Strasbourg, le 29 April 2003 **CPGE (2003) 03**

Conference's website address: *www.coe.int/prosecutors*

Conference of Prosecutors General of Europe

4th session

organised by the
Council of Europe in co-operation with the
Prosecutor General of the Slovak Republic

Bratislava, 01 – 03 June 2003

* * * *

Public prosecution and politics

Report
by
M. Alessandro Pizzorusso
University of Pisa
(Italy)

1.-Connections between the justice system and politics have long been a focus of legal writers' and legal practitioners' attention, and defining the role of the lawyer, the judge and other categories of legal personnel – including the prosecutor – is probably the aspect of the question which raises most issues. However, after decades of debate among legal specialists worldwide, there would now seem to be some approximation of positions which, in the last two centuries, had appeared to be moving wider apart.

In the 19th century and the first part of the twentieth century, under the influence of Enlightenment thinking, the view that law was a manifestation of the "general will" gained the upper hand, not only in continental Europe and in countries outside Europe influenced by the continental-European ones but also in the common law countries, in which judicial precedent continued to be officially recognised as a source of law. However, the view that law is a product of legal culture and not just political will has never completely lost its persuasiveness: in the twentieth century the proposition that there are legal principles which are untouchable even by the political authority and the view that the legal order is a rational system of concepts developed by judges and academic specialists have once again become influential with the spread of constitutional review of legislation and the development of scientific study of law[1].

At the start of the third millennium there is no doubt whatever that the activity of interpreting the law, which is universally recognised as being the business of the legal specialist and the judge, may also be regarded, in some respects, as a form of law-making, though the principle still stands that judicial activity is governed by the rules on creating law which operate within the particular legal system. Even the distinction between civil law systems and common law systems – the main one drawn by comparative law studies, especially from the nineteenth century on – has been extensively weakened by the sharp increase, in Anglo-Saxon systems, in matters covered by statute law and by the huge inroads which judicial precedent has made in those countries which are most receptive to the ideas underlying modern codification[2]. This would appear to lend weight to the contention that, in law also, there is a shift towards a kind of globalisation in which there is greater balance between "legislative" law, essentially political in origin, and doctrine-based law, created by legal theorists, judges and custom, according to an overall pattern familiar to us from pre-eighteenth-century experience[3].

However, as regards public prosecution, the question of connections between the justice system and the political system is a little special in that public prosecution involves some responsibilities which are akin to those of judges (and, in any case, functionally linked to these), but which, in some countries, are regarded as belonging to the political authority, more specifically the executive, or as pertaining to a power which is independent of the three traditional ones and therefore distinct from the judiciary, even though, in some respects, very close to the judiciary[4].

---

[1] See M. Cappeletti, *The Judicial Process in Comparative Perspective*, Oxford, Clarendon Press, 1989.

[2] See R.David, C.Jauffret-Spinosi, *Les grands systèmes de droit contemporains*, Paris, Dalloz, 11th ed., 2002 ; P.Stein, *Legal Institutions. The Development of Dispute Settlement*, London, Butterworth, 1984 ; R. Sacco, *Trattato di diritto comparato*, Turin, Utet, 1992 onwards (5 volumes) ; A.Pizzorusso, *Sistemi giuridici comparati*, Milan, Giuffrè, 2nd ed., 1998 ; R.C.Van Caenegem, *European Law in the Past and the Future*, Cambridge, Cambridge University Press, 2000; M.G.Losano, *I grandi sistemi giuridici,* Rome, Laterza, 2000.

[3] See in particular J.P.Dawson, *The Oracles of the Law*, Westport, Greenwood Press, 1968.

[4] See C.Guarnieri, P.Pederzoli, *La democrazia giudiziaria*, Bologna, Il Mulino, 1997.

Prosecution services' most typical functions have to do with instituting criminal proceedings, often within a monopoly system, and asking the courts to impose the penalties which legislation has laid down for specified offences, likewise defined in law. The prosecution function involves a range of procedural powers, normally including the power to decide whether to contest, in the manner provided for in law, a decision of a court which appears legally unsound. Such powers will often extend to taking charge of investigation of offences and responsibility for execution of sentences. In some countries the prosecution service also has civil or administrative functions but that is less typical of the institution.

