

Presentation

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Honorable Chairman,  
Distinguished Colleagues,

The rationale that the prosecutor joining as a party to legal proceedings in criminal justice and beyond is in the public interest, could be considered a generally accepted position. However, the question is whether the concept of the public interest, apparently self-explanatory, is, in fact, so explicit and clear.

When the European Court of Human Rights deals with the issue of by prosecutorial intervention in areas beyond criminal proceedings, it distinguishes between the different substantive rights which may come into play with such intervention, all derived from Article 6 of the Convention: the right to an independent and impartial tribunal; the right to adversarial proceedings; the right to equality of arms; and the right of access to a court.. The issue of representation of the public interest may not fall under any of these headings, as the primary concern of the Convention is the protection of the rights and freedoms of an individual in respect of the state. However, the interests of the public reflect the interests of the mass of individuals and therefore the protection of the public interest may require similar safeguards.

The public interest is a living concept, which has developed historically and it continues to develop, while bearing features of the environment in which it evolves. Its development is primarily based on a premise of the preponderance of general interest above that of a narrow group of members of the society. On a societal scale of relations, the weight of the interest of a few against the interest of the public could be balanced only by the power of law.

Both criminal and civil procedural legislation in Azerbaijan stipulates the role of the prosecutor as a party to the process acting on behalf of the state for the protection of the public interest. The legislation emphasizes the attachment of the prosecutor rather more to the state than to the public.

While the semantics of the word implies both meanings in English and French, the concept of ‘public interest’ translates into two different concepts in Azerbaijani, state and societal interests. The statutory provisions empowering prosecutors in both fields are yet to be fully applied and, most importantly, pass the test of a hearing in court. There is a prospect of change towards a more active role in this area due to the new strategic goals set for the Prosecutor’s Office within the national process of rebooting the judicial and legal systems. Earlier, the judicial system was decentralized, with the establishment of regional serious crime and appeal courts. The review of criminal law paved the way for considerable easement of punishment. The Bar Association of Azerbaijan has been rebuilt, with the numbers of licensed court advocates rocketing.

As regards the Prosecutor’s Office, President of Azerbaijan Ilham Aliyev spoke of the concept of reforms in the law enforcement system and the place of the Prosecutor’s Office on 01/05/2020. The new legal landscape foresees a leading role for the Prosecutor’s Office, and not only in the fight against crime. That shall be complemented by a proactive role for the institution in other areas.

The prosecutor plays a similarly important role in civil justice, in representing the state and public interest in cases of utmost significance. This principle permeates the provisions of civil, administrative and family law. The prosecutor is entitled to institute a civil action against the defendant or party responsible for his or her action, on behalf of persons with limited physical or mental capacity. Civil claims could be brought and considered within a criminal case. Furthermore, the Civil Procedure Code establishes the prosecutor’s role as defender of the public interest. Thus, the prosecutor initiates civil actions seeking proprietary rights, including ownership, usage and control of property. It is also the prosecutor who brings bona vacantia claims to obtain title over unclaimed property for the state.

In addition, the prosecutor plays a pivotal role in proceedings concerning administrative infractions, which is a kind of liability for civil wrongs (torts) carrying sanctions in the form of fines, warnings, civil confiscations etc. The prosecutor takes pre-emptive action to suppress infractions and oversees proceedings to secure compliance of the administrative infraction proceedings with the Constitution 1995 and legislation. It is also the prosecutor who oversees the lawfulness of provisional measures in administrative infractions proceedings. The prosecutor looks into the lawfulness of a preliminary administrative arrest made in the course of administrative infractions proceedings in order to secure the

defendant's appearance in a court hearing pending, or to isolate a person posing a danger to the public by his illegal behaviour.

Within criminal justice, but beyond the realm of pre-trial proceedings and state defence in court, the prosecutor is empowered to represent the public interest in the execution of punishment, such as release on parole and other issues.

