



Генеральная прокуратура
Российской Федерации



CONFERENCE OF PROSECUTORS GENERAL OF EUROPE

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

*organised by the Council of Europe and the Prosecutor General's Office
of the Russian Federation*

Saint Petersburg, 2-3 July 2008

Konstantinovsky Palace

Protection of human rights and public interests conducted by the prosecution services outside the criminal law system, especially in the field of environment protection, labour law, health protection and consumers' rights

**Presentation by João M. da Silva Miguel
Deputy Prosecutor General - Portugal**

1. The subject on which I have been asked to speak has two aspects to it: a positive one, to do with the prosecution and legal department's role in protecting human rights and public interests with reference to the environment, consumer and other matters and other legal areas, and a restrictive one in that none of my remarks will have to do with the criminal field.

To further clarify the restrictive aspect, I shall not be touching at all on administrative offences (*Ordnungswidrigkeiten*) or any powers or responsibilities which the prosecution and legal department might have in that area as national approaches differ and some of them are very closely linked to criminal law. I shall also leave aside the advisory role which public prosecution services might have in the various fields I have mentioned

2. According to a human-rights classification modelled on the universal values of the French Revolution there are three generations of human rights: the first generation comprises civil and political rights based on the notion of freedom; the second generation comprises economic, social and cultural rights deriving from the idea of equality; and the third generation comprises, among other things, the right to a healthy environment, supplementing the last of the Revolutionary values, fraternity.

These generations of rights are not mutually exclusive, and they do not form any particular sequence. Rather they interact and complement one another as parts of an indivisible whole.

For effective human-rights protection it is not enough for the State to refrain from interfering with people's enjoyment of their rights. Even in the case of first-generation rights and freedoms such as those included in the European Convention on Human Rights, it is commonly accepted, and the European Court of Human Rights has repeatedly made the point, that states have positive obligations in the matter of rights protection. Among other things, states are required not only to equip themselves with legal machinery for effectively protecting the rights established by the Convention, they must also anticipate possible breaches of those rights, and of course take action on infringements of them. In the implementation of social and cultural rights, states are increasingly being asked to act on their positive obligations.

3. The work of the prosecution and legal department is always based on the concept of protecting the general interest – the interests, in other words, of the community. The assertion in Committee of Ministers Recommendation 2000(19) that “[o]perating neither on behalf of any other (political or economic) authority nor on their own behalf, but rather on behalf of society, public prosecutors must be guided in the performance of their duties by the public interest” applies equally, in the present context, to their non-criminal work.

It is possible for the department to perform a key role in the protection of human rights outside the criminal justice system, and it is clear from comparative law that, where the department has activities to do with environment protection, labour law, protection of public health or protection of consumers' rights, society has benefited.

There are substantive and procedural limits to prosecution action in these areas. In the former case, the legitimacy of such action always derives from the law while, as regards the procedural limits, such action is subject to the procedural rules applying in the particular case. In addition, in taking action, the prosecution and legal department must comply with both the separation of powers, which is an ever-present factor in our work (see the fourth conclusion of the Conference

of Prosecutors General of Europe, held at Celle, Lower Saxony, Germany, from 23 to 35 May 2004), and the European Convention (taken together with the Court's case law).

The extent of the department's non-criminal responsibilities varies from country to country because of the wide discretion which states enjoy in the matter. Countries are free to allocate this or that power to the prosecution and legal department or to any other entities which they consider better equipped to achieve the particular aims.

4. Portugal is one of the European countries where the prosecution and legal department has very extensive non-criminal responsibilities. Allow me, therefore, to give you a general account of the department's activities in the relevant fields.

The Constitution (Article 66) recognises the environment as the subject of a basic social right and the Environment Protection Act assigns responsibility for protecting environmental assets to the prosecution and legal department. In addition, the regulations governing the department (Article 3, paragraph 1e), the code of civil procedure (Article 26-A) and the code of procedure governing the administrative courts (Articles 9.2 and 85) provide the legal and procedural framework for its work.

When there is found to be environmental damage which is causing concern to a group of people the department must step in to protect them by setting in motion the procedural machinery available to it under the Act.

The department takes action when it comes to its notice that there is a clash of interests on which the courts must rule, and on the basis that the department is legally responsible for protecting environmental interests before the courts. Similar considerations obtain in the field of labour law, as I shall explain, as well as in criminal and juvenile law. In addition to traditional collective interests, our societies have seen the emergence of new collective interests, among which environment protection has taken on considerable importance.

Damage to a collective interest entails behaviour which is potentially harmful to some undefined number of people, regardless of the number of situations identified.

