PROSECUTION IN THE PUBLIC INTEREST

A legitimate reason for societies to establish criminal justice systems and prosecution services is to serve the "public interest" and the common good. Prosecution motivated by personal profit or other self interests is oppressive. But how should the notion of "public interest" more precisely be understood by prosecutors? The presentation underlines the need for public prosecution of violations of public interests, particularly violations without any immediate offended person (so called victimless crimes). A distinction is made between prosecutors' contribution to public interest when acting in the role as policymakers as opposed to their role when dealing with individual criminal cases. The presentation reflects on the relationship between public interest considerations and independence, legality, necessity, proportionality, public confidence, transparency, ethical framework and quality, particularly when exercising discretion in prosecutorial decisions.

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Punishment and public interest

Punishment involves using the infliction of pain and suffering as *a tool* – that can be used for good or bad purposes. A legitimate reason for societies to establish criminal justice systems and prosecution services is to serve the "public interest" and the common good. Prosecution motivated by personal profit or other self interests is oppressive.

This starting point seems uncontroversial, but it is not so easy to point out exactly and in detail how "prosecution in the public interest" should be understood.

Public interest and public prosecution

The aim of protecting public interests implies that prosecutorial activity cannot – at least not entirely – be outsourced to the market, even if the law opens up for private prosecution. Protection of public interests also requires public prosecution. Many crimes are so called victimless, with no immediate offended, but rather affect society at large. This is the case for tax crimes, drug crimes, environmental crimes and violations of large parts of modern societies' regulation legislation. This means that as public prosecutors we do a job that no one else can do.

The scope of the public interest – legality as a starting point

But to what extent does this mean that it is for prosecutors to decide the scope of the public interest? It is obvious that prosecutors have to perform their duties within the framework of the law. The idea of prosecution in the public interest is very closely linked to the rule of law; the principle that a nation should be governed by law as opposed to decisions of individual government officials. General provisions given prior to their application are also a precondition for equality before the law and necessary to avoid retroactive criminal law.

This means that the public interest when it comes to prosecution is mainly defined by law.

Still, prosecutors need to reflect on the scope of the public interest in many contexts, and I will discuss some of them.

Public interest and prosecutors' contribution to criminal policy

First, let's look at the prosecutors' participation in developing criminal policy and law reform. Although independent prosecutors cannot be politicians in a narrow sense, they are in a unique position to observe tendencies, problems and possible solutions in the criminal law field. This experience should be shared with lawmakers.

The role of a prosecutor as an expert participating in developing criminal policy should be distinguished from the task of prosecuting crimes. When prosecuting crimes, an important aspect of the public interest is to uphold the law as it is at the time, and as decided through relevant political and legal processes.

The law as it is, however, is not decisive for what the law should look like in the future. Of course the values embedded in existing criminal law are important guidelines for the way forward. But this does not mean that the legal development should always continue in one and the same

direction. Without sufficient reflection, I believe there is a risk that prosecutors look at policy work too much as an extension of their pursuit of criminal offences. This can result in generally advocating more repressive criminal policies, including intrusive procedural measures and harsh sanctions, without sufficient regard to an analysis of costs and benefits of such policies. If so, prosecutors that do a great job enforcing the law may not necessarily serve the public interest in their capacity as policy makers.

It is an old idea that fair decisions concerning a group should be taken without regard to the position the decision maker will have in society after a proposed regulation is adopted. Some of you will associate this idea with Rawls' popularized claim that decisions should be taken behind a "veil of ignorance".

Prosecutors should be sensitive to different needs for change in criminal policy, whether this means a development in a stricter, more lenient or otherwise different direction than the *status quo*. If there are tendencies towards oppressive or unfair criminal policy practices, prosecutors should be among the first to observe and address such developments.

Public interest and handling of individual criminal cases

I will now move on to the relevance of public interest considerations in everyday prosecutorial work, particularly when *exercising discretion*.

Let me start by saying that I don't believe too much in any strict definition or fixed set of criteria to decide whether or not a given decision or act is in the best interest of the public. But I believe there are some important elements worth observing when we deal with the notion of public interest.

Public interest and public confidence: transparency and media – ethical framework – quality

Among these are *transparency*. This is of importance to achieve *public confidence*, and create a climate for open discussion where the wants and interests of different groups in a society can be identified, accepted, rejected and balanced.

Prosecutors' relation with the *media* is an important and sometimes difficult aspect of this. The need for information to the public must be balanced with the need for confidentiality to protect the investigation and other interests.

