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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**REPORT**

**ON**

**EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE  
OF THE JUDICIAL SYSTEM:**

**PART II – THE PROSECUTION SERVICE**

**Adopted by the Venice Commission  
at its 85th plenary session  
(Venice, 17-18 December 2010)**

**on the basis of comments by**

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## **I. Introduction**

1. By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Ms Däubler-Gmelin, requested the Venice Commission to give an opinion on “European standards as regards the independence of the judicial system”. The Committee is “interested both in a presentation of the existing *acquis* and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe”.

2. When the present report makes recommendations it does so also in reply to the request by the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly to provide proposals for the further development of European standards.

3. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which decided to prepare two reports on the independence of the Judiciary, a first one dealing with Judges (CDL-AD(2010)004, adopted at the 82<sup>nd</sup> plenary session, 12-13 March 2010) and the present one on the Prosecution Service, prepared on the basis of comments by Mr Hamilton (CDL-JD(2009)007), Mr Sørensen (CDL-JD(2008)005) and Ms Suchocka (CDL-JD(2008)004).

4. Following discussions in the Sub-Commission on the Judiciary on 3 June and 16 December 2010 as well as at the plenary session of 4 June 2010, the present report was adopted by the Venice Commission at its 85<sup>th</sup> plenary session (Venice, 17-18 December 2010).

## **II. Relevant texts**

5. A number of international documents exist on prosecutors. To cite only a few:

- Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System,
- The 1990 United Nations Guidelines on the Role of Prosecutors,
- The 1999 IAP (International Association of Prosecutors) Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors,
- The Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on “Judges and Prosecutors in a Democratic Society”
- The European Guidelines on Ethics and Conduct for Public Prosecutors (Council of Europe, “Budapest Guidelines”, 2005)

6. In a number of opinions, the Venice Commission had occasion to make recommendations on constitutional provisions and legislation on the prosecution office, see Part II of the Draft Vademecum on the Judiciary (CDL-JD(2008)001).

## **III. Variety of models**

7. Systems of criminal justice vary throughout Europe and the World. The different systems are rooted in different legal cultures and there is no uniform model for all states. There are, for example, important differences between systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. There are systems

where prosecution is mandatory (the legality principle) and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). In some systems there is lay participation in the fact-finding and/or law-applying process through the participation of jurors, assessors or lay judges, with consequences for the rules of criminal procedure and evidence. Some systems allow for private prosecution while others do not do so or recognise the possibility of private prosecution only on a limited basis. Some systems recognise the interests of a victim in the outcome of criminal proceedings as a "*partie civile*" where others recognise only a contest between the prosecutor representing the public or the state and the individual accused.

8. The relationship between police and prosecutor also varies. In many countries the police are in principle subordinate to the prosecutor's instructions, although often in practice enjoying functional independence. In others the police are in principle independent. In a third model the police and the prosecutor's office are integrated.

9. Over the centuries European criminal justice systems have borrowed extensively from each other so that today there are probably no pure systems which have not imported other important elements from outside. For example, the jury which has its origins in the common law has been extensively adopted into other legal cultures. The public prosecutor itself as an institution was unknown to the common law but today has been taken into every common law system to such an extent that its civil law origin is usually forgotten by common lawyers. It is probably true to say that this borrowing across systems has led to a degree of convergence that is not always acknowledged.

#### **IV. Convergence of systems**

10. The variety in prosecution systems may appear arbitrary and shapeless but in reality it is shaped by and reflects the variety in criminal justice systems themselves. It is possible to identify features and values which are common to virtually all modern criminal justice systems.

11. In the first place, all states regard criminal prosecution as a core function of the state. A crime is a wrong against society as a whole, although in many cases the same act will also amount to a private wrong against the individual victim. If a wrong has merely a private character it is not a crime. However, the definition of wrongs having merely a private character may differ greatly in different jurisdictions.

12. For this reason most systems provide for a monopoly on criminal prosecutions by the state or an organ of the state. The common law world, which originally allowed for private prosecution, has tended over the years to restrict the right to private prosecution if not to abolish it entirely.

13. Because of the nature of a crime as a wrong against society the penalties attaching to criminal conviction are more severe than the consequences for the perpetrator of a civil wrong. The latter is concerned only with restitution and compensation whereas criminal justice is concerned in addition with other purposes, including punishment, the deterrence of wrongdoing and the incapacitation of the offender. Thus, it is usual that criminal conviction requires stricter proof than is needed in the case of a civil wrong and the stigma attaching to criminal conviction is greater than that where judgment is merely for a civil wrong. Criminal convictions sometimes attract other consequences, such as disqualification from holding certain offices or private sector positions or restrictions on entering other countries.

