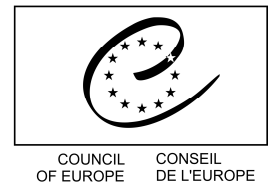


Strasbourg, 8 December 2009



**OPINION No.12 (2009)  
OF THE CONSULTATIVE COUNCIL OF EUROPEAN JUDGES (CCJE)**

**AND**

**OPINION No.4 (2009)  
OF THE CONSULTATIVE COUNCIL OF EUROPEAN PROSECUTORS (CCPE)**

**TO THE ATTENTION OF THE COMMITTEE OF MINISTERS  
OF THE COUNCIL OF EUROPE**

**ON THE RELATIONS BETWEEN JUDGES AND PROSECUTORS IN A DEMOCRATIC  
SOCIETY**

**This Opinion, jointly adopted by the CCJE and the CCPE contains:**

- a Declaration, called « Bordeaux Declaration » ;
- an Explanatory Note.

## BORDEAUX DECLARATION

### “JUDGES AND PROSECUTORS IN A DEMOCRATIC SOCIETY”<sup>1</sup>

The Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE), at the request of the Committee of Ministers of the Council of Europe to provide an opinion on relationships between judges and prosecutors, agreed on the following:

1. It is in the interest of society that the rule of law be guaranteed by the fair, impartial and effective administration of justice. Public prosecutors and judges shall ensure, at all stages of the proceedings, that individual rights and freedoms are guaranteed, and public order is protected. This involves the total respect of the rights of the defendants and of the victims. A decision of the prosecutor not to prosecute should be open to judicial review. An option may be to allow the victim to bring the case directly to the court.
2. The fair administration of justice requires that there shall be equality of arms between prosecution and defence, as well as respect for the independence of the court, the principle of separation of powers and the binding force of final court decisions.
3. The proper performance of the distinct but complementary roles of judges and public prosecutors is a necessary guarantee for the fair, impartial and effective administration of justice. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other.
4. Adequate organisational, financial, material and human resources should be put at the disposal of justice.
5. The role of judges – and, where applicable, of juries – is to properly adjudicate cases brought regularly before them by the prosecution service, without any undue influence by the prosecution or defence or by any other source.
6. The enforcement of the law and, where applicable, the discretionary powers by the prosecution at the pre-trial stage require that the status of public prosecutors be guaranteed by law, at the highest possible level, in a manner similar to that of judges. They shall be independent and autonomous in their decision-making and carry out their functions fairly, objectively and impartially.
7. The CCJE and the CCPE refer to the consistent case-law of the European Court of Human Rights in relation to article 5 paragraph 3 and article 6 of the European Convention of Human Rights. In particular, they refer to the decisions whereby the Court recognized the requirement of independence from the executive power and the parties on the part of any officer authorized by law to exercise judicial power but which does not, however, exclude subordination to higher independent judicial authority. Any attribution of judicial functions to prosecutors should be restricted to cases involving in particular minor sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendants' right to a decision on such cases by an independent and impartial authority exercising judicial functions.
8. For an independent status of public prosecutors, some minimal requirements are necessary, in particular:
  - that their position and activities are not subject to influence or interference from any source outside the prosecution service itself;
  - that their recruitment, career development, security of tenure including transfer, which shall be effected only according to the law or by their consent, as well as remuneration be safeguarded through guarantees provided by the law.

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<sup>1</sup> This Declaration is accompanied by an Explanatory Note. This Declaration has been jointly drafted by the Working Groups of the CCJE and the CCPE in Bordeaux (France) and has been officially adopted by the CCJE and the CCPE in Brdo (Slovenia) on 18 November 2009.

9. In a State governed by the rule of law, when the structure of prosecution service is hierarchical, effectiveness of prosecution is, regarding public prosecutors, strongly linked with transparent lines of authority, accountability, and responsibility. Directions to individual prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria. Any review according to the law of a decision by the public prosecutor to prosecute or not to prosecute should be carried out impartially and objectively. In any case, due account shall be given to the interests of the victim.
10. The sharing of common legal principles and ethical values by all the professionals involved in the legal process is essential for the proper administration of justice. Training, including management training, is a right as well as a duty for judges and public prosecutors. Such training should be organized on an impartial basis and regularly and objectively evaluated for its effectiveness. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality.
11. The interest of society also requires that the media are provided with the necessary information to inform the public on the functioning of the justice system. The competent authorities shall provide such information with due regard in particular to the presumption of innocence of the accused, to the right to a fair trial, and to the right to private and family life of all persons involved in proceedings. Both judges and prosecutors should draw up a code of good practices or guidelines for each profession on its relations with the media.
12. Both public prosecutors and judges are key players in international cooperation in judicial matters. The enhancement of mutual trust between competent authorities of different states is necessary. In this context, it is imperative that information gathered by prosecutors through international co-operation and used in judicial proceedings is transparent in its content and origin, as well as made available to the judges and all parties, with a view to an effective protection of human rights and fundamental freedoms.
13. In member States where public prosecutors have functions outside the criminal law field, the principles mentioned herein apply to these functions.

