

**Anna Fiodorova**

University Carlos III of Madrid, Spain

anna.fiodorova@uc3m.es

ORCID ID: <https://orcid.org/0000-0002-6445-0161>

## **Independence of the Prosecution Service: European Approaches**

**Abstract:** Nowadays, a modern state without the institution of prosecution could rarely be found. It is considered one of the crucial elements for the proper functioning of the system of justice and for the application of the rule of law through such functions as carrying out of pre-trial investigation and / or the prosecution in criminal matters, safeguarding social interests, and judicial independence. The objective of this article is to provide a brief reflection on the necessity and the content of the independence of the modern prosecutor's office. The article is based on the policy tendencies used in the Council of Europe and the European Union and with the more profound analysis of the legal regulation of the Spanish prosecutor's office and its conformity with these tendencies.

**Keywords:** Prosecutor, prosecution office, principle of independence, independence of prosecutors, impartiality of prosecutors, system of justice

### **Introduction: Prosecutor's service as a state institution**

Prosecutor's service is one of the state institutions originated in fifteenth to sixteenth centuries that went through different stages of development depending on state policy, in particular in criminal matters. Nowadays, in many states, it is a constitutional body and a key player in the system of justice, especially in the application of accusatorial criminal procedure that helps to maintain the efficiency of criminal prosecution and judicial independence<sup>1</sup>.

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1 See T. Armenta Deu, *Principio acusatorio y derecho penal*, Barcelona, 1995, pp. 32–33.

Recommendation Rec (2000) 19 of the Committee of Ministers to Member States on the role of Public Prosecution in the criminal justice system states that prosecutors in all European states can decide to initiate, continue and perform the criminal prosecution as well as to appeal some judicial decisions. It also lists some other more common tasks of prosecutors (such as the implementation of the national criminal policy, decision on alternatives to prosecutions, and supervision of the execution of court decisions), and it does not discard the possibility to act in other types of processes, such as civil ones<sup>2</sup>.

Considering the most common functions of the prosecution services, in particular, supervision of judicial independence, it is difficult to imagine their proper implementation being dependent on one of the State Powers<sup>3</sup>. Therefore, this article proceeds with the analysis on the need and content of the independence of prosecution service.

## **1. Independence of the prosecution services**

### **1.1. General remarks**

We can find different principles applicable to the functioning of the prosecution service depending on its role, functions and the relation with the State Powers. As the most common principles can be named legality, impartiality and hierarchy. But nowadays, there is more and more predisposition to talk about the independence of prosecutors which can be met as they are considered one of the key players of the criminal justice system that safeguards the rule of law, and their activities within the criminal process can result in the limitation of some fundamental rights and have an impact on a fair trial<sup>4</sup>.

Notwithstanding, this independence is not easy to define, as it could be addressed to the work of an individual prosecutor solving a particular case (functional independence) or to a prosecutor's office as an institution or General Prosecutor as chief of the service (institutional/structural independence). For example, European Commission for Democracy through Law (Venice Commission) points out that "The prosecutor's offices are often referred to as 'autonomous' and individual prosecutors

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2 Recommendation Rec (2012)11 "Role of Public prosecutors outside criminal justice system" specifies that it might be a representation of the general or public interest, protection of human rights and fundamental freedoms, and upholding the rule of law.

3 See J.A. Zaragoza Aguado, *El Ministerio Fiscal Español y la Fiscalía Europea. Su configuración institucional. La autonomía y la independencia ensu estatuto jurídico. Conflictos de competencia y mecanismos de resolución. La Fiscalía Europea y la orden europea de detención*, Revista del Ministerio Fiscal, no. 9, 2020, p. 72.

4 See S. Guerrero Palomares, *El principio acusatorio*, Navarra, 2005, p. 132.

would be referred to as ‘independent’<sup>5</sup>. The same idea is shared by the Special Rapporteur on the independence of judges and lawyers within the framework of the United Nations that stresses the importance of the autonomy and the functional independence for the “credibility of prosecutorial authorities and public confidence in the administration of justice”<sup>6</sup>.