Another aspect of securing public confidence is to have a sufficient *ethical framework* governing prosecutorial activity. The 1999 IAP standards are still a good starting point to seek guidance, with it's emphasize on professional conduct, independence, impartiality and fairness.

American professor and politician James Q. Wilson claimed that "In the long run, the public interest depends on private virtue ". These words should not be an excuse to disregard regulatory and institutional support for prosecution in the public interest, but there are certainly some truth in them.

No ethical standard can replace *quality* in each individual prosecutors every day work. To achieve this, selection procedures and encouragement through different incentives are important. Based on this belief I have spent a lot of time in my career as Director of Public Prosecutions in Norway dealing with and deciding individual cases. I realise that Norway is a small country, and that it might not be possible or a good idea in all jurisdictions for the prosecutor general himself to handle and decide cases.

Public interest and the decision whether or not to investigate or prosecute

At the core of prosecutorial activity is the decision whether or not to investigate or prosecute an alleged or possible crime. The thresholds for these decisions are to a varying degree governed by law in different jurisdictions, but I believe all prosecutors have to exercise discretion in many cases.

On a general level it is in the public interest that this discretion is guided by rule of law values such as legality, necessity and proportionality.

On a more specific level, it is necessary to conduct a cautious and balanced assessment of the evidence at hand and the gravity of the crime in question. The decisions we take imply that we prioritize some cases, at the cost of others – whether this is done consciously or without much reflection. And I believe it is in the public interest that prosecutors are aware that the sum of our priorities represents the actual implementation of criminal policy.

Public interest and external effects of prosecution

When deciding how to present a case for the court, the immediate objective is to present facts supported by sufficient evidence to establish guilt and determine the correct punishment. In most cases, it will be in the public interest to limit the use of resources to meet this end. However, there are cases where it might be in the public interest to take into account considerations external to the questions of guilt and punishment.

The Breivik / 22 July-case

The Norwegian Breivik case may serve as an example. At 22 July 2011 the terrorist Anders Behring Breivik killed 77 people in two attacks; a bombing of a government building and a spree shooting at a political youth camp. The accused confessed, and the evidence against him was overwhelming. It would have been possible to establish the basic facts of the case beyond doubt in a very short time, and the crimes obviously qualified for the maximum penalty under the law.

However, the crimes were a national trauma, and there was a widespread anticipation in the public that the trial would give a detailed account of the course of events. On the other hand there was a need for closure, so the investigation and the trial should be conducted as fast as possible.

In this situation the prosecution service had to make many considerations, including how to coordinate a substantial number of involved investigators and prosecutors, and how to inform and support the survivors and the relatives of victims. There was also a difficult question whether or not Breivik was criminally insane. Two appointed legal psychiatric experts thought that he was psychotic, and two experts who were appointed later thought he was not.

A technical question that raised considerable public interest was how the indictment should be delimited. Some voices advocated that the indictment should be as limited as possible, and only give an overview of the crimes, indicating the general character of the acts – bombing and shooting – and the number of deceased. Others claimed that the terror attack should be described in detail, and that all the victims should be identified.

The decision was a compromise, but resulted in a rather detailed indictment.

Breivik was charged with two counts of terrorism. The first count regarding the bombing described the explosion and its general effects. The eight *persons who died* were identified, and their location and the injuries that caused death were described in some detail. The persons whom Breivik *attempted to murder* were not individualized, but were referred to as "a large number, including the other persons that were in the building and in the streets nearby". Nine persons who were *severely injured* by the bomb were identified. Their whereabouts and how they were injured were described in some detail. Finally it was referred to in general that at least 200 persons were *physically and psychologically injured*.

The second count – regarding the shooting at Utøya – described the situation and identified all the 69 *murder victims*. Their location and the injuries that caused death (including two persons drowning) were described in some detail. The persons Breivik *attempted to kill* were divided into two groups: One group was referred to in general as "a number of persons", and another group was comprised of 33 persons who were shot and injured. These 33 individualized persons' location and injuries were described in some detail. It was further referred to in general that "a number" of other persons on the island were *injured in various ways* as they tried to flee or save others. Finally it was included in the charge that in addition "a large number of persons on the island", as well as their relatives and other affected persons suffered from *psychological consequences* of the terrorist attack.

In this exceptional case, I believe we struck the right balance. The indictment and the trial explained what had happened in sufficient detail to meet the public demand for answers, and the

most severely affected persons were individually recognized as victims. On the other hand, the case was kept manageable to achieve closure within a reasonable time. Breivik was convicted on both charges and the verdict was final on 7 September 2012 – one year after the tragedy.