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The Difference between the Public Prosecution Intervention as a Principle Party and as a Joined Party in Civil Cases- Nationality suit as a model-

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Abstract :

Although it is legally recognized that the Public Prosecution has inherent jurisdiction over criminal matters, the legislator provided this judicial body the procedural ability to intervene in civil proceedings, either as a principal party or as a joined party. This intervention aims to achieve the public interest and ensure the proper application of justice, due to the legal and political significance that civil cases represent at both the individual and collective levels.

In this research, we will highlight the two forms of this intervention and determine the difference between them Focusing on nationality claims in Algerian legislation and comparative law.

Keywords: intervention ؛ nationality ؛ principle party ؛ .Public Prosecution

Introduction

The law stipulates the intervention of the prosecution in some cases between its parties in order to guarantee the application of the law in a way that achieves the public interest targeted by this legal rule and this intervention helps the judge to reach that aim. The Public Prosecution, as a public procedural body, represents the interests of the social body, and its functions are no longer restricted to the traditional procedures known in the public lawsuit and in the injunctive aspect, but instead include active involvement in civil cases, which are seen as a part of the public affairs of society.

The Public Prosecution's role in civil cases is primarily that of a party, not a judge, and its goal is to ensure that the law is applied properly, even if doing so conflicts with the interests being defended by either party. Additionally, it does not support either the plaintiff or the defendant or both, but rather promotes and defends the law and insists on its proper application.

And the Algerian legislator for example stressed in its last amendment of article 37 of the nationality law* the necessity of involving the public prosecution as a legal representative of the state in every nationality case. It intervenes as a principle party and not merely a joined or a volunteer party. And intervention in both cases is different, from the procedural aspect, in terms of powers and charges and has distinctive adversarial effects.

The French legislation, on the other hand, in accordance with the article 421 and what follows in the Procedural Law, allowed the Public Prosecution to intervene in civil cases as a principle party or as a joined party, depending on the circumstances[1], including, of course, nationality cases, as the Public Prosecution in these cases relates to the lawsuit by intervening in a litigation between its parties, with the intention of expressing its opinion on legal issues for the sake of public interest.

However; there is an essential procedural distinction between the Public Prosecution's participation as a principle party in the civil case and its intervention as a joined party in terms of the roles it performs in each case*.

It is claimed that the Public Prosecution's interaction with the civil case through the prosecution is an exceptional way to perform its role in the civil case,

while its interaction with the civil case to express opinion is the natural way to carry out its role in the civil case (Mekni, 2008).

1- Public prosecution intervention as a joined party in civil cases:

In civil cases, the public prosecution must act as a joined party, unless the legislator makes it a principle party. And the joined party means that the Public Prosecution acts in a neutral way and does not adopt the position of either parties or defend their claim, but rather presents the findings and observations independently, in light of what is required for the proper application of the law.

This is why we find in judicial judgments the phrase "the prosecution has sought the application of the law", which denotes that the prosecution has given an independent view that is in accordance with the law and has not taken a side with either parties. Therefore, when it performs its duties, it is more likely a body that offers guidance or preliminary views to the presiding judge and such opinions may be logical and reasonable which influence the result of the case.

When the case is filed by the opponent and the lawsuit arises between its parties, the Public Prosecution may therefore intervene and act as a joined party. This intervention does not mean that the public prosecution joins one of the parties and defends them, but rather to ensure the proper application of the law.

Jurisprudence considers the Public Prosecution's position when it acts before civil courts as a joined party. Additionally, its intervention in this quality may be obligated when the law imposes this role, as it may be voluntary i.e.; it is free to decide about the type of its intervention in the case.

This designation of the Public Prosecution was met with a sharp criticism by jurisprudence. They argue that the Public Prosecution in this form is not considered a party to the lawsuit because the party, even if it is a joined party, always seeks to achieve a personal interest through that lawsuit. Besides; the Public Prosecution is neither a plaintiff nor a defendant, but seeks to achieve an objective interest, which is the proper application of the law and legitimacy fulfillment.

