

Public Prosecutors to Defend the Public Interest: Legitimacy, Objectives, Methods And Accountability¹

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ABSTRACT

The preconditions for the question I want to address today are the social skills, duties and responsibilities of the Portuguese Public Prosecution Service. It is an independent and autonomous judicial body, based on a constitutional and legal model that confers functions on the Public Prosecution Service encompassing not only criminal prosecution and participation in the implementation of the criminal policy, but also the legal representation for employees, the promotion and protection of the welfare of children and young people, as well as the protection of collective and diffuse interests (environment, urban planning, public health, etc.), the safeguarding of the judicial independence and of the law, the enforcement of judicial decisions, the constitutional review and the promotion of the public interest. It is in the Public Prosecution's powers of initiative in the public interest that I would like to focus on.

Key-words: *Public Interest. Legitimacy. Accountability.*

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1 INTRODUCTION

The scene of my Prezi presentation is Lorenzetti's painting representing the "Good Government", where the distance and balance between justice and political power is essential to gather citizens in concord, covenant, prosperity and common good.

Inspired by such illustrative allegory, I would like to begin by greeting you all and thanking Marina Matic for her kind invitation and even more so for hosting us here today. This kind of initiatives proves how important the Associations of Prosecutors and the discussion of their social responsibility are.

Being structured and organized, as well as enjoying recognition as organizations, the associations have the capacity and a duty to boost a type of social intervention and participation in the public sphere designed to assert and implement fundamental human rights, as well as to ensure the rule of law and strengthen confidence in justice. So... this is clearly a political subject.

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2 CONTEXT

2.1 How inequalities challenge the Public Prosecution Service to be a MAGIStracy engaged in solidarity causes

The BIG PICTURE that challenges PP is **to look at** the protection of common goods –, such as justice, knowledge, public health, environment, etc. - **in contrast** to a depressed society where solidarity have been diluted³ and replaced by the spiritual emptiness of a worn out society of success measured by wealth and the wealth by success, where almost everything is up for sale⁴.

What is to be expected from Public Prosecutors in this paradigm favouring inequalities? Well...we cannot just flog ourselves with regret. On the one hand, economic globalization does not stop citizens from taking political action; on the other hand, they are increasingly demanding the effective guarantee of fundamental rights and, finally, institutions, such as the Public Prosecution Service, cannot fail to favour conditions of solidarity, since they are the ones that sustain society.

Our starting point is: How to root PP in a justice of proximity and hospitality⁵. The idea that I bring is therefore that of PP as a MAGIS-tracy endowed with social responsibilities⁶... an idea that should have practical consequences, and as such, should be placed in the centrality of the social, democratic life as well as of citizenship.

3 Society tends to change, and the last years have been exemplary in this transformation, especially technological, communicational, financial, mercantile and economic, but also ideological, cultural and philosophical, where the nation-state is gradually fading, a phenomenon that has been translated in the so-called globalization or globalization of free trade.

4 Cf. Han, Byung-Chul. *A agonia de Eros*. Lisboa: Relógio de Água, 2014.

5 This reflection was made in: Albuquerque, José P. Ribeiro. *O Ministério Público no contexto de transformação do Estado e das suas funções essenciais: ensaio para um "relatório minoritário"*, em "Ensinar, Defender, Julgar" Para uma reforma das funções do Estado. Coimbra: Almedina, 2014, pp. 319-352. There, the challenges posed to Public Prosecutors were identified, in particular that of being a proximity prosecution.

6 Eduardo Vera-Cruz Pinto launched the designation at the 9th SMMP congress. Cf. Pinto, Eduardo Vera-Cruz. *O Ministério Público como magistratura do povo: uma exigência jurídica em espera*. In Justiça, Cidadania, Desenvolvimento. Livro do IX Congresso do Ministério Público. Edição do SMMP

This model of PP as a MAGIstracy endowed with social responsibilities supposes a magistracy of promotion and initiative, which has in society both its legitimacy base, its objectives, its methods and its accountability. Let us reflect on how these grounds should be put into practice and daily life, and how to make them institutional incentives of new challenges.