## **V. Qualities of prosecutors**

14. The prosecutor, because he or she acts on behalf of society as a whole and because of the serious consequences of criminal conviction, must act to a higher standard than a litigant in a civil matter.

15. The prosecutor must act fairly and impartially. Even in systems which do not regard the prosecutor as part of the judiciary, the prosecutor is expected to act in a judicial manner. It is not the prosecutor's function to secure a conviction at all costs. The prosecutor must put all the credible evidence available before a court and cannot pick and choose what suits. The prosecutor must disclose all relevant evidence to the accused and not merely the evidence which favours the prosecution case. Where evidence tending to favour the accused cannot be disclosed (for example, because to do so would compromise the safety of another person) it may be the duty of the prosecutor to discontinue the prosecution.

16. Because of the serious consequences for the individual of a criminal trial, even one which results in an acquittal, the prosecutor must act fairly in deciding whether to prosecute and for what charges.

17. A prosecutor, like a judge, may not act in a matter where he or she has a personal interest, and may be subject to certain restrictions aiming to safeguard his or her impartiality and integrity.

18. These duties all point to the necessity to employ as prosecutors suitable persons of high standing and good character. The qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place. Of necessity, a prosecutor, like a judge, will have on occasion to take unpopular decisions which may be the subject of criticism in the media and may also become the subject of political controversy. For these reasons it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision.

19. Of course, where a prosecutor falls short of the required standard, the impartial judge may be able to correct the wrong that is done. However, there is no guarantee of such correction and in any event great damage can be caused. It is evident that a system where both prosecutor and judge act to the highest standards of integrity and impartiality presents a greater protection for human rights than a system which relies on the judge alone.

## **VI. Dangers of incorrect decisions and of interference**

20. Political interference in prosecution is probably as old as society itself. In early societies, indeed, the prosecution power would usually have been entirely in the control of princes who could use it to punish their enemies and reward their friends. History provides many examples of the use of prosecution for improper or political purposes. One need look no further than Tudor England or France both before and during the Revolution and the Soviet system in Eastern Europe. Modern Western Europe may have largely avoided this problem of abusive prosecution in recent times but if this is so it is largely because mechanisms have been adopted to ensure that improper political pressure is not brought to bear in the matter of criminal prosecution. In totalitarian states or in modern dictatorships criminal prosecution has been and continues to be used as a tool of repression and corruption. The existence of systems of democratic control does not give a complete answer to the problem of politically inspired prosecutions. The tyranny of the majority can extend to the use of prosecution as an instrument of oppression. Majorities may be subject to manipulation and democratic politicians may be

subject to populist pressures which they fear to resist, especially where these are supported by campaigning in the media.

21. There are two different but related abuses, which can be related to political interference or erroneous prosecutorial decisions. The first is the bringing of prosecutions which ought not to be brought, either because there is no evidence or because a case is based on corrupt or false evidence. A second, more insidious, and probably commoner, is where the prosecutor does not bring a prosecution which ought to be brought. This problem is frequently associated with corruption but may also be encountered where governments have behaved in a criminal or corrupt manner or when powerful interests bring political pressure to bear. In principle a wrong instruction not to prosecute may be more difficult to counter because it may not be easily made subject to judicial control. Victims' rights to seek judicial review of cases of non-prosecution may need to be developed to overcome this problem. However, the present report will not go into details on this issue.

22. Therefore, the Commission focuses on methods to limit the risk of improper interference, which range from conferring independence on a prosecutor, subject to such powers of review, inspecting or auditing decisions as may be appropriate, to the prohibition of instructions in individual cases, to procedures requiring any such instructions to be given in writing and made public. In this connection the existence of appropriate mechanisms to ensure the consistency and transparency of decision making are of particular importance.

## **VII. Main models of the organisation of the prosecution service**

23. The major reference texts allow for systems where the prosecution system is not independent of the executive, and in relation to such systems concentrate on the necessity for guarantees at the level of the individual case that there will be transparency concerning any instructions which may be given.

