

CHAPTER 8

THE ROLE OF THE POLICE IN THE PRE-TRIAL PHASE OF SERBIA

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ABSTRACT

The chapter explores the place, role and position of the police in the pre-investigative and investigative procedure as part of the criminal procedure understood in a broader sense. In addition to the analysis of Serbian criminal procedural legislation, the authors will try to observe this phenomenon even through comparative law and procedural rules in some Balkan and European countries. In addition, a short analysis of the decisions of the European Court of Human Rights and their impact on the position of the police will be carried out. As part of the empirical research, the authors carried out an analysis of the police activities in the (pre) investigative procedure in order to examine the use of certain procedural mechanisms in the fight against crime. Finally, a vision of a model that could serve as a leading idea in the organization and functioning of the police in the pre-trial phase of the criminal procedure is given.

Keywords: Police, pre-investigative procedure, investigation, public prosecutor

1. Introduction

The reform of criminal law legislation in the Republic of Serbia is a dynamic and permanent process that affects the work of both the judiciary and the police. Two of the main goals have been the reforms in Serbia's criminal procedural legislation that have long been started. The first is to create a normative basis for a more efficient criminal procedure, but also to implement a reform that should be in line with international instruments guaranteeing the human freedoms and rights in general. The second is the harmonization of the criminal procedural legislation of Serbia with the solutions present in contemporary comparative criminal procedural legislation (*A/N* primarily in the Eurocontinental) and the tendencies present in modern criminal law in general.¹ The third goal can be added to the creation of a complete, harmonized and non-contradictory normative legal unit, that is, the legal system in the country in order to increase the level of legal certainty of citizens and the rule of law.²

The end result of these 'reforms' is the current Criminal Procedure Code (CPC), which began to be implemented in full capacity at the end of 2013 for which it is 'free to state that the CPC of 2011 represents a radical break with Serbia's criminal process tradition'.³ From the aspect of policing, the most important aspect is the introduction of the so-called 'prosecutorial investigation' where the public prosecutor is in this system the 'absolute chief' (lat. *dominus litis*) of pre-investigative proceedings, which manages the work of the police and the implementation of certain evidentiary actions by the police.⁴ Regulation on relations between the public prosecutor and the police in the preliminary proceedings according to the provisions of the new CPC clearly indicates the intention of the legislature that the public prosecutor should take the leading role in collecting data and evidence that may lead to charge.⁵

The criminal proceedings in Serbia are divided into several stages in which the authorized state bodies play their role. The first stage is the pre-investigate proceedings,⁶ which is managed by the public prosecutor, and which, together with the police, works on the detecting and clarifying of criminal offenses through the use of operative-pursuit (exceptionally and

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- 1 Stanko Bejatovic, 'CPC Serbian the 2011-End to Reforms or Just One Unsuccessful Step Process of Reform' [2014] FLL 48
 - 2 Muamer Nicevic, Branko Lestanin, 'Proposals of Amendment of the Serbian CPC in Order to Improve Policing' [2018] JCCL 128
 - 3 Bejatovic, (n 1) 47
 - 4 Nicevic, Lestanin, (n 2) 128
 - 5 Aleksandar Boskovic, 'The Relationship between Public Prosecutor and the Police during Preliminary Proceedings According to the Serbian Code of Criminal Procedure' in *Thematic Conference Proceedings of International Significance 'Archibald Reiss Days'* vol. III (ACPS and GFILC 2014)
 - 6 Synonyms are preliminary inquiry, pre-trial procedure (proceedings) etc

evidentiary) measures. The second phase is previous criminal proceedings⁷ with first subphase an investigation (inquiry) in which the public prosecutor, with the help of evidentiary measures (general and special), builds the factual basis of a future indictment. The second subphase is charging in which main role have public prosecutor (who press a charge/raise indictment and send to a council for confirmation or rejection) and out-debate trial council (decides on the basis of the indictment and the evidences whether it's lawful and justified). The third stage is the main criminal proceedings, which is within the jurisdiction of the court, which seeks to resolve the criminal matter and reach a judgment. The fourth stage, which is of a facultative nature, is the proceedings for regular and extraordinary legal remedies.⁸

2. Pre-trial proceedings and police

By adopting the CPC in 2011, Serbian criminal procedural legislation introduced 'prosecutorial investigation' as an institute of adversarial (Anglo-American) criminal law, which aims primarily at respecting the cost-effectiveness and speed of criminal proceedings. The police were given the 'right' to carry out certain evidentiary actions in pre-trial proceedings, but also in the investigation when the public prosecutor entrusted them with the execution of those actions. The materials gathered by these police evidentiary acts constitute evidence in criminal proceedings.⁹ Although they accept the prosecutorial investigation as a good concept, the scholars focused on the Serbian criminal procedure tend to criticize the concept in detail for various reasons. First of all, the 'evidentiary power' of the evidence collected in the (pre) investigation is questioned, the disparate separation of pre-investigation and investigation with respect to the degree of suspicion (grounds of suspicion), use of evidence collected by the police, etc.¹⁰ Pre-investigation is a phase of the criminal proceedings in which the police and the public prosecutor work together to detect the crimes, prove them and find and apprehend their perpetrators, and precede the investigative phase of the criminal proceedings. This is a phase which, according to the CPC, is the procedural equivalent of an earlier pre-criminal procedure, in which the position of public prosecutor is quite similar to that of public prosecutor in pre-criminal proceedings.¹¹

