

## PROSECUTION SERVICE IN CRIMINAL PROCEEDINGS

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### Abstract

There are different types of prosecutorial model in the contemporary legal systems. In some cases, the investigation and the prosecution are conducted by different actors (the police conduct the investigation and the prosecution brings the case before the court). In other cases, the prosecution deals with both: conducts the investigation and prosecutes the case. Also, in other cases, the prosecutor works together with an investigative judge and the police in the investigation and the prosecution of the case.

In this paper, we will focus on the role of prosecution in criminal proceedings, aiming to emphasize the strong and weak point of each of the above-mentioned models and to give a brief view on the prosecution service in the Republic of North Macedonia and other countries of the region. A specific part of this paper will focus on main principles of the organization and functioning of public prosecution

*Keywords:* public prosecution, investigation, criminal procedure, principles

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### 1. Introduction

The Public prosecution as an institution was created in a specific period of time regarding the historical timeline of state system of XVIII century as a result of the seizure of administrative functions under a single royal proprietor and the expansion of the state monopoly in the area of criminal justice, which became incompatible as an individual criminal prosecution initiative, initiated by a private lawsuit as it was during the old accusatory criminal procedure. However, its development had two different directions in continental law and common law system. In the first one, the institution of public prosecutor as a specialized organ for prosecuting crimes and as a party in the criminal procedure emerged during the reform of the criminal procedure in the XIX century during the introduction of mixed type of criminal procedure. In England, which maintained a high degree of decentralization of political power and the royal trial concerned only a narrow range of cases, the criminal judiciary continued to act on a private initiative.

In modern criminal justice systems, it is mandatory for the function of criminal prosecution to be sharply separated from the judicial function entrusted to independent courts and to be within the purview of a state body *ex officio*, the structure and functioning of the public prosecution depends on four elements such as: its external dependence or independence from political actors in the state, the internal structure and functioning of its services, the degree of respect of the legal norm in deciding to prosecute (the principle of legality and the principle of opportunity) and also the attitude toward the citizens that are allowed to initiate prosecution for certain criminal offences<sup>1</sup>.

There is a wide variety of types of prosecutorial models existing around the world. In some systems, the investigation and prosecution of the case are conducted by different actors; the

<sup>1</sup>Davor Krapac, *Kazneno Procesno Pravo*, VII Edition, Zagreb, 2015, pp.219

police independently to conduct the investigation and then hand over evidence to a prosecutor, who then brings the case before the court. In other systems, the prosecutor is responsible both for prosecuting the case and for directing the police in the investigation of the case. In other systems, the prosecutor may work together with an investigating judge and the police in the investigation and prosecution of a case. The prosecutor directs the police in the early stages of the investigation and initiates proceedings, where upon an investigating judge gathers the evidence and creates a case file (or a “dossier”) which is submitted to the court. Under this system, the investigating judge has more powers and competences relating to the investigation than a prosecutor does in other systems. For example, the investigating judge may order searches of persons and property and other investigative measures whereas in other systems the prosecutor would be required to submit a motion and obtain an order from the court<sup>2</sup>.

There are different views about that model, some experts favor the investigating judge model and argue that it is more preferable to have investigating judge as an impartial body that will protect the interests of both: the defense and the accusation. Those experts who opposed the use of investigative judge model pointed out that its popularity has been declining for many years and that many states that had once embraced it had now abandoned it. They also argue that it was better to decentralize power in the investigation and prosecution of criminal cases given the security risks to judges in post-conflict states and the risk of pressure being brought to bear on them by those associated with the accused in cases, involving, for example, organized crime or the politically powerful. A third argument against the investigating judge model was that it is overly complex for use in a post-conflict state<sup>3</sup>.

States usually have very detailed regulation of the prosecutorial service. The main provisions are usually found in the constitution and there are also provisions in the laws on criminal procedure and law on public/state prosecution. There are also many other legal sources that regulates the functioning of public or state prosecution (different laws).

## **2. Duties of the Prosecution Service and Duties of the Individual Prosecutors**

United Nations has adopted guidelines on the role of the Prosecutor to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, that should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors and as well as other persons, such as: judges, lawyers, members of the executive and the legislature and the public in general. The Guidelines have been formulated principally with public prosecutors but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

According to United Nations` Guidelines on the role of Prosecutors<sup>4</sup> (Art.10-16) the office of prosecutors shall be strictly separated from judicial functions. The prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decision and the exercise of other functions as representatives of the public interest. Prosecutors shall perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and

<sup>2</sup> Vivienne O`Connor and Colette Rauschs, Model Codes for Post-Conflict Criminal Justice, Volume II, Model Code of Criminal Procedure, United States Institute of Peace Press, Washington D.C., 2008, pp. 89

