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**REPORT**

**ON THE RELATIONSHIP BETWEEN JUDGES AND PROSECUTORS**

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## Introduction

1. The Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) both have the task to annually draft an opinion to the attention of the Committee of Ministers of the CoE on a given theme. For 2009 the Committee of Ministers wishes these two bodies to draft an opinion in common. The draft is prepared by a working group consisting of members of either councils. For 2009 the theme is:

### **“The relations between judges and prosecutors”**

2. Public prosecutors and judges are major players in the administration of criminal justice. During the whole criminal process there are important relations between judges and prosecutors. During the investigation of major crimes by the police rather often special investigation methods have to be applied and coercive measures have to be taken.

3. In many CoE countries no special investigation methods can be applied nor coercive measures can be taken by the police or the prosecution service without a prior warrant by the court or a judicial order. In particular special investigation methods or coercive measures that seriously infringe constitutional rights like the search of premises, taking a suspect into custody, interception of communication, monitoring or technical surveillance require in many countries a judicial warrant.

4. Before a judicial warrant can be issued the court or a judge has to assess the compliance with the statutory requirements of the methods or measures. After the termination of the investigation the public prosecutor has to decide upon the prosecution. Are there sufficient reasons of public interest to address the court? In the majority of the CoE countries once the prosecutor has decided to prosecute, the court has to deal with the criminal case. The court does not have the power to refuse a case, e.g. due to the lack of public interest.

5. The court, however, can dismiss a case when the prosecution service presents evidence that is illegally obtained or when the prosecution service otherwise acted seriously unfair. Furthermore the court may acquit the suspect due to insufficient evidence of guilt.

6. The court may control and assess the investigation and prosecution activities of the public prosecutor and when these have been legal and fair, may impose a sentence in case of sufficient evidence and proof of guilt. The public prosecutor on his turn enjoys the possibility of lodging an appeal with a higher court when he disagrees with the judgement or the verdict until the court in highest instance gives a final decision.

7. From the early beginning of the process of the administration of criminal justice until the end of the process, i.e. the implementation of the sentence, public prosecutors and judges in many matters have to cooperate. Public prosecutors and judges, although separate institutions, are related to each other as the congruent spirals in a DNA double helix.

8. Before starting the preparatory work of an opinion, for further depth and knowledge in this field, the members of the working groups need a precise presentation of the different status between judges and prosecutors as well as the differences amongst prosecutors in the different Member States of the CoE. I have been asked to prepare such a presentation (email secretary CCJE December 8, 2008). In the instructions I received it was underlined that the presentation should not be a detailed document precisising the situation in each Member State but a presentation of the different group of status, with examples of States, in order to better understand what sort of relationship can exist between judges and

prosecutors. On January 10, 2009 I received the information note CCJE-GT(2009)3 containing preliminary views by the CCJE Delegations on the content of the opinion.

9. I have taken these preliminary views as starting point for this report. In this report I will deal with:

**Constitutional safeguards or constitutional law considerations about the link between independence of judges and an independent exercise of prosecution, in particular with reference to instructions from the executive branch.**

10. Instructions by the executive branch as a rule will be issued in relation to the utilization of discretionary power. When the prosecution service has the absolute statutory obligation to prosecute every crime that is brought to its attention, provided that sufficient evidence of guilt exists, instructions by the executive branch cannot have an impact on the prosecution.

11. Instructions are used as an instrument to pursue a prosecution policy and to reduce the discretion of individual public prosecutors. Therefore the *first chapter* deals with discretion and instructions.

12. In many CoE Member States the prosecution service may exercise discretionary power to waive a case or to divert a case without any control or interference of a criminal court. Only in a few countries (like Germany) the court may be involved in a decision to waive a case or to apply a diversionary measure. In such cases a judicial authorisation may be necessary. An important item under this heading will be the question how uniformity in the use of prosecutorial discretion can be achieved and who may control the prosecutorial decision.

13. In a number of CoE Member States, where the prosecution service is empowered to apply discretionary power to waive a case, the interested party can file a protest against such decision by lodging a complaint with a court. The court then examines the manner in which the discretionary power over the prosecution was exercised. The court may order the initiation of prosecution if it holds the opinion that the public prosecutor misused his discretionary power.

14. Such an avenue does not exist in the legal systems where the public prosecutor is in general required to obtain the consent of a judge before he can waive prosecution on the ground of expediency (for example Germany), or in countries adhering strictly to the legality principle. This avenue seems to be an element that influences the level of independence of the prosecution as well.

15. The second chapter deals with the level of dependence or independence of the prosecution service. What is the present situation within the Council of Europe Member States? What various types of (in)dependence exist and are there major differences in dependence or independence between the prosecution services in Western, Central and Eastern European countries? In case the prosecution service is dependent and public prosecutors do not have a similar status as judges, what measures can be taken to avoid that its relation to the executive power and its institutional dependence may be abused by political authorities? How can be prevented that political authorities prevent certain offences being submitted for assessment by a judicial authority?

16. In the third chapter I will deal with some special topics related to the relation between the public prosecutor and the judge. The first topic is the impact of simplified criminal procedures on the role of public prosecutors. In some countries in the CoE one can see a trend to vest the public prosecutor with adjudicatory powers. That seriously changes his relation with the judge. The second topic is whether a public prosecutor is considered to be a

magistrate or a civil servant. As a magistrate he seems to be less dependent from the executive branch than him being a civil servant. The third topic is the professional status of public prosecutors and judges.

## **I. Discretion and instructions related to the prosecution of crimes**

### *1. Introduction*

17. One remarkable feature of present day criminal law enforcement in the majority of the CoE countries is that only a small percentage of all the crimes recorded by the police are actually tried by criminal courts.

18. One important reason for the discrepancy between the number of registered crimes and crimes tried by courts, is that the public expenditure for the law enforcement agencies at large has not kept pace with the rising crime rate. Consequently, the police have been increasingly forced, because of resource considerations, to fix priorities in detecting and investigating crimes.

19. A second reason why relatively few cases are tried by criminal courts is that in many countries an increasing number of cases are settled out of court by the prosecution service. While this movement originally was driven by efforts to socialise, humanise and rationalise the administration of criminal justice, the emphasis has increasingly shifted towards the need to reduce the pressure on the criminal law administration.

20. The prosecution service in many countries in Europe is vested with powers to divert cases out of the formal flow of criminal justice and to deal with criminal cases outside formal court procedures, e.g. when the prosecution service decides to waive a case and not to proceed further with it or to divert the offence to a settlement or reconciliation between the victim and offender, without further involvement of the criminal justice system.

21. Other such methods include the use of a caution, an oral or a written admonition, a transaction, a simplified procedure, a referral to legal bodies other than the criminal courts, and various other forms of diversion. These methods aim at diverting the suspect out of the criminal justice system at the earliest possible stage. Once such an alternative method has been applied in a case, prosecution can no longer take place and no judicial assessment of the crime takes place.

22. The extent to which the prosecution service diverts cases away from the criminal justice system primarily depends on the legal basis for the prosecutorial power.

