



Strasbourg, 14 October 2009

CDL-UDT(2009)011  
Engl. only

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



**REPORT**

**GUARANTEES OF INDEPENDENCE  
AND NON-INTERFERENCE  
OF THE PROSECUTION SERVICE**

by

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## 1. INTRODUCTION

1. The essential role that Public Prosecutors play in judicial systems, especially in the criminal justice field, is widely recognised<sup>1</sup>. The need to ensure adequate prosecution of criminal offences, including corruption, the impact that the exercise of criminal actions and the execution of criminal policy has on citizen's rights and the principle of equality of treatment before the law, require that prosecution functions be exercised in an impartial and consistent manner. Introducing guarantees to protect public prosecutors from undue interferences and to enhance their independence therefore reinforces respect for fundamental rights and the rule of law and is a requirement of democratic societies.

2. The independence of the Prosecution Service does not mean the same as judicial independence nor does it require equal guarantees. By definition, prosecutors cannot be impartial in the sense of passive, as is required of judges in criminal proceedings, as their role includes initiating and conducting prosecutions before the courts. Similarly, they need not be guaranteed tenure in a concrete position as a matter of principle, like the principle of the natural judge requires for judges, and they may be subject to hierarchical instructions and act according to fixed criteria to ensure an effective and equal application of criminal law and policy.

3. What must be ensured is that the conditions under which prosecutors exercise their functions guarantee the fair, effective and impartial prosecution of criminal offences; that such conditions are transparent and fixed by the law; that prosecutors act in defence of public and not individual or political interests; that arbitrary decisions or undue influence from internal or external authorities are ruled out. It is in this sense that independence must be understood, not as an absolute concept, but rather as an adequate balance between the somehow conflicting elements and principles that are present in every prosecution model. Only if sufficient guarantees are in place to this end, will the system be able to benefit from modern, efficient, autonomous and accountable prosecution services fully aligned with democratic principles.

## 2. EUROPEAN STANDARDS ON THE ROLE AND FUNCTIONING OF PUBLIC PROSECUTORS

4. Despite the existence of different prosecution systems, the need has been felt to identify and set up guiding principles applicable to all European Public Prosecution Services, as well as objectives to be achieved regarding their independence and the "institutional balance on which democracy and the rule of law in Europe largely depends"<sup>2</sup>.

A number of international instruments of the Council of Europe contain standards that concern Public Prosecutors<sup>3</sup>, but the most relevant from the point of view of independence is

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<sup>1</sup> In Rec.1604 (2003) on the Role of the public prosecutor's office in a democratic society governed by the rule of law, the Parliamentary Assembly recognises and appreciates the essential role of the public prosecutor in ensuring security and liberty throughout European societies: by safeguarding the rule of law, by protecting against criminal violations of their rights and freedoms, by ensuring respect for the rights and freedoms of those suspected of or charged with the commission of criminal offences, and by overseeing the proper functioning of the bodies responsible for the investigation and prosecution of offences.

<sup>2</sup> See Explanatory Memorandum of Rec (2000) 19

<sup>3</sup> For example R(87)18 concerning the simplification of criminal justice, which encourages the application of the principle of discretionary prosecution, or Guiding Principle n°3 of Resolution (97)24 on the 20 guiding principles for the fight against corruption, in which States are invited to "ensure that those in charge of the prevention, investigation, prosecution and adjudication of corruption offences enjoy the independence and autonomy appropriate to their functions, are free from improper influence and have effective means for gathering evidence, protecting the persons who help the authorities in combating corruption and preserving the confidentiality of investigations".

Recommendation Rec (2000)19 of the Committee of Ministers to member states on the role of the public prosecutors in the criminal justice system.

5. The Recommendation first refers to the functions of Public Prosecutors as public authorities who exercise criminal actions neither on behalf of any (political or economic) authority nor on their own behalf but “on behalf of society and in the public interest...taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system”.