## EXPLANATORY NOTE

### I. INTRODUCTION:

#### a. Purpose of the Opinion

1. It is an essential task of a democratic State based on the rule of law to guarantee that fundamental rights and freedoms as well as equality before the law are fully respected, in accordance, in particular, with the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as well as the case-law of the European Court of Human Rights (the Court). At the same time it is important to ensure security and justice in society by assuring effective measures in respect of criminal conduct. Security in society must also be guaranteed in a democratic state by an effective enforcement of penalties imposed for criminal conduct (Declaration, paragraph 1).

2. Thus, it is the mission of the State to set up and to ensure the functioning of an efficient justice system respectful of human rights and fundamental freedoms. While numerous actors participate in this mission, be they from the public or (as in the case of lawyers) private sector, a key role in ensuring the functioning of justice in an independent and impartial way is played by judges and public prosecutors.

3. In their previous Opinions, the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) addressed many important aspects of the efficiency of justice with emphasis on human rights and fundamental freedoms. It should be underlined that the common goal of judges and prosecutors, including that of public prosecutors who have tasks outside the criminal law field, is to ensure a fair, impartial and effective justice. The novelty of this Opinion is that it has been drafted by judges and prosecutors representing their national colleagues and it deals with matters which the judges and prosecutors have agreed on the basis of their practical experience.

4. Hence, the text focuses on essential aspects of the two missions and in particular: independence, respect of individual rights and freedoms, objectivity and impartiality, ethics and deontology, training and relations with the media.

5. The present Opinion should be considered in the context of the relations of judges and prosecutors with professional persons dealing with justice involved in the various stages of judicial proceedings, such as lawyers, judicial experts, court clerks, bailiffs, police, as suggested by the Framework Global Action Plan for Judges in Europe, adopted by the Committee of Ministers on 7 February 2001 and the Recommendation (2000)19 on the role of prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000.

#### b. Diversity of national systems

6. In the member States of the Council of Europe, many legal systems exist side by side:

- i. the Common Law systems in which there is a clear division between judges and prosecutors and where *the criminal investigation power* is not combined with other functions;
- ii. the Continental Law systems where one may observe different types in which either judges and prosecutors are part of the « judicial corps » or, on the contrary, only judges may belong to that corps

In addition, in these various systems, the public prosecution's autonomy from the executive can be complete or limited.

7. The objective of this Opinion is to identify, in the light of the Court s' case law, a basis of applicable principles and approaches while taking into account common points as well as differences.

8. The guarantee of separation of functions represents an essential condition of the judge's impartiality towards the parties in the proceedings. Impartiality, as stated in Opinion No. 1 of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges (2001), is first among the institutional guarantees that define the position of a judge. Furthermore, it presupposes that the public prosecution is allocated the burden of proof and the filing of indictments, which constitutes one of the first procedural guarantees of the ultimate decision.

9. In every system, the judge's role is therefore different to that of the public prosecution. Their respective missions remain nevertheless complementary. There are no hierarchic ties between the judge and the prosecutor.

10. The independence of the public prosecution service constitutes an indispensable corollary to the independence of the judiciary. The role of the prosecutor in asserting and vindicating human rights, both of suspects, accused persons and victims, can best be carried out where the prosecutor is independent in decision-making from the executive and the legislature and where the distinct role of judges and prosecutors is correctly observed. In a democracy based on the rule of law, it is the law that provides the basis for prosecution policy (Declaration, paragraph 3).

### **c. Peculiarities of functions**

11. Prosecutors and judges must both carry out their functions fairly, impartially, objectively and consistently, must respect and strive to protect human rights and seek to ensure that the justice system operates promptly and efficiently.

12. In carrying out their functions, prosecutors rely on either a system of discretionary prosecution (the opportunity principle) or a system of mandatory prosecution (the legality principle), but in both cases prosecutors not only act on behalf of the society as a whole, but also discharge duties to particular individuals, namely the accused person to whom a duty of fairness is owed, as well as the victims of crime to whom a duty is owed to ensure that their rights are fully taken into account. In that sense and without prejudice to the respect for the principle of equality of arms, the prosecutor can not be considered equal to other parties (Declaration, paragraph 2). Prosecutors should also take proper account of the views and concerns of victims and take or promote actions to ensure that victims are informed of both their rights and the course of the proceedings. They should not initiate or continue prosecution when an impartial investigation on the basis of the available evidence shows the charge to be unfounded.