### *2. The utilisation of discretion by prosecutors and judges*

23. Both the public prosecutor and the judge are exercising powers: prosecutorial power and judicial power. The power shall be exercised in the benefit of a proper administration of justice and in accordance to law.

24. Both public prosecutors and judges have margins of discretion when exercising power. There are two major fields where prosecutors and judges exercise discretionary power. Public prosecutors may exercise discretionary power when deciding on prosecution or non-prosecution and judges may exercise discretionary power when deciding on sentencing.

25. The prosecutorial decisions made by prosecutors influence other actors in the criminal justice framework. Not only does his decision involve profound consequences for the offender, but repeated refusals to prosecute certain crimes may also lead to a decline in the investigation and charging of such offences by the police. In addition, the charges brought

against an accused largely delineate the adjudicatory and dispositional functions of the courts. The prosecutorial decision consequently has a significant impact on other criminal justice agencies, and on their everyday functions.

### 3. Prosecutorial discretion

26. Two basic principles provide the basis for prosecutorial policies: the legality principle and the opportunity principle (the expediency principle).

27. The primary premise of the legality principle is that prosecution must take place in all cases in which sufficient evidence exists of the guilt of a suspect, and in which no legal hindrances prohibit prosecution. Adherence to the legality principle in the procedural sense means that the prosecution service cannot exercise any discretion over the prosecutorial decision.

28. In Europe there are only a few countries with a strict legality principle, like Italy and Spain. In Italy the legality principle is even laid down in the Constitution (Sect. 112). Although the Italian and Spanish laws require compulsory prosecution, the prosecutorial decision is, in practice, influenced by how, when and in what case, it is made.

29. The public prosecutor can decide how to organise his work and he is consequently able to give priority to certain cases. Out of the day to day influx of cases sent in by the police he will select cases in which a decision to prosecute has to be made with priority. In other cases a decision on prosecution is less urgent, which may lead to a deferment of the prosecutorial decision.

30. The growing number of penal procedures, as well as the increasing complexity and social relevance of a large number of cases, has made prioritisation necessary. This, in effect, may lead to the elimination of low priority cases through the lapse of limitation period, or through the eligibility of the case for probable future amnesties. Such prioritisation is neither in Italy nor in Spain generally perceived as a violation of the rule of compulsory prosecution.

31. The principle of opportunity, on the other hand, does not demand compulsory prosecution. Instead, it allows the prosecution agency discretion over the prosecutorial decision.

32. These two principles therefore define the prosecutorial power differently, one confining its existence and utilization to certain definite rules, the other granting discretionary freedom in its utilization.

33. The issue of which basic principle has been adopted in a country is only of concern with respect to public prosecution (state prosecution). Legal systems which allow private prosecution of offences have opted, with respect to such prosecution, for the expediency principle. Private prosecution exists as a right of the injured person, never as his duty. Therefore, the very existence of this right in a system adhering to the legality principle is an automatic deviation from this principle in favour of the expediency principle.

34. Most of the countries adhering to the legality principle have made some legal exceptions to this principle, sometimes to such an extent that from a pragmatic viewpoint, these countries may be perceived as having a mixed system: the legality principle is applied in cases involving serious offences and the expediency principle is utilized in cases involving minor offences.

35. Due to the fact that in recent years legal exceptions to the legality principle have been extended in a number of European countries, or a more extended application of the existing exceptions has been permitted partly due to the introduction of diversionary measures, the systems applying the opportunity principle and those applying the legality principle have been approaching each other.

#### 4. *Positive or negative approach of the expediency principle*

36. In most of the provisions which express the expediency principle or which ease strict adherence to the legality principle, some reference is made to the public interest. It is stated that prosecution may be waived for reasons of public interest, or if public interest does not require prosecution.

37. It therefore seems that the expediency principle can be approached from both a positive and a negative perspective. When applied in the negative way, prosecution takes place as a rule, and prosecutorial waiver is an exception. When applied in its positive form, non-prosecution is the rule, and prosecution the exception.

38. When the expediency principle is applied in its negative form, each infringement of the law is in itself a sufficient reason for the initiation of a prosecution, so that the prosecutor must justify his decision to waive a prosecution. That is, he must analyse the case in order to find reasons for non-prosecution. Conversely, when the principle is applied in its positive form, an infringement of the law is not, in itself, a sufficient reason to initiate prosecution; the prosecutor must analyse the case in order to find justification necessitating prosecution.

39. Although this distinction between the two possible interpretations of the expediency principle may appear to be of a purely academic nature, in fact it may have considerable impact on the position of the prosecution service as an actor in shaping crime control policy. When the principle is applied in its negative form, the formal concept of crime seems to be taken as the initiating point for the administration of justice. It is the legislature which decides, by enacting penal law, that the penal law must be administered as a matter of principle. Within this context, the application of the expediency principle is an instrument in alleviating the consequences of the strict application of the legality principle by the prosecution service. The contribution of the prosecution service to the shaping of crime control policy is a limited one in this framework. Within this form, the prosecutor must therefore adhere to the specific rules formulated by the legislature for the administration of justice.

40. When the principle is applied in its positive form, on the other hand, the expediency principle may be used by the prosecution service as a key instrument in shaping crime control policy. The legislature, by enacting penal laws, merely provides the legal basis for such a policy. The prosecutor then acts as a central figure in the determination of the practical prosecutorial policy. It is up to the prosecution service to decide, within the legal framework delineated by the legislature, how the administration of justice is carried out. In this form, prosecution is one of many avenues for achieving the goal of crime control.

41. In most of the countries which adhere to the legality principle (the majority of the CoE Member States), as well as in those which have adopted the expediency principle (Belgium, Cyprus, Denmark, France, the United Kingdom, Ireland, Luxembourg, the Netherlands, Norway and some cantons of Switzerland), the prosecution agency can exercise some discretion in making the prosecutorial decision. In recent years, the legal exceptions to the legality principle have been widely extended in some CoE Member States, or a more extended application of the existing exceptions has been permitted.

42. In general, it can be said that, even in systems which utilize the expediency principles in a generous manner, the division of state power (*Trias Politica*) as a rule does not allow the

executive power (the prosecution service) to interfere with the legislative power by not applying a law which is in force. That is, a waiver of prosecution should not become so extensive that it would amount to the practical decriminalisation of a criminal act. The power to criminalise or decriminalise acts resides with the legislature, not with the other agents of the criminal justice system.

43. The legal reality that the expedience principle allows for the use of discretionary prosecutorial power in all types of crimes without exceptions does not mean that this opportunity is fully used in practice. Indeed, a wide range of crimes, particularly the more serious ones, seems to be excluded from the application of the expediency principle in the everyday administration of justice. Certain types of crimes (such as drug trafficking, offences which are generally of dangerous nature, crimes against life and liberty, and so forth), due to the nature of these offences, are offences for which prosecution should be instigated.

