

OPTIONS FOR INDEPENDENCE OF PROSECUTORS IN EXERCISE OF JUDICIAL FUNCTIONS, CURRENT SITUATION AND REMEDIES

**- Some issues of debate on the independence and accountability
of prosecutors. Situational and trend aspects -**

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ABSTRACT

The independence of justice is often debated in the Romanian legal community, regarding also the independence of prosecutors. The legislative changes are subject of review in accordance with international standards or approaches and national constitutional framework. From this dual perspective a set of reflections and requirements are presented to be taken into account in legislative review of prosecutors' status with their assigned professional rights and liabilities.

Keywords: *prosecutors, status, independence, accountability, relationship, separation of powers.*

Background context and present

In Romania, the role of Public Ministry and the prosecutors is determined by the Constitution² and by the statute of judges and prosecutors law³.

In order to guarantee the independence of justice a council for the judiciary has been established, called Superior Council of Magistracy.

According to these basic regulations within the judicial activity, the Public Ministry shall represent the general interests of the society and defend legal order, as well as the citizens' rights and freedoms. The Public Ministry shall discharge its powers through public prosecutors, constituted into public prosecutor's offices, in accordance with the law. The public prosecutor's offices attached to courts of law shall direct and supervise the criminal investigation activity of the police, according

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² The Constitution of Romania of 1991 was amended and completed by the Law No. 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I, No. 758 of 29 October 2003. The Law No. 429/2003 on the revision of the Constitution of Romania was approved by the national referendum of 18-19 October 2003, and came into force on 29 October 2003.

³ Law no. 303/2004 came into force on 27 September 2004 and republished in 2005 in the Official Gazette of Romania, Part I, No. 826 of 13 September 2005, with subsequent amendments.

to the law. The office of public prosecutor is incompatible with any other public or private office, except for academic activities.

Establishing the rights of prosecutors is done taking into account the place and role of justice in the rule of law, the responsibility and complexity of the prosecutor's office, the prohibitions and incompatibilities prescribed by law for this function, and their independence and impartiality.

At the same time, the statute also considers and stipulates that continuous professional training of prosecutors is the guarantee of independence and impartiality in the exercise of their office. Therefore, training is viewed as a form and way of guaranteeing the prosecutors' independence.

Regarding the statute of public prosecutors an important provision laid down in constitution [art.132(1)] says that „Public prosecutors shall carry out their activity in accordance with the principle of legality, impartiality and hierarchical control, under the authority of the Minister of Justice”. This rule has been subject of many disputes and interpretations, either statutory, professional, academic or lay discussions. Developing the constitutional text, the statute [art. 3(1)] stipulates that „Prosecutors appointed by the President of Romania enjoy stability and are independent, under the law.” At the moment of preparing this article the Parliament is assessing the possibility to ensure more consistency between Constitution and organic law in this respect.

Another question raised is regarding the place of prosecution service within the system of separation of powers. Is it part of the executive power, the judiciary power, or somewhere in between? According to the Romanian Constitution it is part of „Judicial Authority” (Chapter VI of the Constitution)⁴ In this context to be mention that prosecutors are enjoying stability not immovability as a difference stated by Constitution, and they are called to enforce penal policy of the state as part of general policy of government. For this reason Constitution provide authority of Minister of Justice upon prosecutors.

Main stakeholders and their role

What are the prosecutors and what they do?

European Court of Human Rights (ECHR/CEDO) held that „prosecutors are civil servants whose task is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term”⁵. Council

⁴ Some interesting points of view on the topic and practical approaches can be found find in Alexandru, I., Giredariu, O. (2013) *The public ministry between executive and justice*. București, Editura Universul Juridic and Alistar, V. (2007) *Le statut du procureur en Roumanie. Le procureur: magistrat ou agent exécutif?*”, Editura Universitară Danubius.

