



THE ROLE OF PUBLIC PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM

Recommendation Rec(2000)19

*Adopted by the Committee of Ministers
of the Council of Europe
on 6 October 2000*

and Explanatory Memorandum

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Legal issues

1. Recommendation Rec(2000)19, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000, was prepared by the Committee of Experts on the Role of Public Prosecution in the Criminal Justice System (PC-PR), set up under the aegis of the European Committee on Crime Problems (CDPC).
2. This publication contains the text of Recommendation Rec(2000)19 and the explanatory memorandum related thereto.

COUNCIL OF EUROPE

COMMITTEE OF MINISTERS

RECOMMENDATION REC(2000)19

OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON THE ROLE OF PUBLIC PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM

*(Adopted by the Committee of Ministers on 6 October 2000
at the 724th meeting of the Ministers' Deputies)*

The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe,

Recalling that the aim of the Council of Europe is to achieve a greater unity between its members;

Bearing in mind that it is also the Council of Europe's purpose to promote the rule of law; which constitutes the basis of all genuine democracies;

Considering that the criminal justice system plays a key role in safeguarding the rule of law;

Aware of the common need of all member states to step up the fight against crime both at national and international level;

Considering that, to that end, the efficiency of not only national criminal justice systems but also international co-operation on criminal matters should be enhanced, whilst safeguarding the principles enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms;

Aware that the public prosecution also plays a key role in the criminal justice system as well as in international co-operation in criminal matters;

Convinced that, to that end, the definition of common principles for public prosecutors in member states should be encouraged;

Taking into account all the principles and rules laid down in texts on criminal matters adopted by the Committee of Ministers,

Recommends that governments of member states base their legislation and practices concerning the role of public prosecution in the criminal justice system on the following principles:

Functions of the public prosecutor

1. “Public prosecutors” are public authorities who, on behalf of society and in the public interest, ensure 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.
2. 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.
3. In certain criminal justice systems, public prosecutors also:
 - implement national crime policy while adapting it, where appropriate, to regional and local circumstances;
 - conduct, direct or supervise investigations;
 - ensure that victims are effectively assisted;
 - decide on alternatives to prosecution;
 - supervise the execution of court decisions;
 - etc.

Safeguards provided to public prosecutors for carrying out their functions

4. States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close co-operation with the representatives of public prosecutors.
5. States should take measures to ensure that:
 - a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach which favours the interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status;
 - b. the careers of public prosecutors, their promotions and their mobility are governed by known and objective criteria, such as competence and experience;
 - c. the mobility of public prosecutors is governed also by the needs of the service;
 - d. public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law;

e. disciplinary proceedings against public prosecutors are governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review;

f. public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected;

g. public prosecutors, together with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions.

6. States should also take measures to ensure that public prosecutors have an effective right to freedom of expression, belief, association and assembly. In particular they should have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings in a private capacity, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organisation. The rights mentioned above can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional¹ position of the public prosecutors. In cases where the rights mentioned above are violated, an effective remedy should be available.

7. Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of:

a. the principles and ethical duties of their office;

b. the constitutional and legal protection of suspects, victims and witnesses;

c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;

d. principles and practices of organisation of work, management and human resources in a judicial context;

e. mechanisms and materials which contribute to consistency in their activities.

Furthermore, states should take effective measures to provide for additional training on specific issues or in specific sectors, in the light of present-day conditions, taking into account in particular the types and the development of criminality, as well as international co-operation on criminal matters.

8. In order to respond better to developing forms of criminality, in particular organised crime, specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed.

¹ The word “constitutional” is used here with reference to the legally established aims and powers of the public prosecutor, not to the Constitution of any state.

9. With respect to the organisation and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of cases, this should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter.

10. All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.

Relationship between public prosecutors and the executive and legislative powers

11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the public prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.

12. Public prosecutors should not interfere with the competence of the legislative and the executive powers.

13. 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 either 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.

14. In countries where the public prosecution is independent of the government, the state should take effective measures to guarantee that the nature and the scope of the independence of the public prosecution is established by law.

15. In order to promote the fairness and effectiveness of crime policy, public prosecutors should co-operate with government agencies and institutions in so far as this is in accordance with the law.

16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.

Relationship between public prosecutors and court judges

17. States should 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. In particular states should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.

18. However, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.

19. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.

20. Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.

Relationship between public prosecutors and the police

21. In general, public prosecutors should scrutinise the lawfulness of police investigations at the latest 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.