That the prosecutor, in trial proceedings, has the role of a "party", and as such is ranged against the judge, the accused and the other parties, is significant. Equally significant is the fact that the prosecutor is different from the other parties in being a "public party" (often also termed an "impartial party") distinguished from the "private parties" by the requirement, at all times, to seek out the truth, even if doing so benefits the prosecution's natural adversary in the proceedings (and solely in the proceedings), namely the accused.

The "political nature" of prosecution functions can be seen in particular in relation to two issues. The first is that it is possible to see prosecution work as coming under "criminal policy" and therefore as part of a wider policy framework laid down, constitutionally, by the "political" organs of state – ie the legislature and the executive – under arrangements which vary according to the particular features of government in the given country. The other issue is the possibility of the prosecution service's (and subsequently the courts') having to concern themselves with people who are in public office as part of another power of state, thus causing a collision between the two powers.

The second issue is the one that, particularly in recent years, has most given rise to criticisms in various countries, whether from those who view prosecution activities as interfering illegally with the work of the constitutionally ordained political institutions or from those who object, in particular cases, to what they see as failure to take proceedings either against members (or protégés) of such institutions or members of other bodies for fear of causing political embarrassment (similarly there are cases where prosecution of foreigners could give rise to international controversy).

2.To take the latter problem first, the solution is generally to be found in a range of rules, often extremely detailed and usually contained in the Constitution or its implementing legislation (or legislation having a constitutional character), which lay down cases of "immunity" or "exemption from jurisdiction" deriving from the principle of reason of state and derogating from other constitutional principles, not least the principle of equal treatment for all[5]. As is well known, cases of immunity divide into two main types, according to whether they involve non-liability (in criminal or even civil or administrative matters) or "inviolability".

Non-liability (or privilege)[6] means that conduct for which, in theory, the person responsible could be prosecuted – and which must generally have occurred in the performance of public duties – is not an offence, even if it would be one in other circumstances, and this normally rules out any civil liability or disciplinary action.

[5] As embodied in the axiom that the law is the same for all. That maxim is often stated in documents of especial solemnity or to be found on the walls of courtrooms in many countries, and is one from which all judicial work should draw inspiration.

[6] In French, "irresponsabilité"; in Spanish, "inviolabilidad"; in Italian "insindacabilità" or "irresponsabilità".

A typical example is non-liability of sovereigns (sometimes defined as "sacred and inviolable"), whereas in republics there is no non-liability for especially serious offences such as treason or violation of the Constitution[7]. In the case of members of parliament (and sometimes even regional councillors, judges of constitutional courts or other categories), non-liability is generally confined to votes cast and opinions expressed in the performance of their duties, in line with the ninth article of England's 1689 Bill of Rights, which codified a rule which the English parliament had already applied, and with the decree of 23 June 1789 which France's revolutionary assembly adopted on a proposal from Mirabeau. The main problem in such cases is the precise scope of "performance of duties" – some writers have tried to widen the concept well beyond what would seem appropriate to the words. In Germany and Greece non-liability in this area does not extend to defamation.

In the case of parliamentary immunity[8] criminal proceedings necessitate an application to the chamber of which the potential accused is a member (this is required as long as he or she remains a member of it) to have the immunity lifted. Immunity of this kind came in with the 1791 French Constitution (Title III, Chapter I, Section V, Article 8) and the 1795 French Constitution (Article 113), and then spread to a large number of countries. In some legal systems special authorisation is needed for individual procedural measures (such as arrest) against members of parliament whereas, when the authorisation is general, cases are laid down (flagrante delicto, for example) in which it need not be requested. Needless to say, parliamentary immunity ceases when the parliamentary term ends or when the member is not re-elected. Where the member is re-elected a further application to have the immunity lifted must be made. In some countries parliamentary immunity refers not to the legislature but to the parliamentary session.

The rules on parliamentary immunity have likewise given rise to great debate about their actual scope. Some writers have tried to reduce the grounds of immunity to matters of a "political" nature (though that has not always simplified the issue), whereas others have held that the organ making the charge must prove the existence of a *fumus persecutionis*, which would appear even more difficult to demonstrate. It is worth making the point, even if, on its own, it does not clear up the difficulty, that immunity, here, is a guarantee of Parliament's continuing to function and not a protection of the member's personal interest, as has often been maintained.

