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**“THE INDEPENDENCE OF JUDGES AND PROSECUTORS:
PERSPECTIVES AND CHALLENGES”**

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**PROSECUTORIAL INDEPENDENCE
AND ACCOUNTABILITY**

**by
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INTRODUCTION

My subject this morning is that of prosecutorial independence and accountability. The subject cannot, of course, be looked at in isolation from broader considerations of the function of the prosecutor in upholding the rule of law. Prosecutorial independence is not an end in itself. Where it exists it is intended to put the prosecutor in a situation where he or she can take the right decision in a case without fear or favour, without being subjected to improper pressure from another source, whether it be the media, politicians, the police, a victim seeking revenge or even a misguided public opinion.

Prosecutorial independence, like judicial independence, can mean two different things: the independence of the prosecution as an institution from other organs of society, or (where it exists) the independence of the individual prosecutor. Even where the prosecution as an institution is independent, the prosecution may be organized along hierarchical lines, so that the individual prosecutor may be subject to instructions from a more senior colleague. In other systems the prosecution is modelled on, and may even be a part of, the judiciary.

In considering independence it is necessary to examine the relationship of the prosecutor to the executive power, to the legislature, to the judiciary, and to the police, and I propose to address each of these relationships in turn. I will then look at the question of accountability, because where the prosecutor is independent the questions will then arise: what is the source of the prosecutor's power in a democratic society? Should he or she be accountable and if so how and to whom?

But first I want to make some observations on the nature of prosecution services.

MODELS OF PROSECUTION SERVICE

Anyone approaching the comparative study of prosecution services must first of all be struck by how few legal texts there are on the international plane. There are no legally binding conventions in relation to the matter. What does exist is in the realm of "soft" law. Of the texts which do exist, the three most important are the United Nations Havana Guidelines on the Role of Prosecutors, adopted in 1990, the Council of Europe Recommendation Rec (2000) 19 on the role of public prosecution in the criminal justice system, and the Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors adopted by the International Association of Prosecutors on 23 April 1999.¹ Recently the Venice Commission adopted a Report on European Standards as regards the Independence of the Judicial System, Part II of which deals with the prosecution service.²

Why should the literature be so sparse? A possible reason is suggested by Van Den Wyngaert³. In discussing the fact that until recently there was relatively little interest in comparative criminal procedure she says the following:

"This may be explained by the fact that criminal procedure, more than any other legal discipline, resists harmonisation. A political reason for this phenomenon may be that criminal procedure is essentially linked to State sovereignty and the rules of criminal procedure belong to those rules which set the limit of the state of the powers of a state vis-a-vis its citizens. As such, they regulate

¹ All three texts are contained in the Human Rights Manual for Prosecutors, Egbert Myjer, Barry Hancock, Nicholas Cowdery, (Editors), published by the International Association of Prosecutors, Hartogstraat 15, 2514EP, The Hague, The Netherlands. (2nd Ed. 2008)

² CDL_AD(2010)040, adopted 17-18 December 2010

³ *Criminal Procedure Systems in the European Community*, Van Den Wyngaert, Butterworths, London, Brussels, Dublin, Edinburgh, 1993, at p i

the State's monopoly on the use of power, not only in respect of convicted criminals but also in respect of suspects, who may be subjected to such measures as arrest, search and seizure and telephone surveillance. From this perspective, criminal procedure is a standard to measure the degree of democracy of a given society. It is hardly surprising that States have a tendency, not only to be chauvinistic about their own criminal justice systems, but also to be suspicious about foreign systems. Efforts towards harmonisation in this field are therefore very often considered as an unacceptable interference in their domestic affairs."

It is, of course, the case that criminal justice systems vary considerably from one country to another, and in particular criminal procedure rules vary widely. In relation to prosecution systems, there is a huge variety of arrangements. These to some extent mirror the important divide between common law adversarial systems and civil law inquisitorial systems, but the picture is in fact rather more complex and there are other divisions between the different systems.

