Department of Law of the University of Perugia, 2022, p. 522.



## 4 EU STANDARDS AND REQUIREMENTS

Although, the EU is based on rule of law values it is often discussed in the general and professional public whether the EU has common standards on the judiciary.<sup>44</sup> One of the reasons for discussion is the fact that EU standards in other areas of law are quite clear and precise, while the same cannot be said for the judiciary. The reasons for the lack of precision are linked with the significant differences among the Member States legal systems and different constitutional solutions concerning the organization of the judiciary, the relationship between the three branches of power, as well as formal guarantees of independence and impartiality of the judiciary.<sup>45</sup> Initially, the EU did not have the ambition of unifying organization of the Member States judicial systems, however the fall of the Berlin Wall and the large EU enlargement in 2004, opened the issues of European standards on judiciary.<sup>46</sup> The national judiciaries in the EU member states are different, and the constitutional solutions regarding the independence and impartiality of the judiciary also vary.<sup>47</sup> Nevertheless, the manner in which the rule of law is applied in the member states is of crucial importance for the

<sup>44</sup> MATIĆ BOŠKOVIĆ, M. & NENADIĆ, S. Evropski standardi u oblasti pravosuđa, In *Foreign Legal Life*, Vol. 62, 2018, No. 1, pp. 39 – 56.

<sup>45</sup> See: GUTMANN, J. & VOIGT, S. *Judicial Independence in the EU – A Puzzle*, ILE Working Paper Series, No. 4, Hamburg: Universität Hamburg, Fakultät für Rechtswissenschaft, Institute of Law and Economics, 2017. pages 21, Retrieved from: <https://www.econstor.eu/bitstream/10419/156756/1/ile-wp-2017-4.pdf> (date of access 7.9.2022.).

<sup>46</sup> In order for a country to become a member of the EU, it is necessary to fulfil the Copenhagen Criteria, which in relation to the judiciary imply the fulfilment of political conditions in the form of the stability of institutions that guarantee democracy, the rule of law, human rights and respect and protection of minorities, as well as administrative and institutional capacities for the effective implementation of the *acquis* and the ability to assume the obligations of membership. In relation to the judiciary and fundamental rights, the *acquis* is described in chapter 23 and refers to the preservation of the EU's development in the field of freedom, security and justice. In order to achieve this goal, the establishment of an independent judiciary is required, and in order to protect the rule of law, the impartiality, integrity and high professional standards of the judiciary are also required. It also requires a firm commitment to the elimination of external influences on the judiciary, as well as the provision of adequate financial resources and training. Corruption is recognized as a fundamental threat to the rule of law and an effective fight against it is required. Nevertheless, the provision and effective protection of fundamental human rights is a basic requirement for the judiciary of future member states.

<sup>47</sup> See: GUTMANN, J. & VOIGHT, S. *Judicial Independence in the EU – A Puzzle*, ILE Working Paper Series, No. 4, 2017.

EU. Since Council of Europe and its bodies, including the European Court of Human Rights, has longer focus on the rule of law standards, the EU fully accepted those values as its own and is further developing them.<sup>48</sup>

European standards are defined based on the set goals such as independence, impartiality, integrity, trial within a reasonable time and efficiency, while the instruments used to achieve these goals are different from country to country. The challenges raised in Romania and Bulgaria in the field of judiciary and the fight against corruption provided further incentives for the Council of Europe and the European Union bodies and institutions to standardize the criteria for measuring progress in the field of judicial reform and the achievement of European standards.<sup>49</sup>

While there are different prosecutorial models in Europe, there is a growing trend of strengthening the independence of public prosecutors in relation to other branches of government, especially the executive.<sup>50</sup> However, in some countries the subordination of the public prosecution to the executive may be a matter of traditional arrangements, in which the executive avoids intervening in individual cases or decisions, even though it has legal powers. Thus, in the Netherlands, the Minister of Justice is authorized to issue instructions to

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<sup>48</sup> See: Memorandum of Understanding between the Council of Europe and the European Union of May 2007.

<sup>49</sup> MATIĆ BOŠKOVIĆ, M. & KOSTIĆ, J. How to Build Common Features of the Justice Systems in Candidate Countries and EU Member States, In BLAŽO, O., MOKRA, L., MAČAJ, A., (ed.) *Legal Challenges for the new European Commission, Bratislava Legal Forum*, Comenius University in Bratislava, Bratislava: Faculty of Law, 2020, pp. 101 – 113.

