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PUBLIC PROSECUTOR IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS. ITS ROLE IN THE CRIMINAL PROCEDURE CODE AND IN RESPECT OF THE DEFENDANT'S AND THE VICTIMS' FUNDAMENTAL RIGHTS

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Theme I : Prosecutorial independence, autonomy and accountability: different models, common challenges in protection of human rights?

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The public prosecutor in the case law of the European Court of Human Rights. Its position in the criminal procedure and in respect of the defendant's and the victims' fundamental rights

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1. The European Convention on Human Rights does not directly deal with the issue of the status of the public prosecutor within the judiciary and in relation to the other powers of the state, and consequently this is not directly dealt with in the case law of the European Court. As is well known, even the question of the separation of powers is not resolved in univocal terms. However, this is a relevant issue at least for the systems that see the public prosecutor as belonging to the judiciary. The court refused to adopt a specific constitutional doctrine, although it noted that the notion of separation of powers between the political and the judicial is of growing importance. In this regard, the Court noted that neither Article 6 of the Convention nor any other provision requires states to be consistent with a specific doctrine regarding the admissible limits in the interaction between powers. What matters is the fairness of judgment in individual cases and, therefore, the impartiality and independence of the judge¹. The Convention does not consider criminal policy, of which the prosecutor is also a protagonist.

As far as the prosecutor is concerned, the national systems in Europe are different: adversarial or inquisitorial, with dependence of the police on the prosecutor, or autonomy, with mandatory prosecution or discretion, with or without private action. The prosecutor's relationship with government authorities or with Parliament depends on this.

2. The Convention does not outline a specific and binding figure of the public prosecutor in terms of status. In fact, in the 46 countries of the Council of Europe the role of the public prosecutor is exercised in the criminal trial by a wide variety of figures. Even the victim of the crime can sometimes introduce a criminal charge, as in the case of the action of the *partie civile* in the French criminal trial². In this regard, the European Court affirmed that the guarantees of independence and impartiality that are proper to the fair trial established by Article 6(1) of the Convention essentially concern the jurisdictions called to decide the merits of an accusation in criminal matters, and do not apply to the representative of the public prosecutor - this being one of the parties to a contradictory judicial procedure - or to the body which, without considering the innocence or guilt, is in charge of deciding whether the accused should be tried by a "tribunal"³.

The varying status of the judge with respect to that of the public prosecutor naturally concerns the time in which the relative functions are exercised, so that the fact that

¹ *Stafford v. the United Kingdom*, 28 May 2002, § 78; *Kleyn v. The Netherlands*, 6 May 2003, § 193; *Sacilor Lormines v. France*, 6 November 2006, § 59; *Henryk Urban and Ryszard Urban c. Polonia*, 30 November 2010, § 46.

² Art. 85, French Code of Criminal Procedure.

³ *Previti v. Italy*, dec. 8 December 2009, § 255.

prior to that, the same person has exercised the functions of public prosecutor, cannot lead to any consequences on the independence and impartiality of the judge⁴.

3. Even when the offices of the public prosecutor are not independent from the Executive, the lines that emerge from the documents produced by the various European and international bodies underline the need to ensure guarantees to those in charge of the functions of the public prosecutor: transparency on the instructions that it receives and inadmissibility of instructions in individual concrete cases⁵. The decision to proceed or not to proceed in individual cases should rest solely with the prosecutor's office (under the control of the judge). General instructions on criminal policy, with priority assigned to certain categories of crimes, are instead acknowledged as being the responsibility of the government or Parliament.

The particular position of the public prosecutor, member of the judiciary and thus distinct from the general category of civil servants, implies the need for specific guarantees. Thus the jurisprudence of the European Court in the matter of disciplinary procedures and related guarantees mainly concerns cases relating to judges, but the Court has also ruled in reference to the public prosecutor. Significantly, in relation to a prosecutor in a government-dependent system (Romania), the Court noted that growing importance in documents of the Council of Europe and the European Union is attached to procedural guarantees for the appointment and removal of prosecutors, including recommending the intervention of authorities independent of the government and parliament. With particular reference to the delicate area of statements made by prosecutors on the subject of justice and the possible rising tension with the government or Parliament, the Court has recalled principles common to all members of the judiciary. And along the same lines of thought, the Court considered the need for each system to ensure an effective possibility of appealing to the judge in the matter of disciplinary proceedings relating to members of the prosecution service⁶. In this way, the status of the public prosecutor is not conflated to that of the judge as to the necessary independence from the government and Parliament, that option remaining one left to the individual national systems⁷. But the particularity of the role of the public prosecutor in view of the rule of law is noted.

4. From the point of view of the Convention, to guarantee the fairness of the criminal trial, which must be adversarial, the prosecutor is an opposing party to the accused. A necessary part, since the judge cannot play the role proper to the prosecutor, but still a part⁸.

The prosecutors are a party in the criminal trial, even in systems in which their statute is that of independence, resulting from the separation from any connection with the government authorities or even only guaranteed at certain moments of the trial (such as in the case of free speech at the hearing). And this partisan position has its consequences. This can be seen in the application that the European Court makes of Article 5 of the Convention, on the right to personal freedom and security, in particular

⁴ *Paunovic v. Serbia*, 3 December 2019, §§ 41-42; *Jerinò v. Italy*, dec. 2 September 2004; *Piersack v. Belgium* 1° October 1982, § 30.