##### 5. *The extension or reduction of discretionary prosecutorial power*

44. The administration of criminal justice is a scarce resource. In all European countries the case-load of criminal courts has increased significantly as a result of a number of separate developments. In recent years, extensive legislative programmes have been carried out in many countries to bring a large number of socially dangerous acts within the scope of the criminal law. Furthermore, a general increase in crime has become apparent. Moreover, there has been an increase in the complexity of cases and in the number of cases involving serious and trans-national crimes. The expansion of the judiciary as a rule has not kept pace with this increase in case-load.

45. In this light, it is essential that the prosecution service, which is the agency that can regulate the influx of cases to be dealt with by the criminal courts, possesses the discretionary power to decide which cases have to be brought before the court, and which cases can be dealt with by methods other than a court procedure.

46. In a number of European countries, particularly in those which adhere to the legality principle, the legal scope of prosecutorial discretionary power has been gradually extended. This extension has manifested itself in at least four ways:

- legislation has been provided which has noted that the principle of legality no longer forms the governing principle for the prosecutorial practice in regard to certain specified crime(s);
- new grounds have been introduced for non-prosecution in legislation, or the threshold for the application of the existing rules has been lowered;
- the legislature has deleted restraints which previously existed with respect to the use of the discretionary prosecutorial power; and/or
- the judiciary, controlling prosecutorial decisions, has accepted an extended interpretation of regulations concerning the use of discretionary power.

47. This extension of discretionary prosecutorial power may also result from changes in the prosecution service's organizational structure or from changes in the policy of the prosecutorial service. The organizational structure of the prosecution service indeed has a great impact on the practical use of the discretionary power.

48. In some countries, control over the prosecutor's decision is exercised by the head of the local prosecution service, by personal contacts, by the review of the files or by compulsory prior consultation with a superior prosecution officer. In other countries, the hierarchical structure of the prosecution agency seems to be a contributing factor in the attempt to attain consistency in the prosecution policy.



49. In the legal systems adhering to the expediency principle, directives, guidelines, prior consultation or explicitly formulated objectives of a prosecution policy seem to be used as instruments for widening or curtailing the practical use of discretionary power.

50. The reduction of the scope of prosecutorial discretionary power can take place through the utilization of the same instruments as those mentioned for the extension of the discretionary power. The reduction of discretionary prosecutorial power seems to be an item which is only of interest in legal systems which adhere to the expediency principle, or in systems which allow exceptions to the legality principle. It must be emphasized that a reduction in the scope of prosecutorial discretion cannot only be the result of explicit legal restrictions, but also of new legislation offering alternative ways of dealing with crime. This can particularly be the case where the criminal justice system offers two procedural extremes, the waiving of criminal cases on one hand, and the bringing of a case to court on the other hand. When legislation provides other solutions for such a dilemma, these solutions seem to affect, to some extent, the utilization of prosecutorial discretionary power.

#### *6. Judicial discretion*

51. Except in countries that have a system of trial by jury, judges decide on the basis of produced evidence whether the defendant is to be acquitted or convicted. In this decision some discretion is involved as well. Evidence that is produced must be assessed by judges and must be evaluated in order to be able to reach the conclusion that the defendant is proved by the evidence to be guilty or to be not guilty because the evidence is not considered to be sufficient for a safe conviction or the process which brought the individual to court was considered to be flawed or (police-)officers were considered to have behaved in such a way that the rule of law itself was undermined. All these decisions by courts contain elements of discretion.

52. In many countries the criminal law does not know the system of mandatory compulsory or required sentences for certain type of crimes like in England and Wales or Germany where courts do not have discretionary power in sentencing in case of a conviction for murder. In these countries the court must impose a life sentence. However, a life sentence in the United Kingdom may differ considerably from a life sentence in Germany, not to speak from a life sentence in the Netherlands. In the United Kingdom the court in case of a life sentence may set a tariff that has to be served before someone can be eligible for parole. In Germany parole may be considered after having served fifteen years of a life sentence and in the Netherlands a life sentence really means imprisonment for life.

53. In countries where the system of mandatory sentences is unknown judges may utilize discretion when deciding on sentences, both as far as it concerns the type of sentence (imprisonment, fine, etcetera) and as far as it concerns the amount.

54. As a rule the absence of mandatory sentences and the wide discretion is an expression of the faith in the judiciary. However, a problem of the discretion is that the sentencing may be arbitrary or inconsistent.

#### *7. Equality before the law*

55. A common element in the utilization of discretionary power by public prosecutors and by judges is that discretion may lead to disparity and arbitrary decisions. The way to deal with this problem is for the prosecution service a different one than for the judiciary. In all countries, equality before the law and the uniform application of legal rules are a focal concern.

56. Various ways exist to improve the uniform application of the law. All countries appear to be aware of the danger of inequality, and have accordingly taken appropriate measures to prevent its existence, such as building a hierarchical prosecution service with regular internal supervision, holding regular meetings where the actual prosecution policy is discussed, and issuing internal directives or guidelines aiming at consistency in the prosecution policy. These directives in many countries are called guidelines, guiding the public prosecutor in the process to take a decision on whether or not to prosecute. Guidelines seem to form an instrument for assuring the uniform application of the law.

57. Guidelines are instructions to prosecutors regarding their prosecutorial tasks, particularly the initiation of the prosecutorial waiver. Various synonyms are used for guidelines, such as 'instructions', 'directives', or 'circulars'. Whatever the term used, we will deal with the guidelines as far as they contain written instructions to members of the prosecution agency.

58. A guideline can be defined as a codification of a specially defined rule of conduct, which the members of a certain agency are expected to observe when exercising a legally recognized or de facto autonomous power under an internal organizational order.

59. Prosecutorial guidelines serve as indicators of the existence and the possible use of discretionary prosecutorial power within a country. These guidelines manifest themselves in two main forms:

- those which give directives as to the carrying out of prosecution, and
- those which contain directives for the waiving of prosecution.

60. Even in countries which have adopted the legality principle, guidelines or instructions sometimes seem necessary for the uniform application of the law or for the explanation of new legislation. In countries where the utilization of prosecutorial discretionary power is not allowed, prosecutorial guidelines do not appear to be present.

#### 8. *Aims of the guidelines*

61. Prosecutorial guidelines exist mainly for the purpose of avoiding arbitrariness and lack of uniformity in the use of prosecutorial discretion. The requirement for directives in order to achieve this end, depends on three subsidiary factors:

- the explicitness of the regulations expressing the granting of the discretionary power;
- the extent of the granted power; and
- the number of persons possessing the power to decide on prosecution.

62. These three factors carry a danger of arbitrariness in decision-making, and of the consequent lack of uniformity. The less explicit the regulations granting the discretionary power are, the wider the extent of their application, and the greater the number of persons actually exercising discretion, the greater this danger is. The guidelines aim at avoiding such danger by confining and structuring the exercise of this power to certain situations and/or cases. This is done, or at least should be done, by:

- interpreting words contained in law which are too vague for application without their explicit clarification;
- restricting the application of the discretion to certain crimes or types of offences and/or offenders, and/or excluding certain crimes; and
- attaching certain conditions to the situations in question and/or the waiver or prosecution itself.