While in common law systems the prosecution is invariably a part of the executive, in some civil law systems it is part of the executive and in others it is part of the judiciary. There is also the divide between countries operating a system of discretionary prosecution (the opportunity principle) and countries operating a system of mandatory prosecution (the legality principle), and while common law states operate a discretionary system civil law systems can fall into either category.

Then there is the divide between those countries where each individual prosecutor is independent of every other, and those where the prosecution operates a hierarchical system. Countries where the prosecution is part of the judiciary generally opt for the model of individual independence, but in those where it is part of the executive both the hierarchical system of organisation and the system of individual independence may be found. While prosecution systems which are part of the judiciary are by virtue of that fact independent of other institutions of the state, there is a wide variety of arrangements in prosecution services which are part of the executive, ranging from complete integration within the justice department in some states to systems where prosecution services which are part of the executive are nonetheless independent of government as well as other branches of the executive, as in Ireland and at the federal level in Canada. When there is not complete independence, the degree of answerability to governments and parliaments can vary considerably. Finally prosecution services may be invested with no functions other than prosecution, or at the other end of the spectrum may have considerable powers to ensure compliance with the law in general so as, in some cases, to risk trespassing on functions which might more appropriately be placed in the judiciary.

In view of this wide variety of systems it is not surprising that attempts have rarely been made to try to set out general principles applicable to prosecutors of all sorts. Nevertheless, the Havana Guidelines and the standards of the International Association of Prosecutors represent important statements of the essential duties and rights of prosecutors, and the Council of Europe's Rec (2000)19 goes further and attempts to set out, in addition to matters related to the rights and duties of prosecutors, basic rules which should govern the relationship between public prosecutors and the executive and legislative powers, the relationship between public prosecutors and judges, and the relationship between public prosecutors and the police. The Venice Commission's Report on European Standards as regards the Independence of the Judicial System: Part II – The Prosecution Service has attempted to formulate principles of general application to prosecution services and to make recommendations concerning the appropriate standards.

RESPONSIBILITIES OF PUBLIC PROSECUTORS IN ENSURING DUE PROCESS AND THE RULE OF LAW

This is an area where it is perhaps easiest to set out general norms applicable to all prosecution systems since there are certain basic principles which are fundamental to all systems. As Recommendation Rec(2000)19 points out:

“In all criminal justice systems, public prosecutors:

- decide whether to initiate or continue prosecutions;
- conduct prosecutions before the courts;
- may appeal or conduct appeals concerning all or some court decisions”⁴

Recommendation Rec(2000)19 also refers to certain functions of public prosecutors which exists in some systems but not in others, including implementing national crime policy, conducting, directing or supervising investigations, ensuring that victims are effectively assisted, deciding on alternatives to prosecution, and supervising the execution of court decisions.⁵

It is obvious that the function of public prosecutors necessarily impacts in a vital way on those who are involved in criminal trials. The right to liberty and security of person and the right to procedural fairness in the determination of criminal charges are central to the rule of law in criminal proceedings. Articles 5 and 6 of the European Convention on Human Rights have given rise to more jurisprudence under the Convention than any other two provisions. It is clear that a prosecutor’s office which displays a respect for fair procedures will operate as a bulwark against human rights abuses, whereas a prosecutors office which is not concerned with such matters will make it more likely that the rule of law will not be observed. In this connection it should be noted that the prosecutor not only acts on behalf of the people as a whole, but also has duties to particular individual citizens. These include both the accused person and suspects to whom a duty of fairness is owed, as well as the victims of crime. In particular, the prosecutor has a duty to ensure that so far as practicable the criminal justice system vindicates the rights of victims where these have been infringed.

