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REPORT
by
Mr Jean-Amédée Lathoud
Principal Public Prosecutor
Douai Court of Appeal
(France)

Relations between the public prosecution service and the judiciary are the very cornerstone of the criminal justice system. Public prosecutors, who are responsible for conducting prosecutions and may appeal against court decisions, are one of judges' natural counterparts in trial proceedings and also in the broader context of management of the system of criminal law.

In the functioning of the courts, members of the public prosecution service and of the judiciary share the same responsibilities for promoting the rule of law, safeguarding freedoms and democracy and upholding the principles laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms.

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The case-law of the European Court of Human Rights and Recommendations R (94) 12, on the independence, efficiency and role of judges, and Rec (2000) 19, on the role of public prosecution in the criminal justice system, issued by the Committee of Ministers of the Council of Europe lay down principles governing the way we perform our judicial activities and our respective roles in the criminal justice system.

At the same time, member states of the Council of Europe have answered two questionnaires on the status and role of public prosecutors and their relations with the judiciary, which the European Committee on Crime Problems and the bureau of the Conference of Prosecutors General of Europe sent out in 2000 and 2002.

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The above sources provide insight into the relationship between members of the public prosecution service and of the judiciary at a time when the courts are playing an increasing role in society and the public demands and expects more efficient criminal justice.

- The fact that judges and public prosecutors have the same standards of reference and pursue the same objectives means that the two professions are subject to similar requirements and should enjoy similar guarantees.
- However, the roles of the judiciary and of the public prosecution service are not indistinguishable. There must be no confusing their respective places within the criminal justice system. This means coming to terms with their differences, respecting each profession's independence and clarifying the precise duties of the different persons involved in dispensing justice.

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**1/ Public prosecutors and judges:
common objectives and guarantees**

a) The recommendations issued by the Council of Europe give members of the judiciary and of the public prosecution service the same points of reference for the performance of their activities:

- Safeguarding the rule of law and respecting and protecting human rights and fundamental freedoms;
- Ensuring the efficiency of the criminal justice system (Recommendation 2000 (19), paragraphs 1, 24 and 36; Recommendation 94 (12), preamble and principles V2 and VI1).

b) Their shared objective of doing justice gives both public prosecutors and judges reason to take account of the position of the victim (Recommendation (85) 11) and of the need for simplification of criminal justice (Recommendation (87) 18), consistency in sentencing (Recommendation (92) 17), improved management of criminal justice (Recommendation (95) 12) and protection of witnesses and respect for the rights of the defence (Recommendation (97) 13).

These mutual aims go hand in hand with common ethical standards.

Both judges and public prosecutors are required to perform their activities objectively and impartially (Rec (2000)19, paragraphs 20 and 24, and R (94) 12 , principle V3).

Both have a duty to deal with cases fairly and speedily (Rec (2000)19, paragraphs 20 and 24, and R (94) 12, principle V2).

The two must work in an open manner: clarity concerning the assignment of cases in the public prosecution service (Rec (2000)19, paragraphs 9 and 36 c) and the judiciary (R (94)12, principle I e), the requirement that judges give reasons for their decisions (R (94) 12, V f), and that the public prosecution service account for its activities (Rec (2000) 19, 11), guarantees of transparency concerning any instructions given to prosecutors on the handling of specific cases (Rec (2000)19, paragraph 13 d and f).

Respect for parties to proceedings is incumbent on both public prosecutors (Rec (2000)19, paragraphs 26 and 28) and judges (R(94)12 - V 3 b, d, e).

c) Given their mutual dedication to the rule of law and justice and their identical codes of ethics, judges and public prosecutors must enjoy the same statutory guarantees.

- These guarantees must be established by national law (Rec (2000)19, 17 and R(94)12 - I 2 a). They enable members of these two professions to discharge their duties and responsibilities with real independence, as regards the decision-making powers they exercise for the public good and in the interests of freedom.

- Judges and public prosecutors must be provided with adequate material, budgetary and human resources (Rec (2000)19, paragraphs 4 and 5 d; R(94)12, principle III 1).