"General" authorisation to take proceedings was abolished in Italy in 1993 and in France in 1995, and only certain types of authorisation for individual procedural measures were retained. An odd consequence of this, in Italy, has been the emergence of an interpretation to the effect that the matter has to be referred to the relevant chamber of Parliament so that it can decide whether the member's alleged conduct falls within the scope not of immunity but of non-liability, the chamber's decision being binding on the courts in any criminal proceedings[9], and it has also resulted in a parliamentary tendency (which in fact is at odds with the case-law of the Constitutional Court) to increasingly widen the concept of "performance of duties" as applied to members of parliament.

---

[7] See the report of Professor Avril's committee on liability of the President of the French Republic.
[8] In French "inviolabilité"; in Spanish "immunidad"; in Italian "inviolabilità".
[9] Corte cost., 29 December 1988, n.1150, in *Foro italiano*, 1989, I, 326 ff.

In addition there has been occasional debate about whether a member of parliament can be compelled to appear in proceedings as accused, witness or defendant and whether proceedings can be postponed on account of parliamentary activity.

On the other hand it was the doctrine of reason of state which inspired the requirement that, to prosecute a government member for offences committed in the performance of their duties, authorisation must be sought from a branch of Parliament, a requirement laid down in Italian law as a check on whether the alleged offence was committed in furtherance of a constitutionally important state interest or of a priority public interest in the performance of government duties (in which case prosecution is not possible)[10].

Cases of exemption from jurisdiction include those where certain types of offence are triable by the Parliament chamber of which the person accused is a member (peer trial), even though the practice has been done away with almost everywhere[11]. Some countries merely provide that a special tribunal deal with any charge against the President of the Republic[12] or, sometimes, a minister[13], or against a member of parliament or government member (in Spain the tribunal here is the criminal division of the *Tribunal Supremo*[14]), or against a member of parliament accused of defamation (in Greece the tribunal is the Court of Appeal)[15]. In other cases provision for trial merely involves variations on ordinary procedure[16].

The basis for immunities and exemptions from jurisdiction is to be found in the balance which the constituent assembly attempts to strike between the general interest in prosecution of offences, which of course involves equal treatment of all offenders regardless of any institutional role which they may have, and the public interest in ensuring that holders of the highest public offices have freedom to take action without fear of incurring liability. The balance is a very delicate one but on the whole is justified[17].

3. As regards the other type of problem, it should be observed that the term "crime policy" refers to the range of state action concerned with legislating on and implementing the prevention and punishment of crime. More specifically, rule-making in the criminal sphere is a matter for the legislature, like rule-making in any other area, whereas prevention is a branch of administrative activity which is a responsibility of the executive, and punishment is a matter for the judiciary, which imposes the appropriate legal penalty at the instigation of the public prosecutor or the victim of the offence.

---

10 Article 96 of the 1948 Constitution and Article 9.3 of Constitutional Law No.1 of 16 January 1989.

11 In the case of members of Britain's House of Lords this privilege was abolished by a 1948 act.

12 France's *Haute Cour de Justice*, as provided for by Articles 67 and 68 of the 1958 French Constitution, is an example.

13 France's *Cour de Justice de la République*, provided for in Articles 68.1, 68.2 and 68.3, introduced into the 1958 French Constitution by Constitutional Law No.93-952 of 27 July 1993, is an example here.

14 Article 71.3 and Article 102.1 of the 1978 Spanish Constitution.

15 Article 61.2 of the 1975 Greek Constitution, amended in 1986.

16 In Italy, for example, in the case of ministerial offences, under Article 96 of the 1947 Constitution, as amended by Constitutional Law No.1 of 16 January 1989, which abolished the Constitutional Court's special jurisdiction for such offences (though the special jurisdiction was retained for offences of a President of the Republic).

17 On this question see L.M. Diez-Picazo, *La criminalidad de los gobernantes*, Barcelona, Critica, 1996. For extremely harsh criticisms of the system of parliamentary immunities, see H. Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen, J.C.B. Mohr (P. Siebeck), 1929. Also see C. Mortati, *Istituzioni di diritto pubblico*, IX ed., Padua, CEDAM, 1975, vol.I, pp.494 and 495.