⁵ European Network of Councils for the Judiciary (ENCJ) – *Independence and Accountability of the Prosecution Report 2014-2016*, para.III.A.3. *Apud* (ECHR, Lešník v. Slovakia, § 54, 11 March 2003, 35640/97, ECHR, Blaja News sp. Z o.o. v. Poland, § 60, 23 November 2013, ECHR Chernysheva v. Russia, 10 June 2004).

of Europe (COE) defines public prosecutors as “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”⁶.

Transparency International in its Practical guide Enhancing judiciary’s ability to curb corruption stated that „Judicial and prosecutorial independence helps establish an impartial judiciary and improves public trust in the courts. Prosecutorial independence, even in those jurisdictions in which they are not formally part of the judiciary, occurs when the decision-making of prosecutors is free from interference by any other state entity including higher prosecutorial offices or courts”⁷.

Few years ago, the Superior Council of Magistracy adopted the *Profile of the magistrate in the Romanian judicial system* and the *Evaluation Guide*, reference papers in understanding the vision, the demands and the aims of judicial branch as a public service and among these a view of the prosecutors’ activity⁸.

At a glance, the prosecutors have constitutional basis and legal status, are invested with public authority, carry out specific judicial functions, acting within hierarchy circle, with proper rights and liabilities, legal restrictions concerning conflicts of interest and incompatibilities, seeking and pursuing for the jure and the facto independence on their activity and responding to the need for accountability and public scrutiny.

The role of the Council for the Judiciary

There are 5 states⁹ among EU countries that have organised *Councils for the Judiciary* including both categories: judges and prosecutors: France, Italy, Belgium, Romania and Bulgaria, more or less within so called „Southern European Model”¹⁰ which are significantly different from Northern European Model.

The design, size, dimension and competences of councils for judiciary are subject of studies and comparative questions in order to find out and highlight their role in

⁶ *The role of public prosecution in the criminal justice system - Recommendation Rec(2000)19* - adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum, p. 4, para. 1.

⁷ Alistar, V., co. (2015) *Practical guide Enhancing judiciary’s ability to curb corruption*. București, Transparency International, p.12.

⁸ According to the first document (2006), the magistrates must be able to think independently in juridical matters, recognize the inner factors that might cloud their judgment, understand the society, manifest moral integrity, have the capacity and the courage to improve his/her working environment, communicate clearly and logically and be receptive to the information that might improve his/her message, be credible and trustworthy, be efficient in the management of his/her own duties and contribute to the improvement of the court’s administration. The personality profile connects to: independent/critical thought; moral- cognitive integrity/consistency, social awareness and commitments, being inclined for hard work and continuous professional training; authenticity; clear and logical communication, receptivity toward any information that might improve his/her message; self-control; conscientiousness, diligence, collegial respect.

⁹ Three of them are EU/EEC founders (1957).

¹⁰ Voermans, W., Albers, P. (2003) „*Councils for the Judiciary in EU Countries* “. Brussels, p. 10.

the protection of prosecutors' guarantees provided by law. In this regard, a chart was drawn up below, where you may see some substantial differences in approach.

We may note that in the Romanian law system, the Superior Council of Magistracy has the right and obligation to defend prosecutors against any act that might affect their independence or impartiality or would create suspicions about them. Prosecutors who consider that their independence and impartiality are affected in any way through acts of prohibition of professional activity may address to the Higher Magistracy Council in order to take the necessary measures, according to the law.

The role of policy-makers

Stakeholders in a consolidate and adaptive legal framework comprise the Parliament as well as the Government through the Ministry of Justice, professional associations, think-tank structures and, last but not least, judicial authority's bodies.

Political will and society's expectations are crucial for better regulation. In this respect Council of Europe (COE) has shown that „States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges.”¹¹ Guaranteeing the prosecutors' independence should be seen as a way to promote and to preserve it, as the case may be to safeguard it.

The decision makers are called to be accountable to public opinion¹² [10] for measures enhancing capacity of judiciary from a dual perspective: resources and regulatory framework.