With respect to the term of independence, we could also find different opinions whether it is similar to the independence of judges or not. For example, the International Commission of Jurists refers to the independence of the justice system that is understood as a totality of judges, lawyers and prosecutors<sup>7</sup>. On the other hand, we can also find some indications that the content of the independence of prosecution offices differs from the judicial independence as they, as a general rule, are hierarchical institutions with accountability to the superiors. They can be also required by the State to implement some public policies related to criminal justice, for example, to “prioritise the prosecution of one type of criminal activity over another”<sup>8</sup>. Nevertheless, it should be stressed that these peculiarities of structural (in)dependence shall be compatible with the functional independence of prosecutors in the application of the law and that makes it more similar to judicial functional independence. Some authors also contend that if the independence is understood as a judge’s submission exceptionally to the law in solving a criminal case, a prosecutor never can be independent in criminal process, as he/she is a prosecuting party in defence of legality<sup>9</sup>. However, in defence of the legality in general, proper actions of the prosecutors’ service also have to be legal, meaning within the limits established by the law and not interfered by any other authorities<sup>10</sup>.

From our perspective, the principle of independence of prosecutors should be understood in broad manner and closer to the content of the judicial independence,

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5 European Commission for Democracy through Law (Venice Commission), Report on European standards as regards the independence of the judicial system: part II – the prosecution service”, 2010, p. 7. The same idea is followed by the European Network of Councils for the Judiciary. See. European Network of Councils for the Judiciary “Independence and Accountability of the Prosecution. Report 2014–2016”, p. 14.

6 Special Rapporteur on the independence of judges and lawyers (United Nations), Independence of Judges and lawyers, 2020, p. 10.

7 International Commission of Jurists, “International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, Practitioners Guide No. 1, 2007, p. 4.

8 European Network of Councils for the Judiciary, Independence and Accountability of the Prosecution..., loc. cit., p. 11.

9 See J.L. Gómez Colomer, La Fiscalía Española, Debe ser una institución independiente?, Teoría y Realidad Constitucional, 2018, no. 41, p. 161.

10 See T. Armenta Deu, Lecciones de Derecho procesal penal, 12th Edition, Madrid, 2019, p. 99, International Commission of Jurists, “International Principles on the Independence...”, loc. cit., p. 5.

meaning a guarantee that prosecution service is not influenced either by the executive or the legislative power.

## 1.2. European approach towards the independence of prosecutors

One of the best ways to see the development of the principle of the independence of the prosecution service is the analysis of the work done in the framework of the Council of Europe. Looking chronologically at the provisions developed within this organisation during the last two decades, some tendency of enhancing the independence could be perceived.

The Recommendation Rec (2000)<sup>19</sup> did not discard the possibility of the subordination of the prosecutor's office to the government; however, it required respect for some guarantees, such as the legality of governmental powers towards prosecutors regarding publicity and the written form of general instructions. It also outlined that in case of possibility foreseen in national law to give governmental instruction to the prosecutor in individual cases, and transparency and equity should be respected. Concerning the internal functioning, the Recommendation foresaw that principles of impartiality and independence should be applied to the assignment of cases.

Despite maintaining this possible dependence of the prosecutor's office under the executive power, the European Commission for Democracy through Law (Venice Commission) in 2010 stated that an individual prosecutor is expected to act judicially<sup>11</sup>.

In the Opinion No. 9(2014) of the Consultative Council of European Prosecutors the wording became stronger considering the independence of the prosecution services as 'an indispensable corollary to the independence of the judiciary' that have to perform their functions without "external pressure or interference, having regards to the principles of separation of powers and accountability"<sup>12</sup>. Therefore, the independence of prosecutors shall be similar to the independence of judges and should embrace such aspects as a recruitment system, career, salaries and disciplinary responsibility.

In its opinion No 13(2018) the Consultative Council of European Prosecutors pointed out that the European Court of Human Rights supports the prosecutors' independence, whether they are considered judicial authorities or not. It also highlighted external and internal independence saying that prosecutors "must enjoy external independence, i.e. vis-à-vis undue or unlawful interference by other public or

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11 See. European Commission for Democracy through Law, Report..., *op. cit.*, p. 5

12 Consultative Council of European Prosecutors, Opinion No 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe on European norms and principles concerning prosecutors" CCPE(2014)4Final. The same opinion is shared by some practitioners, for example, see. J.-A. Zaragoza Aguado, *El Ministerio...*, *op. cit.*, p. 72.

non-public authorities, e.g. political parties; they must enjoy internal independence and must be able to freely carry out their functions and decide, even if the modalities of action vary from one legal system to another, according to the relationship to the hierarchy”<sup>13</sup>.

