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Policy

Independent state bodies

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CONTENT

Nothing New Under...The Institutional Sun

Separation of powers and checks and balances

In accordance with the principle of separation of powers in a system of electoral representative democracy, the parliament (the first branch), the government (the second branch) and the judiciary (the third branch) are the pillars of the institutional arrangements of democratic states. Separation of powers implies that each branch of government is independent of the other two. At the same time, their mutual relations are based on the principle of mutual checks and balances. These same principles apply to Serbia.[1] In the legal-

[1] Article 4 of the Constitution of Serbia envisages that „the Government system shall be based on the division of power" and that the relations among the three branches of government shall be based on "balance and mutual control".However, it is worth noting that in addition, Serbia has the President of the Republic. The regulation of his position is typical of institutional arrangements of democratic states. The President of the Republic is elected by citizens in direct elections, which gives his position i.e. the function he performs, a powerful democratic legitimacy.

The President of the Republic is also vested with some legislative powers: he promulgates laws and may return them to the Parliament for reconsideration. He is part of the executive branch of government, but also holds the key to constituting it – he proposes the candidate for the Prime Minister. The latter also makes him the guardian of a human right, namely the right to vote in elections thereby expressing the free will in elections, which is the basis of constituting any democratic government (the formation of the will of a political majority). He shares the role of an ultimate guardian of the Constitution and the constitutional order with the Constitutional Court. He also performs this role by being granted the right to appoint five judges of the Constitutional Court, which is the ultimate guardian of the Constitution, of the legal order and of human rights (it is empowered to decide on constitutionality, legality and constitutional appeal). In addition, from a list of ten candidates, which the President of the Republic submits to the National Parliament, the Parliament appoints five additional judges of the Constitutional Court (this is an example of the functioning of the principle of mutual checks and balances on which the separation of powers is based).

The President of the Republic is a part of the executive branch of government due to his competences in terms of the making of foreign policy and his competence to grant pardon and exempt some persons from enforcement of sanctions without having to consider the merits of court decisions, thus limiting the power of the second branch empowered to pronounce sanctions.

The responsibility and manner of dismissal of the President of the Republic can be interpreted in various ways. The decisions of the Constitutional Court are final,

political system of Serbia there are numerous control and regulatory state bodies, the common denominator of which is that they are (or are supposed to be), independent of the three traditional branches of government. The existence of independent bodies is not a specificity of Serbia nor a novelty in its political system, including the Socialist period based on the unity of powers. The separation of powers and mutual checks and balances are ideals which have always had to contend with aberrations from the norm. Frequently a state body which belongs to one branch of government is vested with powers which fall under the purview of another.[2]

In addition to bodies belonging to the three traditional branches of government, there have always been other state bodies which are independent from them. The reasons for their establishment have been various: the necessity to dispose with specific knowledge and the ability to apply it in order to safeguard the public interest; the will of society to (additionally) safeguard and protect certain values or principles which are especially important for the society above and beyond any ideological, political or particular interest (e.g. human dignity protected by a set of enshrined rights and freedoms and prohibition of discrimination); to boost accountability of holders of public office etc. For these reasons, since the 18th century, independent state bodies have gradually come to be established and vested with powers to control other state bodies and correct market imbalances so as to provide effective protection of principles and values on which the basic "social contract" is based.

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enforceable and generally binding (Article 166, paragraph 2 of the Constitution of Serbia). However, Article 118, paragraph 3 stipulates that: "The Constitutional Court shall have the obligation to decide on the violation of the Constitution, upon the initiated procedure for dismissal, not later than within 45 days". At the same time, paragraph one of the same Article stipulates that: "The President of the Republic shall be dismissed for the violation of the Constitution, upon the decision of the National Assembly, by the votes of at least two thirds of deputies". This means that it is theoretically possible for the Constitutional Court to ascertain that the President of the Republic has violated the Constitution, but that two thirds of deputies do not vote to dismiss him. This would violate the provision of Article 166, paragraph two of the Constitution, according to which decisions of the Constitutional Court are "final, enforceable and generally binding". Or perhaps the provision of Article 118, paragraph one, is an aberration from the rule stipulated by Article 166, paragraph 2?

[2] In the United Kingdom, until the constitutional reform in 2005, the upper house of the Parliament, the House of Lords, as a part of the first branch of government, had used to perform the functions of a Constitutional Court of the United Kingdom. Despite the guarantees of independence, the House of Lords Judicial Committee, which acted as the Supreme Court, the highest court instance, used to formally work and act as a part of the first branch of government. When the Supreme Court as an institution separate from the Parliament began to work, the President of the UK Supreme Court, Lord Phillips, confirmed that „...the old system had been confounding people. For the first time in Great Britain we have a clear separation of powers into judicial, legislative and executive branch. This is important. This emphasizes independence of the judiciary and clearly separates those who enact laws from those who enforce them."The Daily Telegraph, London, October 1, 2009.

A little bit of history

The institution of the Ombudsman was inaugurated by the Swedish Constitution in 1809. The Ombudsman was established as an independent body which, in the name of the parliament, supervised the legality of work of the government and state administrations. The Ombudsman was empowered to initiate appropriate proceedings in the case of unlawful conduct of the government (including a failure to enforce laws), the consequence of which was a violation of human rights. The institution of the Ombudsman has thus become inextricably linked to the idea of protection of human rights. In the legal order of Socialist Yugoslavia, there was some semblance of an institution of the Ombudsman through the institution of the social public attorney of Socialist self-management.[3] In the 1990s the discussion about whether there was a need to establish the Ombudsman in Serbia as an independent state body was resuscitated and despite politically motivated theoreticians managing to dispute its significance the institution of the Ombudsman was finally established by law (2005) as an independent state institution upon Serbia's admission to the Council of Europe. The institution of the Ombudsman was established directly by the Constitution (2006). Looking at the list of 16 independent state bodies presently operating in the legal and political system of Serbia, it is not difficult to conclude that discussions about the necessity to establish the Ombudsman as an independent state body were most controversial; the resistance towards its establishment being severe and the period of time elapsing from enacting the Law to its establishment within its constitution (the appointment of the first Ombudsman and his deputies) the longest. This is an important indicator of the quality of democratic political culture, the culture of observance of human rights and the self-perception of carriers of political power i.e. the governing authorities, and an indicator for understanding factual relations between the state and the citizens (subjects/citizens).

The era of enlightenment at the theoretical level "postulates publicity of all forms of state power",[4] and Sweden was the first in 1766 to legislate the right of access to documents and data in the possession of the public government. Gradually, the principle of openness of government has become an indisputable standard of democratic government, whereas the right to free access to information of

[3] cf. Bogoljub Milosavljević: "Ombudsman, zaštitnik ljudskih prava." Centre for Anti-War Action, Belgrade 2001; Prof. Stevan Lilić, mr Dejan Milenković, Biljana Kovačević-Vučo: „Ombudsman – međunarodni dokumenti, uporedno pravo, zakonodavstvo i praksa" [Ombudsman – International Documents, Comparative Law, Legislation and Practice], Yugoslav Committee of Lawyers, Belgrade 2002.