6. It then provides for a number of safeguards for carrying out their functions, inviting states to take the necessary measures to ensure them. The following can be highlighted:

- Guarantees related to adequate legal and organisational conditions of service, including appropriate remuneration and budgetary means to fulfil their function, and if need be protection of personal safety.

- Guarantees related to the career of prosecutors, such as a fair and non-discriminatory system for recruitment and promotion; disciplinary proceedings governed by law, access to a satisfactory grievance procedure, including access to a tribunal if their legal status is affected; access to training as a duty and a right for all public prosecutors.

- Guarantees related to fundamental rights, such as freedom of expression, belief, association and assembly.

- Guarantees related to internal organisation, such as impartial criteria for the assignment of cases, specialisation, being able to request that instructions are delivered in writing and replacement should the prosecutor believe that an instruction is illegal or runs counter to his/her conscience.

7. The Recommendation also contains principles regarding the relationship between the public prosecution and the executive and legislative powers, (namely to prevent undue interference and ensure cooperation between them) the court judges (in particular to respect the independence of judges) and the police (in particular to control the lawfulness of police investigations and monitor the observance of human rights by the police). Finally, it contains a number of principles in relation to International Cooperation.

8. It is worthwhile mentioning that the Recommendation does not really try to harmonise European prosecution systems, and recognises, especially in what concerns the relationship with the executive and legislative powers (subordination or independence), that legal Europe is “divided on this key issue”<sup>4</sup>. It therefore makes specific recommendations for each type of system, after having identified “the elements for achieving the balance that is necessary if excesses in either direction are to be avoided”. The further harmonising of European prosecution systems and functions remains a difficult and controversial issue<sup>5</sup> and the existence of a variety of systems, resulting from different traditions in Europe is generally accepted. It is therefore for member states to define the role and functioning of public prosecution services.

9. On the occasion of finalising the draft Recommendation, high level prosecutors were invited to a Conference in Strasbourg to discuss the future of public prosecution in the XXI century.

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<sup>4</sup> “...between the systems under which the public prosecutor enjoys complete independence from parliament and government and those where it is subordinate to one or other of this authorities while still enjoying some degree of scope for independent action”. See Explanatory Memorandum Rec(2009)19 p.11

<sup>5</sup> See Parliamentary Assembly Recommendation 1604(2003) and reply from the Committee of Ministers

Ever since, the Council of Europe has organised a yearly Conference of Prosecutors General of Europe, which allows them to discuss and exchange views on the development of prosecution services. In 2005, the Conference of Prosecutors General adopted the European Guidelines on Ethic and Conduct for Public Prosecutors ("The Budapest Guidelines").

10. Although not binding on national prosecution services, they set up widely accepted standards of conduct expected of prosecutors in the performance of their duties and can serve as guidance at national level considering ethical questions. The Guidelines refer to professional conduct in general, in the framework of criminal proceedings and to private conduct. In addition they establish that Public Prosecutors should at all times and under all circumstances:

- perform their duties, including the duty to take action, always in accordance with relevant national and international law
- carry out their functions fairly, impartially consistently and expeditiously
- respect, protect and uphold human dignity and human rights
- take into account that they are acting on behalf of society and in the public interest
- strive to strike a fair balance between the general interests of society and the interests and rights of the individual

11. Finally, we will briefly refer to the Consultative Council of European Prosecutors (CCPE) that was set up by the Committee of Ministers in 2005 to prepare opinions on issues related to the prosecution service and promote the effective implementation of Rec (2000)19.

12. In 2008, the CCPE presented its 3<sup>rd</sup> Opinion on "The role of prosecution services outside the criminal law field" which also mentions some guarantees of independence in the exercise of these functions. In particular, States are invited to ensure that the principles of separation of powers, impartiality and fairness are respected when prosecutors act outside the criminal law field, that no undue intervention in their activities occurs, that their competences are provided by law and regulated as precisely as possible, or that the action of public prosecutors does not go against the equality of arms or the principle of *res judicata*.