Recommendation Rec(2000)19 sets out a number of duties of public prosecutors towards individuals. These include the obligation to carry out their functions fairly, impartially and objectively, to respect and seek to protect human rights and to seek to ensure that the criminal justice system operates as expeditiously as possible.⁶ Prosecutors are obliged to abstain from discrimination on any grounds such as sex, race, colour, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health, handicaps or other status.⁷ They are to ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting a suspect, irrespective of whether they are to the suspect’s advantage or disadvantage.⁸ They are not to initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.⁹

An important provision in Recommendation Rec(2000)19 is as follows:

“Public prosecutors should not present evidence against suspects that they know or believe on

⁴ Recommendation Rec(2000)19 paragraph 2

⁵ Ibid paragraph 3

⁶ Ibid paragraph 24

⁷ Ibid paragraph 25

⁸ Ibid paragraph 26

⁹ Ibid paragraph 27

reasonable grounds was obtained through recourse to methods which are contrary to the law. In cases of any doubt, public prosecutors should ask the court to rule on the admissibility of such evidence.”

According to the explanatory memorandum to the Recommendation this provision is intended to cover not so much minor, formal irregularities, many of which have no impact on the overall validity of proceedings, but rather those illegalities that impinge on fundamental rights.

Public prosecutors are also obliged to disclose to the other parties, save where otherwise provided in the law, any information which they possess which may affect the justice of the proceedings.¹⁰ They are however to keep confidential information obtained from third parties, in particular where the presumption of innocence is at stake, unless disclosure is required in the interest of justice or by law¹¹.

So far as concerns the duties of public prosecutors towards persons other than the accused they should take proper account of the interests of witnesses, and especially they should take or promote measures to protect their life, safety and privacy, or to see to it that such measures have been taken.¹² They are also to take proper account of the views and concerns of victims when their personal interests are affected and to take or to promote actions to ensure that they are informed of both their rights and developments in the procedure.¹³

The standards of the International Association of Prosecutors follow broadly similar lines. A number of matters are defined as being duties of the individual prosecutor which according to Recommendation Rec (2000)19 are regarded as matters for the state or the prosecution authorities to address, for example the duty of prosecutors to keep themselves well-informed and abreast of relevant legal developments¹⁴ and the duty to remain unaffected by individual or sectional interests and public or media pressures and to have regard only to the public interest.¹⁵ Prosecutors are also to perform their duties consistently.¹⁶

It is, of course, the judges who have the ultimate responsibility to protect the rights of accused persons and the duties of prosecutors in respecting the rights of the parties do not mean that they are not to prosecute their cases vigorously provided that rules of fairness are observed. Recommendation Rec (2000)19 in defining public prosecutors lays particular emphasis on the necessary effectiveness of the criminal justice system which the prosecutor is obliged to ensure. One of the purposes of the criminal justice system is, of course, to protect the rights of victims of crime and to vindicate breaches of those rights.¹⁷

The IAP Standards require the prosecutor to prosecute cases “firmly but fairly ... and not beyond what is indicated by the evidence.”¹⁸

¹⁰ Ibid paragraph 29

¹¹ Ibid paragraph 30

¹² Ibid paragraph 32

¹³ Ibid paragraph 33

¹⁴ Standards for Prosecutors (IAP) paragraph 1(d); however, Recommendation Rec (2000)19 describes training as both a duty and a right for prosecutors and says that states should take effective measures to provide education and training

¹⁵ Ibid paragraph 3(b)

¹⁶ Ibid paragraph 4.1

¹⁷ The definition of public prosecutors is as follows “public prosecutors’ are public authorities who, on behalf of society and in the public interest, ensuring the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system.” Rec(2000)19 paragraph 1

¹⁸ Standards paragraph 4.2 (e)

The Venice Commission Report on the independence of the prosecution service also lays emphasis on the qualities of prosecutors, in particular at paragraphs 14 to 19 of the Report. Having referred to the importance of the prosecutor acting to a higher standard than a litigant in a civil matter because he or she acts on behalf of society as a whole and because of the serious consequences of criminal conviction, and having referred to duties to act fairly and impartially, as well as the duty to disclose all relevant evidence to the accused, the Commission points to the necessity to employ as prosecutors suitable persons of high standing and good character, having qualities similar to those required of a judge, and to require that suitable procedures for appointment and promotion are in place.