In fact, the concept of joined party is merely a metaphorical expression recognized by jurisprudence and procedural court, and the Public Prosecution is not considered a party by its intervention. It represents however the public interest in a lawsuit arising between its two parties. It is merely a “formal opponent” that gives an independent opinion in the right and fair way, and also seeks by its intervention to respect the law and nothing more. In other words; it does not join one of the litigants, but rather joins the justice system, and on this basis its powers are determined and limited to expressing its legal opinion in the case, in a way that achieves the integrity of the application of texts and guarantees the validity of procedures (Zouda, 2005).

If the Public Prosecution is in the position of the joined party, its link with the case may be through a notice by one of the parties to the case or by the court clerk or based on an obligatory court order as it may be based on its automatic voluntary intervention where its role is limited to providing objective and

procedural advice and expressing the legal opinion to the judge. This intervention is permissible to the court and to the Judicial Council as well*.

Additionally, this joined intervention of the public prosecution may take the form of a voluntary intervention if it finds interest in that. It may also take the form of obligatory intervention if the legislator stipulates it, like in cases of minors and other cases affecting public order (See articles 99, 102, 114, 125, 182, of the Family Law).

The public prosecution may automatically intervene in the case as soon as it is notified about it. This intervention may be based on the judge's request in order to get its opinion or upon request of one or both of the parties. In all cases, voluntary intervention cannot be restricted under any circumstances since they are primarily connected to the presence of the public interest.

The joining intervention of the Public Prosecution in the civil case is deemed the natural method in which it intervenes in the civil case. Whereas it may, initially, intervene in any cases before the court or the Judicial Council to represent its legal point of view in the litigation. The litigants cannot oppose its intervention, nor can the judge prevent it from expressing its opinion, because it is him who will give the final word in the case, and not the Public Prosecution.

It is noted that all cases of principle intervention by the Public Prosecution are obligatory and not voluntary, unlike cases of joined intervention.

This principle intervention may take place at both the court level and the judicial council level (See article 47 or the Fundamental Law n° 04-11). It is evident that it takes place at the court level as long as this intervention is regarded an obligatory intervention in all cases, because the Public Prosecution is represented by the Attorney General at the Supreme Court (See article 8 and 20 or the Fundamental Law n° 11-12). This customary formation is derived from the French jurisprudence and law.

It is remarkable that the cases in which the Public Prosecution is joined are not solely determined by the legislator. Nevertheless, despite their legal and practical significance, the civil courts rarely turn to the Public Prosecution for advice.

It should be noted that some comparative laws, like those of Egypt and Jordan, for instance, gave the administrative judiciary qualitative authority to consider nationality cases, whether to approve or deny, and these cases must be brought against the Minister of Interior (and not the Minister of Justice). However, this does not deny the necessity of integrating the Public Prosecution as a party in the nationality case (Mekni, 2015).

However, when it acts as a joined party, the Public Prosecution has limited procedural rights and powers. It is only permitted to make observations and nothing else. It is not allowed to make requests or observations after the case file is closed and neither the parties (See articles 266 and 267 of Administrative and Procedural Law). Unless the Public Prosecution believes that it is necessary to dismiss the case and bring it back to the table, which would then allow the litigants to make related requests and defenses.

2- Public Prosecution intervention as a principle party in the civil case:

The Algerian legislator has tried to limit the cases in which the public prosecution must intervene through the article 260 of Civil and Administrative Law. However; if we examine other texts such as the Family Law, Civil Status Law, Nationality Law, etc. we tend to adopt the notion of not limiting it.

Depending on the circumstance, the Public Prosecution may act as either a plaintiff or a defendant in a civil case, provided that the general rules and guidelines for filing lawsuits are followed in this respect.

However, this litigation on the part of the Public Prosecution as a principle party can be divided into two aspects:

A- **Mandatory litigation:** in cases determined by the legislator explicitly in the Procedural Law (article260) or in any law, even in a non procedural field. In this case, the public prosecution does not have discretionary power, and the Public Prosecution cannot refrain from intervening and fulfilling its legal role. And any neglect from any side may result in objective and procedural effects towards the litigants, and may result in disciplinary action for breach of legal duties.

B- **Volunteer litigation:** in cases determined by law, or to defend the public interest, in accordance with the article 261 of Procedural and Administrative Law. This litigation is automatic whenever the public prosecution assumes the presence of a case that relates to the public order. It can also be based on the court's request when it assumes the presence of that principle that calls for its intervention.