The LEGITIMACY underpinning the community prosecution initiative

2.2.1 Ensuring rights

A truly democratic Prosecution Service must take seriously the constitutional mandate to ensure maximum protection of fundamental rights. This project is a simple and simultaneously ambitious project: To accomplish rights through guarantees. We do not say we are lacking in rights. We say that rights lack guarantees. This is today the true utopia according to *Ferrajoli*: to transform rights into acting, living and current realities⁷.

In this context, PP, as a public institutional power, is functionally bound to respect and guarantee such rights, as an expression of the unit or of “fragments of popular sovereignty” represented by those rights, and it is in this functional and guarantee-based link that must be grounded its legitimacy of initiative, and above all, the legitimacy of its community initiative.

2.2.2 Much more than ensuring rights and carrying out a criminal prosecution: defend the public interest.

We all know that the Public Prosecution Service plays a decisive role in upholding criminal justice and *ius puniendi* in a democratic Rule of Law. However, this key role as guardian of the criminal justice

⁷ Ferrajoli, Luigi. *La democracia a través de los derechos. El constitucionalismo garantista como modelo teórico y como proyecto político*. Madrid: Editorial Trotta, 2014, p. 79-83.

system through criminal prosecution should not make us forget that PP also defend and promote the public interest, be it general or collective.

This perspective, it can be said, is supported in the most recent documents on the role of Prosecutors: The **“Rome Charter”**⁸, a reference document within the Council of Europe, summarizes European rules and principles concerning prosecutors, and points out that, as a defining concept:

Prosecutors are public authorities who act on behalf of society and represent the general or public interest – as its mission (II; 5, 23 and 26); and in performing their tasks, they should focus on serving society and pay particular attention to the situation of vulnerable persons, notably children and victims (VIII, 22).

As regards the general duties and rights of PP, the recent guide of UNODC and IAP on **“The Status and Role of Prosecutors”**⁹ also provides that:

“Prosecutors shall always serve and protect the public interest.”¹⁰

⁸ Available at:

[https://wcd.coe.int/ViewDoc.jsp?Ref=CCPE\(2014\)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CCPE(2014)4&Language=lanEnglish&Ver=original&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864).

⁹ Launched in November 2014 this guide is the result of the collaboration between UNODC and the International Association of Prosecutors and synthesizes United Nations guidelines on the role of the Public Prosecutors and IAP Standards of Professional Responsibility and Statement of the Essential Duties and Responsibilities of Prosecutors and compiles those rules with respect for the different criminal justice systems. It can be found at the following e-mail address: http://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf. It also states that Public Prosecutors **“Remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest”** or that prosecutors should play an active role in criminal proceedings in particular: where, according to local law and practice, they exercise supervisory functions in relation to the execution of a judicial decision or when they perform a function other than that of the prosecution, **they must always act in the public interest**, among other references.

¹⁰ What does the Portuguese PP about the defence of public interest?

Article 3º - Competence:

1 – It is a special competence of PP:

(...)

l) Intervene in bankruptcy and insolvency proceedings and **in all cases involving public interest**; What does CoE Recommendation Rec(2000)19 tell us about public interest? It states that Public Prosecutor is a public authority charged with ensuring, **in the name of society and in the public interest**, the application of the law, where non-compliance implies criminal sanctions, taking into account individual rights and the necessary effectiveness of the criminal justice system.

The public interest here means not only the public interest in criminal prosecution, which procedurally promotes security and freedom, but equally the public interest in having access to law and jurisdiction, ensuring the protection of common goods, such as environment, public health, consumers rights or the promotion of property and personality rights of the most vulnerable people (children and young people, persons with disabilities, absent persons).

Only in this way the name of “**public**” conferred on a magistracy will acquire full meaning, which is thus transformed into a true “ministry”, that is, a magistracy intended to serve the public interest.

