

Some Aspects of and Perspectives on the Public Prosecutor's Objectivity according to ECtHR Case-Law

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1 Introduction and overview

It is a common phrase in legal doctrine and in legal soft law instruments, that 'the public prosecutors play a key role in the criminal justice system.'¹ Some criminal law scholars tends to focus on the prosecutors' function as the 'gatekeepers to the courtroom,' their 'screening' or 'filtering function' and their role as the criminal process 'engine' or 'dynamo.'² These terms, although superficial, are quite accurate, because they emphasize the major role of prosecutors in both the investigation- or pre-trial-phase and the trial phase of criminal proceedings.

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¹ See, among others, 'European Guidelines on ethics and conduct for public prosecutors,' adopted by the Conference of Prosecutors General of Europe on 31. May 2005 (hereafter 'The Budapest guidelines') with references to Council of Europe Rec(2000)19 on the Role of Public Prosecution in the Criminal Justice System (hereafter Rec(2000)19).

² See Tak, *Methods of Diversion Used by the Prosecution Services in The Netherlands and Other Western European Countries*, UNAFEI Annual report, 74 Resource Material Series (<http://www.unafei.or.jp/english/pages/RMS/No74.htm>), p. 54, Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford University Press 1995), p. 189 and Wade, *The Changing Role of European Prosecution*, in 4 *Newsletter of the European Society of Criminology* (no. 2, July 2005), pp. 3, 13–15, on p. 3 ('the basic prosecution role'). In the US the term 'prosecutorial screening function' is commonly in use; see LaFave, Israel & King, *Criminal Procedure* (Fourth ed., West Academic Publishing 2004), p. 679.

The public prosecutor represents a dominant force within an adversarial system of criminal procedure, and obviously *the* dominant force in legal systems based on a strict separation of powers to initiate investigation and further prosecution, between courts and the public prosecution service. This is the case in Norway, where the courts only act on an application from the prosecution, and the court must cease to act when the prosecution's application is withdrawn. The courts cannot go beyond the matter of the application and are to a large extent bound by the content of the indictment submitted, both when it comes to the law and facts.³

The prosecutor's essential role is derived, first of all, from its power over the police, the police investigation, its monopoly over prosecution and the expediency principle ('the opportunity principle'). But also important is the public prosecutor's increasing competence to make out-of-court decisions, such as penal orders, to waive (further) prosecution 'for public interest reasons' or decide on other alternatives to prosecution and a full-scale trial.

Commonly there is a high level of professionalism within a modern public prosecution service, and the preparation of the case, the prosecution's evaluation of the police investigation, their presentation of the case before the court, all have a great impact on how their arguments are viewed by the judges. The national courts' starting point should in principle be that the prosecution has gathered and presented the evidence impartially and in an unbiased fashion, both for and against the accused.

But there is a thin line between prosecution and persecution. It is quite obvious in a modern and democratic society that such an important criminal law institution, and all its representatives, should be governed by the rule of law. Not only in the strict sense of this old and broad phrase; namely that there exists an accessible, clear and consistent legal framework setting and regulating its powers.⁴ But also for reasons such as the legitimacy of the public prosecution authority, public trust, the protection of the public against the arbitrary use of power and - not least - to guarantee the prosecution's ability to perform its core functions and obligations towards human rights, it is crucial that there exists legal norms and principles as a constraint upon the public prosecutor's behaviour and conduct within criminal law enforcement.

Such a principle is the principle of objectivity, which includes several aspects of the prosecutor's functions in criminal procedure. The public prosecutor's duty, when it comes

³ See Criminal Procedure Act of 22 May 1981, sections 38 and 63 (*Lov om rettergangsmåten i straffesaker (Straffeprosessloven)*).

⁴ This article does not elaborate different conceptions of the Rule of Law, but in my view the concept of 'Rule of Law' is not a mere formal and procedural norm. It also gives certain requirements to the content of the law and the protection of democracy and individual rights, such as the rights and freedoms enshrined in the ECHR.

to the performance of its functions, is often formulated as a requirement that the prosecution should be objective and take an unbiased position at all stages of the criminal proceedings. Impartiality and objectivity is generally emphasized as the core point in the principle of prosecutors' objectivity. In short, both the prosecutor's own professional ideals and the public's expectations imply a requirement that prosecutors should 'act objectively, independently and conscientiously'.⁵

The main focus here is to highlight some aspects of and perspectives on the prosecutor's role and to raise some central questions regarding the prosecutor's obligation to objectivity according to the case-law of the ECtHR. The case-law reflects several elements of this principle, and both acts and omissions by police and prosecutors that may raise concern in this respect have been closely examined by the Strasbourg court.

Various international guidelines and soft law instruments regarding prosecutorial conduct underline the prosecutor's role of safeguarding the guarantees in the ECHR. One of the basic requirements is that prosecutors shall always

*(...) serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights'*⁶

Article 6(1) ECHR (the fair trial-standard), the specified minimum rights in article 6(2) and 6(3), and the guarantees afforded by article 5 to arrested persons, are obviously crucial. These rights must be respected by all judicial bodies. The primary responsibility to ensure that these rights are respected remains however with the public prosecutor, who must always

*(...) protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial'*⁷

The so-called Bordeaux Declaration of 2009 states:

'The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall

⁵ See Torgersen, Påtalejuristens rolle, in *Lov og Rett* 2011, p. 46.

⁶ See Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors. International Association of Prosecutors (hereafter IAP-Standards), section 1 'Professional Conduct', Rec(2000)19 section 24b 'Duties of the public prosecutor towards individuals' and the Budapest guidelines 2005 section I. 'Basic duties', which also emphasize that this obligation should be upheld 'at all times and under all circumstances'. For the police authorities, see Rec(2001)10 European Code of Police Ethics, section I/1 and section V/35-37.

⁷ IAP-Standards section 1. See also Rec(2000)19 section 24b, with specific reference to the rights laid down in the ECHR.

be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially.’⁸

The aforementioned IAP-Standards are essential, because they are an expression of a worldwide legal attitude towards the public prosecution’s role and functions.⁹ As far as professional conduct is concerned, chapter 1 reads:

‘Prosecutors shall:

- at all times maintain the honor and dignity of their profession;*
- always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession;*
- at all times exercise the highest standards of integrity and care;*
- keep themselves well-informed and abreast of relevant legal developments;*
- strive to be, and to be seen to be, consistent, independent and impartial;*
- always protect an accused person’s right to a fair trial, and in particular ensure that evidence favorable to the accused is disclosed in accordance with the law or the requirements of a fair trial;*
- always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights’.*

These principles have been implemented by several states, either as prosecutorial directives or in statutory provisions. Even if not implemented into national legislation, they should indeed form the basis for standards of public prosecution in most European countries. These norms (among others) are also clearly stated as ‘Principles of the Activities of the Prosecution Service’ in the Law on the prosecution service in the Republic of Georgia (2008) article 4:

‘The principals of the activities of the Prosecution Service are:

- a) legality;*
- b) the protection and respect of the rights and freedoms of natural entity and the rights of legal person;*
- c) professionalism and competency;¹⁰*
- d) objectivity and impartiality;*

⁸ Section 6, Joint opinion by the CCJE and the CCPE on the relationships between judges and prosecutors, Opinion No. 12 (2009) of the Consultative Council of European Judges (CCJE) and Opinion No. 4 (2009) of the Consultative Council of European Prosecutors (CCPE) on ‘Judges and prosecutors in a democratic society’.

