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## THE ROLE OF PUBLIC PROSECUTORS IN UPHOLDING THE RULE OF LAW

Before addressing this subject under the three headings suggested by the organisers of the seminar. I would like to make some general observations on the nature of prosecution services.

Anyone approaching the comparative study of prosecution services must first of all be struck by the paucity of legal texts. There are no legally binding conventions in relation to the matter. What does exist is in the realm of “soft” law. Of these, the two most important texts are the Council of Europe 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.

Why should this be so? A possible reason is suggested by Van Den Wyngaert<sup>1</sup>. 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 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. While these to some extent mirror the fundamental divide between common law adversarial systems and civil law inquisitorial systems, the picture is by no means as simple as this. While in common law systems the prosecution is invariably a part of the executive, in civil law systems in some states it is part of the executive and in others it is part of the judiciary. There is 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

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<sup>1</sup> *Criminal Procedure Systems in the European Community*, Van Den Wyngaert, Butterworths, London, Brussels, Dublin, Edinburgh, 1993, at p i

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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 obviously 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 the prosecution systems centred in the judiciary are by definition 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 a system whereby a prosecution service which is part of the executive is nonetheless independent of the other branches of the executive, as in Ireland and parts of Canada and Australia. When there is not complete independence, the degree of answerability to governments and parliaments can vary considerably. Finally prosecution services can be invested with no functions other than prosecution, or at the other end of the spectrum can have considerable powers of ensuring compliance with the law in general such 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 standards of the International Association of Prosecutors represent an 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.

### **RESPONSIBILITIES OF PUBLIC PROSECUTORS IN ENSURING DUE PROCESS AND PROTECTION OF HUMAN RIGHTS IN THE CRIMINAL JUSTICE SYSTEMS OF THE PARTICIPATING STATES**

This is an area where it is perhaps easiest to set out general norms applicable to all prosecution systems since there are certain matters 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”<sup>2</sup>

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

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<sup>2</sup> Recommendation Rec(2000)19 paragraph 2

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are effectively assisted, deciding on alternatives to prosecution, and supervising the execution of court decisions.<sup>3</sup>

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 human rights. 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 human rights standards 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 that the criminal justice system operates as expeditiously as possible.<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> They are not to initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.<sup>7</sup>

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 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

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<sup>3</sup> Ibid paragraph 3

<sup>4</sup> Ibid paragraph 24

<sup>5</sup> Ibid paragraph 25

<sup>6</sup> Ibid paragraph 26

<sup>7</sup> Ibid paragraph 27

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the justice of the proceedings.<sup>8</sup> 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 law<sup>9</sup>.

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.<sup>10</sup> 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.<sup>11</sup>

The standards of the International Association of Prosecutors follow broadly similar lines. A number of matters are defined as duties of the individual prosecutor which in 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 developments<sup>12</sup> 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.<sup>13</sup> Prosecutors are also to perform their duties consistently.<sup>14</sup>

It is, of course, the judges who have the ultimate responsibility to protect the human rights of accused persons and the duties of prosecutors in protecting human rights 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 human rights of victims of crime and to vindicate breaches of those rights.<sup>15</sup>

The IAP Standards require the prosecutor to prosecute the case “firmly but fairly ... and not beyond what is indicated by the evidence.”<sup>16</sup>

## **THE IMPORTANCE OF THE RELATIONSHIP BETWEEN PUBLIC PROSECUTORS AND THE EXECUTIVE POWERS IN UPHOLDING THE RULE OF LAW**

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<sup>8</sup> Ibid paragraph 29

<sup>9</sup> Ibid paragraph 30

<sup>10</sup> Ibid paragraph 32

<sup>11</sup> Ibid paragraph 33

<sup>12</sup> 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

<sup>13</sup> Ibid paragraph 3(b)

<sup>14</sup> Ibid paragraph 4.1

<sup>15</sup> 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

<sup>16</sup> Standards paragraph 4.2 (e)

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This is a difficult area. As already mentioned, there is a wide variety of degrees of independence as between 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 and some Canadian provinces and Australian states. Speaking as the Irish Director of Public Prosecutions I have to admit that I strongly favour the concept of independent prosecution.