63. It may be concluded that the guidelines define, to some extent, the discretionary use of prosecution through the specification and clarification of the existing law.

64. In some countries, the prosecutorial guidelines aim to establish a desired criminal policy. The guidelines present the possible means for achieving set policies, to realize their actual practice in the criminal justice system. They may, in other words, serve as an instrument for attaining certain goals which await their practical application and realization.

#### 9. *Adherence to guidelines*

65. Most guidelines governing the discretionary use of prosecutorial power are issued by the national top authorities of the prosecutorial hierarchy. Due to their formulation by such authorities, guidelines must be consistently and uniformly followed by those vested with prosecutorial power. The existence of the guidelines implies an explicit duty for the prosecutor to apply them in practice. Guidelines therefore primarily deal with the presence and the use of the prosecutorial power at the individual level. However, they may also prescribe a duty for the prosecutor to seek the approval of a higher authority for the use of this power in certain cases.

66. Although the guidelines generally require strict adherence, the specificity of a particular case or a situation may demand deviation from this practice. Indeed, some of the existing guidelines explicitly express the individual and professional responsibility of a prosecutor to do so in unique cases.

67. Because of the complexity of life, the guidelines are only to be followed in average (common) cases. Thus, in every case the public prosecutor shall independently, and conscious of his responsibility, prove what measures must be taken, and he can deviate from the guidelines because of the special character of the individual case.

68. The contents of the existing guidelines for waiver of prosecution vary among the European nations. Some guidelines address certain specific crimes, and/or factors which are required for a prosecutorial waiver.

69. In other countries, guidelines for prosecutorial waiver exist on a more general level. These guidelines do not define specific crimes and/or factual situations, but provide an overall general directive for the waiving of prosecution. To give an example: the law may allow the prosecutor to waive prosecution in petty offences, where the offence was committed due to forgivable heedlessness, thoughtlessness or ignorance, and where the public interest does not demand prosecution. This provision does not define "petty offence"; instead, general guidelines are provided as to the necessary prerequisites for the applicability of this provision. For instance, a property offence is to be considered as minor if only minor damages resulted from the offence.

70. Within the judiciary as a rule no hierarchy exists and therefore in many countries there is no external superior body that can give instructions to judges on sentencing. That does not mean, however, that there exists great disparity.

71. In some countries superior courts may give so-called arrêts de règlement, concerning the sentencing of certain crimes or groups of crimes. In other countries the judiciary itself has developed guidelines for sentencing. Finally there are countries where superior courts check the reasoning for the sentences and may quash a sentence when the reasoning is inappropriate.

## II. **Levels of dependence and independence of the prosecution service**

72. The second chapter deals with the level of dependence and independence of the prosecution service. After I have dealt with the various forms of dependence and

independence I will discuss the question whether an independent prosecution service rather than a dependent prosecution service is likely to strengthen the independence of the judge.

### 1. *Introduction*

73. In all European states, regardless whether they are continental, central or eastern states, a state agency is vested with the power to prosecute deviant behaviour which constitutes a criminal offence. This does not mean, however, that the prosecution agencies in all European states have similar organisational structures, or that they are vested with similar prosecutorial powers and tasks. Moreover, the place of the prosecution service in the constitutional state organisation differs considerably.

74. Although in quite a number of the Western European states the prosecution service has been based on the concept of the French *ministère public*, as improved and elaborated in the Napoleonic Code in the early nineteenth century, many countries have modified the basic concept, due to political changes and constitutional reforms. Certain classical basic principles for the prosecution service still prevail in the majority of the European legal systems. The most characteristic ones are:

- the prosecution agencies are independent of the courts;
- the prosecution agency is a centralised and vertically organised institution;
- it is hierarchically structured and a line of command exists within the organisation; and
- the prosecution agency is organised with respect to the court system and the administrative structure of the country.

75. The same goes for the legal systems in the continental Central and Eastern European states. The legal systems of pre-1917 Russia and pre-war Eastern and Central Europe were typically continental civil law systems, not radically different from those existing in France, Germany and other Western European countries.

76. However, the pre-revolutionary and pre-war legal systems have been replaced by legal systems based on the consolidation of state power in the hands of the ruling socialist party, although in Russia and the other former Soviet Republics more completely than in the countries of Eastern and Central Europe.

77. The ideas of political democracy, human rights, the creation of a rule of law state, and a new separation of state powers, which got full attention after the collapse of the socialist party rule in the late eighties and early nineties, have had a considerable impact on the organisation and tasks and functions of the public prosecutor's office in the Central and Eastern European countries. In a number of these countries the prosecution service has an independent position (e.g. Czech Republic, Hungary).

78. The topic of dependence or independence of the prosecution service can be dealt with from various angles. It seems justified to distinguish between the external and internal (in-)dependence and to distinguish between the institutional and functional aspects of the independence.

### 2. *External dependence and independence*

79. The external (in-)dependence deals with the question to what state power the prosecution service is subordinated or related. State power, according to the *Trias Politica* theory of Montesquieu, is divided into the executive power, the legislative power, or the judicial power.

80. In some countries the prosecution service is related to the executive power, so an institutional dependence exists. This, however, does not mean that the prosecution service has to be dependent as well with regard to its functional aspects. In some countries institutional dependence coincides with functional autonomy, such as in England and Wales. The English Crown Prosecution Service is headed by a state official (the Attorney General) with strong political links. The Attorney General is a member of the Government and may be dismissed due to lack of confidence from the Prime Minister. The Attorney General as head of the Crown Prosecution Service is politically responsible to Parliament. Despite the functional dependence the Crown Prosecution Service functions on the basis of considerable autonomy.

81. In other countries like France, Belgium, Germany, and the Netherlands, institutional dependence is combined with functional subordination. The prosecution services in those countries act under the supervision of the Minister of Justice who can issue directives to his subordinates concerning prosecutorial decisions to be made.

82. In Western Europe the prosecution service is, as a rule, related to the executive power. The main exception however is Italy, where the prosecution service is related to the judicial power. So in Italy the prosecution service is an independent institution with full functional autonomy (Sect. 108 Italian Constitution). A similar situation exists in Latvia where the prosecution service belongs to the judicial power. The prosecutor is independent of the influence of other institutions or officials exercising state power and shall observe only the rule of law.

### 3. *Internal dependence and independence*

83. The internal (in-)dependence is related to the internal structure of the prosecution service – a centralised or decentralised structure – and the hierarchical links. In England and Wales the Crown Prosecution Service is a highly decentralised organisation placed under the authority of the Director of Public Prosecutions. There are, however, a small number of local divisions. The Chiefs Crown Prosecutors, heads of a local division, are responsible for the acts of their division to the Director. The hierarchical links, however, are quite restricted and the local divisions possess a considerable autonomy.