⁹ The list of soft-law instruments on the role of public prosecutors is extensive. See the aforementioned Bordeaux Declaration 2009, the Budapest guidelines 2005, the Venice Commission 2010 report (CDL-AD(2010)040) and also the aforementioned Rec(2000)19 of the Council of Europe, Adopted on 6 October 2000.

¹⁰ Allegations about a public prosecutor’s criminal record and questions about whether he possess the necessary legal education –unfortunately not an unknown scenario in Georgia- could easily create a perception of a breach of this principles, and of course in other ways damage both the image of the prosecution service and public trust in the law enforcement authorities.

- e) *unity and centralizations, the submission of subordinate prosecutor and other employees of the Prosecution Service to the Minister of Justice of Georgia;*
- f) *political neutrality;*⁷

So, why is objectivity so important in criminal cases, and why is objectivity crucial for the prosecutor's role as the protector of human rights?

In legal theory the prosecutor's duty to act objectively is often elaborated in connection with aspects of the law on evidence, especially regarding the collection of evidence, the evaluation of evidence, evidentiary standards, and the prosecution's burden of proof. This thematic approach is due to the principle of material truth. Criminal procedures aim is to establish the truth, and determine criminal liability based on established facts. This goal is commonly accepted, although there seems to be a slight shift in the general orientation of the aims of the criminal process, from a focus on 'truth-finding' towards *conflict resolution*, such as illustrated by plea-agreements.¹¹

The principle of material truth constitutes the foundation of the prosecution's duty of impartiality and objectivity. It also provides the basic guidelines that regulate and limit the prosecution's decisions and the prosecutor's appearance at any stage of criminal proceedings. Objectivity must therefore be seen as a precondition for truth-finding. The obligation to objectivity is closely linked to the prosecution's function as the head of the investigation, and its responsibility to collect and facilitate all the material that should serve as the basis for both the prosecution's own decisions or the court's decisions on guilt and criminal liability.

So how can we in practice fulfil these requirements? It is first of all a question of professionalism, moral standards and personal attitude towards one's role and function as a public authority. The prosecution does not win or lose cases; it should seek justice and do justice. But the principle of objectivity goes beyond this, and it must be seen to be upheld in action. The ECtHR gives some guidance in its case-law.

But first a brief look at the principles of independence and impartiality of prosecutors, which should be seen – along with high integrity and professionalism – as institutional preconditions for objectivity in single cases.

¹¹ See part 7 below on plea-agreements.

2. Some aspects of institutional independence and impartiality

In ECHR case-law the concepts of independence, objectivity and impartiality of *judges* are closely linked.¹² To some extent this is similar for the public prosecution services.

There are two aspects to the question of ‘impartiality’: The prosecutor must be *subjectively* free of personal prejudice or bias, and must also be impartial from an *objective* point of view, which requires sufficient guarantees in the legal framework and practice to exclude any legitimate doubt in this respect. The first element overlaps to some extent with the principle of objectivity. The criterion of ‘independence’ pertains first of all to issues such as the manner of appointment of prosecutors, their term of office, the existence of guarantees against outside pressure, and whether the prosecutors appear to be independent. What is decisive regarding the latter is whether the accused’s possible doubts that the prosecution lacks independence or impartiality can be objectively justified.

European countries are divided when it comes to the question of the relationship between the public prosecution service and the other branches of the criminal justice system. Even within the Council of Europe, the institutional choices and legal frameworks differ.¹³ There are also several models of organising the public prosecutor’s role, and various ways to regulate the prosecutor’s relationship with the political system. This is clearly not only a matter of law and state authority structures: the political dimension is obvious.

Some countries choose to subordinate the public prosecution to the Ministry of Justice.¹⁴ The prosecution forms a part of the executive branch, but is at the same time closely linked to the political system. The Minister of justice may have policymaking power, but also powers to give binding instructions with regard to investigation and prosecution in individual cases, and can be held accountable in parliament for using or failing to use these powers. Such a model could very well lead to a public perception of a lack of

¹² See in this respect *Cooper v. the United Kingdom*, judgment (GC), 16. December 2003 (appl. 48843/99), regarding the independence of certain service tribunals.

¹³ There are also great differences, and no clear common view, on matters of professional status, in spite of the clear Rec(2000)19 and IAP-Standard on this issue. In some countries the status of public prosecutors is equal to judges on wages and career opportunities, and grounds for dismissal are similar. See further Tak, Report on the relationship between judges and prosecutors, Working paper of the consultative council of European judges (CCJE-GT(2009)4), 16th meeting 2009.

¹⁴ This is so in, for example, The Netherlands, Denmark and in Georgia.

political neutrality and impartiality in the prosecutorial decision-making, and abuse of political power, especially at the level of individual cases.¹⁵

The ECtHR has - to my knowledge - not addressed this issue *separately*.¹⁶ The most relevant legal instrument, providing for safeguards in this respect, is Rec(2000)19 section 11-16. The keywords are *transparency* when giving instructions, instruction must be *in writing*, they must be transmitted *through hierarchical channels* and there should be *full disclosure* of the instructions on file and before the court.¹⁷

This is first of all a question regarding what is *an acceptable level* of dependence or independence. If structural dependence exists, the public prosecution should have full functional autonomy in all individual criminal cases.¹⁸

3. The ECtHR's approach; prosecutors' objectivity as an integrated part of the state's human rights obligations

3.1 Overview and other relevant principles

The principle of objectivity is not in itself stated in the convention's text. It is derived from aspects of the 'rule of law' doctrine, of the 'fair trial-standard' in article 6 and – most explicitly – from elements of the state's positive obligations to investigate and prosecute human rights violations, as well as the police's and the public prosecutor's obligations to protect and uphold human rights.

Under article 6, the principle of objectivity meets – and is closely connected to – other important principles, particularly to the presumption of innocence. There is a common

¹⁵ This issue seemed to be the major concern when The Georgian parliament in 2008 requested the opinion of the Venice Commission (European Commission for Democracy through Law) on the reform of the Prosecution service, see Opinion no. 503/2008 on four constitutional laws amending the Constitution of Georgia (CDL-AD(2009)017.), adopted at the 78th Plenary Session, March 2009.