The Venice Commission also emphasizes the necessity to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimized on account of having taken an unpopular decision.

The Venice Commission goes on to talk about political interference in prosecution. The Report points out that if modern western Europe has largely avoided the problem of abusive prosecution in recent times this is largely because mechanisms have been adopted to ensure that improper political pressure is not brought to bear in the matter of criminal prosecution. The Commission points out that in totalitarian states or in modern dictatorships criminal prosecution has been and continues to be used as a tool of repression and corruption. However, as the Commission states:

“The existence of systems of democratic control does not give a complete answer to the problem of politically inspired prosecutions. The tyranny of the majority can extend to the use of prosecution as an instrument of oppressions. Majorities may be subject to manipulation and democratic politicians may be subject to populist pressures which they fear to resist, especially where these are supported by campaigning in the media.”¹⁹

The Venice Commission goes on to refer to two different but related abuses, the first being the bringing of prosecutions which ought not to be brought, and the second, which the Commission describes as more insidious and probably commoner, being the failure of the prosecutor to bring a prosecution which ought to be brought. The Commission points out that this problem is frequently associated with corruption but may also be encountered where governments have behaved in a criminal or corrupt manner or where powerful interests bring political pressure to bear. The report points out that in principle a wrong instruction not to prosecute may be more difficult to counter because it may not easily be made subject to judicial control. The possibility of giving victims a right to seek a judicial review of cases of non-prosecution is referred to.²⁰

The conclusion which can be drawn from these comments is that independence of the prosecutor does not exist as a value in itself but rather as a means of preventing improper political or other interference in the work of the prosecutor and ensuring that prosecutorial decisions, so far as possible, are made fairly and impartially, just as a judge is expected to act fairly and impartially without being subject to outside pressures.

THE RELATIONSHIP BETWEEN PUBLIC PROSECUTORS AND THE EXECUTIVE POWER

The prosecutor's relationship to the executive power is a difficult area. As already mentioned, there is a wide variation in the degree of independence of different prosecution agencies. In some countries there is complete independence of the prosecutor. This is true not only in countries such as Italy where the prosecution is part of the judiciary and where each prosecutor is individually independent, but also in countries such as Ireland, Canada and some Australian states. Speaking as the Director of Public Prosecutions of Ireland, a country where the prosecution is independent, I have to admit that I strongly favour the concept of independent prosecution.

¹⁹ CDL-AD(2010)040, 3 January 2011, para 20

²⁰ *Ibid*, para 21

However, independent prosecution may sometimes have a negative side. In particular, states which have a history of a very powerful prokuratura which in Soviet times was above the rule of law and could dictate to the judiciary how to behave may be suspicious of an independent prosecution which they fear may operate in a similar way and may lead to a system where the judiciary is too deferential to the prosecutor. Furthermore, while an independent prosecution service may ensure that wrongly motivated prosecutions will not be brought for political reasons or to further the interests of the political party which is in power, it does not in itself without any other measures ensure that the power of the independent prosecutor will not be arbitrarily exercised. There are those who argue against an independent prosecutor by arguing for the necessity in a democracy for democratic control over prosecution policy as over any other executive function and who argue that a prosecution service lacking such control lacks democratic legitimacy. But even here it is usually conceded that a government ought not give specific instructions at the level of the individual case. An example of this argument may be found in one of the Venice Commission's opinions, which draws a distinction between the need for general democratic control over prosecution policy and the need to respect prosecutorial independence at the level of the specific case.

"Like it or not, a country's judicial policy in the criminal and civil law spheres is determined, in a democratic context, by the government as an offshoot of the parliamentary majority. This policy has to be carried out by the government's representatives who are the members of the prosecution department.