Looking at quite recent case-law of the Court of Justice of the European Union (hereinafter – CJUE), a stronger position about the independence of prosecution service from the executive power could be noticed. For example, in Joined Cases C-508/18 and C-82/19 the CJUE pronounces itself about the independence of German prosecutor’s offices. According to German Law on Judicial System, they belong to a hierarchical structure under the Minister for Justice (Federal or of the respective country) and the minister may exercise the power of their supervision, direction, and instruction. The CJUE calls these ministerial powers as external ones that could influence the decisions of a prosecutor’s office. Although German law foresees that instructions in respect to a specific case cannot exceed the limits of the law and some countries even establish the requirement that they have to be written, the CJUE states that this “cannot wholly rule out the possibility, in all circumstances, that a decision of a public prosecutor’s office (...) be subject to an instruction from the minister for justice of the relevant Land” and the existence of the principle of legality is “not capable of preventing the minister for justice of a Land from influencing the discretion enjoyed by the public prosecutors’ offices of that Land” if the law does not specify how the legality is ensured<sup>14</sup>.

In Joined Cases C-566/19 PPU and C-626/19 PPU the CJUE analyses the status of the French prosecution service that is a hierarchical institution with the application of the directions and control of superiors, but in which the Minister of Justice is endowed with the power only to issue general instructions about the development of the criminal policy that is accompanied by the explicit prohibition to instruct concerning individual cases. The CJUE underlines that independence requires that there are adequate statutory or organisational rules to ensure that the authority is not exposed to the risk of receiving individual instructions from the executive, and in this case such requirement is fulfilled<sup>15</sup>.

Summarising, the CJUE refers to the independence “ad extra” that excludes the possibilities of individual instructions from institutions other than judicial ones, but the possibility of internal ones remains<sup>16</sup>.

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13 Consultative Council of European Prosecutors, “Opinion No 13(2018) of the Consultative Council of European Prosecutors. Independence, accountability and ethics of prosecutors” CCPE(2018)2, point 31.

14 Judgement of CJEU of 27 of May 2019 on the joined cases C-508/18 and C 82/19, points 80, 81.

15 Judgement of CJEU of 12 of December 2019 on the joined cases C-566/19 and C-626/19, points 8, 10, 52, 54.

16 R.A. Morán Martínez, *Investigaciones transfronterizas y cooperación judicial internacional en la Fiscalía Europea*, Revista del Ministerio Fiscal, no. 9, 2020, p. 47.

When it comes to European legislation, the independence is found in the Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO')<sup>17</sup> as one of the key principles applied to this European body with the powers of investigation and prosecution.

Article 6 of the above-mentioned Regulation outlines the independence of the EPPO as a European body, as well as the independence of the European Chief Prosecutor, his deputies, the European Prosecutors and the European Delegated Prosecutors, meaning all prosecutors under the EPPO. It also refers to the prohibition of the above-mentioned prosecutors to seek or take any external instructions and for the Member States of the European Union and the institutions, bodies, offices, and agencies of the Union to influence them. Thus, the obligation to secure independence is dual: of the prosecutors by themselves and of the rest of the actors that might use their influential power.

Summing up European tendencies, it could be said that although the content of the independence of the prosecutors' services might be different from the judicial independence, it is an indispensable element for the Rule of Law and an independent judiciary.

## **2. Some comparative analysis: a closer look at Spanish regulation**

After a brief description of the European approach towards the independence of the prosecutor's office, which could be considered as guidelines or a general framework to be followed, it would be interesting to have a closer look at some real national regulation.

In Spain, the prosecutor's office can be considered as a constitutional institution, as its brief regulation is foreseen in the Spanish Constitution of 1978. Article 124 establishes the tasks and principles of the functioning of the Office of Public Prosecutor, as well as the rules of appointment of its chief – State Public Prosecutor (General Prosecutor). The prosecutor's office acts in the defence of the rule of law, citizens' rights, and public interests as well as in the protection of the independence of the judiciary and satisfaction of social interest. These functions are carried out based on four principles: legality, impartiality, unity of action and hierarchical dependency. The constitutional regulation has its peculiarity as article 124 belongs to the Part that regulates Judicial Power in order to emphasise a lack of hierarchical dependence of prosecutors to the Government<sup>18</sup>. But at the same time, it establishes that the State

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17 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (OJ L 283, 31.10.2017, p. 1–71).