¹⁶ The ECtHR underlined 'hierarchical, institutional and practical independence' as a crucial element of an 'effective official investigation' (see section 3 below), and that the prosecution's subordination to the executive branch does not satisfy the requirements of independency and impartiality of an 'officer authorized by law to exercise judicial power' within the meaning of article 5.3, see *Moulin v. France*, judgment 23. November 2010 (appl. 37104/06). See also *Merit v. Ukraine*, judgment 30. March 2004 (appl. 66561/01) and *Nevmerzhitsky v. Ukraine*, judgment 5. April 2005 (appl. 54825/00), para. 116 and in para. 125.

¹⁷ Rec(2000)19 section 13. See also the recommendations of The Venice Commission 2010 report (CDL-AD(2010)040), pp. 5-10, and conclusion in section J/87.

¹⁸ According to the Norwegian Code of Criminal Procedure, the public prosecutors are subordinated to the King in council, but in the common legal view – and in practice – the prosecution enjoys full functional autonomy in all criminal cases and in its prosecutorial decision-making.

element: the prosecutor should be unbiased and impartial, and the investigation should not start with a preconceived idea that the accused has committed the alleged offence. As an example, in the case of *Virabyan v. Armenia* (2012), the decision to terminate the criminal proceedings against the applicant (on grounds of expediency), was formulated in terms which left no doubt as to the prosecutor's view that the applicant had committed a criminal offence. This was in breach of the principle of the presumption of innocence, and a violation of art. 6(2) (among other violations based on a number of failures and omissions in the investigation).¹⁹

The prosecutor's duty of objectivity is also an issue in rules of disclosure of evidence to the defence and the principle of equality of arms. Even if police and prosecutors are obliged to gather facts both in favour of and against the suspect, the concept of a fair trial demands that the opportunity be afforded to both parties to have knowledge of, and comment on the evidence.²⁰ A procedure that leaves it to the investigating police and/or the prosecution itself to decide upon the relevance of facts – without some form of judicial control – does not comply with article 6, no matter how objective one may consider the prosecutors to be in this respect.²¹

3.2 *The positive obligation to conduct an effective official investigation*

The principle of objectivity is most explicitly expressed by the court in its long range of judgment on the state parties' positive obligations to investigate and prosecute human right violations. These obligations include the effective protection of individuals from actions by the state or state officials, but also protection against criminal acts committed by private parties, as well as reasonable steps to prevent such actions, if the authorities knew or ought to have known of them.

In order to 'secure ... the rights and freedoms defined in ... the Convention' as stated in art. 1, and for convention rights and freedoms to be 'practical and effective ... not theoretical or illusory', the ECtHR has emphasised that there should be '*some form of effective official investigation*' into alleged breaches of convention rights and freedom.²² This is:

¹⁹ See *Virabyan v. Armenia*, judgment of 2 October 2012 (appl. 40094/05).

²⁰ See the broad expression of this in *Abbasov v. Azerbaijan*, judgment of 17 January 2008 (appl. 24271/05), which states that the concept of a fair trial 'includes the principle of equality of arms and the fundamental right that criminal proceedings should be adversarial' and both prosecution and the defence 'must be given the opportunity to have knowledge of and to comment on the observations filed and evidence presented by the other party'.

²¹ See *Rowe and Davis v. The United Kingdom*, Grand chamber judgment of 16 February 2000 (appl. 28901/95) para. 63 and *Janatuinen v. Finland*, judgment of 8 December 2009 (appl. 28552/05) para. 49. In the latter case the prosecutor were even obliged by law to delete some covert phone communication data (characterised by the ECtHR as a 'legal defect').

²² As it is formulated in *McCann and others v. United Kingdom*, judgment 5. September 1995 (appl. 18984/91) para. 161, and repeated in several cases thereafter.

«...» essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law.»²³

It is important to emphasise that especially the rights outlined in art. 2, 3 and 8, cover a considerably large variations of conducts, from rather 'minor' body inflictions, to threats, sexual assaults and attacks on several aspects of privacy and private property. Even car accidents and industrial accidents could give rise to issues of positive obligations under these articles, and require criminal proceedings.²⁴

The ECtHR's 'general principle' or 'general approach' towards the state parties' positive obligations, is that there should be

*«...» in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.
(...) [this] may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual ...»²⁵*

The term 'criminal-law mechanisms' is comprehensive, and it covers the entire criminal justice system; both substantive criminal law (criminal law provisions) and criminal procedure law, including the police and prosecution authorities' legal framework and

²³ See, among others, *Gldani Congregation of Jehovah's Witnesses and others v. Georgia*, judgment 3. May 2007 (appl. 71156/01), para. 97 (the police failed to give protesters effective protection against violent acts from others during a demonstration) and *Kolevi v. Bulgaria*, judgment 5. November 2009 (appl. 1108/02), para. 194.

²⁴ Compare the cases *Tonchev v. Bulgaria*, judgment of 19 November 2009 (appl. 18527/02) and *Janković v. Croatia*, judgment of 5 March 2009 (appl. 38478/05), on the 'the minimum level of severity' in article 3 and the distinctions between article 3 and 8 when it comes to violent acts. See also *Railean v. Moldova*, judgment of 5 January 2010 (appl. 23401/04). The police investigation into who was the driver in a traffic accident, was found to be 'manifestly unilateral and superficial', and in breach of the positive obligation in article 2.

²⁵ See, among others, *Osman v. the United Kingdom*, judgement of 28 October 1998 (appl. 23452/94), para. 115.

practices. It also covers certain aspects of the national courts' sentencing practice²⁶ and the correctional services.²⁷

The Court has summarised its practice as follows:

The authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (...)
For an investigation to be effective, the persons responsible for carrying it out must be independent from those implicated in the events. This requires not only hierarchical or institutional independence but also practical independence (...)
The investigation must be capable of leading to the identification and punishment of those responsible (...)
A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation (...)
*In all cases, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his legitimate interests'*²⁸

These are elements of the so-called 'minimum threshold of effectiveness.' The effectiveness-test is of course case-oriented, it depends on the circumstances of each particular case and the court also takes into account 'all relevant facts and with regard to the practical realities of investigation work...'²⁹

Objectivity, independence, promptness, thoroughness, and the use of all reasonable steps available to secure evidence, are the essential element of an effective official investigation. Although the ECtHR does not 'interfere with the lines of inquiry pursued by the authorities or the findings of fact made by them, unless they manifestly fail to take into account relevant elements or are arbitrary,'³⁰ case-law shows that the ECtHR examines closely, and in great detail, the police's and the prosecutor's *response, conduct and attitude* towards alleged human rights violations.

