

## **PROSECUTORIAL INDEPENDENCE, ACCOUNTABILITY & EFFECTIVENESS: A COMPARATIVE PERSPECTIVE**

Martin Schönteich

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The presentation is based on an analysis of nine prosecution services in the following jurisdictions: Bulgaria, Chile, England & Wales, France, Germany, Hungary, Italy, South Africa, and the USA (i.e. both common law and civil law systems, as well as both long-established and transitional democracies). The analysis focused on actual practice as well as formal rules. We also looked at international and regional norms and standards as they apply to prosecution services and the work they do.

Today I will try and summarise the main conclusions we reached in respect of prosecutorial independence, accountability, effectiveness and efficiency.

### **Independence and accountability**

There is very little theoretical, academic, political or practical discussion about the meaning of prosecutorial independence. In most Western European countries the institutional dependence of prosecutors on the executive branch is the accepted status quo. At the same time, recognition of the problems related to prosecutorial dependence upon the executive branch is growing, and there is a trend towards increasing the independence of prosecution services from the executive; this is especially evident in the transitional democracies of Central Europe and Latin America.

In many countries in transition, the independence of judicial and prosecutorial authorities is seen as an integral part of the broader transition from authoritarianism to open, democratic societies. Yet this foundational, constitutional function is not the only purpose of a prosecution service, because of course societies create prosecution services first and foremost to punish and control crime, or otherwise ensure the legality of public and private behavior.

In Chile, for example, reform of the criminal justice system – although sweeping in its own right – has not been seen only or even principally as part of the broader political transition from military rule. This separation of criminal justice reform and restorative justice efforts contrasts sharply with the transitions in Central and Eastern Europe and South Africa, where justice-sector reform has been part of the transformation of the state. In these states, the affirmation of justice coincided with

efforts to establish the rule of law, independence of the judiciary (and often of the prosecution service), and democratic institutions of the state.

The experience of the countries surveyed shows that no particular model of independence and accountability is necessary. One of the core comparative lessons is that different constitutional, institutional, and functional structures must be considered comprehensively, not in isolation, to understand their operation and effects in a given social and political context. A single element in isolation – or introduced in a reform, for example – may have very different effects if the totality of relevant, interrelated elements is not in place as well.

What then, is the essential quantum of independence for a prosecution service? By the same token, what measure of accountability to society or political actors is irreducibly necessary? Review of international standards and state practice shows that a prosecution service must be able to provide *neutral, non-political, non-arbitrary decision-making* about the application of criminal law and policy to real cases. To ensure this, the *institutional* decisional independence of the entire prosecution service appears to be more important than the independence of the individual prosecutor.

The practical check on prosecutorial decision-making is the judiciary itself – or, in functional terms, there is a division of social response to criminality between a prosecution that initiates and pursues, and a judiciary that decides. It follows from this that the judiciary – because it provides the final or effective check – is generally better positioned to ensure against abuse of liberty.

Political actors may, however, perceive advantage in encouraging investigations even if they will ultimately fail to pass muster with an independent judiciary. Investigation and prosecution can last for years, considerably inconveniencing and intimidating its targets, without ever reaching a stage at which the judiciary can effectively intervene. Criminal investigation often is, *de facto*, a sanction in itself, which may continue for years before any judicial review.

The risks that arise from non-investigation or non-prosecution are more difficult for the judiciary to check. A prosecutor's discretionary decision not to proceed with a prosecution can provide valuable cover for powerful actors, both outside and inside government; an independent judiciary can check unjust prosecution, but it cannot effectively force the investigation or prosecution of crimes.

The level of independence prosecutors are afforded, or the degree of accountability to which they are subjected, is not an absolute quality they can be adduced in the abstract; it is rather a means of ensuring that the prosecution service performs those socially valuable tasks societies assign to it. (One of those purposes, especially in a democracy, is to provide protection against politically motivated use of the criminal law and justice system, which can be ensured by an independent judiciary *and* prosecution service.)

Yet even though this independence is contingent and instrumental, experience suggests that it is detrimental to the maintenance of a balance between independence and accountability, and to the underlying social purposes, if that balance is altered too frequently or in an *ad hoc* manner (either for partisan gain or to achieve a particular outcome in a particular case); the legitimate purposes society may assign a prosecution service are broadly defined, not tailored to short-term political outcomes.

### **Effectiveness and efficiency**

Purposes of a Prosecution Service: Effectiveness is first a function of purpose; without a clear sense of what purposes a prosecution service is supposed to serve, it is definitionally impossible to say how effective it is.