Some countries (Slovenia, the Czech Republic) have mentioned their concern that judges and public prosecutors should be awarded sufficient remuneration, of a similar level, and the same social protection.

- Recruitment and training of suitably qualified judges and public prosecutors is of prime importance (R(94)12, I 2 c, and Rec (2000) 19, 5). Advantages are to be derived from running joint training schemes for the two professions. There is also a general consensus in the member states that training to improve the handling of complex financial cases must be stepped up.

A number of reforms of judges' and prosecutors' training are in progress (in the Czech Republic and Portugal, for instance).

- Career management (promotions, transfers, appraisal) must take account of experience and merit and be based on fair, impartial, clear procedures (Rec (2000)19 - 5 a and b, and R(94)12, I 2 c).
- Both judges and public prosecutors are entitled to freedom of expression, association and assembly (Rec 2000 19, paragraph 6, and R (94)12, principle IV). Their right to belong to political parties remains a subject of debate in a number of countries.
- Proceedings against judges and public prosecutors who fail to carry out their duties in the proper manner or commit disciplinary offences must be impartial and objective (R (94) 12, principle VI, and Rec (2000)19, paragraph 5 e).

In many member states (France, Italy, Scotland, etc.) the question of the personal responsibility of members of the judiciary and the public prosecution service is on the agenda. In some cases, concerns have been voiced about the ensuing risks of intimidation or of bringing things to a standstill.

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It is on the strength of these common standards of reference, rules of ethics and guarantees that both judges and prosecutors qualify as officers of the court.

The legal framework within which officers of the court - judges and prosecutors - perform their duties and their independence from outside influences when taking decisions (an independence denied to members of ordinary, non-judicial public authorities) constitute a guarantee against arbitrary treatment for persons coming before the courts. In the case of prosecutors, this state of affairs was endorsed by the European Court of Human Rights in its *Schiesser v. Switzerland* judgment of 4 December 1979. Prosecutors therefore rightly set great store by their quality as officers of the court.

However, members of the public prosecution service perform specific duties, in the interests of the community, which distinguish them from judges.

2/ Public prosecutors:
Specific responsibilities, fulfilled for the public good

a) Under European criminal justice systems the main task of members of the public prosecution service is to conduct prosecutions on behalf of society and in the public interest (Recommendation (2000)19, paragraph 1).

This is the prosecutors' own responsibility, which society entrusts to them. In conducting a prosecution they must adhere to a number of basic principles: upholding the rule of law, combating crime and safeguarding individual rights and fundamental freedoms.

- This responsibility for conducting prosecutions is what distinguishes the prosecutor's role from that of judge, and also from that of counsel. Since they act on society's behalf and in the public interest, prosecutors are not a legal representative like any other. The principles set out in Committee of Ministers Recommendation (2000) 21 on the freedom of exercise of the profession of lawyer cannot apply to members of the public prosecution service. In seeking to defend their clients' rights and legitimate interests, lawyers do not practise their profession under the same conditions as public prosecutors. The guarantees of efficiency of criminal justice, objectiveness and impartiality required of public prosecutors do not necessarily apply to lawyers, whose prime concern is to defend their clients' interests.
- In addition to this essential task of conducting prosecutions, in a number of European countries public prosecutors may decide on and monitor the implementation of measures constituting alternatives to prosecution, as recommended by the Committee of Ministers in Recommendation (87) 18, 1, concerning simplification of criminal justice and the principle of discretionary prosecution. The public prosecution service may also carry out a number of tasks relating to the implementation of national and/or regional crime policy. In some countries it may direct or supervise police investigations. Lastly, the public prosecution service has an important role in international co-operation.

b) This range of responsibilities in connection with crime policy requires fairness, consistency and efficiency. It is acknowledged that members of the public prosecution service must be autonomous in their decision-making, but that decisions must nonetheless be taken within a hierarchical framework. The aim of this hierarchical organisation is to guard against arbitrary decision-making and departures from general guidelines, laid down in the public interest, when dealing with individual cases (cf Recommendation (2000)19, paragraph 36).