Action in pursuance of a policy, however, in no way implies that prosecutors are personally issued with specific orders in a given case. Each prosecutor retains freedom of decision, though in the framework of ministerial circulars that determine the country's principal judicial policy aims. A country could not have multiple criminal law policies at the whim of prosecutors' opinions and beliefs; there must be only one such policy. In determining how it should be applied to individual cases, each prosecutor must nevertheless be independent."²¹

A further question arises from the common tendency to confuse public interest with state interest. This tendency is by no means confined to eastern Europe. In its Report on the independence of the prosecution service, the Venice Commission makes the following observation:

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

In the course of its work on individual countries, the Venice Commission has sometimes been critical of excessive powers of the prosecutor's office. In the Soviet system, the prosecutor's office was a powerful means to control the judiciary and in a few countries remnants of this system linger on. There is a danger that an over-powerful prosecution service becomes a fourth authority without accountability. Avoiding this risk is one of the aims of the present report."²²

²¹ CDL-AD (2002)12 on the draft revision of the Romanian Constitution adopted 5-6 July 2002 at paragraph 61 and 62

²² CDL-AD(2010)040, 3 January 2011, para 72-73

Rec (2000)19 recognises the necessity, with a view to promoting fair, consistent and efficient activity of public prosecutors, for states to define general principles and criteria to be used by way of reference against which decisions in individual cases should be taken, in order to guard against arbitrary decision making. However, the recommendation envisages that methods of organisation, guidelines, and principles and criteria can be decided by parliament, by government, or, if national law enshrines the independence of the public prosecutor, by representatives of the public prosecution²³.

There is general agreement in democratic states that the government or parliament should not as a general rule seek to influence the decision in relation to individual cases or determine how a prosecution in any particular case should be conducted, even when the prosecution is not fully independent. Even in countries where the prosecution is an integral part of the executive the prosecutor is therefore given a functional day-to-day independence in relation to particular cases.

If the government is to have a power to give directions in particular cases, then those instructions must be given in a transparent way. In this respect Rec (2000)19 provides as follows:

“Where the public prosecution is part of or subordinate to the government, states should take effective measures to guarantee that:

- a. the nature and the scope of the powers of the government with respect to the public prosecution are established by law;
- b. government exercises its powers in a transparent way and in accordance with international treaties, national legislation and general principles of law;
- c. where government gives instructions of a general nature, such instructions must be in writing and published in an adequate way;
- d. where the government has the power to give instructions to prosecute a specific case, such instructions must carry with them adequate guarantees that transparency and equity are respected in accordance with national law, the government being under a duty, for example:
 - to seek prior written advice from the competent public prosecutor or the body that is carrying out the public prosecution;
 - duly to explain its written instructions, especially when they deviate from the public prosecutor’s advices and to transmit them through the hierarchical channels;
 - to see to it that, before the trial, the advice and the instructions become part of the file so that the other parties may take cognisance of it and make comments;
- e. public prosecutors remain free to submit to the court any legal arguments of their choice, even where they are under a duty to reflect in writing the instructions received;
- f. instructions not to prosecute in a specific case should, in principle, be prohibited. Should that not be the case, such instructions must remain exceptional and be subjected not only to the requirements indicated in paragraphs *d.* and *e.* above but also to an appropriate specific control with a view in particular to guaranteeing transparency.”²⁴

Similarly, the IAP guidelines require that where prosecutorial discretion is permitted in a particular jurisdiction, it should be exercised independently and free from political interference.²⁵ If non-

²³ Recommendation Rec(2000)19 paragraph 36 b

²⁴ Ibid paragraph 13

²⁵ Standards paragraph 2.1

prosecutorial authorities have the right to give general or specific instructions to prosecutors, those instructions are to be transparent, consistent with lawful authority and subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.²⁶

Procedures to guarantee a proper selection of prosecutors and to prevent their arbitrary dismissal are very important in safeguarding prosecutorial independence. There is no point having a system where on paper the prosecutor is independent but in practice is prepared to accept covert instructions from a government. Furthermore the independence of the prosecutor's decisions could be undermined if there is a risk of arbitrary removal from office. The Venice Commission have dealt with this as follows in their Opinion on the regulatory concept of the Constitution of the Hungarian Republic:

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

- The President of each of the courts or of each of the superior courts.
- The Attorney General of the Republic.
- The President of the Faculty of Advocates.
- The civil service head of the state legal service.
- The civil service Secretary to the Government.
- The Deans of the University Law Schools."²⁷

In relation to dismissal, the Venice Commission also set out its views:

"An important element in the independence of the general prosecutor is his protection from arbitrary or politically motivated dismissal. If the government were to have the power to dismiss him at will then he could not discharge his function with the absolute independence which is essential. On the other hand to involve Parliament in the decision to dismiss might draw him into the arena of party politics which would be undesirable. The grounds for dismissal should be stated in the Constitution, eg stated misbehaviour or incapacity. A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and, if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified."²⁸

Another issue concerns measures for the protection of prosecutors. In many countries prosecutors' independence may be subject to physical threats, in particular from organized crime, and sometimes even from the forces of the state itself. The UN Guidelines refer to the duty on states to ensure that prosecutors are physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions (Article 5) and the IAP Standards repeat this provision. The IAP adopted a Declaration on Minimum Standards concerning the Security and Protection of Public Prosecutors and their families in Helsinki in 2008.

²⁶ Ibid paragraphs 2.2 and 2.3

²⁷ Opinion on the Regulatory Concept of the Constitution of the Hungarian Republic CDL-INF (1996)2, and CDL (1995)73, II.11

²⁸ CDL-INF (1996)2, and CDL (1995)73, II.11

THE RELATIONSHIP BETWEEN THE PROSECUTION AND THE LEGISLATURE

It is normal that the legislature should have a role in laying down general principles and criteria and principles to be used by way of references against which decisions in individual cases should be taken. It is also common for the legislature to play a role in the appointment or dismissal of public prosecutors, usually following a nomination by the government or the president of the country concerned or some expert body. These matters are dealt with in some detail above.

Where difficulties can arise, however, is when the legislature becomes involved in criticising the decision of the prosecutor in individual cases. Unfortunately, it is precisely when there is public concern about some particular case that the politicians are most likely to get exercised and it can be very difficult to draw the line between general commentary and interference in a particular case in such circumstances. Of their nature, politicians tend to be very responsive to the views of the media who effectively have the power to make and destroy political careers. For this reason, there is a great danger that legislative control over the work of the prosecutor can become a vehicle by which media pressures are used to undermine the independence of the prosecutor. Prosecutors can be subjected to populist pressures particularly when there is a media frenzy arising out of a high profile criminal trial. For this reason, if there is any role for the legislature in relation to the prosecutors office it needs to be aware of and respect these considerations. It is in the writer's view important that a prosecutor who has to appear before the parliament or its committees should be answerable only in the most general terms for prosecution policy but not for the decisions made in individual cases. The Venice Commission has expressed the view that "accountability to Parliament in individual cases of prosecution or non-prosecution should be ruled out".²⁹ Furthermore, if parliament is to have a say in the dismissal of a prosecutor it should be enabled to do this only after receiving a report of an impartial expert group into the misconduct of the prosecutor but should not have the power to dismiss him or her by reason of disagreement with the decision made in a particular case.