²⁶ *Okkali v. Turkey*, judgment of 17 October 2006 (appl. 52067/99). Violation of article 3. Two police officers were sentenced to a minimum sentence and a short suspension from duty, for committing violent acts against the applicant, a detained minor. The court attached considerable importance to the fact that 'the punishment was not sufficiently dissuasive to effectively prevent illegal acts of the type ...' (para. 78)

²⁷ See among others *Mastromatteo v. Italy*, Grand chamber judgment of 24 October 2002 (appl. 37703/97). No violation of art. 2. Two previously violent offenders were given leave from prison and killed the complainant's son during a bank robbery. The regulations and practices relating to early release provided adequate protection. There was no evidence of a risk directed at the complainant's son.

²⁸ *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010 (appl. 25965/04), paras. 232–233, with further references (not cited here).

²⁹ See *Zashevi v. Bulgaria*, judgment of 2 December 2010 (appl. 19406/05), para. 57, with further references.

³⁰ As stated in, among others, *Dimitrova and others v. Bulgaria*, judgment of 27 January 2011 (appl. 44862/04), para. 76.

The effectiveness of the investigation and prosecution is therefore at stake if the principle of objectivity is not upheld by the police or prosecution in *securing evidence* during the investigation phase or in the *evaluation of the investigation material* during the pre-trial phase. This is also true if the circumstances in the case cast serious doubt about their objectivity, especially if there appears to be any ‘collusion in or tolerance of unlawful acts.’

In the grand chamber case of *Nachova and others v. Bulgaria* (2005), the court stated a basic principle: ‘The investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements.’³¹ If there are relevant pieces of evidence missing, the question of why they are missing arises. Any insufficiency in the collection of relevant evidence could undermine the investigation’s capacity to establish the circumstances of the case or to find the person responsible. The court has in several cases found that such failures ‘fall foul of the required measure of effectiveness.’ In the *Nachova* case, the court found violations of art. 2, and criticised that ‘a number of indispensable and obvious investigative steps were not taken’, as well as the fact that ‘the investigator and the prosecutors ignored highly relevant facts.’³²

Some other cases should be mentioned.

In *Mátásaru and Savitchi v. Moldova* (2010), the court formulated the obvious requirement, but sadly not fulfilled in the case, that ‘the authorities must always make a serious attempt to find out what happened, and should not rely on hasty or ill-founded conclusions to close their investigation.’³³ The prosecution’s decision not to initiate an investigation was based on ‘tendentious circumstances’, and the General prosecutor’s assignment of the case back to the same district prosecutor after the investigation was initiated ‘raised a legitimate concern for the first applicant that his case was not being examined without bias and unnecessary delay.’

In *Kolevi v. Bulgaria* (2009), concerning the alleged assassination of a senior public prosecutor, the court stated that ‘failing to follow an obvious line of inquiry undermines the investigation’s ability to establish the circumstances of the case and the person responsi-

³¹ *Nachova and others v. Bulgaria*, Grand chamber judgment of 6 July 2005 (appl. 43577/98 and 43579/98), para. 113. Similar in *Kolevi v. Bulgaria*, judgment of 5 November 2009 (appl. 1108/02), para. 192.

³² *Nachova and others*, paras. 115-116. Both substantive violations (lack of legal framework) and procedural violations (non-effective investigation) of article 2 were found. The applicant’s relatives had been shot and killed by military police. There were in the court’s view insufficient sketch maps of the terrain, relevant measurements were missing, no reconstruction of the events was set up during the investigation and the ‘investigator and the prosecutors ... effectively shielded Major G. from prosecution.’

³³ *Mátásaru and Savitchi v. Moldova*, judgment of 2 November 2010 (appl. 38281/98), para. 85, concerning several refusals by the prosecution to initiate a criminal investigation into alleged ill-treatment (head injury after being attacked) under detention.

ble. Such an investigation cannot be seen as effective.’³⁴ There was evidence of a conflict that could have been a motive for the assassination, and the possible involvement of the Chief Public Prosecutor and others should have been explored further.

The case of *Dimitrova and others v. Bulgaria* (2011) is an example of the ECtHR’s broad and extensive examination of the conduct of police and prosecutors.³⁵ The court expressed serious doubts as to whether the investigation was thorough and above the minimum standards of effectiveness. The court found that the regional public prosecutor failed to take into account important elements of facts when entering into a plea bargain/plea agreement with one of the alleged perpetrators. The plea agreement was based on a confession that he had killed the deceased in self-defense (but reacting disproportionately), with one blow to his head. But the investigation material indicated several blows, a possible deliberate attack on the deceased and several other persons involved. Based on this (and a lack of promptness and expedition) the court concluded that the authorities did not carry out ‘a thorough and objective investigation, as required ... because they failed to take available investigative measures and manifestly disregarded important evidence.’³⁶

This brief presentation of cases illustrates the crucial importance of securing and upholding the highest standard of objectivity and thoroughness among public prosecutors through all phases of the criminal proceedings, in order to fulfil state parties’ positive obligations under the ECHR.

4. The relevance of the prosecutor’s objectivity when determining the availability of an effective domestic remedy

Under art. 13 ECHR, the complainant of an alleged breach of freedoms or rights under the convention has a right to an ‘effective’ domestic remedy. This could be an administrative or a judicial national authority, as long as it is likely to be effective, adequate and accessible.³⁷ This gives the states an opportunity to prevent or to put right alleged violations, before those allegations are submitted to the ECtHR.³⁸

³⁴ *Kolevi v. Bulgaria*, judgment of 5 November 2009 (appl. 1108/02), para. 201.

³⁵ *Dimitrova and others v. Bulgaria*, judgment of 27 January 2011 (appl. 44862/04). Further elaborated on in section 7 below, on the prosecutor’s involvement in plea agreements.

³⁶ *Dimitrova and others*, para. 86.

³⁷ See among others, *Scoppola v. Italy* (no. 2), Grand chamber judgment of 17 September 2009 (appl. 10249/03), para. 70.

³⁸ Pursuant to art. 35 the court only deals with complaints when all domestic remedies have been exhausted. There are obviously close links between articles 13 and 35: both aim to secure and uphold a primary responsibility for national courts to safeguard fundamental rights and freedoms.

If an alleged violation is adequately brought to the attention of the police or prosecutors, or lodged in some other way with the relevant prosecution authorities, it triggers the relevant authorities' duty to act promptly to verify the information and to institute an investigation, and a possible prosecution. An ordinary criminal investigation and subsequent prosecution will usually satisfy the requirement of an effective domestic remedy, but not if the alleged substantive violation involves state officials, such as police and prosecutors, or alleged breaches of the procedural obligation to initiate and conduct an effective and official investigation. If the police and/or the prosecution fail to fulfil these obligations, there are good reasons to fear that they would be seen as neither objective nor independent enough to handle a complaint about the police's or the prosecutor's alleged violation of the convention.