7 Synonyms are preliminary proceedings, preceding procedure etc

8 Branko Lestanic, Zeljko Nikac, 'Fight against Cyber Crime in Republic of Serbia' in *Conference Proceedings of 9th International Crime and Punishment Film Festival: Justice in the Virtual World* (IUFL 2019) – forthcoming

9 ibid

10 See in Ivan Jovanović i Ana Petrović-Jovanović (ur.), *Tužilačka istraga – regionalna krivičnoprocesna zakonodavstva i iskustva u primeni* (OEBS 2014) [eng., Ivan Jovanovic and Ana Petrovic-Jovanovic (eds), *Prosecutorial Investigation - Regional Criminal Procedure Legislation and Implementation Experience* (OSCE 2014)]

11 Goran Ilić, 'O predistražnom postupku' in Milan Škulić, Goran Ilić i Marina Matić Bošković (ur.) *Unapređenje Zakonika o krivičnom postupku* (OEBS 2015) [eng. Goran Ilic, 'About Pre-investigate Procedure' in Milan Skulic, Goran Ilic i Marina Matic Boškovic (eds.) *Improving Criminal Procedure Code* (OSCE 2015)]

Pre-investigate proceedings have several characteristics: 1) Pre-investigation is conducted exclusively for the felonies prosecuted *ex officio* (Here, the felonies prosecuted on the victim's request and in a private lawsuit are completely unfounded. This is further reinforced by the fact that neither the Police Law nor any other procedural laws deal with these crimes e.g. disclosure, clarification, gathering of evidence, etc.); 2) pre-investigation is *informal in nature*, since as a rule, pre-investigate proceedings take operative actions to detect the felony and the perpetrator, although this does not exclude the possibility of taking evidentiary actions having evidentiary character; 3) pre-investigation is a kind of 'investigation' because it has the same purpose as the investigation itself; 4) the pre-investigation is initiated and conducted if there are basic suspicion that the crime was committed, which is the same level of suspicion as for the investigation; 5) the *public prosecutor* is the *de iure* chief of pre-investigation (lat. *dominus litis*), but pre-investigation are under the *de facto* control of the *police*, since conducting operational and evidentiary actions at this stage of the proceedings is within the competence of the police (first of all, due to the incompletely regulated leadership role of the public prosecutor and in this regard, the somewhat confused relationship between the public prosecutor and the police at this stage of criminal proceedings. The public prosecutor's office must make additional efforts to fully 'put' the police under its control); 6) pre-investigate proceedings can be said to be *more formal* in nature than the former pre-criminal procedure; 7) in pre-investigate proceedings, the *court* may also have appropriate jurisdiction (the pre-trial judge decides on custody, etc.).¹²

The role of the police can be sorted by different criteria, but for the purposes of this chapter, the most important criterion is the stage of (criminal) proceedings, or the purpose of the policing. Based on these criteria, the role of the police can be preventive (proactive) and repressive. Preventive role of the police involves working to prevent, first and foremost, felonies but also misdemeanors (and even economic offenses). Preventive work is not part of any criminal proceedings and is therefore not governed by the CPC but by the Police Law and other laws and secondary legislation. This activity consists in the constant presence of, above all, uniformed police officers in places where felonies and misdemeanors can potentially be committed (policing in community, patrolling, neighborhood policing, etc.). Also, the preventive activity of the police includes supervision of potential perpetrators of crime (recidivism), the protection of victims of crime from secondary victimization, as well as various programs for improving the safety of the local community.¹³ Repressive role of the

12 Paraphrased according *ibid*.

13 Further readings in Zoran Djurdjevic, Branko Lestanin, 'Intelligence-Led Policing in Ministry of Interior of the Republic of Serbia', in *Thematic Conference Proceedings of International Significance 'Archibald Reiss Days'* vol III (ACPS 2017)

police implies the actions after a felony or misdemeanor has been committed and involves the exercise of all statutory authorities to detect and clarify a felony. Further they need to gather all the necessary evidence to conduct a criminal proceeding, and to detect and apprehend the perpetrator of the crime. If it is proven that the defendant has committed the crime charged, the court will impose an adequate criminal sanction on him. This will achieve the full purpose of punishment and the purpose of work of all state bodies in the fight against crime, that is, preventing the perpetrator from committing crimes and influencing him from committing crimes in the future (*special prevention*), influencing others from committing crimes and expressing the social convictions for felonies, enhancing morale and reinforcing the obligation to obey the law (*general prevention*) and the realization of justness and proportionality between the felony and the severity of criminal penalty.¹⁴

Depending on the State administration system, the role of police in criminal proceedings also varies. For example, in Germany, the police have the right, on their own initiative, to take the necessary actions to clarify the crime, and then have the duty to inform the public prosecutor of the results of their 'investigation'. As a rule, the police themselves ends the investigation in such cases and then submit the results with their final report to the prosecution, which always retains the right to issue orders to the police.¹⁵ In some German provinces even catalogs of felonies have been drawn up to determine the manner of communication between the police and the public prosecutor's office, the needs and deadlines for early reporting and joint performance of certain evidentiary actions.¹⁶

Observing the police in the area, especially the members of the former SFRY, one can see a prosecutorial investigation as part of a criminal procedure managed by a public prosecutor and in which the police directly work on the detection and clarification of felonies, the gathering of evidence, etc. This similarity is understandable given the same criminal procedural heritage, tradition, mentality, culture, interplay, etc.