[4] Vladimir V. Vodinelić, Saša Gajin. „Slobodan pristup informacijama: ustavno jemstvo i zakonske garancije" [Free Access to Information: Constitutional Safeguards and Legal Guarantees"], Open Society Foundation, Belgrade, 2004.

public importance held by public authorities has attained the status of a basic human right. The Constitutional Charter of the State Union of Serbia and Montenegro granted citizens of the then state union the right to free access to information of public importance as a basic human right for the first time, while a special independent body - the Commissioner for Information of Public Importance - in charge of exercise and protection of the newly acquired right was set up under the 2004 Law. The 2006 Constitution of Serbia renamed the right to free access to information of public importance to the "right to information", merging it with the previously recognized right to (objective) information. The protection of this right was partly entrusted to a body inherited from the State Union of Serbia and Montenegro – the Commissioner for the Right of Information of Public Importance. The European Court for Human Rights in its verdict no. 37374/05[5] has effectively granted the right of free access to information of public importance the status of an individual human right, thus elevating it to the rank of rights and freedoms enshrined in the European Convention on Human Rights.

The revolutionary year 1848 gave a new boost to the principle of publicity and accountability of state government. Consequently, the question of accountability of the disbursal of public funds was emphasized and numerous European constitutions, including that of Serbia (1888), established special independent bodies which were the fore-bearers of independent state auditing institutions and auditing courts. The institution comparable to the present-day State Audit Institution in terms of its competences and position was the Main Control, introduced into the legal system of Serbia under the 1888 Constitution. Article 180 stipulated that "for auditing state bills, the Main Control is vested with a special jurisdiction..." It was appointed by the National Parliament "from a list of candidates made by the State Council" i.e. the Government (Article 180) "which contains twice as many candidates as there are vacancies". The members of the Main Control were "irremovable in their positions": meaning; irreplaceable. The "special position" which was subsequently elaborated and the permanency of tenure of members of the Main Control became the main guarantee of independence of this body.

The strengthening of the principles of publicity and accountability have naturally led towards the establishment of new independent controllers, the task of which was to ensure the enforcement of these principles in the discharge of public office above and beyond any individual political interest and to prevent any sort of "privatization" and political/party monopolization of public authority or the compromising of public interests and to ensure

[5] Case of Társagás a Szabadságokért v. Hungary, Application no. 37374/05, April 14, 2009.

integrity of the state and its bodies. Thus gradually bodies have been established with the task of preventing conflict of interests or abuse in public procurement procedures (implying the use of public funds and other kinds of abuse of public authorities for purposes serving particular or private interests which mostly acquire the form of corruption). In numerous countries which have had a pronounced problem with corruption and which have realized that it is in their best economic interest to solve this problem, special independent bodies have been set up to fight against it. The agencies for the fight against corruption in Singapore and Hong Kong have become the prototypes of such bodies in terms of their guarantees of independence, areas of jurisdiction and efficiency of work. An independent body of the same name was established in Serbia under a 2008 law, but, compared with the aforementioned agencies, the areas of jurisdiction of the Serbian agency are very limited (prevention of the conflict of interests, control of financing of political parties and their campaigns and control of assets and gifts reported by holders of public office).

During the twentieth century the rise of constitutional judiciary began i.e. the process of establishing Constitutional Courts as separate bodies which are not a part of the judiciary. They are entrusted with protection of basic constitutional tenets or basic values on which the valid "social contract" rests. Czechoslovakia was the first country which, under its 1920 Constitution, established the Constitutional Court as a separate body and entrusted it with control of constitutionality of acts passed by the Parliament. Numerous countries do not have separately established constitutional courts and instead vest the jurisdiction of a Constitutional Court in the highest judicial instance in the country. The US Supreme Court was the first court to annul a law due to its unconstitutionality (case Marbury v. Madison); consequently certain authors consider it "the oldest Constitutional Court". In the second half of the twentieth century constitutions of numerous countries, including SFRY and the Socialist Republic of Serbia, established constitutional courts as separate bodies entrusted with the role of an ultimate guardian of the basic principles on which constitutional order rests i.e. the interests of a democratic society and protection of the democratic order. After World War II, the model for many countries to establish a constitutional court was the Constitutional Court of FR of Germany, which was also granted (for some, the controversial) jurisdiction to decide whether to prohibit certain political parties; thus representing an instrument preventing promoters of non-democratic forms of rule and undemocratic values to come to power, (even if this be via democratic elections).

Moreover, in all modern forms of legal and political order, there is a central bank; an independent body entitled to exercise monetary power. Its position is located outside the traditional separation

into three branches of government (or it marks an aberration in a system based on the principle of unity of powers). As early as 1824, D. Ricardo wrote an article on the establishment of a central bank, saying that: "The government cannot be trusted to issue money because there is a huge probability that it would misuse this authority... Therefore I suggest to place the trust into a Commissioner appointed by one or even both houses of the Parliament. I propose to prohibit all kinds of monetary transactions among them... Under no circumstances should it be allowed to borrow the money from the instance which issues it". A similar point of view was taken by Keynes before the Royal Commission establishing the central bank of India in 1913: "...the ideal central bank should have the widest range of governing responsibilities, accompanied by a high degree of independence in the exercise of its areas of jurisdiction". As the former governor of the Australian central bank Fraser has said: "Even politicians who know that there is no long-term bargain between inflation and economic activity yield to the irresistible urge which tempts them to short-term exchange. The task of an independent and responsible central bank is to save them from this temptation." Today the independence of the central bank is a norm. The discussion is still going on whether the central bank should be tasked with setting the goals of monetary policy and if yes, to what extent, and whether it should be given full autonomy to use instruments for their attainment. But once this is settled, or once the law is brought, the central bank has to be independent in the exercise of its jurisdiction.

As a reflection of the need to ensure free functioning of the market, a fair market game and equality of subjects on the market, special independent state bodies are established in order to protect competition and/or regulate the securities' market. In some countries, e.g. Ireland, the jurisdiction for this is entrusted to the Central Bank. The bodies in this category – namely the Securities' Commission and the Commission for the Protection of Competition – were set up in Serbia after 1990, that is, after reintroduction of the principles of the market economy. The independence, the areas of jurisdiction and the ability of these bodies to effectively exercise their competences is a sensitive and complex question in countries which are "readopting" the principles of the market economy. Commonly in such cases the public sector is bloated, state aid a widespread form of state intervention in carrying out economic activities and the process of privatization widely accompanied by corruption, abuse or failure to exercise public authority, as well as various forms of dodging the law and acting against the public interest or interest of small shareholders.

In addition to these traditional independent bodies, in the second half of the twentieth century numerous independent regulators have sprung up as a result of the liberalization of the market and

the tendency to reduce regulatory authority of the government in the economic sphere.

Independent bodies in the overall institutional set-up

It is obvious that independent state bodies are not a particular novelty in various institutional arrangements of modern states. Some have such a long history that we can them traditional but almost all are associated with the need to ensure observance of basic tenets of a democratic state and protection of the public interest. Traditional independent bodies primarily play the role of controlling and correcting the three branches of government within the system of electoral representative democracy. The goal of their establishment is three-fold: effective observance of the principles on which the social contract of a democratic state is based; accountable i.e. public-interest-oriented exercise of the public authority; and protection of interests of a democratic society.