The bringing of proceedings in defence of collective interests is part of the department's basic function and closely links the department to the community, as the community's spokesperson before the courts. There are thus social objectives involved here, and the community aspect is in fact always a key dimension of the prosecution and legal advice role.

The arena for possible intervention is the courts and intervention is governed by procedural law. A further part of the legal basis comprises the regulations governing the prosecution and legal department, the code of civil procedure and the Consumer Protection Act. It is by exercising its legal powers to instigate proceedings that the department protects the collective interest in this area.

There are various channels available to the department: it can apply to the civil or administrative courts for emergency measures compelling persons responsible for permitted actions or activities affecting the environment to comply with the legal requirements.

On the administrative front, infringements of planning regulations or of the rules on environmental impact studies have occasioned court proceedings to have the offending actions

declared illegal. As a result, administrative authorities have been compelled to take legally required environmental measures which they had neglected.

Application can also be made to the civil courts to enforce protection of protected natural areas against environmentally damaging structures or development.

In the specifically environmental field the national system contains another recourse worth pointing out: the *actio popularis*, which provides a form of judicial protection of substantive rights vested in the community as such and therefore not usable for the individual's private purposes.

In this type of action an individual (or an organised group) always acts in the general interest of their community.

In such actions the prosecution and legal department always has powers to review lawfulness. If necessary it can take over the case if the main complainant decides to drop it, and it is also empowered to check on a transaction or whether there have been any acts possibly damaging the interests at stake (Article 16.3 of Law 83/95).

5. Consumers' rights also enjoy constitutional protection (Articles 60 and 81h), and in this area the department's work on behalf of collective rights is concerned with health and safety risks, liability for defective products, and checking on unfair clauses in standard contracts or contracts with general clauses (Articles 4, 7 and 10.3 of Law 24/96 of 31 July).

In such cases the department can refer cases to the civil courts in order to obtain an order for the withdrawal of a defective product or a product presenting a health risk or for the removal of unfair clause. However, the department is not allowed to apply for compensation for injured parties.

Empowering the public authorities, and in particular the prosecution and legal department, to refer matters affecting consumers' interests to the courts, although controversial, is seen as one of the most effective ways of providing legal protection for consumer rights and is in line with the Council of Europe's 1973 Consumer Protection Charter, which provided for giving one or more specific authorities a procedural role in this area and for legal recognition of consumers' and citizens' organisations.

In domestic law, in exercising its powers to act as a party on behalf of widely shared or collective interests for groups of consumers affected by a particular consumer issue, the department acts in its own name, in its legal capacity as possessor of a social interest which, by definition, is not affected by individual considerations.

6. Health is also constitutionally protected as a basic right (Article 64).

In addition to defence of collective interests to do with health matters, the department has a specific function in relation to persons affected by mental illness who refuse medical care because of inability to recognise a danger to their health. In such cases the department is legally empowered to apply to the courts for an order for compulsory placement in a psychiatric institution.

These inherent powers and responsibilities of the department are concurrent with those of other interested parties, and the justification for them is the protection which such parties require.

7. Finally, as regards the department's role in employment cases, there is provision for two kinds of action: the department acts as counsel for the employed person and in industrial accident cases it presides over the conciliation phase.

Here again, all action by the department, and the limits of such action, are governed by law. On the one hand, under the regulations governing the prosecution and legal department, the department acts as the official representative of employees and their families for the purposes of protecting their social rights (Article 3); on the other, the code of labour procedure specifies the cases in which the department must or may refuse to act as official representative (Article 8).

The department must refuse to act as representative when it considers the claims advanced to be ill-founded, and it may refuse to act as representative when it takes the view that the person concerned has trade-union legal-advice services available to him or her.

It might be wondered why, in a democratic society, the role of workers' representative should fall to the prosecution and legal department.

The reasoning behind this has to do with the social interest in protection of employment and of persons whom the State regards as basically vulnerable. In addition, in present circumstances, the very concept of the welfare state or social protection is clearly necessary, particularly at a time of economic downturn and weaker protection by the trade unions.

8. A final remark.

Although there are no detailed figures on action by the department in the fields discussed, evaluations carried out indicate intensive activity, particularly as regards environment and consumer protection, and, in the case of protection of the workforce, the latest annual report of the Portuguese chief prosecutor's office (2006) records over 2 300 worker-representation cases brought and over 20 000 cases concerning industrial accidents.

9. To sum up this presentation, it seems fair to say that the role of the prosecution and legal department outside the criminal field, and particularly in environment, employment, public health and consumer matters, provides, or potentially provides, added value in the promotion and protection of human rights and the public interest because of the defence contribution it makes in situations warranting vigilance where people would otherwise be left unprotected.