<sup>3</sup> Ibid, pp.89

<sup>4</sup> United Nations Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system. In the performance of their duties, prosecutors shall:

A). carry out their functions impartially and avoid all political, social, religious, racial, cultural, and sexual or any kind of discrimination;

B). protect the public interest and act within objectivity, take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are in advantage or disadvantage of the suspect;

C). keep matters confidential, unless the performance of duty or the needs of justice requires the opposite;

D). consider the views and concerns of victims when their personal interests are affected and ensure that the victims are informed of their rights in accordance with the Declaration of basic Principles of Justice for Victims of Crime and Abuse of Power. Prosecutors shall give due attention to the prosecution of crimes, committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through resources to unlawful methods, which constitute a grave violation of the suspect`s human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

The duties of the prosecution service is investigating and prosecuting crimes as well as directing the police in the investigation of criminal offences. Prosecutors are responsible for examining evidences in favor and against the defendant. Prosecutors are required to act in the interests of the prosecution of a case but also they have an affirmative duty to take investigative measures that may reveal exonerating evidence. This is especially important where the accused does not have legal representation<sup>5</sup>.

### **3. Organization of Prosecution in Comparative Law**

As stated above, there are different types of prosecutorial model in the comparative law. Consequently to that, here we will analyze legislation and due to that we will be able to conclude which country, what kind of prosecutorial model has.

#### *A). Prosecutorial model in the Republic of North Macedonia*

According to the Law on criminal procedure<sup>6</sup> and the Law on Public Prosecution<sup>7</sup>, public prosecution is responsible for prosecuting the perpetrators of criminal acts. It is also responsible for directing and development of investigative procedure<sup>8</sup>. Former Law on Criminal procedure<sup>9</sup> of the Republic of North Macedonia had adopted the system in which the investigation was carried out by the investigative judge.

#### *B). Prosecutorial model in the Republic of Kosovo*

The investigation of crime, according to the legislation of Kosovo is carried out by the state prosecutor. In the Code of Criminal Procedure of Kosovo, it is stated that the state prosecutor can authorize the police to undertake investigative measures for collection of evidences (art.104, par.4), which deals under its supervision. In cases provided by law, the police or

<sup>5</sup> O`Connor- Rausch, pp.93

<sup>6</sup> Law on criminal procedure of the Republic of North Macedonia, Official Gazette no.150/10

<sup>7</sup> Law on Public Prosecution of the Republic of North Macedonia, Official Gazette no.150/07

<sup>8</sup> Art. 39, par.2, subpar.3 of the LCC states that: "he brings a decision and directs the investigative procedure"

<sup>9</sup> Law on criminal procedure of the Republic of North Macedonia, Official Gazette no.150/97

prosecutor's office will request the order from pre-trial judge for undertaking certain investigative measures. The pre-trial judge, compared to former investigative judge has reduced changed in terms of authorizations. In fact, despite the transfer of authorization for investigations from the former investigative judge to the state prosecutor and the police, the CPC of Kosovo did not transfer the judicial authorization in deciding about the restriction of rights and freedoms of the individuals. In such cases, the decision is taken by the pre-trial judge on the demand of the state prosecutor or the police<sup>10</sup>.

*C). Prosecutorial model in the Republic of Albania*

The prosecutor prosecutes and presents the accusation in trial on behalf of the state, conducts and controls the preliminary investigations and the activity of the judicial police, conducts any investigative acts that seem to be necessary, takes measures to execute the decisions, supervises their execution and cooperates with foreign authorities, in accordance with the Code of Criminal Procedure of Albania<sup>11</sup>. Even more, in the CPC of Albania, it is foreseen that the prosecutor conducts the investigative activity and investigative actions that are necessary. He also conducts investigative actions to verify the facts or circumstances that are in favor of the suspected or accused person. He may require from the judicial police to conduct specially delegated actions, such are: the interrogation of the defendants and confrontation, in which participates the defendant and his lawyer (art. 304, par.1 and 2 of the CPC of Albania).

*D). Prosecutorial model in the Republic of Croatia*

The state prosecutor's duty in the criminal procedure is to conduct the criminal prosecution of perpetrators of criminal acts<sup>12</sup>.

In the Law on Criminal Procedure of Croatia it is foreseen that the main duty of the state prosecutor is to prosecute the perpetrators of criminal acts that are prosecuted ex officio<sup>13</sup>. On the part .2 of the article 38 the LCP of Croatia, once more it is emphasized the role of state prosecutor in investigation and (beside other duties, actions and measures listed in the part.2. states that the public prosecutor is authorized and has the duty to initiate and conduct the investigation.