The role of civil society

If we have a look at the composition of those 5 mixt-organized (judges and prosecutors) bodies we mentioned above, we may note that civil society, in the narrow sense of the term, is represented only in the Romanian Council for Judiciary. In the others, there are only magistrates or magistrates and professors, practitioners or lawyers appointed by the head of state or parliaments.

A project team of European Network of Councils for the Judiciary (ENCJ) in one of their open reports on the composition of the Council for the Judiciary „highlights the advantages of including members of civil society who are held in high esteem by their peers and are in a position to represent the ordinary citizen in addition to the needs of society as a whole, thereby giving rise to a diverse representation of society¹³”.

¹¹ *The role of public prosecution in the criminal justice system - Recommendation Rec(2000)19* - adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum, p. 6, para. 11.

¹² Cocoşatu, M. (2012) *Governance in Europe*. Bucureşti, Editura ProUniversitaria.

¹³ European Network of Councils for the Judiciary (ENCJ) – *Councils for the Judiciary Report 2010-2011*, p. 5, para. 2.6.

Moreover, in other further report, ENCJ suggests referring to the Declaration of principles on prosecutors (Naples, 1996) that „*A council of Prosecutors offers one further means of accountability, particularly if the Council includes members of civil society*¹⁴” and „*Such councils must be representative of the professional body of prosecutors and must include members of civil society*¹⁵”.

Open epilogue

There is a wide range of international reports, resolutions, charters, recommendations, standards, declarations of principles, guidelines, opinions, statements, research projects, white papers, public policies and programmatic documents that treated the independence, autonomy and accountability of prosecutors, giving binding or non-binding rules and patterns of good practices for common and transnational approach.

An increasingly discussed issue and a questionable one is the following: independence related to whom? In most situations related to the executive and legislative branch or political parties, but also in relation with the courts, other public or private entities, professionals etc.

Currently there is a heated debate concerning the interference of legislature in setting and updating the regulatory framework:

- Is it viewed as a normal one, grounded on society needs and dynamics or it comes like a threat to prosecutors' independence?
- How is it received and treated by the stakeholders and public opinion?
- Could be a law passed by the Parliament, within constitutional limits, an arbitrary action?

Forward we would like to emphasize some positioning statements that may comprise further debates and reflections on how the independence and accountability of prosecutors should meet other check and balance mechanisms.

ENCJ Report 2014-2016, Independence and Accountability of the Prosecution, underlines among others that „*The priorities in terms of types of offences can properly be influenced by legislation*”¹⁶, or „*Prosecutors must not pursue a conviction whatever the circumstances and at all costs*”¹⁷ or „*It is legitimate for the executive to require a prosecution service to implement government policies contained in legislation or decided upon by the executive, but such influence must not bear upon any individual prosecuting decision*”¹⁸.

Referring to the relationship between public prosecutors and the executive and legislative powers as well as to judiciary, Council of Europe (COE) states that

¹⁴ European Network of Councils for the Judiciary (ENCJ) – *Independence and Accountability of the Prosecution Report 2014-2016*, para. C.1/45.

¹⁵ *Ibidem*, para. B.1.1/13.

¹⁶ *Ibidem*, para. B.1.3/38.

¹⁷ *Ibidem*, para. B.1.3/39.

¹⁸ *Ibidem*, para. B.1.3/40.

„Public prosecutors should not interfere with the competence of the legislative and the executive powers”¹⁹ or „States should take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges. In particular, States should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge”²⁰.