Most European criminal justice systems rely on internal bureaucratic accountability to keep prosecutors in line with rule-of-law standards. But the ECtHR and the ECHR demands more. When it comes to alleged breaches of the state's positive obligations to investigate, prosecute and punish human rights violations, the ECtHR calls for an external control on prosecutors. As mentioned above, the court requires hierarchical, institutional and practical independence for an investigation to be effective. There should not be institutional or hierarchical connections between the investigators and the police-officers or prosecutors complained against. This should be seen as a precondition for an objective investigation and prosecution of such cases.

The ECtHR has no clear preference as to the form in which these requirements should be met,³⁹ but it seems to be a common view that these obligations require a special law enforcement agency to conduct investigation and prosecution, with their own pre-trial investigation and evidence-gathering powers.⁴⁰ This is the case in Norway.

Practical independence also implies that police and prosecutors cannot take any part in the investigation, unless immediate action is necessary to avoid the loss or destruction of important evidence.⁴¹ In *Dvalishvili v. Georgia* (2012) there was an

³⁹ See in general, *Kolevi*, para. 208: '(...) may be secured by different means, such as investigation and prosecution by a separate body outside the prosecution system, special guarantees for independent decision-making despite hierarchical dependence, public scrutiny, judicial control or other measures.'

⁴⁰ See the Opinion of the Commissioner for Human rights, concerning the independent and effective determination of complaints against the police, 12. March 2009 (CommDH(2009)4), which is based on that best practice is served by an 'Independent Police Complaints Body,' working in partnership with the police.

⁴¹ On 'practical independence' and the implications for ordinary police to assist in special law enforcement agencies investigations, see *Ramsahai and others v. Nederland*, Grand chamber judgment of 15 May 2007 (appl. 52391/99), paras. 333–341. See paras. 342-346 regarding the local prosecutor's role.

(...) examination of the applicant conducted by an emergency doctor in the presence of a prosecutor. In this connection, the Court reiterates that the medical examinations of presumed victims of ill-treatment should be conducted outside the presence of police officers and other government officials in order to attain the required standards of independence and thoroughness⁴²

Also the use of information received from the police officers involved, and the evidential weight this information is lent by prosecutors, could reveal, or cast doubt on, a lack of independence (and objectivity). In *Ergi v. Turkey* (1998), the public prosecutor investigated the death of a girl during an alleged clash between security forces and the PKK. The court found a violation, essentially because the prosecutor showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident.⁴³

The demands for objectivity and independence also have other implications for the prosecution. The requirement of an 'effective' remedy is not met if an appeal authority lacks the competence to deal with the case, has limited competence, or – which is of special importance here – is not sufficiently independent. The possibility to appeal to a superior prosecution authority is common, but is not in itself considered by the ECtHR to be an effective domestic remedy under article 13 and article 35. This was one of the issues in *Merit v. Ukraine* (2004), which concerned the question of whether a right to appeal a prosecutor's decision to suspend the investigation to the superior prosecution authority, constituted an 'effective remedy'. The Ukrainian government claimed it was, but the court did not agree:

*(...) the Court finds that they cannot be considered 'effective' and 'accessible' since the status of the prosecutor in the domestic law and his participation in the criminal proceedings against the applicant do not offer adequate safeguards for an independent and impartial review of the applicant's complaints ...*⁴⁴

The prosecutors in Ukraine are - as in Georgia until recently - subordinate to the Prosecutor General, who is appointed by the President. The Prosecutor General can be dismissed by the President and he is subject to the supervision of the executive branch of Government. The ECtHR noted that although the prosecutors

⁴² *Dvalishvili v. Georgia*, judgment of 18 December 2012 (appl. 19634/07), para. 47 (violation of art. 3), with further references to previous case-law, including *Lopata v. Russia*, judgment of 13 July 2010 (appl. 72250/01), para. 114.

⁴³ See *Ergi v. Turkey*, judgment of 28 July 1998 (appl. 23818/94), para. 83. The lack of inquiry into the credibility of those involved could also raise doubt about whether the investigation itself was sufficiently thorough and effective, see *Dvalishvili*, para. 50. The court found a violation, because (among other omissions) the prosecution (and judicial authorities) '... accepted the credibility of the police officers' testimonies without giving any convincing reasons for doing so.'

⁴⁴ *Merit*, paras. 62-63. Similar in *Ivanov v. Ukraine*, judgment of 7 December 2006 (appl. 15007/02).

(...) under the applicable laws ..., in addition to exercising a prosecutorial role, also act as guardian of the public interest, [this] cannot be regarded as conferring on them a judicial status or the status of independent and impartial actors.'

Also in *Baisuev and Anzorov v. Georgia* (2012), the court stated that although the applicants could have challenged/appealed the district prosecutor's failure to take action before a higher prosecutor,

*(...) the Court reiterates that in general a hierarchical remedy cannot be regarded as effective, because litigants are unable to participate in such proceedings (...) Since the competent authorities remained passive in the face of the applicants' allegations of misconduct and abuse of power by State agents, the applicants could justifiably have regarded any further requests to the same authorities as a futile exercise.'*⁴⁵

6. Some legal strategies to secure and uphold a strict principle of objectivity

6.1 Introduction

The preferred legal strategy to secure compliance with the principle of objectivity should be to implement this principle in the legal framework and in legal practice, in a way that reflects its fundamental value and makes it operational in every decision-making process, on a daily basis. Several avenues can be chosen to do so: either by implementing the principle in a broad elaborated sense, like the Norwegian Code of Criminal Procedure,⁴⁶ by implementing it in principle, like the Law on the prosecution service in the Republic of Georgia (2008) art. 4 (cited above), or by transposing, for example, the IAP-Standards as binding prosecutorial directives for prosecutors.

Two other possible avenues are detailed below, section 6.2 and 6.3.

6.2 Mandatory prosecutions – limited prosecutorial discretion?

There is a 'rise of prosecutorial discretion' throughout European countries, and a development towards lending prosecutors powers to divert cases out of the formal and

⁴⁵ *Baisuev and Anzorov v. Georgia*, judgment of 18 December 2012 (appl. 39804/04), para. 35, with references to *Nikolaishvili v. Georgia*, judgment of 13 January 2009 (appl. 37048/04).

⁴⁶ See The Norwegian Code of Criminal procedure: 'Every public prosecutor shall act objectively in all activities, including at the investigation stage, when indictment decisions are made and when prosecuting the case before the courts.' (section 55) 'If a specific person is under suspicion, the investigation shall seek to clarify both the evidence and against him and the evidence in his favour.' (section 226). 'If it appears clear to the prosecutor that there has not been submitted sufficient evidence for a conviction, the acting prosecutor should drop the charges or request an acquittal.' (section 304).

ordinary course of criminal justice and to 'settle' criminal cases outside formal court procedures.⁴⁷ The prosecution services take over substantial functions originally handled by the courts. And a wide range of discretionary powers, without or with limited judicial review, creates an arena for biased decisions and other elements of lack of objectivity and unequal justice.

