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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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"The role of prosecution services in supervising the functioning of courts"

Cédric Visart de Bocarmé,
Prosecutor General of Liège, Belgium

The complex functions of the prosecution service were defined in the Napoleonic era, specifically in the Decree on Judicial Organisation of 16-24 August 1790. They included:

– in the administration of justice, upholding all laws relating to public policy,
– enforcing judgments, because this conditioned the authority of the actual laws on which the judgments were based,
– supervising the conduct of judges, since this was considered essential in order to avoid undermining public confidence in and respect for justice.

The rapporteur, Mr Thouret, had listed these functions in a speech to the National Assembly:
"These officials are in post at the courts in order to regulate all the latter's movements with a view to upholding established principles and procedures, and by constantly referring to the law, to prevent miscarriages of justice which would lead to increased numbers of appeals on the facts and on points of law;
they are in sole charge of the enforcement of judgments, in order to draw the correct demarcation line between judicial functions and the executive;
and lastly, they are responsible for supervising discipline in the courts and the proper performance of judicial services;
it is impossible not to regard them as valuable officials in the administration of justice".
The prosecuting function was introduced only at a later date.

Clearly, the basis of the institution was not primarily its criminal law function but, rather remarkably, its functions in fields other than criminal law.

So the prosecution service's work is not only warranted by the requirements of public policy or the public interest.
Among other rights, it is entitled to supervise the proper functioning of judicial activity.

Supervision by the prosecution service of the proper performance of judicial services by the courts, provided for by Article 140 of the Judicial Code, originated in Section 156 of the Law on Judicial Organisation of 18 June 1869.

It is because the prosecution service is the guardian of public policy that it must, in particular, supervise the proper performance of judicial services and the enforcement of the law by the courts.

It quite naturally has these duties in criminal matters.
But that is also true in civil matters (in the broad sense), even where only civil interests are involved, since the prosecution service must ensure the effective administration of justice.

In order to fulfil this obligation, which it has to do in a wide range of areas, the prosecution service has to perform a number of tasks, including:

- **generally supervising the functioning of court hearings**, including the composition of the bench, the number of cases on the list, the number of judgments delivered, of interlocutory orders, of cases adjourned, of cases under deliberation and of proceedings resumed, and the list of cases pending;

- **remedying the excessive length of deliberations** when this directly impedes the normal conduct of proceedings.
  One way of doing this is to check the records of proceedings every month (Art. 788 Judicial Code);

- **where necessary, bringing proceedings against negligent judges**

The prosecution service has an important part to play in the area of judicial discipline, where it has very broad scope for action.

For example, it can bring disciplinary proceedings against judges, as it can against prosecutors.

This is one of the methods for internal supervision of the judiciary, precisely assigned to independent law officers in order to safeguard the judicial independence of judges, for the benefit of litigants.

The law of 7 July 2002, which amended the part of the Judicial Code concerning discipline and was intended in particular to confer the status of "prosecutor" on the heads of prosecution services, as part of their management tasks, at the same time assigned the prosecution service a more proactive role in disciplinary proceedings against judges.

Contrary to the previous procedure, in which a hearing of the prosecution service was mandatory in certain cases, the new law leaves it to the prosecution service to decide on the attitude to adopt.

The prosecution service can initiate disciplinary proceedings (Art. 410 § 4 Judicial Code), appeal against any disciplinary penalty (Art. 415 § 12 Judicial Code) and be notified of cases and sit in the court or other body hearing the case if the service considers it appropriate, in order to state its position by means of an opinion (Art. 764, 11°, § 2 Judicial Code).

The fact that Parliament took care to specify that under Article 410 § 4 of the Judicial Code, the prosecution service can bring disciplinary proceedings before any disciplinary authority inevitably implies that proceedings will be started, or in other words that a disciplinary investigation will be opened, whereas a complaint can be dropped immediately.
If this provision is to be applied, the prosecution service must be automatically informed of any complaint addressed to the head of court.
This obligation is therefore included among the duties of a head of court.
It is for the prosecution service alone to decide whether it can be content with this referral, without sitting in the court or other body hearing the case, or whether it considers it necessary to sit.
As a result of the choices thus offered to it, the prosecution service acts as guarantor of the unity of disciplinary case-law, alongside the National Disciplinary Board.
This task is more important for the prosecution service at the Court of Cassation because the latter has become the appeal body for all decisions concerning major penalties imposed on judges;

- **requesting the Court of Cassation to take a negligent judge off a case** (Art. 648 and 652 Judicial Code), that is if the judge fails for more than six months to decide a case on which he is supposed to be deliberating;

- **supervising investigations**
  On the basis of Article 136 bis of the Code of Criminal Procedure, the Crown prosecutor reports to the principal Crown prosecutor on all cases on which the court in chambers has not taken a decision within a year of the prosecutor's first application to commence proceedings.
  Furthermore, at all stages in the investigation, the principal Crown prosecutor can refer a case to the indictments chamber and make submissions to it, if he considers it advisable for the proper conduct of the investigation or for the lawfulness or proper conduct of the proceedings (Art. 136bis § 2 Code of Criminal Procedure).

