



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 the prosecution services in the protection of human rights and the public interest outside the criminal-law field

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The report submitted on 5 May 2008 by the technical expert, Mr Andras Varga, summarising the replies to a questionnaire sent out by the Consultative Council of European Prosecutors on the role of the public prosecution service outside the field of criminal justice, indicates that almost half of the prosecution services in the member states (43 countries replied to the questionnaire) have little or no jurisdiction for matters falling outside the criminal justice field. The other half does have powers in such matters and these powers can sometimes be quite extensive.

It will not be easy for me to sum up the reason for such powers outside the criminal-law field in the time available to me and I would therefore refer you to Mr Varga's report.

However, I can analyse the legal foundation for these powers in respect of the public interest, public order and defending human rights and individual freedoms.

I shall focus my presentation on the role of the public prosecution service in France outside the criminal-law field on the above concepts.

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In France, the public prosecution service, comprising the principal state prosecutors (of whom there are 35) and the public prosecutors (of whom there are 181) and the staff working with them, is a body of law officers attached to the courts, whose role is to defend the general interests of society with due regard for individual freedoms.

The public prosecutors' status as law officers, derived from the Constitution, confers upon them the role of guaranteeing individual freedoms.

However, public prosecutors are required not only to guarantee these individual freedoms but also to ensure that public order is maintained.

Of course, it is in the criminal-law field that this role is best known, but this is not the area we are dealing with today.

As an agency acting in defence of the law and the public interest, the French public prosecution service may be party to the proceedings in all courts, whether civil or commercial courts or industrial tribunals, with the exception of the administrative courts.

This corresponds to its role of defending the public interest and maintaining public order, and is the first point I shall address.

However, while its role as guarantor of individual freedoms, considered in the context of the principles governing human rights, underlies all the action taken by public prosecutors in view of their status of law officers, there are a number of situations and areas which are clearly defined by legislation in which members of the prosecution service have an obligation to ensure that these freedoms are respected. Here I am referring primarily to the monitoring of all premises where people are deprived of their liberty. This will be the focus of the second part of my presentation.

I Defending the public interest and public order -

This applies primarily to the civil and commercial fields. In addition, however, it is reflected in the supervision and monitoring of the regulated professions.

A. The civil field -

The public prosecution service acts as main or associated party.

It is the main party:

when it acts *ex officio* in cases specified by law: for example, in matters of nationality, in cases where people are declared missing, on behalf of legally incapacitated adults or minors in danger, and in cases of amending the population register. It also becomes involved in procedural matters: the principal state prosecutor at the Court of Cassation may initiate an appeal on points of law in the interests of the law.

when it decides to act in defence of public order in respect of matters which pose a threat to law and order. There is a great variety of areas in which this may be the case, the only limit being that there must be a serious undermining of public order provided, according to case-law, that no other “rival interest”, ie purely private interests, are harmed. By way of example, a public prosecutor recently lodged an appeal in the case of an annulment of marriage (a manifestly private sphere) where the ground for annulment related to the “essential quality” of the bride’s virginity.

The public prosecution service took the view that making the validity of the marriage conditional on the virginity of the wife-to-be violated the principles of equality, dignity and the freedom to control one’s own body, and that this therefore introduced a discriminatory condition that was contrary to public order.

when it represents others in cases specified by law. For example, it may represent the Préfet, in other words the administrative authorities, if the latter consider that a dispute brought before the ordinary courts in reality falls within the jurisdiction of the administrative courts. It also acts when a person instigates action to declare another person missing; in such cases, the public prosecutor represents the missing person in all proceedings.

The public prosecution service also acts as associated party, ie to present observations on the application of a law in a case of which it is notified, such notification being either optional or mandatory.

Notification of proceedings is mandatory in cases relating to a person’s status – such as in matters of descent, legally incapacitated adults, educational measures for minors ordered by the court, and adoption.

However, the public prosecution service may also play a role if it considers it appropriate from the viewpoint of defending the public interest or public order, or where the court wishes to obtain an opinion.

In some other countries, such as Belgium and Luxembourg, the prosecution service has extensive powers in civil matters. In yet others (such as Austria, Germany, Denmark, Albania and Turkey) these powers are more limited.

B. The commercial field -

The prosecution service's prime role is to maintain public order. This does not cover the criminal-law field alone; it may encompass the protection of economic and social public order.

In France, the public prosecution service has particular powers in the economic field relating, first and foremost, to collective proceedings; however, other sectors are also covered (company law, competition, literary and artistic property, auditors, etc).

With regard to companies finding themselves in financial difficulties, the prosecution service was granted significant powers in 1985, which were further strengthened in 1994 and 2005.

In certain cases, the prosecution service must be present at hearings. If they are not, the latter are deemed to be null and void; this confirms the essential nature of its role.

It also plays a part in rescue, administration and winding-up proceedings.

Public prosecutors monitor the court-appointed administrators who act in this field.

Principal state prosecutors also monitor the professional auditors given the task of certifying company accounts.

Public prosecutors are also involved in matters relating to the commercial register.

Lastly, public prosecutors, together with the first president of the appeal court, inspect the courts within their jurisdiction. This includes the commercial courts.

I would add that public prosecutors and principal state prosecutors, each at their geographical level of responsibility, take action in advance of collective proceedings via administrative and economic agencies responsible for identifying companies facing financial difficulties.

C. Monitoring and supervision of the regulated professions -

In disciplinary matters, principal state prosecutors are responsible for the supervision of the various professional officers. They are also competent to give their opinion on the appointment of such officers and on the establishment and location of offices and practices.

The officers concerned are solicitors, bailiffs, valuers and auctioneers of movables, and the registrars of commercial courts.

Lastly, principal state prosecutors are also responsible for disciplinary matters relating to barristers.

That, very briefly then, is the role of the public prosecution service in defending the

public interest and public order.

II Defending individual freedoms -

This is a role assigned more rarely to the public prosecution service, but it is one that is justified in France because its members have the status of law officer.

Principal state prosecutors and public prosecutors have the task of ensuring that individual freedoms are respected in premises where people are deprived of their liberty. This role, provided for by various laws, has not yet been modified despite the recent establishment in France of the post of Inspector of prisons and other places of custody, an independent administrative authority which complies with the European Prison Rules adopted by France and all Council of Europe member states on 11 January 2006.

Accordingly, once every four months, public prosecutors must visit establishments accommodating those suffering from mental disorders, take receipt of complaints and make all the necessary checks.

They are also required to visit holding centres for foreigners (“administrative detention” centres) as often as they consider it necessary, according to legislation, and at least once a year.

The same applies in the case of holding areas in ports, railway stations and airports where foreigners are detained.

Public prosecutors must visit police custody premises in their jurisdiction and submit an annual report to the principal state prosecutor on their findings. The latter includes a summary of these reports in his or her own annual criminal-law policy report sent to the Minister of Justice.

Lastly, public prosecutors and principal state prosecutors are obliged to visit prisons, and an annual report is submitted by the principal state prosecutors to the Minister of Justice. They are also members of the committees responsible for monitoring these establishments.

In all these cases, it is the concept of defending individual freedoms and upholding human rights that is the prime issue.