And when there is no legal text that grants the Public Prosecution the right to claim as a principle party, and when the case is not related to public order, there is a lack of legal evidence and then it is not possible for the representative of the Public Prosecution to file an initial case against the litigants.

For instance, the public prosecution cannot file a case to claim one of the parties' personal debts and protect them from squandering. The public prosecution has nothing to do with this. On the other hand; its role becomes obligatory if it has to do with claiming the money of a minor person and protecting it from all forms of squandering.

It is noted that the concept of public order, despite its broad and unrestricted nature, may be a reason for the Public Prosecution to automatically intervene in many cases that initially only concern individuals. This is especially true given that the Public Prosecution has the authority to estimate this intervention without making any comments as it may abuse this legal authorization.

It is agreed that the court cannot refuse a case filed by the Public Prosecution if it performed its right of bringing a given case against a person claiming that it harms or is related to public order. Thus; the case will always be admissible in this respect. But, the judge is free and not restricted to the claims of the Public Prosecution, because in terms of subject matter, this claim may be inadmissible for lack of evidence or lack of foundation

This can be illustrated by the example of a seizure lawsuit filed by the prosecution against a person. However; the medical forensic report, which is an obligatory procedure in this kind of cases, showed that he has complete mental

capabilities and is physically and mentally healthy. Thus, it is obvious that the judge in this case refuse the seizure lawsuit filed by the Public Prosecution.

On this basis, comparative jurisprudence did not agree with this point, and was split into two groups; a group that supports the automatic intervention of the Public Prosecution, and a group that opposes it (Bakir, 1974).

The disagreement over how to define the idea of public order continues to be one of the legal terms that still cause controversy between jurists. This is because it is a relative concept that differs from era to era and from state to state, and only serves to accentuate this divergence. This concept is more challenging when it comes to cases involving persons' status, eligibility, and nationality. This is due to the religious and ideological peculiarities of these notions as well as the fact that they relate to the individual and his family.

Besides the cases determined in Article 260 of the Civil and Administrative Procedures Law or on which a special provision is stipulated, such as family, nationality, civil status, and bankruptcy cases, the Public Prosecution may intervene in a civil case as a principal party whenever it seemed necessary, for the aim of achieving the public interest and the rules of fairness and justice.

The Public Prosecution may also automatically rule public order cases and request access to the case file submitted to the court in order to draw its findings therein in compliance to what the proper application of the law requires without having to join one of the disputing parties,.

In this case, it acts as a principle party and has the power to sue the original plaintiffs if they make demands that are illegal and against the law or violate the rules of both objective and procedural law.

Besides, whenever it becomes apparent to the court that a case is of a special nature or that it is connected to the public interest and concerns public order, in its substantive or procedural aspect, the court may, based on its discretion, order that the file be communicated to the Public Prosecution in order to give its conclusions. However, the Public Prosecution in this case shall compel to the court's wishes and does not have the option of refusing the request to intervene, because it overlaps with it in function and purpose.

The actual reality affirms and attests not to notify the Public Prosecution in this manner for multiple reasons. It can be due to negligence from the court taking into consideration the huge quantity of files submitted to the court, or a failure of the referral system to the Public Prosecution which is a no longer effective method, when all of its petitions turned into requests for the law to be applied (Saad, 2012), and possibly as a result of a third factor, which is the Public Prosecution's intervention in the criminal justice system and the variety of fields in which it may do so. This made the public prosecution intervention deliberate out of solidarity between judges for the intention of reducing its workload and limiting its task to only intervene in cases in which the legislator stipulates its intervention without including other issues of little importance.

There is no doubt that assigning the Public Prosecution with more civil cases requires physical and intellectual effort, and the Public Prosecution judge needs then to investigate and research in areas related to civil law, family law,

commercial law, banking law, insurance law, and other areas of private law (especially if he only handles criminal cases). This will significantly drain him, especially the lack of Public Prosecution judges in comparison to the volume of cases being filed.

The Public Prosecution rarely intervenes in civil cases or brings original litigation in that role in legally constrained situations that should not be enlarged, such as nationality cases, family cases, civil status proceedings (See Articles 40, 46, 49, 50 and 89 of the Order No. 70/20 of 02/19/1970), and bankruptcy (Article 266 of the Commercial Law) cases and every matter that affects public order is added by the legislature. In the latter case, the intervention acquires an original and necessary character and is no longer a joined or a volunteer intervention.