THE PROSECUTOR AND THE JUDICIARY

The question of relations between the prosecutor and the judiciary is dealt with in Recommendation Rec (2000) 19. The recommendation speaks of ensuring that the legal status, competencies and procedural role of the prosecutor do not cast any doubt on the independence and impartiality of judges and in particular that a person should not at the same time be able to perform duties as a public prosecutor and as a court judge.³⁰ This does not mean that the same person may not successively perform the two functions; only that they may not be performed at the same time.³¹ Public prosecutors are to strictly respect the independence and the impartiality of judges; in particular they should neither cast doubt on judicial decisions nor hinder their execution.³²

In a number of cases the Venice Commission has been critical of the continuance of powers of prosecutorial supervision in the prosecutor's office of former communist countries on the grounds that they cut across the judicial function and infringe principles of separation of powers. For example, in its Opinion on the Federal Law of the *Prokuratura* (Prosecutor's Office) of the Russian Federation³³ the Venice Commission stated as follows:

"The general supervisory function appears as the primary task of the Prosecutor's Office. This approach gives rise to misgivings. Such a broadly defined general supervisory function was a logical component of the system of unity of power and resulted from that system's lack of

²⁹ CDL-AD(2010)040, 3 January 2011, Para 42

³⁰ Rec(2000)19 paragparh 17

³¹ Ibid paragraph 18

³² Ibid paragraph 19

³³ CDL-AD(2005) 014, 10-11 June 2005

administrative and constitutional courts and the institution of an ombudsman. The prosecutor therefore combined the functions of different organs within his function of general supervision. The justification for such a broad definition of the role of the Prosecutor's Office vanishes, when other institutions to safeguard the legal order and adherence to civil rights are established. In a democratic law-governed state, protection of the rule of law is the task of independent courts...

The broad extent of the Prosecutor General's supervisory power over state authorities compared with the court's functions in this area risks inhibiting the courts developing their own remedies and acts as a brake on the development of administrative law. On the other side of the coin, the system of petitioning the Prosecutor General appears to provide an effective and cheap remedy where officials of the state break the law. Any reform will therefore have to take care that alternative remedies are made available to the people.

THE PROSECUTOR AND THE POLICE

Finally, we should consider the relationship between public prosecutors and the police. Again, there is a variety of arrangements as to whether or not prosecutors have a role in relation to investigations or not. In some countries investigation is for the police and prosecution for the prosecutor and each acts independently of the other in his or her own particular sphere.³⁴ More commonly, perhaps, the prosecutor has an overall supervisory role over the investigations of the police. In such a system, of course, the police may well have a considerable degree of functional independence from the prosecutor, particularly in the more routine case. In some countries the police and the prosecution service are integrated.³⁵

Recommendation Rec(2000)19 provides that as a general rule:

“PUBLIC PROSECUTORS SHOULD SCRUTINIZE THE LAWFULNESS OF POLICE INVESTIGATIONS WHEN DECIDING WHETHER A PROSECUTION SHOULD COMMENCE OR CONTINUE. IN THIS RESPECT, PUBLIC PROSECUTORS WILL ALSO MONITOR THE OBSERVANCE OF HUMAN RIGHTS BY THE POLICE.”³⁶

In my own country, Ireland, while the prosecution has no function in relation to investigation and no power to supervise the carrying out of an investigation by the police, by reason of the operation of a very strict rule which excludes any evidence obtained unlawfully the prosecution must necessarily scrutinize the lawfulness of police investigations when a file is received from them. Of course, in such a system the prosecutor has no role in a case which does not result in a file being sent to the prosecutor for consideration.

Recommendation Rec (2000)19 provides that where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the prosecutor, the state should take effective measures to guarantee that the public prosecutor may give instructions with a view to an effective implementation of crime policy priorities, the means used to search for evidence, the staff used, the duration of investigations, and information to be given to the public prosecutor and may carry out evaluations and controls and sanction violations.³⁷ In the case of states where the police is independent of the public prosecution the recommendation merely provides that the state should take effective measures to ensure that there is appropriate and functional cooperation between the public prosecution and the police.

Of course, even in a state such as Ireland where the prosecution cannot direct the conduct of an

³⁴ Such is the case, for example, in Ireland

³⁵ This is the case in Denmark

³⁶ Rec(2000)19 paragraph 21

³⁷ Ibid paragraph 22

investigation that is not necessarily the whole story. Where the police submit a file which is deficient in some particular respect the pointing out of that deficiency may be tantamount to a direction to the police as to how the investigation should be further conducted. Certainly a failure by the police to do so would be likely to expose them to criticism.