The purpose of the hierarchical organisation of the public prosecution service is to safeguard public interests, the interests of society. That organisation should not reflect specific political, government or economic interests. It is a specific feature of the public prosecution service, which contrasts with judges' independence, personally and as members of the courts, since they base their judgments on the individual circumstances of a case.

This hierarchical organisation, which should not result in increased bureaucracy and paralysis and with which there should be no unwarranted tinkering by executive authorities, is first and

foremost a guarantee for parties to proceedings. It is also a means of safeguarding public prosecutors against undue outside interference. It is necessary to the efficiency of efforts to combat complex - that is to say multi-faceted or organised - crime.

The European Court of Human Rights dealt with this hierarchical organisation in its *Piersack v. Belgium* judgment (1.10.1982), which recognises public prosecutors' hierarchical position vis-à-vis their deputies in the conduct of proceedings, since prosecutors are empowered to revise their deputies' written submissions to the courts, to discuss with them the approach to be adopted in a specific case and to advise them on points of law ...

This hierarchical structure within which members of the public prosecution service operate is what distinguishes their situation from the independence enjoyed by members of the judiciary. Nonetheless, this hierarchy must go hand in hand with a number of guarantees (recognition of prosecutors' discretion, of their right to freedom of speech at court hearings, of their own specific powers, and provision of institutional safeguards concerning relations between the different tiers of the hierarchy).

The stricter disciplinary supervision and greater mobility formerly imposed on public prosecutors in certain countries by virtue of this hierarchical organisation can be seen to be diminishing, and the status of members of the public prosecution service increasingly resembles that of judges.

However, this issue of prosecutors' "independence" is still a subject of widespread debate in many member states (the Czech Republic, Estonia, France, Luxembourg), and bills on the public prosecution service are before parliament in Poland and in Scotland.

c) There must be no ambiguity in the relationship between public prosecutors and judges. There should be no confusion in the minds of those who come before the courts as to these professions' specific roles (conducting prosecutions and giving judgment). It is important to clarify the respective duties of judges and public prosecutors. The public should be in no doubt about the independence and impartiality of judges (Recommendation (2000) 19, paragraph 17 and explanatory memorandum), although operational contacts between the two professions are constant, necessary and in need of further reinforcement.

It would seem that there is room for further clarification of the respective roles of prosecutors and judges. Questionable situations can be noted in a number of countries: approval or implementation by the judiciary of measures constituting alternatives to prosecution (in France); judges' faculty of challenging decisions to prosecute (in Austria, the Netherlands and the United Kingdom); judges' capacity to decide to bring a prosecution (in Italy).

Although, in principle, judges of the criminal courts cannot give instructions to members of the public prosecution service, exceptions to this rule can be noted in a number of countries (the Netherlands, Poland, Slovakia, Italy).

In France and Switzerland, as in certain other countries, the role of investigating judges, which raises questions linked to these issues, is currently under discussion. Criminal court judges are involved in police investigations everywhere, so as to guarantee protection of freedoms, but in some countries (Belgium, Spain, Portugal and Austria) they also have a role in uncovering evidence.

Clear procedural rules on the respective roles of each profession should enhance the efficiency of the criminal justice system and satisfy our fellow citizens' demand for impartiality, the impartiality necessary to guarantee respect for individual freedoms and the suppression of crime. Pursuit of efforts to clarify the situation moreover offers the assurance of improved international co-operation in the judicial sphere in future.

This debate is of importance at a time when the Statute of the International Criminal Court (signed in Rome on 17 July 1998) seems to follow a different logic concerning the principles governing the relationship between judge and prosecutor in the Pre-Trial Chamber with regard to decisions to prosecute (articles 15, paragraph 3, 53 and 61 of the Statute of the ICC).

Appendices:

[Recommendations \(2000\) 19](#) on the role of public prosecution and [\(94\) 12 on judges](#).