84. In Belgium, France, and the Netherlands the internal structure of the prosecution service is a highly centralised one, characterised by a strictly hierarchical subordination. The rationale of this subordination is mainly that the prosecution service has considerable discretionary power when making prosecutorial decisions. The hierarchy and the right of the Minister of Justice to issue directives concerning the prosecutorial policy are regarded as essential instruments of the government to pursue a consistent and uniform criminal policy.

85. The internal structure of the prosecution service in Italy is of a decentralised nature, without any hierarchical subordination. There is no hierarchical dependence among the various tiers of public prosecution offices. Each public prosecutor enjoys complete autonomy. The independence of the prosecution service and its members is quite similar to that of the judiciary and the individual judges. In turn, Italian prosecutors are not vested with discretionary prosecutorial powers because Italy strictly adheres to the legality principle. The lack of hierarchical subordination appeared not to be beneficial for an effective fight against Mafia criminality and organised crime. Recently new legislation has been enacted to provide high ranking public prosecutors with instruments to co-ordinate the prosecution of organised crime.

86. In the past, the prosecution service in the Central and Eastern European countries was closely affiliated with the ruling socialist party and it was a strictly centralised institution.

Since the decline of socialism the service in those countries has, as a rule, been transformed into an institution independent of directives by the government or the socialist party.

87. With regard to the topic of (in-)dependence, the Central and Eastern European countries can now be divided into three groups:

- The countries that have maintained the independent constitutional position of the Prokuratura in its form inherited from the old regime belong to the first group. In these countries the Prokuratura is independent of the executive power but subordinated to Parliament. The situation in the Republic of Belarus can serve as an example. The Public Prosecution Office of Belarus is an independent state body, accountable to the Supreme Soviet (Parliament). The head of the prosecution service is the Prosecutor General, who is elected by the Supreme Soviet. Subordinated prosecutors are appointed by the Prosecutor General and are accountable to him. Although the constitutional position of the Prokuratura did not change, in practice the position is not comparable with that in former times. Under the old regime the Prokuratura was accountable to Parliament, read: the ruling socialist party. Now the Prokuratura is accountable to a democratic body. Other countries have chosen for a subordination of the Public Prosecution Office to Parliament as well (for example the Slovak Republic, Ukraine, Russia, Slovenia and Hungary). The power to appoint the Prosecutor General does not in all countries rest with Parliament, but a common feature is that Parliament is seriously involved in the process of appointment.

- The second group consists of countries which have created a new type of independence, more similar to that of the judges. In these countries the Public Prosecution Office became part of the judiciary (for example Albania, Bulgaria, and Croatia). As a rule the Prosecutor General and his subordinates are appointed by the newly created High Judiciary Council, inspired by the High Council of Magistracy (Conseil Supérieur de la Magistrature) as known in France, Portugal and Italy.

- In the last group, comprising e.g. Poland, the Public Prosecution Office is subordinated to the executive power, that is: the Minister of Justice. In Poland, the Minister of Justice exercises the function of Attorney General. In this capacity he is accountable to Parliament

88. In the majority of the countries the prosecution service or the Public Prosecution Officer is internally organised in a hierarchical way. The head of the prosecution service is vested with the power to issue directives or instructions to his subordinates. This power restricts the internal autonomy of the prosecution service and influences the level of independence. The individual members of the prosecution service owe obedience to instructions from their hierarchical superiors. In a number of states, such as France, Belgium, and the Netherlands, the Minister of Justice is the head of the prosecution service. In this capacity he can issue written circulars and guidelines or directives instructing the prosecution service to pursue the prosecution policy as determined by government. He can also give individual instructions.

89. In these countries the instructing power of the Minister of Justice is restricted by the adagio 'la plume est servie, la parole est libre' (the pen is bound, but speech is free), meaning that members of the service are bound by written instructions from their superiors during the pre-trial stage of the procedure, but that they resume their freedom when pleading in court. A written order from a superior to prosecute a particular case has to be complied with by the prosecutor, even if he thinks a prosecution is inappropriate. However, when this case is tried in court the prosecutor is free to ask for an acquittal of the accused. In case a public prosecutor does not comply with a written instruction from his superior, a disciplinary measure can be taken against him.

90. In countries where the prosecution service is subject to the executive power, the power of the Minister of Justice to issue instructions is of a limited nature. One of the restrictions is

that an instruction or directive may not result in the effect that an individual member of the service is by way of a sanction deprived of (parts of) his prosecutorial powers. When appointed as public prosecutor, the law vests him with full prosecutorial powers. The execution of these powers cannot be restricted without grounds other than those stipulated in the law, such as suspension and dismissal.

91. Another restriction to give instructions to subordinates is that the Minister of Justice may not give an instruction to waive a criminal case, or to suspend a prosecution, or to give instructions to request for a specified sentence in a particular case. The reason for this restriction is that such instructions would in fact imply an exercise of prosecutorial power by the Minister of Justice. Although the Minister of Justice is the head of the prosecution system, he is not vested with prosecutorial power because he is not appointed as a public prosecutor.

92. In civil law systems prosecutors as a rule function in a hierarchical structure with strong internal guidelines controlling the use of discretionary prosecutorial powers. This is due to the aversion to prosecutorial discretion and the emphasis on uniform results in the civil law systems. This paradigm is not accurate, however, when applied to prosecutors in the Italian system. Over time, the institution of the *pubblico ministero* has lost the advantages of the civil law model: it lacks an effective hierarchical structure, strong internal guidelines, and internal controls.

#### 4. *Accountability*

93. In countries where the prosecution service forms part of the executive power, the head of the prosecution service is accountable to Parliament for the prosecution policy pursued by the service. As a rule, the head of the prosecution service is not answerable for the exercise of prosecutorial powers in individual cases. He is answerable only with respect to whether or not he has issued instructions regarding the prosecution policy.

#### 5. *Election or appointment*

94. Unlike the American legal system, where state prosecutors are as a rule elected by popular votes, sometimes after a quite intensive election campaign, in Europe at large prosecutors are as a rule appointed officials. In some Eastern and Central European countries the heads of the Public Prosecutors Office, the Prosecutors General and some high ranking prosecutors are elected as well, according to the wording of the applicable legislation, but this election is not at all similar to that applied in the American states. Election in the Eastern and Central European states either means nomination, or *de facto*, the election procedure may be regarded more properly as an appointment procedure because no democratic element is prevalent in this procedure at all.

95. The way in which prosecutors are appointed may have an impact on the level of their independence. Being elected by popular vote could impair their independent position because in that system the prosecutor in pursuing a prosecution policy has to take the private interests of his constituency which has elected him into serious consideration.

#### 6. *Discussion*

96. As we have seen in our presentation of the use of discretionary power in the CoE Member States, in a few countries the law provides that the prosecution service shall be independent in the exercise of prosecution. In other countries no such rule can be found in the Constitution or in the law. In most of the countries the prosecution service is hierarchically structured and hierarchy means that a lower ranking prosecutor is as a rule

subjected to instructions of his superior. There are only very few countries where the public prosecutor is as independent as a judge.