<sup>50</sup> See: Council of Europe, European Commission for Democracy Through Law (Venice Commission), Report on European standards as regards the independence of the judicial system: Part II – The prosecution service, 3 January 2011, CDL-AD(2010)040, para. 26. The tendency to strengthen the independence of the public prosecutor's office was also noticed by the Vienna Commission. In Resolution 17/2, the Commission on Crime Prevention and Criminal Justice states „integrity, independence and impartiality of the public prosecutor's office is a key prerequisite for the effective promotion of human rights...” (preamble, paragraph 4). The Inter-American Commission on Human Rights states that „the public prosecution must be a body independent of the executive power and must have the guarantees of inviolability and other constitutional guarantees that exist for the courts” and „must have autonomy and independence from other branches of government” (IACHR, Report on the Situation of Human Rights in Mexico, OEA/Ser L/V/II.100, chap. V, paras. 372 and 381). The Rome Statute states that „The Public Prosecutor's Office must act independently as a body independent of the court” (Art. 42, Paragraph 1). „Neither the public prosecutor nor the deputy public prosecutor can participate in activities that may justifiably cast doubt on their impartiality” (paragraph 7) or which may „affect confidence in their independence” (paragraph 5).

public prosecutors that include the priorities of criminal prosecution, as well as instructions in individual cases to prosecute a person or to waive criminal prosecution.<sup>51</sup> The law regulates in detail the procedure for issuing individual instructions, which differs depending on whether it is a waiver of criminal prosecution or a decision to initiate criminal proceedings against an individual. However, in practice, the Minister of Justice refrains from issuing individual instructions and has not issued any instructions in an individual case so far.<sup>52</sup>

Although, the practice of non-interference of the executive power in the work of the public prosecution is long-lasting tradition, the problem of the lack of formal protection measures against possible interventions remains. In the era of strengthening of populist and right-wing political options it represents a risk of abuse in the future. Also, the existence of legal authority of the executive power can negatively affect public opinion.

The tendency to improve the independence of prosecutors is welcomed in the Opinion No. 9 of the Consultative Council of European Prosecutors on European norms and principles for public prosecutors where is stated that the independence and autonomy of the prosecution constitute an indispensable corollary to the independence of the judiciary. The Opinion indicates that the effective independence of the prosecutor's office also includes financial independence.

The European Court of Human Rights has rarely ruled on the independence of public prosecutors, and mostly in the context of the fairness of the overall procedure. In the cases *Moulin v France*,<sup>53</sup> *Kolevi v Bulgaria*<sup>54</sup> and *Medvedyev v France*<sup>55</sup>, the European Court of Human Rights decided whether the public prosecution service could be considered as independent as the court and took the view that this was not the case. In these rulings, the European Court of Human Rights stated the characteristics of independence: appointment and

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<sup>51</sup> VAN de BUNT, H. & VAN GELDER, J-L. The Dutch Prosecution Service, In *Crime and Justice*, Vol. 41, No. 1, 2012, p. 123.

<sup>52</sup> TAK, P. J. P. The Dutch Criminal Justice System, Nijmegen: Wolf Legal Publishers 2008, 53. Retrieved from: [https://repository.wodc.nl/bitstream/handle/20.500.12832/2945/dutch-cjs-full-text\\_tcm28-78160.pdf?sequence=1&isAllowed=y](https://repository.wodc.nl/bitstream/handle/20.500.12832/2945/dutch-cjs-full-text_tcm28-78160.pdf?sequence=1&isAllowed=y) (date of access 7.9.2022.).

<sup>53</sup> Application No. 37104/06, 23 November 2011, para 57.

<sup>54</sup> Application No. 1108/92, 5 February 2010, para 149.

<sup>55</sup> Application No. 3394/03, 29 March 2010, para 61.

guarantees against undue influence, influence of the executive on selection and career, and instructions from the Ministry of Justice.<sup>56</sup>

The European Court of Human Rights emphasized in its decisions that in a democratic society both courts and investigative authorities must be free from political pressure.<sup>57</sup> Also, the European Court of Human Rights highlighted that prosecutors must be independent in making decisions and in cooperation with other institutions should perform their duties without external pressure and interference from the executive or legislative authorities, respecting the principles of separation of powers and competences. Furthermore, the Court interpreted the independence of prosecutors in the context of general guarantees such as ensuring the functional independence of prosecutors from the internal hierarchy and judicial control of prosecutorial acts.<sup>58</sup>

The aforementioned standards have been applied as a lack of independence that can affect the fairness of the entire criminal justice procedure. Example of such interpretation could be seen in the case *Vera Fernandez Huidobro*,<sup>59</sup> in which the European Court of Human Rights stated that the guarantees from Article 6 should be applied to the entire procedure and that the violation of these guarantees can significantly jeopardize the fairness of the procedure, so the requirements of impartiality must also be applied to the prosecution. Investigative authorities must be impartial as long as their activities and decisions directly and unchangeably affect the later stages of the proceedings, including the stage of the main trial and the court's substantive decision-making. Also, this position implies that the authority that controls the pre-trial phase of the procedure must be independent, because the evidence gathered in this phase determines the framework for the indictment examination phase.

