Independence of Magistrates as a Guarantee to Reduce Political Corruption. Specific Case of Prosecutors in Romania

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Successfully prosecuting high profile cases of political corruption is an exceptional challenge for any law enforcement agency.

The fundamental democratic principle according to which everyone is equal under the law does not always work when the suspects are prominent politicians, who have virtually unlimited access to all kinds of resources, employ sophisticated schemes in order to commit and disguise their illicit activities, have the support of skilled lawyers, utilize lengthy appeals, constitutional challenges or other stalling tactics and have at their disposal a wide range of means to influence the media coverage of the investigation, in order to wear down public opinion, which tends to demand results quicker than the judicial system can deliver.

This kind of investigations usually gives rise to wide public attention and brings along significant institutional and psychological pressures to prosecutors, who do not act in a political or social vacuum, so it is important that they should be in a position that allows them not to worry about how it may influence their professional career.

On the other hand, public confidence in the fairness and openness of systems of accountability will depend on the trust they have in the individuals charged with investigating particularly controversial issues, something that can't be achieved when the investigators are in any way connected to the suspects.

In order to address these difficulties, the independence of the prosecutors is an essential prerequisite, although not sufficient by itself, for obtaining significant results in the fight against corruption.

Romania is probably an ideal case-study, as a country which has acknowledged several years ago having a serious problem with corruption and has been under intense external and internal pressure to tackle with it, so has by now a significant experience in implementing policies aiming at this problem, and identifying those that do not work, or, unfortunately not as often as we wished, those that do.

In Romania, the existing legal and institutional framework adopted in the recent years ensured the effective independence of the Public Ministry, which was an important step towards a different approach of the corruption phenomenon.

The Public Ministry is part of the judicial authority, while prosecutors are magistrates, appointed by the President of Romania, enjoy stability and are independent, their career being conducted solely by the Superior Council of Magistracy. Within the Prosecutor's Office attached to the High Court of Cassation and Justice there are two autonomous structures - the Directorate for Investigation of Offences of Organised Crime and Terrorism (DIICOT) and the National Anti-Corruption Directorate (DNA), which are coordinated by the General Prosecutor.

Prosecutors are completely independent in the solutions they ordain and may object with the Superior Council of the Magistracy against any interventions from the hierarchically superior prosecutors.

As regards the relations with the other authorities, the Public Ministry is independent and exercises its attributions only according to the law and for ensuring its observance.

The effective enforcement of these principles, combined with the dedication and specialization

of the prosecutors in the two before mentioned structures, based on a proactive attitude and a strategic approach of the corruption phenomenon, allowed the start of a significant number of very high profile investigations, concerning prominent politicians from all the major political parties.

For example, among the politicians who have been indicted in 2007 for corruption crimes are a former prime minister, four members of Parliament, a former presidential counsellor, several ministerial counsellors and 3 mayors of important cities.

Nevertheless, the picture is not all bright and shiny considering that the independence of prosecutors is not enough in a legal and institutional framework that is often unsuitable for coping with the specific complexity of these crimes, the need to find a balance between the defendant's rights and prosecution, the impact of public interest, and the institutional and psychological pressures these entail.

The most frustrating effect of this imperfect framework, both for the prosecution and for the public, is the lack of convictions in the cases concerning prominent politicians, even several years after the indictment, even though none of these persons have been acquitted and the cases are still pending.

There are numerous reasons for this situation, coming out mainly from a very rigid Criminal Procedure Code, which dates since 1968 and is in many ways obsolete given the new reality. The Code's provisions can be interpreted in such ways that defendants can find virtually unlimited number of tactics to delay the trials indefinitely. Also, it allows the courts to establish the absolute nullity for a wide range of procedural acts that were drawn up without observing the legal provisions regulating the course of the criminal trial, irrespective of the damage caused, and to dispose the restitution of the case to the prosecutor as a consequence in order to start over the investigation.

Without trying to make an in depth analysis of these court decisions, one can not help but notice an obvious reluctance of judges to reach a conclusion on the facts of the high profile cases, given the extensive application of these provisions compared to the average cases.

This can be the starting point for a different discussion on the concept of independence of magistrates and how should its limits be settled in order to avoid the lack of accountability. Striking the right balance is not an easy job and our judicial system still has to work about that.

While 96% of the judges and 86% percent of the prosecutors are happy with their degree of independence in taking decisions, 66% of the public believe that the judges' and prosecutors' decisions are influenced by the politicians.

The best proof for the efficiency of the Public Ministry's approach towards political corruption is in our opinion the response we get from the political word. In the last few years we witnessed a whole series of unusually innovative initiatives which we interpreted as a clear indication that politicians no longer feel that their position is sufficient to grant them impunity and that's why they keep looking for ways to influence, more or less subtly, the prosecutor's activity.

For this reason, laws were adopted or initiated in order to decriminalize activities which used to be considered as corruption crimes, to change the procedure of appointing chief prosecutors, to reorganize the specialized structures that deal with corruption and organized crime, or in order to severely limit the prosecutor's competences and thereby deprive him of the instruments enabling him to fulfil his role efficiently. These laws were voted by some members of Parliament who are subject to a judicial procedure and influenced directly their cases, raising strong questions about the morality of these procedures and the obvious inequality to individuals belonging to other social categories in identical circumstances, who don't have the possibility of changing the applicable laws.

For example, in October the Parliament amended the Criminal Procedure Code, through a law which is presently challenged constitutionally, by penalizing the nonobservance of any trial provisions when producing evidence with absolute nullity; removing the prosecutor's competence to issue provisional orders for the interception of conversations and communications; restricting the instances when the judge can order the interception of conversations; limiting the preventive measures available to the prosecutor and introducing new grounds for stalling the cases, such as new appeals or the obligation of carrying out an

expert's report in order to establish whether the evidence has been legally obtained.

Another essential obstacle in investigating political corruption is a highly controversial regime of immunities, especially concerning ministers. Consequently to a widely debated decision of the Constitutional Court, if the serving and former ministers are also members of Parliament, an investigation can only start with the authorisation of the respective chamber.

Already in two cases the Parliament refused to authorise the investigation of prominent politicians for corruption crimes, claiming that no sufficient evidence was produced to convince them that they were involved in criminal activities, despite a prior indictment for the same deeds and the fact that according to the provisions of the Criminal Procedure Code the *evidence* can be administrated only after the beginning of the criminal investigation in the case, the assurance of this procedural framework representing exactly the ground of our request.

A widely employed tactic by the investigated politicians is the accusations in the media against the prosecutors, who are presented as the instrument of the rival political parties, in order to discredit the investigation. The constant presence of these accusations, combined with objective factors, such as the lack of convictions in high profile cases, slowly managed to alter the public perception commitment and the independence of the judiciary system. Thus, political corruption no longer is the main issue on the public agenda because of the confusion induced by these messages.

As a consequence, a recent survey proved there is a huge gap in the perception of the independence of the judicial system between magistrates and the public. While 96% of the judges and 86% percent of the prosecutors are happy with their degree of independence in taking decisions, 66% of the public believe that the judges' and prosecutors' decisions are influenced by the politicians. It is an obvious problem of credibility, which we don't know yet very well how to address and exactly how much of it is our own fault.