24. Nonetheless, for years, the scope or degree of independence which the prosecution office should enjoy has evoked discussion. That stems to a large extent from the fact that European standards allow for two different ways of resolving the position of the prosecution vis-à-vis other state organs:

*“Legal Europe is divided on this key issue between the systems under which the public prosecutor’s office enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. As a prevailing concept, it can be seen, that in the current situation the very notion of European harmonisation round a single concept of a prosecutor’s office seemed premature.”<sup>1</sup>*

25. Consequently, Recommendation (2000) 19 allows for a plurality of models. Its paragraph 13 contains basic guidelines for those states where the public prosecution is part of or subordinate to the Government.

26. Nonetheless, only a few of the countries belonging to the Council of Europe have a prosecutor’s office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Commission notes that there is a widespread tendency to allow for a more independent prosecutor’s office, rather than one subordinated or linked to the executive. For example, in Poland recent amendments to the Law on the Prosecutor’s Office separated the role of the Ministry of Justice from that of the Prosecutor General. Also, it is important to note that in some countries, subordination of the prosecution service to the executive authority is more a question of principle than reality in the sense that the executive is in fact particularly careful

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<sup>1</sup> Recommendation Rec(2000)19, Explanatory Memorandum p.11.

not to intervene in individual cases. Even in such systems, however, the fundamental problem remains as there may be no formal safeguards against such intervention. The appearance of intervention can be as damaging as real interference, as can be seen in the current Austrian debate on the power of the executive to give instructions to the prosecutors.

27. The tendency described above is visible not only among the civil law member states of the Council of Europe but also in the common law world. The federal prosecution service in Canada recently moved from the model of a service as an integral part of the Attorney General/Ministry of Justice to the model of an independent Director of Public Prosecutions (DPP). Northern Ireland has now also established its DPP's Office as independent. England and Wales and Ireland have also all seen the gradual elimination of police powers to prosecute, which was a traditional feature of common law systems, in favour of a public prosecutor.

28. Apart from those tendencies, there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court. The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general.

#### **A. "Internal" and "external" independence**

29. A clear distinction has to be made between a possible independence of the prosecutor's office or the Prosecutor General as opposed to the status of prosecutors other than the prosecutor general who are rather 'autonomous' than 'independent'. The prosecutor's offices are often referred to as 'autonomous' and individual prosecutors would be referred to as 'independent'.

30. Any 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). General instructions, for example to prosecute certain types of crimes more severely or speedily, seem less problematic. Such instructions may be regarded as an aspect of policy which may appropriately be decided by parliament or government.

31. The independence of the prosecution service as such has to be distinguished from any "internal independence" of prosecutors other than the prosecutor general. In a system of hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for non-interference from their hierarchical superior.

32. In order to avoid undue instructions, it is essential to develop a catalogue of such guarantees of non-interference in the prosecutor's activities. Non-interference means ensuring that the prosecutor's activities in trial procedures are free of external pressure as well as from undue or illegal internal pressures from within the prosecution system. Such guarantees should

cover appointment, discipline / removal but also specific rules for the management of cases and the decision-making process.

33. In the following chapters of this report, guarantees relating to the Prosecutor General, other prosecutors and some structural elements (Prosecutorial Council, training) will be discussed. As pointed out above, the present report refers both to existing standards and proposals for future ones.

## VIII. Prosecutor general

### A. Appointment and dismissal

34. The manner in which the Prosecutor General is appointed and recalled plays a significant role in the system guaranteeing the correct functioning of the prosecutor's office. In its opinion on the Regulatory Concept of the Constitution of the Republic of Hungary, the Venice Commission stated:

*"It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore **professional, non-political expertise should be involved in the selection process**. However, it is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, *carte blanche* in the selection process. It is suggested, therefore, that **consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government.**"<sup>2</sup>*

35. No single, categorical principle can be formulated as to who - the president or Parliament - should appoint the Prosecutor General in a situation when he is not subordinated to the Government. The matter is variously resolved in different countries. Acceptance of the principle of cooperation amongst state organs seems a good solution as it makes it possible to avoid unilateral political nominations. In such cases, a consensus should be reached. In any case, the right of nominating candidates should be clearly defined. **Advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.**

36. In countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by **providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to achieve consensus on such appointments.** However one would need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock.

37. It is important that the Prosecutor General should not be eligible for re-appointment, at least not by either the legislature or the executive. There is a potential risk that a prosecutor who is seeking re-appointment by a political body will behave in such a manner as to obtain the favour of that body or at least to be perceived as doing so. **A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office should not coincide with Parliament's term in office.** That would ensure the greater stability of the prosecutor and make him or her independent of current political change.

