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**Independence and accountability of prosecutors**

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1. Why independence of prosecutors matters?

1.1. Public prosecutors play a key role in the criminal justice system and are ones of its most powerful actors: they determine whether to divert a case, which crimes to charge, whom to charge and prosecute, and whether to negotiate and offer concessions to obtain a conviction without a contested trial.

1.2. The structure, organization and role of prosecution services vary from one state to another. They can be part of the executive power, or of the judiciary or be completely independent from both branches. Functions of prosecutors may also vary. For example, some operate a system of discretionary prosecution (the “opportunity principle”) while others operate a system of mandatory prosecution (the “legality principle”).

1.3. Notwithstanding this variety of institutional and legal arrangements, common features and values characterize the professional status and the ethical standards governing the conduct of prosecutors. As recalled by the Venice Commission, prosecutors are expected to carry out their functions fairly and impartially, regardless of their position in the criminal justice system.

1.4. Prosecutors have to be free from any undue external influence and must remain unaffected by individual or sectional interests and public and media pressures. This is of highest importance as prosecutors may have to take unpopular decisions, which may be the subject of criticism in the media or become the subject of political controversy.

1.5. As highlighted by the Venice Commission, “political interference in prosecution is probably as old as society itself”. Such undue interference may be aimed at prompting prosecutors to make incorrect decisions. Under undue influence, a prosecutor may decide to prosecute a case where there is insufficient evidence or on the basis of improperly obtained evidence. Undue influence may also lead a prosecutor to decide not to prosecute a case which ought to be prosecuted. These non-autonomous decisions jeopardize the fairness and the credibility of the administration of justice and consequently undermine the rule of law.

1.6. Independence of prosecutors is therefore of critical importance and a fundamental component of the administration of justice. This was underlined by numerous international and regional bodies such as the United Nations Office on Drugs and Crime, the Special Rapporteur on the independence of judges and lawyers, the Inter-American Commission on Human Rights, the Venice Commission of the Council of Europe, and the Consultative Council of European Prosecutors. Independent prosecutors, willing to investigate and prosecute, regardless of the status suspects may have in society, play a key role in strengthening the rule of law. Any influence that may affect the independence of prosecution is likely to affect the entire trial.

1.7. The independence of prosecutors is largely seen today as the corollary of the independence of judges even though the scope and elements of their respective independence are not identical. No instructions should be given to judges, who have to take their decisions exclusively on the basis of the law. Although, and by contrast, lawful instructions may be given to prosecutors within the terms of their hierarchy or general instructions in relation to an aspect of policy decided by parliament or government. Nevertheless, independence of prosecution services requires them not to come under any kind of influence in individual cases from any source outside of the prosecution service itself.

1. Components of prosecutorial independence

2.1. The independence of prosecution services is secured through various complementary means that can be divided into three categories: institutional independence towards other powers, organizational independence and individual independence.

I cannot detail all the different components falling under those three categories but I suggest to briefly mentioning the ones that sound of critical importance – also in light of long-standing problems or recent attacks to the independence of prosecutors we are observing around the world.

2.2. **Institutional independence towards other powers**: **appointment and dismissal processes** of the heads of prosecution services are of critical importance. International and regional bodies unanimously agree that the appointment and dismissal process of chief prosecutors should be robust in order to secure their independence. The applicable process should avoid political nominations or dismissal process that exposes them to political pressure or other external influence (we can think about influence coming from criminal organization that can even infiltrate the prosecution office).

Other relevant aspects in terms of institutional independence are 1. Whether **instructions can be given to prosecutors** (general and in individual cases); and 2. The **structure and functioning** of the prosecution service, including organizational autonomy in terms of budgets (allocation and management, hiring decisions, etc.)

What we are already doing within OSJI in that respect is

* Trying to strengthen the international standards and to have binding law regarding the appointment and dismissal processes of chief prosecutors (ECHR and Mexico – looking at IACHR)
* We gathered information about the appointment and dismissal processes in about 20 different jurisdictions around the world in order to better understand existing issues and best practices. Our report is about to be completed. I brought copies of an extract of the draft report, explaining links between appointment/dismissal and independence of prosecutors, international standards and the list of countries we examined. These copies are available here. The full version of our draft report is available upon request.

2.3. **Organizational independence**: Includes questions such as the allocation of resources within the office, the allocation of cases between members of the office (including distraction of a case from one prosecutor to another), decision-making on the merits of a case, instructions given by hierarchy in individual cases.

We know from experience that these internal and organization aspects can have damaging impact for independence of prosecutors that is to say their ability to conduct their prosecutions free from undue influence: distract a case from one prosecutor to another may be for example an insidious way to prevent a prosecutor from seeking for accountability in a particular (sensitive) case.

2.4. **Individual independence**: includes the basic requirements such as the status (appointment, security of tenure, salary, retirement), but also security, disciplinary proceedings, conflicts of interests, freedom of expression.

It should come as an evidence that guaranteeing a proper status for prosecutors is the first step to guarantee their independence. Without security of tenure or without a decent salary for example, prosecutors may be very much vulnerable to external influence and corruption. Likewise, without having their security guaranteed, prosecutors cannot carry out their duties with the boldness required for sensitive investigations.

1. Prosecutorial accountability

As a last word, I would like to underline also the need to secure accountability of prosecution services, as the complementary component of their independence. Prosecutorial independence and prosecutorial accountability are not competing ends but complementary means to strengthen and further the rule of law.

Two level of accountability must be explored:

3.1. Accountability of the prosecution office as a whole: for its actions and for the priorities defined by the prosecutor.

This raises various questions such as:

* + Are there public guidelines / prosecution policies, defining the priorities of the office
  + Does the chief prosecutor has to report and to whom? Publicly? In which extent?
  + Are there oversight or complaint mechanisms?

3.2. Accountability for individual decisions or for individual behavior, with questions such as

* + Are there remedies offered to victims to challenge individual decisions of prosecutors not to prosecute a case?
  + Are there ethical rules developed (code of ethics / conduct)?
  + Is there a general immunity or a functional immunity guaranteed for prosecutors?