### **d. Existing international instruments**

13. Several texts of the Council of Europe as well as the case-law of the Court address directly or implicitly topics related to the relationship between judges and prosecutors.

14. First and foremost, the Court assigns tasks to judges only in their capacity as the guardians of rights and freedoms – see in particular Articles 5 (right to liberty and security) and 6 (right to a fair trial) - but it does so also to public prosecutors (as a result of Article 5 paragraphs 1a and 3, and 6).

15. The Court, one of whose tasks is to interpret the ECHR, has given several rulings on matters affecting the relationship between judges and public prosecutors.

16. In particular it has dealt with the problem of a person serving in turn as prosecutor and judge in the same case (judgment of 1 October 1982 in *Piersack v. Belgium*, §§ 30-32), the need to guarantee that no political pressure is ever put on the courts or the prosecuting authorities (judgment of 12 February 2008, in *Guja v. Moldova*, §§ 85-91), the need to protect judges and public prosecutors in the context of freedom of expression (judgment of 8 January 2008, in *Saygılı and Others v. Turkey*, §§ 34-40), procedural obligations of courts and public prosecutors' departments to investigate, prosecute and punish human rights violations (judgment of 15 May 2007, in *Ramsahai and Others v. the Netherlands*, §§ 321-357) and lastly the prosecuting authorities' contribution to the standardization of case-law (judgment of 10 June 2008, in *Martins de Castro and Alves Correia de Castro v. Portugal*, §§ 51-66).

17. In the area of criminal procedure, the Court has examined the status and powers of the public prosecution service and the requirements of Article 5 paragraph 3 of the ECHR (with regard to other officers "authorized by law to exercise judicial power") in the context of various factual situations (see, inter alia, the judgments of 4 December 1979, in *Schiesser v. Switzerland*, §§ 27-38, in *De Jong, Baljet and Van den Brink v. the Netherlands*, §§ 49-50, in *Assenov and Others v. Bulgaria*, §§ 146-150, in *Niedbala v. Poland*, §§ 45-47, in *Pantea v. Romania*, §§ 232-243, and 10 July 2008, in *Medvedyev and Others v. France*, §§ 61, 67-69). The Court has also examined the status, jurisdiction and supervisory powers of the prosecuting authorities in cases of telephone monitoring (judgment of 26 April 2007, in *Dumitru Popescu v. Romania*, §§ 68-86) and the presence of the prosecuting authorities at the deliberations of Supreme Courts (judgments of 30 October 1991, in *Borgers v. Belgium*, §§ 24-29, and 8 July 2003, in *Fontaine and Berlin v. France*, §§ 57-67).

18. Lastly, outside the criminal sphere, the Court has a well established body of case-law on the “doctrine of appearances”, according to which the presence of prosecutors at the deliberations of courts is contrary to Article 6 paragraph 1 of the ECHR (judgments of 20 February 1996, in *Lobo Machado v. Portugal*, §§ 28-32, and 12 April 2006, in *Martinie c. France [GC]*, §§ 50-55).

19. Other texts have been drawn up by the Council of Europe :

- Recommendation Rec(94)12 of the Committee of Ministers on the Independence, Efficiency and Role of Judges recognizes the links between judges and public prosecutors, at least in countries where the latter have judicial authority within the meaning attached to this expression by the Court;

- Recommendation Rec(2000)19 of the Committee of Ministers on the Role of Public Prosecution in the Criminal Justice System explicitly highlights the relations between judges and prosecutors, while underlining the general principles that are crucial for ensuring that these relationships contribute unequivocally to the proper performance of judges’ and public prosecutors’ tasks. It particularly emphasizes the obligation of States to “take appropriate measures to ensure that the legal status, the competencies and the procedural role of public prosecutors are established by law in a way that there can be no legitimate doubt about the independence and impartiality of the court judges”.

- Recommendation Rec (87)18 of the Committee of Ministers concerning the Simplification of Criminal Justice provides different examples of tasks previously vested solely in judges and currently entrusted to the public prosecution service (whose primary mission still consists in undertaking and directing prosecutions). These new tasks create additional requirements concerning the organisation of the public prosecution service and the selection of the people called upon to assume those functions.