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<sup>2</sup> Emphasis added, CDL(1995)073rev., chapter 11.



38. **If some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment** so that again no question of attempting to curry favour with politicians arises. . On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his term of office.

39. The law on the prosecutor's office should clearly define the conditions of the Prosecutor's pre-term dismissal. In its Opinion on the Draft Law of Ukraine amending the Constitutional Provisions on the Procuracy, the Commission found that:

***'The grounds for such dismissal would have to be prescribed by law. (...) The Venice Commission would prefer to go even further by providing the grounds for a possible dismissal in the Constitution itself. Moreover, there should be a mandatory requirement that before any decision is taken, an expert body has to give an opinion whether there are sufficient grounds for dismissal'***.<sup>3</sup>

40. In any case, **the Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament.**

## **B. Public accountability of the prosecutor's office**

41. Like any state authority, including judges, the prosecutor's office needs to be accountable to the public. A traditional means to assure accountability is control by the executive, which provides indirect democratic legitimacy through the dependence of the executive on the elected Parliament. Another means is control by a prosecutorial council, which cannot be an instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament.

42. In many systems there is accountability to Parliament. In countries where the prosecutor general is elected by Parliament, it often also has the power to dismiss him or her. In such a case, a fair hearing is required. Even with such a safeguard, there is a risk of politicisation: *"Not only is there a risk of populist pressure being taken into account in relation to particular cases raised in the Parliament but parliamentary accountability may also put indirect pressure on a prosecutor to avoid taking unpopular decisions and to take decisions which will be known to be popular with the legislature."*<sup>4</sup> Consequently, **accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out.**

43. It is important to be clear about what aspects of the prosecutor's work do or do not require to be carried out independently. **The crucial element seems to be that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature.** However, **the making of prosecution policy** (for example giving priority to certain types of cases, time limits, closer cooperation with other agencies etc.) seems to be an **issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role.**

44. Some **specific instruments of accountability** seem necessary especially in cases where the prosecutor's office is independent. The **submitting of public reports by the Prosecutor General could be one such instrument.** Whether such reports should be submitted to Parliament or the executive authority could depend on the model in force as well as national traditions. When applicable, in such reports the **Prosecutor General should give a transparent account of how any general instruction given by the executive have been implemented.** Guidelines for the exercise of the prosecutorial function and codes of ethics for

<sup>3</sup> Emphasis added, CDL-AD(2006)029, paragraph 34.

<sup>4</sup> CDL-AD(2007)011. Opinion on the Draft Law on the Public Prosecutors Office and the Draft Law on the Council of Public Prosecutors of "the former Yugoslav Republic of Macedonia", para. 25.

prosecutors have an important role in standard setting. These may be adopted by the prosecution authorities themselves or may be adopted by Parliament or by Government.

45. The fact that so much of the prosecutor's work is subject to scrutiny by courts of law also provides a form of accountability. In systems where the prosecutor does not control the investigation, the relationship between the prosecutor and the investigator necessarily creates a degree of accountability. **The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability.**

46. Finally, prosecution offices like other state organs are accountable for public expenditure through whatever public auditing procedures are in place and this would be so in every jurisdiction.

## **IX. Prosecutors other than the Prosecutor General**

### **A. Appointment**

47. In order to allow them to exercise their functions in accordance with the law, appropriate legal qualifications are indispensable for all levels of prosecutors, including the prosecutor general.

48. In view of the special qualities required for prosecutors, it seems inadvisable to leave the process of their appointment entirely to the prosecutorial hierarchy itself. Various methods can help to remove the danger that within a monolithic prosecution system instructions from above count more than the law. **In order to prepare the appointment of qualified prosecutors expert input will be useful.** This can be done ideally in the framework of an independent body like a democratically legitimised Prosecutorial Council or a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment. Such a body could act upon a recommendation from the Prosecutor General with the body having the right to refuse to appoint a person but only for good reason.<sup>5</sup>

49. In some countries, the career of the prosecutors is regulated by the law, which provides for the progression of the promotions and for the appointment to new offices in the frame of the carrier. In this case, prosecutors have rights and interests which are covered by the law and should be guaranteed through the possibility of challenging before a court decisions which do not comply with the law's provisions.

50. **Prosecutors should be appointed until retirement.** Appointments for limited periods with the possibility of re-appointment bear the risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her.