97. In the preliminary views by the CCJE drafted on the basis of the points of the preliminary views by the Bureau of the CCPE, the CCJE expresses its opinion on the Constitutional safeguards/constitutional law considerations about the link between independence of judges and an independent exercise of prosecution, in particular with reference to instructions from the executive branch, as follows: *“The independence of the prosecution service is an element which strengthens the independence of the judge: in certain countries, the Constitution provides that the prosecution service shall be independent in the exercise of prosecution. That is a very important guarantee, for its effect is that the political authorities can never prevent certain offences from being submitted for assessment by a judge. This also guarantees that persons in the public eye who are suspected or having done something wrong do not escape prosecution solely on the basis of a decision by the political authorities. This therefore strengthens the role of the judge in society, guaranteeing that the judge will dispense justice in all cases which deserve to be submitted for his or her assessment”*.

98. These views are in my opinion expressed too strong and in many countries, as we have seen, no such guarantees exist. I even dare to say that in no country a guarantee exists that a political authority never can prevent a prosecution for certain offences. Even in a system with a strict application of the legality principle – expressed in the Constitution – no 100% prosecutions are effected. In Italy around 74% of all suspects are prosecuted although one would expect 100%.<sup>1</sup> Nevertheless these views need further consideration.

99. Indeed, discretionary power and the hierarchical structure of the prosecution service may be abused for political reasons. But guarantees, other than the independence of the prosecution service, can be build in the system in order to strongly reduce the risks of abuse for political reasons. In many CoE countries the discretionary power of the public prosecutor in practice is much less than could be expected according to the statutory formulation.

100. The decision whether a prosecution of a crime is deemed necessary in the public interest must be based on an independent view. An instruction by a political authority not to prosecute undermines this legal character of a prosecution decision. The plea for an independent prosecution service is very understandable in the light of the fear that prosecutorial decisions may otherwise be strongly influenced by political views.

101. Let us therefore look somewhat closer to the prosecution service in Italy, one of the very few countries where the public prosecutors have the same independence as judges. They are both magistrates and the independence of both is guaranteed by the Constitution (Sect. 108). No one has the power to give instructions to individual public prosecutors or to issue guidelines for a prosecution policy. No external control on the activities of individual prosecutors or the prosecution service exists. There is only an internal control by the Superior Council of the Magistracy (CSM). The only power of the Italian Minister of Justice is to set the budget for the judiciary and to initiate disciplinary procedures against individual magistrates. In Italy no coordinated national prosecution policy exists like in many other European countries because this is contrary to the constitutional independence of a public prosecutor.

102. As we have seen in the first chapter, the annual amount of criminality and the insufficient financial resources to administer the whole amount of criminality asks for a prosecution policy, even in countries like Italy where a strict prosecutorial legality principle is

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<sup>1</sup> Paul Smit, Prosecution and Courts, in: K. Aromaa & M. Heiskanen (Eds), *Crime and Criminal Justice in Europe and North America 1975-2004*, HEUNI 2008, table 5.3.



applied. The consequence is that the Italian State has to provide sufficient money to the prosecutor in order to allow him to finance all investigations and prosecutions he has decided or selected. Restriction of the financial means would be considered as an immediate attack on his independence.

103. Another consequence is that an individual public prosecutor is not answerable for the expenditure of public money nor for the consequences of the investigation for the society or individuals.

104. Furthermore the independence has led to judicial activism – a political way of applying powers – that initially may have had beneficial effects in the fight against political corruption but later on has led to serious abuse of power by individual public prosecutors like a nine years investigation to the relation between the organised crime and free mason that at the end led to a waiver. Over sixty persons suffered for years under the investigation and there was an extreme waste of money (Il caso massoneria). The reaction on the judicial activism has led to a contra-reaction by the political power like the adoption of legislation to extend the immunity of high state officials or to block the continuation of certain criminal proceedings against politicians.

105. In general one may conclude that a fully independent prosecution service modelled after the situation in Italy is not a preferred option because in practice it may lead to a serious crisis in the Rule of Law State. It is of major importance that a public prosecutor when applying discretionary power feels free to take a decision which is consistent with the previous decisions taken by himself or other public prosecutors and furthermore feels free to take a decision which is impartial and is in conformity with the public interest.

106. Therefore all international instruments and norms for prosecutors require that professional prosecutorial functions can be performed without intimidation, hindrance, harassment, improper interference or unjustified expose to any form of liability<sup>2</sup>.

107. How to prevent that the executive power uses its power to instruct for improper purposes the prosecutor to prosecute or to waive a case? There are various solutions to prevent that the executive power abuses its power to give public prosecutors instructions to prosecute a case for improper purposes. One could e.g. statutorily allow a public prosecutor to file a complaint against such an instruction with the Superior Council of the Magistracy in order to assess whether the instruction is appropriate.

108. One could also prescribe a special procedure to be followed in such a case. Such a special procedure has recently been adopted in the Netherlands (Sect. 128 Judicial Organization Act). When the Minister of Justice considers giving an instruction in an individual case, the Board of Prosecutors General shall be given the opportunity to express its views concerning the instruction considered. That instruction and its reasoning are sent to the Board, which gives its reasoned views. The instruction must be reasoned and issued in a written form. In very urgent cases, the instruction can be issued orally but shall also be issued in written form within a week. The instruction together with the considered instruction and the views of the Board shall be added to the case file unless this is contrary to state interest. In the latter case, a notification that an instruction has been issued is added to the case file. In this way the court is informed that an instruction to prosecute the case or an instruction on what sentence to request has been given to the public prosecutor. The court will certainly consider this when giving its judgment. The Minister of Justice is not only empowered to give the instruction that an individual case shall be investigated and prosecuted but can also issue an instruction that a case shall not be investigated or

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<sup>2</sup> UN Guidelines for prosecutors, Sect. 4, International Association of Prosecutors Standards, Sect. 6 and CoE Rec (2000) 19, Sect. 11.

prosecuted. In that case the Minister shall notify Parliament (both Chambers of the States-General) that such an instruction has been issued. His instruction together with the considered instruction and the views of the Board of Prosecutors General shall be sent to Parliament. This procedure ensures democratic control over the Minister's decision. Through this procedure, openness over the involvement of the Minister of Justice in prosecutorial decisions is guaranteed. This openness however is absent when the prosecution service agrees with the considered instruction and takes such a prosecutorial decision so that an instruction does not need to be issued. The starting point of the legislator adopting Sect. 128 Judicial Organization Act was that there shall be a restricted use of instructions in individual cases by the Minister of Justice. Until now, the Minister has not made use of this power.

109. It seems very important that instructions by the executive power whether these are general or specific, shall be transparent and open for democratic control.

### **III. Matters affecting the relation between the public prosecutor and the judge**

#### **1. *The adjudicatory function of the prosecution service***

110. Until recently, a sharp division was made in the administration of justice between prosecutorial tasks exercised by a prosecution agency and the adjudicatory and dispositional functions of the courts. This sharp division in functions has gradually become more vague due to the fact that the prosecution service in a number of European states has been vested with some adjudicatory and dispositional powers as well.