## II. STATUS OF JUDGES AND PUBLIC PROSECUTORS

### a. Guarantees for the internal and external independence of judges and public prosecutors; the rule of law as a condition for their independence

20. Judges and public prosecutors should be independent from each other and also enjoy effective independence in the exercise of their respective functions. They discharge different duties in the justice system and in society at large. Therefore different perspectives of institutional and functional independence exist (Declaration, paragraph 3).

21. The judiciary is based on the principle of independence from any external power and from any instructions coming from any source, as well as on the absence of internal hierarchy. Its role and, where applicable, that of juries, is to properly adjudicate cases brought before them by the prosecution services and the parties. This involves the absence of all undue influence by the public prosecutor or the defence. Judges, prosecutors and defence lawyers should each respect the roles of the others. (Declaration, paragraph 5).

22. The fundamental principle of independence of judges is enshrined in Article 6 of the ECHR and stressed in previous opinions of the CCJE.

23. The function of judging implies the responsibility for making binding decisions for the persons concerned and for deciding litigation on the basis of the law. Both are the prerogative of the judge, a judicial authority independent from the other State powers<sup>2</sup>. This is, in general, not the mission of public prosecutors, who are responsible for bringing or continuing criminal proceedings.

24. The CCJE and the CCPE refer to the consistent case-law of the Court in regard to article 5, paragraph 3 and article 6 of the ECHR. In particular, they refer to the decision in the case *Schiesser vs. Switzerland*, whereby the Court recognized the requirement of independence from the executive and the parties on the part of any “officer authorized by law to exercise judicial powers”, which does not, however, exclude subordination to higher independent judicial authority (Declaration, paragraph 7).

25. Some member States assign to public prosecutors the power to make binding decisions in some areas instead of pursuing criminal prosecutions or in order to protect certain interests. The CCJE and the CCPE consider that any attribution of judicial functions to prosecutors should be limited to cases involving minor

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<sup>2</sup> See in particular Opinion No.1 (2001) of the CCJE on standards concerning the independence of the judiciary and the irremovability of judges and Recommendation Rec(94)12 on the independence, efficiency and role of judges.

sanctions, should not be exercised in conjunction with the power to prosecute in the same case and should not prejudice the defendant's rights to a decision on such case by an independent and impartial authority exercising judicial functions. Under no circumstances, should any such attribution allow public prosecutors to take final decisions restricting individual freedoms and involving deprivation of liberty with no right to appeal to a judge or a court (Declaration, paragraph 7).

26. The public prosecution service is an independent authority whose existence should be based on the law at the highest possible level. In democratic states neither the parliament nor any governmental body should seek to unduly influence a particular decision taken by public prosecutors in relation to individual cases in order to determine how a prosecution in any particular case should be conducted, or constrain public prosecutors to change their decisions (Declaration, paragraphs 8 and 9).

27. The independence of public prosecutors is indispensable for enabling them to carry out their mission. It strengthens their role in a state of law and in society and it is also a guarantee that the justice system will operate fairly and effectively and that the full benefits of judicial independence will be realised (Declaration,, paragraphs 3 and 8). Thus, akin to the independence secured to judges, the independence of public prosecutors is not a prerogative or privilege conferred in the interest of the prosecutors, but a guarantee in the interest of a fair, impartial and effective justice that protects both public and private interests of the persons concerned.

28. The function of the prosecutor, which may be characterized by the principles of mandatory or discretionary prosecution, differs according to the system existing in each country, according to the position which the public prosecutor occupies in the institutional landscape and in the criminal procedure.

29. Whatever their status, public prosecutors must enjoy complete functional independence in the discharge of their legal roles, whether these are penal or not. Whether they are under a hierarchical authority or not, in order to ensure their accountability and prevent proceedings being instituted in an arbitrary or inconsistent manner, public prosecutors must provide clear and transparent guidelines as regards the exercise of their prosecution powers, (Declaration, paragraph 9).

30. In this respect, the CCJE and CCPE wish to recall in particular Recommendation (2000)19 which recognises that, in order to promote equity, consistency, and efficiency in the activity of the public prosecution service, States should seek to define general principles and criteria to serve as a reference against which decisions are taken by prosecutors in individual cases.

31. Directions to prosecutors should be in writing, in accordance with the law and, where applicable, in compliance with publicly available prosecution guidelines and criteria (Declaration, paragraph 9)<sup>3</sup>.

32. Any decision to prosecute or not to prosecute must be legally sound. Any review according to the law of a decision by the prosecutor to prosecute or not to prosecute should be carried out impartially and objectively, whether or not it is being carried out within the prosecution service itself or by an independent judicial authority. The interest of the victim as well as any other person's legal interests, should always be duly taken into account. (Declaration, paragraph 9).