The Public Prosecution, in its capacity as the public protector may act to respect this latter. According to established law, even in the absence of clear legislation that grants it this authority, wherever there is public order, there is a representative of the public right.

The Public Prosecution cannot refuse or object the court's decision when it requires its intervention, claiming that the case does not relate to the public order. Because the estimation of the extent to which the filled case relates to public order or not, is a matter for the judicial authority. And the Public Prosecution shall respond to the court's request (Ghali, 1978) and accordingly provide its clarifications and defenses in writing, and it must convince the court authority about its legal view in the litigation.

It is concluded from what was already mentioned that the legislator gave the Public Prosecution a dual role. It allowed it to act in both capacities together and at the same time gave it the authority to decide in which capacity it wanted to intervene in the case, voluntarily or involuntarily.

It is noteworthy that just being required by the law to notify the Public Prosecution of the file or to order that the court must examine the file does not grant it any more quality than that of the joined party.

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4- The difference between the two types of intervention of the Public Prosecution:

The difference between the role of the Public Prosecution as a principle party and as a joined party in a civil case involves specific procedural outcomes. These outcomes consist of whether the Public Prosecution fulfills its tasks as a principle party or is just a joined party. This may be summarized as follows (Bakir, Op. Cit):

- If the Public Prosecution is a principle party, the court authority shall not adjudge in its absence, because the court is not fully formed without the presence of the representative of the public interest. As a result, the name of the Public Prosecution representative must be mentioned in the judgment or judicial decision.

- If the Public Prosecution acts in the position of the principle party in the case, it shall notify the litigant of the papers and announce them. However, if it acts as a

joined party, it does not have to notify the litigant about these papers or announce them. It is the court clerk who is responsible to do so.

Whereas, if it acts as a joined party, it does not announce the papers to the litigants, nor is notified about these documents, but it is the court clerk who is responsible to notify it of the case, and send it the documents thereof.

-If the Public Prosecution acts as a principle party, it speaks as the ordinary party does. In other words it is the first to speak if it acts as a plaintiff and the last to speak if it acts as a defendant. However, if it acts as a joined party, it performs then its intervention by presenting requests and defenses but it is the last to speak, i.e., after the litigants or their lawyers finish presenting their requests and defenses.

- If the Public Prosecution acts as the principle party in the case, it accepts the opponent's decision and may thus make any requests or assert any defenses (Ahmed, 1991). Because the law grants it the right to seek and express what, in its opinion, are the proper aspects of defense in the case like any other ordinary opponent. However, it is committed to organize the litigants and comments on their requests, answers, and responses just like every other litigant.

However, if it acts as a joined party capacity, it is not supposed to express its point of view on the claims and defenses made by the original litigants. It is only required to express its opinion in accordance with the law and the professional conscience; it is not permitted to broaden the case's scope or to make additional demands or draw conclusions that are not followed.

This means that the Public Prosecution assumes a role similar to the work of the technical or legal counselor of the judge, and it must express its opinion, in accordance with the proper application of the law, without targeting the interest of one of the opposing parties. Therefore, the role of the Public Prosecution, when it is litigated as a joined party, is limited to expressing its opinion in terms of legal opinion, and it stops at this point. Regardless how significant, objective, and accurate such opinions may be, the court is not bound by them.

In all of these cases, when the prosecution intervenes by filing a lawsuit, it is deemed a principle party because it is a party with full procedural rights and is thus entitled to appear in all case aspects, during investigations, when moving to locations related to the case, and all these procedures are written in its name, except procedures that does not relate to it like, for instance, assign the swear to it.

Nevertheless, it is established that the "joined" prosecution lacks the ability to confront or argue since it can never make demands in the form of litigation; instead, its job is neutral and determined by the law.

This does not, however, prevent it from holding on defenses relating to matters of public order, even if the parties to the dispute did not hold on them or agreed to waive them, such as the defense of lack of qualitative jurisdiction, the defense of plaintiff's incapacity,…etc

Practically speaking, it should be noted that the majority of public prosecution bodies are almost physically and formally present at the hearings, in addition to the fact that they prepare advance printed matters that they fill out

briefly, requesting either to accept or reject the application or to assign the consideration to the judge, whether it is a principle party or a joined party, and that the least what it gives is a "request to apply the law"

- If the Public Prosecution is associated with the civil case through judicial request, it has then the right to appeal against the judgment rendered against it. Because considering the Public Prosecution a principle party in the case grants it the possibility to perform the methods of appeal if the judgment is not in its favor whether it acts as a plaintiff or a defendant.
- On the other hand, if the Public Prosecution is associated with the civil law through expressing its opinion, i.e.; as a joined party, it is then not permitted to appeal whether the judgment complies with its legal opinion or opposes it*.