The novelty, which appeared in the second half of the twentieth century with the promotion of principles of the liberal economy are known as regulatory agencies. As already mentioned, they are the expression of a tendency to reduce the regulatory role of the state in the economic sphere and the conviction that the state should not act at the same time as the regulator and the actor (through state ownership) on the market. After the 1970s, the authority which had traditionally been exercised by the second branch of government, namely the executive, through various administrative bodies, were transferred, often uncritically, to independent regulators (agencies). This process is often termed the process of "agencification".[6]

Contemporary literature mostly classifies both kinds of bodies

[6] The modernization of regulatory systems in these areas is still an ongoing task in transition countries which lag behind in the process of deregulation and privatization and to which, Serbia included, comments made by OECD in 2003 still apply today: "The existing /regulatory/ entities do not function as truly independent regulators... Many countries do not have a uniform regulatory framework for the establishment and work of sector regulators. It is especially pronounced in terms of limitation of their jurisdiction, as real regulative oversight remains in the hands of the ministries" (cf. Stability Pact, South-East Europe Compact for Reform, Investment, Integrity and Growth, REGULATORY AUTHORITIES IN SOUTH EAST EUROPE, OECD, 2003). However, this question requires special consideration precisely in the context of EU accession. This is illustrated by the most recent "misunderstanding" between the countries signatories of the contract on the envisaged Southern Stream pipeline on the one hand and the EU on the other. The misunderstanding concerns precisely issues of diversification – demonopolization – prohibition of concentration of ownership in production and supply of energy and lack of harmonization of regulatory frameworks with the standards and requirements of the EU.

under the common heading of "independent and regulatory bodies", often causing numerous misunderstandings and doubts. This classification further complicates the debate about their position, their mutual relations, their relations with the bodies that belong to the three traditional branches of government, their democratic legitimacy and finally and most importantly, their accountability.

Regardless of the final answer to the question about justifiability of such an approach, each individual body from both groups has to meet the requirement of being established with an appropriate purpose and has to dispose with appropriate instruments to fulfill the purpose of its existence.

The reasons for establishing "independent bodies"

The reasons for establishing independent bodies and regulatory agencies can be classified into four groups, (which does not mean that they are not intertwined and that they do not intercept) namely:

1. **Protection of human rights.** The relationship between the state and the citizens should be a relationship of trust in which the exchange between loyalty and the protection of rights is made. However, history has taught us the citizens that the state, apart from protecting the rights, can also jeopardize them. Bearing in mind the significance of human rights, it is not surprising that precisely the Ombudsman was the first independent institution to emerge as a result of the need to additionally safeguard the rights of individuals vis-a-vis the state. This need has become even more acute in the era of ever increasing and extending complexity of state administration and excess of executive power. The Constitutional Court is an institution which, apart from protecting constitutionality and legality, also plays a role in protecting human rights and civic freedoms.[7]
2. **External government control**. The tendency of ever stronger executive branches, which emerged due to sweeping social and economic changes, require efficient mechanisms of control. The executive government, given that it disposes with instruments for rapid action, has acquired an "excess of power", which may disturb the system of "checks and balances". The legislative branch, to which the executive branch is accountable, must continuously advance and establish new mechanisms of

[7] The new Constitution of Serbia, in its Article 166, gives a modern definition of the Constitutional Court: "Constitutional Court shall be an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms".

control, as well as establish mechanisms of protection which are more efficient in terms of swift reaction than the ultimate judicial protection. Given that the nature of the parliament as a representative body is such that it does not permit adequate control for a number of reasons (slowness of response, insufficient expertise etc), the parliament transfers parts of its executive or judicial areas of jurisdiction to independent bodies which acquire either quasi-executive (e.g. Broadcasting Agency) or quasi-judicial functions (e.g. the Commissioner for Information as the second-instance/appeals body, whose decisions are enforceable, binding and final).

3. **Transparency, accountability and public integrity of state institutions.** The abuse of public authority and prerogatives of power is a danger which is possible within all branches of government and at all levels of authority. Corruption finds its way even to the highest levels of power. Although the classical separation of powers into executive, judicial and legislative branch, upheld by the principle of checks and balances, has attempted to curb and prevent corruption and dominance of any one of them, it has turned out that it is necessary, especially in some areas (finance) to activate additional mechanisms of protection. Political influence and political power have always been a way to amass fortune. The concept of accountability and public integrity requires responsible behavior of holders of public office and state administration, the policies and activities of which have to take into account the benefit of all citizens i.e. the public or the general interest. Independent bodies represent an additional mechanism for protecting the public interest, boosting accountability and preventing the abuse of prerogatives of power, so that bodies such as the state audit institution, the committee for the prevention of the conflict of interest etc, are established, the primary function of which is to ensure, either a priori or a posteriori, accountability in the discharge of public office.

4. **Stable development and protection of a free market** is another public interest considered to merit special protection, freed from any form of bias and politicization. Its safeguarding is as a rule entrusted to independent bodies, primarily central banks, securities' commissions (if this jurisdiction is not exercised by the central bank) and committees for protecting the competition.

5. **Ensuring achievement of the public interest through the rule of professions**. The increase of the number of areas and issues handled by the state in the era of "postindustrial society" is the environment which creates the need for unbiased (unpoliticized) decision-making and expert knowledge in making decisions. This group includes

bodies which are established with an intention to focus on formulating draft public policies.[8] Examples of such bodies are telecommunications agencies or education councils.

Areas of jurisdiction

In the departmental division of power, new institutions have to be coherently integrated into the institutional architecture of a state or a wider community such as the European Union. The basic principle which must accompany the decision to establish an independent body is the one investing it with its areas of jurisdiction, their scope and instruments for exercising them, which tightly correspond to the purpose for which the given body was established. A "lack" of jurisdiction implies that the very idea of establishing an independent body has been undermined, because such a lack makes this institution inefficient and superfluous from the start. On the other hand, when envisaged areas of jurisdiction exceed the required and defined purposes the new institution is meant to accomplish, it creates a danger of excessive concentration of power in the hands of a body the legitimacy of which is merely delegated.

The second principle is that areas of jurisdiction of an independent body ought not to be in conflict with areas of jurisdiction of bodies belonging to other branches of government. The ordering of relations among independent bodies with quasi-judicial competences and the judiciary is particularly sensitive, especially when complex issues associated with this question are viewed in the context of the right to a fair trial. A lack of practice and an excess of sensitivity regarding independence of this group of state institutions, requires additional attention when attempting to delineate areas of jurisdiction of independent bodies, especially when an independent body supervises other independent bodies (e.g. the Ombudsman supervises bodies entrusted with protecting competition etc.).

Clearly defined areas of jurisdiction and clear delineation of these areas in distinction to other state bodies are in themselves a guarantee of the independent position of an independent body.