In cases involving politically motivated prosecutions, the European Court of Human Rights preferred to point to the negative consequences of a lack of independence on the enjoyment of certain rights rather than on the independence of the prosecution itself.<sup>60</sup>

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<sup>56</sup> ILIĆ, G. MATIĆ BOŠKOVIĆ, M. *Javno tužilaštvo u Srbiji – Istorijski razvoj, međunarodni standardi, uporedni modeli i izazovi modernog društva*, pp. 78 – 79.

<sup>57</sup> Case *Guja v Moldavije*, application No. 14277/04, 12 February 2008, para 86.

<sup>58</sup> Case *Kolevi v Bulgaria*, para 142.

<sup>59</sup> Case *Vera Fernandez Huidobro v Spain*, application No. 74181/01, 6 January 2010.

<sup>60</sup> Case *Salov v Ukraine*, application No. 65518/01, 6 September 2005.

Independence also includes guarantees against undue influence. Thus, Council of Europe in Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System from 2000, in paragraph 11 states are invited to take appropriate measures to ensure that public prosecutors perform their professional duties and obligations without undue influence or exposure to civil, criminal or other types of liability. In the Explanatory Memorandum of Recommendation Rec(2000)19, the concept of undue influence is defined as influence in cases not provided for by law and carried out by executive or legislative authorities, but also by economic and local political authorities. Another Council of Europe body, Group of States against Corruption (GRECO) has a similar point of view, which in several reports from the fourth round of evaluation recommended that member states should establish confidential counseling for prosecutors so that they can seek advice on appropriate behavior that is in line with ethical standards.<sup>61</sup>

## **5 KEY CHANGES INTRODUCED BY 2022 CONSTITUTIONAL AMENDMENTS**

The Constitution, as the highest legal act, tends to be long-lasting. The permanency of the Constitution gives stability to the legal system, and thus steadiness to society. Therefore, the question could be raised on reasons for amendments of 2006 Serbian Constitution that was adopted only 15 years ago. The main motivation for the amendments is obligations that the Republic of Serbia undertook in the process of the EU access to harmonize its legal system with EU standards and *acquis* in various areas, including the judiciary. As it is already elaborated, the reform obligations on the judiciary are listed in the Action Plan for Chapter 23.

The Action plan for Chapter 23 stipulates more precisely the results that should be achieved by the Constitutional amendments. According to the Action

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<sup>61</sup> GRECO Fourth evaluation round– Prevention of corruption in respect of members of parliament, judges and prosecutors, Compliance Report Serbia, 15 March 2018, GrecoRC4(2017)8; Compliance Report Georgia, 2 July 2019, GrecoRC4(2019)9; Evaluation Report Croatia, 25 June 2014, Greco Eval IV Rep (2013) 7E, etc.



plan for Chapter 23, the amendment of the Constitution should aim at securing a judiciary independent of political influence, specifically limiting the influence of the legislative and executive authorities in the process of selection, nomination, election, promotion, transfer and termination of office of judges, court presidents and (deputy) public prosecutors, which must be based on clear and objective criteria. To achieve this goal, the roles of the High Judicial Council and the State Prosecutorial Council in managing the judiciary, as well as in terms of supervision and control of work, must be strengthened.

During the process of preparation of the Constitutional amendments in 2018, the Venice Commission<sup>62</sup> and the Consultative Council of European Prosecutors issued their opinions on draft text.<sup>63</sup> The first round of opinions of both bodies on proposed provisions on public prosecution service was largely critical. Draft text was further revised, however, Consultative Council of European Prosecutors remained critical position. The draft amendment from 2018 have not been adopted by the Parliament and no further activities related to the Constitutional amendments were taken till 2021. In 2021, the consultation process regarding the amendment of the Constitution, as well as the public debate, restarted again in the more transparent and inclusive procedure. One of the important steps for increasing trust and transparency was establishment of the working group for drafting amendments,<sup>64</sup> so that professional and general public is informed on authors of draft text. In addition, the working group for amending the Constitution, as well as the relevant professional organizations, had the opportunity to discuss the new draft text with the members of the Venice Commission. The Venice Commission adopted a positive opinion on the Draft Act on Changing the Constitution of Serbia and the Draft

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<sup>62</sup> Venice Commission Opinion on the draft amendments to the constitutional provisions on the judiciary, CDL-AD(2018)011; Secretariat memorandum – Compatibility of the draft amendments to the Constitutional Provisions on the Judiciary in Serbia, CDL(2018)023.