33. The complementary nature of judges' and prosecutors' functions means that both are conscious that impartial justice requires equality of arms between the public prosecution service and the defence, and that public prosecutors must act at all times honestly, objectively and impartially. Judges and public prosecutors have, at all times, to respect the integrity of the suspects, accused persons and victims, as well as the rights of the defence (Declaration, paragraphs 2 and 6).

34. The independence of the judge and of the prosecutor is inseparable from the rule of law. Judges as well as prosecutors act in the common interest, in the name of the society and its citizens who want their rights and freedoms guaranteed in all their aspects. They intervene in areas where the most sensitive human rights (individual freedom, privacy, protection of possessions, etc.) deserve the greatest protection. Prosecutors must ensure that evidence is gathered and proceedings are initiated and continued in accordance with the law. In doing so, they must uphold the principles laid down by the ECHR and other international legal instruments, notably respect for the presumption of innocence, the rights of the defence and a fair trial. Judges must see to it that those principles are respected in proceedings before them.

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<sup>3</sup> See also the CCPE Opinion N°3 (2008) on the role of public prosecutor outside the criminal law field.

35. While a public prosecutor is permitted to refer to the judge actions and petitions defined by law and to put before the judge the matters of fact and law supporting the same, the prosecutor may not interfere in any way in the judge's decision making process and is bound to abide by the judge's decisions. The prosecutor cannot oppose the enforcement of such decisions, other than by exercising such right of recourse as may be provided for by law (Declaration, paragraphs 4 and 5).

36. The activity and the demeanour of the public prosecutor and the judge should leave no doubt as to their objectivity and impartiality. Judges and public prosecutors must both enjoy independence in respect of their functions and also be and appear independent from each other. In the eyes of litigants and the society as a whole, there must not be even a hint of connivance between judges and prosecutors or confusion between the two functions.

37. Respect for the above principles implies that the status of prosecutors be guaranteed by law at the highest possible level in a manner analogous to that of judges. The proximity and complementary nature of the missions of judges and prosecutors create similar requirements and guarantees in terms of their status and conditions of service, namely regarding recruitment, training, career development, discipline, transfer (which shall be effected only according to the law or by their consent), remuneration, termination of functions and freedom to create professional associations (Declaration, paragraph 8).

38. Both judges and prosecutors should, according to the national system in force, be directly associated with the administration and the management of their respective services. For this purpose, sufficient financial means as well as infrastructure and adequate human and material resources should be put at the disposal of judges and prosecutors and should be used and managed under their authority (Declaration, paragraph 4).

#### **b. Ethics and deontology of judges and public prosecutors**

39. Judges and prosecutors should be individuals of high integrity and with appropriate professional and organisational skills. Due to the nature of their functions, which they have accepted knowingly, judges and prosecutors are constantly exposed to public criticism and must, in consequence, set themselves a duty of restraint without prejudice, in the framework of the law, to their right to communicate on their cases. As principal actors in the administration of justice, they should at all times maintain the honour and dignity of their profession and behave in all situations in a way worthy of their office<sup>4</sup> (Declaration, paragraph 11).

40. Judges and prosecutors should refrain from any action and behaviour that could undermine confidence in their independence and impartiality. They should consider cases submitted to them with due care and within a reasonable time, objectively and impartially.

41. Public prosecutors should refrain from making public comments and statements, using the media, which may create an impression of putting direct or indirect pressure on the court to reach a certain decision or which may impair the fairness of the procedure.

42. Judges and prosecutors should strive to acquaint themselves with ethical standards governing the functions of each other. This will enhance understanding and respect for each other's missions, thereby increasing the prospects of a harmonious collaboration.

#### **c. Training of judges and public prosecutors**

43. The highest level of professional skill is a pre-requisite for the trust which the public has in both judges and public prosecutors and on which they principally base their legitimacy and role. Adequate professional training plays a crucial role since it allows the improvement of their performance, and thereby enhances the quality of justice as a whole (Declaration, paragraph 10).

44. Training for judges and prosecutors involves not only the acquisition of the professional capabilities necessary for access to the profession but equally permanent training throughout their career. It addresses

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<sup>4</sup> For judges see for example the Opinion No. 3 (2002) of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality (2002) and The Bangalore Principles of Judicial Conduct (adopted by the UN ECOSOC in 2006) and the Universal Charter of the Judge, adopted by the Central Council of the International Association of Judges on 17 November 1999 in Taipei (Taiwan). For prosecutors besides the UN guidelines on the role of the prosecutors (1990), see the European Guidelines on Ethics and Conduct for Public Prosecutors (The Budapest Guidelines) adopted by the Prosecutors General of Europe on 31 May 2005 at their Conference in Budapest.



the most diverse aspects of their professional life, including the administrative management of courts and prosecution departments, and must also respond to the necessities of specialisation. In the interests of the proper administration of justice, the permanent training required to maintain a high level of professional qualification and to make it more complete is not only a right but also a duty for judges and public prosecutors (Declaration, paragraph 10).