In most cases the power to institute criminal proceedings is reserved to the state, through the prosecution service. It is only in a very few cases that the power to bring proceedings is conditional on a "complaint" being made by the injured party or on other procedural requirements to be met by parties outside the judiciary. Private criminal proceedings, as a form of popular action, are available in Spanish law (Article 125 of the 1978 Constitution). England has a similar type of action, essentially consisting in private exercise of public functions. The 1985 legislation which introduced the Crown Prosecution Service restricted private prosecution but did not do away with it[18].

Although penalties are usually based on essentially moral values which are widely shared in the society whose legal organisation the state is concerned with, it is generally recognised that the introduction of certain offences can be a policy tool to combat particular types of conduct which, in a given context, are regarded as socially harmful even though they may not be so in absolute terms. This amounts to placing on the same footing *mala in se* (as penologists in centuries past used to call them) and *mala quia priobita*. And even where offences are based on general consensus, there is no doubt that there may be more or less contingent factors that could prompt the authorities to punish them with greater severity or greater leniency.

However it should be noted that it is for the legislature to lay down what cases constitute offences and what penalties apply to them and that no decision of the executive can rule that a given type of behaviour is to be an offence[19]. Nor can the judiciary so decide[20] (*nullum crimen, nulla poena sine lege*)[21].

Consequently there can be no doubt that, subject to any limits laid down by constitutional rules, the legislature, through the measures which it enacts, is allowed to develop criminal policy of its own aimed at deterring certain types of behaviour by means of criminal penalties. Similarly there is no doubt that the government, particularly the justice minister, can promote such measures by using its powers to instigate legislation. On the other hand, given the parliamentary monopoly referred to, it is less clear how legitimate it is to talk of crime policy in the context of administrative or judicial activity.

---

[18] L.M. Diez-Picazo, *El poder de acusar. Ministerio Fiscal y Constitucionalismo*, Barcelona, Ariel, 2000, pp.35 ff and 151 ff.; J.R. Spencer, *Jackson's Machinery of Justice,* Cambridge*,* Cambridge University Press, 1995, pp.228 and 229. Reporting an offence (to the police, the prosecution service or any other authority required to forward it to the appropriate quarter) does not amount to instituting criminal proceedings. It is everyone's entitlement and gives rise only to a qualified *notitia criminis*.

[19] See, however, debate as to the permissibility of so-called "blank" criminal norms, laying down criminal penalties for breach of rules set in non-legislative measures (even future ones) to which the legislation refers for details of those cases which are to be treated as offences.

[20] Attention should be drawn, here, to the rule that criminal legislation is to be "strictly interpreted", which rules out interpretation by analogy (see, for example, Article 14 of the preliminary provisions of the Italian Civil Code). That rule, involving a parliamentary monopoly of the criminal sphere, is often laid down in constitutions (see, for example, Article 25 of the Italian Constitution) but is also to be found in common law systems, which do not have criminal codes.

[21] In common law systems, for example, the courts apply the law as deriving from judicial precedents but also statute law. In the criminal sphere, however, both in civil law and common law systems, there is an exception deriving from the *nullum crimen, nulla poena sine lege* principle whereby a rule of criminal law cannot be formulated on the basis of sources subordinate to statute law or by means of judicial precedent.

The key point about administrative activity is that it must at all times keep to the line set by the legislature and that administrative measures can only attempt to apply, or, at a pinch, interpret - under judicial supervision - what Parliament has laid down. In addition, in systems which allow delegation of legislative powers, the term "legislation" obviously also applies, even for these purposes, to rule-making activity of the executive under such delegation.

Judicial activity is clearly governed by the relevant general laws, and in particular must strictly comply with criminal law and criminal procedure. In the (very few) cases where the law confers discretionary powers on the courts (for example, where it sets minimum and maximum penalties), their decisions still have to be based on the principles explicitly set out in the legislation or in any regulations (even extra-legal ones) to which the legislation refers.

However, the principle of the separation of powers and of independence of the judiciary requires that the legislative and administrative measures by means of which crime policy is put into effect do not encroach on the judiciary's province, which includes establishing the facts on which the penalty depends and deciding what legal provisions apply to those facts.

Thus all influence of the legislator or executive over the courts must be regarded as prohibited other than in the form of general, abstract measures directed to the future. The prohibition especially applies to measures capable of affecting judicial decisions in individual cases (except where there is constitutional provision for them, as in the case of amnesties). Any such influence is illegal, whether direct or indirect[22].