However, independent prosecution may have its drawbacks. 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 are naturally suspicious of an independent prosecution which they fear may operate in a similar way. 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 itself be arbitrarily exercised. The argument against an independent prosecutor is sometimes rooted within the necessity in a democracy for democratic control over prosecution policy. An example of this argument may be found in the Venice Commission's Opinion on the draft revision of the Romanian Constitution.

“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.”<sup>17</sup>

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 such 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 prosecution<sup>18</sup>.

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,

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<sup>17</sup> CDL-AD (2002)12 adopted 5-6 July 2002 at paragraph 61 and 62

<sup>18</sup> Recommendation Rec(2000)19 paragraph 36 b

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even when the prosecution is not fully independent. Even in countries where the prosecution is an integral part of the executive the prosecutor is nonetheless 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.”<sup>19</sup>

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.<sup>20</sup> If non-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.<sup>21</sup>

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<sup>19</sup> Ibid paragraph 13

<sup>20</sup> Standards paragraph 2.1

<sup>21</sup> Ibid paragraphs 2.2 and 2.3

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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 if in practice he is prepared to accept covert instructions from a government. Furthermore the independence of the prosecutors decisions could be undermined if he could be arbitrarily removed 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.

A public announcement would be made inviting written applications for the position of general prosecutor and stating the qualifications required for the position; it is suggested that these should be not less than those required for appointment to high judicial office. The Commission would examine the applications and submit to the government (or to Parliament if that is preferred) not more than, say, three names all of whom the Commission considered to be suitable for appointment. The government (or Parliament, as the case might be) would be free to make the selection from those names. In order to emphasise the importance of the position of general prosecutor he might be appointed by the President of the Republic on the nomination of the government (or Parliament) although the President would have no power to reject the nomination. A possible variation of the above proposal is that the selection of nominee that is made by the government should be approved by Parliament before submission to the President. Not all the matters set out need to be stated in the Constitution which might merely say “the general prosecutor of the Republic shall be appointed by the president of the Republic on the nomination of the (government) (with the approval of Parliament) (Parliament)”. The other matters would be set out in a law of Parliament.”<sup>22</sup>

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

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<sup>22</sup> Opinion on the Regulatory Concept of the Constitution of the Hungarian Republic CDL-INF (1996)2, and CDL (1995)73, II.11

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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. The body, for example, might be of similar composition to the nominating body described in paragraph 5 above or consist of the remaining members of the National Jurisdiction Council. Alternatively the body might consist of three judges appointed by the presidents of their courts. It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome. Whatever body is selected it is probably better that it be comprised of *ex officio* members rather than be appointed *ad hoc*, in order to avoid suggestions that its members have been chosen so as to obtain a particular result. An alternative (though less desirable) approach would be to confine the function of the body to establishing the facts, leaving to the government or Parliament the decision whether those facts amount to misconduct and deserve dismissal. Whether the body conducts its investigation in public or in private its report would be published. It is probably better that any citizen should have the right to make a complaint to the body. However, in order to guard against frivolous or vexatious complaints it should have the power to reject complaints without investigation or report. All the matters suggested above could be provided for in a law of Parliament except the removing authority ("The President of the Republic at the request of the Government/Parliament"), which should be in the Constitution."<sup>23</sup>

### **THE FUNCTIONS OF PROSECUTORIAL ORGANS AND THEIR COOPERATION WITH OTHER LEGAL INSTITUTIONS**

I will refer briefly to the relationship between the prosecutorial organ and the legislature, the judiciary, and the police.

#### **The Legislature**

Firstly, in relation to 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 other 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 legislature is 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,

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<sup>23</sup> CDL-INF (1996)2, and CDL (1995)73, II.11



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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 through this means particularly when there is a media frenzy arising out of a high profile criminal trial. For this reason, any role for the legislature in relation to the prosecutors office needs to respect these considerations. It is in the writers view important that if the prosecutor has to appear before the parliament or its committees he should be answerable only in the most general terms for prosecution policy but not for the decisions which he or she has made in individual cases. 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 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

In an 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 Federation<sup>27</sup> the Venice Commission stated as follows:

“From the description of the key features of the Law above, it clearly follows that the Law establishes a very powerful institution. The first thing that strikes the reader is that it is not merely, or perhaps even primarily, an office concerned with criminal prosecution. Its primary function is that of control over the State apparatus. If the State withdraws from large areas of activity its power will diminish, but as long as the State remains powerful so will the *Prokuratura*. The overall structure of the Prosecutor's Office during the Soviet period is still recognisable in the present Law on the Prosecutor's Office despite some welcome changes which have taken place, notably in the limitation of the power to exercise supervision over the legality of court proceedings and in making it clear that the final decision is with the courts.