22. In countries where the police is placed under the authority of the public prosecution or where police investigations are either conducted or supervised by the public prosecutor, that state should take effective measures to guarantee that the public prosecutor may:

a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the public prosecutor, etc.;

b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;

c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;

d. sanction or promote sanctioning, if appropriate, of eventual violations.

23. States where the police is independent of the public prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the Public Prosecution and the police.

Duties of the public prosecutor towards individuals

24. In the performance of their duties, public prosecutors should in particular:

a. carry out their functions fairly, impartially and objectively;

b. respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms;

c. seek to ensure that the criminal justice system operates as expeditiously as possible.

25. Public prosecutors should abstain from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health, handicaps or other status.

26. Public prosecutors should ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting the suspect, irrespective of whether they are to the latter's advantage or disadvantage.

27. Public prosecutors should not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.

28. 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.

29. Public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties – save where otherwise provided in the law – any information which they possess which may affect the justice of the proceedings.

30. Public prosecutors should 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.

31. Where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible.

32. Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken.

33. Public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.

34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.

35. States should ensure that in carrying out their duties, public prosecutors are bound by “codes of conduct”. Breaches of such codes may lead to appropriate sanctions in accordance with paragraph 5 above. The performance of public prosecutors should be subject to regular internal review.

36. *a.* With a view to promoting fair, consistent and efficient activity of public prosecutors, states should seek to:

- give prime consideration to hierarchical methods of organisation, without however letting such organisational methods lead to ineffective or obstructive bureaucratic structures;
- define general guidelines for the implementation of criminal policy;
- define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.

b. The above-mentioned methods of organisation, guidelines, principles and criteria should be decided by parliament or by government or, if national law enshrines the independence of the public prosecutor, by representatives of the public prosecution.

c. The public must be informed of the above-mentioned organisation, guidelines, principles and criteria; they shall be communicated to any person on request.

International co-operation

37. Despite the role that might belong to other organs in matters pertaining to international judicial co-operation, direct contacts between public prosecutors of different countries should be furthered, within the framework of international agreements where they exist or otherwise on the basis of practical arrangements.

38. Steps should be taken in a number of areas to further direct contacts between public prosecutors in the context of international judicial co-operation. Such steps should in particular consist in:

a. disseminating documentation;

b. compiling a list of contacts and addresses giving the names of the relevant contact persons in the different prosecuting authorities, as well as their specialist fields, their areas of responsibility, etc;

- c.* establishing regular personal contacts between public prosecutors from different countries, in particular by organising regular meetings between Prosecutors General;
- d.* organising training and awareness-enhancing sessions;
- e.* introducing and developing the function of liaison law officers based in a foreign country;
- f.* training in foreign languages;
- g.* developing the use of electronic data transmission;
- h.* organising working seminars with other states, on questions regarding mutual aid and shared crime issues.

39. In order to improve rationalisation and achieve co-ordination of mutual assistance procedures, efforts should be taken to promote:

- a.* among public prosecutors in general, awareness of the need for active participation in international co-operation, and
- b.* the specialisation of some public prosecutors in the field of international co-operation,

To this effect, states should take steps to ensure that the public prosecutor of the requesting state, where he or she is in charge of international co-operation, may address requests for mutual assistance directly to the authority of the requested state that is competent to carry out the requested action, and that the latter authority may return directly to him or her the evidence obtained.

EXPLANATORY MEMORANDUM

Introduction

Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Role of the Public Prosecution in the Criminal Justice System (PC-PR) was entrusted with studying the status of the Public Prosecution and its role in the criminal justice system, with a view to drafting recommendations.

The PC-PR met on seven occasions between October 1996 and November 1999.

The Committee drew up a questionnaire that was distributed to all member States. The replies constituted a basis for the Committee's work. A synthesis of such replies is appended to this memorandum.

At its last meeting, it approved the draft Recommendation and the draft Explanatory Memorandum thereto. At its 48th plenary session (June 2000) the CDPC examined these texts. It approved the draft Recommendation and submitted it to the Committee of Ministers. Furthermore, it adopted the Explanatory Memorandum.

At the 724th meeting of the Ministers' Deputies in October 2000, the Committee of Ministers adopted the text of the Recommendation and authorised the publication of the Explanatory Memorandum.

General considerations

Since its inception, the Council of Europe has worked tirelessly to establish and promote common principles in its member states' laws, systems and practices aimed at combating crime.

This is firstly because fighting crime demands the direct practical application of the principles on which the Council of Europe was founded and which it is expected to uphold, namely the rule of law, democracy and human rights.