In constitutional systems guaranteeing independence of the judiciary by vesting organisational functions in a special body[23] such as a judicial service commission, as provided for in many recent constitutions, the view must be taken that this type of guarantee encompasses all functions of which that body is in charge. Equally, it is clear that crime policy can be developed by the government or the justice minister, even through non-legislative measures, as regards functions which do not affect either areas reserved to the legislature or other guarantees of judicial independence which the Constitution directly or indirectly provides. A further point is that bodies such as judicial service commissions, although they have no hand in shaping crime policy, must clearly, in performing their work, take into account any policy indications provided by decisions of Parliament or the government which do not exceed either institution's jurisdiction.

In the context of the prosecution service, the main question is whether, from the standpoint of guarantees of independence, it is to be treated as a judicial body. As an argument for so treating it, it may be observed that the courts are not normally allowed to institute proceedings of their own motion. If, therefore, the prosecution service is not given the same kind of independence as the judiciary, the guarantee of judicial independence will be insufficient to prevent the political authority's possibly interfering in the handling of cases. For while independence of the criminal courts can prevent politically motivated wrongful

---

[22] A typical safeguard of this kind is to be found in Article III, Section 1 of the United States Constitution, under which federal judges' remuneration cannot be reduced while they continue in office. It is to prevent indirect influence of that kind that, in systems where judges and prosecutors are civil servants, management of them is often taken out of the hands of the executive and transferred (even though the function concerned is an administrative one) to bodies such as a judicial service commission.

[23] On this type of measure, see A. Pizzorusso, *L'organizzazione della giustizia in Italia*, Turin, Einaudi, 1990, pp.27 ff.

convictions it is powerless to prevent people escaping prosecution as a result of political string-pulling, in contravention of the principle that the law is the same for everyone.

Here, the rules to be found in modern-day constitutions adopt a variety of approaches, some of which are of the latter type while others differ from it in varying degrees, sharply in some cases.

4. The role which public prosecution plays in those constitutional systems which have it depends mainly on how the institution is organised, the procedural rules governing it, whether proceedings are compulsory and whether the authorities alone can institute them[24] (even if there is a requirement that the private individual who is a victim of the offence come forward and make a formal complaint).

As regards organisation, the various possibilities depend on whether there are links between the prosecution authority and political institutions and on the degree of co-ordination between the prosecutors' offices at the various courts. Prosecutors' offices may be part of a single hierarchy covering the whole of the country or federated state or there may be a number of district-level hierarchies operating independently of one another to varying degrees. In the former case prosecutors' offices may come under the judiciary, or they may be part of the executive, or they may even form a system independent of any other power (and thus enjoying autonomy), even if linked in various ways to one or more of the traditional powers. There may also be a single prosecution service, even if it comprises a number of offices (which may be decentralised) interconnected in whatever way and located at the courts (normally distributed across the country). The internal organisation of prosecutors' offices is likewise extremely important, particularly as regards relations between the head of the office and the other legal staff.

Procedurally, a crucial distinction is whether the prosecution is treated as an "impartial party" - in which case its role is akin to that of the judge even though it is in procedural contention, but on an equal footing, with the defence (whereas the neutral judge is placed over the parties) - or has a function which is mainly accusatorial, particularly if there is a link with political authority. The procedural rules in force often seek to reconcile the opposing requirements underlying these two opposite cases.

Lastly, as regards whether the institution of proceedings is compulsory or discretionary[25], it must be said that prosecution decisions undeniably always have an element of discretionariness since a decision to go ahead usually depends on evaluation of the facts, the law and the prospects, in the specific case, of a successful prosecution. However, when the principle of compulsory proceedings is adopted it implies that the discretion does not extend to the kind of evaluation of advisability which is a feature of administrative work and that discretionary power is confined to evaluating the key facts and interpreting the relevant law (in much the same way as the courts do, so that the prosecution service is then involved in making a forecast of sorts as to what decision the courts are liable to deliver). What we then have is a type of technical discretion, even where the discretionary element is more marked,

---

[24] The official monopoly system exists in France, Germany, Italy and the United States but not in Spain or England.

[25] The compulsory system exists in Italy (see Article 112 of the Constitution), Germany and Spain, but not in France (where prosecution is subject to "advisability"), England or the United States.

as where the prosecution service's action consists in suggesting an appeal against a court's decision or in requesting a preventive measure[26].