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<sup>24</sup> Rec(2000)19 paragparh 17

<sup>25</sup> Ibid paragraph 18

<sup>26</sup> Ibid paragraph 19

<sup>27</sup> CDL-AD(2005) 014, 10-11 June 2005

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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 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. This is not reflected in the Law under consideration.

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.

Chapter III of the Law entitled 'Prosecutorial supervision' is devoted to the detailed instruments whereby the prosecutor exercises supervision and endows the prosecutor with extremely broad rights. Article 22 defines the specific instruments of the said supervision. In order to perform his functions, the prosecutor has access to all those entities' documents and materials and can ask them to clarify all matters pertaining to the violation of the law. Item 4 of the same article states that "*officials of the bodies referred to in Article 21, item 1[...] shall be bound to comply immediately with any requests by the prosecutor or his deputy to carry out checks and inspection*". Article 6 introduces the principle that all requests by the prosecutor are binding. This once again raises doubts as to whether such powers do not violate the system of balance inherent in the separation of powers, obliterate the division of authority and grant the Prosecutor's Office the rank of an authority above all other bodies.

These misgivings are reinforced by the fact that Article 21 of the Law listing the bodies under supervision by the Prosecutor's Office includes, without any differentiation, in addition to public bodies also "*governing bodies and heads of commercial and non-commercial organisations*".

Against this background the Commission would support a very different approach to the powers of the prosecutor's office which results from a text adopted by the Parliamentary Assembly. While it is not binding on Member States, the Parliamentary Assembly of the Council of Europe, in Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, having recited (at paragraph 6) that the various non-penal law responsibilities of public prosecutors "*give rise to concern as to their compatibility with the Council of Europe's basic principles*" went on to declare its opinion (at paragraph 7):

"it is essential... that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public

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interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other function.”<sup>28</sup>

The Commission has been critical of prosecution powers to intervene in court proceedings in which it was not a party.

“The Prosecutor General retains a power, as part of his supervisory review powers, to intervene in any court proceedings and to seek a review by a superior court even if a final judicial decision has been given. That power has, however, now been limited.

In the case of *Brumarescu v Romania* (28342/95, Judgment of 28 October 1999), the European Court of Human Rights held that a similar power exercised by the Prosecutor General of Romania to set aside a civil judgment in a case in which the Romanian State had not been a party was contrary to Article 6.1 of the European Convention on Human Rights. The Court stated:

“The right to a fair hearing before a tribunal as guaranteed by Article 6.1 of the Convention must be interpreted in the light of the Preamble to the Convention, which declares, among other things, the rule of law to be part of the common heritage of the Contracting States. One of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, inter alia, that where the courts finally determined an issue, their ruling should not be called into question.

In the present case the Court notes that at the material time the Procurator-General of Romania – who was not a party to the proceedings – had a power under Article 330 of the Code of Civil Procedure to apply for a final judgment to be quashed. The Court notes that the exercise of that power by the Procurator-General was not subject to any time-limit, so that judgments were liable to change infinitely.

The Court observes that, by allowing the application lodged under that power, the Supreme Court of Justice set at naught an entire judicial process which had ended in – to use the Supreme Court of Justice’s words – a judicial decision that was “irreversible” and thus *res judicata* – and which had, moreover, been executed.

In applying the provisions of Article 330 in that manner, the Supreme Court of Justice infringed the principle of legal certainty. On the facts of the present case, that action breached the applicant’s right to a fair hearing under Article 6.1 of the Convention.

There has thus been a violation of that Article.”<sup>29</sup>

### **The Police**

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<sup>28</sup> Ibid paragraphs 50-55

<sup>29</sup> Ibid paragraphs 62-63

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Finally, there is 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.<sup>30</sup> 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.<sup>31</sup>

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.”<sup>32</sup>

In my own country, 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.<sup>33</sup> 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 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

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<sup>30</sup> Such is the case, for example, in Ireland

<sup>31</sup> This is the case in Denmark

<sup>32</sup> Rec(2000)19 paragraph 21

<sup>33</sup> Ibid paragraph 22

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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 the United Kingdom, and until recently was the case in Ireland. 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.