18 J.A. Zaragoza Aguado, *El Ministerio...*, *op. cit.*, p. 72.

Public Prosecutor is nominated by the Government (after consultation with the General Council of the Judiciary) and formally appointed and removed by the King. In conclusion, the constitutional provisions neither describe precisely its position among state powers nor describe precisely its role<sup>19</sup>.

It should be mentioned that Spain belongs to that minority of countries where the pre-trial investigation is led by the pre-trial (investigating) judge and not the prosecutor<sup>20</sup>. However, the task to present an indictment and to participate as an accusatory part in the process belongs to prosecution service. The latest drafts of criminal procedure code have tried to introduce modifications of current pre-trial system towards investigation led by the prosecutor's office, but that means radical changes of the current system of justice and implies significant expenditures and for the time being does not have enough support to pass legislative procedure.

The Act 50/1981, of December 30<sup>th</sup>, on the organic statute of the prosecution service (with its later modifications, especially of the Act 24/2007, of October 9<sup>th</sup>) sheds more light on the autonomous functioning of the Prosecutors' Office, stating that it has functional autonomy and proper legal personality. In the words of Moreno Catena, this autonomy separates the Prosecutors' Office from the general State administration and weakens the supremacy of the Executive Power<sup>21</sup>.

In article 7 of the Act 50/1981 we can also find a direct reference to independence. It outlines that "Pursuant to the principle of impartiality, the Prosecution service will act objectively and *independently* in defence of the interests entrusted thereto". Is the content of this independence similar to the independence of the Judicial Power? The answer seems to be partially negative. It is explicitly prohibited to affect the independence of Judicial Power, and in case of infringement of this rule a legal action can be initiated. This prohibition is applied both to external entities and persons as well as to judge-to-judge relations due to the lack of hierarchical dependency, one of the principles of the functioning of the Office of Public Prosecutor. But when it comes to the individual action of judges or prosecutors, they have to act impartially (objectively and independently), and they have a right and obligation to refrain from a case where their impartiality could be doubted<sup>22</sup>.

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19 V. Moreno Catena, *El papel del Ministerio Fiscal en el Estado democrático de Derecho*, 2002, no. 16, p. 141.

20 The only exception to this rule for the time being is the investigation of the juvenile delinquency that since 2000 has been endowed to prosecutors.

21 *Ibidem*, p. 146.

22 Article 219 of the Organic Act 6/1985 of the 1 July, on Judicial Power, establishes 16 situations that serve as a motive to refrain from a specific case. For example, when judge or prosecutor: – Has marriage ties or similar de facto situation, kinship by consanguinity or affinity to the second degree with any of the parties or their attorney involved in the suit or legal proceedings; – Has acted as legal counsel or representative of any of the parties, or has issued an expert report in the proceedings; – Has a direct or indirect interest in the suit or in the proceedings.

Interpreting article 124 of the Spanish Constitution in a systematic way, the scope of the prosecutor's independence should be also interpreted as having in mind the principles of unity of action and hierarchical dependency. As explained in the previous part, these principles by default do not mean a lack of independence, everything depends on the content that is given to them by the law, especially concerning the possibility to give instructions in individual cases. If the prosecutor's office functions based on general and individual instructions from superior prosecutors, but with the possibility to appeal the latter, it is compatible with the scope of independence that prosecutors should have. However, if an external entity is endowed with the power to give instructions in individual cases, that negatively affects the proper functioning of the prosecution service and its independence.

Let see how this issue is regulated in the Act 50/1981. Article 23 outlines that any assignment given to a prosecutor through an ordinary case distribution system can be reassigned by the direct superior to another prosecutor. In this case, a motivated resolution shall be issued. As it is a hierarchical institution, article 25 establishes that "the General Prosecutor may issue general or specific orders and instructions to subordinates relating to the service and the performance of their duties". The same article foresees a safeguard if such instructions is related to any member of the government. In this case, before giving instruction, the General Prosecutor shall consult the Board of High Prosecutors.

According to article 26, the General Prosecutor also has the power to summon any prosecutor and to receive his/her reports or give direct instructions. If a prosecutor considers such instructions as unlawful, he or she can consult the Board of High Prosecutors and act according to its considerations. Thus, it seems that hierarchical dependency stays within the prosecutor's office and does not affect the independence.