This also applies to deciding the priorities of penal action, a question which has given rise to much debate in some European countries. The issue arises from the observable fact that, where priorities are not laid down in the legislation, it will be left to the competent prosecutor to make a judgment as to what cases are more and what cases less urgent.

Clearly this discretion has to have procedural restrictions placed on it, in the shape of rules which require that decisions take into account - though not necessarily reflect (beyond the requirement to give reasons) - the arguments of everyone who, on one ground or another, may be taken to represent the interests and opinions of bodies or groups immediately involved (the views of all members of the court concerned - and not just of the senior judge or the judge in charge of the case - being particularly important).

There is nothing to prevent consultation taking in political representatives, though that does not mean recognising them as having the kind of authority to steer crime policy that a constitution vests in specific institutions. Crime policy can only be laid down by the legislative organs, through laws which say what cases are to be prosecuted as offences and what procedure is to be used for that purpose. It cannot be laid down in governmental or parliamentary instructions calculated to influence decisions in specific cases, even indirectly. The principle of the "lawfully established court", which has been incorporated in the constitutions of several countries, provides a safeguard since it means that it is Parliament that lays down what organ delivers the decision and involves predetermining what court handles a case.

In contrast, discretionary powers to decide how prosecutors' offices and their work are organised are closer to those found in administration. This type of discretion, even though it closely affects prosecutions, is similar to that needed in any kind of administrative work. Where criminal proceedings are compulsory the relevant functions are necessarily governed (administration of courts' work is a similar case) by rules that restrict discretionary power to the minimum inherent in prosecution work and requiring that reasons by given for individual decisions.

Assignment of various secondary functions to the prosecution service is of less significance. They may include power to intervene in civil proceedings concerned with matters of public interest or routine administrative functions which, for one reason or another (usually to guarantee maximum impartiality) it is judged preferable not to entrust to the ordinary administrative services.

While the prosecution authority's functions (such as ascertainment of civil liability for official error) are performed on behalf of the state, they have to be performed impartially, even as regards the interests of the state and even where criminal proceedings are not compulsory or the prosecution service has a strictly accusatorial function: the impartiality requirement stems direct from the principle of equal treatment which public bodies are bound to observe with respect to the citizen. For that reason it is often asserted that the prosecution - like the court - upholds the interests of the state-as-national-community, not those of the

---

[26] L.M. Diez-Picazo, *El poder de acusar*, cit., pp.15 ff.

state-as-legal-person (its role being distinct from that of other institutions such as the Treasury solicitor, to be found in many countries).

5. As regards organisation of the prosecution service in the countries whose experiences have heavily influenced studies of the institution, the approach differs widely[27]. The main features may be classified according to certain characteristics, whose practical implications I shall try to bring out.

The first distinction which may be drawn hinges on whether the prosecution service is directly in charge of (or at any rate supervises) all law enforcement work regarding the particular offence, or only some of it. That work, construed in the widest sense, includes: 1) receiving reports of offences from the public or seeking such reports; 2) preliminary investigation of offences; 3) instituting criminal proceedings or requesting (or taking) a decision not to proceed; 4) representing the state in all phases of the proceedings, including appeals against decisions of the court and arrest of an accused or other preliminary measures; 5) execution of sentences imposed by the court.

The approaches to be found, in practice, in the different countries range from an authority describable as a prosecution service and responsible only for activity 4, as in the United Kingdom, to a prosecution service responsible for all the above activities, as in Italy after the introduction of the 1988 Code of Criminal Procedure. Two intermediate approaches are an office of investigating judge (with powers, on certain conditions, to institute proceedings) and prosecution involvement in preliminary investigations, even where investigation is mainly conducted by police bodies not answerable to the prosecuting authority. In the latter case, relations between the prosecuting authority and the police, whether organisationally or operationally, are of vital importance. For where the prosecuting authority has proper oversight of police investigations, its potential effectiveness and potential political role are clearly greatly enhanced.

A second distinction turns on whether the prosecution service is a single organisation covering the whole country or is made up of offices independent of one another to varying degrees and operating within districts which coincide with those of the courts to which they submit their requests. If local offices are not co-ordinated in any way by organs with wider geographical jurisdiction (or a central organ), their operational effectiveness is obviously extremely limited and co-ordination is performed by the police or the government. In federal systems, or in systems which have local autonomy in various matters, an important consideration is how prosecutors' offices are supervised at the central or the regional/local level.