Looking at Croatia separately, one can see a specific feature specifically in the function of police investigator which Croatian Law on Criminal Proceedings define as a person who is authorized to carry out evidentiary and other actions under a special regulation issued by

14 According to article 42 (Serbian) Criminal Code (Official Gazette RS No 85/2005, 88/2005 – corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019)

15 Milan Skulic, 'The Dominant Characteristics of the Major Criminal Procedure Systems and their Impact on the Reform of the Serbian Criminal Procedure' [2013] *Crimen* 191; Same in Dragana Čvorović, 'Modern Tendencies of the Police Action in Criminal Procedural Legislation of Germany' [2018] *JICSR* 70

16 Josip Pavlicek, 'Investigators from the Police (Some Procedural and Administrative Issues)' [2012] *PS* 517

law¹⁷. Thus, the central role of the investigator is reflected in the authority to take evidentiary actions. In most cases, for the sake of criminal prosecution, but also the risk of delay, such actions will need to be carried out before criminal proceedings are initiated. The LCP authorizes the inclusion of an investigator in this process in Article 213 (1) only upon the order of the public prosecutor and sometimes judge of investigation. Thus, the investigator is very restricted in taking his/her own initiative action. This implies that the public prosecutor is informed of the crime in a timely manner so that he/she can independently take evidentiary actions or order them to the investigator.¹⁸ What is devastating is the fact that there has been a great bureaucratisation that has been wasted valuable time, especially in the case of urgent evidentiary actions.¹⁹

On the other hand, law enforcement agencies in the US conduct relatively independently a substantially informal investigation that ‘amounts to a factual clarification of a crime by performing all necessary actions by the police, with the possibility of a certain instructive role of the State Attorney.’²⁰

3. Police actions in pre-investigative proceedings

In the pre-investigative proceedings, the police take measures and actions that can be classified into four groups: 1) operational actions; 2) general evidentiary actions; 3) special evidentiary actions and 4) pursuit actions.

Operational actions are taken when there is a *basic suspicion* that *ex officio* prosecuted a felony was occurred. The purpose of operational actions is not to prove a felony, but to find the perpetrator, prevent his escape or hide or escape and hide his accomplices, then discover and secure traces of the crime and objects that can serve as evidence, as well as gathering any information that could be useful for successful conduct of criminal proceedings.²¹ Operational actions include: 1) requesting information from citizens; 2) searching of means of transport, passengers and luggage; 3) restriction of movement in a certain area; 4) identification of persons and objects; 5) searching of certain facilities and premises of state bodies, enterprises, shops and other legal entities; 6) gain access to the documentation of state bodies, enterprises, shops and other legal entities; 7) temporary seizure of documentation; 8) obtaining records of

17 Article 202 Law on Criminal Proceedings (Official Gazette RC No 152/08, 76/09, 80/11, 91/12 – Des. Of CC, 143/12, 56/13, 145/13, 152/14 and 70/17) further LCP

18 Josip Pavlicek, ‘The Role of the Investigator in the Criminal Procedure’ [2009] CACLP 897

19 Pavlicek (n 14) 516

20 Skulic, (n 13) 198

21 According to article 286 Serbian CPC

telephone communication, base stations used or locating the place from which communication is made, and 9) other necessary measures and actions.

The majority of operational actions are undertaken by the police on their own initiative without prior approval by the public prosecutor, except in the case of obtaining records of telephone communication, used base stations or locating the place of communication undertaken at the request of the public prosecutor, and with the warrant of the pre-trial judge. This does not mean that there is no control over the implementation of these actions. On the contrary, the police are obliged to inform the competent public prosecutor immediately, and no later than 24 hours after taking operational actions. Also, every citizen who has been subjected to an operative action has the right to file a complaint with a competent pre-trial judge.

When it comes to jurisdiction (competent prosecutor/judge), first of all, it refers to the so called ‘actual’ and ‘local’ jurisdiction of the public prosecutor’s office. Actual jurisdiction is determined on the basis of the tort (crime) criterion (gravity and type of felonies), as well as the status criterion ie perpetrator’s traits. The Basic Public Prosecutor’s Office acts in felonies for which a fine or imprisonment of up to ten and ten years is issued as the main punishment, if for some of them the jurisdiction of another court and in cases of international criminal assistance is not competent. The Higher Public Prosecutor’s Office acts in the felonies for which the punishment of imprisonment of over ten years is issued as the main punishment, for the ‘serious’ crimes (e.g., rape, murder, etc.) which are enumerated in Article 23 of the Law on the Organization of Courts²², and felonies committed by juveniles. Local jurisdiction is determined on the basis of the legally issued jurisdictional area of the competent court/prosecutor. The jurisdiction of a pre-trial judge determines the same as that of a public prosecutor’s office.²³

Looking at the comparative example of the case, the Croatian Law-maker has a similar solution. The Public Prosecutor has the right to order the police to collect the necessary information by conducting a ‘survey’ and taking other measures to collect the information necessary to decide on a criminal notification for felonies prosecuted *ex officio*. The police are obliged to follow the order of the Public Prosecutor and report on the results within 30 days of receiving the order.²⁴ The following operations can be distinguished as operational actions or ‘survey’ actions: 1) collecting information from citizens, 2) establishing identity

22 Official Gazette RS No 116/08, 104/09, 101/10, 31/11 – oth. law, 78/11 – oth. law, 101/11, 101/13, 106/15, 40/15 – oth. law, 13/16, 108/16, 113/17, 65/18 – Des. of CC, 87/18 and 88/18 – Des. of CC)

23 Paraphrased according Sasa Knezevic, *Krivicno procesno pravo – opsti deo* (1st edn, Pravni fakultet u Nisu 2016) [eng. Sasa Knezevic, *Criminal Procedural Law – General Part* (1st edn, Law Faculty of Nis 2016)]

24 Article 206x LCP

of persons, 3) controlling the operations of persons and legal entities, 4) temporary seizure of money, securities, objects and documentation.