Independence

Firm and effective guarantees of independence are a condition for independent state bodies to serve their purpose and fulfill the aims for which they were established: to ensure, in a way which

[8] The Uhrig Review and the future of statutory authorities, Parliamentary Library of Australia, www.aph.gov.au/library.

is unbiased and beyond and above any ideological, political or particular interest, timely protection of basic values of a democratic society and the public interest i.e. the interest of stakeholders in the case of regulatory agencies. Once established, they must have a certain degree of autonomy and their position defined so as to ensure equal distance from any interest- or stakeholder i.e. government, consumers and providers of services/producers.

There are no uniform solutions regarding *guarantees of independence;* however, independence is mostly assessed on the basis of the manner of establishment; which bodies appoint or propose candidates for appointment of members of independent bodies or their management; what guarantees pertain to its independent functioning i.e. guarantees of personal, financial and operational independence.

1. The manner of establishment. – Independent bodies may be established under the Constitution: this is considered to be the strongest guarantee of their independence; on the basis of a general provision contained in the Constitution it is stipulated that an independent body may be set up in a certain area, stating the guarantees of independence in such a case.
2. Personal independence. – Guarantees of personal independence pertain to the manner of appointing and dismissing members of steering committees of independent bodies i.e. their management; the length of their term in office and the extensiveness of immunity.

   2.1. Appointment. In a vast number of cases both globally and locally in Serbia there is a tendency to make the legislature (or a strong president in the presidential or the semi-presidential system) constitutionally or legally competent to appoint members of independent bodies.[9] In order to reinforce guarantees of independence some form of qualified or even absolute majority for the appointment of an independent body or a special procedure of proposing candidates can be envisaged. In older democracies there are exceptions when independent bodies (and also judges) are concerned, because sometimes they are appointed by the government. However in those systems the rule of law has become "the living norm" – namely a part of everyone's behavior rather than just a desirable normative principle; to such an extent that a lack of firmer formal guarantees of independence in terms of appointment of independent bodies rarely affects their functioning. Where agencies are concerned, members of these bodies are appointed

[9] When bodies are set up by the government, there is an apprehension concerning the lack of accountability and politicized acting on the part of the executive government. See P. Shergold, Regeneration: New structures, new leaders, new traditions, Speech, 11 November 2004.

- in accordance with the envisaged procedure - by the government upon the proposal of stakeholders. However in this case, the government must not in any way limit the independence of these bodies.

2.2. Dismissal. Important mechanisms of protection of personal independence are conditions and procedures envisaged for dismissal of members of independent bodies. When procedures for dismissing members of these bodies are too easy and disconnected from a direct relationship between the founder and the body, it may undermine the work of these bodies. This is particularly dangerous due to the possibility of politically motivated parliamentary initiatives (when a small number of deputies are empowered to launch an initiative to dismiss members of independent bodies or when the executive government, rather than the parliament, is empowered to launch such an initiative, it may facilitate pronounced politicization of the process of dismissal). The observance of the procedure and the criteria for appointing and dismissing members of independent bodies is a fundamental condition for establishing credibility and integrity of these institutions.

2.3. Length of the term in office, along with guarantees pertaining to the manner of appointing and proposing candidates, is often an additional guarantee of independence in the sense that the term in office of an independent body ought to be longer than the term in office of the body in charge of appointments.

2.4. Immunity is the fourth way of protecting personal independence enabling unhindered and free exercise of competences of independent bodies.

2.5. In addition, clear rules about financial reimbursement, provisions on incompatibility of government positions, prohibition of the conflict of interest and other provisions are important instruments which boost personal independence.

3. Financial independence is also one of the preconditions for full independence of these bodies. When a body does not freely dispose with financial means for its own work, this leaves room for the limiting of independence and possibility of undue (political) influence. Certainly, financial control of the work of independent bodies is necessary, in line with the legal order, but when the government is involved in approving an independent body's budget and executing it, the independence of such an institution is questionable. Therefore independent planning, presenting and justifying of a proposed budget before a body competent to decide on it, is considered to be

a guarantee of independence. However, an independent body should plan and tailor its budget to the economic situation and tendencies in the country, just like the government does (or should do).

4. **Operative independence** is the most difficult to attain. While the first two types of independence depend on legal regulation and established mechanisms for ensuring implementation and verification of legality (e.g. administrative procedures), operative independence concerns mundane functioning of an organization and depends on political and social processes which are extremely difficult to control. Operative independence implies freedom from any external pressure, timely enforcement of decisions and observance and enforcement of recommendations of an independent body. Very often these bodies have an advisory function and their power depends on how much their recommendations are observed, the kind of public image they or their management are able to forge etc.

Therefore strengthening output and performance legitimacy is an important instrument which may empower their operative independence; a precondition of accountability of these bodies that are primarily and mostly accountable to citizens themselves. The trust that citizens place in these bodies and their public support represents an additional instrument for strengthening their operative independence, along with other instruments which reinforce the internal integrity of the institution: clear procedures of work and decision-making; proactive transparency; internal control and exposure to external control of competent independent bodies (e.g. the auditor etc.).

Relationship with the judiciary

The question of the relationship between the judiciary and the independent bodies has two dimensions.

The first, less controversial, dimension is the one concerning the relationship between the judiciary and those independent bodies which are competent to exercise control over the judiciary. This competence of independent bodies is not necessarily "liked" by the judiciary, but the judiciary is obliged to be subject to financial control of a state auditor or a similar body; to observe the norms in the field of public procurement and areas of jurisdiction and decisions taken by an independent body in this area; to disclose data in its possession upon the request of the commissioner for public information or a similar institution; and to be subjected to control of the Ombudsman in countries in which such a competence has been envisaged. For example, the Ombudsman in Sweden has

competences in cases which concern the judiciary. Such a position is unique because in many countries areas of jurisdiction of the Ombudsman are limited and exclude the judiciary, and in some countries the police as well.

The second dimension concerns decisions which are taken by independent bodies in their areas of jurisdiction. As with other state institutions, decisions of independent bodies can be challenged in terms of their constitutionality before the Constitutional Court and the legality of their decisions and procedures can be challenged in administrative proceedings.

In the latter case, the debate is conducted into whether the judiciary should, could or would have the capacity to challenge the merit of their decisions (e.g. decisions taken by the central bank, by the body for the protection of competition etc.) or whether the judicial review should be limited to challenging the legality of the procedure in which they were made. If this dilemma is not resolved in the legislation, it may have numerous negative consequences; weakening the credibility of both the judiciary and independent bodies. However, even when legal solutions are clear, it often happens that independent bodies refuse to abide by court decisions (Serbia has experienced some independent bodies refusing to abide by decisions of the Supreme Court and despite and in opposition to court decisions they have continued to bring decisions with the same content e.g. the Republic Broadcasting Agency).

Nevertheless, the matter must be clearly regulated in accordance with Article 6 of the European Convention on Human Rights which envisages that any decision on civic rights and duties or on criminal charges has to be brought by "an independent and unbiased tribunal established by law" and that the parties must have the right to a fair and public trial within a reasonable time.

