AUTONOMY AND SELF GOVERNANCE OF THE PORTUGUESE PUBLIC PROSECUTOR'S OFFICE

1. When, after the democratic revolution of 25 April 1974, a reform of the legal system in Portugal was begun and it was immediately ascertained that a number of problems were in urgent need of resolution. These problems had already been detected during the dictatorship by the opposition to the former regime and by the more liberal sectors of this same regime.

Unlike other dictators, Salazar's regime, perhaps due to the fact that its leaders, Salazar and Caetano, were originally Law Professors, never ostentatiously broke with the legal and judicial traditions of the country but rather endeavoured, by way of significant alterations, to render them harmless vis-à-vis the ideological objectives of the regime. The strategy of the regime was therefore one whereby there was an appearance of neutrality in common courts of justice and of independence of their judges, the judgement of "*political crimes*" being referred to specific jurisdictions and administrative and labour jurisdiction being kept outside the scope of political crimes as they were the direct responsibility of the President of the Council of Ministers and the Ministry of Corporations.

On another level, the Government at the time proceeded to a successive plan of reforms the purpose of which was to gradually condition the composition and the powers of the management bodies of the two judiciaries – Judges and Public Prosecutor's Office - by integrating them into one body, the so-called Higher Judiciary Council. This body would with apparent autonomy manage the careers and the disciplinary proceedings of judges and public prosecutors. The above mentioned Council, the heir to those which already existed in the Portuguese legal and judiciary system before the dictatorship, successively underwent a politicisation in terms of its composition and functioning during the dictatorship and saw its powers become increasingly more limited. The Public Prosecutor's Office lost its original powers over public prosecutors' career management, the Ministry of Justice keeping for itself the power of directly placing and appointing respective prosecutors and, even more important, their superiors. In addition, and given the unchecked power that in certain

circumstances an Attorney General of the Republic who occupied this position over a stable period of time could hold, the regime stopped making appointments on a definitive basis and this position came to be held on a temporary basis alone.

It was not for this reason though that after the 1974 democratic revolution in the Constituent Assembly Barbosa de Melo, a distinguished MP and Professor of the Coimbra Law Faculty stated the following à propos of the meaning given to the Public Prosecutor's Office in the constitution:

«*…the provision submitted by the Committee concerns two ideas which appear to be truly fundamental for the structure of the Public Prosecutor's Office.*

On the one hand, the principle of autonomy which we understand as conferring to the body established by the Public Prosecutor's Office an independence vis-à-vis political powers. This independence which is secured in a provision set out in article 22 whereby it is declared that the Public Prosecutor's Office will be accountable to the Attorney General of the Republic.

It seems important therefore that the persecution of crimes or the fight against crime does not necessarily depend on the concrete political options taken by the Government at any time. That this should result from legality in general and from the conscience of the body of prosecutors or agents from the Public Prosecutor's Office who will endeavour to implement this legality.

On the other hand […] it is the idea of saying that the Public Prosecutor's Office only makes sense when working within the universe of the courts.

[…] The Popular Democratic Party currently, and I suppose will also in the future, considers that the Public Prosecutor's Office should be structured in such a way as to ensure that the intervention of judges does not depend on the indirect pressure which for many years, for many decades in this country, was borne by the Ministry of Justice on and through the agents of the Public Prosecutor's Office.»

2. It was therefore based on the historical experience of the dictatorship and the preoccupations it raised with the purpose of creating a truly independent judicial system able to effectively, impartially and responsibly meet the requirements of a democratic state which after the revolution was addressed through a working group formed for the reform of the judiciary organisation, especially of the Public

Prosecutor's Office. This working group obviously started with the Portuguese judiciary tradition inherited from the times of the liberal monarchy and the republican democratic regime which governed until 1926. This tradition, as we have seen, already accepted the existence of collegial bodies which were more or less autonomous from the governance of the magistracy. However, the above mentioned working group also attempted to analyse the doctrine, the experiences and the more modern models of many democratic countries in Europe and America.

If it is true, as far as Criminal Law and Criminal Procedural Law are concerned, that the Portuguese university tradition has always been allied to the German schools – the *"principal of legality"* in the exercise of penal action was inherited from them – but it was from more recent French, Italian and North-American experiences of judiciary organisation that the working group found sources of inspiration for the draft reform of the judiciary system which was based on a strong organic and institutional autonomy.

The experience of the *Conseil Supérieur de la Magistrature* in France and also the concept of the Italian Public Prosecutor's Office as a body of judicial power consisting of prosecutors with a similar status to that of judges and like these governed by a plural Council independent of political power, strongly inspired the proposal of this working group.