2.2.3 What should and should not be the public interest defence: an approximation to the community prosecution initiative.

The approach to the community prosecution initiative means first and foremost doing a practical job in touch with reality; a job that should pay attention to the practical experience and that only then extracts its principles; a job that is attentive to the needs and aspirations of community, that is open to life. How should this initiative be conceived?

The community prosecution initiative should begin by being a proximity-based magistracy. It should be up to PP to seek the citizens, to know their needs and aspirations for justice. It should be up to PP to effectively guarantee the citizens’ rights to freedom and security, as well as their social, economic and cultural rights. It is up to PP to be the booster of citizenship, and not just the intermediary.

In an increasingly complex society PP must be aware of its place, as well of its responsibility within the justice system, and therefore must be permeable to society of our time, in order to fulfil the “**public**” side of being a ministry, and respond – for being responsible – to society expectations.

We are talking about a model of proximity-based justice that we

have already mentioned. Within that model of proximity-based justice, first, it's important to have the community prosecution initiative divided into two territories, in what we can call a present task that branches in two futures:

The community initiative in the criminal justice field (preventive in nature).

The community initiative to promote and guarantee social, economic and cultural rights (which is a guarantee and promotion initiative).

3 COMMUNITY PROSECUTION INITIATIVE

The community prosecution initiative has been tested in other justice systems. According to the Association of Prosecuting Attorneys¹¹, it covers several situations, from strategies designed to address problems that have been identified in a given community; through improved types of inter-institutional coordination or through more efficient prosecution, until what we could describe as a more effective, constant and ultimately concrete presence of PP within a given community¹².

For us, the most accurate notion of this type of community prosecution initiative is the effective presence and involvement of PP in the community, thus giving effect to the notion that the Public Prosecution Service is a magistracy intended to serve the public interest and protect common goods.

It is a commitment to society, including the public bodies, such as the security forces and public authorities, be it police, municipal or other, and private institutions, like local groups or organizations, local traders, minority representatives, NGOs, the national or local media, educational establishments and universities, churches or religious

11 Cf. *Choosing performance indicators for your community prosecution initiative. Prosecutor's report*. BJA, available at: http://www.courtinnovation.org/sites/default/files/documents/Choosing_Performance_Indicators.pdf.

12 Good practices and good laws are those based on the experience of everyday existence and its conflicts.

groups, basic organizations and all formal or informal associations, that in anyway pursue purposes in accordance with the powers of intervention of PP.

What might be the advantages of and the novelty value in forming partnerships with civil society?

Altruism and solidarity are valued.

Civil society representatives may be allies of PP, who must be able to participate and enter into engagements with the community.

Public resources are spared.

Institutions get closer from their legitimacy base.

Dynamism and inspiration are gained through external views than those of PPP; it also benefits from the flexibility of civil society intervention and its freedom of action that public prosecutors do not always have.

It enables pedagogy on the role of PP in the community.

Those partnerships may provide crucial help and support as far as techniques and know-how are concerned.

In turn, **PP** involved in the community initiative, shall be able to¹³:

Solve problems.

Form partnerships.

Assess and be accountable.

3.1 The practical aspects of the community prosecution initiative:

What are the practical dimensions necessarily reflecting a community initiative model? How to fulfil the “public” side of being prosecutor? Henk Korvinus¹⁴ explains:

¹³ Cf. Porter, Rachel. *Choosing Performance Indicators for Your community Prosecution Initiative*. cit.

¹⁴ Let us follow here closely the systematization and examples presented in the intervention held at the 19th IAP conference - November 2014. Cf. Korvinus, Henk. *The public role of the prosecutor: four in-*

(1) First of all in the ownership of prosecution, which is public, carried out on behalf of society or the people, and as such, in the public interest. This is, for example, the basis of its *legitimacy* of initiative.

(2) Another dimension of the community prosecution initiative is the one developed “with the public”¹⁵.