On the same prerequisites, in the circulated paper “The Status and Role of Prosecutors. A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide” (2014) it is shown that *„The independence of the prosecutor does not mean that a prosecutor is completely autonomous and accountable to no one. Prosecution services are accountable to the executive and legislative branches of government, to the public and to an extent the judiciary. „Accountability” of the prosecutor means that a prosecution service may be required to account for its actions either by filing reports, responding to inquiries or, in some situations, acting as a respondent in a court hearing. Accountability may also mean that a prosecution service can potentially be held liable as a result of inefficiencies and abuses of its authority. Individual prosecutors are also accountable for their decisions and actions, through the courts, the hierarchies of their prosecution services, their professional associations and the media and public interest in their professional conduct. [...]Accountability also involves accountability to other branches of government and the general public²¹” or*

„A prosecution service may be required to report on its activities or on specific issues to the executive branch and to the Parliament. The Ministry of Justice, the legislative branch and financial and auditing services of government can be kept informed of the activities and expenditures of a prosecution service in a variety of ways. One method is the preparation and tabling of annual reports to the legislature and in some jurisdictions the subsequent publication of those reports. The appearance of senior members of the prosecution services before legislators to answer questions regarding the operation of the prosecution service is an example of another method. However, care should be taken to ensure that any accountability to Parliament does not extend to permitting the legislature to give directions to a prosecutor in any individual case or to compel the disclosure of information which is properly confidential²²”.

Finally, an overlook on branch machinery shows that the prosecutors’ activity includes dealing with criminal matters (mainly) or non-criminal matters (such as in the case of civil or administrative trials/litigations).

They also may be involved in non-specific activities without the exercising of judicial functions. For example, a prosecutor may act as a part of an electoral

¹⁹ The role of public prosecution in the criminal justice system – Recommendation Rec(2000)19 – adopted by the Committee of Ministers of the Council of Europe on 6 October 2000 and Explanatory Memorandum, p. 6, para. 12.

²⁰ *Ibidem*, p. 7, para. 17.

²¹ „The Status and Role of Prosecutors. A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide” (2014), p. 17, para. 2.

²² *Ibidem*, p. 18, para. 2.1.

commission/body every electoral cycle, together with other public officials, political parties' representatives and electoral experts. Should they claim the independence even in this case? If so, has it the same weight as in their day-by-day working judicial issues?

It is no less true that prosecutors may temporarily fulfil public dignities in executive branch where they may act as state secretaries, counsellors to the ministers, general directors, prefects etc.

There are questions raised and perhaps there are several answers and approaches. As well as required measures, specific regulatory framework and public expectations.

We may conclude that, under both its forms, internal and external, prosecutors' independence implies accountability and the latter implies also self-responsibility meaning either individual or as an "esprit de corps".

COMPARATIVE TABLE OF COUNCILS FOR THE JUDICIARY ORGANIZED FOR BOTH: JUDGES AND PROSECUTIONS - Governance and independence factors for legislative consideration

Item	France	Italy	Belgium	Bulgaria	Romania
Total number of members	22 members	27 members	44 members	25 members	19 members
Term of office	4 years	4 years	4 years	5 years	6 years
Composition	- 6 elected judges (5 are member of the formation with jurisdiction over sitting judges and 1 is a member of the formation with jurisdiction over public prosecutors); - 6 elected prosecutors (5 are member of the formation with jurisdiction over public prosecutors and 1	- 16 members are magistrates, elected by their peers. The members elected by judges are chosen as follows: 2 magistrates from the Supreme Court (Corte di Cassazione), who are judges and/or public	- 22 judicial members elected by their peers - each linguistic college comprise at least 1 judge and 1 prosecutor. - 22 non-judicial members appointed by the Senate - each linguistic college comprises at	- 11 members elected by the Judicial system bodies out of their own composition, the judges electing 6, the prosecutors - 4 and the investigating magistrates - 1 of these. - 11 members elected by the National Assembly among judges,	- 14 magistrates (9 judges and 5 prosecutors, representing all levels of jurisdiction) elected by the general assemblies of magistrates and validated by the Romanian Senate - 2 lay members, representatives of the civil society,