45. Where appropriate, joint training for judges, public prosecutors and lawyers on themes of common interest can contribute to the achievement of a justice of the highest quality. This common training should make possible the creation of a basis for a common legal culture (Declaration, paragraph 10).

46. Different European legal systems provide training for judges and prosecutors according to various models. Some countries have established an academy, a national school or other specialised institution; some others assign the competence to specific bodies. International training courses for judges and prosecutors should be arranged. It is essential, in all cases, to assure the autonomous character of the institution in charge of organising such training, because this autonomy is a safeguard of cultural pluralism and independence.<sup>5</sup>

47. In this context, much importance attaches to the direct contribution of judges and prosecutors towards training courses, since it enables them to provide opinions drawn from their respective professional experience. Courses should not only cover the law and protection of individual freedoms, but should also include modules on management practices and the study of judges' and the prosecutors' respective missions. At the same time, additional lawyers' and academic contributions are essential to avoid taking a narrow-minded approach. Finally, the quality and efficiency of training should be assessed on a regular basis and in an objective manner.

### **III. ROLES AND FUNCTIONS OF JUDGES AND PUBLIC PROSECUTORS IN THE CRIMINAL PROCEDURE**

#### **a. Roles between judges and public prosecutors in the pre-criminal procedure**

48. At the pre-trial stage the judge independently or sometimes together with the prosecutor, supervises the legality of the investigative actions, especially when they affect fundamental rights (decisions on arrest, custody, seizure, implementation of special investigative techniques, etc).

49. As a general rule, public prosecutors should scrutinise the lawfulness of investigations and monitor the observance of human rights by the investigators when deciding whether a prosecution should commence or continue.

50. Recommendation Rec(2000)19 provides that when the police is placed under the authority of public prosecutors or when 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 and may carry out evaluations and controls, and can sanction the violations. Where the police is independent from public prosecutors, the recommendation merely provides that the State should take effective measures to ensure that there is an appropriate and functional cooperation between public prosecutors and the investigative authorities.

51. Even in systems where the investigation is supervised by the prosecutor whose status invests him with a judicial authority, it is essential that any measures taken in this context which involve significant infringements of freedoms, in particular temporary detention, are monitored by a judge or a court.

#### **b. Relations between judges and public prosecutors in the course of prosecution and court hearing**

52. In some States, public prosecutors can regulate the flow of cases by exercising a discretionary power to decide which cases will be brought before the court and which cases can be dealt with without court proceedings (conciliation between the accused and the victim, pre-trial settlement of the case with the

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<sup>5</sup> See Opinion No. 4 (2003) of the CCJE on appropriate initial and in-service training for judges at national and European levels and Opinion No. 10 (2007) of the CCJE on the Council for the Judiciary at the service of society, paragraphs 65-72.

consent of the parties, plea bargaining-related simplified and shortened procedures, mediation, etc), all of which contributes towards reducing the burden on the judicial system and determining prosecution priorities.

53. Such public prosecution powers, which reflect the modernisation, socialisation, humanisation and rationalisation of the administration of criminal justice, are useful in reducing the case overload of courts. On the other hand, as soon as prosecutors have the right not to present particular cases in court, it is necessary to avoid arbitrary actions, discrimination or possible unlawful pressures from the political power and to protect the rights of victims. It is also necessary to enable any person affected, in particular the victims, to seek a review of the prosecutor's decision not to prosecute. An option may be to allow the victim to bring the case directly to the court.

54. Therefore, in countries which operate a system of discretionary prosecution, the prosecutor should give careful consideration on whether to prosecute or not, taking into account any general guidelines or criteria which have been adopted with a view to achieving consistency in prosecution decisions.

55. The impartiality of the prosecutors during the procedure should be understood in this sense: they should proceed fairly and objectively to ensure that the court is provided with all relevant facts and legal arguments and, in particular, ensure that evidence favourable to the accused is disclosed; take proper account of the position of the accused person and the victim; verify that all evidences have been obtained through means that are admissible by the judge according to the rules of a fair trial and refuse to use evidence obtained through human rights violations, such as torture (Declaration, paragraph 6).