### **B. Discipline**

51. The system of discipline is closely linked to the issue of the hierarchical organisation of the prosecutor's office. In such a system, disciplinary measures are typically initiated by the superior of the person concerned.

52. **In disciplinary cases,** including of course the removal of prosecutors, **the prosecutor concerned should also have a right to be heard** in adversarial proceedings. In systems where a Prosecutorial Council exists, this council, or a disciplinary committee within it, could

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<sup>5</sup> CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova , para. 44

handle disciplinary cases. **An appeal to a court against disciplinary sanctions should be available.**

### **C. Guarantees of non-interference into the work of prosecutors other than the prosecutor general**

53. As pointed out above, the “independence” of prosecutors other than the prosecutor general, unlike that of individual judges, is not an absolute value. There is a tension between the need to decide on the approach to the individual case on the basis of the prosecutor’s conscience and the need to ensure consistency of approach and the application of the principles and guidelines which have been established. It is legitimate to have a system of prosecution which is organised on a hierarchical way, and in which a decision of a prosecutor may be overruled by a senior prosecutor when it runs counter to general instructions.

54. A key element in order to determine whether instructions to prosecutors other than the prosecutor general in individual cases are permissible is the question of whether prosecutors have discretion not to prosecute where a prosecution is not in the public interest as in countries where the opportunity principle applies, or alternatively whether the principle of legality applies and prosecutors are obliged to prosecute cases under their competence. While common law countries invariably operate the opportunity principle both the legality principle and the opportunity principle are found in civil law systems.

55. In systems which have the legality principle, instructions not to prosecute can easily be illegal if the conditions for the termination of a case are not met. This is also the case in systems which have the opportunity principle if the instruction is based upon improper reasons. Conversely, in all systems, instructions to prosecute when the necessary elements (suspicion, proof etc.) are not met would be illegal.

56. In most cases the decision to prosecute will be made simply on the basis of whether there is sufficient evidence to prosecute. In some cases, there may be matters unrelated to the weight of evidence tending to suggest that a prosecution may be undesirable. These may relate to the circumstances of the offender or the victim, or to the damage a prosecution might cause to the interests of a third party. Exceptionally, there may be cases where a prosecution would risk causing damage to wider interests, social, economic or relating to questions of security. Where such public interest questions arise, care should be taken not to violate the rule of law, and while the prosecutor may think it wise to consult with persons having a special expertise, he or she should retain the power to decide whether a prosecution is in fact in the public interest. If the prosecutor can be subject to an instruction in such a case, then that instruction should be reasoned and where possible open to public scrutiny.

57. In a hierarchical prosecution system instructions may be given at the level of an individual case provided certain safeguards are met. Point 10 of Recommendation 2000 (19) reads:

*“All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.”*

58. Consequently, where a prosecutor other than the prosecutor general is given an instruction he or she has a right to have the instruction put in writing but **Recommendation 2000 (19) does not prevent the allegedly illegal instruction from being given nonetheless.** The prosecutor is also entitled to initiate a procedure to allow for his or her replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience. The wording of point 10 also leaves open the possibility of such a procedure being initiated by

the hierarchical superior who might have an interest in replacing a prosecutor other than the prosecutor general daring to contest the legality of the instruction given.

59. The Commission is of the opinion that these **safeguards are not adequate and should be further developed**. An allegation that an instruction is illegal is very serious and should not simply result in removing the case from the prosecutor who has complained. **Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.**

60. A means of influencing a prosecutor is his or her transfer to another prosecutor's office without their consent. Threats of such transfers can be used as an instrument for applying pressure on the prosecutor or a "non obedient" prosecutor can be removed from a delicate case. **Again, an appeal to an independent body like a Prosecutorial Council or similar should be available.**

#### **D. Immunity, restraint and security**

61. **Prosecutors should not benefit from a general immunity**, which could even lead to corruption, but from functional immunity for actions carried out in good faith in pursuance of their duties.

62. There are various standards on the acceptability of involvement of civil servants in political matters. **A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges. Prosecutors should avoid public activities that would conflict with the principle of their impartiality.**

63. Another practical issue which is important both for prosecutors and for judges is the question of security. Obviously, it is important that prosecutors and judges are not intimidated by anybody and are given the necessary physical protection to enable them to carry out their duties impartially and without favour. The International Association of Prosecutors has recently adopted standards in relation to security for prosecutors.