The second reason for its involvement is that "*the effectiveness of responses to crime depends greatly on their being harmonised within a coherent and concerted European crime policy*".²

² Preamble to Recommendation No. R (96) 8 of the Committee of Ministers to the member states on crime policy in Europe in a time of change.

That requirement is all the more pertinent today with the existence of crime phenomena, such as organised crime and corruption, the international dimension of which is more and more important and with respect to which national machinery risks to prove insufficient³. That situation requires, other than redefining co-operation in criminal matters, the development of more closely approximated – or indeed common – principles and strategies.

It is a fact that European legal systems are still divided between two cultures - the split being evident both in the organisation of criminal procedure (which is either accusatorial or inquisitorial) and in the initiation of prosecutions (under either “mandatory” or “discretionary” systems). However, the traditional distinction is tending to blur as the different member states bring their laws and regulations more closely into line with what are now common European principles, in particular those laid down in the Convention for the Protection of Human Rights.

In the field of law enforcement - and the focus here is on the authorities responsible for prosecuting alleged offenders - it has taken longer for harmonisation to emerge as a concern, probably because the issue is a delicate one for the institutions in each state, with implications for the way that public authorities are organised.

None the less, several Council of Europe texts already offer guidance in matters related to the present Recommendation, and obviously the committee has given them its closest attention:

- Recommendation No. R (80) 11 concerning custody pending trial;
- Recommendation No. R (83) 7 on participation of the public in crime policy;
- Recommendation No. R (85) 11 on the victim’s position in the framework of criminal law and procedure;
- Recommendation No. R (87) 18 concerning the simplification of criminal justice, and specifically the section relating to discretionary prosecution;
- Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation;
- Recommendation No. R (92) 17 concerning consistency in sentencing;
- Recommendation No. R (94) 12 on the independence, efficiency and role of judges;
- Recommendation No. R (95) 12 on the management of criminal justice;
- Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence;
- Recommendation No. R (99) 19 concerning mediation in penal matters.

However, it is fair to say that, to date, the status, role and operating methods of authorities responsible for prosecuting alleged offenders have not been scrutinised in detail with a view to their harmonisation at European level.

In response to political upheaval in central and east Europe and to the thoroughgoing reforms undertaken in other countries (Italy, the Netherlands and France, for example), the Council of Europe has now made this question one of its priorities. It is clear from the fact that 25 states appointed representatives to the Select Committee of Experts set up to study the problem that the pursuit of harmonisation is both worthwhile and timely.

³ See in particular Resolution (97) 24 on the twenty Guiding Principles for the Fight against Corruption.

But we would be wrong to see the task as a simple one, for a number of reasons:

Firstly, the very concept of an authority responsible for prosecuting alleged offenders is a dual one in Europe because its roots lie in two major systems founded on different bases:

- the French model of the “ministère public”, under which public officials have a virtual monopoly on prosecutions, within an inquisitorial system;
- the Anglo-Saxon model with its tradition of prosecutions being initiated either by victims or by the police, in an adversarial system.

Nowadays, all the member states possess a public prosecuting authority, known variously as the “state prosecutor”, the “prosecuting attorney” or the “public prosecutor”.⁴ In all criminal justice systems, this authority plays a key role, with differences depending on whether it is a long established or a more recent institution. The status and role of the Public Prosecution have also evolved considerably, reflecting the scale of the reforms undertaken in many member states over the last ten years.

Secondly, there are great differences in the institutional position of the public prosecutor from one country to another, firstly in terms of its relationship with the executive power of the state (which can range from subordination to independence), and secondly with regard to the relationship between prosecutors and judges: under some systems they belong to a single professional corps while in others they are entirely separate.

The committee considered that its job was neither to draw on features of both traditions in order to come up with some type of third option, nor to propose the unification of existing systems, nor to suggest a supranational model. Nor did it believe that it should merely seek the lowest common denominator. On the contrary, it took a dynamic approach and set out to identify the major guiding principles - common to both types of system - that ought to govern Public Prosecution as it moves into a new millennium. At the same time it sought to recommend practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend.

Because the Recommendation is not legally binding, any form of words that otherwise could be interpreted to mean any obligation imposed on States must in fact be read to suggest that the State alone can implement the principle concerned.

⁴ The last is the term used throughout the Recommendation.

Commentaries on individual recommendations

FUNCTIONS OF PUBLIC PROSECUTORS

1. Public prosecutors are public authorities who, on behalf of society and in the public interest, ensure 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.

