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The role of public prosecution in the protection of human rights and public interests outside the criminal law field

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“Activity of the Prosecution Services in Protection of Human Rights and Public Interests in the European Countries of the Common Law System”

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Let me first state that my speech on the activity of the prosecution services in human rights protection in common law countries will cover the theme by reference to the legal system pertaining in Cyprus as a common law country.

It is, therefore, pertinent to say as a starting point that the legal system of Cyprus has its ancestry in the common law system and its prosecution authority, the office of the Attorney-General, has its roots on the offices of the King's Attorney and King's Sergeant, who were responsible under the Anglo-Saxon system of law to defend the interests of the Crown before Crown Courts.

In examining the role of prosecution services in human rights protection there are two different approaches between countries with a common law tradition and countries with a continental tradition, which are of particular relevance. One concerns the notion of a separate prosecution service, and the other concerns adherence in varying adaptations, to either the legality or the opportunity principle in making decisions on prosecutions.

Concerning the first approach, in countries with a common law legal system the notion of a separate prosecution service was not embedded in their common law culture. In the administration of criminal justice, emphasis was instead placed on individual responsibility, meaning that responsibility for prosecutions lay in the main with private individuals. The police gradually substituted private prosecutors, but in the absence of specific prosecution powers or responsibilities, police prosecution was based on the model of private prosecution. This may explain the fact that in some common law countries the police still enjoy a strong independence from the prosecution service, and also that in common law countries there is still a right to private prosecution. By contrast to the above common law approach, in inquisitorial jurisdictions, the state as a rule monopolizes the right to prosecute, and the police who never had a prosecutorial role, are regarded as coming under the control of the public prosecution services.

Concerning the second approach, adherence to the legality principle in making decisions on prosecutions which is usually connected with the continental tradition, means that the role of the prosecution services is limited to the evaluation of the sufficiency of evidence against the suspect. Public interest factors are not considered relevant to prosecution decisions, and are rather a matter for the court. Adherence to the opportunity principle which is connected to the common law tradition means that in deciding on prosecutions, the prosecution authorities are allowed an unfettered discretion on whether to prosecute taking into account public interest factors and not only the evidence against the suspect. The distinction between the above two principles was gradually eroded with the introduction of many variations in the systems of different countries adhering to either one or the other of the principles.

By contrast to other common law countries in which the Office of the Attorney-General was set up on the English prototype, in Cyprus this Office was established by the Constitution itself which sets out its functions. The Office as established by the Constitution has distanced itself from the common law prototype. It discarded its political character by becoming completely independent of the executive and the legislature. The Attorney General is not a member of the Government, and serves until retirement under the same terms as Supreme Court Judges. His Office, that is the Republic's Law Office is composed of lawyers who act under and in accordance with his instructions concerning exercise of his constitutional and other statutory functions in the domain of criminal, public, civil, and human rights law. A group of such lawyers are assigned the criminal law aspect of the Attorney-General's functions.

Two of the Attorney-General's constitutional functions are of particular relevance to human rights protection in the prosecution field. Firstly, the Attorney-General is invested with

power, exercisable at his discretion in the public interest, to institute, conduct, take over and continue or discontinue proceedings for any offence. Secondly, he is the legal adviser of the Republic, and of its President, its Council of Ministers, and its Ministers, and as such he acts also as Government Agent in proceedings before the European Court of Human Rights.

The Attorney-General's powers to act in the public interest in criminal cases reflect in the Constitutional provisions the opportunity principle of common law traditions. By contrast however to other common law countries, the police are subject to a large extent to the Attorney-General's supervision in exercising their powers of investigation of crimes and bringing offenders to justice. In exercise of his constitutional powers the Attorney-General can ex-proprio motu order the police to initiate and carry out an investigation into the commission of any criminal offence, including human rights offences, for the purpose of determining whether to order criminal proceedings against any person. Although the power to prosecute offences is not exercised only by the Attorney-General, as the police have a statutory duty not only to detect crime but also to bring offenders to justice, the conduct of all police investigations is subject to the Attorney-General's instructions and directions, and all criminal proceedings are subject to his constitutional power to discontinue them in the public interest. Under express statutory provision the police are subject to instructions by the Attorney-General concerning the decision to prosecute, applications to courts for warrants of arrest and search, the filing of charges, and the conduct of criminal cases brought before the courts. Legal guidance and directions to the police by the Attorney-General is also given in exercise of his constitutional function as the legal adviser of the Republic and its civil service. Moreover, the right to private prosecution, that is the institution and conduct of a criminal prosecution by any person, although rarely exercised is subject to the Attorney-General's constitutional powers. It can thus be said that by virtue of constitutional powers the Attorney-General exercises control and co-ordination over the machinery of administration of criminal justice in the public interest.

