

Strasbourg, 30 April 2020

CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)

Questionnaire for the preparation of the CCPE Opinion No. 15 (2020):

The role of prosecutors in emergency situations

In your answers, please do not send extracts of your legislation but describe the situation in brief and concise manner, including briefly what is happening in practice.

Introduction

This topic - the role of prosecutors in emergency situations – was selected by the CCPE members in the context of the present unprecedented situation in the world relating to the fight against COVID-19 pandemic. The aim is to address it in a practical way, since prosecutors have an important role to play in emergency situations declared in member States. Consequently, the CCPE will show its response to the present crisis and challenges that the prosecutors face. The Opinion No. 15 will take the lead and illuminate the way in which prosecutors may deal with the present challenges based on European standards. The Opinion will send a strong legal as well as political message to the Committee of Ministers of the Council of Europe about how the CCPE adapts to the new challenges.

Questions

IN YOUR COUNTRY:

General questions

1. Has there been an emergency or similar situation declared in order to fight against COVID-19? (by which provisions (constitutional, other), part of the territory covered, duration, how does emergency situation cease)

The exceptional measure (state of alarm) was approved by the Spanish Cabinet on March 14 and came into effect the following day. It was set to last until March 29 but

was extended by Congress for another 15 days until April 11. Since then, it has been extended every 15 days by the Parliament. The Spanish government has announced plans to gradually relax some confinement measures in phases over the next six to eight weeks.

2. Which rights have been affected as a result of this emergency situation? (i.e. freedom of conscience and religion, freedom of movement, right to health, etc.)

The state of alarm consisted, mainly, in deprivation of movement, that is, confinement measures, affecting, as a result, to education, commerce, right to practice religion in public places, and everything that affects to the right of movement, etc. to avoid concentration of people. The Spanish Constitutional Court also prohibited public demonstrations, to avoid the political demonstrations that currently take place when the First of May.

3. Which rights may have not been affected under any circumstance? (i.e. the right to life, to personal integrity, access to courts, personal identity, citizenship capacity, rights of defence in criminal proceedings, non-retroactivity of criminal law, etc.)

The rest of rights have been preserved.

4. Has there been any kind of discrimination, also originating from private persons, against certain groups (for instance, health workers, racial and ethnic minorities), hate speech, racism, xenophobia, attacks and forced returns of refugees and asylum-seekers, mistreatment of foreigners and migrants, and sexual and gender-based violence?

Not at all, to my knowledge.

Questions relating to the usual functions of prosecution services but in an emergency situation

5. How the prosecution service has worked in emergency situation? (i.e. restraints imposed on prosecution services such as teleworking and limited possibilities to get to the working premises, to use the corresponding equipment, to interact with relevant professionals etc.)

The above described options and modus operandi are those introduced to keep Prosecutors doing their job.

6. How criminal suspects in pre-trial detention have been dealt with? Article 5(3) of the European Convention on Human Rights requires trial within a reasonable time or release pending trial. But if the criminal courts are scarcely functioning, trials do not take place. Consequently, have criminal suspects been released from pre-trial detention? (even if they could have been dangerous). Or have the grounds for detention in custody and custody time limits been interpreted differently, according to the exceptional circumstances - in other words, has a "reasonable time" within the meaning of Art. 5(3) of the ECHR become longer?

There was an agreement by the Plenary of the Constitutional Court of 16 March 2020, regarding the suspension of procedural and administrative deadlines while the state of alarm is in force. However, that decision does not apply to the penal order, habeas corpus cases, pre-trial detention, orders of protection, inmates control in jails,

precautionary measures on gender or minor crimes. No criminal suspects have been released as a result of the state of alarm.

7. In case of suspension or restriction of rights on public health grounds, which requirements have been necessary (i.e. legality, proportionality, adequacy of the measures, necessity) and which principles (equality, non-discrimination) and limits must have been observed? (i.e. searches, restrictions relating to media, political parties, etc.)