In this case PP are involved not only in preventing crime, but also, as regards collective and diffuse rights, in promoting and guaranteeing those rights. And this implies co-operation and partnerships with society. This means that the Public Prosecution Service should not be reactive, but must meet citizens’ priorities and concerns.

This has to do with the intervention of PP when working with local authorities where, for instance, a certain type of crime occurs, whether linked to foreigners, domestic violence or sexual exploitation; concerns that have its equivalent in the protection of social rights and in those that matter to the protection of collective and diffuse rights.

This implies that PP may have to get in touch with the civil society, making itself known in order to diminish institutional distance, including cooperation with social support networks, Private Institutions of Social Solidarity, public health network, the environment or consumer protection, as well as the co-operation with the local elected representatives, the schools, business associations and trade unions.

In this case, the community prosecution initiative runs “with the public”, thus enabling *PP* to be itself a builder of institutions and of community spirit. We have here the basis of its objectives of initiative.

(3) The community prosecution initiative is also about the people targeted by the intervention and those are of course also “public” too.

novative initiatives. http://www.iap-association.org/getattachment/Conferences/Annual-Conferences/Annual-Conference-2014/Tuesday-25-November-2015/19AC_P2_Speech_Henk_Korvinus.pdf.aspx.

15 Cf. Pinto, Eduardo Vera-Cruz. *O Ministério Público como magistratura do povo: uma exigência jurídica em espera*. Em *Justiça, Cidadania, Desenvolvimento*. Livro do IX Congresso do Ministério Público. Edição do SMMP. In this context, as pointed out by H. Korvinus, this aspect also concerns the priorities of the Public Prosecutor’s Office in the execution of a criminal policy, has it to do with domestic violence, has to do with terrorism, which remains dramatically active and close to us, as the recent events in France have horribly shown, has to do with corruption, cybercrime or organized and violent crime or the trafficking in human beings, the various types of modern slavery or trifle crime drug-related.

They are part of the dimension where PP acts “for the public”. Are part of that dimension, obviously, the victims of crime, such as the victims of domestic violence, victims of child sexual abuse and their family members, victims of slavery or trafficking in human beings or even older victims with whom we need to know how to communicate and interact, both institutionally and emotionally, assembling here all those who are requiring guarantees to promote their rights. We have here the basis of the method of its intervention.

(4) Finally, taking advantage of the examples given by H. Korvinus, the community prosecution initiative implies an accountability different from the one that has been adopted.

In other words, what we need is to put PP intervention “under the eye of the public”. What does that mean? In an information society, where commentators influence communication and public opinion, everything PP does is subject to scrutiny starting with the investigation.

All this visibility overrates the perception of the justice system performance and imposes high standards of integrity as well as of professional and personal responsibility. It is important to establish self-imposed ethical rules – this is a role the associations of prosecutors should know how to interpret and implement.

Such practical dimensions show that we are not just a MAGIStacy. We are, first and foremost, a MINIStry entrusted with the huge responsibility and the great challenge of carrying out initiative functions on behalf of the public, for the public, with the public and in the eye of the public¹⁶.

This sets out, finally, the core accountability framework of PP.

3.2 Organizational requirements for the community prosecution initiative.

The PP corporate governance structure must be able to change, which implies developing competencies to adapt to the challenges

¹⁶ Cf. Korvinus, Henk, *The public role of the prosecutor: four innovative initiatives*. cit.

and supposes internal leadership and organizational¹⁷ competencies to be open to community problems it is tasked to solve.

In view of the foregoing considerations, the community prosecution initiative calls on the PP to work as a team when acting locally, both on the definition of plans and priorities, whether they relate to the freedom and personality rights or of social rights needing promotion. To this end, the community prosecution initiative requires:

(1) Organizational and functional flexibility in order to be adapted to each local community, where PP can develop the specific community prosecution initiative.

(2) Preparation through appropriate training and self-assessment to adjust the effective presence and involvement of PP in the community.

(3) Coordination to streamline strategy, impulse, implementation and assessment of the community prosecution initiative.