<sup>63</sup> Opinion of the Consultative Council of European Prosecutors (CCPE) Bureau following request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the High Prosecutorial Council and the functioning of prosecutors, CCPE-BU(2018)3; Opinion of the Consultative Council of European Prosecutors (CCPE) Bureau following request by the Prosecutors Association of Serbia to assess the compatibility with European standards of the proposed amendments to the Constitution of Serbia which will affect the composition of the High Prosecutorial Council and the way prosecutors work, CCPE-BU(2019)2.

<sup>64</sup> The Parliamentary Committee for constitutional matter and legislation established working group for drafting text of the constitutional amendments in July 2021.

Constitutional Law for its implementation on October 18, 2021.<sup>65</sup> In the conclusion of this document, the Venice Commission praised the initiative of the Serbian authorities to amend the Constitutional provisions on the judiciary with the aim to harmonize them with European standards. The Commission assessed the consultation process, which preceded the preparation of the Draft, as sufficiently inclusive and transparent. However, the Venice Commission highlighted challenges of the political landscape in Serbia, specifically the fact that one party has the majority in the parliament and that there is no parliamentary opposition. Having in mind these challenges, the Venice Commission suggests that it is necessary to achieve a broad level of legitimacy for the Constitutional reforms, which would be achieved through an inclusive approach and actively seeking the participation of the opposition in the public debate. This also means that the Venice Commission suggested the active participation of the non-parliamentary opposition, which should act responsibly and contribute to the process of amending the Constitution.

In relation to the Constitutional amendments concerning the public prosecution service, the Venice Commission particularly praises the introduction of functional immunity for public prosecutors, the removal of the probationary period for prosecutors, the abandonment of the idea of dissolving the State Prosecutorial Council if it does not render a decision within 30 days, and most importantly - the removal of the competence from the National Assembly to elect court presidents and public prosecutors and decide on the termination of their office. However, the Venice Commission indicates that there is possibility for further improvement of the text and criticizes certain solutions. In relation to the prosecutor's offices and public prosecutors, several criticisms were made, which were remained in the final text of the amendments and repeated in the Venice Commission Opinion from December 2021.<sup>66</sup>

Since the criticized solutions remained in the adopted text of the Constitutional amendments, it is necessary to highlight them. The first issue concerns

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<sup>65</sup> Venice Commission, Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments, CDL-AD(2021)032. Retrieved from: [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2021\)032-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)032-e) (date of access 7.9.2022.).

<sup>66</sup> Venice Commission, Urgent Opinion on the revised draft Constitutional amendments on the judiciary, CDL-AD(2021)048, Strasbourg, 13 December 2021. Retrieved from: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2021\)048-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)048-e) (date of access 7.9.2022.).

the election of prominent lawyers as members of the High Prosecutorial Council (new title for the State Prosecutorial Council), specifically the introduced anti-deadlock mechanism if high quorums in the National Assembly for the election of prominent lawyers is not met. The Venice Commission believes that such a mechanism, embodied in the five-member Commission,<sup>67</sup> will become the rule rather than the exception. In that case, this mechanism would serve to avoid the election of prominent lawyers by the National Assembly, and it would represent a bypass mechanism that would enable politicized appointments of prominent lawyers.