A particularly sensitive question is the issue of regulating relations of an independent body with judicial competences and the judiciary in cases when an independent body may be empowered to conduct an investigation or take a decision in a matter which effectively represents a criminal investigation (such procedures can be conducted primarily before commissions for the protection of competition).[10] The reason is that proceedings in criminal matters – unlike civil procedures – have to be conducted in accordance with guarantees contained in points 2 and 3 of Article 6. Namely, the European Court for Human Rights is particularly consistent in

[10] In practice, the decision on a merger is considered to be a civil procedure, while the proceedings in anti-monopoly matters are considered to be criminal proceedings. See more in: Competition Law Proceedings before the European Commission and the Right to Fair Trial: No Need for Reform. Global Competition Law Center, College of Europe, Bruges.

its requirement that criminal proceedings should strictly observe the right to defense and that provisions of Article 6 should be not interpreted restrictively. Additionally, the Court does not allow any sort of formalism and demands "to look behind the projected image and examine reality behind the given proceedings". Adhering to this logic, the ECHR has developed its own concept of "criminal charges" i.e. a criminal case[11] out of which the so-called Engel-criteria was subsequently developed on the basis of which it is ascertained whether a case can be classified as a criminal prosecution or not. The Engel-criteria examines the following: 1) how has the offense been classified in domestic legislation; 2) the nature of the offense; 3) the nature and the severity of envisaged sanction. It is important to notice that the given criteria do not have to be met cumulatively and that each of them does not carry the same weight (e.g. how the offense has been classified in domestic legislation is the least important). In its subsequent practice, the ECHR has elaborated the second and the third criteria from the Engel set of criteria. To ascertain the nature of the proceedings i.e. the offense, the following has to be taken into account: first, whether the norm refers to a group of people or has a general character, this is the basis on which to determine whether disciplinary measures or criminal sanctions ensue[12]; secondly, whether the nature of the envisaged sanction represents a compensation (for damages) or has a penal character and a deterring function[13]; and thirdly, whether the type of sanction and stigma associated with the offense are significant.[14]

Finally, it is important to underline that when exercising control of decisions and proceedings of an independent body, the judiciary must not jeopardize the position and the competences of an independent body.

Accountability

An independent body, just like any state body in a democratic society, is subject to the (constitutional) principle of accountability and publicity of its work. This obligation is more pronounced in relation to independent bodies than with other state bodies, because as guardians of the public interest they are vested with controlling and correcting powers vis-a-vis other bodies belonging to the three traditional branches of government, as well as the function of regulating issues in a way which transcends any political interest.

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[11] Engel et. al. vs. The Netherlanads, A 22, par. 81, 8, June 1978

[12] Bendemoun v. France, A 284, par. 46.

[13] Weber v. Switzerland, A 177, par. 33.

[14] See in: P. van Dijk, F. van Hoof, A. van Run& I. Zwaak: Theory and Practice of the European Convention of Human Rights, Intersentia Antwerpen/Oxford 2006

Apart from submitting their reports to the founder, independent bodies should find special ways and forms of communication with, and reporting to, the general public which enables the citizens to form an opinion about their work, dispute their decisions or launch a dialogue about issues in which they are particularly interested, be that; concern about the operations and effectiveness of independent bodies, their position or their relationship with other branches of government.

Transparency of work is a sine qua non of effectiveness of independent bodies. It should be not only passive (at the request of a citizen) but also active, disclosing information and data in their possession even when there is no legal obligation to do so.[15] Justification of their mission, function or jurisdiction and public extrapolation of certain decisions has to be an inherent part of the mandate and work of all independent bodies.

Accountability implies the establishment of democratic control over the work of independent bodies. Every state should determine which instance should be vested with the power to control the work of independent bodies.

The founder certainly has this right, and if an independent body has been founded under the Constitution, such a right should primarily be granted to the parliament. However, control of the work should pertain to control of the legality of the work of an independent body i.e. the way in which it exercises its areas of jurisdiction and to control of its finances. The founder should: control whether an independent institution exercises its areas of jurisdiction; be informed about conditions in which the jurisdiction is exercised and the problems in enforcing its decisions (recommendations); and, take measures in its jurisdiction to enable an independent body to act unimpeded in accordance with the given mandate. Judicial control of the legality of work of independent bodies and their financial operations should be the norm (which can be judicial – courts of audit or exercised by another independent body). To make control, including judicial control, possible and effective, reasons for every decision taken by independent bodies should be clearly stated. This requirement necessarily ensues from the principle of the rule of law as well as from the principle of transparency/publicity of work and represents the condition and the basis for a decision of an independent body to be challenged before a court. It is implied that every decision of an independent body should be in accordance with national legislation.

The control of the legality of work should be a posteriori control,

[15] For example, the Republic Electoral Commission would significantly boost its credibility and integrity if it had published, at its own initiative, the results of elections at every polling station in addition to final election results.

because otherwise it could turn into censorship of the work of an independent body. Contrarily, financial control can be exercised a priori (e.g. at the moment of adopting the budget).

The existence of various internal controls and publicizing of their findings also reinforces accountability of work of independent bodies.

"The fourth branch of government" – external control or the rule of experts???

The multiplying of independent state bodies which may have control functions vis-a-vis the three traditional branches of government, or may be competent to make policies and/or regulations in certain areas, has led the theory on these bodies to refer to them as "the fourth branch of government". The central issue in the debate between proponents and opponents of the idea about the fourth branch of government (in the making) is the question of the democratic (input) legitimacy of independent state bodies.

The adherents of the Schumpeterian model of democracy are skeptical towards the idea of the fourth branch of government because all state bodies that could possibly be classified into this group escape the chain of traditional delegation of sovereignty through direct elections by citizens to political bodies of government (parliament, government). Modern adherents of the Madisonian model of democracy – without questioning the Schumpeterian model of electoral representative democracy – recommend, together with the founding fathers, of the idea of the separation of powers; the fragmentation and limitation of political power in order to curb possible tyranny of the majority. They are more prone to the claim that independent bodies are the fourth branch (in the making), the basis of democratic legitimacy of which is the purpose to which they were set up "to prevent arbitrary use of political power". Those bodies, they say, are entrusted to safeguard "certain supreme values/principles on which the very social contract" (the constitution) "is based" against the so-called populist component of democracy and the passing political interest (mood).

The debate is made even more complex by the fact that numerous authors group together as independent bodies constituting "the (emerging) fourth branch of government" as not only bodies which protect basic constitutional principles, but also as" regulatory agencies", established in response to the liberalization of the market (sometimes exclusively) of public services (telecommunications, energy, transportation) with an aim of contributing to finding a balance between a natural monopoly and interests of consumers.