*E). Prosecutorial model in other countries*

In Euro-continental countries, in the middle of XIX century the investigation was carried out by judicial authorities. While in common-law countries, it has been always carried out by the police. Today, in international level there is a tendency for termination of judicial investigation and it's reforming into prosecutorial investigation. For example, it has been terminated in Germany (1974), in Italy (1988) and in recent years in Bosnia and Herzegovina, Croatia and Serbia<sup>14</sup>.

Nowadays, in contemporary legislations, beside the judicial investigations that are carried out by the investigative judge, there are four models of organization of investigations such as:

- A. in USA, England, and the investigation is done by the police;
- B. in France, by the police which is under the supervision of the state prosecutor;
- C. in Germany, formally it belongs to the prosecutor, but usually it is done by the police;

<sup>10</sup> Ejup Sahiti- Rexhep Murati, E drejta e procedurës penale, Prishtina, 2016, pp. 320

<sup>11</sup> Art. 24, par.1 of the Code of Criminal Procedure of the Republic of Albania Botimi Qendrës së botimeve zyrtare, Tirana, 2017

<sup>12</sup> Davor Krapac, Kazneno Procesno Pravo, Seventh Edition, Zagreb, 2015, pp.222

<sup>13</sup> Art. 38 of the LCP of Croatia Consolidated Text, "Official Gazette", nr. 152/08, 76/09, 80/11 143/12, 56/13, 145/13, 152/14 i 70/17)

<sup>14</sup> Nikola Matovski, Gordana Lazhetiq- Buzharovska, Gordan Kalajxhiev, Kazneno Procesno Pravo, Vtoro Izmeneto i dopolneto izdanie, Skopje, 2011, pp.276

D. in Italy, the investigation is carried out independently by the police and by the state prosecutor<sup>15</sup>.

## **4. Independence and Impartiality of the Prosecutors**

### **4.1. Independence of Prosecutors**

The 4<sup>th</sup> Guideline of the United Nations Guidelines on the Role of the Prosecutor requires that states ensure “that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper influence or unjustified exposure to civil, penal or other liability”.

Just as judicial independence is multifaceted, the same way is prosecutorial independence, including institutional, functional and the individual aspects. The 6<sup>th</sup> Guideline of the United Nations Guidelines requires those reasonable conditions of service, adequate remuneration, and, where applicable, tenure, pension, and age of retirement of prosecutors all will be set by law. These conditions are fundamental elements of ensuring the personal independence of prosecutors<sup>16</sup>.

A prosecutor must carry out his or her duties in accordance with the applicable law and the solemn declaration that he/she makes upon being appointed a prosecutor. Prosecutors must be insulated from two types of pressure: external and internal. External pressure means pressure from external entities, for example, the executive, the legislative, an international organization, or a private person. Internal pressure is exerted from within the prosecution service<sup>17</sup>.

The Law on Public prosecution of the North Macedonia<sup>18</sup>, on its article 2 defines the public prosecution as a unique and independent<sup>19</sup> body, responsible for the prosecution of the perpetrators of crime and other criminal acts.

### **4.2 Impartiality of prosecutors**

In the performance of their duties, prosecutor shall carry out their functions impartially and avoid all political, social, religious, racial, cultural sexual or any other kind of discrimination<sup>20</sup>. The concept of impartiality requires that a prosecutor will act without favor, bias or prejudice in the adjudication of a criminal case. A prosecutor who holds a bias or prejudice relating to a person who is a party to the proceedings (e.g., the accused person) or who has personal knowledge of the disputed facts of the case cannot be considered to be impartial. Moreover, a prosecutor must not have a vested interest in a case. A vested interest occurs where the prosecutor has an economic or other interest in the outcome of the case or where he or she has a spousal, parental, or other close family, personal, or professional relationship or a subordinate relationship with any of the parties<sup>21</sup>.

According to the Law on public prosecution of the North Macedonia (Art.5, par.1), the public prosecutor performs his function legally, impartially and objectively; respects and protects the human rights and freedoms, the rights and freedoms of the citizens and other legal entities and

<sup>15</sup> Sahiti- Murati, pp.319

<sup>16</sup> O'Connor- Rausch, pp.95

<sup>17</sup> Ibid, pp.95

<sup>18</sup> Law on Public prosecution, Official Gazette no. 150, 12.12.2007

<sup>19</sup> In this occasion, we have to emphasize that the legislator does not use the usually term: (Mac. Language) “nezavisen” or (Alb. Language) “I pavarur” but uses the term “samostoan” or “I mëvetëshëm”.

<sup>20</sup> Art. 13(a) of the United Nations Guidelines on the Role of the Prosecutor

<sup>21</sup> O'Connor- Rausch, pp.96

within the framework of its competencies, takes care of the efficiency of the criminal justice system on behalf of the society.