In line with the Committee of Experts' terms of reference, the recommendation is exclusively concerned with the public prosecutor's role in the criminal justice system, although public prosecutors may also in some countries be assigned other important tasks in the fields of commercial or civil law, for example.

The wording "*the law where the breach of the law carries a criminal sanction*" denotes the criminal law in the broad sense. The term "criminal law" was rejected because many people tend to associate it exclusively with a Criminal (or Penal) Code, whereas today a growing and increasingly varied area of the law may be termed "criminal" not because it is embodied in any statute of a recognised "criminal" nature, but rather because the breach of its provisions systematically carries a criminal sanction.

It is the task of public prosecutors, as of judges, to apply the law or to see that it is applied. Judges do this reactively, in response to the cases brought before them, whereas the public prosecutor pro-actively "*ensures*" the application of the law. Judges sit on the bench and deliver decisions; public prosecutors are in the business of vigilance and action to bring cases to court.

Operating neither on behalf of any other (political or economic) authority nor on their own behalf, but rather on behalf of society, public prosecutors must be guided in the performance of their duties by the public interest. They must observe two essential requirements concerning, on the one hand, the rights of the individual and, on the other, the necessary effectiveness of the criminal justice system, which the public prosecutor must, to some extent, guarantee. Here the committee wished to emphasise the concept of effectiveness because, whereas it is up to judges rather than public prosecutors to decide individual cases concerning liberties in general and the rights of the defence in particular, it is public prosecutors, not judges, who are primarily responsible for the overall effectiveness of the criminal justice system with reference to the concept of the general interest.

Throughout the recommendation, the term "law" is used in its generally accepted sense, that of a body of legal rules emanating from different sources written and otherwise.

- 2. In all criminal justice systems, public prosecutors:**
- **decide whether to initiate or continue prosecutions;**
 - **conduct prosecutions before the courts;**
 - **may appeal or conduct appeals of all or some court decisions.**

It is clear from an analysis of public prosecutors' specific duties in the different member states, that they can be seen as forming a series of concentric circles. The inner circle contains the duties common to prosecutors in all criminal justice systems - the "core" tasks that have been the main focus of the committee's deliberations.

Firstly, public prosecutors play the lead role in initiating and continuing prosecutions, although that role differs depending on whether the principle at work derives from a mandatory or discretionary system.

Secondly, the formal business of conducting a prosecution and arguing the case in court is the public prosecutor's prerogative.

Lastly, the right of appeal against court decisions is intimately bound up with the public prosecutor's overall function because it is one of the means of ensuring the application of the law while at the same time helping to make the system more efficient, particularly with regard to consistency in court rulings and, by extension, in law enforcement. On this point, the committee wished public prosecutors to be afforded substantial scope for appeals, which is not always the case under certain central and east European legal systems. Moreover, this proposal cannot be seen in isolation from the recommendation's provisions concerning the relationship between public prosecutors and judges.

- 3. In certain criminal justice systems, public prosecutors also:**
- **implement national crime policy while adapting it, where appropriate, to regional and local realities;**
 - **conduct, direct or supervise investigations;**
 - **see to it that victims are effectively assisted;**
 - **decide on alternatives to prosecution;**
 - **supervise the execution of court decisions;**
 - **... etc.**

Listed here - albeit not exhaustively - are those of the public prosecutor's tasks that lie within the second circle. For institutional reasons they are not found in all legal systems and for the same reasons there is currently no consensus on whether they ought to apply generally.

None the less, they concern what is an extremely important aspect of several major continental European legal systems.

The implementation of crime policy as determined by the legislative authority and/or the executive is one of the public prosecutor's main tasks in many countries. The adaptation of national policy to regional and local realities does not imply freedom on the part of public prosecutors to depart from the priorities fixed in the central strategy or to jeopardise its consistent application. Quite the reverse: adaptation to regional and local conditions is a prerequisite if such priorities are to be applied properly.

With regard to investigations, the role assigned to the public prosecutor falls in every case between two extremes - one being the complete absence of authority to initiate investigations and the other the case where the prosecutor is fully empowered to investigate. In some countries the public prosecutor normally acts only when its attention has been drawn - usually by the investigating police authority - to apparent violations of criminal law. In other countries, the public prosecutor can make the first move and has its own active role in identifying breaches of the law - part of its task in these circumstances being to direct investigations. However, rather than merely recording these differences, the recommendation makes a number of specific points in relation to them (see paragraph 21 and following).

It also devotes specific attention to the question of support for victims (see paragraphs 33 and 34).