### **3. GUARANTEES OF INDEPENDENCE AND NON-INTERFERENCE OF THE PROSECUTION SERVICE IN THE SPANISH SYSTEM**

13. After having examined "in abstracto" some of the safeguards that should be provided to ensure Public Prosecutors are able to fulfil their professional duties in an effective, impartial and fair way, I would like to refer to the Spanish system as a concrete example. Since the restoration of the constitutional regime by the Constitution of 1978, the Spanish Prosecution Service has undergone a gradual process of modernisation and full adjustment to the requirements of a democratic society. The evolution of the institution in Spanish law shows that the system of checks and balances introduced to enhance the "independence" of the prosecution service must be always considered from a dynamic point of view. Indeed, elements can be introduced in the system that reinforce or weaken such guarantees. In addition, there is no such thing as a single, ideal way in which European prosecution services should be conceived and organised. The peculiarities of the diverse legal systems determine to a great extent the need, the feasibility and the timeliness to introduce additional guarantees. Society itself frequently contributes to this process, demanding increased transparency and impartiality, especially as the role of public prosecutors becomes more important and is even extended beyond its traditional remit in criminal law.

14. The institutional design of the Spanish Prosecution Service was radically changed by the Constitution. In the pre-constitutional regime, the Prosecution Office was initially defined as the "government's representative before the courts" (Organic Statute of 1926) and later as the "communication organ between the Government and the Courts of Justice"(Organic State Law of 1967). The Constitution, which refers to the Public Prosecution Office in Title VI (devoted to

the Judicial Power), establishes in Section 124 (2) “The Office of Public Prosecutor shall discharge its duties through its own bodies<sup>6</sup> in accordance with the principles of unity of performance and hierarchical subordination, always subject to the principles of legality and impartiality”, thus granting it organic and functional autonomy to achieve its tasks<sup>7</sup>. It also sets an important guarantee by requiring that the organic statute of the Office of the Public Prosecutor is laid down by law. This constitutional requirement was provided for by Act 50/1981 of 30 December regulating the Organic Statute of the Public Prosecution Service with successive amendments in 2003 and 2007.

15. A first characteristic of the system is that the Prosecution Service maintains certain links with the judicial, legislative and executive powers. It is “geographically” integrated, albeit with functional autonomy, in the judiciary (article 2 of the Organic Statute) and the suppletory application of the provisions Organic Law for the Judiciary is foreseen for a number of career related issues. It shall cooperate with Parliament and appear before it on request to report about concrete matters, as long as there is no legal obstacle for such cooperation. In general, the Prosecutor General shall present in Parliament the annual activity report that he is obliged

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<sup>6</sup> The Prosecution Service is governed by Law 50/1981, of 30 December and counts the following bodies:

- a.the State Attorney General (“SAG”)
- b.the Attorney General Council (“Consejo Fiscal”)
- c.the Board of Court Attorney Generals (“Junta de Fiscales Jefes de Sala”)
- d.the Board of Chief Prosecutors of the Autonomous Communities
- e.the Attorney General’s Office at the Supreme Court
- f.the Attorney General’s Office at the Constitutional Court
- g.the Attorney General’s Office at the National Court
- h.the Special Attorney General’s Offices
- j. the Attorney General’s Military Office
- k. the Attorney General’s Offices at the Autonomous Communities
- l.the Attorney General’s Offices at the Provincial Courts
- m. the Attorney General’s Local Offices

<sup>7</sup> Section 124(1)The Office of Public Prosecutor, without prejudice to functions entrusted to other bodies, has the task of promoting the operation of justice in defence of the rule of law, the rights of citizens and the general interest as safeguarded by the law, whether ex officio or at the request of interested parties, as well as that of protecting the independence of the courts and securing before them the satisfaction of social interest.

to submit to the Government<sup>8</sup>. The link with the executive power is, however, still predominant, as the Government appoints the State Attorney General to which the rest of prosecutors are subject<sup>9</sup>.