A statutory obligation to prosecute every known case with sufficient evidence (the legality principle in its procedural sense) could be seen as a procedural safeguard and a guarantee against biased considerations, unequal justice and prosecutions based on non-objective grounds. Furthermore, it strengthens prosecutors' independence, since instructions or interference by the executive branch – and politicians – cannot have an impact on the decision to prosecute. The obligation to prosecute all offences, except petty offences, could also to some extent protect prosecutors from other undue pressure. In countries which recognise the principle of discretionary prosecution, the transparency of official guidelines is important for the same reasons.

But in the very few European countries who still uphold a strict legality principle, the reality is that the public prosecution in practice, without any clear statutory basis or limited statutory basis, decides not to prosecute some cases. To cling on to a principle of mandatory prosecution – even with a wide range of exceptions – has in German legal theory for that reason been regarded as 'Dekoration einer Fassade' or 'Etikettenschwindel'.⁴⁸ In recent years, legal exceptions to the legality principle have been widely extended, and prosecutors in most states within the Council of Europe have *de facto* extensive prosecutorial discretion in cases of moderate severity ('every-day crimes').⁴⁹

The differences between the principle of legality on the one hand, and expediency on the other, and whether these principles are safeguards against biased considerations, should not be overrated. I do not consider that a stronger emphasis on mandatory prosecution is *in itself* a safeguard of the prosecutors' objectivity and independence. It resembles more a doctrine of 'turning a blind eye' to crucial pragmatic aspects of prosecutorial decisions, and to the everyday management of case-loads, such as cost-effectiveness and balancing limited financial and personnel resources.

⁴⁷ For a comprehensive analysis of this development, see Jehle & Wade, *Coping with Overloaded Criminal Justice Systems. The Rise of Prosecutorial Power Across Europe* (Springer 2006), with report from England, France, Germany, Netherland, Poland and Sweden.

⁴⁸ Weigend, *Anklagepflicht und Ermessens, Die Stellung des Staatsanwalts zwischen Legalitäts- und Opportunitätsprinzip nach deutschem und amerikanischem Recht* (Nomos 1978) pp. 58-59, with further references.

⁴⁹ See Tak, Report on the relationship between judges and prosecutors. Working paper of the Consultative council of European judges (CCJE-GT(2009)4) 16th meeting 2009.

6.3 *The prosecutor's objectivity and the law of evidence*

The ECtHR puts great emphasis on the thorough and objective collection and evaluation of evidence. But the court has not yet – to my knowledge – *separately* addressed the question of which evidential standard the prosecutors should adopt in the decision to indict or drop the case.⁵⁰

Are prosecutors bound by the standard 'beyond reasonable doubt'?

It is common to say that the prosecution must be convinced of the accused's guilt, and it must be of the opinion that criminal guilt can be proved in court 'beyond reasonable doubt' before filing an indictment. But the meaning and reality of this differs. In Norwegian criminal procedure (in law, practice and amongst scholars) this is *not merely seen as a prognostic review* of how the court will value the evidence. The prosecutor must in addition be *personally convinced* of the guilt, based on the evidence when the decision is made.

This is a relevant issue for discussion, along with a discussion of whether to lower the evidential standards for prosecutorial decisions. There is some debate in legal doctrine about these matters. In Sweden, Finland, but also in The United Kingdom and Germany, it is discussed whether the prosecutor is legally entitled to indict a suspect based on a lower standard of proof, and whether or not the prosecutor himself should personally be convinced of the guilt before doing so. The attitude varies. In Germany, the prosecutor '... may take a case to trial even where he is not fully convinced of the suspect's guilt as long as he thinks that the court will be able to resolve remaining doubts at the trial'.⁵¹

The evidence-test in the Code of Conduct for prosecutors in the United Kingdom, focuses on 'a realistic prospect of conviction' and on whether the judge 'is more likely than not to convict'.⁵² Some English scholars argue that this is an unethical claim, because it sets the evidence requirement lower for the prosecutor's decisions than for the courts.⁵³

⁵⁰ The ECtHR seems to accept different evidential standards for court judgments and prosecutor's indictments. See the - non-decisive - statement in *Lavrechov v. The Czech Republic*, judgment of 20 June 2013 (appl. no. 57404/08), para. 50: 'Different standards of proof are required for a person to be convicted, usually described as proof beyond reasonable doubt, and for a person to be prosecuted, usually described as reasonable suspicion that the person has committed a crime.' The case concerned the forfeiture of bail notwithstanding the applicant's acquittal (no violation of article 1 of protocol no. 1).

⁵¹ See Weigend, *Toward a Prosecutor for the European Union*, Volume 1 A: *Comparative Analysis*, ed. Ligeti (Hart publishing 2013), p. 292.

⁵² Crown Prosecution Services Code of Conduct section 5.2.

⁵³ See Young & Sanders, *The Ethics of Prosecution Lawyers*, in 7 *Legal Ethics* (no. 2, 2004), pp. 190-209, at pp. 200-202. See also *Gersham*, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, in 20 *Fordham Urban Law Journal* (Issue 3, 1992), pp. 513-530, at p. 522, '(...) a standard of moral certainty'.

The very strict approach to this issue in Norwegian criminal procedure is, as one can see, not commonly accepted, among neither scholars nor practitioners in the other Nordic states.⁵⁴

This approach, whether it is based on legal or moral/ethical considerations, could be said to strengthen the prosecutor as an *effective* gatekeeper of justice, its objectivity and the presumption of innocence.⁵⁵ Especially in legal systems that give prosecutors the role of a judge in pre-trial settlements, the evidential standards adopted by the prosecution should, in my view, be the same as the evidential standards for the court's decision. If this standard of proof is not fulfilled, the case must be dropped without any incriminating statements.⁵⁶ On the other hand, an *indictment* by the prosecutor based on such a strict evidential standard, will not in itself be in breach of the presumption of innocence, because it only constitutes 'a mere assertion' by the prosecutor that there is 'sufficient evidence to support a finding of guilt by a court.'⁵⁷

Some other aspects of the law on evidence deserve to be briefly mentioned here.