Let continue with the analysis of the entities/persons that are allowed by the law to give instructions to the prosecutors. Article 8 of the Act 50/1981 allows the government to ask the General Prosecutor to promote legal action in the defence of the public interest. As a general rule, it is done through the Ministry of Justice, but in case of the necessity, it could be done directly by the President of the Government. To proceed with such a request, the General Prosecutor has to consult the Board of High Prosecutors and take a motivated decision. Thus legally, the governmental request does not mean unconditional order. The Government can also request information on "any of the matters handled by the Prosecution service", meaning also individual cases under prosecution and possibly those with the involvement of political figures. The law does not stipulate a possibility to give direct governmental instructions to the prosecutors; thus, from the legal point of view a direct interference of the Executive Power in work of the prosecutor's office does not exist. Notwithstanding, the total correctness of this statement could be evaluated only after analysis of the appointment of the General Prosecutor.



As mentioned above, article 124 of the Spanish Constitution establishes the way to appoint a General Prosecutor: “appointed by the King on being nominated by the Government, after consultation with the General Council of the Judiciary”.

The Act 50/1981 provides more details on nominations and limits the possibility to choose the General Prosecutor only from among “Spanish attorneys of prestige who have been practicing for over fifteen years”. This provision ensures that a General Prosecutor is a legal professional and not a politician and shall be considered as a positive development. The Act 24/2007 that modifies the Act 50/1981 introduced a novelty that a nominee shall be summoned to a hearing before the respective parliamentary committee. Thus nowadays, in legal terms, all three state powers are participating in the appointment of the General Prosecutor. Nevertheless, it should be pointed out that the weight of this participation is not equal, but with the prevailing role of the Government that takes the final decision. The consultation with the General Council of the Judiciary is not always free of at least indirect political influence as according to article 567 of the Organic Act on Judiciary, the members of the General Council of Judiciary are elected by the Chambers of Parliament (and not by judges). Political dependence could be noticed even more looking at the motives of dismissal of the General Prosecutor, as one of them is “when the government that nominated him/her leaves power”.

Considering what has been said, there is a doubt whether instructions given by the General Prosecutor would always be free of political influence and would not affect the impartiality of the Prosecutor’s office.

Questions of independence of judicial authorities and prosecutors were the subject matter of the Fourth evaluation round “Corruption prevention in respect of members of parliament, judges and prosecutors”, carried out by the Group of State against Corruption (GRECO) of the Council of Europe between 2012 and 2017.

In its Evaluation report of Spain, among other comments, GRECO outlined that the independence and impartiality of individual prosecutors is not questioned, but there are some doubts about the structural independence of the governing bodies of the prosecution service and “the term of office of the Prosecutor General should not coincide with that of Parliament or the continuance in office of the Government as this could create an impression that the Prosecutor General is linked to or a part of the executive branch of Government.”<sup>23</sup> In light of the findings made by the GRECO, it was recommended to Spain:

- To reconsider the method of selection and the term of tenure of the Prosecutor General;

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23 Group of State against Corruption (GRECO), Fourth evaluation round. Corruptions prevention in respect of members of parliament, judges and prosecutors. Evaluation Report. Spain, 2013, p. 35.

- To increase transparency of communication between the Prosecutor General and the Government;
- To explore possibilities to provide for greater autonomy in the management of the means of the prosecution services<sup>24</sup>.
- For the time being, none of these recommendations have been fully implemented, although respective drafts of modifications have been developed.

Currently, the Ministry of Justice is drafting a new Criminal Procedure Code where again the idea to change a pre-trial investigation model and transfer the investigating power to the prosecutor's office is being raised. In this light, it is even more important to strengthen the independence of this institution in order to ensure proper application of the rule of law and guarantees of the fundamental rights.

## Conclusions

Though it is more common to assign the feature of independence to the judiciary, the importance of independence of prosecutor's services has evolved recently. Policy developments within the Council of Europe point at the independence of prosecution as an essential condition to the independence of the judiciary and protection of fundamental rights. Prosecutors' independence is not equal to judicial one in all its aspects, but they do have common denominators: impartiality of individual judges and prosecutors towards individual cases and lack of external influence in solution of these cases.

From the few examples of national regulation analysed in this article (German and French in the context of the case-law of the CJUE and Spanish in more details), no severe criticisms towards the impartiality of individual prosecutors have been identified; however, national legislators shall take more steps to eliminate possibilities of external influence in individual cases in two ways: by the prohibition of direct external instructions in individual cases and by the exclusion of the political dependence of the prosecution service and the General Prosecutor.

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24 See *Ibidem*, p. 37.

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