This is contentious issue and even generates conflicting practice in judicial practice, but it primarily pertains to regulatory bodies. The US Supreme Court has adopted a pragmatic attitude. In the case of Mistretta vs. US, the court was to decide about the constitutionality of setting up a Commission for Verdicts to which the Congress had delegated its powers in terms of issuing guidelines for meting out sanctions. The lawsuit claimed that this act violates the constitutional principle prohibiting delegation of legislative power. The lawsuit was rejected on the grounds that in a complex society, the parliament would not be able to exercise its competences were it to be denied the right to delegate jurisdiction to other bodies, in accordance with the general guidelines on the manner of exercising such jurisdiction. In the opinion of the Court, "delegation of jurisdiction is constitutional if the Congress clearly determines the general policy, the public body pursuing such policy and limits of jurisdiction of such a body". The Court further claims that the said body exercises vested competences instead or in the name of the parliament with an aim to strengthen control functions of the legislature. In accordance with this, having passed a law (general guidelines) on establishment and areas of jurisdiction of such a body and having appointed its members, the legislature ought no longer to interfere into its work because this would constitute a violation of its independence. The European Court of Justice has contrarily adopted the Meroni doctrine[16] according to which it is prohibited to delegate regulatory authority to other bodies. This has made agencies, as well as other independent bodies, mere administrative organs, which is reflected in the structure of Progress Reports the EU Commission issues on the fulfillment of goals of European Partnerships. However, the principles on which this court precedent has been based are being increasingly challenged and the debate on the fourth branch of government has picked up in Europe too,[17] which is a consequence of the fact that contents of EU institutional arrangements are significantly different from those which existed within the European Coal and Steel Community.

The proponents of the claim that regulatory bodies can be considered the "fourth branch of government" emphasize that their democratic legitimacy is based on knowledge which these bodies possess and which are the reason for their exemption from the chain of delegation of political power and on their effectiveness (output legitimacy). The critics of this view cite counter-arguments to the effect that: even after several decades of the existence of regulatory bodies there are no generally accepted criteria or evidence to substantiate this claim; it is not certain that any democratic deficit on the input side can be compensated with "the better quality" on the output side. Another group of authors propose that the dilemma concerning democratic legitimacy of regulatory agencies

[16] Meroni v. High Authority, [1957-58] ECR 133, at 151-52.

[17] See: http://www.jeanmonnetprogram.org/archive/papers/02/020201-03.html

can be solved by adducing procedural legitimacy i.e. accountability which can be established "top-down" – regulatory agencies are accountable to their democratic founders (the parliament, the government) or vice versa. A third group of authors attempts to construct new forms of accountability (reciprocal accountability etc.) which subsequently facilitate social construction of legitimacy of regulatory agencies.[18] The objection about democratic legitimacy of regulatory bodies primarily concerns the question how these bodies are appointed. However, a great number of authors maintain that direct election of members or just the election of top personnel to these bodies would not contribute to solving this issue. The consequence of direct elections would be that when performing their tasks, regulators would be driven by interests of consumers rather than producers i.e. service providers. This would undermine the very reason for their existence: objective and knowledge-based regulation of a certain area.[19] A part of this debate pertains to traditional independent bodies the primary function of which is to exercise control, with or without quasi-executive or quasi-judicial competences.

Finally, in order to make a difference between traditional independent bodies and regulatory agencies, an argument is put forward that regulatory agencies represent a form of self-regulation. It is considered that regulatory bodies (in some sectors, several sectors or infrastructural sectors) have a task to harmonize and strike a balance between the interests of stakeholders and simultaneously create a benefit within a new regulatory system i.e. creating conditions and advancing effectiveness of the sector as a whole. For example, structural reforms through privatization must ensure the following: protection of consumers from any abuse of companies which hold a significant share of the market; protection of investments from arbitrary government actions; and advancement of economic efficiency.

Further development of this debate and power of arguments propounded for and against the claim of the fourth branch of government depends on solving two issues: firstly, whether, to what extent and under which circumstances we agree to amend the definition of "democratic legitimacy" understanding it as a chain of delegation of sovereignty on the basis of a democratic voting right (Maggetti); and secondly, whether we share Vibert's[20] conviction

[18] see Martino Maggetti: „Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Review"; http://democracy.livingreviews.org/index.php/lrd/article/viewArticle/lrd-2010-4/30; Frank Vibert: The Rise of the Unelected, Democracy and the New Separation of Powers, Cambridge University Press 2007

[19] See T.Besley and S.Coate: Elected versus Appointed Regulators: Theory and Evidence; Journal of the European Economic Association, September 2003 1(5).

[20] Ibid.

that new separation of powers should be based on separation of empirical components of public policies on the one hand and value judgments on the other; because this makes a democratic system of rule stronger. However, it is probable that these issues will be resolved only after a previous issue has been discussed: namely, whether it is possible at all to group traditional independent bodies in the same category as "regulatory agencies" and whether all "agencies" – even those expressive of an additional concern about human rights – can be perceived in exactly the same way.

Regardless of the debate, it should be noted that the existence of independent state bodies brings distortions into the functioning and operation of the principle of separation of powers and engenders the re-distribution of competences which, had independent bodies not been set up, would have been entrusted to one of the three traditional branches of government. This fact serves as an argument reinforcing the requirement that when deciding about the establishment of independent bodies, a restrictive approach should be adopted and goals of their establishment should be very precisely defined. The last requirement is closely related to the principle of accountability in the exercise of public authority which also applies to independent bodies and to the need to control the work of the controllers themselves.

What does the EU require?

Institutional arrangements and the process of EU accession

In neither the Copenhagen Criteria nor the Acquis communautaire, does the European Union decree institutional architecture nor contents of institutional arrangements of its member states. However, in the process of accession, the Union assesses to what extent institutional arrangements guarantee and ensure the functioning of a democratic order, rule of law, observance of human and minority rights (the so-called political criteria), the functioning of the market economy (the so-called economic criteria) and efficient implementation and enforcement of European standards (which ought to be adopted in domestic legislation – harmonization) and EU norms (which apply directly in member states) i.e. the so-called EU Acquis communautaire.[21] In this sense, the existence of some institutions, the nature of which corresponds to the notion of independent bodies and their independence, are

[21] See Europeanization of Serbia: Capacities of Government and Local Self-Government Bodies, ed by Jadranka Jelinčić, Open Society Foundation, 2006;

a condition for joining the EU.[22] Thus for example the existence and effective functioning of a state auditor and an Ombudsman are explicitly mentioned as conditions in several documents which pertain to the process of accession and membership of Serbia in the EU. Following the logic of Acquis communautaire, the first and all subsequent national strategies i.e. plans to join the EU state the following: "In order to efficiently implement the competition policy, it is important to grant full institutional independence to the Anti-Monopoly Commission (Commission for the Protection of Competition)..."[23] This is an expression of correct and proper understanding that a member state has to ensure and guarantee efficient implementation of EU competition law and that practice shows that the best institutional arrangement for fulfilling the set goal is the existence and effective functioning of a special independent body. However, theoretically, Serbia could opt for another institutional arrangement if it could vouchsafe that the other arrangement would equally guarantee fulfillment of the projected objective.