#### **X. Prosecutorial Council**

64. A Prosecutorial Council is becoming increasingly widespread in the political systems of individual states. A number of countries have established prosecutorial councils<sup>6</sup> but there is no standard to do so.

65. If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system. Where they exist, in addition to participating in the appointment of prosecutors, they often also play a role in discipline including the removal of prosecutors.

**66. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If**

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<sup>6</sup> While there are specialised prosecutorial councils for example in Bosnia and Herzegovina, Moldova (CDL(2008)055), Montenegro (CDL(2008)023), Serbia (CDL(2009)103) and "the Former Yugoslav Republic of Macedonia" (CDL(2007)023), France, Italy and Turkey (CDL(2010)125) have judicial councils, which are also competent for prosecutors (however, with a separate chamber for prosecutors in France; see also footnote 7 below).

**members of such a council were elected by Parliament, preferably this should be done by qualified majority.** If prosecutorial and judicial councils are a single body, **it should be ensured that judges and prosecutors cannot outvote the other group in each others' appointment and disciplinary proceedings** because due to their daily 'prosecution work' prosecutors may have a different attitude from judges on judicial independence and especially on disciplinary proceedings. In such a case, the Council could be split in two chambers, like in France, where the *Conseil supérieur de la magistrature* sits in two chambers, which are competent for judges and prosecutors respectively<sup>7</sup>).

67. The effects of the decisions of prosecutorial councils can vary. Their decisions could have a direct effect on the prosecutors or could be only of advisory nature, thus requiring their implementation by the Ministry of Justice. The former is to be preferred because it takes away discretion from the Ministry and leaves less opportunity for political interference in the prosecutors' careers.

68. It would be difficult to impose a single model of such a council in all the states of the Council of Europe. Moreover, the existence of such a Council cannot be regarded as a uniform standard binding on all European states.

## **XI. Remuneration and training**

69. Like for judges, **remuneration in line with the importance of the tasks performed is essential for an efficient and just criminal justice system.** A sufficient remuneration is also necessary to reduce the danger of corruption of prosecutors.

70. Appropriate training should be available for prosecutors throughout their career. The importance of training for prosecutors is certainly of the same level as that for judges. Such training should include legal, including human rights, training as well as managerial training, especially for senior prosecutors. Again, **an expert body like a Prosecutorial Council could play an important role in the definition of training programmes.** For reasons of cost and efficiency, synergies could be found in common training for prosecutors and judges.

## **XII. Dangers of excessive powers of the prosecutor's office for the independence of the Judiciary**

71. A distinction needs to be made between the interests of the holders of state power and the public interest. The assumption that the two are the same runs through quite a number of European systems. Ideally the exercise of public interest functions (including criminal prosecution) should not be combined or confused with the function of protecting the interests of the current Government, the interests of other institutions of state or even the interests of a political party. In many countries the function of asserting public interest, outside the field of criminal prosecution, would rest with an ombudsman or with an official such as the Chancellor of Justice in Finland. There are a number of democracies where the two functions of defending state interest and public interest are combined, as in the Attorney General model in some common law countries. The functioning of such a system however depends on legal culture, and especially in younger democracies, where there is a history of abuse of prosecution for political goals, special precautions are needed.

72. In the course of its work on individual countries, the Venice Commission has sometimes been critical of excessive powers of the prosecutor's office. In the Soviet system, the

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<sup>7</sup> Until the entry into force of the amended Article 65 of the Constitution of France on 23 January 2011 (by virtue of the Organic Law n°2010-830 of 22 July 2010), the *Conseil de la Magistrature* has a majority of five judges in the "judge's chamber" and a majority of five prosecutors in the "prosecutor's chamber". The reform adds 6 "qualified personalities" from civil society to each of the chambers.

prosecutor's office was a powerful means to control the judiciary and in a few countries remnants of this system linger on. There is a danger that an over-powerful prosecution service becomes a fourth authority without accountability. Avoiding this risk is one of the aims of the present report.

73. This issue is closely linked to the question of what powers the prosecution service should have. There is a very strong argument for confining prosecution services to the powers of criminal prosecution and not giving them the sort of general supervisory powers which were commonly found in "prokuratura" type systems. The question seems very much one of checks and balances within the system. In any case, **prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges. In some countries a 'prosecutorial bias' seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole.**

74. While it is of course normal and permissible for prosecution services to control the investigation, in some ways where the prosecutor does not control the investigation this in itself reduces the possibility for an over-powerful prosecution which can abuse that authority. While there are weaknesses in the model whereby the prosecutor and investigator are separate, one advantage of such a system is to reduce the risk of an over-powerful institution abusing its powers. On the other hand, it creates a greater risk that the police will abuse their powers.