The availability of the appeal does not necessarily require notifying the Public Prosecution of the judgment because it is always present, even if it is actually absent. The deadlines for appeals are therefore supposed to apply to it the date of their issuance, not the date of their notification, as applicable in the penal article.

When the Public Prosecution wins the case, the opposing party losing the case will be charged with the judicial expenses (See Article 124 of Law n° 90-36 on the Finance Law of 1991). However; when the Public Prosecution is the losing party, it seems more obvious that the state will be the one charged with these expenses and also with the expenses of the wining party. Public Prosecution is a state representative anyway, and the state is discharged from registration fees and other judicial expenses. But, in fact, this is not a viable solution. Judicial jurisprudence decided that the state bears only its expenses, and the losing party is charged to pay its own fees (Mekdad, 1982). It does not matter therefore his nature and position.

- Based on the general principle, if the Public Prosecution is the one who files the case, in its quality of a principle party in the case, its opposing party is not allowed to disqualify the Public Prosecution judge or request the recusal of its representative. The Public Prosecution judge takes the personality of the real opponent that the opposing party cannot recuse. The rule is that it is not permitted to reject the opponent.

On the other hand, when the Public Prosecution is a joined party in the case, its representative body can be recused by the litigants because the Public Prosecution's position in the case is close to that of the legal representative or the decision-maker, necessitating the expression of an objective opinion which can have a strong influence on the court decision. Thus, it is allowed to request its representative recusal taking into account that the Public Prosecution cannot be recused as an authority but rather as a party (Ghali, Op. Cit.).

It is important to note that the Algerian legislator kept silent regarding ruling in this type of civil cases, but it is established that if the Public Prosecution acts in favor of the joined party*, it is permitted to recuse it as a member. However, if it acts as a joining party itself, it is not permitted to ask for the recusal of judges.

This is what Morocco's legislation specifically complies with (article 299 of the Law of Civil Procedure).

It is believed that because the Public Prosecution acts as a joined party, it neither joins nor defends one of the litigants but is instead required to express its opinion on the matters brought before the judge in a way that achieves the proper application of the law, and as a result, its opinion influences the course of the court. It is therefore acceptable to request the Public Prosecution member's recusal and replacement with another if a circumstance arises that may have an impact on it. If it is established that the Public Prosecution will not express its opinion in the case in an abstract and objective way, which is in conflict with the principle for which the legislator obligated its intervention in the case (Ghali, Op. Cit.).

We shall draw attention to the fact that the Public Prosecution does not have the authority to participate in the judgment formation in the deliberation because doing so would render the decision void (article n° 269 of the Civil and Administrative Law), regardless of whether it is a joining intervention or a principle main intervention in a civil case. It is still considered a defendant in court, and the general rule is that litigants may not carry out duties that are assigned to the tasks of presiding judges.

Additionally, if the Public Prosecution representative position is changed to the position of ruling judge, he is unable to participate in the judgment formation at the level of appeal in the same case in which he provided his opinion as a judge of the public prosecution (Decision of the Personal Status Chamber, 1986). On two levels, this violates the rule of litigation.

It is essential to note that the Public Prosecution body, unlike ruling judges, is subject to progressive or presidential instructions. Because the Public Prosecutor in the Judicial Council can direct written or verbal instructions or orders the representative of the Republic to follow certain procedures in connection with a civil or criminal case, and because the Minister of Justice can also direct instructions and orders to the Public Prosecutor to favorably intervene in court matters or to file a particular case of public interest.

The Public Prosecution's representative being subject to these instructions, however, does not disqualify the Public Prosecution's role or negate its presence as an opponent. However; these interventions could support, defend, and strengthen the position of the representative of the Republic before the court, especially when it is supported by relevant case-related documents that can positively serve the case and help the ruling judge in a way that best serves justice.