The German police, on its own initiative or with the approval of the public prosecutor or investigating magistrate, may take the following actions: identification and verification of documents; interrogation of the suspect (ger. *Vernehmung des Beschuldigten*); examination of witnesses and experts (ger. *Vernehmung der Zeugen*); search of persons, apartments and movable property, photographing and taking fingerprints from a suspect; setting up checkpoints on streets and squares; physical testing; DNA analysis; seizure and control of telephone and other communications, etc.²⁵

General evidentiary actions are taken in order to prove the facts that constitute the characteristic of the crime, or on which the application of another provision of the criminal law depends. These evidentiary actions are generally undertaken by the public prosecutor but may entrust the police with the execution of certain evidentiary actions in accordance with the provisions of the CPC. General evidentiary actions that the public prosecutor may entrust to the police are: 1) questioning the suspect, 2) questioning the witness (*auth. rem.* questionable), 3) identifying persons and objects (with the obligatory presence of the public prosecutor), 4) certain types of expertise, 5) insight, 6) taking samples, 7) temporary seizure of objects, 8) search of an apartment and other premises and 9) search of a person. As certain evidentiary actions involve the restriction of basic human rights and freedoms, it is necessary for them to take prior approval (warrant) of the pre-trial judges to take them. Such sampling shall be undertaken at the behest of the public prosecutor or court. The search is an evidentiary action, as a rule, taken at the warrant of a pre-trial judge at the reasoned request of the public prosecutor, and only exceptionally without a warrant when issued by the CPC. Serbian CPC also includes the detention of a suspect in the evidentiary actions, which is essentially a measure to secure the suspect during the proceedings.

The evidentiary actions taken by the police in Croatia are: 1) search (persons, apartment and other premises, movable objects and bank safe), 2) temporary seizure of objects, 3) insight, 4) taking of fingerprints and other body parts, 5) examination witnesses (*A/N* questionable), 6) recognizing of persons, 7) expertise, and 8) checking the establishment of telecommunication contact. Considering the systematic nature of the LCP, it is concluded that this action is, in fact, an evidentiary action, with Art. 339a LCP provides that if the telecommunication contact information was obtained without the order of the investigating

judge, or if the public prosecutor did not submit the warrant to the investigating judge within the issued time limit or if the public prosecutor's request for verification of the warrant to verify the establishment of telecommunications contacts was denied, then cannot be used as evidence in criminal proceedings.

Special evidentiary actions shall be taken in cases where there is *basic suspicion* that a particular person has committed a so called 'special felony'²⁶ and that there is no possibility of otherwise collecting evidence for the prosecution or that the collection of evidence would be significantly impeded. In certain cases, but only exceptionally, the court may order special evidentiary actions and if there is basic suspicion that one of the 'special felonies' is being prepared, and the circumstances of the case indicate that the felony could not otherwise be detected, prevented or proven or would cause disproportionate difficulty or great danger. The court is obliged, when deciding on the determination and duration of special evidentiary actions, to particularly assess whether the same result could be achieved in a way that lessens the rights and freedoms of citizens.²⁷

Special evidentiary actions include: 1) covert surveillance of communications, 2) covert surveillance and recording, 3) providing simulated bussines, 4) computer data search, 5) controlled delivery, and 6) undercover agent. Special evidentiary actions shall be taken solely on the order of the pre-trial judge, which must be separately substantiated with the exception of a controlled delivery ordered by the State Public Prosecutor or Public Prosecutor of special jurisdiction.

Comparatively observing the Croatian legislature classifies special evidentiary actions in a relatively similar manner, namely: 1) monitoring and technical recording of telephone conversations and other communications at a distance; 2) intercepting, collecting and recording computer data; 3) entry into the premises for the purpose of supervision and technical recording of the premises; 4) secret surveillance and technical recording of persons and objects; 5) use of undercover agent and trusted persons, 6) simulated sale and purchase of items and simulated giving a bribe and simulated taking a bribe, 7) providing simulated business services or concluding simulated legal transactions, 8) supervising the transportation and delivery of felony's items.²⁸ Pursuit actions include scheduling a search for the person

26 Milan Skulic, Goran Ilic, *Novi Zakonik o krivičnom postupku: kako je propala reforma, šta da se radi?* (Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije 2012) [eng. Milan Skulic, Goran Ilic, *New Criminal Procedure Code: How the reform failed, what to do?* (Association of Public Prosecutors and Deputy Public Prosecutors of Serbia 2012)]

27 Article 161 and 162 Serbian CPC

28 Article 332 LCP

and/or items being searched for. In the case of fugitive, in practice, these are persons suspected of having committed a certain felony and not available to the police to hearing or take other operational or evidentiary action (s). The police are also looking for felony's items such as stolen items, items that are the bearers of certain felonies and the like.