In the exercise of the above functions and powers as the State's Public Prosecutor and legal adviser, the Attorney-General who is independent of the executive and the legislature, must safeguard adherence to constitutionality and legality and defend the public interest through the criminal justice system. It is important that by virtue of his function as Government Agent the Attorney-General is in practice a prosecuting authority which is directly seized of convention jurisprudence and norms. Legal advice and directions can be given to the police at the very initiation of the criminal investigation process. This may concern inter alia Article 5 issues of lawfulness of proposed arrests, procedural rights of information to persons arrested, and subjection to custody. If violation is perceived whether of Article 5 or of Article 3 after effecting an arrest, or during custody or pre-trial detention, decisions can be made on whether it is in the public interest to prosecute or discontinue the criminal case, as the case may be. Decisions on whether to discontinue in the public interest can be made where serious violation is perceived for example of Article 6 rights of fair trial.

In making his decision on whether to order a prosecution the Attorney-General is free to examine in the common law tradition reflected in the Constitution, the issue whether on account of public interest factors, in the wide sense of the word, a prosecution is unwarranted. He must determine whether there are special reasons of public interest which mandate against the case being taken to court. One speaks of the existence of special reasons of public interest since the public interest also requires that criminals be brought to justice. Such special reasons may concern not only public safety and order and the state's international relations, but also the demands of justice in the particular case. The decision may thus take into account human rights violations, their gravity, any suffering sustained by the suspect on account of them, and the impact that a criminal prosecution and trial may have in such cases on public order and in reinforcing or weakening the public's trust. The decision requires a balancing exercise between the rights of suspects and those of the victims, witnesses, and the public.

The same considerations apply also concerning exercise by the Attorney-General of his power to discontinue a criminal case at any stage after a criminal prosecution. This power is exercisable by the Attorney-General ex-proprio motu, or on application by the prosecution or the accused. The power applies also to human rights violations perpetrated or perceived at some stage after prosecution. Owing to the seriousness of the step of discontinuance the decision is as a matter of established practice taken by the Attorney-General in person, who thus assumes responsibility for it.

Human rights violations can lead to decisions not to prosecute or to discontinue the particular criminal case in connection with which the violations were perpetrated. The Attorney-General however has also a most vital role to play in the field of human rights protection in exercise of his powers of prosecution of perpetrators of human rights violations when they constitute criminal offences under domestic law. Unlawful deprivation of liberty, that is in instances other than those permitted by Constitutional provisions corresponding to those of Article 5 of the Convention, is a criminal offence. So is also an arrest without a judicial warrant, and also neglect or omission to inform arrested persons at the time of arrest and in a language they understand, of the reasons for their arrest. Subjection to torture and to inhuman treatment or punishment are criminal offences.

Concerning human rights offences committed by the police whether at some stage of the criminal process or otherwise, the Attorney-General is empowered to appoint himself investigators from outside the police force, to carry out under his directions a criminal investigation. In the alternative he can refer the matter of investigation to an Independent Authority set up by law to carry out and supervise investigations of human rights violations by members of the police, through independent investigators appointed by it. Investigators appointed by the Authority again act under the Attorney-General's directions. The evidential material collected by investigators, whether appointed directly by the Attorney-General or by the Authority is evaluated by the criminal lawyers of his Office for the purpose of deciding on prosecutions.

The Attorney-General's Office as the State's Public Prosecutor and at the same time its legal adviser and Government Agent is particularly experienced to act also in the field of prevention of human rights violations by input in the legislative process. This is achieved by advises to the executive when introducing legislation concerning the administration of criminal justice. It is also achieved by specifically advising the executive by the Offices human rights lawyers, to introduce in parliament legislation which is aimed at reinforcing human rights protection, or by advising it to introduce amendments of legislative provisions incompatible with convention jurisprudence. Important pieces of legislation specifically enacted in recent years for protecting and reinforcing the rights of persons when arrested and while detained, setting up effective remedies for their violation, and criminalizing and facilitating the prosecution of violation of human rights corresponding to convention rights, were the result of legal advice and preparation by human rights lawyers of the Attorney-General's Office of the laws themselves, which were introduced in the legislature.

This leads me to say a few words also on the activity of the Attorney-General's Office in the protection of human rights outside the criminal law field. It must first be mentioned that the Attorney-General represents the Republic in all court proceedings whether before the Supreme Court or district courts which are brought by individuals against the state, or vice versa, and whether in the domain of public or civil law rights. In the context of court proceedings the Attorney-General is directly seized of all human rights issues of alleged violations raised before all courts in the Republic, and can advice accordingly the state when of the opinion that there was a violation in the particular case, or where a domestic judgment makes a finding of violation. Human rights lawyers in the Attorney-General's Office dealing with cases before the European Court of Human Rights under the Attorney-General's function as Government Agent, are also responsible for advising on his behalf the Republic and its civil service on the

compatibility of existing and proposed legislation, and of administrative practice, with the Convention and the Court's case-law. The relevant legislation to be introduced in the legislature following such advice is prepared by the said lawyers, who also have overall responsibility for the adoption of measures by the state in enforcement of judgments of the Court against Cyprus.