As regards supervision of the lawfulness and proper conduct of the proceedings, the Code of Criminal Procedure does not grant either the defendant or the party claiming damages the right to apply directly to the indictments chamber during the investigation in order to have an unlawful decision set aside;

- **ensuring the enforcement of judgments** (Art. 139 Judicial Code and 40 § 2 Constitution).
  The enforcement of judgments must always be regarded as a component of the right to a fair trial.
  The requisite confidence in the judicial institution, together with the public interest and individual interests, demand that court decisions be complied with.
  Access to a court would be illusory if the judicial system allowed a final court decision, duly including a writ of execution, to remain ineffective to the detriment of the successful litigant.
  As dean de Leval put it, “the idea of justice is reflected not only in the wisdom of court decisions but also in their speed and effectiveness”.
  In civil cases, the enforcement of a decision is admittedly a matter for the parties, and in principle for them alone.
  The party concerned is entitled to rely on the authorities’ support to ensure enforcement of the document delivered to it, in this case via a bailiff.
  It is only if, in absolutely exceptional cases, the bailiff refused to perform this duty that the party could apply to the Crown prosecutor.
  The latter is thus the public authority best suited to exerting the statutory forms of pressure, which was in fact, historically, the Crown prosecutor’s prime function under the Decree on Judicial Organisation of 16-24 August 1790.
  The prosecution service must also ensure enforcement of the decision in a civil case if it took part in the proceedings as plaintiff or defendant or as third party; this is merely a matter of applying Article 139 of the Judicial Code
  On the basis of Article 138 § 6 of the Judicial Code, the prosecution service takes automatic action if there is a violation of the sharing out of functions between the state powers, or if there is a breach of the basic principles of organisation, jurisdiction and procedure in the judicial system, or in order to enforce, in the civil courts, the mandatory rules of law governing jurisdiction or certain basic procedural principles concerning the nature of court decisions on legality, such as the impartiality and independence that is required between the judge and the prosecution, or concerning the organisation of the courts’ auxiliary services;

  the possibility of convening a general assembly of the courts on the basis of a reasoned request (Art. 340, § 5, 3° Judicial Code)
  These general assemblies are convened, among other reasons, to discuss and decide on topics of interest to all courts or to justices of the peace and magistrate’s court judges, and to deal with public policy matters falling within the jurisdiction of one of those courts. The prosecutor attends the general assembly and can have his submissions recorded on the register, with a view to drafting the operating report (Art. 341 § 3 Judicial Code);

- **supervising court registries and their staff**

  The statutory supervision of court registries assigned to the prosecution service concerns three specific areas, in compliance with Article 403 of the Judicial Code: technical matters, discipline and staff management, and financial matters.

  Since 1997, court registries have enjoyed a degree of autonomy, so that they no longer come under the authority of the prosecution service but under its supervision, and the concept of supervision is gradually giving way to that of quality control.

Financial supervision is hard to exercise without the co-operation of the civil servants in charge of registration and property (in compliance with Article 35 of the Royal Decree on Court Registry Accounts of 13 December 1968).
It has to be admitted that these audits are conducted very occasionally because the civil servants concerned have so little time to carry out this task properly.
There is a strong demand for a specialist inspection service to be set up for court registrars. The idea was broached in 2001, but has still not been put into practice.
Given the lack of adequate supervisory facilities, the prosecution service's task of supervising the activities of court registries is difficult, not to say completely illusory, especially as regards accounting.
The prosecution service nevertheless performs it to the extent permitted by the minimal resources allocated to it for the purpose.

As part of its supervision of court registries (Art. 403 Judicial Code), the prosecution service wields disciplinary powers in respect of registrars, except in the case of errors committed by registrars in assisting judges (Art. 415 Judicial Code).

As of 1 January 2009, authority over and direction of court registries will be the task of heads of court, while inspection of registries will remain the duty of the prosecution service.
This may well result in a divide between heads of court and heads of prosecution services;

- **running the secretariat of the prosecution service**
  This task covers the organisation of the secretariat and all its activities;

- **appealing against district court decisions on jurisdiction** (Art. 642 Judicial Code)
  District courts deal with certain disputes on jurisdiction.
  An applicant disputing the jurisdiction of a trial or appeal court can request that the case be referred to the district court, which will settle the dispute on jurisdiction.
  The defendant does not have this possibility.
  If the judge himself queries his jurisdiction, he has to order the case to be referred to the district court.

  In principle, no appeal lies against decisions of the district court.
  The principal Crown prosecutor at the court of appeal may exceptionally lodge an appeal in order to remedy a serious error in the settlement of a dispute on jurisdiction;

- **applying to the Court of Cassation to censure a bar association regulation** in the event of misuse of authority, unlawfulness or unlawful adoption
  Article 611 of the Judicial Code confers this power exclusively on the Principal Crown Prosecutor at the Court of Cassation;

- the principal Crown prosecutor at each court is also required to **give an address on a topic suited to the circumstances when work resumes after the court vacation** (Art. 345 Judicial Code).
  Among other things, the principal Crown prosecutor gives an account of the manner in which justice has been done in the judicial district of the court at which he is in post, and of the abuses he has observed.
  These addresses are by no means academic.
  The text is sent to the Ministry of Justice and the court usually orders its publication.

To conclude this non-exhaustive inventory of the supervisory tasks performed by the prosecution service, it has to be acknowledged that the text of Article 140 of the Judicial Code, which provides for the prosecution service to ensure the proper performance of court services, is too vague, so that the lessons drawn from the prosecution service's supervision produce few results.