56. Prosecutors shall not initiate or continue prosecution and shall make every effort to stop proceedings when an impartial investigation or a review of the evidence shows the charge to be unfounded.

57. In essence, during proceedings judges and prosecutors carry out their respective functions for the purpose of a fair criminal trial. The judge supervises the legality of evidence taken by the public prosecutors or investigators and may acquit an accused when there is insufficient or unlawfully obtained evidence. The public prosecutors may also have a right to appeal a court decision.

### **c. The rights of the defence at all levels of procedure**

58. Judges must apply the rules of criminal procedure while fully respecting the rights of the defence (giving the defendants the possibility of exercising their rights, notifying the defendants of their charge, etc.), the rights of the victims in the procedure, the principle of equality of arms and the right to a public hearing, so that a fair trial is guaranteed in all cases<sup>6</sup> (Declaration, paragraphs 1, 2, 6 and 9).

59. An indictment plays a crucial role in a criminal proceedings: it is from the moment of its service that defendants are formally put on written notice of the factual and legal basis of the charges against them (the European Court of Human Rights judgment of 19 December 1989 in *Kamasinski v. Austria*, § 79). In a criminal process, the "fair hearing" required by Article 6 paragraph 1 of the ECHR entails that defendants must have the right to challenge the evidence against them, as well as the legal basis of the charge.

60. In countries where public prosecutors supervise the investigation, it is also for the prosecutor to ensure that the rights of the defence are respected. In countries where the criminal investigation is directed by the police or other law-enforcement authorities, judges are involved as guarantors of individual freedoms (*habeas corpus*), particularly as regards pre-trial detention, and it is for them to ensure that the rights of the defendant are respected.

61. In many countries, however, the judge and the prosecutor only become responsible for monitoring the exercise of the rights of the defence once the investigation has been completed and examination of the charges begins. At this point it is for the prosecutor, who receives the investigators' reports, and the judge, who examines the charges and the evidence gathered, to ensure that everyone charged with a criminal offence has, in particular, been informed promptly, in a language he/she understands and in detail, of the nature and cause of the accusation against him/her.

62. Depending on their role in a particular country, prosecutors and judges must then ensure that the person has had adequate time and facilities for the preparation of his/her defence, that he/she is properly defended,

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<sup>6</sup> See Opinion No. 8 (2006) of the CCJE on the role of judges in the protection of the rule of law and human rights in the context of terrorism.

if necessary by an officially appointed lawyer paid by the state, and has access, if necessary, to an interpreter, and is able to request the taking of actions necessary to establish the truth.

63. Once the case has been brought before the trial court, the powers of the judge and the prosecutor vary according to the role they play during the trial. In any event, if any of the components of respect for the rights of the defence is lacking, either the judge or the prosecutor, or both, depending on the particular national system, should be able to draw attention to the situation and objectively remedy it.

#### **IV. RELATIONS OF JUDGES AND PUBLIC PROSECUTORS OUTSIDE THE CRIMINAL LAW FIELD AND IN SUPREME COURTS**

64. Depending on the State in which they operate, prosecutors may or may not have tasks and functions outside the criminal law field.<sup>7</sup> Where prosecutors have such tasks and functions these can include, inter alia, civil, administrative, commercial, social, electoral and labour law as well as the protection of the environment, social rights of vulnerable groups such as minors, disabled persons and persons with very low income. The role of prosecutors in this respect should not allow them to exercise undue influence on the final decision making process of the judges (Declaration, paragraph 13).

65. The role that public prosecutors have in certain countries before the Supreme Court is also worth mentioning. This role is comparable with that of the advocate general before the Court of Justice of the European Communities. Before these jurisdictions, the attorney general (or equivalent) is not a party and does not represent the State. He is an independent authority who sets down conclusions, in each case or only in cases of particular interest, in order to clarify for the court all aspects of the questions of law that are before it, with a view to ensuring the correct application of the law.

66. According to the rule of law in a democratic society all these competences of public prosecutors as well as the procedures of exercising these competences have to be precisely established by law. When prosecutors act outside the criminal law field, they should respect the exclusive competence of the judge or court and take into account the principles developed in particular in the case-law of the Court as follows:

- i. The participation of the prosecution in court proceedings should not affect the independence of the courts;
- ii. The principle of separation of powers should be respected in connection with the prosecutors' tasks and activities outside the criminal law field, on the one hand, and with the role of courts to protect human rights, on the other hand;
- iii. Without prejudice of their prerogatives to represent the public interest, prosecutors should enjoy the same rights and obligations as any other party and should not enjoy a privileged position in the court proceedings (*equality of arms principle*);
- iv. The action of prosecutors' services on behalf of society to defend the public interest and the rights of individuals shall not violate the principle of binding force of final court decisions (*res judicata*) with some exceptions established in accordance with international obligations including the case-law of the Court.