	<p><i>is a member of the formation with jurisdiction over sitting judges);</i></p> <ul style="list-style-type: none"> - President of the Cour de Cassation; - General Prosecutor of the Cour de Cassation; - 8 prominent figures from outside the judiciary: 1 member of the Conseil d'Etat elected by the general assembly of the Conseil d'Etat, 1 lawyer nominated by the president of the national Council of bars and 6 prominent figures nominated respectively by the President of the Republic, the president of the National Assembly and the president of the Senate. 	<p>prosecutors deciding on legitimacy issues; 4 <i>public prosecutors who carry out their role by deciding on the merits;</i> 10 judges who carry out their role of judges in trial courts deciding on the merits.</p> <ul style="list-style-type: none"> - 8 lay members, appointed by Parliament in a joint session; - 3 ex officio members: the President of Italy (Chairperson), the First Chief Judge of the Supreme Court and <i>the Attorney General (Chief Public Prosecutor).</i> 	<p>least: - 4 lawyers member of the bar for at least 10 years,</p> <ul style="list-style-type: none"> - 3 university or college of higher education professors having at least 10 years of professional experience and - 4 members who hold an university or equivalent degree as well as 10 years of relevant professional experience. 	<p>prosecutors, investigating magistrates, full professors in legal science, attorneys at law or other lawyers.</p> <ul style="list-style-type: none"> - 3 ex officio members: the President of the Supreme Court of Cassation, the President of the Supreme Administrative Court, and <i>the Prosecutor General.</i> 	<p>specialists in law, who enjoy a good professional and moral reputation elected by the Romanian Senate</p> <ul style="list-style-type: none"> - 3 ex officio members: the president of the High Court of Cassation and Justice, the minister of justice and <i>the general prosecutor of the Prosecutor's Office</i> attached to the High Court of Cassation and Justice
Presidency of the Council	<p>President of the plenary formation and President of the formation with jurisdiction</p>	<p>The President of the Republic of Italy</p>	<p>The Presidency of the High Council is exercised on a rotating</p>	<p>The meetings of the Supreme Judicial Council shall be presided</p>	<p>President: is elected among the members who are also judges <i>or</i></p>

	<p>over sitting judges: President of the Cour de Cassation. Substitute President of the plenary formation and <i>President of the formation with jurisdiction over public prosecutors: General Prosecutor of the Cour de Cassation.</i></p>		<p>basis by one of the four members of the Bureau. The Bureau is composed of four members of the General Assembly who serve as President of the Council on a rotating basis, for a period of one year.</p>	<p>over by the Minister of Justice, without a right to vote.</p>	<p><i>prosecutors</i> for a 1 year term of office; (if the President is a judge than the Vice-president must be <i>a prosecutor</i> and vice-versa) Vice-president: is elected among the members who are also judges or <i>prosecutors</i> for a 1 year term of office</p>
<p>Particularly aspects regarding prosecutors</p>	<p>The formation of the Council with jurisdiction over public prosecutors has the task to issue a simple "favorable" or unfavorable" opinion on proposed appointments by the Minister of Justice who is not bound by this opinion.</p> <p>The formation of the Council with jurisdiction over prosecutors</p>	<p>The High Council is exclusively competent on disciplinary procedure and sanctions against public prosecutors. The decision adopted by the Disciplinary Division can be challenged in front of the Joint Divisions of the Supreme Court.</p>	<p>The proposal of a candidate prosecutor by the High Council can be refuted by the King within 60 days by a reasoned decision, in which case a new candidate will be proposed by the Council. In case of a renewed reasoned refusal by the King the entire procedure of</p>	<p>Disciplinary procedure is under the competence of the Council. The Supreme Judicial Council shall impose the disciplinary sanctions of demotion and removal from office on prosecutors and investigating magistrates</p>	<p>Through its specialised section, the Superior Council of Magistracy fulfils the role of a court in the field of the disciplinary liability of prosecutors. The SCM's Plenum settles the appeals brought by prosecutors against the decisions rendered by its section.</p>

	issues a simple opinion as only the Minister of Justice is granted power to impose a sanction.		nomination is reopened.		
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*This comparative table was elaborated according to data and information provided by ENCJ

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