75. Already in Part I of the present report on the Independence of Judges the Commission insisted that:

*"Judicial decisions should not be subject to any revision outside the appeals process, in particular not through a protest of the prosecutor or any other state body outside the time limit for an appeal."*<sup>8</sup>

76. This excludes the Soviet system of *nadzor*, giving the prosecutor a general task to oversee legality and even to re-open cases – including in civil law between private parties - decided in final instance when the prosecutor deems that the law has been applied incorrectly. Of course, the Venice Commission's strong stance against such powers do not exclude a request to a court to re-open proceedings. However, the decision on re-opening a case has to remain with a court, not the prosecutor.

#### **A. Prosecution powers outside the criminal law field**

77. While it does not do so in absolute terms, the Venice Commission has consistently advocated that the **prosecution service should have its primary focus on the criminal law field.**<sup>9</sup> It is not uncommon that prosecutors' offices do exercise other functions. However, where other functions are exercised they must not be functions which interfere with or supplant the judicial system in any way. Where prosecutors have power to question the decision of a court, they must do so by exercising a power of appeal or a power to seek a review of a decision just as any other litigant might do. It has to be acknowledged that even in private litigation there may be a public interest which requires to be defended or asserted before the court and there is no objection in principle to it being a function of the prosecutor to do so provided that the ultimate say rests with the court.

78. In its Opinion no. 3 (2008) on the Role of Prosecution Services outside the Criminal Law Field, the Consultative Council of European Prosecutors, correctly states that "[t]here are no common international legal norms and rules regarding tasks, functions and organisation of

<sup>8</sup> CDL-AD(2010)004, paragraph 82.13.

<sup>9</sup> CDL-JD(2008)001, for an overview of the European practice on this issue see the report by Mr. András Varga for the CCPE ([CCPE-Bu\(2008\)4rev](#)).

*prosecution service outside the criminal law field". The opinion goes on insisting that "it is the sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests ...".<sup>10</sup>*

79. While the Venice Commission fully agrees on the key importance of the respect of human rights by prosecutors, Opinion 3 seems to hint that under certain conditions the protection of "women and children"<sup>11</sup> could be a task not only for ombudspersons but also for prosecutors.

80. In its opinion on a draft law on the prosecution Service of Moldova, the Commission had opportunity to comment on the power of the prosecutor to *"initiate civil proceedings to secure the protection of the rights, freedoms and interests of juveniles, elderly or disabled persons, or persons who due to their state of health are unable to take proceedings."* The Commission found that *"[g]iven that the main task of the prosecutor is to represent the interest of the state and general interest, it may also be questioned whether the prosecutor is necessarily the most appropriate person to undertake this function."*<sup>12</sup>

81. Further, in its Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, the Venice Commission found that:

*"In the opinion of [the] Consultative Council of European Prosecutors the constitutional history and legal tradition of a given country may thus justify non penal functions of the prosecutor. This reasoning can, however, only be applied with respect to democratic legal traditions, which are in line with Council of Europe values. The only historical model existing in Ukraine is the Soviet (and czarist) model of 'prokuratura'. This model reflects a non-democratic past and is not compatible with European standards and Council of Europe values. This is the reason why Ukraine, when joining the Council of Europe, had to enter into the commitment to transform this institution into a body which is in accordance with Council of Europe standards.*

**17. [...] The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office."**<sup>13</sup>

82. This is in line with Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe, which points out that the various non-penal law responsibilities of public prosecutors *"give rise to concern as to their compatibility with the Council of Europe's basic principles"* and that *"it is essential ... that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function"* (paragraph 7).

83. Especially, when the prosecutor has to act against the state, claiming for example social benefits on behalf of such vulnerable persons, he or she would be in a clear situation of conflict of interest between the interest of the state, which the prosecutor represents and the interest of the individual he or she is obliged to defend. This position of the Venice Commission to restrict the task of prosecutors to the criminal field however does not rule out other powers performed by prosecutors, like representing the financial interests of the state where such a conflict of interests cannot be expected. The Committee of Ministers of the Council of Europe and its CDCJ currently work on the preparation of a recommendation to limit such powers.

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<sup>10</sup> Paragraph 31.

<sup>11</sup> Paragraph 33.