111. The main reason for this shift is related to the general increase in serious and complex criminality which has become apparent in recent years in many countries. Complex and time-consuming criminal cases like economic and environmental crimes, transnational fraud cases, international drug offences, cases involving corruption and organised crime, are tying the court up for extended periods of time. The expansion of the judiciary has not kept pace with the increase in case-load, resulting in a considerable backlog.

112. Due to the financial and personnel restraints, law enforcement is a scarce resource. It is increasingly difficult to ensure law enforcement. This difficulty not only reduces the public's confidence in the administration of criminal justice but also makes it no longer possible to maintain a minimum standard of law enforcement, which is essential in any state based on the Rule of Law.

113. When the gap between the number of law violations and the number of reactions by law enforcement agencies becomes too wide, the objectives of deterrence and uniform enforcement are not adequately achieved, and it is feared that the tendency of citizens to take the administration of justice in their own hands can no longer be satisfactorily kept in check. To avoid this situation, a number of legislative and practical measures have been taken. One of the measures was to vest appropriate bodies other than the criminal courts with adjudicatory and dispositional powers.

114. In almost all European countries various kinds of consensual criminal procedure exist and an increase in the various types of this kind of procedure is under consideration.

115. The recent reforms of the codes of criminal procedure in France, Italy, Spain and Portugal have led to the creation of criminal procedures in which a criminal case is materially administered by a prosecutor and not at full length by a judge in a public trial. It concerns a pre-trial settlement of a criminal case with the consent of the offender. *Plaide coupable*, known in France, *patteggiamento* as this procedure is called in Italy, or *conformidad* known in Spain, are procedures similar to the plea bargain or sentence bargaining as known in Anglo-American legal systems.

116. Through his confession the suspect opens the possibility that his case is tried in a shortened procedure. Very often the acceptance of a simplified procedure by the suspect leads to a serious sentence reduction or other advantage for the suspect.

117. Although the judge is not bound by the negotiated result, as a rule the judge confirms the result in his verdict and imposes the negotiated sentence. In such a procedure the work of the public prosecutor closely resembles the adjudicatory work of the judge because the prosecutor has to check the existence of sufficient evidence against the defendant and furthermore has to make up his mind on the appropriate sentence – although formally imposed by the court.

118. The ultimate consensual procedure is that the public prosecutor settles a criminal case without any involvement of a judge.

119. In a number of countries the prosecution agency is vested with the power to settle a criminal case and to circumvent a trial procedure.

120. According to those legal systems an offender can, at times, avoid a criminal charge by complying with instructions set in a transaction or penal order. A transaction is a unilateral proposal by the public prosecutor to the offender to pay a certain amount of money to the treasury within a certain period of time. After the offender has paid the proposed sum, the prosecutor no longer has the right to prosecute the case.

121. In some countries transactions are only possible with respect to petty offences. In other jurisdictions, however, the prosecution service can use the power to resolve a criminal case on the basis of such an arrangement, even for crimes carrying a statutory prison sentence of considerable length (for instance Belgium five years and the Netherlands six years).

122. Many countries have implemented a third form of settlement of a criminal case by the public prosecutor which contains consensual elements. It concerns the conditional waiver, which is explicitly expressed in the codes of for example Austria, Germany, Bulgaria, Norway, Denmark, and Poland. Without a statutory basis it is also applied in countries like Scotland and the Netherlands. In some countries legal provisions concerning a conditional non-prosecution only exist in relation to certain crimes such as drug abuse.

123. The waiver is subject to general and special conditions which must be complied with before the decision of non-prosecution becomes final.

124. In most penal systems the general condition attached to conditional non-prosecution is that the offender will not commit further offences during the probationary period. Special conditions may also be imposed. Such conditions usually aim at compensating society for the harm caused by the offence, or at changing the offender's future behaviour.

125. In general, a strong similarity appears to exist between a suspended sentence and a conditional non-prosecution. In many countries the conditions for a suspended sentence also apply to the use of conditional non-prosecution. Theoretically the conditions attached by the public prosecutor to a conditional waiver cannot be regarded as a sentence, but adjudicatory elements are present in the conditions and the conditions can be regarded as penalty-like sanctions.

126. The most recent development to vest the public prosecutor with adjudication power is the adoption of the new penal order legislation in the Netherlands.

127. A weak point of the transaction is that non-compliance automatically leads to a trial. This automatism creates a lot of work for the prosecution service and the court. To avoid this, the prosecution service statutorily was recently vested with the power to impose sentences and orders without intervention by the court (Sects 257a-257h CCP). In a so-called penal order (*strafbeschikking*), the prosecution service may impose:

- a task penalty to perform non-remunerated work or compulsory participation in a training course lasting 180 hours;
- a fine;
- a withdrawal from circulation of seized objects;
- an order to pay to the treasury a sum of money to benefit the victim;
- the withdrawal of a driving license for a period of up to six months.

128. Furthermore, the order may consist of instructions to be complied with by the offender. Those instructions may not restrict the offender's freedom of religion or his civil liberties. The instructions may consist of:

- the surrendering of objects that may be eligible for forfeiture or confiscation;
- the payment to the treasury of a sum of money that is equal to the profit of the crime;
- the payment of an amount of money to a public fund the aim of which is to support victims of crimes. The amount of money may not be higher than the maximum statutory fine set for the offence; or
- compliance with specifically-designed instructions during a probationary term of one year maximum.

129. Before the public prosecutor may impose a sentence, he has to hear the offender in person or by telephone. In cases where the public prosecutor intends to impose a fine or compensation order of more than € 2,000, the offender is assigned a defense counsel for the hearing. For the imposition of orders, the offender does not have the right to be heard by the public prosecutor. The sentence or order becomes final unless the offender objects either in person at the public prosecutor's office or by letter. In such cases, a court trial will take place (Sect. 257e CCP).

130. The main purpose for this law reform was to extend the capacity of the criminal justice system by increasing the prosecutorial power to divert cases and to settle cases out of court.

131. The penal order may be imposed for infractions and for crimes which carry a statutory prison sentence of six years or less.

The right of the prosecution service to impose a penal order will be gradually implemented. Until 2012, the transaction and the penal order will co-exist.

132. This new form of administration of criminal justice on the long run may have as result that small criminality as a rule is dealt with by the prosecution service – with an avenue to a court in case the suspect disagrees – and serious criminality is dealt with by a court in a full fledged criminal procedure.

133. Since negotiated justice in many – mainly Western European – countries starts to play an increasing role, public prosecutors and judges have to cooperate more closely and prosecutors have to play more a judge like role.

## **2. Public prosecutor: magistrate or civil servant**

134. It cannot be denied that the prosecution service has a special position within the separation of state power. On the one hand the service and its members are part of the executive power or closely linked to the executive power in systems where a political

authority like the Minister of Justice is the highest prosecutorial authority or has the power to issue instructions to individual prosecutors or to the prosecution service as a whole. Furthermore its position is special because in the majority of the CoE Member States the public prosecutor has a decisive say in whether or not a criminal case will be prosecuted and under what statutory criminal offence the case will be prosecuted. In some countries, however, it is not the public prosecutor who decides on the final indictment but the court. The special position of the public prosecutor in many countries has been discussed: is he, like a judge, a magistrate or is he a civil servant representing the executive power?