... and (as the historians would say) the circumstances in Serbia

Institutional "circumstances" in Serbia are partially "messy" because institutional arrangements have been made chaotically (under pressure of the process of acquiring unwanted independence: SFRY, FRY, SUSM, Serbia), hastily (under the political imperative to achieve agreement among stakeholders, namely political elites, to the detriment of consensus among the citizens: 2006 Constitution), and through uncritical reception or rejection of institutions from previous forms of state order. A fascinating legal compound known as "the right to information" displays a lack of knowledge or understanding of the meaning of the newly established and previous non-existent institutions: all laws which pertain to these institutions – from bodies ensuring judicial independence to those which can be termed independent bodies – have been changed at least three times in a period less than ten years; partly as a consequence of the impatience of the international community (i.e. donors) to transfer their "best practices" into the barren soil of completely different institutional arrangements. The result is that the situation is at best, inconsistent, for example it is not clear why the parliament should appoint members of RATEL (Republic of Serbia Regulatory Agency for Electronic Communications and Postal Services) but not other agencies with similar tasks; or members of the Securities'

[22] Cf: Administrative structures required for implementation of the Acquis

[23] National Strategy of Serbia for the Accession of Serbia and Montenegro to the European Union, June 2005.

Commission which, due to the manner in which its competences are spelled out, can barely be termed an independent body.[24] The chaos and uncritical reception are also manifest in the way in which independent bodies are defined under the Constitution, causing confusion when it comes to strengthening positions of these bodies. A closer look at the provision of Article 95, point 2 of the Constitution of Serbia, which concerns the National Bank, reveals that the National Bank has been defined as an autonomous body, while the Constitutional Court has been defined under Article 166 as an independent body (but also autonomous in addition). Does this signify a difference in their position? If terminology used for independent bodies is compared to terminology the constitution maker uses to distinguish between the position of the judiciary (independence) and prosecution (autonomy)? Does this mean that the constitution maker wanted the National Bank to be a part of the second branch of government together with the prosecution? Or does it merely reveal the hasty adoption of terminology from the time when the principle of "unity of government" used to be valid? Can in this context the National Bank be considered an independent state body? In all probability, the constitution maker ought to have paid much greater attention to nomotechnics and the elaboration of the constitutional text ought to pay due attention to such details.

The situation is also "chaotic" when delineation of areas of jurisdiction are concerned, especially pertaining to the judiciary, but this will be discussed in separate sections devoted to each individual independent body.

When we talk about independent bodies in Serbia, just like in other countries, they can be classified according to numerous criteria. In this publication, we discuss only those independent bodies whose members are appointed by the National Parliament.[25] There are 16 such bodies in Serbia today.

The reason for the establishment (purpose)

All independent bodies in Serbia are established with a purpose of advancing instruments for the attainment of "the goals of

[24] The subject of this publication is not the complete institutional set-up of Serbia, but only those parts which pertain to independent bodies and only those which are appointed by the National Parliament. A critical analysis of overall institutional set-up of Serbia from the point of view of the process of Serbia's accession to the EU and the process of internal Europeanization is provided in the publication "Good Governance in Serbia – Institutional Arrangements and Participatory Quality of Decision-Making", 2010, www.fosserbia.org

[25] Ibid. v. "Agencifikacija"

governance" and advancing conditions for achieving the public interest.[26] According to the purpose and the reason for their establishment, these bodies can be grouped into several categories:

- **Bodies which safeguard the democratic order and ensure external control of government bodies.** This purpose is primarily envisaged for the Constitutional Court which is the last guardian of the Constitution, protector of the interests of a democratic society and protector of human rights. (1) The Constitutional Court is "an autonomous and independent state body which protects constitutionality and legality and human and minority rights and freedoms" and thereby all basic constitutional tenets. Everybody, including the parliament, which unlike the government is often exempt from any other control, is subject to control by the Constitutional Court, everybody except voters in a system of general/parliamentary elections. (2) The Ombudsman,has a controlling and correcting function. His/her basic task is to act as a defense mechanism against attempts to abuse public authority or use it in a way which would violate human rights and compromise human and civic dignity (maladministration). It is a body through which a citizen expresses and exercises his/her right to question the legality of the work of state bodies and honesty of law and legal rules of every kind.[27] The latter is the basic reason why the Ombudsman has the right to submit legal drafts.

  Another body can also be grouped into this category, is (3) the Republic Electoral Commission, a body which safeguards democratic grounds and legitimacy of the first and consequently the second branch of government and all other state bodies appointed by the parliament. At the same time, it is also a protector of human rights i.e. the active voting rights of citizens.

  The Constitutional Court, in its capacity to control and correct, also exercises external control of the government (protection of legality) together with other independent bodies, the primary role of which is to protect the principle of accountability in the exercise of public office and ensure public integrity of bodies such as the State Audit Institution or the Ombudsman (maladministration). The external control of independent bodies is a supplement to parliamentary control of the government, which, due to the nature of the legislative body, is

[26] Michael Zuern enumerates four basic goals of governance in complex societies: security (including safe living environment), welfare, legitimacy and forging of identity: Zuern, Michael, Democratic Governance Beyond the Nation State, Filip Višnjić, Belgrade, 2003, p. 30.

[27] Cf Linda C. Reif: Promotion of IHRL through the Ombudsman Office, u International Ombudsman Anthology, Ed. Linda C. Reif, International Ombudsman Institute, Martinus Nijhoff Publishers, 1999,

by definition slow, inadequate and insufficiently professional. On the other hand, the government/executive authorities dispose with the means for swift response. It enables them to acquire "an excess of power" which may distort the system of "mutual checks and balances"; it is also in the position to abuse its competences or not exercise some of them, consequently damaging the public interest or violating human rights.

In terms of external control, the Constitutional Court is an external controller of the judiciary, along with the State Audit Institution or the Commissioner for Information of Public Importance and Personal Data Protection, the task of which includes additional protection of human rights: the right to information and, indirectly, the right to privacy.

- **Protection of human rights** – The relationship between the state and the citizens should be a relationship of trust in which an exchange is made between protection of rights and loyalty. However, through history citizens have learned that the state, especially the government, may not only protect their rights, but also infringe them. He/she has also learned that judicial protection just like intervention of the parliament itself (e.g. through control and ultimately dissolving of the government) may not be a sufficiently efficient enough instrument through which to ensure protection of an individual's right vis-a-vis the state. The necessity for additional protection has become even more acute in a situation of increasing complexity of state administration and the acquisition of an "excess of executive power" by the government.

  In the contemporary political system of Serbia, protection of human rights is entrusted to several independent bodies which hold a controlling function.(4) The Commissioner for the Protection of Equality is responsible for controlling, correcting supposedly ensuring equal access to rights for all citizens regardless of their personal characteristics, that is, without any discrimination. The protection provided by the Commissioner for Equality is a supplement to the classical judicial protection of the constitutional tenet of prohibition of discrimination.

  In time, the list of human rights has been extended, some existing rights have come to demand additional protection and protection of some rights has come to require special knowledge and competences. This is the reason why protection of some human rights has been entrusted to other, specialized, independent state bodies such as: (5) the Commissioner for Information of Public Importance and Personal Data Protection which protects the right to information and indirectly the right to privacy, as well as the Council of the Republic Broadcasting Agency which basically has the obligation to protect the right

of citizens to objective information by guaranteeing freedom of electronic means of public information.[28] The role of the Constitutional Court, the Ombudsman and the Republic Electoral Commission in the area of protection of human rights has already been mentioned.