The adopted Constitutional amendments provides fewer prosecutors in the High Prosecutorial Council (HPC) than the 2006 Constitution in the State Prosecutorial Council.<sup>68</sup> The Venice Commission stated that the amendments provide for the membership of two *ex officio* members in the High Prosecutorial Council, the Supreme Public Prosecutor and the Minister of Justice. As an ideal solution, the Venice Commission proposed that the membership of these two members should be excluded, however both *ex officio* members remained in the adopted amendments. According to the Venice Commission opinion, the overall composition of the HPC raised concerns since a majority of the HPC will act under the hierarchical control of the Supreme Public Prosecutors who will sit on the HPC. Furthermore, six out of 11 members of the HPC will be political appointees: four prominent lawyers would be elected by the National Assembly, the Supreme Public Prosecutors is elected by the National Assembly and the Minister of Justice is a political figure.<sup>69</sup> Adopted Constitutional amendments introduced the provision that the Minister of Justice may not participate in disciplinary proceedings, however Venice Commission refer to the GRECO position that presence of the Minister of Justice and the Supreme Prosecutor

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<sup>67</sup> Article 151 of the amended Constitution of the Republic of Serbia. The anti-deadlock commission for the election of prominent lawyers is composed of the President of the Constitutional Court, the President of the Supreme Court and the Supreme Public Prosecutor, Ombudsman and Speaker of the Parliament.

<sup>68</sup> Article 163 of the Constitution of the Republic of Serbia. Constitutional amendments changed the composition of the HPC 11 members: five members are elected by the prosecutors themselves, four prominent lawyers are elected by the National Assembly, and two *ex officio* members (the Supreme Public Prosecutor and the Minister of Justice). The number of prosecutors elected by their peers is therefore lower (six prosecutors elected by their peers is replaced by five prosecutors elected by their peers).

<sup>69</sup> Venice Commission, Urgent Opinion on the revised draft Constitutional amendments on the judiciary, CDL-AD(2021)048, para 28.

General on the HPC alters the balance between prosecutors elected by their peers and political nominees.<sup>70</sup>

The Constitutional amendments failed to incorporate budgetary autonomy of the High Prosecutorial Council. Transfer of budgetary competence from the Ministry of Justice to State Prosecutorial Council and High Judicial Council was postponed several times and a 2018 decision of the Constitutional Court blocked the planned transfer of full authority for the judicial budget from the Ministry of Justice to the HJC and SPC envisaged by the 2013 National Judicial Reform Strategy and the Action Plan for the Chapter 23.<sup>71</sup> It was expected that this problem could be overcome by the Constitutional amendments, but opportunity was missed.

Although the Venice Commission commented that the working methods of the High Prosecutorial Council should not be regulated by the Constitution, but by ordinary law, having in mind political climate and all challenges with the rule of law in Serbia the general principles of the HPC work should be included in the Constitution.

Related to the public prosecution, two amendments to the Constitution are significant. The first concerns the fact that the monocratic arrangement of the public prosecutor's office is abolished, which strengthens the internal independence of prosecutors, and leads to a greater demand of professionalism and accountability of individual public prosecutors. As a long-term impact, that solution should prevent the establishment of a clerical mentality among public prosecutors. The abolition of the monocratic arrangement also affects a greater degree of responsibility and transparency of public prosecutors in their actions. The second concerns the fact that the process of electing public prosecutors has been moved from the pure political sphere of the Parliament. The removal of the Parliament should reduce the political influence on the selection of public

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<sup>70</sup> GRECO IV evaluation round, Second compliance report, 26 November 2020, Greco RC(2020)12, para 48.

<sup>71</sup> Decision of the Constitutional Court No. IUZ-34/2016, adopted in December 2018. The amendments of the Law on Organisation of Courts which would have provided the legal basis for the transfer of all court budget responsibilities (Article 32 of the Amendments of the Law on Organisation of Courts, Official Gazette of the Republic of Serbia, No. 101/2013, 13/2016, 108/2016 и 113/2017), including the budget of administrative staff, were challenged before the Constitutional Court. In December 2018, the Constitutional Court decided that the challenged provisions were not in line with the Serbian Constitution and have hence annulled them.

prosecutors, which would lead to a gradual depolitisation of the prosecutorial system.

## 6 CONCLUSION

The EU influenced judicial reform and reform of public prosecution in Serbia, since the main EU standards on the judiciary were incorporated in the Serbian policy document (independence, efficiency, impartiality, accountability, competence). Under the influence of the European Union at the national level, the National Strategy for the Judicial Reform for the period from 2006 to 2012 was adopted, which was the first comprehensive national strategy in that area. 2006 Strategy was adopted to ensure implementation of the Constitution adopted in 2006 to reflect new direction after democratic changes in 2000. Despite new Constitutional and policy framework, in 2009, an unconstitutional national reorganization of the court network and the reappointment of judges and prosecutors were carried out. Due to these shortcomings the new policy documents and further reforms were needed. To overcome the problems identified during the implementation of the first Judicial Reform Strategy, a new Strategy was adopted in 2013 with the aim to improve the quality of the judiciary, efficiency, effectiveness, and independence. In January 2014, a new network of courts was established, and new judicial professions (notaries and bailiffs) were introduced. The latest policy document is the Judicial Development Strategy adopted in 2020 to ensure further improvement of the quality of work of the judicial system. The priorities remained similar to those from the previous strategy: strengthening the independence of the judiciary, prosecutorial autonomy, efficiency and quality of judiciary.