It is particularly important that there should be an effective mechanism for investigating complaints against the police. Of necessity this requires that there be investigators who are themselves independent of the police. Such a system of control may be in the hands of the public prosecutor or in the hands of an independent complaints commission or police ombudsman. In view of the close working relationship which necessarily exists between the prosecutor and the police in relation to the prosecution of crime it is preferable that a separate body should be responsible for investigating complaints.

Finally, in some states the prosecution of minor offences continues to be carried out by the police. This is, for example, still the case in New Zealand and was until recently the case in the United Kingdom. In Ireland the police continue in practice to prosecute minor offences, although they do so subject to the requirement that they comply with any general directions issued by the Director of Public Prosecutions and also subject to the possibility of the Director giving specific directions in any individual case. In Northern Ireland until recently the police could prosecute minor offences, but this has now been transferred to the new Northern Ireland Public Prosecution Service which prosecutes in all criminal cases, even the most minor.

ACCOUNTABILITY

Despite the argument that there should not be any accountability of prosecutors to parliament or the government in respect of individual prosecutorial decisions, as with any institution it is necessary to ensure that the prosecutor behaves in an acceptable way and does not act arbitrarily.

Firstly, the prosecutor's office should remain accountable for its work other than the taking of prosecutorial decisions. The prosecutor should be accountable to bodies such as public auditors in respect of financial and organizational issues.

Secondly, so far as prosecution policy is concerned it is legitimate that society may settle matters of policy through the political system with appropriate parliamentary control.

Regarding the content or substance of prosecutorial decisions, there are steps which can increase accountability without undermining the prosecutor's ability to act independently. If the prosecutor is required to explain decisions to the police and to injured parties this will act as a safeguard against arbitrary decision making. The prosecutor should publish reports at regular intervals, usually on an annual basis. The prosecutor's working methods and the basis for decision making should be set out in published guidelines. The prosecutor should attempt to put as much general information as possible into the public domain while taking care not to infringe the rights of third parties, in particular their legitimate privacy interests.

It is possible also to envisage such methods of accountability as an inspectorate which, without having power to change a decision, can review the work of the prosecutor and report on it. Such an institution exists in the three legal jurisdictions in the United Kingdom.

It is possible also to envisage the creation of a prosecutorial council. The Venice Commission has argued that such a council should not be an instrument of pure self-government but should derive democratic legitimacy from having at least some of its members elected by parliament.³⁸

³⁸ CDL-AD(2010)040, at para 41

The judiciary can act as an important source of accountability. A prosecutor who acts in a wrong manner is likely to find decisions and procedures criticized in the courts, whether the error is one of law or a failure by the prosecutor to observe correct procedures.

CONCLUSION

Despite the variety of arrangements in prosecutor's offices, the public prosecutor plays a vital role in ensuring due process and the rule of law as well as respect for the rights of all the parties involved in the criminal justice system. The prosecutor's duties are owed primarily to the public as a whole but also to those individuals caught up in the system, whether as suspects or accused persons, witnesses or victims of crime. Public confidence in the prosecutor ultimately depends on confidence that the rule of law is obeyed.

While the executive and the legislature may play a role in formulating prosecution policy and responsibility for organizational arrangements, at the level of the individual case respect for the rights both of accused persons and of crime victims demands that the prosecutor should make decisions independently of media or political pressures. Methods to ensure the selection of good prosecutors and to protect them against unfair dismissal are essential to protect the independence of the prosecutor. The role of the prosecutor must not be confused with the role of courts and trial judges nor should the power of prosecutors be abused to compromise the independence of the judiciary. The prosecutor may fulfill an important role in supervising police investigations, and even where this is not the case an independent system of investigation of allegations of police misbehaviour is vital. Public confidence in the proper operation of the rule of law can best be ensured where the organs of government respect each others' proper spheres of operation.