In addition to the aforementioned police, at certain stages of criminal proceedings, it also applies measures for ensuring the presence of the defendant and for the undisturbed conduct of criminal proceedings, namely: bringing the defendant; ban on accessing, meeting or communicating with a specific person and visiting certain places; and a ban on leaving the residence. All these measures are implemented by the competent court warrant. Bringing the defendant is directly performed by police officers, while in other measures the police can control the enforcement by the person to whom one of the measures has been determined. If ordered by the court, the police may temporarily confiscate a travel document or a driver's license for the duration of the measure.²⁹

4. Police and public prosecutor relationship in pre-investigate proceedings

Police and public prosecutors are two different public authorities (by their nature and procedural status in criminal proceedings) and form part of the executive authority. The public prosecutor's office can be said to be a judicial body at the same time. Both of these bodies have a judgmental role in pre-trial proceedings, which is why their relationship must be issued by regulations. More specifically for the functioning and relationship of these two State bodies, it is crucial whether the procedural law regulates at all and to what extent the activity of detecting and clarifying felonies before the commencement of formal criminal proceedings, as well as which bodies are entrusted with the pre-trial stages— inquest and investigation.³⁰ Comparatively observing, in criminal procedural theory, a distinction is drawn between Continental-European and English concepts. The basic feature of the first conception is that the public prosecutor manages the inquest and directs the police (France, Italy and Belgium). In Germany, the police are obliged to inform the public prosecutor of the results without delay. The English concept empowers the police to investigate felonies on their own, that is, without the control of the public prosecutor. Upon completion of the investigation,

29 Vanda Bozic, Zeljko Nikac, Branko Lestanin, 'Criminal Law Framework for Treatment and Use of Police Powers' in *Collection of Papers 'National and International Law-Current Issues and Topics'* vol 1 (FLP 2017)

30 Vojislav Djurđić i drugi, *Javno tužilaštvo i policija: izazovi tužilačke istrage* (Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije 2017) [eng. Vojislav Djurdjic and others, *Public prosecutor and police: challenges of prosecutor's investigation* (1st edn, Association of Public Prosecutors and Deputy Public Prosecutors of Serbia 2017)]

the police submit files to the Crown Prosecution Service, which decides whether to continue or suspend criminal prosecution.³¹

There are four systems in regulating the police/public prosecutor relationship in pre-trial proceedings. First, the criminal procedural legislation has provisions issuing the public prosecutor's jurisdiction (competence) and what police can or cannot do in pre-trial phase (e.g. Germany). The second system is that the criminal procedural legislation issuing the prosecutorial competence and police regulations consist of norms on police competence in pre-trial proceedings (e.g. Finland, Denmark and Sweden). The third system is characteristic of the Balkan countries ex- Yugoslav republic where both criminal procedural and police legislation issued police and prosecutorial competences in pre-trial phase of criminal proceedings. Additionally we can argue that there is the fourth system in the States of common law (but not exclusively) where case law can regulate the relationship between this two state bodies. Recently, there has been a significant influence of the European Court of Human Rights on criminal procedural legislation which, among other things, regulates the relationship between the public prosecution and the police (e.g. Croatia, Serbia). Cases in particular must be kept in mind *Maresti v Croatia*³², *Milenkovic v Serbia*³³, *Muslija v Bosnia and Herzegovina*³⁴ etc. The aforementioned cases relate to the application of the double jeopardy prohibition (lat. *ne bis in idem*), but it certainly affects the relationship between the public prosecutor and the police. Concretely, if there is a doubt as to whether the actions of the suspect realized a felony or misdemeanor public prosecutor must decide which proceeding will be conducted (criminal or misdemeanor).

Concerning the Serbian concept, the public prosecutor has very authorities toward police. First of all there is a general obligation for all authorities involved in pre-investigative proceedings to inform the competent public prosecutor of any action taken to pursuit for a felony and perpetrator. The emphasize is on that the public prosecutor is an authority over the police: the public prosecutor is empowered to order the police to take any action in order to detect crimes and find perpetrator; the police are required to comply with the public prosecutor's order; the police have a duty to keep him regularly informed of actions taken; the public prosecutor may take from the police any action at any stage of the pre-investigate proceedings. The public prosecutor also has disciplinary authority over the police, which

31 Goran P. Ilic, 'Relationship between Police and the Public Prosecutor's Office in the Light of the New Code of Criminal Procedure' [2011] JCCL 314

32 *Maresti v Croatia* App no 55759/07 (ECHR, 25 June 2009)

33 *Milenkovic v Serbia* App no 50124/13 (ECHR, 1 March 2016)

34 *Muslija v. Bosnia and Herzegovina* App no 32042/11 (ECHR, 14 January 2014)

is very important in context of managing the pre-investigate proceedings. In the event of failure to comply with his order, the public prosecutor may inform the police chief and initiate disciplinary proceedings against the responsible police officer. Whether disciplinary proceedings against the police officer considered by the public prosecutor to be responsible and what the outcome will be will be decided by the police disciplinary authorities. Official data from the Republic Public Prosecutor's Office indicate that no initiatives were initiated in 2012-2016 to initiate disciplinary proceedings.³⁵ However, another survey shows that public prosecutors nevertheless sought the initiation of disciplinary proceedings (4% of respondents) but the prosecutors did not know the outcome of such a request (91.7%).³⁶ The problem is that the chief of police, who has already been informed by the public prosecutor about not taking the ordered action, is responsible for initiating disciplinary proceedings, and the police did not take the action in spite of that.³⁷ In practice, there is a precedent for the public prosecutor to be informed of the actions taken by the police at the stage when everything is completed, and proposes that the prosecutor detain the person. In this way, the prosecutor represents only the 'contact point' that should provide the defendant with an attorney *ex officio*. Certain problems are identified in the relationship and cooperation between prosecutors and police officers in practice based on certain ambiguities, ignorance, lack of training, lack of interest and passivity. The fact is that neither individual police officers nor prosecutors, each on their own and for their own reasons, want to (fully) practically affirm the concept of 'prosecutorial investigation' – police officers do not want to lose earlier operational independence while prosecutors are reluctant to take a more active role in the investigation.³⁸ As can be seen, the public prosecutor only plays a superficial leading role over the police, but does not have realistic mechanisms to carry out his role in practice. This is especially pronounced when it comes to politically sensitive cases, corruption cases, suspected police officers and the like. It must be emphasized that both the police and the public prosecutor's office are subject to political influence, although organizationally the police are more vulnerable. This is confirmed by the fact that the police are located within the Ministry of the Interior, run by the Minister as a political figure.