With regard to the public prosecutor's role in selecting alternatives to prosecution - an increasingly significant aspect of all systems, including those where the principle of mandatory prosecution applies - the committee chose not to break any new ground, but simply to refer to Recommendation (87) 18 concerning the simplification of criminal justice, which sets out in detail aims to pursue and methods to follow.

As regards the execution of court decisions, the public prosecutor's role varies depending on the systems. In certain cases, the public prosecutor himself orders that the court decision be executed; in other cases, he supervises the execution; in all cases, his role is particularly important where a custodial sentence is involved.

Lastly, in many member States, the Public Prosecution is given other essential tasks, such as:

- its role in recommending an appropriate sentence⁵.
- its role in co-operation in criminal matters, the importance of which justifies recommendations 37, 38 and 39 ahead.

SAFEGUARDS PROVIDED TO PUBLIC PROSECUTORS FOR CARRYING OUT THEIR FUNCTIONS

4. States should take effective measures to guarantee that public prosecutors are able to fulfil their professional duties and responsibilities under adequate legal and organisational conditions as well as adequate conditions as to the means, in particular budgetary means, at their disposal. Such conditions should be established in close co-operation with the representatives of the public prosecutors.

Like judges, public prosecutors can only perform their duties and properly discharge their professional responsibilities if they have the appropriate status, organisational back-up and resources, whether in terms of personnel, premises, means of transport or simply an adequate budget. Consulting representatives of the prosecution service about these requirements is a sure method of determining what the real needs are.

⁵ In certain common law jurisdictions the prosecutor does not recommend an appropriate sentence, neither before nor after conviction. The prosecutor may decide to accept pleas of guilty to certain charges offered by the defence. This does not involve a discussion as to sentence, which is a matter for the trial judge. Even where the prosecution can appeal an apparently lenient sentence, the prosecutor will argue that the sentence is unduly lenient without recommending an appropriate sentence to the appeal court.

5. States should take measures to ensure that :

- a. the recruitment, the promotion and the transfer of public prosecutors are carried out according to fair and impartial procedures embodying safeguards against any approach representing interests of specific groups, and excluding discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status;**
- b. careers of public prosecutors, their promotions and their mobility be governed by known and objective criteria, such as competence and experience;**
- c. mobility of public prosecutors be governed also by the needs of the service;**
- d. reasonable conditions of service should be governed by law, such as remuneration, tenure and pension commensurate with the crucial role of prosecutors, as well as an appropriate age of retirement;**
- e. disciplinary proceedings against public prosecutors should be governed by law and should guarantee a fair and objective evaluation and decision which should be subject to independent and impartial review;**
- f. public prosecutors have access to a satisfactory grievance procedure, including where appropriate access to a tribunal, if their legal status is affected;**
- g. public prosecutors, together with their families, are physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their functions.**

These are the main safeguards needed to enable public prosecutors to carry out their functions properly, and all member states should be guided by them because they reflect a common concern, born not from any self-interested class thinking but from the will to eliminate a number of unlawful practices, in particular unlawful practices by political authorities.

The first three safeguards - (a), (b) and (c) - concern impartiality, which in one form or another must govern the recruitment and career prospects of public prosecutors. Arrangements for a competitive system of entry to the profession and the establishment of Service Commissions for the judiciary, or exclusively for prosecutors, are among the means of achieving impartiality. However, unlike judges, public prosecutors must not be guaranteed tenure in a particular position or post, although decisions to transfer them from one post to another must be based on verified needs of the service (in the light of the prosecutors' skills and experience), and not simply on arbitrary decisions by the authorities. The quest for mobility should not however induce any prioritising temporary recruitments or appointments that may carry damaging effects.

The status of public prosecutors and their rates of remuneration and pension - see (d) above - must take account of the need to maintain a certain balance between members of the judiciary and the prosecution service, as both - despite the different nature of their duties - play a part in the criminal justice system. The material conditions of service should also reflect the importance and dignity of the office. Lastly, improving the situation of public prosecutors in certain member states, particularly in central and east Europe, should curb the tendency for them to desert to private sector posts.

As to disciplinary decisions (*e*), it should at the end of the day be possible for prosecutors to submit them to review by an independent and impartial entity. However, this is not meant to prevent the requirement of previous administrative or hierarchical review.

The term “tribunal” in (f) above is used in the sense it carries in Article 6 of the European Convention on Human Rights.

The requirement in (g) that public prosecutors should enjoy protection refers back to the provisions of Recommendation (94) 12.

