



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

**“The role of public prosecution in protection of public and state interests in court
and other agencies”**

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As we have heard this morning from our dear colleague Mr. Joao Manuel da Silva Miguel public prosecution service in Portugal has an quite extensive range of competencies which are reaching far beyond the traditional criminal area. Like in Portugal, in other European countries the public prosecution services still play an active role in implementing the promoting of the access of citizens to law and justice, in the protection of consumers' rights and the environment. In these and some other areas they perform an important responsibility in defending the human rights of persons and the general collective values and interest of the society. Acting in behalf of the person or the common values, the public prosecution Service more and more competes with other actors in the democratic society, such as specialised administrations, associations, private agencies, trade unions and , last but not least, specialised lawyers.

Playing this historically based role outside the criminal field, public prosecution services are facing a pressure from the just mentioned groups of experts to give up these extra-penal powers. The key question is: Which is the best way to promote the best access for citizens to human rights and in the same time to protect the public and state interests? If the two challenges of public prosecution services meet in one file, this may bring us into a dilemma as the following example shows:

Example1:

A pregnant woman commits a theft of some goods in a shop where she is working. The shop-keeper therefore terminates her job. The labour law does not allow employers to terminate the employment of a pregnant woman. The criminal law does not accept stealing. The woman comes to you and asks for help.

If the public prosecution service in this case plays a role in both fields of law, the prosecutor has to decide: What is the public interest in this case? Is it to help the pregnant woman to get access to the rules of the labour law? Or does the state interests need to prosecute the theft?

Example 2:

A large company with many employees causes a big environmental disaster, like water and air pollution. This is a crime to be prosecuted by the prosecution service. The director of the enterprise argues that to avoid the pollution would cost the existence of the company, the loss of hundred employments. The same situation, the same questions: If the public prosecution service in this case plays a role in both fields of law, the prosecutor has to decide: What is the public interest in this case? Is it to help the employees to maintain their jobs? Or does the state interests need to prosecute the environment pollution?

Both examples do not only show the dilemma, the conflict of interests which may arise in law systems with wide extra-penal powers of prosecution services outside the criminal field.

They also have the next question in common: Who, within the public prosecution service will decide about the public interests in these cases? Is it the local prosecutor? Is it the General Prosecutor? Or who else may influence and determine the definition of public and state interests in the proper case?

As it is not the time now to argue in a philosophical, scientific way or by examining the situation in all European Law systems I will give to you just the German experience.

In my country we nowadays do not have any significant powers outside the criminal field. But we have the power and responsibility to defend public interests through the criminal justice system. Therefore we have some general guidelines for the application of the discretionary power of prosecutors in the so called "mass-criminality", whose overcrowding demands the establishing of certain crime-policy orientations, for example cases of shop-lifting, patrimonial violence, drunken driving. These guide-lines are given either by the ministries of justice of the

Länder, which are responsible for crime-policy within their territory, by the Prosecutors General within their area or by the local Chief Prosecutors within their district.

Nevertheless, in all cases it is up to the local prosecutor to decide by regarding and weighing all circumstances, facts and evidence of the file, whether public interests require punishment either by court sentencing or by other measures (such as compensation to the victim, community work and so on). The decisions must be within the limits of criminal law and the given general guide-lines of crime-policy. If the court decision is not in line with state interests, prosecutors can appeal against the judgement within the limits of the procedural and constitutional law. Following the hierarchical system of the prosecution Service legally the Prosecutor General or even the minister of Justice may determine the decision of the Local Prosecutor in every single case. In reality this nearly never happened and if, this will always be followed by a broad public discussion within the media, the parliament and the judiciary. In most of the cases, it led to the resignation of the minister. So we try to avoid this discussion like devil the holy water. But sometimes it is necessary, especially in cases which are touching fundamental national interests of foreign affairs or internal peace.

Coming back to the examples I gave earlier:

To the pregnant woman, I would recommend her to go to a labour association or to a lawyer to defend her against the notice to quit. If she is poor, she could seek the financial help of the state, which is provided for these cases. The file of her shop-lifting I would have to decide due to the circumstances of the case and in accordance with the guide-lines dealing with stealing from department stores.

In the environmental case there are no guide-lines existing. Firstly, I would investigate the circumstances and decide about the evidence. Then I would measure the public interest in prosecuting and charging, but after having discussed the circumstances with the relevant bodies, responsible to preserve the environment and to secure employment and safety at work.

Having said this, I underline in general the position of the Parliamentary Assembly of the Council of Europe in Recommendation 1604 (2003) on the Role of the public prosecutor's office in a democratic society governed by the rule of law. As to non-penal law responsibilities The Parliamentary Assembly finds it essential, that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interests through the criminal justice system, with separate, appropriate located and – I underline this word -effective bodies established to discharge - I would say: replace - any other functions. Of course, this must be in line with historical traditions and the future development of every member state of the Council of Europe. This is my vision of a Public Prosecution Service in Europe, governed by the rule of law and being able to save both, the human rights of defendants and victims as well as the public interest in the rule of law.

Finally, I want to close my statement.

It is up to every country to organise the powers of prosecution outside the criminal field according to law traditions, historical experiences and the actual situation of their society, especially taking into account the legal powers and practical influence of civil law agencies and specialised public authorities. But these law systems must have in mind the dilemmas and democratic infringements that might occur in regarding the separation of powers.

Thank you for your attention.