35 Zeljko Nikac, Vanda Bozic, 'Legal and Institutional Mechanisms of External Control of Police' [2018] SPT 147, 155

36 Snezana Sokovic, Dragana Cvorovic, Veljko Turanjanin, 'Cooperation Between the Public Prosecutor and the Police in Serbia' [2016] CPFLNS 843, 855

37 Djurdjic and others (n 25) 13

38 Aleksandar Miladinović, Goran Amidžić 'Practical Aspects of Cooperation between Prosecutors and Authorized Police Officials in Investigation' in *Conference Proceedings 'Međunarodna i nacionalna saradnja i koordinacija u suprotstavljanju kriminalitetu'* (IAK 2010) [eng. Aleksandar Miladinovic, Goran Amidzic 'Practical Aspects of Cooperation between Prosecutors and Authorized Police Officials in Investigation' in Conference Proceedings 'The international and national cooperation and coordination in combating crime' (IAC 2010)]

Police operational independence is both a national and international standard. The European Code of Police Ethics in Article 15 recommends that ‘*The police shall enjoy sufficient operational independence from other state bodies in carrying out its given police tasks, for which it should be fully accountable*’.³⁹ In some ways, police are operationally independent of the public prosecutor’s office, but must be clearly and unambiguously identified. From the moment when the basic suspicion showing that a crime has been committed, operational independence of the police ceases and the public prosecutor assumes leadership. It should be added that operational independence of the police also means a clear separation of police managers from political decision- makers, strategic management and planning, career advancement, precise criteria of competencies required, and the like.

Although it is issued that the public prosecutor’s office receives reports on felonies police was, are and will be the main ‘source’ for initiating criminal proceedings. Research conducted prior to the reform of the criminal justice legislation in Serbia indicates that in 96.3% of cases the police appear as the submitter of the criminal report to the public prosecutor.⁴⁰ More recent surveys provide slightly different data where the police appears as the submitter in 58% and the victim in 29% of cases.⁴¹ These data show us that procedural legislation reforms have strengthened the role of the public prosecutor’s office and that citizens as victims of crime are increasingly turning to the public prosecutor’s office. However, police stays the dominant authority for receiving criminal reports and submitting them to the competent public prosecutor’s offices. This is expected given the organization and functioning of the police (permanent 911 services, presence of patrols, police officers in the local community⁴², etc.).

When it comes to cooperation between the police and the public prosecutor’s office, empirical research indicates that it depends to a large extent on personal relations, that is, on the very relationship between the leadership positions of the public prosecutor and the chief of police in a particular area. The main tool for communication is verbal communication and information gathering request issued by prosecutor toward police.⁴³ Studies show that one of the most important police activities is the undertaking activities on the crime scene.

39 Branko Lestanin, Zeljko Nikac, *Komentar Zakona o policiji* (prvo izd., Poslovni biro 2016) [eng. Branko Lestanin, Zeljko Nikac, *Commentary of Police Law* (1st edn, Poslovni biro 2016)]

40 Aleksandar Bošković, *Radnje policije u prethodnom krivičnom postupku i njihova dokazna vrednost* (Institut za kriminološka i sociološka istraživanja 2015) [eng. Aleksandar Boskovic, *Police Actions in the Preliminary Criminal Proceedings and Their Probative Value* (Institute for Criminological and Sociological Research 2015)]

41 Djurdjic and others (n 25) 85

42 Further readings in Željko Nikač, *Policija u zajednici* (drugo izdanje, Kriminalističko-policijski univerzitet 2019) [eng. Zeljko Nikac, *Community Policing* (2nd edn, University of Criminal Investigation and Police Studies 2019)]

43 Djurdjic and others (n 25) 85 and 90

Usually, the police first find out the felony. However, the police have to inform the public prosecutor about that step. As it was can be seen, in the 86,1% the police inform the prosecutor before undertaking activities on the crime scene, but in the 13,9% it takes this step during the investigation on the crime scene. The fact that is especially troubling is notifying after the activities on the crime scene, which is not justifiable. The prosecutor goes to the crime mostly when he evaluates that it is necessary (96, 2%).⁴⁴