Demands and appeals to judicial bodies can be submitted, according to the Constitutional Court, by those who consider that their rights have been affected as a result of the state of alarm.

8. Has there been any particular intervention of the prosecution service in the emergency situation (i.e. in the case of Portugal, the Prosecutor General's Office has been in permanent session during the whole duration of the emergency situation in order to defend the principle of legality and the rights of citizens)

The Attorney General's Office has been coordinating Prosecutors and Specialised Prosecutors in order to be able to face the different problems which may appear as a result of the Coronavirus crisis since March 23 up to now.

9. Has there been suspension of procedural delays (except in urgent cases or cases affecting human rights) imposed by a particular law or other legal instrument?

As mentioned before (para. 6), there has been an agreement by the Plenary of the Constitutional Court of 16 March 2020, regarding the suspension of procedural and administrative deadlines while the state of alarm is in force. However, that decision does not apply to the penal order, habeas corpus cases, pre-trial detention, orders of protection, inmates control in jails, precautionary measures on gender or minor crimes. No criminal suspects have been released as a result of the state of alarm. Non the less, there is a certain level of confusion on that specific subject, since the case law is quite complex, and the number of possibilities is high. Eventually the Courts will have to put order in the matter.

10. Have there been crisis response teams created within the prosecution service and at which level (central, regional, local)?

No response team has been created.

11. Have there been guidelines to address the emergency situation issued for the prosecution service and at which level? What measures have been taken regarding shifts of prosecutors (for urgent matters, or during the period where courts have been mostly closed or with their activity significantly reduced) and the replacement of infected prosecutors?

The Attorney General's Office has issued a number of measures to cope with those problems, following the same scheme followed by the Judges regarding reinforcements and replacements of judicial bodies.

12. Has there been specific cooperation with other agencies set up (i.e. law enforcement, courts, etc.)?

Most of the initiatives regarding the matter of our concern adopted have been agreed by the General Council of the Judicial Power, the Public Prosecutor's Office and the Ministry of Justice.

13. Has the prosecution service conducted or supervised investigations carried out by police and other investigation authorities to ensure the adequate protection of human rights in the emergency situation?

Not, in a specific manner

14. Has the prosecution service decided on alternatives to prosecution to avoid overcrowding in detention facilities in the emergency situation?

Mediation, as well as the partial use of the discretionary principle in criminal prosecutions, are right now on the table of debate.

15. Have there been any specific modalities for action of the prosecution service in the emergency situation as regards:

- initiating prosecution (particularly in urgent cases, or cases relating to the emergency situation – for instance, disobedience to law enforcement agencies, health personnel, intervention in cases of domestic violence, etc.);
- conducting prosecution before the courts, particularly when courts have significantly reduced their activity (have courts maintained their activity, even if somewhat reduced?);
- ensuring that victims and witnesses and other vulnerable participants were effectively assisted and/or protected and defendants had their rights respected through the whole procedure
- appealing court decisions;
- supervising the execution of court decisions and applying whenever possible non-custodial measures or reduction of prison sentences (to avoid overcrowding in detention facilities and to prevent the dissemination or spread of the disease);
- implementing national crime policy (i.e. in cases where disobedience to lawful orders of law enforcement and health personnel, regarding confinement, may add spreading the disease)
- carrying out functions, where applicable, outside the criminal justice system (i.e. lockdowns may result in heightened risk of people, namely children, witnessing or suffering violence and abuse, unemployment/enforcement of movement restrictions and physical distancing measures can serve as a cover for discrimination and violence against particularly groups, namely foreigners or vulnerable groups, observation of labour laws and social protection, minimising the risks of contagion of workers and employees)

There has been an important number of administrative fines imposed to those who did not respect the confinement measures. In those cases, where there has been physical resistance by the offender, arrest may follow as a possible crime of resistance or disobedience to the authorities. In fact, there are some procedures, in development, based on that approach.

On the other hand, while videoconferences were beginning to be used in the judicial context before the present pandemic, the tendency right now is to resort to videoconferences in the majority of cases. It is for sure that a higher degree of digitalization will be one of the results of the present events.