A prosecutor must be both objectively and subjectively impartial. A prosecutor may objectively appear not to be impartial where he/she takes part in certain activities outside the scope of his/her work for example, the prosecutor has expressed opinions, through the media through writing or objectively, could adversely affect his or her required impartiality. In some instances, prosecutors are barred from certain extra-career activities in order to secure the perception of objective independence. This prohibition usually does not include teaching but may include involvement in certain business activities<sup>22</sup>.

#### **a. Excusal of a Prosecutor on Account of Lack of Impartiality**

The impartiality of the prosecutor can be in doubt as a result of different relations that a prosecutor might have with the case or with the participants within the case. For this reason, there are some general rules that must be respected in order to maintain the impartiality of the prosecutors. For example, a prosecutor must not participate in case if he or she:

A). is a victim of the criminal offense;

B). is a relative of the judge, defense counsel, the victim, the counsel for the victim or the suspect or accused or

C). has taken part in the proceedings as a defense counsel or a counsel for the victim or has been examined as an expert witness or witness<sup>23</sup>.

The LCP of North Macedonia has foreseen the situations of excluding a judge because of the lack of impartiality. These reasons are:

A). if the judge is a victim of the criminal act;

B). is a married or unmarried partner or a relative by blood in straight line to any degree, in a lateral line up to the fourth degree or a relative by law of the defendant or his/her defense counsel, the plaintiff, the damaged party or his/her legal or authorized representative;

C). is a guardian, adoptive parent, adoptive child, nourished, foster child with the defendant, his/her defense counsel, the plaintiff or the damaged party;

D). has participated in the same case as a pre-trial judge, has participated in the examination of the indictment before the main hearing or has participated in the proceedings as a plaintiff, counsel, legal or authorized representative of the victim, or has been examined as a witness or as an expert and

E). has participated in decision making process of the lower court in the same case<sup>24</sup>.

The provisions of excluding a judge also applies on the excluding the public prosecutors, the minutes-keepers, the interpreters and professional persons as well as the experts<sup>25</sup>. There are also some grounds that makes the judge and other relevant participants to be treated as *iudexsuspectus* and those are grounds of believe that causes suspect in their impartiality for cases outside the above-mentioned ones (i.e. relative outside the mentioned lines).

<sup>22</sup> O'Connor- Rausch, pp.96

<sup>23</sup> Ibid, pp. 97

<sup>24</sup> Art. 33, par.1, subpar.1-5 of the LCP of North Macedonia, same reasons are foreseen on the CPC of Kosovo (Art.39, par.1 and 2).

<sup>25</sup> Matovski- Lazhetiq- Kalajxhiev, pp. 107

## 5. Conclusion

The role of public prosecutor has a great importance for a fair trial and for the rule of law. It's main role and duty is to prosecute the actors of criminal acts and to present the accusation within the criminal process.

The organization and functioning of public prosecution is based upon many principles which tends to guarantee that the process will be governed only by law and principle of legality. In this regard, the United Nations Guidelines on the Role of the Prosecutor ask states to ensure “that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper influence or unjustified exposure to civil, penal or other liability” as well as in the performance of their duties, prosecutor shall carry out their functions impartially and avoid all political, social, religious, racial, cultural sexual or any other kind of discrimination.

The United Nations Guidelines on the role of the Prosecutor, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general.

According to United Nation`s Guidelines on the role of Prosecutors<sup>26</sup> (Art.10-16) the office of prosecutors shall be strictly separated from judicial functions. Prosecutors shall perform their duties fairly, consistently and expeditiously respecting and protecting human dignity and upholding human rights in order to contribute to ensure a fair process for a fair justice system. The structure and functioning of the public prosecution depends on four elements: its external dependence or independence from political actors, the internal structure and functioning of its services, the degree of respect of the legal norms in deciding to prosecute (the principle of legality and/or the principle of opportunity) and also the attitude toward the citizens that are allowed to initiate prosecution for certain criminal offences.

There are a number of different types of prosecutorial models found around the world:

- (I) In some systems, the investigation and prosecution of a case are conducted by different actors; the police independently conduct the investigation and then give the evidence to the prosecutor, who then brings the case before the court.
- (II) In other systems, the prosecutor is responsible both for prosecuting the case and for directing the police in the investigation of the case.
- (III) In other systems, the prosecutor may work together with an investigating judge and the police in the investigation and prosecution of a case. The prosecutor directs the police in the early stages of the investigation and initiates proceedings, where upon the investigating judge gathers the evidence and creates a case file (or a “dossier”) which is submitted to the court.

<sup>26</sup> United Nations Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

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