16. Additional safeguards were introduced by the Organic Statute to enhance independence. Firstly the objective requirement that the Attorney General is designated between Spanish jurist of recognised professional prestige and capacity and at least 15 years' experience. After the 2007 reform, the introduction of a limited 4 year mandate in addition to a closed list of causes for removal, so that the Government can no longer destitute the Attorney General solely at its will, reinforced his autonomy. The reform also provided that, after receiving the report of the General Council for the Judiciary, the candidate proposed by the Government appears before a Parliamentary Chamber prior to appointment, which will assess his/her merits and suitability for the post. The three state powers are therefore involved in the nomination of the General State Attorney.

17. The link of the Attorney General with the executive power also means that the Government may, through the Ministry of Justice, ask the Attorney General to introduce motions in court in order to promote and defend the public interest.<sup>10</sup> The latter is, however, not legally obliged to follow such instructions, but will respond to the Government on the feasibility and adequacy of implementing its request in a reasoned way, after consulting the Board of Court Attorney Generals, a technical body composed of Supreme Court Prosecutors.

18. The new territorial design of the Prosecution Offices, introduced in 2007, entailed the creation of new Offices and hierarchical structures at the level of the Autonomous Communities. Their relations with the governments of the Autonomous Communities (ie. as regards intructions or reporting), have been regulated in parallel to those between the Government and the Attorney General. It has been said that in this way the Prosecution Service has been organised in accordance to the legal and sociological territorial structures derived from the Constitution. Whether such adjustment is not a step backwards as far as the independence of the Prosecution Service is concerned, remains to be seen. Indeed the new provisions allow for certain interference of territorial executive powers, with no formal competence in criminal policy, in the Prosecution Offices within their territory and introduce an element of complexity which could prove detrimental to the principle of unity.

19. From a functional point of view, it derives from the abovementioned constitutional provision that the design of the prosecution service entails a difficult balance between principles that at first glance seem contradictory: unity and hierarchical subordination versus legality and impartiality.

20. The two first principles are indeed a limit to the independence of Public Prosecutors but must also be seen as a guarantee of efficiency and equality of treatment. The General Attorney and in general, every chief prosecutor, can give general and specific instructions to subordinate prosecutors who are in principle obliged to follow them and may otherwise face disciplinary

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<sup>8</sup> Organic Statute Article 9.1. The Attorney General of Spain shall submit to the Government an annual report on the activity of the Attorney General of Spain, the development of crime rates, crime prevention and reforms that would enhance the efficacy of Justice. Therein shall be collected the observations of the reports that, in turn, the public prosecutors at the different courts must have submitted to the Attorney General of Spain in the fashion and at the time established by regulation. Copies of this report shall be forwarded to the Cortes Generales and to the State Judiciary Council. At all events, the aforesaid report shall be presented by the Attorney General of Spain to the Cortes Generales in the ordinary period of sessions closest to its public presentation.

<sup>9</sup> Section 124. Spanish Constitution "The State's Public Prosecutor shall be appointed by the King on the Government's proposal after consultation with the General Council of the Judiciary."

<sup>10</sup> Organic Statute Section 8

sanctions. They can also decide to replace one prosecutor by another regarding the assignment of a case.

21. A number of mechanisms have been introduced to strike a balance between hierarchical powers and the requirements derived from the principle of legality and impartiality, which oblige prosecutors to act with full objectivity and independence in defence of the public interest always subject to constitutional and legal provisions. In this sense the Organic Statute provides for the following guarantees:

- Any Public Prosecutor who receives orders or instructions that he or she considers contrary to law or wrongful for any other reason shall notify the Chief Prosecutor in a reasoned report. The Chief Prosecutor after consulting the relevant board of prosecutors decides whether or not to ratify the instruction. If he decides to ratify the instruction, he must do so in a reasoned, written form expressly relieving the recipient of any liability stemming from its performance or else decide to entrust the matter to another Public Prosecutor. (Art.27)
- Public prosecutors remain free to orally submit before the court any legal arguments of their choice even if they are under a duty to reflect in writing the instructions received for a specific case (Art.25)
- Public Prosecutors may not receive orders or indications concerning how to discharge their functions except from their hierarchical superiors (Art.55)
- The hierarchical powers of each Chief Prosecutor are moderated by the corresponding Board of prosecutors, which comprises all the prosecutors that form part of a specific prosecution office. The Board of Prosecutors meets regularly to fix unified criteria, and study complex cases. Although the views of the Chief Prosecutor in principle prevail, if his opinion be contrary to the majority of prosecutors present in the meeting, both opinions will be submitted to their hierarchical superior who will take the final decision. (Art.24)
- It is also important to mention that the principle of mandatory prosecution applies in Spain, so that the prosecution service must prosecute all crimes that come to its knowledge, and cannot receive instructions not to prosecute certain offences or take into consideration the opportunity of giving priority to the prosecution of certain conducts. Similarly, the Prosecution Service is not empowered to drop prosecution or investigation. Even if it considers there are reasons to do so, the final decision is taken by a judge and it is also possible, as the Public Prosecutor does not hold the monopoly of criminal action, that charges are brought by the private or popular prosecution and that the Public Prosecutor finally intervenes in trial in the position of the defence.

22. The way the career of prosecutors is legally defined is also an important element of their independence. In Spain the Public Prosecution Service is a highly professional body whose members (with the exception of the Attorney General) are recruited exclusively on the basis of specific competitive examinations (that are common for the selection of judges and prosecutors) and appointed for lifetime. They may only be removed from office in the cases provided by law (ie. as a result of disciplinary proceedings for serious breaches of their duties) and the main aspects of their career (appointment, tenure, duties and responsibilities, incompatibility regime, etc) are fixed in the Organic Statute.

23. There are 3 categories of Public Prosecutors, who form a single hierarchically organised body:

Category 1: Supreme Court Division Prosecutors, on a level with Supreme Court Magistrates. The Deputy Chief Prosecutor at the Supreme Court and the Chief Prosecutor at the Technical Secretariat also belong to this category.

Category 2: Public Prosecutors, on a level with Magistrates.

Category 3: Prosecuting attorneys, on a level with Judges.

24. The Attorney General plays a predominant role in the appointment of members of those organs especially created to assist him and of the higher grades of the hierarchy. Chief Prosecutors and those working at the higher court's prosecution offices or specialised prosecution offices are appointed by the government on a proposal submitted by the State Attorney General; However, he must previously consult the Attorney general council (as a representative body of public prosecutors) and the objective requisites regarding length of service provided for in the Organic Statute of the State Prosecution Service must be respected.

25. All other public prosecutors' posts are filled by means of a selection process predominantly based on seniority. Among the applicants, the highest-positioned person on the promotion roster will be chosen. Vacant positions in category two shall be covered, in order of seniority, from amongst the public prosecutors belonging to category three.

26. The Organic Statute refers to the responsibility of Public Prosecutors. They are subject to civil and criminal liability in the exercise of their functions that will be governed by the same provisions as Judges thus ensuring a high level of non-interference. Regarding disciplinary proceedings, a detailed list of misconducts and sanctions is provided by law, together with rules on who can impose them and how. It is interesting to point out that the most serious sanction, removal from office, can only be pronounced by the Minister of Justice on a proposal from the Attorney General after receiving the favourable opinion of the Council of Public Prosecutors, which is a representative body elected by and from prosecutors of all categories. In all cases there is the possibility to appeal to the hierarchical superior and when administrative channels have been exhausted, decisions are open to judicial appeal.

27. Finally, the Public Prosecution Service's budget is part of the Ministry of Justice's budget (and, exclusively regarding material means, part of the budget of those Autonomous Communities to which competences in justice administration have been transferred). In order to reduce an excessive dependence from the Ministry of Justice, two important amendments were introduced in 2007. First, the Prosecution Service was granted legal personality, which gives it capacity to act and establish relations with other institutions. Second, specific budgetary lines for the Prosecution Service will be individualised in the General State budget and, the case being, in the budget of the Autonomous Communities.