It is true that certain Jacobin prejudices, inherited from the 1st Republic (1910/1926) and used and developed by the dictatorship to control the Public Prosecutor's Office, were followed by a number of MPs from the majority paper in the Constituent Assembly – Socialist Party – and for this reason things could not move forward as much as a number of MPs in this and other parties to the right and left would have desired at the time.

It was nevertheless a Socialist minister of a more liberal tendency who finally accepted the paternity of the new status of Public Prosecutor's Office. This Status established, for the first time, in an objective and openly affirmed manner, the autonomy of the Public Prosecutor's Office vis-à-vis political power and as a result a new collegial and pluralist body – the Higher Council of the Public Prosecutor's Office – became responsible for the management of the careers and disciplinary matters concerning the members of this magistracy.

A theoretical solution was therefore found which endeavoured to ally the characteristics of traditional *"unity and hierarchy"* of a Public Prosecutor's Office of a clear Napoleonic inspiration with the new constitutional and statutory guarantees conferred on its members, which also wanted a constitutional status of "*magistrat"* equivalent to that of judges. Among them the innovative guarantee of *"stability"* should be noted which meant, as the *"permanence"* of judges, that, unlike civil servants, public prosecutors may not *"be transferred, suspended, retired, dismissed or in any way see their situation altered under the terms set out by law (article 72 of LOMP)".*

How can one then match the hierarchic chain with the democratic and independent management of prosecutors and their careers?

3. The Office of the Attorney General of the Republic, the supreme constitutional body of the Public Prosecutor's Office, came to consist of two distinct governance instruments of the Public Prosecutor's Office.

One, monocratic – the Attorney General of the Republic – who presides over it and is appointed for a term of six years, under Government proposal, by the President of the Republic.

It should be noted that the Portuguese regime is a semi-presidential regime and that the President of the Republic is directly elected by universal suffrage and does not depend on the parliamentary majority from which the Government emerges.

The choice and exoneration of the Attorney General of the Republic therefore depend on a coinciding of the political will of the prime minister and the President of the Republic, a coincidence which does not always occur. This provides the Attorney General of the Republic with a high degree of independence.

The other, collegial – the Higher Council of the Public Prosecutor's Office – consisting of five members elected by Parliament, two persons appointed by the Minister of Justice, seven members elected by the prosecutors of the different hierarchic scales of the Public Prosecutor's Office and the four District Prosecutors and is chaired by the Attorney General of the Republic.

The former became "*politically responsible"* for the hierarchic management of the Public Prosecutor's Office on a technical-tactical level and, in general,

whenever options are raised, which in a concrete case and up to a certain extent go beyond the mere application of the law.

The latter was initially only responsible for the management of the careers and discipline pertaining to the Public Prosecutor's Office and subsequently for the monitoring and submission to the Office of the Attorney General of the Republic of proposals of guidelines concerning the activity of the Public Prosecutor's Office and its prosecutors.

3.1 The power to appoint, transfer, promote, place and assess the merit of the prosecutors as well as disciplinary action became the exclusive responsibility of the Higher Council (HCPPO) which, on the other hand, had no hierarchic power over prosecutors.

These appointments, transfers, placements and promotions are based above all on an assessment of the merit of the prosecutors and result from the internal competitions regularly launched for this purpose.

The merit of the prosecutors is assessed by a body of inspectors which is accountable and chosen by the HCPPO and consists of high-level prosecutors. These inspectors check and analyse the work carried out by the prosecutors every three years and propose, through a process where the adversary principle prevails, a classification which the HCPPO subsequently analyses and approves or not. These inspectors are also those who proceed to take disciplinary action against prosecutors, the decision concerning such a matter being of the responsibility of the Higher Council.

3.2 The hierarchy, as defined in no. 3 of current article 76 of the Statute, was designed as a power of functional management and remained exclusively in the hands of the Attorney General of the Republic and the other members of the different regional and local departments.

The Public Prosecutor's Office was in effect designed as an autonomous *"body for justice"* pertaining to judicial power and not as a body pertaining to Public Administration. For this reason it was included in that part of the Constitution concerning Courts.

The intervention of the Minister of Justice in the Public Prosecutor's Office was therefore extremely limited. The Minister may, if he/she so decides, attend HCPPO meetings and address subjects he/she considers appropriate; which occurs very rarely and only when is part of the protocol. The Minister of Justice

is also responsible, through the Attorney General of the Republic, for requesting information on the work carried out by the Public Prosecutor's Office, but has no directive powers in criminal matters or in those related to the constitutional functions of this magistracy in the representation of public interests conferred on it and in general in the defence of democratic legality.

In accordance with the Statute the concept and scope of *"hierarchy"* of the Public Prosecutor's Office therefore only imply the subordination of low-level prosecutors to high-level prosecutors, in the exact terms of the provisions defined by the Statute and their ensuing and exclusive obligation to comply with the directives, orders and instructions received by the internal hierarchy of the Public Prosecutor's Office. Such a conception of hierarchy obviously excluded instructions coming from any member of the Executive or any other body of power.