Questions relating to the possible new functions of prosecution services as a result of an emergency situation

16. Have there been any new or extended functions of prosecution services resulting from the emergency situation as regards for example:
- supervising maintenance of public order and security;
 - supervising implementation of emergency measures including confinement of population, closure of public areas and other relevant measures;
 - supervising general protective measures for the population and maintenance of provision of relevant services, including to the most vulnerable groups during and after the pandemic (women, children, elderly, people living in institutions, deprived of their liberty or in detention or confinement, displaced, homeless, migrants, refugees, slum-dwellers, etc.);
 - ensuring regulatory measures to prevent profiteering on foodstuffs, hygiene products and essential medicines and supplies;
 - reducing the risk of stigmatising and harmful conduct against vulnerable groups, including those infected by COVID-19;
 - ensuring the rights of persons held in quarantine or confinement;
 - interacting with media and highlighting the work of prosecution services in the context of emergency situation;
 - informing the population about the emergency measures and the corresponding penalties for their non-observation

There have not been special initiatives adopted in the direction described above. Perhaps, the powers and capacities existing into the professional context of the Public Prosecutors are being executed with a higher level of awareness and caution to avoid excesses that may occur under the present circumstances.

Questions relating to the challenges for the prosecution service in an emergency situation

17. What are, in your opinion, the main challenges faced by prosecution services in an emergency situation and in its aftermath/recovery?

I think that when giving the opinion required one has to be aware of some aspects which, occasionally, are put aside under the present circumstances and that, by no means, have to be taken into consideration. On the one hand, it is true, that more police surveillance has been applied and more control has been introduced, which may result in police abuses. It is also true that cybercriminality has increased since more trade is taking place through internet. Besides, incidents related to gender violence have increased up to a 47,3%, according to Spanish statistics, as well as assaults on minors but. Not to forget cases of death of old people hosted in nursing homes, as a result of the possible negligent treatment of the nursing home staff regarding the coronavirus threat. But, on the other hand, it is also true that the average level of crime in general has decreased more than 50 %.

Accordingly, I think it is convenient to wait still for some time until the moment we have a proper picture of the whole situation, since there may still be, or appear, factors which we cannot evaluate properly right now.

18. Are such challenges related to:

- independence and accountability of prosecutors in the context of emergency situations;

- ethics and professional conduct of prosecutors during emergency situations and thereafter;
- training of prosecutors on working modalities at the time of emergency situations (for instance, for teleworking) and protecting themselves from COVID-19;
- creation of multidisciplinary teams, if need be (with health personnel, for instance);
- support to vulnerable groups, which are to be the most impacted by the economic consequences of the pandemic (unemployment, worsening working conditions, impact on economic, social and cultural rights in general, etc.)
- international assistance and cooperation, taking into account the consequences of the pandemic and the need for a reinforced cooperation among prosecution services (sharing best practices)

I partially refer to the answer provided at para. 17 for para. 18. Non the less, there are new aspect, as a result of the Coronavirus crisis, which are quite interesting, and we may have to consider. First of all, the fact that digitalization will develop, should demand different and new procedural safeguards and measures, in line with this new approach. Secondly, as mentioned, cybercriminality and gender violence has seriously increased, and we will need to update Prosecutors on those specialties, and, thirdly, it is worth mentioning that the environmental issues are arising everywhere. In fact, the origin of the pandemic has a clear environmental background, besides, the way the virus spreads it is through the air, which is in the same way than any other form of dangerous pollution spreads, etc., etc. What has been said may require new initiatives to face those new aspects.

19. What are, in your opinion, ways and methods to overcome these challenges?

Besides the need to face those points mentioned in para 18, all those novelties may affect human rights, since there are new perspectives being introduced and we lack the proper training, capacity, skills, etc. in those new area, or, at least, not in the necessary level. Accordingly, we should care about protecting society, specially from the human rights point of view on those novelties.