As we will see, this community prosecution initiative and action plan entails re-thinking the framework within which PP should operate as well as the one within which it must be accountable and implies an appropriate model regarding strategy, decision-making and assessment.

3.3 The community prosecution initiative as a model of FORESIGHT and STRATEGY.

Here, we are dealing with the “**VISION?**” of PP initiative in promoting the public interest. In this field, the deepening of autonomy is the only acceptable vision. We may have the best organizational

17 With which we should identify the leadership and hierarchy characteristics enunciated by Eduardo Vera-Cruz: leadership in the exercise of competencies; in the respect earned by honesty, competence, accuracy, courtesy in the internal relationship; institutional cooperation established with other actors of the judicial system and other entities; knowledge of laws and jurisprudence and coherence of action; boldness and functional innovation; in their demonstrated capacity in the persevering task of ensuring the autonomy of PP and the means for their action; in accordance with the deliberations of the HCPP; in dialogue with the SMMP; in the material imposition, by the action of the PP, of the principle of equality of citizens before the law and in a relationship with the press aimed at clarifying public opinion whenever this is necessary and not for personal reasons or journalistic stimuli. Cf. O Ministério Público como magistratura do povo: uma exigência jurídica em espera. em Justiça, Cidadania, Desenvolvimento. Livro do IX Congresso do Ministério Público. Edição do SMMP.

skills, etc., but the entire strategy underpinning the community prosecution initiative requires that the PP Service knows how to govern itself, that is to say that it has to decide what it considers to be good for the community, the public interest and the protection of common goods. What strategy will this be?

The community prosecution initiative should be focused on a proactive intervention model, whose starting-point would be a commitment to the community, based on partnerships with civil society, and seeking to identify and solve problems and meet challenges that emerge from community, not only reacting to crime, but also to prevent it¹⁸; not only in the intermediation and safeguarding the freedom and social rights, but in their effective promotion and jurisdictional guarantee.

3.4 The community prosecution initiative as a DECISION-MAKING model

The issue here is how the community prosecution initiative should be CONDUCTED. The process of running the initiative entails establishing a valuing link with the strategic view referred to above. It is within the scope of the decision model that it is important to talk about the OBJECTIVES of the Public Prosecution Service's intervention in promoting the public interest.

The objectives cannot be dissociated from the nature of PP as a magistracy – a magistracy of impulse, promotion and initiative – where community prosecution initiative must be included. The objectives have naturally a limited normative nature, thus constituting what is being called *soft law*¹⁹.

¹⁸ In this sense, cf. Jansen, Steve; Hood, Robert. A Framework for High performance prosecutorial services. APA, 2011, p. 2. Available at: <http://www.prosecutingattorneys.org/wp-content/uploads/APA-High-Performance-Framework-FINAL.pdf>.

¹⁹ They do not, however, have a zero legal power; they are not what some call “legislative neutrons”. They have limited normative effects, of course, because they are addressed primarily to the public authorities, but their teleological dimension allows for an effectiveness check which, if it is operationally

In any event, it is by reference to the objectives that law must be accommodated and it is the hierarchy of objectives that organizations must adhere and comply with²⁰. As a decision model, the community prosecution initiative requires knowledge, processing and analysis of relevant information about the functioning of the justice system and of PP involvement in it, proposed to promote and guarantee rights.

Such an approach, as a decision model, requires the encouragement of creativity and innovation. Both are needed to solve problems, which implies a paradigm of a PP further anchored in the overall culture and in the complexity of modern society, as well as open to the variety of solutions.

3.5 The community prosecution initiative as a model of RESPONSIBILITY (accountability for what is initiated).

The issue at stake here is the DEMONSTRATION of the community prosecution initiative: to know how to be accountable for the future rather than for the past. Accountability is the crucial criterion for democracy and should be one of the parameters for the legitimacy of PP. But this accountability is only required for those who have the means to administer justice responsibly.