This secured the autonomy of the Public Prosecutor's Office vis-à-vis political power which today is understood as a body of judicial power.

3.3 The question of the autonomy of the Public Prosecutor's Office cannot be limited to this last aspect.

It would be of little use in some cases if Prosecutors were not guaranteed a status of significant internal independence.

The Statute therefore also set out the possibility for Prosecutors to be able to refuse to comply with hierarchic instructions which would violate their legal conscience, with the exception of those coming directly from the Attorney General of the Republic, which can only be refused on the grounds that they violate the law.

In addition, instructions addressing specific proceedings must always be given in writing and the doctrine directives by the Attorney General of the Republic must be published in the Official Journal in order to meet concerns on public transparency and make those who issue them personally accountable.

But these prerogatives and guarantees would be merely theoretical if for any reason whatsoever the hierarchy could transfer those Prosecutors who annoyingly invoked that right of conscientious objection. Therefore, the Constitution and the Statute directly established the principle of *"stability"* which is after all really the same thing as the *"permanence"* granted to judges and which, together with the *"right to conscientious objection"*, grants each and

every Prosecutor an important degree of independence. In addition, the Statute provides the HCPPO with the powers to appoint, place, transfer and promote members of the Public Prosecutor's Office.

4. If the fundamental principles of the autonomy of the Public Prosecutor's Office were immediately accepted by the members of the Constituent Assembly of 1976, the truth is they were not immediately implemented nor upgraded. The implementation of these principles was only included in the Constitution and the Statute after successive discussions and public claims put forward by the Trade Union of the Public Prosecutor's Office together with the more advanced political sectors which existed within the different parties to the left and right.

In effect, it was the political action undertaken by the Trade Union of the Public Prosecutor's Office, formed after the establishment of democracy (before the democratic revolution judicial associations were forbidden), which helped overcome the political prejudices of the more conservative sectors and to upgrade in subsequent constitutional and legal revisions the texts which today set out the rules concerning the autonomy of the Public Prosecutor's Office.

4.1 In any case we are aware that we have not yet won the battle.

The more conservative sectors (and closer to power) of the hierarchy of the Public Prosecutor's Office and the political and economic sectors which feel weaker due to the investigations and procedural interventions of the Public Prosecutor's Office endeavoured to limit the exercise of those guarantees.

It was not by mere chance that their initiatives almost always coincided with the action of Portuguese prosecutors and judges to fight the growing corruption and impunity of social sectors which have always acted outside the scope of the obligations imposed on the common citizen and which had never before been troubled by the hands of Justice. The purpose of such initiatives is merely to go against the wish of the members of the Constituent Assembly that *"the intervention of judges will not depend on the indirect pressure which for many years, many decades in this country, was borne by the Ministry of Justice on and through the agents of the Public Prosecutor's Office".*

5. Claus Roxin, the emeritus German criminalist, addressed these same issues with unusual clarity in a conference held in 1969 on the occasion of the

commemoration of the 100th anniversary of the Public Prosecutor's Office of Hamburg.

He defended the *"independence"* of the Public Prosecutor's Office and the need for the *"personal independence"* of all Prosecutors in relation to the internal hierarchy, within the scope of their function as objective law enforcers in a penal procedural system guided by the principle of legality.

The distinguished Professor wrote: *«the position of guardian of the law is of the responsibility of the Public Prosecutor's Office and with this limit, as is the case for judges, prosecutors are exclusively subject to legal values and as a result prosecutors need to enjoy the same independence that judges enjoy […] … a material as well as conceived independence, in turn […] personal independence: unremovability and permanence which as a rule are guaranteed to prosecutors should be secured – mutatis mutandis – according to the rules which govern judges.*»

In this text, the problems recognised by the MPs of the Constituent Assembly and the Portuguese legislator are identified and these were the people who defined them by establishing those statutory guarantees of the prosecutors and the division of the Office of the Attorney General into two bodes with different vocations and powers.

Allow me to conclude by quoting Thouret, a distinguished French MP and also President of the Supreme Court. He said with rare prescience with regard to this issue in the National Assembly (1789 -1791):

«Le pouvoir judiciaire influe chaque jour sur les citoyens, vous ne l'avez pas confié au pouvoir exécutif. Le pouvoir d'accuser est également un pouvoir de chaque jour; il intéresse également le peuple ... le pouvoir exécutif n'a aucun droit à revendiquer l'accusation publique, Qui est toute populaire dans son objet. L'accusation ne pourrait devenir ministérielle, sans être oppressive.».

And he was right. Thourez died under the guillotine during the Jacobin «terror» which succeeded the public announcement of the Constitution on which he had worked.

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