Several criminal procedure codes expressly require prosecutors to collect and consider exonerating as well as incriminating evidence. This is a core element of the principle of objectivity, but this basic requirement does not – in my view – require any other legal basis than a reference to the principle itself. Neither the ECHR itself, nor ECtHR case-law, lay down any rules on the admissibility of the evidence, except for evidence extracted in breach of article 3 (torture, inhuman or degrading treatment). But one could argue that statutory provisions that exclude the collection and/or use of certain kind of evidence could strengthen the prosecutor's objectivity. At least it could strengthen the public's perception of objectivity, because it leaves no discretion as to the relevance or legitimacy of taking certain circumstances or elements in consideration. So-called 'bad character' evidence, 'similar-fact' evidence, or evidence of a dubious nature or which lacks credibility, could be relevant examples in this respect.

⁵⁴ See the discussion in Strandbakken, *Uskyldspresumsjonen 'In dubio pro reo'*, (Fagbokforlaget 2003), pp. 583-585 and his conclusions on pp. 590-591, Lindell *et. al*, *Straffeprocessen* (Iustus Förlag 2005), pp. 186-188 (Sweden) and Frände, *Finsk straffprocessrätt* (Edita 2009), pp. 187-191 and p. 202 (Finland).

⁵⁵ See Gersham *op.cit.*

⁵⁶ See *Virabyan v. Armenia*, judgment of 2 October 2012 (appl. 40094/05), above in section 3.1.

⁵⁷ As stated in *Butkevicius v. Lithuania*, judgment of 26 March 2002 (appl. 48297/99), para. 52. Similar in *Daktaras v. Lithuania*, judgment of 10 October 2000 (appl. 42095/98), para. 44: 'sufficient evidence of the applicant's guilt to justify proceedings to trial', and *Shuvalov v. Estonia*, judgment of 25 May 2012 (appl. 39820/08), on how to refer to an indictment in a prosecutor's press-release, prior to court proceedings.

7. Prosecutors' involvement in plea agreements – a threat to the principle of objectivity?

In close connection with the rise of prosecutorial discretion and prosecutorial powers in Europe, there is a development towards implementing different forms of consensual criminal proceedings, plea bargaining or plea-agreement systems.⁵⁸ One could point to a legal transplant from the US system of plea-bargaining,⁵⁹ but such a comparison – and the use of the term transplant - is not quite accurate. It is more a 'legal translation' of the American form of plea bargaining (or aspects of it).⁶⁰ This development is – although in limited and light terms - embraced by European prosecutors 'regarding particular delinquency areas.'⁶¹

The Norwegian criminal procedure is not open to plea-bargaining, but there exist confession-triggered summary procedures and other simplified procedures, which do have some consensual elements.⁶² The Norwegian Supreme Court has stated that a plea bargaining-system will involve a risk of unequal justice, discrimination and bias, particularly in favour of wealthy and resourceful suspects. It could also put undue pressure on an accused who is actually innocent, but who is afraid not to be found trustworthy. A criminal procedure where the defendant's legal position is dependent on the prosecutor's willingness to negotiate, and on the defendant's negotiating skill, was considered by the Supreme Court to be 'highly unfortunate.'⁶³ There has not since this judgment, or since a statutory proposal in 2006 on promises of sentence-reduction for confession, been any climate in Norwegian criminal procedure for implementing plea-agreements.

⁵⁸ See further Thaman (ed.), *World Plea-Bargaining, Consensual Procedure and the Avoidance of the Full Criminal Trial* (Carolina Academic Press 2010), and Rauxloh, *Plea Bargaining in National and International Law: A Comparative Study, USA*. (Routledge 2012).

⁵⁹ See Jung, Plea Bargaining and its Repercussions on the Theory of Criminal Procedure, in *5 European Journal of Crime, Criminal Law and Criminal Justice* (1997) pp. 112-122.

⁶⁰ See Thaman *op. cit.*, p. 38.

⁶¹ See Conclusion, 8th Eurojustice Conference. Lisboa 2005, section no. 6 on 'Consensus areas in criminal justice.'

⁶² See Strandbakken *op. cit.*, pp. 245-257, and similarly in Denmark, see Wandall pp. 219-244, in Thaman *op. cit.*

⁶³ Supreme Courts Grand chamber judgment (Rt. 2009 p. 1336, paras. 20 and 23)

Georgia has chosen a different path, and introduced a plea-agreement system in 2004.⁶⁴ It seems to dominate criminal justice in Georgia because the amount of cases that are settled out of court is very high (some 87 % in 2011).⁶⁵

In such proceedings the role of the prosecutor closely resembles that of the judge or the court, both in the evaluation of what is sufficient evidence, and as to the appropriate outcome or sentence. The most sustained criticism of Georgia's model of plea agreements relates to the extensive discretionary powers it leaves to the prosecutor.⁶⁶

There is - in general - a widespread perception that any plea-agreement system opens up an excessive scope for subjectivity and undue influence on the part of the public prosecutor, especially because a pre-trial settlement very well could be preferred instead of a full-scale trial. It could also open a door for using criminal proceedings as a tool for other governmental aims or state policy interests, than strictly law enforcement. ECtHR case-law gives some examples. In *Gusinskiy v. Russia* (2004), the court found it necessary to emphasise that 'it is not the purpose of such public-law matters as criminal proceedings and detention on remand to be used as part of commercial bargaining strategies.'⁶⁷

The evidentiary value of statements given under a plea agreement, especially the general fear that the statement is not to be trusted when given after a promise of impunity in one form or another, or of sentence reduction, does not make such statements inadmissible. Such statements can also form the basis for a conviction of co-offenders, as long as there is full disclosure and transparency, and the value and the credibility of the evidence is carefully examined by the courts.⁶⁸

Plea bargaining and plea agreements are not in itself incompatible with the fair-trial standard in article 6. The ECtHR accepts various forms of simplified procedures, the

⁶⁴ My knowledge is mainly based on the report 'Plea Bargaining in Georgia: Negotiated Justice' 15. December 2010, available on Transparency International Georgia, (<http://transparency.ge/en/our-research?page=4>) and the summary of the early legal framework of plea-agreements in Georgia in the recent case of *Natsvlishvili and Togonidze*, paras. 40-61, below at note 69.

⁶⁵ See the report 'Strengthening the Rule of Law: Challenges and Opportunities for the Georgian Bar', Report of the International Bar Association's Human Rights Institute (IBAHRI), December 2012. The amount is approx. the same as in the US.

⁶⁶ Report 'Plea Bargaining in Georgia: Negotiated Justice' *op. cit.*, p. 17.

⁶⁷ *Gusinskiy v. Russia*, judgment of 19 May 2004 (appl. 70276/01), para. 76. Violation of articles 5 and 18, because the prosecution detained the applicant also for other reasons than for the purpose of bringing him before the competent legal authority on reasonable suspicion. One of the reasons for the applicant's release and the termination of criminal proceedings was that the applicant, while in prison, had compensated for the harm caused by the alleged fraud, by transferring shares from his company to a State-controlled company (Gazprom).