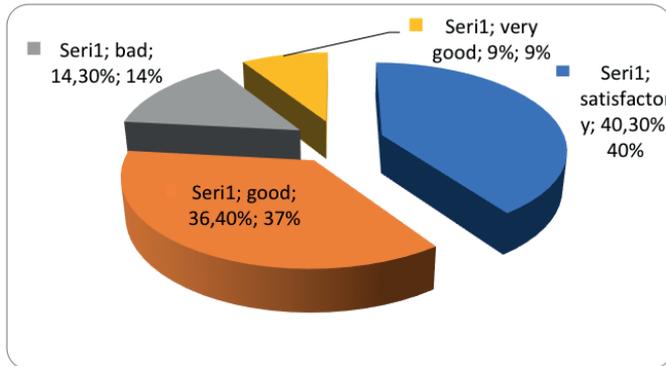


Figure 1: Attitudes of Serbian public prosecutors on cooperation with the police

Other studies show that cooperation between prosecution and the police is not very satisfactory (Figure 1) which is particularly evident when it is viewed from the perspective of the police where 14,3% of respondents defined this cooperation as *bad*; 40,3% as *satisfactory* and only 36,4% as *good* and 9% as a *very good*. Bearing in mind the position of the police and the public prosecutor in the concept of the new CPC, especially the leadership role of the public prosecutor in the preliminary investigation procedure, it is necessary to make the cooperation more qualitative by the authorization of the police and the new concept of investigation.⁴⁵ This result could be compared with another study which shows that 22,4% of the respondents in police consider this cooperation to be unsatisfying, 28,4% satisfying, 45,7% good and 3,3% very good⁴⁶ (Figure 2).

44 Snezana Sokovic, Dragana Cvorovic, Veljko Turanjanin, 'Cooperation between the Public Prosecutor and the Police in Serbia' [2016] CPFLNS 843, 852-853

45 Ibid. 850

46 Snezana Sokovic, Veljko Turanjanin, Dragana Cvorovic, 'Cooperation between Police and Public Prosecutor – Law and Practice in Serbia' [2017] CPFLNS 337, 342

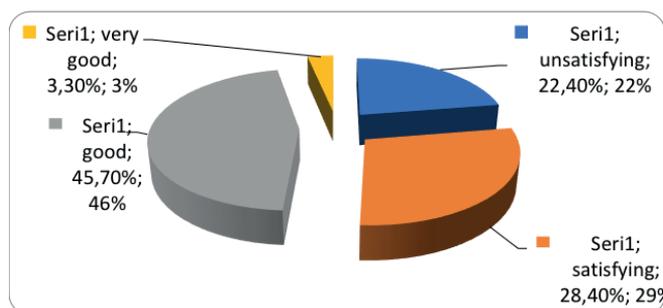


Figure 2: Attitudes of Serbian police officers on cooperation with the public prosecutors

It can be noted that the percentage of respondents who consider this cooperation to be poor is higher in comparison with results in prosecutors' offices, while the percentage of respondents who consider this cooperation to be very good is lower. Given the number of respondents from the last category, this difference can be considered negligible.⁴⁷

One of the possible solutions in the CPC that could potentially enhance co-operation is the mandatory meetings of the public prosecutor and the police, which do not aim to have general themes in the co-operation and each time concludes that co-operation is 'good'. On the contrary, meetings should relate to the analysis of specific cases and the evidentiary actions to be taken in those cases. Minutes must be kept of each meeting, signed by the competent (republican, higher, basic) public prosecutor and the head of the organizational unit of the police attending the meeting.⁴⁸ One study found that prosecutors were not very fond of this kind of cooperation with the police (Figure 3). Examination of police has shown that the percentage is even higher and that prosecutors do not like the meetings (Figure 4).

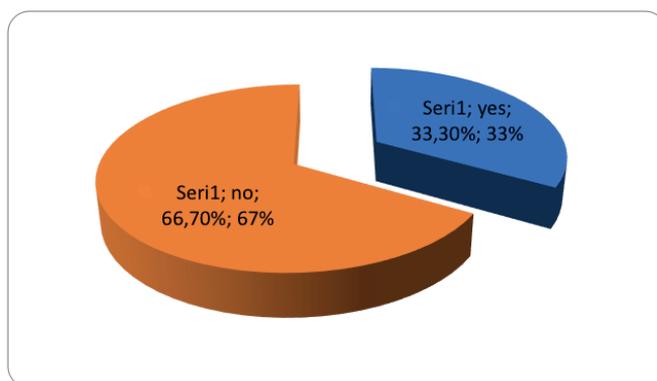


Figure 3: Answers of public prosecutors on question 'do you meet with the police to discuss the strategy of the investigation after the reception of the criminal report'

47 Snezana Sokovic, Veljko Turanjanin, Dragana Cvorovic, (n 45) 343

48 Nicevic, Lestanin, (n 2) 131

As expected, perception of the cooperation between police and prosecutors differs, whereby members of the police strongly believe that they are doing everything in their power to make this cooperation better, but that it is still not at a satisfactory level, nor is it adequately regulated by the existing legal framework.⁴⁹

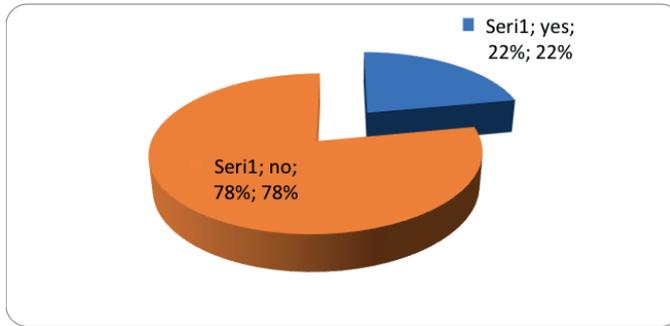


Figure 4: Answers of Serbian police officers on question ‘do you meet with the public prosecutors to discuss the strategy of the investigation after the submission of the criminal report’

According to some surveys, there are 90 public prosecutors in Serbia and 627 deputy public prosecutors, totaling 717 holders of public prosecution.⁵⁰ In Croatia, this number is smaller, where there are about 600 holders of public prosecution.⁵¹ On the other hand there are about 30 thousand police officers (or sworn officers) in Serbia⁵² and about 20 thousand in Croatia⁵³ organized into hierarchical police departments and central units equipped with the means to fight crime and long tradition in criminal investigations of crimes. The answer on the question who should investigate crime is more than obvious because it can be seen that the police are more capable of doing so, for now. However, the police cannot do this alone. The public prosecutor must be its controller, legal advisor, organizer and coordinator.

