

The independence of public prosecutors: international and European standards

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Reason for Prosecutorial independence

- Right to liberty and security of the person (Article 5 ECHR) and to a fair hearing... by an independent and impartial tribunal (Article 6 ECHR)
- Article 18 ECHR provides that restrictions under the Convention may not be applied for any purpose other than that for which they are prescribed
- No specific right to an independent prosecution but “the restriction of liberty permitted under Article 5 (1) (c) not only for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence, but also for other reasons” breached the Convention (*Lutsenko v Ukraine, Tymoshenko v Ukraine*)
- Politically inspired prosecutions and punishments are in blatant disregard of the core values of the ECHR (Harris, O’Boyle and Warbrick)
- Prosecutorial independence a safeguard against this risk

Diversity of arrangements

Functions of the public prosecutor: Council of Europe's

Recommendation REC (2000)19
1. "Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.

2. In all criminal justice systems, public prosecutors:

- decide whether to initiate or continue prosecutions;
- conduct prosecutions before the courts;
- may appeal or conduct appeals concerning all or some court decisions.

3. In certain criminal justice systems, public prosecutors also:

- implement national crime policy while adapting it, where appropriate, to regional and local circumstances;
- conduct, direct or supervise investigations;
- ensure that victims are effectively assisted;
- decide on alternatives to prosecution;

Prosecutorial Models

- Judicial/Executive/“Fourth Power”
- Independent/ Subject to Executive Control
- Hierarchical/ Individual Independence

Criminal Justice System

- Adversarial/Inquisitorial
- Opportunity/Legality Principle
- Jury/Judge only
- Prosecutors and Investigators
- Other functions- General Supervision, State representation

Prosecutorial Independence

- Purpose- to enable impartiality, fairness and integrity
- Distinguish between external and internal independence
- External- freedom from executive control
- Internal independence- absence of hierarchical control
- Hierarchical control: limitations and safeguards. Written instructions, reasoned decisions, remedy for unlawful instructions
- Nominally independent systems- Soviet model

Limiting executive control

- Control may be limited to policy questions and general instructions
- No instructions should be given as to how to act in individual cases or such instructions should be subject to limitations

Council of Europe's Recommendation REC (2000)19 of the Committee of Ministers of the Council of Europe to member states on the role of public prosecution in the criminal justice system

- 13. Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:
 - a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;
 - b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
 - c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
 - d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example: – to seek prior written advice from either the competent public prosecutor or the body that is carrying out the public prosecution; – duly to explain its written instructions, especially when they deviate from the public prosecutor's advices and to transmit them through the hierarchical channels; – to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;
 - e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
 - f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs d. and e. above but also to an appropriate specific control with a view in particular to guaranteeing transparency.

Venice Commission Report on European Standards as regards the Independence of the Judicial System: Part II- The Prosecution Service

Any 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government. (CDL-AD(2010) paragraph 30)

Limiting Hierarchical Control

- Written instructions only from superior
- Instructions placed on file
- General instructions only
- Safeguards against illegal instructions
- No negative instructions
- Freedom to present relevant arguments (duty to court may be relevant)
- Appeals to senior prosecutor or court

Kovalev Report

Needs Assessment Report Strengthening functional independence of prosecutors in Eastern European participating States, published on the OSCE/ODIHR website.

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- Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine
- Many guarantees for independence not implemented or neglected in practice
- Consultation on key decisions with senior prosecutors is common and their informal “approval” seen as necessary
- Issuing of verbal instructions common
- Junior prosecutors depend on the head of the service for career development, salaries and rewards, performance evaluation and sanctioning
- Hierarchical tradition of informal consultations and instructions
- Performance evaluations based on clearance and conviction rates without a meaningful qualitative component

Types of accountability of Prosecutors

- Obligation to explain decisions not to prosecute to victims:
EU Directive on the rights of victims
- Answerability to Parliament
- Disciplinary liability
- Answerable for the expenditure of public money
- Performance evaluation

PROMOTING INTEGRITY OF PROSECUTORS AND LIMITING CORRUPTION RISKS

- Prosecutors should be appointed, promoted and dismissed through an objective, merit-based, non-political process.
- Provide a reasonable remuneration and good conditions of service
- Promote a culture of pride in work and respect the integrity of their function
- Codes of conduct and ethics
- Clear rules on conflicts of interest and incompatibilities
- Clear, fair and efficient disciplinary rules and procedures
- Training as a right and a duty
- Transparency and documentation of decisions
- Clear guidelines regarding any exercise of discretionary powers

Threats and safeguards

- Powerful people who can affect the prosecutor's career (both external and internal)
- Political or business interests or criminal gangs
- Media pressures
- Protection by prosecutorial councils and courts
- Self-censorship
- Physical threats