The issue that arises here is also that of the financial autonomy of the Public Prosecutor's Office, which we will not develop, or address here, but which must be present when we speak of accountability.

limited, is still referentially decisive in assessing and validating the conduct of public authorities, who must respond by the means and results of the flexible obligations that result from the objectives set, to which a new normative function must be recognized, which is more than a permission and less than an obligation, although they can be seen as only permissions, to the extent and only in so far as they authorize the limitation of a right or a power. Cf the view of Montalivet, Pierre. *Les objectifs sont-ils des règles de droit? Les objectifs dans le droit.* (Direction de Bertrand Faure). Dalloz. Paris, 2010, pp. 61, 56, where it is cited, in the sense of being a permit, the decision of the ECHR of 10/22/81 in the case *Dudgeon v. United Kingdom*, A-45, §52..

²⁰ The active collaboration of PP to achieve objectives is fundamental to test their effectiveness, but also to legitimize the options - **which links the decision model to the strategy model**. To act on the real rather than on the slogans - this is the way of the community prosecution initiative. It is by starting from it and from the institutional reality that the objectives of PP initiative must be stated: **from reality to objectives and not from proclamations to reality**.

What does the Public Prosecution Service propose to defend, promote and guarantee? This should be the starting point for accountability.

When assessing the effectiveness of PP intervention – without taking into account the traditional paradigm of the case-processing prosecutor (process dispatcher) –, what is important to evaluate is the performance based of PPService on the cases it initiates and in which promotes, ensures and boosts the defence of the rights to freedom and security or of the social rights, as well as through preventive interventions within the community.

This approach is different from that based on the assessment of the number of cases closed, the level of convictions the percentage use of certain procedural mechanisms of opportunity or diversion and the always-called ultimatum for procedural speed²¹. The evaluation should therefore measure the prosecution's initiative within the justice system rather than the traditional intervention model – the reactive justice system.

Innovation, continuous improvement and the development of new roles, whether within the criminal justice system, or in guaranteeing the freedom and social rights, in any case the QUALITY of performance is crucial.

4 CONCLUSION

The future history of justice and PP has not been written yet. PP should not just witness, but also write part of that story, if they are to preserve independence and show responsibility. PP, as an authority endowed with power of initiative and promotion of the democratic Rule of Law, it should be in the public interest, as a common good, that its action should be centered.

It is also through the effective exercise of such intervention po-

²¹ This approach is not intended to measure "effectiveness", as it should be perceived in a community prosecution initiative model, in which new roles are conferred to PP.

wers that the effectiveness, productivity or efficiency of a MAGIStracy should be invoked and assessed. In spite of the economic empire of quantification and management, incapable of giving humans the recognition it gives to profit, PP must develop strong institutional roots in order to enjoy constitutional legitimacy.

The PP field of action cannot but be the proximity-based justice, founded on the Law and taking seriously the enforcement of citizenship rights, since we cannot be indifferent to the lives that people live. This is one of the major challenges in the future of PP.

PROCURADORES PÚBLICOS PARA DEFENDER O INTERESSE PÚBLICO: LEGITIMIDADE, OBJETIVOS, MÉTODOS E RESPONSABILIDADE

RESUMO

As condições prévias para a pergunta que quero abordar hoje são as habilidades sociais, deveres e responsabilidades do Ministério Público de Portugal. É um órgão judicial independente e autônomo, baseado em um modelo constitucional e jurídico que confere funções ao Ministério Público, abrangendo não só o processo penal e a participação na implementação da política criminal, mas também a representação legal dos funcionários, a promoção e proteção do bem-estar das crianças e dos jovens, bem como a proteção dos interesses coletivos e difusos (ambiente, urbanismo, saúde pública, etc.), a salvaguarda da independência judicial e da lei, a execução de decisões judiciais, A revisão constitucional e a promoção do interesse público. É no poder de iniciativa do Ministério Público no interesse público sobre o qual gostaria de me concentrar.

Palavras-chave: Interesse Público. Legitimidade. Prestação de contas.

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