

European commission for democracy through law (Venice Commission) report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service

Adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010) on the basis of comments by Mr James HAMILTON (Substitute Member, Ireland) Mr Jørgen Steen SØRENSEN (Member, Denmark) Ms Hanna SUCHOCKA (Member, Poland)^[1]

^[1] Publicado em [https://www.venice.coe.int/webforms/documents/CDL-AD\(2010\)040.aspx](https://www.venice.coe.int/webforms/documents/CDL-AD(2010)040.aspx) (nota do Conselho de Redacção).

I. INTRODUCTION

1. By letter of 11 July 2008, the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Ms Däubler-Gmelin, requested the Venice Commission to give an opinion on “European standards as regards the independence of the judicial system”.

The Committee is “interested both in a presentation of the existing *acquis* and in proposals for its further development, on the basis of a comparative analysis taking into account the major families of legal systems in Europe”.

2. When the present report makes recommendations it does so also in reply to the request by the Chairperson of the Committee

on Legal Affairs and Human Rights of the Parliamentary Assembly to provide proposals for the further development of European standards.

3. The Commission entrusted the preparation of this report to its Sub-Commission on the Judiciary, which decided to prepare two reports on the independence of the Judiciary, a first one dealing with Judges (CDL-AD(2010)004, adopted at the 82nd plenary session, 12-13 March 2010) and the present one on the Prosecution Service, prepared on the basis of comments by Mr Hamilton (CDL-JD(2009)007), Mr Sørensen (CDL-JD(2008)005) and Ms Suchocka (CDLJD(2008)004).

4. Following discussions in the Sub-Commission on the Judiciary on 3 June and 16 December 2010 as well as at the plenary session of 4 June 2010, the present report was adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

II. RELEVANT TEXTS

5. A number of international documents exist on prosecutors.

To cite only a few:

- ▶ Recommendation Rec(2000)19 of the Committee of Minister of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System,
- ▶ The 1990 United Nations Guidelines on the Role of Prosecutors,
- ▶ The 1999 IAP (International Association of Prosecutors) Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors,
- ▶ The Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on “Judges and Prosecutors in a Democratic Society”

- The European Guidelines on Ethics and Conduct for Public Prosecutors (Council of Europe, “Budapest Guidelines”, 2005)
6. In a number of opinions, the Venice Commission had occasion to make recommendations on constitutional provisions and legislation on the prosecution office, see Part II of the Draft *Vademecum* on the Judiciary (CDL-JD(2008)001).

III. VARIETY OF MODELS

7. Systems of criminal justice vary throughout Europe and the World. The different systems are rooted in different legal cultures and there is no uniform model for all states. There are, for example, important differences between systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. There are systems where prosecution is mandatory (the legality principle) and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). In some systems there is lay participation in the fact-finding and/or law-applying process through the participation of jurors, assessors or lay judges, with consequences for the rules of criminal procedure and evidence. Some systems allow for private prosecution while others do not do so or recognise the possibility of private prosecution only on a limited basis.

Some systems recognise the interests of a victim in the outcome of criminal proceedings as a “*partie civile*” where others recognise only a contest between the prosecutor representing the public or the state and the individual accused.

8. The relationship between police and prosecutor also varies. In many countries the police are in principle subordinate to the prosecutor’s instructions, although often in practice enjoying functional