A third distinction has to do with the internal organisation of prosecutors' offices. A key consideration here is the degree of independence of the prosecution staff, how much control is exerted over them by the head of the office, or to what extent that office is controlled by another office further up the hierarchy (in other words, what degree of "internal" independence do the officials have?).

A fourth distinction rests on whether prosecution functions are performed by lawyers recruited on a temporary basis or by civil servants with professional status affording them security and independence from whoever might seek to bring pressure to bear on them (in

---

[27] C. Guarnieri, *Pubblico ministero e sistema politico*, Padua, Cedam, 1984.

other words, how much "external" independence is there?) Here, the main question is whether the prosecution service is part of the judiciary, part of the executive, or an organisation separate from both (constituting something of an independent administrative authority).

A key factor in links to the judiciary is that, in some cases, the persons performing prosecution functions are members of the same corps of officials as the judges (as in France and Italy) even though, even here, the rules on independence of the two categories of personnel may differ from the operational standpoint. A given legal official can thus work, at different times in his or her career, as a judge or as a prosecutor.

The prosecution service may be part of the executive if the functions involved are assigned to a body of officials who, organisationally, come under a government department (such as the justice ministry or the internal affairs ministry), or the same situation may arise if, from a purely functional standpoint - and in some cases with safeguards, which may take various forms - the prosecution service receives instructions from government[28].

Where the prosecution service is an independent organisation with an organ in overall charge, as in Spain, an issue may arise concerning its position, since it is liable to have a political role of especial significance[29]. The Portuguese approach is an attempt to reconcile the various requirements: there, the prosecution service, although separate from the judiciary, has similar guarantees of independence, including a body providing the profession with self-government.

Obviously each of these variants gives rise to different problems, whose real significance will depend not only on the theoretical scope of the rules in force but also on the traditions and sensitivities which influence how the particular type of prosecution authority operates.

6. To conclude, a comparative analysis of the different approaches adopted in European Union countries and in other countries which apply constitutionalist ideas within the same tradition and model themselves on the key principles common to modern democratic systems suggests that, given the typical prosecution functions, the personnel performing them need the same kind of professionalism and the same ability to evaluate the facts and interpret the law as do judges and lawyers. This is the main feature distinguishing the legal specialist's work from the politician's, even where the politician is legally qualified or where the legal specialist performs functions of a political nature.

The fact that prosecutors' main role is to institute criminal proceedings nevertheless to some extent sets them apart from the judiciary: the prosecution service plays an instigative part in all its work in connection (close or less close) with criminal proceedings and that work, overall, is necessary if criminal law is to be properly enforced, whereas the judge must maintain a passive attitude, taking decisions on the requests made by the parties without - as a rule at least - himself or herself taking any personal initiatives. In addition, the prosecution role differs from that of the defence in that the prosecuting authority represents a rather special client - neither a private individual nor the state in the sense of the public authorities,

---

[28] While in France the prosecution service receives instructions, subject to certain limits, from the Minister of Justice, in Italy this connection was abolished by a 1946 legislative reform. In both countries, however, both the courts and the judicial services with investigative functions - the two are of course separate - are composed of legal personnel from the same corps, and transfers from a court to an investigative service are always possible.

[29] Diez-Picazo, *El poder de acusar*, cit., pp.141 ff.

but "civil society" (in other words, the entire community). Its action is therefore not guided by instructions from a "client" but by the "public interest", which affects everyone but no-one in particular.

These basic features of its role mean that the prosecution service needs the same kind of guarantees of both internal and external independence as the judiciary. The main reason for this is that if the prosecuting authority is not independent the judiciary will not be fully independent either, since the judiciary cannot take the place of an inactive prosecuting authority which is failing to play its proper instigative role. It is also essential for the prosecuting authority to have overall charge of work by the police, being able at least to supervise and direct it[30].

These general considerations[31] have obvious implications as regards questions of organisation of prosecution services, even though that does not mean that arrangements must fit a standard organisational model in order to be appropriate to the prosecution role. On the contrary, traditions in the various countries justify a variety of approaches, which will be shaped by the particular country's experience and will of course depend on a range of factors.