⁶⁸ See the ECtHR decisions: *X v. the United Kingdom*, decision of 6 October 1976 (appl. 7306/75), *Meneses v. Italy*, decision of 30 November 1994 (appl. 18666/91) and *Mambro and Fioravanti v. Italy*, decision of 9 September 1998 (appl. 33995/96).

accused's right to accept penal orders, and to waive elements of the rights and guarantees under article 6. The ECtHR has stated that any 'waiver must be made in an unequivocal manner and must not run counter to any important public interest.'⁶⁹ The key phrase is that *waivers, pleas and plea-agreements must be made voluntarily and free from any improper pressure.*

In the court's view, different variations of plea agreements are today 'a common feature of European criminal justice systems ... [and] there cannot be anything improper in the process of charge or sentence bargaining in itself.'⁷⁰ Promises in advance of a sentence reduction based on a guilty plea, and agreements on the basis of the plea, will only give rise to issues under article 6 if

*(...) the discrepancy between two sentences was so great that it amounted to improper pressure on a defendant to plead guilty when he was in fact innocent, when the plea bargain was so coercive that it vitiated entirely the defendant's right not to incriminate himself or when a plea bargain would appear to be the only possible way of avoiding a sentence of such severity as to breach Article 3.'*⁷¹

The validity of waivers under a plea-agreement must, according to the ECtHR's most recent case-law, be accompanied by the following conditions:

*(...) (a) the bargain had to be accepted by the first applicant in full awareness of the facts of the case and the legal consequences and in a genuinely voluntary manner; and (b) the content of the bargain and the fairness of the manner in which it had been reached between the parties had to be subjected to sufficient judicial review.'*⁷²

For the whole justice system, and especially for the public prosecution, the line between oppressive or coercive conduct towards the accused in individual cases has to be drawn. Elements of possible 'structural coercion' within the system should also be acknowl-

⁶⁹ See, in general and among others, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990 (appl. 11855/85), para. 66. See also *Deweert v. Belgium*, judgment of 27 February 1980 (appl. 6903/75), violation of article 6 because of undue pressure to accept a 'penal order' (case settlement with a fine as condition) and *Gusinskiy* regarding abuse of power to detain a suspect.

⁷⁰ *Natsvlshvili and Togonidze v. Georgia*, judgment of 29 April 2014 (appl. 9043/05), para. 90.

⁷¹ See *Ahmad and others v. the United Kingdom*, decision of 6 July 2010 (appl. 24027/07 and others), para. 168.

⁷² See *Natsvlshvili and Togonidze*, paras. 90-97. The court (by six to one vote) found no violation, mainly because the plea-agreement was initiated by the applicant himself, represented by lawyers, and was 'undoubtedly conscious and voluntary.'

edged.⁷³ It should be mentioned that English scholars argue, albeit disputably, that a sentence reduction of one-third for guilty pleas places ‘an unfair pressure on those who maintain their innocence...’⁷⁴

The aforementioned requirement of ‘a thorough, objective and impartial analysis of all relevant elements’ of the case is crucial. This must be true both for what is sufficient evidence and what the appropriate sentence would be. But it must also include the legitimacy and appropriateness of any fines or other financial component that can be imposed in - or in the context of - a plea agreement (such as repayments, compensations or retributions).⁷⁵ Some obvious limits of such financial penalties are drawn in the *Deweer* and *Gusinskiy* cases,⁷⁶ but also the public’s perception of objectivity and independency hangs in the balance. What happens to public trust, if the prosecutor’s conduct and decisions create an impression that big thieves are allowed to buy immunity from justice? Obviously, no brief answer can be given to this question.

There are also other boundaries for plea-bargaining and plea-agreements, based on state parties’ positive obligations (detailed above) and victims’ rights. In the aforementioned case of *Dimitrova and others v. Bulgaria* (2011), the prosecution made a plea agreement with the accused, based on the fact and confession of guilt that he had committed a violent act (bodily injuries). The court made it clear that it was not its ‘task to determine whether it was appropriate to conclude the investigation with a plea bargain and whether Mr B.I.’s punishment thus agreed upon was adequate,’ but the agreement and the accused’s confession contradicted several facts in the investigation files; the facts indicated an act of intentional murder involving other perpetrators. Such a prosecutorial decision, and the outcome of the case, was deemed incompatible with the obligation to conduct an effective investigation ‘because the prosecution failed to take available investigative

⁷³ See critics referred to in the *Natsvlishvili and Togonidze* case, paras. 67 and 73: ‘In view of an almost certain conviction, for many defendants plea-bargaining is the only alternative to get a lighter sentence, and a defendant is less likely to bring a justified complaint of ill-treatment if there is a perceived risk that this could undermine the chance to conclude an agreement with the prosecutor.’

⁷⁴ See Ashworth & Redmayne, *The Criminal Process* (Third ed., OUP 2005), p. 292.

⁷⁵ This has been a major concern about the plea agreements in Georgia, see the critics referred in the *Natsvlishvili and Togonidze* case, para. 49 and the abovementioned report ‘Strengthening the Rule of Law: Challenges and Opportunities for the Georgian Bar’, p. 44.

⁷⁶ See note 67 and 69 above.

measures and manifestly disregarded important evidence.’⁷⁷ The ECtHR took a similar approach in the case of *Eremia v. Moldova* (2013).⁷⁸

The concept of plea-bargaining and plea-agreements is indeed a complex and disputed one. The overarching principle should be that any simplified criminal procedure must give sufficient guarantees to secure the overall fairness of the process and its outcome. To lean on the prosecutor’s duty to objectivity and independency in this respect is hardly enough. Plea-agreements call for transparency, rules of disclosure, and an effective system of judicial review, especially to ensure that defendants are not directly or indirectly pressured into accepting plea agreements against their wishes.

8. Closing remarks

Legislators do much to improve compliance with both international standards and practice, but most important are the state’s efforts to ensure that criminal procedure is regulated and operated in accordance with the ECHR. As has briefly been discussed in this article, the ECtHR’s case-law has a strong focus on the objectivity of police and prosecutors, and the court has performed a thorough examination of several aspects of this fundamental obligation. The prosecutors have an obligation to secure this in practice, and the principle of objectivity should be the basis for all their activities in that respect.

⁷⁷ *Dimitrova and others v. Bulgaria*, judgment of 27 January 2011 (appl. 44862/04), para. 86.

⁷⁸ *Eremia v. Moldova*, judgment of 28 May 2013 (appl. no. 3564/11). The prosecutor made a plea agreement with the accused ‘to a less serious offence’ than the alleged act of grave domestic violence, and suspended the investigation for one year under the condition that no reoffending would take place. The court stated that this ‘had the effect of shielding him from criminal liability rather than deterring him from committing further violence against the first applicant, resulting in his virtual impunity,’ in a manner incompatible with positive obligations under art. 3.