EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

COMMENTS ON

EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM: PROSECUTION SERVICE

by
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1. The request is perceived to focus mainly on the judiciary (i.e. the court system), re report on the meeting of the sub-commission on the judiciary on 16 October 2008 (CDL-JD-PV(2008)001).

This means that the issue of the prosecution service could be expected to play a minor role in the project. What the secretariat has pointed to in this respect is mainly the question of "whether prosecution should be independent or whether guarantees of non-interference would be sufficient", re Mr Dürr's e-mail message of 24 October 2008.

There will be a preliminary discussion of the case on the sub-committee meeting on 11 December 2008. A final opinion will not be adopted until the plenary session of the Commission in March 2009.

In my opinion, it is not feasible to prepare detailed opinions at this stage on the issue of the independence of the prosecution service. It is a huge issue. Furthermore, no specific proposals have been put forward, and there has, as I understand, been no qualified discussions of the issue so far.

I would therefore find it more useful to have a preliminary discussion at the sub-commission meeting where main views could be introduced and on that basis have members contribute more specific personal opinions in writing.

2. However, I would like, at this stage, to note that a number of international standards exist on the issue of protecting the independence of prosecutors. See, for example:

- CoE Recommendation Rec(2000)19 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.

These instruments all contain important and useful rules on protecting the independence of prosecutors. However, they all "allow" for systems as such where the prosecution service is not independent vis a vis the political system but rather guard against undue political interference in specific cases.

This is also one of the main principles behind an extensive number of opinions by the Venice Commission, see Part II of Draft Vademecum on the Judiciary (CDL-JD(2008)001).

3. On that basis, I would be very hesitant to see the Venice Commission move in a direction of recommending the independence as such for prosecution services. Where this may be desirable in some countries, it may not be in others, and some of the most well-functioning prosecution services in Europe work under systems where they are in principle subordinate to the executive. A fundamental change on this is not likely to be accepted by member states.

In general, I believe the standards on independence/non-interference laid down in various international instruments (see above) adequately express the principles which should govern this delicate issue. In my opinion, the problems that arise, from time to time, in member states should be dealt with as such, and not by seeking to introduce new standards that would have little chance of surviving a reality test.

This is, obviously, not to say that it might not be feasible to look into more specific issues, for example on how to ensure transparency in cases where instructions are given by the executive

to the prosecution service (although I tend to believe that existing international instruments deal with this adequately as well). I would suggest that discussions at the December meeting of the sub-commission concentrate on such issues.