The other principles mentioned in the Declaration apply to all the functions of the public prosecutors outside the criminal law field, mutatis mutandis (Declaration, paragraph 13).

#### **V. JUDGES, PUBLIC PROSECUTORS AND THE MEDIA** (Declaration, paragraph 11)

67. Media play an essential role in a democratic society in general and more specifically in relation to the judicial system. The perception in society of the quality of justice is heavily influenced by media accounts of how the justice system works. Publicity also contributes to the achievement of a fair trial, as it protects litigants and defendants against a non-transparent administration of justice.

68. The expanding public and media attention to criminal and civil proceedings has led to an increasing need for objective information to be provided to the media both from the courts and public prosecutors.

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<sup>7</sup> See e.g. the CCPE Opinion N°3 on "the role of public prosecution outside the criminal law field".

69. It is of fundamental importance in a democratic society that the courts inspire confidence in the public<sup>8</sup>. The public character of proceedings is one of the essential means whereby confidence in the courts can be maintained.

70. Within the Council of Europe two main documents deal with this issue: a) Recommendation Rec (2003)13 on the Provision of Information through the Media in Relation to Criminal Proceedings, and b) Opinion No. 7 of the CCJE on Justice and Society (2005).

71. Bearing in mind the right of the public to receive information of general interest, journalists should be provided with necessary information in order to be able to report and comment on the functioning of the justice system, subject to the obligations of discretion of the judges and prosecutors on pending cases and to the limitations established by national laws and in accordance with the case-law of the Court.

72. Media, as well as judges and public prosecutors, shall respect fundamental principles such as the presumption of innocence<sup>9</sup> and the right to a fair trial, the right to private life of the persons concerned, the need to avoid an infringement of the principle and of the appearance of impartiality of judges and public prosecutors involved in a case.

73. Media coverage of cases under investigation or on trial can become invasive interference and produce improper influence and pressure on judges, jurors and public prosecutors in charge of particular cases. Good professional skills, high ethical standards and strong self-restraint against premature comments on pending cases are needed for judges and public prosecutors to meet this challenge.

74. Media liaison personnel, for example public information officers or a pool of judges and prosecutors trained to have contact with the media, could help the media to give accurate information on the courts' work and decisions, and also assist judges and prosecutors.

75. Judges and prosecutors should mutually respect each other's specific role in the justice system. Both judges and prosecutors should draw up guidelines or a code of good practice for each profession on its relations with the media<sup>10</sup>. Some national codes of ethics require judges to refrain from public comments on pending cases, in order not to make statements that might cause the public to question the judges' impartiality<sup>11</sup>, and to avoid violation of the presumption of innocence. In any case, judges should express themselves above all through their decisions; discretion and the choice of words are important where judges give statements to the media on cases pending or decided in accordance with the law<sup>12</sup>. Public prosecutors should be cautious when commenting on the procedure followed by the judge or upon the judgment issued, stating his/her disagreement concerning a decision by means of an appeal, if appropriate.

## **VI. JUDGES, PROSECUTORS AND INTERNATIONAL CO-OPERATION**

(Declaration, paragraph 12)

76. In order to ensure the effective protection of human rights and fundamental freedoms, it is important to note the need for an efficient international cooperation notably between the Council of Europe member states on the basis of values enshrined in relevant international instruments, in particular the ECHR. International co-operation must be built on mutual trust. Information gathered through international cooperation and used in judicial procedures must be transparent in its content and origin as well as available to judges, public prosecutors and to the parties. It will be necessary to prevent international judicial cooperation from taking place without any judicial monitoring and without taking adequately into account, in particular, the rights of defence and the protection of personal data.

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<sup>8</sup> On this issue, see European Court of Human Rights, *Olujić v. Croatia*, (Application no. 22330/05)

<sup>9</sup> See among others: principle I of the appendix to Recommendation Rec (2003)13 and the corresponding Explanatory Memorandum.

<sup>10</sup> Proposed for judges and for journalists by Opinion No. 7 of the CCJE on justice and society, paragraph 39 (2005).

<sup>11</sup> See e.g. Opinion No. 3 of the CCJE on ethics and liability of judges, paragraph 40 (2003).

<sup>12</sup> See e.g. European Court of Human Rights, *Daktaras v. Lithuania* (Application no. 42095/98) and *Olujić v. Croatia*, (Application no. 22330/05).