The prosecutor also acts on behalf of the state to protect the public interest in family matters. The executive authority that removes a child from a family in unsuitable conditions shall immediately report it to the prosecutor. A civil action shall be brought before the court to limit or terminate parental rights within seven consecutive days.

However, the power of the prosecutor is subject to the general rule established by the Constitution for all state institutions. According to the Constitution 1995 on guarantees of the rights and freedoms of man and citizen, state bodies may function only on the basis of the present Constitution, in the manner and within the boundaries prescribed by law. In one of the most recent cases taken up on the 23/02/2021, the Constitutional Court of the Republic of Azerbaijan ruled for a strict interpretation of the powers of a prosecutor in administrative infractions proceedings. Effectively, the Constitutional Court left to the legislature the decision as to whether the prosecutor should be more active in pursuing public interest cases. This brings us back to the main question. Armed with the statutory provisions on the power of the prosecutor and insight into the prosecutor's role in the modern judicial and legal system, one may arrive at a critical view of the entitlement to represent public interest, as conceptually defined above.

The Criminal Law of Azerbaijan makes it clear that society's interest might not be the same as that of the state, but it shall be of no less importance, and sometimes even of greater importance. Thus, the crime of Abuse of Office in Section 308 of the Criminal Code 2000 foresees the official's intentional use of his official powers to gain illegal advantage for himself or third parties in connection with the performance of official duties, or his failure to use his official interests in the interests of service, when such behaviour results in significant harm to the legitimate interests or legally protected interests of society or state.

While an overview of the Criminal Law does not reveal serious flaws in representing the interest of the general public, the situation is different in civil justice. Both Civil Procedure Code 2000 and Family Code 2000 contain a cap on

the role of the prosecutor as a guardian of the public interest, in contrast with his representation of the state's interest. According to the Family Code, the competent social service authority informs the prosecutor when triggering a process to deprive of parental rights. Furthermore, according to Civil Procedure Code 2000, in cases of an appropriate request from a state department or organization, or legal persons founded by the state or state department, the prosecutor bringing a civil claim to protect the interest of the state could be considered a party to a civil case.

The provision of civil law cited above sets boundaries for the power of the prosecutor as 'the guardian of the public interest'. Specifically, it draws a line between representation of the interest of the general public (publique) and that of the state. Such an arrangement does not only exclude the possibility of the prosecutor representing the interests of the public. It also puts a cap on the prosecutor's role as the defender of state interests. The Prosecutor's Office is an institution of the judicial branch of power under triple control (see above), fit for the role of representing the interests of the state in civil cases. Currently, the initiation of such representation is left to the discretion of the executive bodies.

A decision by a state institution not to bring a civil action or not to request the prosecutor to bring a civil action may be currently regarded as an executive prerogative. It is not subject to judicial review. And the matter of fact is that these cases may not necessarily be issues of national security. Issues of national security are legitimate reasons for executive prerogative; this is a typical practice in many of the world's democracies. A typical example might be a situation in which a local executive, abusing his office, submits a plot of state-owned land to private persons for cultivation without any of its profits being paid to the state, i.e. an unaccountable use of state property. Another example might concern the local executive authority remaining inactive or negligently oblivious to the fact that state property, i.e. a plot of land in a central part of the city, is privatized according to an illegal land scheme.

In summary, the Prosecutor's Office of Azerbaijan is seen as a guardian of the public interest due to its active role in criminal proceedings. The involvement of prosecutors in areas beyond criminal justice, although provided for by legislation, is limited. Initiation of civil action for the protection of state and public interests is left to the discretion of state institutions. Decisions by state institutions not to bring an action, which in grave circumstances could be considered misuse of power, in less serious circumstances Infraction. These decisions are not subject to court

review and triggers for such appeals are not provided for in legislation. The law allows some limited opportunity for the prosecutor to defend the former, and there is no room for action in defence of the latter. While this institution is subject to the full scrutiny of the courts and it reports to both legislature and head of state, it appears to be better placed to act as an agent of public and state interests in civil jurisdiction.

Thank you for your attention.