Prosecution services typically have at least the following social purposes:

- Pursuing criminal charges, including initiation (though they may share this with police or other investigative authorities), prosecution – that is, pursuit of the interests of the state or particular parties in court – and enforcement;
- Contributing generally to public order and implementation of society's criminal policy.

In general, these purposes involve representing society's interest in *initiating* and *pursuing* legal resolutions to social problems, but not *adjudicating* those problems. The social interest in achieving final determinations concerning criminal actions, violence, harm to social peace, or justice rest with the judiciary.

All prosecution services serve as society's principal means of pursuing punishment of criminal behavior, along with the police and the judiciary, and as its principal interface with the adjudicative power.

Effective and Efficient Pursuit of Purposes: Effectiveness simply measures whether or not the prosecution service is achieving the goals society has set for it. Does the work

of the prosecution service punish enough criminals? Does it reduce crime? Does it represent the interests of specific parties? Does it contribute to greater legal certainty?

Efficiency differs from effectiveness in its measure of costs. A measure which is effective achieves its stated goal, but without reference to the costs; a measure which is efficient achieves its goal at an acceptable cost, or at lower cost than alternatives. Efficiency therefore measures whether or not the prosecution is achieving the goals society has set for it within some framework of costs, monetary or other. Does the prosecution service achieve its goals within budget? Does it discover and punish criminals without catching up the innocent? In representing some parties' interests, does it under-represent other parties' interests? Does it achieve legal certainty without sacrificing flexibility or harming important interests and rights?

If analysis seldom considers whether or not prosecutors are effective, it even less rarely considers if they are efficient, and they rarely figure in policy planning or statistical measurement. Yet each of these parameters is important and useful. Without clear purposes and mechanisms for measuring performance towards those purposes, there is no way for society to know if the prosecution is contributing towards a better society, howsoever defined. Without also considering the costs of its contribution, there is no way for society to know if it is making a worthwhile investment in the prosecution service, or the criminal justice system more broadly, or if it should consider different strategies that would cost less or yield more.

### **Measuring performance**

Even if the purposes are clearly agreed upon and costs estimated, measuring the prosecution service's success in meeting those purposes, and the price of its doing so, requires creative and sophisticated metrics that focus as much on qualitative outcomes as they do on numbers or points in the process. Yet present performance measurement, especially statistical evaluation, tends to focus on quantitative processes without attending to the outcomes that actually affect individuals and society.

Some current measurements do, however, exhibit attention to outcomes: drops in crime rates, for example, directly measure a phenomenon of significance to individuals and the whole community. But many of the internal measurements commonly used by prosecution services to evaluate themselves (and to justify their operations and budgets before the legislature or the executive) focus on quantitative processing with little real-life relevance. An increase in the number of cases filed per

prosecutor, for example, may bespeak a busier office, but does not tell us if this reflects a rise in efficiency, a rise in the rate of crime reporting, or a rise in the crime rate itself, or even some combination of these; it does not tell us if those prosecutors are overworked. Internal processing measurements, alone, tell us little about the outcomes of the prosecutorial enterprise, which are ultimately the justification for social support of a professional prosecution service.

Thus orienting measurement and evaluation towards public policy standards – meaning a focus on outcomes of direct interest to the final beneficiaries, who are the citizenry, rather than intra- or inter-institutional standards – can be a useful means of ascertaining the prosecution service’s performance.

Possible criteria for such public policy-oriented measurement could include expeditiousness and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence. These are admittedly very broad measures (and some are measures of perceptions), but their direction is towards qualitative measures of outcomes which are of real consequence to the public.

## **Conclusion**

Prosecution services are a society’s principal means of pursuing punishment of criminal behavior and its interface with the adjudicative power. A prosecution service must be able to provide neutral, non-political, non-arbitrary decision-making about the application of criminal law and policy to real cases.

Prosecutorial independence is thus not an absolute quality; it is a means of ensuring that the prosecution service performs those tasks society assigns to it. Yet analysis seldom considers whether or not the prosecution service is effective or efficient. Performance measurement, especially statistical evaluation, tends to focus on quantitative processes without attending to the outcomes that actually affect individuals and society.

There is no single model for a prosecution service, and each must be evaluated in context. Many configurations are consistent with international standards; the choice among them is political and constitutional. Recognizing the availability of various models does not imply a casual approach to reform, but rather deliberation about the interrelatedness of different design elements, which must be evaluated in their full historical, social, and political context.

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