<sup>12</sup> CDL-AD(2008)019, paragraph 30.

<sup>13</sup> CDL-AD(2009)048, adopted by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009), emphasis added.

### **XIII. Conclusion**

84. The case for the independence of Judges, discussed in Part I of the present report is a clear cut one. Separation of powers and the right to a fair trial are inconceivable without independent judges. This is less obvious for prosecutors, especially in the light of the variety of systems ranging from independence to full integration into the executive power.

85. In view of this diversity, the present Part II of the Report on the Prosecution Service focuses on guarantees for the prosecution service from outside pressures. Especially when there is subordination of the prosecution to the executive, such guarantees are required in order to shield the former from undue political influence by the latter. Among other guarantees discussed in this report, a frequently used tool is the establishment of an independent board of prosecutors or prosecutorial council, dealing with appointments, promotion and discipline.

86. The 'independence' of prosecutors is not of the same nature as the independence of judges. While there is a general tendency to provide for more independence of the prosecution system, there is no common standard that would call for it. Independence or autonomy are not ends in themselves and should be justified in each case by reference to the objectives sought to be attained.

87. In order to provide for guarantees of non-interference, the Venice Commission recommends:

1. In the procedure of appointing a Prosecutor General, advice on the professional qualification of candidates should be taken from relevant persons such as representatives of the legal community (including prosecutors) and of civil society.
2. In countries where the Prosecutor General is elected by Parliament, the danger of a politicisation of the appointment process could be reduced by providing for the preparation of the election by a parliamentary committee
3. The use of a qualified majority for the election of a Prosecutor General could be seen as a mechanism to promote a broad consensus on such appointments.
4. A Prosecutor General should be appointed permanently or for a relatively long period without the possibility of renewal at the end of that period. The period of office of the Prosecutor General should not coincide with Parliament's term in office.
5. If some arrangement for further employment for the Prosecutor General (for example as a judge) after the expiry of the term of office is to be made, this should be made clear before the appointment. On the other hand, there should be no general ban on the Prosecutor General's possibilities of applying for other public offices during or after his term of office.
6. The grounds for dismissal of the Prosecutor General must be prescribed in law and an expert body should give an opinion whether there are sufficient grounds for dismissal.
7. The Prosecutor General should benefit from a fair hearing in dismissal proceedings, including before Parliament.
8. Accountability of the Prosecutor General to Parliament in individual cases of prosecution or non-prosecution should be ruled out. The decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy seems to be an issue where the Legislature and the Ministry of Justice or Government can properly have a decisive role.
9. As an instrument of accountability the Prosecutor General could be required to submit a public report to Parliament. When applicable, in such reports the Prosecutor General should give a transparent account of how any general instruction given by the executive have been implemented.



10. The biggest problems of accountability (or rather a lack of accountability) arise, when the prosecutors decide not to prosecute. If there is no legal remedy - for instance by individuals as victims of criminal acts - then there is a high risk of non-accountability.
11. In order to prepare the appointment of qualified prosecutors other than the prosecutor general, expert input will be useful.
12. Prosecutors other than the Prosecutor General should be appointed until retirement.
13. In disciplinary cases the prosecutor concerned should have a right to be heard.
14. An appeal to a court against disciplinary sanctions should be available.
15. The safeguard provided for in Recommendation 2000 (19) against allegedly illegal instructions is not appropriate and should be further developed because it does not prevent an allegedly illegal instruction from being given. Any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction.
16. Threats of transfers of prosecutors can be used as an instrument for applying pressure on the prosecutor or a "non obedient" prosecutor can be remove from a delicate case. An appeal to an independent body like a Prosecutorial Council or similar should be available.
17. Prosecutors should not benefit from a general immunity,
18. A prosecutor should not hold other state offices or perform other state functions, which would be found inappropriate for judges and prosecutors should avoid public activities that would conflict with the principle of their impartiality
19. Where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority.
20. If prosecutorial and judicial councils are a single body, it should be ensured that judges and prosecutors cannot influence each others' appointment and discipline proceedings
21. Remuneration of prosecutors in line with the importance of the tasks performed is essential for an efficient and just criminal justice system.
22. An expert body like a Prosecutorial Council could play an important role in the definition of training programmes.
23. Prosecutor's actions which affect human rights, like search or detention, have to remain under the control of judges.
24. In some countries a 'prosecutorial bias' seems to lead to a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole.
25. The prosecution service should have its primary focus on the criminal law field.