⁵ Council of Europe, CM, Rec(2000)19, The Role of Public Prosecution in the Criminal Justice System; Venice Commission, European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service, 17-18 December 2010.

⁶ *Kövesi v. Romania*, 5 May 2020, §§ 156, 176, 201-207.

⁷ *Moulin v. France*, 23 February 2011, §§ 53-60.

⁸ *Karelin v. Russia*, 20 September 2016, §§ 51-84; *Mikhaylova v. Ukraine*, 6 March 2018, §§ 56-67.

when it comes to the rule that every person arrested or detained must be promptly brought before a judge or other magistrate authorized by law to exercise judicial functions. The European Court has denied that the authority that will exercise the functions of prosecution in the criminal proceedings is authorized to check the regularity of the limitation of freedom⁹.

Likewise, under the angle of Article 8 of the Convention, the intervention of the public prosecutor alone, without *ex ante* or *ex post* control by a judge, was deemed insufficient in a case of house search not followed by any seizure¹⁰.

The position of the prosecutor in the trial has further consequences. The public prosecutor falls within the notion of "judiciary" found in Article 10 of the Convention, which recognizes that limitations on freedom of expression are permitted where necessary to guarantee the authority and impartiality of the judiciary. But as a consequence of its nature as a party in opposition to the accused person, the European Court distinguishes its position from that of the judge, admitting against him a greater possibility of criticism¹¹.

It is therefore the character of a party in the procedure that the European Court emphasizes for various purposes, finding in it a common thread present in all systems of the states of the Council of Europe. However, it is a public party, which commits the responsibility of the State as regards compliance with the content of the Convention, with the rights and freedoms it recognizes for individuals.

5. The focus of attention placed on the legal status of the judge does not imply the irrelevance of what concerns the public prosecutor, since it is the prosecutor's conduct (rather than formal status) in the specific case that can give rise to an overall unfairness of the procedure. But this can occur in specific concrete cases with aspects of pathology. Criminal charges alone, raised by the prosecutor by introducing criminal proceedings, may result in the violation of one of the rights or freedoms of the Convention. For instance, in one case the extreme length of time that proceedings remained pending, ultimately ending with the acquittal of the accused, was deemed to constitute a violation of freedom of expression¹². Furthermore, the discriminatory use of criminal charges by the prosecutor could constitute a violation of Article 14 of the Convention. The inaction or serious delay of the public prosecutor may also give rise to a violation of the Convention. I am referring to the positive obligations of protection. The European Court, with regard to certain violations of the Convention, affirms that effective investigations are needed to identify those responsible for the violations and to punish them with adequate criminal sanctions. This concerns the need for criminal sanctions for those responsible for serious violations, such as those of Articles 2, 3 and 4 of the Convention, as well as for the most serious violations of Article 8. Attention to the "concrete and effective" protection of rights requires that an effective reaction of the State follow the violation. And in this regard, the role and initiative of the public prosecutor are central¹³. The jurisprudence of the European Court insists on the requirement of the independence of the body carrying out the investigation. But the requirement is understood to exclude that the investigation could be validly carried out by the colleagues of those who could be responsible for violation of the Convention

⁹ *Medvedyev v. France*, 29 March 2010, § 124.

¹⁰ *Brazzi v. Italy*, 27 September 2018, §§ 38-52.

¹¹ *Nikula v. Finland*, 21 March 2002, §§ 25, 50; *Roland Dumas v. France*, 15 July 2010, § 50.

¹² *Kaboglu and Oran v. Turkey (n.2)*, 20 October 2020, §§ 105-124

¹³ *V.C.L. and A.N. v. The United Kingdom*, 16 February 2021, §§ 117-121, 150-174.

(for example when the action at issue was by the police¹⁴) and does not concern the prosecutor.

It is the public prosecutor's obligation to act in compliance with and protection of the rights of the victims of the crime, as well as those that the law establishes to protect the accused. Thus, a violation of Article 6 of the Convention was found in a case in which the victim of a crime had not been able to act as a *partie civile* and request compensation for the damage before the prescription of the crime, due to the length of time the proceedings were pending at the stage of the preliminary investigation conducted by the public prosecutor¹⁵. More generally, the broad scope of the victim of a crime's right to access to the judge is recognized by the jurisprudence of the European Court¹⁶, and the exercise of this right cannot be prevented by the conduct of the public prosecutor.

This means that in the system of the Convention, even the action of the public prosecutor (for which the judge may not be able to completely remedy) can constitute an interference that violates fundamental rights. Likewise, conversely, the public prosecutor has the duty and also the ability to act to ensure the concreteness of people's fundamental rights and freedoms.

¹⁴ *Ramsahai v. Netherlands*, 15 May 2007, §§ 321 ss.; *Mustafa Tunç and Facire Tunç v. Turkey*, 14 April 2015, §§ 169-182; *Hanan v. Germany*, 16 February 2021, §§ 198 ss.

¹⁵ *Petrella v. Italy*, 18 March 2021, §§ 20-23, 58-62.

¹⁶ *Perez v. France*, 12 February 2004, § 57-72.



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The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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