In Serbia the Public Prosecutor's Office is not formally part of either the judiciary or the executive branch, but it has a *sui generis* position. According to the Law on Public Prosecutors, it rests on the principles of constitutionality, legality, independence, impartiality and transparency and is independent of the influence of the executive power. In the previous period, the powers of the public prosecutor's office were expanded, and they were given the discretionary right to make prosecutorial decisions and postpone prosecution for charges that could result in a prison sentence of up to five years. To align the prosecutors'



position with the powers they have and to respond to the Venice Commission and EU recommendations, the Constitutional provisions should have strengthened the position of prosecutors to ensure they act independently and to be able to resist undue influence in cases that involve politically or economically powerful people. However, it was not an easy task, especially considering that the European standards in the field of justice are not precise enough but set an aim to be achieved, because the legal systems of the member states differ. National judiciaries at the level of the European Union have different constitutional solutions regarding the independence and impartiality of judges and autonomy of public prosecutors. Therefore, the task that Serbia as an EU accession country has is more complex. The Council of Europe and its bodies, as well as the European Court of Human Rights and EU Court of Justice, focus on the standards of the rule of law that has accepted these values as its own and has promoted them. In the field of justice, these standards are independence, impartiality, integrity, trial within a reasonable time and efficiency. However, the way in which they are defined in regulations and implemented in practice differs among the member countries. Though, it is noted that the practice of non-interference of the executive power in the work of the public prosecution is a long-standing tradition in EU member states, in some countries there is still a problem related to the absence of formal protection measures against possible interference in the work of the public prosecution. In the era of the strengthening of populist and right-wing options, this may represent a risk of influencing the work of the public prosecutor's office. Although the judgments of the European Court of Human Rights in several cases have taken the position that the Public Prosecutor's Office cannot be independent as a court, highlighted that prosecution independence is of great importance for decision-making, cooperation with other institutions and carrying out work without external pressure and interference from the executive or legislative branch. The lack of this principle can negatively affect the fairness of the entire procedure.

In February 2022 Constitutional amendments were adopted in the Republic of Serbia, which should strengthen the independence and impartiality of the judiciary and the public prosecution. The amendments included safeguards and strengthened the roles of the High Judicial Council and the State Prosecutorial Council to supervise and control the work of courts and prosecutor's offices. However, amending the Constitution was a long-term process that was followed by the Venice Commission and European Commission. In the Venice

Commission Opinion from December 2021, the introduction of the functional immunity of public prosecutors, the abolition of probationary work, as well as the revocation of the authority of the National Assembly to elect presidents of courts and public prosecutors and decide on the termination of their functions, were highlighted as a special success. However, the Venice Commission expressed concerns in relation to few solutions. One of the challenges that remained in the adopted Constitutional amendments is the possibility of electing four prominent lawyers to membership of the High Prosecutorial Council by the five-member Commission, which creates a possibility that these are politically eligible lawyers, which could have a negative impact on the independence of the public prosecutors' work. In addition, the membership of the Supreme Public Prosecutor and the Minister of Justice in the Council is also recognized as a shortcoming, since the Supreme Public Prosecutor is elected by the National Assembly, while the Minister of Justice is a representative of the executive branch and a political figure. From that reason their participation in the Council is not in line with the European standards.

All shortcomings identified by the Venice Commission should be addressed in the coming period to enable greater independence of the public prosecutor's work in the Republic of Serbia. In addition, the Constitution failed to ensure budgetary competences of the Council, as an essential precondition for financial independence of prosecution service and functioning of the system.

However, we must conclude that, compared to the previous period, significant progress has been achieved. Finally, among them, we would like to highlight the abolition of the monocratic arrangement of public prosecutions, as well as the election of public prosecutors outside the Parliament, which reduces the possibility of political influence. However, to assess the true effects of the Constitutional amendments it is necessary to analyze judicial laws that are under the revision, and it is expected to be adopted in early 2023. Moreover, only after the adoption of a set of judicial laws it will be possible to conduct their impact assessment and challenges in their application in practice. Having all that in mind, the Constitutional amendments present step forward in alignment with the EU standards and requirement, but only application will provide adequate insight in progress achieved.

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