4. Conclusion

What are steps toward the ideal model of pre-trial proceedings? The answer on this question is everything but not easy to give. We will give a few propositions as following:

49 Snezana Sokovic, Veljko Turanjanin, Dragana Cvorovic, (n 45) 351

50 According to <https://www.uts.org.rs/index.php?option=com_content&view=article&id=1247:analiza-potrebno-g-broja-zamenika-javnih-tuzilaca-u-javnim-tuzilastvima-u-republici-srbiji&catid=56:vesti&Itemid=483#_ftn1> accessed 10 January 2020

51 Pavlicek (n 14) 519

52 Information Booklet of Ministry of Interior of Republic of Serbia <http://www.mup.gov.rs/wps/portal/sr/ministarstvo/!ut/p/z1/fY3BCoJAEEB_RQiPMaOHpY5CJGZR5KHayzKZxZbOrusofX5-QccHj_dAwXU002RfJNYxtTPfDLH9UEIOablqsi3mC1MilOpEtykUA3BnCuz2JMw7ED_t-ecffe9zkDXjqX5Clz9eG9tbdp5yTF6VzfCFGNn2Q5CYZDJxWj56UJH4kLkokCPMepGvyTwn_zyA2UgDHo!> accessed 10 January 2020

53 Pavlicek (n 14) 519

In a normative sense, States and decision makers can arrange in two ways the role of police in pre-trial proceedings and the relationship between the police and the public prosecutor. First activity of the police in the phase of detecting crime, cooperating with the victim until the filing of a criminal report, collecting information on felonies, and in general the complete procedure of 'policing the crime' could be *regulated by police legislation*. The role of police in the investigation phase would also be issued by police legislation. Of course, this implies regulating the role of the public prosecutor at this stage of the procedure and regulating the relationship between the police and the public prosecutor. The public prosecutor must retain a managerial, controlling, organizational and coordinating role at this stage of the proceedings with toward the police. This role of the public prosecutor is particularly important in cases where police, in accordance with the Constitution and law, restrict basic human and minority rights. In addition to the public prosecutor, the criminal court must have a controlling role over the police in order not to overstep the restriction on basic human rights. Second way for issuing the role of police in pre-trial procedure is by criminal procedural legislation. Considering that the investigation is considered to be part of the criminal proceedings (in broad sense), the role of the police at that stage of the proceedings should be issued by the criminal procedural legislation. In this way, the public prosecution and the police would be more closely linked at least legally observing. One legal act would include all norms pertaining to the work of the police and the public prosecutor's office at the pre-trial stage of the proceedings. Both solutions have their advantages and disadvantages. The first solution would promote the operational independence of the police in relation not only to the public prosecutor but also to other public authorities involved in the fight against crime. On the other hand, giving too much authority to the police without a proper control can lead to abuse of authority and to the distortion of the concept of lawful crime control. The second solution minimizes the operational independence of the police and even its creativity and initiative. The police rely too heavily on the public prosecutor and his responsibility to lead the pre-trial phase of criminal procedure. However, it must be borne in mind that the public prosecutor's *operational and criminalistics knowledge* necessary for this stage of the procedure is minimal. In addition, there may be a third solution to these two solutions, which is a mixed type in which the pre-trial phase is issued both by police and criminal procedural legislation. This solution may be ideal at first sight, but it can be very confusing when applied in practise. Police may refer to police legislation and public prosecutors to criminal procedural legislation. This could further cause problems in the co-operation and coordination of pre-trial measures and crime control itself. Regardless of which solution is chosen between the public prosecutor and the police in the pre-judicial phase, it must be regulated by secondary legislation. Without such

regulation, we face different interpretations of the provisions of the law, different application of the law, relationships depend on the personal relations of the public prosecutor and the chief of police and other similar problems.

The organizational aspect of the relationship between the public prosecutor and the police is related to the normative aspect mentioned above. There are legal systems in which criminal police and the public prosecutor are separate bodies of public authority, while in some systems they are within one another. Where the police and public prosecutors are separated, there is a high degree of operational independence, initiative and creativity in the work of the police in combating crime. On the other hand, in systems where the criminal police is organizationally part of the public prosecutor's office, the situation is quite the opposite because it lacks operational efficiency, there is a great bureaucracy, lack of criminalistics knowledge and the like. It can be concluded that in most legal systems where the legal acts governing the pre-trial phase of the procedure are separate, the bodies participating in the procedure are also separate.

Political decision makers need to have a clear view of what they want to achieve in criminal proceedings and thus conceptualize the pre-trial stage of the proceedings. Perhaps one of the first and proper steps could be to make recommendations by European Union level and to create standards for the police and public prosecutors at a pre-trial stage. This would leave room for Member States to retain something that is inherent and traditional while respecting standards.

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