Whether the model is the one commonest in the English-speaking countries, where prosecution functions are mainly performed by a personnel whose training equips them for a role similar to that of the barrister, or the continental model, in which the prosecution service is often staffed by civil servants, though of a very special kind, it is essential that the personnel have guarantees of independence whether from the political authority or any other pole of authority capable of exerting influence on them. Those guarantees, in substance, are similar to those enjoyed by the judiciary.

Of course, the work the two services perform presents differences which mean that they cannot be treated identically. It is in fact the technical features of pre-trial prosecution work - bearing in mind of course that non-prosecution or an application for acquittal are always options open to the prosecutor - which require much closer co-ordination between offices and between officials than is necessary in the case of judges. In addition those features make it necessary for prosecution services to be organised very differently from courts[32]. This does not alter the fact that there is a good case for making prosecution services part of the judiciary even though the aims which could then conveniently be pursued might well be attainable even if the two services were not under the one organisational roof, especially if, within the justice system, the two services were already accustomed to close, responsible co-operation or at any rate regarded themselves as being essentially part of the one set of machinery. In

---

30 Article 109 of the Italian Constitution provides: "The judicial police are at the direct disposal of the judiciary." That rule has been interpreted as meaning that subordinacy may be of a purely functional nature. The 1988 Code of Criminal Procedure gave the prosecution service powers to direct investigations which made for closer co-operation between the two institutions. The police of course have administrative functions in which they do not take instructions from the prosecution service.

31 See, in this connection, Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, produced by a committee of experts under the European Committee on Crime Problems and adopted by the Council of Europe Committee of Ministers on 6 October 2000. See also the proceedings of the conferences of prosecutors general (Strasbourg, 22-24 May 2000; Bucharest, 12-16 May 2001; Ljubljana, 12-14 May 2002). On the prospects of prosecution europeanisation, see V. Monetti, *Il pubblico minstero europeo, Questione Giustizia*, no.1/2003, p.187 ss.

32 The differences are illustrated by the inapplicability to prosecution services of the "predetermination principle" which features in some constitutions or other legal instruments with regard to benches of judges or single judges.

such circumstances, formal legal guarantees can be effectively replaced by spontaneous acceptance of unwritten rules that fully meet the requirements for a balanced functioning of judicial institutions. If such a climate is not fully attainable, however, then organisational and procedural guarantees are advisable to pursue the objectives in question.

Even where selection of prosecution personnel uses the type of procedure usual in the filling of political or administrative positions (as is the case in some countries), that cannot be regarded as creating, between the person appointed/elected and those who do the appointing/electing, any relationship of the kind characteristic of representative democracy: the work of the prosecution services, like that of the courts, consists in giving effect to the law and there cannot be any question of their being influenced by the views of an electorate or of persons involved in the selection process.

Prosecution work, like court work, being concerned with the technicalities of applying the law[33], does not derive its legitimacy from investiture, on the democratic model, of the organ performing it, and proper performance of it is essentially a matter of compatibility between the decisions taken and the parameters laid down in law - that is, the rules deriving from the various sources recognised by the system which the legal specialist is required to apply in the particular case. He/she does not need democratic investiture (whether direct or indirect) in that the legitimacy of what he or she is doing comes from the connection to the law which he or she is required to apply. It is the law's validity which lends his or her action a democratic basis and he or she has no need of any other form of legitimacy.

Action by the judge or prosecutor must comply with the rule of law, just as action by other institutions of state must comply with the democratic principle. The two things must be co-ordinated, with neither taking precedence over the other. That does not mean that, in taking decisions which involve exercise of discretionary powers, the prosecutor is not required to take into account the impact which those decisions may have on the social context in which he or she is operating. It is, however, essential that those decisions have a firm basis in the legal system (and first and foremost, of course, in constitutional principles), and that the prosecutor not be swayed by public opinion or the views of prominent persons if, in his or her view, such influences would interfere with his or her duty to apply specific legal provisions.

These considerations make acceptable any of the alternatives, for the prosecution service, with which comparative analysis presents us: whether an institution of the judicial service commission type (either a single one covering both judges and prosecutors or one for each service, divided into chambers or not and with other possible variants) or solutions of other kinds. The important thing is awareness that the different legal professions are all involved in the same task and pursuing the same objectives.

---

[33] The "lawfulness principle" as developed in France, Italy and Latin America corresponds, in its essentials, with the German principle of the *Rechtstaat* and with the concept of the rule of law, as used in the English-speaking countries.