- **Publicity of work, integrity and accountability** are the principles on which the exercise of political power and public competences in a democratic society should be based. The legal postulating of these principles and their effective implementation aims to "ensure that the power is exercised in a way which is in accordance with values, purposes and duties for which certain competence has been granted to an institution or an individual – a holder of public office. And authority, that is, jurisdiction, is entrusted to state institutions or holders of public office for two reasons: in order to achieve the public (general) interest, but not to the detriment of human dignity, or in order to protect human rights".[29]

  According to their capacity to control and correct independent bodies: (6) the State Audit Institution; (7) the Republic Commission for Protection of Rights in Public Procurement Procedures; (8) Agency for the Fight against Corruption and the Commissioner for Information of Public Importance and Personal Data Protection are entrusted with a broad range of areas of jurisdiction which enable them to advance achievement of the principle of accountability, preclude or sanction abuse or failure to exercise vested powers and contribute to strengthening public integrity.

- **Sustainable development and market freedom** are the tenets of democratic states, the economic system of which is based on the principles of market economy, so (9) the National Bank, (10) the Securities' Commission, and (11) the Commission for Protection of Competition are three independent bodies the regulatory, control and corrective competences which are supposed to contribute to ensuring these principles beyond and above any particular political or personal interest and prevent any kind of abuse that may jeopardize their attainment. In the context of EU accession, these bodies have a special responsibility which pertains to increasing credibility and predictability of policies of national states. However, the Commission for Protection of Bidders' Rights should also

[28] CoE, Council of Ministers, Recommendation No. R (2000) 23 on the Independence and Functions of Regulatory Authorities for the Broadcasting Sector

[29] Cf. Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems, National Integrity Systems Assessment (NISA) ,Final Report , Griffith University –TIA-Australian Research Council, December 2005

be mentioned in this context, because it indirectly bears responsibility for the protection of competition.[30]

- "**Rule of experts**" – The multiplying of state functions and an increase in the number of areas and issues a state deals with in an era of "postindustrial society" is an environment which creates the need not just for unbiased (unpoliticized) decision-making, but also for expert knowledge in making these decisions. This group consists of bodies set up with the intention to focus on formulating draft public policies,[31] although some of them also have a regulatory function. The example of such bodies in the Serbian legal system are (12) the National Education Council; (13) the National Council for Higher Education which is also competent to set conditions for and carry out accreditation of higher-education institutions; (14) the Republic of Serbia Regulatory Agency for Electronic Communications and Postal Services (RATEL); (15) the Republic Broadcasting Agency (RRA); (16) the Energy Agency.

Area of Jurisdiction

The redistribution of areas of jurisdiction among various bodies within one branch of government, or bodies which belong to different branches of government, has to be assessed individually for each body (which will be provided in the text that follows) according to the sufficiency of instruments placed at their disposal in order to attain the purpose of their establishment; enabling it to function effectively, efficiently and responsibly. Grosso modo, areas of jurisdiction and instruments are adequately apportioned to independent bodies in Serbia and they are able, without major hindrances, to perform their tasks. The great question mark could be put next to the Securities' Commission, which lies somewhere between an administrative body and an independent body because some areas of its jurisdiction are of the first instance and some are delegated tasks.

Any requirement to complete institutional arrangements in terms of functioning of independent bodies causes many misunderstandings, to which the government (all governments since 2001) usually responds by not wanting to engage in a dialogue about an optimal

[30] The connection between public procurement and protection of competition was recognized by the Commission for the Protection of Bidders' Rights and organized in December 2013 the first working meeting with the Commission for Protection of Competition and the Public Procurement Office. See: htpp://www.kjn.gov.rs/sr/aktuelnosti/Radni+sastanak as well as www.balkantenderwatch.eu.

[31] The Uhrig Review and the future of statutory authorities, Parliamentary Library of Australia, www.aph.gov.au/library.

solution. The gist of such behavior on the part of the government is an attempt to regulate the position of whistleblowers and the government's tenacious refusal to at least justify its behavior. It illustrates completely different understanding on the part of the government and on the part of independent bodies themselves what these bodies are and what their purpose is. Therefore their mutual dialogue is urgent, given that such divergence of attitudes completely undermines the effectiveness of independent bodies.

Significant problems are encountered when the government or some other body is responsible for the implementation of decisions of independent bodies. For the present purposes it suffices to say that the government has never consistently implemented decisions of the Republic Broadcasting Agency on withdrawal of frequencies from certain broadcasters; illegitimate broadcasters thus continue to work for years after their license had been rescinded; without paying any fee for using the frequency and without attracting attention of the Commission for Protection of Competition for violating competition in the media sphere.

Such occurrences illustrate lack of responsibility on the part of executive government and weak control function of the parliament which should play a key role in improving the practice and sanctioning the government.

Independence

Manner of establishment

The bodies established directly under the Constitution are: the Constitutional Court; the Ombudsman; the National Bank; the State Audit Institution. Other independent bodies are established under the law. The members of both are appointed by the National Parliament (the management and the members of steering boards which steer the work of these bodies). The Constitution, unfortunately, does not contain a general clause which would allow establishment of other independent bodies which would more closely regulate conditions and the manner of establishment of other independent bodies, the manner of proposing candidates, the manner of making appointments etc. The possible negative consequences of such a solution is uncritical proliferation of the so-called independent bodies and delegation of competences among branches of government, which makes it harder to control their work and weakens the principle of accountability; on the other hand it weakens the guarantees of independence, because an independent body may be abolished at any moment and without too much explanation, just as it was established. The simple majority of votes

required for establishing and appointing members of independent bodies increases this type of insecurity and facilitates politicization of appointment procedures.

Personal independence

Independent bodies are appointed with a majority of votes of the total number of deputies in the National Parliament. Given how young Serbian democracy is and that sliding into politicization of the appointment process is quite easy (the telling examples are several appointments of the Governor of the National Bank since 2001) and given that independent bodies must be independent not only in their decisions but also in the manner of their appointment (especially so as to boost personal independence and integrity), there are many reasons to consider the idea to make a stronger qualified parliamentary majority, or even an absolute parliamentary majority, a requirement for the appointment of independent bodies.

The right to propose candidates for members of independent bodies is not uniformly regulated in Serbia. This is a good regulatory approach given the diversity of purposes for which independent bodies are established. A significant advancement and de jure strengthening of guarantees of personal and operative independence are all solutions which have been amended so as to transfer the right of proposing candidates for members of independent bodies from the government to the competent committees of the National Parliament. It has increased transparency of the appointment procedure and should strengthen accountability of the proposer, primarily those political actors who control the parliamentary majority. Whether this has de facto strengthened independence of each of the independent bodies remains to be seen on a case by case basis.

Financial independence

Financial independence of independent bodies has to be strengthened and each independent body has to have the right to autonomously justify a draft annual budget before the National Parliament. However, this is not the case. When planning the budget, independent bodies should take into consideration the existing macro-economic situation, which represents the guideline for the government in planning its annual budget.

Operative independence

The achievement of operative independence has to be assessed on an individual basis for each body in particular. Despite obstacles which come from the political sphere, it is important to recognize that attainment of operative independence largely depends on the independent bodies themselves, their relationship with their citizens, their demonstrated integrity and the high output and performative legitimacy.

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