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Presentation of the theme
“THE PROSECUTOR'S OFFICE AND POLITICS”
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Introduction

Many public prosecutors in Europe have been questioned by the public and the media about their political links, whether with the executive, parliament, local and regional authorities or even political parties. These questions sometimes lead to personal attacks and to accusations that particular officials of the prosecutor's office are influenced by specific interests.

There are historical reasons for this phenomenon, based on the fact that the modern prosecutor's office had its origins in the executive, as a result of which its functions often had a political tinge and its officials were often appointed and dismissed on the basis of such criteria. This perception of the prosecutor's office lasted for a long time, both in countries that did not opt for representative democracy and in certain west European states when political figures or parties were accused of corruption, embezzlement or illegal financing.

Although as a result of changes in political regimes and the emphasis now placed on human rights public prosecutors have greater statutory and procedural protection from political influences and pressures from particular interests, the latter have not disappeared.

The very fact that such influences exist or may emerge diminishes public prosecutors' legitimacy and their ability to fulfil their basic responsibilities.

- The trend towards greater independence for European public prosecutors *vis-à-vis* politicians and the linking of their status with that of judges has sometimes been misunderstood, and even criticised, by elements of the political structure.

The reservations or even open hostility occasioned by such a trend are based on public prosecutors' supposed lack of legitimacy arising from the office's remoteness from the executive or legislative functions. The argument is that the legitimacy granted by election underlies all democratic power, including that conferred on public prosecutors. The latter might otherwise become prey to vested interests, or even unlawful influences, if left to their own devices. Similar ideas have sometimes been advanced to justify restrictions on the independence of the courts.

Other critics maintain that the new legitimacy enjoyed by public prosecutors is not accompanied by any real responsibility on their part when members of their staff are guilty of misconduct, errors or other failings.

Finally there are those who justify the absolute need to maintain such special links by arguing that the very role of public prosecutors differs from that of judges and consists exclusively of providing the interface or link between government or parliament and the independent courts.

The growing role played by public prosecutors in criminal justice systems - the result of the need for an effective response to ever-rising crime and the requirements of human rights - has undoubtedly given this debate added topicality.

- In fact the discussions and hesitations about the public prosecutor's place in the institutional framework simply reflect the general tensions within the political structure engendered by growing judicial involvement in the everyday life of democratic regimes.

Political activity itself - not excluding its most prominent and sovereign aspect: that of law-making - is increasingly subject to judicial oversight, both domestic (reviews of compatibility with the constitution and international treaties) and international (witness the Strasbourg and, for EU members, Hague and Luxembourg courts). Politicians themselves are today held to account before the courts like any other member of the public, while administrative decisions are equally frequently challenged in the courts by citizens with no compunction about questioning their merits.

Conversely neither parliaments, which make the laws, or governments, which enforce them, can afford to ignore their application by the courts, particularly in the penal domain. The public see politicians and policy makers as bearing a direct responsibility for the growth in crime - whether this be everyday offences, organised crime or terrorism - and for finding a more effective response by the state, including the criminal justice system.

Finally it is governments and parliaments who decide how much is spent on the courts and prisons, how many policemen are employed to fight crime and what should be done to secure international co-operation in this field.

The proposed response: Recommendation 2000 (19)

Safeguarding judicial independence *vis-à-vis* government and parliament in terms of functions and status:

- **Public prosecutors' role.** "...*public authorities who, on behalf of society and in the public interest, ensure the application of the law...*" (Article 1 of the Recommendation). Public prosecutors do not take decisions on behalf of government and their activities are solely concerned with protecting society and each of its members. This is the primary source of public prosecutors' legitimacy, based on the principle of the universality of law to which all citizens are liable, whatever their status and public position.

- **A status that protects public prosecutors' impartiality.** "*The recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as ... political opinion...*" (Article 5a of the Recommendation). The recruitment and careers of prosecution department officials, **and in particular their heads**, must not in any circumstances be influenced by political affiliations or sympathies, which would prevent them from carrying out their responsibilities, but must be governed by strict impartiality.

At its meeting in Ljubljana in May 2002, the Conference referred in section 3 of its conclusions to the "proximity and complementarity" of the roles of judges and prosecutors and concluded that the two needed "**rules and professional safeguards of the same nature in terms of appointment, promotions and career**", meaning that the recruitment and career progression of prosecution officials must be kept out of the political domain and be based on impartial selection procedures (such as a competitive system of entry) and professional management bodies (such as service commissions for the judiciary as a whole, or for prosecutors) to exclude special interest factors (explanatory memorandum to the Recommendation, Article 5).

As a result, disciplinary proceedings against public prosecutors should "**guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review**" (Article 5e of the Recommendation).

Protecting public prosecutors from special interests in the exercise of their functions:

The principle of universality of the law calls for firmly established safeguards for public prosecutors but does **not signify that the latter should necessarily carry out their duties completely independently of government and parliament**. The Recommendation respects variations in legal systems and is fully aware of the different functions assigned to public prosecutors and judges. It does not therefore advocate any particular institutional approach but comes out in favour of a form of supervised autonomy.