135. In many countries the prosecution service is seen as an organ of the executive power that can be used to pursue a criminal policy that is formulated by the executive power. In those countries the prosecution service performs its tasks and powers under the political responsibility of the Minister of Justice who is accountable to the Parliament and who therefore is empowered to give instructions to the prosecution service as a whole and to individual prosecutors. In those countries the public prosecutor is considered to be a civil servant.

136. In other countries like the Netherlands the legislature has chosen for a hybrid position of the public prosecutor. Public prosecutors are, unlike judges, not appointed for life and are civil servants as far as it concerns their legal status in the performance of their prosecutorial tasks, but according to the law, the members of the prosecution service are magistrates and are member of the judiciary (Sect. 2 Judicial Organization Act). In the Netherlands both for judges and public prosecutors the professional position is regulated in the same Act.

137. The relation with the judge, to whom the public prosecutor has to answer in public for all his prosecutorial decisions, is always the basis and the orientation for every prosecutorial activity. The task of the prosecution service is to impartially and unbiased contribute to the gathering of evidence and to guarantee the legality of the investigation and prosecution. The judge in all aspects may expect that he can rely upon this. Therefore the prosecution service shall ensure that the court is provided with all relevant facts and legal arguments necessary for a fair administration of criminal justice, irrespective of whether these are to the advantage or disadvantage of the suspect.

138. The public prosecutor has to perform his tasks in such a way that the judge can take as starting point that the prosecutorial powers have been exercised in conformity with his special position as magistrate. Both the judge and the public prosecutor have to contribute to a fair trial of the suspect, each from its own responsibility.

139. In the code of conduct for public prosecutors the duty to behave as a magistrate is expressed. In many CoE countries such codes of conduct exist. Furthermore there are international standards like the *IAP Standards of professional responsibility and statement of essential duties and rights of prosecutors* adopted by the IAP on April 23, 1999. As far as it concerns the professional conduct of prosecutors chapter 1 of the Standards rules reads:

“Prosecutors shall:

- at all times maintain the honour 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 favourable 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”.

140. These rules rule the position of the prosecutor in the administration of criminal justice and calls for a magistrate-like attitude in the performance of their duties.

141. In many CoE countries the legal position of a public prosecutor seems to be that of a civil servant because their legal position is ruled in laws on civil servants or similar legislation – like in Austria, the United Kingdom, Finland, Germany, the Slovak Republic and Slovenia – and equals to that of a judge.

142. In other countries the legal position of a public prosecutor is ruled in legislation on the prosecution service or on the office of the public prosecutor.

143. In many countries the prerequisites for becoming a public prosecutor equal or are similar to the requirements to be appointed as a judge, as is e.g. the case in Austria, Germany, the Netherlands, Greece and Italy.

144. Public prosecutors and judges are employed and paid by the State, but their position differs in whom they represent. The judge represents the State in whose name he adjudicates, the public prosecutor represents the society in whose name he prosecutes. The aim of the judge and the prosecutor is the same: a fair trial for the defendant and a decision that is either a safe conviction or an acquittal.

### **3. The professional status of public prosecutors and judges**

145. In many countries (for example France, Germany, the Netherlands) the professional status of a public prosecutor equals that of a judge. The wages of judges and prosecutors are more or less similar and the possibilities to make a career are of the same extent. In these countries it therefore occurs at times that a public prosecutor in the course of his career chooses to become a judge and vice versa.

146. Quite often the corps of members of the judiciary includes both judges and members of the prosecution service. The statutes for the judiciary are therefore applicable to both judges and public prosecutors.

147. As a rule there is no serious disparity between the prosecution service and the adjudicatory judiciary with respect to labour conditions.

148. However, there is one main difference in the status of the prosecutor compared to that of a judge, due to the principle of hierarchy and subordination, which is only applicable to prosecutors and not directed at judges. The basic guarantees to protect the independence of judges are that they are appointed for life until their retirement, and that they cannot be suspended or dismissed by their employer.

149. There is no hierarchical relation between the employer and the judge. Consequently, the judges of the bench are irremovable unless they agree to an appointment elsewhere. In many countries the irremovability of judges is stipulated in the law. Although the reasons for dismissal of a public prosecutor in many countries are similar to the reasons for dismissal of a judge, the official or body that has the authority to dismiss a judge differs from the official or body that has the authority to dismiss a public prosecutor. Prosecutors as a rule can be dismissed by the official or body that has appointed him/her.

150. Judges cannot be dismissed by their employer but as a rule can only be dismissed by a judicial authority like the Supreme Court or a special court like in Denmark.

151. Due to the hierarchical relation, the public prosecutor can theoretically be removed from one part of the service to another without his consent by a decision of his superior. As a rule the reason for a removal without consent will be the well-functioning of justice. Such a decision may not be based on disguised grieves but may be made as a disciplinary measure.

152. Moreover, a decision to dismiss a prosecutor can be made by the body vested with the right to nominate the public prosecutor. Such body may be the Parliament (for example Republic of Macedonia), the Ministry of Justice (Germany), the President of the Republic (Romania, Slovak Republic), the King i.e. the Government (Belgium), or the Supreme Council of the Magistracy or the Supreme Judicial Council (Albania, Bulgaria, Croatia and France).

153. In some countries (for example Italy and Luxembourg) the public prosecutor enjoys the same guarantees for independence as judges, that is to say that he enjoys judicial independence and is appointed for life. The Italian prosecutor is a career bureaucrat with almost complete autonomy. A mechanism for automatic wage increases keeps the salaries of the prosecutors at the top of the pay scale for public employees.

154. There is one striking difference between the status of prosecutors in Western countries compared with the prosecutors in Central and Eastern Europe. This difference concerns one item dealt with in the UN Guidelines on the Role of the Public Prosecutors: "Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly". In the Western European countries prosecutors are free to become a member of a political party and to be politically active, provided that these activities do not impair their proper functioning.

155. In the majority of the Central and Eastern European states (for example Albania, Belarus, Bulgaria, Romania, and the Slovak Republic) party membership and political activities are explicitly prohibited to prosecutors. More in general they may not have other functions that may influence their autonomy or objectivity, or that may impair their social reputation.

156. The prohibition to be a member of a political party is quite understandable as a reaction to the requirement of the past, when party membership was a prerequisite to become a prosecutor or to be promoted. It is also understandable in those countries where public services were over-politicised for several decades and where the political culture somehow differs from that of the traditional democracies.

157. The system of promotion of prosecutors in many Western countries consists of some automatic elements and some elements connected with the assessment of the functioning of the public prosecutor. In the majority of the Eastern European countries systematic assessment and promotion seem to be non-existent. In as far as a promotion system does exist, this does not seem to be transparent.