It is important to emphasize as well that the Public Prosecution is deemed not responsible of the procedures that took place, favorably or unfavorably. Therefore, it is not possible to order the Public Prosecution a reimbursement due to unfair proceedings, even if it is extremely strict with regard to those actions because, as we previously stated, it is not an opponent in the true sense. Although the Public Prosecution is not questioned about the procedures, but it is still legal to sue its representative directly if certain circumstances exist, such as when the public prosecutor engages in fraud, document destruction, bias, or misuse of their position.

Additionally, the rule in procedures states that it is the losing party in a case who is charged to pay the costs of the legal proceedings (article 417 of the Civil and Administrative Procedures Law). Therefore, the litigants are not always responsible for paying these charges; instead, the public treasury will do so if the public prosecution loses the case (Article 372 of the Commercial Law).

Conclusion

Generally speaking, it is permitted to have a procedural competence in some litigation to intervene or litigate in it as a principle litigant (principle party) or as a secondary litigant (joined party)

It is agreed in the jurisprudence and jurisdiction field, that the Public Prosecution cannot conduct conciliation, request arbitration, or waive the lawsuit in cases in which it intervenes, especially in nationality cases, as long as the Public Prosecution has the right to be associated to the civil lawsuit, and because these issues are related to public order, and because it does not have a personal right that she can act upon.

In this research, we have seen some procedural aspects resulting from the extent of the obligatory litigation of the Public Prosecution in civil cases. We have also investigated the legal importance of this intervention, and we revealed the procedural effect that the law arranged for not integrating the Public Prosecution in civil cases or not being able to view the file or preventing it from expressing its written or oral defenses and requests.

As long as the Public Prosecution litigation is deemed a crucial procedure in civil cases, its violation has a negative impact on the integrity of the procedures. And the penalty stipulated for that is the absolute annulment of the procedure as agreed among jurisprudence and judiciary. Therefore, the judgment or the final decision in this matter is invalid and can be revoked by the Supreme Court, on the basis of violation of laws and ignorance of the crucial procedures stipulated.

We note that the Algerian legislator was not precise regarding cases that are related to the ways of notifying the Public Prosecution with the case file and determining the duration of presenting briefs, and the extent to which the Public Prosecution has the right to appeal and the possibility to recuse its representative. Additionally, the Algerian legislator was not strict regarding the penalty resulting from integrating the Public Prosecution, it neglected to mention this point despite of its great significance from the procedural aspect, even though all the judicial provision and jurisprudence views state that this penalty is the absolute nullity and nothing else, although the rule is that such penalties are determined only by an explicit legal text.

However, we assume that for the appropriate application of the law and the achievement of the legislator's intent, the Public Prosecution, represented by the Attorney General on the court level, shall examine nationality cases registered in the court level. It does not matter the appearance as much as the positive role of the Public Prosecution by submitting its requests, defenses and opinions. However, the appearance of its representative in the hearings is automatic, as it is considered one of the necessities of the court formation. Thus, when the Public

Prosecution gives demands briefs or briefs in reply or a legal opinion in a written form, it achieves the intent of article 37 of nationality law.

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* It is stated in the second paragraph the article 37: "the Public Prosecution is deemed a principle party is all cases intended for the application of the provisions of this law".

[1] Le ministère public peut agir comme partie principale ou intervenir comme partie jointe. Il représente autrui dans les cas que la loi détermine.

* Article 256 of the Law of Civil and Administrative Procedures.

* It is noteworthy that the previous Civil Procedural Law stipulated cases of the Public Prosecution intervention before the court only, while Article 141 of it was included in the provisions for litigation before the Court, and in addition to that, the phrase (the Public Prosecutor) was mentioned, not the Attorney General. This means that the public prosecution at the court level is not obligated to intervene in those particular cases mentioned in this article.

* The French Jurisprudence granted the Public Prosecution the right to appeal, even if it was a joined party, especially if the object of the case was related to matters of public order.

* The legislator stipulated the recusal of ruling judges only in article 241 of the Civil and Administrative Law. And we do not believe that cases of recusal will be applied on the Public Prosecution as long as it is not a ruling judge. It is also a party and the party cannot be recused.

And the legislator confirmed the non recusal of the Public Prosecution in Procedural articles, considering that it is a principle litigant, in the text of article 555 of Procedural Law.