- The legitimacy of political involvement in the exercise of public prosecutors' functions. In carrying out their duties, public prosecutors must take account of "*the necessary effectiveness of the criminal justice system*" (Article 1 of the Recommendation) and always reflect the need to be "*fair, consistent and efficient*" (Article 36a). **In countries where they are part of or subordinate to parliament or the executive, they may be given "instructions of a general nature"** in the form of "*general guidelines for the implementation of criminal policy*" or "*general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making*" (Article 36a and b)¹), or even "*instructions to prosecute*" (Article 13c and d).

However such instructions must not rigidly impede "*the necessary evaluation of each case individually and in the light of local circumstances*" (explanatory memorandum to the Recommendation, Article 36), or represent specific interests, which would be incompatible with the principle of equality before the law.

- The principle of no interference on behalf of specific interests. In carrying out their duties and in their relations with the executive or legislative powers, public prosecutors must not be subject to legislation or procedural rules or be given instructions that might compromise the "*independence or autonomy ... necessary for the exercise of their duties*" (explanatory memorandum to the Recommendation, Article 11). Whatever the interests at stake, they and their staff must be able to perform their duties "*without unjustified interference*" (Article 11 of the Recommendation) and, in particular, "*prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights*" (Article 16).

This means avoiding any interference on behalf of particular interests and any form of pressure - national or local, political, economic or social - by ensuring that citizens benefit from total equality before the law and, as a consequence, granting the prosecution service a genuine **right to impartiality**.

¹ Compare with criminal justice systems in which public prosecutors "*implement national crime policy while adapting it, where appropriate, to regional and local circumstances*" (Article 3 of the Recommendation)."

By the same token, where the prosecution service is part of the executive in one form or another any instructions of a general or specific nature must be subject to the principles of transparency and equity and accompanied by an explanation, and instructions not to prosecute in specific cases should, in principle, be prohibited (Article 13).

From the right to impartiality to the duty of impartiality for prosecution service members

There are two aspects to this:

- **Prosecution authorities' non-involvement in the political domain:** "*public prosecutors should not interfere with the competence of the legislative and the executive powers*" (Article 12 of the Recommendation). This means that while public prosecutors may have occasion to put forward proposals or even offer advice on certain matters in no circumstances may they lay down rules or undertake extra-judicial functions that, by their nature, fall within the scope of government or the civil service. On the other hand they should "*co-operate with government agencies and institutions*" in the interests of justice and effectiveness and in accordance with the law (Article 15).

- **Prosecution authorities' duty of impartiality: prosecution officials,** who are protected against any form of interference on behalf of special interests and must "*strictly respect the independence and the impartiality of judges*" (Article 19 of the Recommendation), must themselves, **at whatever level,** "*be objective and fair during court proceedings*" (Article 20), more generally "*carry out their functions fairly, impartially and objectively*" in the performance of their duties (Article 24a), "*abstain from discrimination on any ground such as ... political ... opinion*" (Article 25) and "*ensure equality before the law*" (Article 26). Prosecutors may be held personally responsible for failure to respect these obligations, and in particular liable to disciplinary measures.

This duty of impartiality derives from the fact that while in criminal cases public prosecutors are in charge of prosecutions, their "*primary function*" is that of "*custodian of the law*" (explanatory memorandum to the Recommendation, Article 24).

Safeguards against public prosecutors' unlawful use of power

The Recommendation seeks to ensure that the greater measure of independence or autonomy granted to public prosecutors in recent years is accompanied by more strictly defined responsibilities, which in turn imply principles and rules designed to circumscribe and govern their activities and act as a barrier to self-interest, as well as stringent oversight of their application.

- **Duties and responsibilities of prosecution officials *vis-à-vis* the public.** The amount of space the Recommendation devotes to this subject (Articles 24 ff) reflects the importance it ascribes to the principles governing prosecutors' relationships with victims, witnesses and accused.

It also emphasises that while judges and prosecutors have much in common, a clear distinction needs to be drawn between their respective functions. Moreover, public prosecutors must not only show total loyalty in their relations with court judges but must also protect and defend the latter's independence and impartiality (Articles 17 ff.).

Each signatory state should incorporate such principles in their procedures and provide training for prosecution officials in the principles and ethical duties of their office and in constitutional and human rights (Article 7a). Prosecution departments should draw up "*codes of conduct*" and carry out "*regular internal review[s]*" to prevent conduct that might otherwise justify disciplinary proceedings (Article 35), and account publicly for their activities (Article 11).

- **A well-organised hierarchical structure.** The Recommendation (Article 36a) emphasises the importance of the hierarchical principle as a means of ensuring that public prosecutors' functions are carried out with efficiency, consistency and fairness, and of preventing any abuses of power.

However hierarchical relations must avoid unwarranted "*personal considerations*" and meet general requirements of impartiality (explanatory memorandum to the Recommendation and Article 9), which underlie the rights embodied in Article 10.