6. States should also take measures such to enable that public prosecutors have an effective right to freedom of expression, belief, association and assembly. In particular they should have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings in a private capacity, without suffering professional disadvantage by reason of their lawful action of their membership in a lawful organisation. The rights mentioned above can only be limited in so far as this is prescribed by law and is necessary to preserve the constitutional⁶ position of the public prosecutors. In cases where the rights mentioned above are violated, an effective remedy should be available.

This recommendation is based in particular in Article 10 of the Convention for the Protection of Human Rights. It must be interpreted in the light of the prosecutor’s duties, in particular the duty of reserve. In this respect, members of the Public Prosecution, in certain member States, may neither become a member of a political party nor be active in politics.

7. Training is both a duty and a right for all public prosecutors, before their appointment as well as on a permanent basis. States should therefore take effective measures to ensure that public prosecutors have appropriate education and training, both before and after their appointment. In particular, public prosecutors should be made aware of:

- a. the principles and ethical duties of their office;**
- b. the constitutional and legal protection of suspects, victims and witnesses;**
- c. human rights and freedoms as laid down by the Convention for the Protection of Human Rights and Fundamental Freedoms, especially the rights as established by Articles 5 and 6 of this Convention;**
- d. principles and practices of management in a judicial context;**
- e. mechanisms and materials which contribute to consistency in their activities.**

Furthermore, States should take effective measures to provide for additional training on specific issues or in specific sectors, in the light of present-day conditions, taking into account in particular the types and the development of criminality, as well as international co-operation on criminal matters.

⁶ The word “constitutional” is used here with reference to the legally established aims and powers of the public prosecutor, not to the Constitution of any State.

The committee based its thinking on the principle that, while training is a fundamental aspect of the way the Public Prosecution is organised in all European countries, it needs to be reinforced in terms of quality and quantity, for both trainee and serving prosecutors, by becoming a veritable right. At the same time, all members of the prosecution service must be convinced that they have a duty - particularly to those brought before the courts - to undertake training.

Specifically, they should be made more aware of:

- the ideals and ethical duties of their office;
- the constitutional and legal protection of suspects' and victims' rights;
- human rights and freedoms as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms, especially in Articles 5 and 6 thereof, in the light of the case-law of the Strasbourg Court..

Attention must also be paid to the tasks assigned to principal state prosecutors in the fields of management, administration and the organisation of multidisciplinary teams - see sub-paragraph (d). The expression "*in a judicial context*" refers to the fact that many legal systems require public prosecutors, judges and other officers of the law to work together in the same functional administrative structures or in structures that, although separate, are closely linked and increasingly interconnected. Moreover, there are certain specific features of legal management and administration that differ from those of mainstream administrative management and must be taken into account.

Lastly, greater equality of treatment for persons appearing before the courts depends on achieving greater consistency in the work of the prosecution service at local, regional and central levels, and not only with regard to individual decisions⁷. Training must therefore include information about the different mechanisms that can promote consistency - sub-paragraph (e) - which are discussed in greater detail in paragraph 36a.

In general, sub-paragraphs (d) and (e) reflect and redefine the aims set out in Recommendation (95) 12 on the management of criminal justice, which includes the following:

"Management principles, strategies and techniques may make significant contributions to the efficient and effective functioning of criminal justice. To this end, the agencies concerned should set objectives for the management of their workloads, finances, infrastructure, human resources and communications.

The achievement of more efficient and effective criminal justice will be greatly facilitated if the objectives of the various agencies are co-ordinated within a broader framework of crime control and criminal justice policies."

⁷ Cf. 8th Criminological Colloquium of the Council of Europe (1987) on "disparities in sentencing: causes and solutions".

At a practical level, and in the light of developments in crime, there is a good case for additional training in specific sectors, such as:

- cross-border crime and other forms of crime of international concern;
- organised crime;
- computer crime;
- international trafficking in psychotropic substances;
- offences relating to complicated financial transactions, such as money laundering and large-scale fraud;
- international co-operation on criminal matters;
- comparative criminal justice systems and comparative law;
- prosecution strategies;
- vulnerable witnesses and victims;
- the contribution of criminal law to the protection of the environment, in particular the Council of Europe texts in this field, namely Resolution (77) 28 and the Convention on the Protection of the Environment through Criminal Law (ETS 172);
- scientific-based evidence, in particular the use of recently developed technologies such as DNA profiling.

8. In order to respond better to developing forms of criminality, in particular organised crime, specialisation should be seen as a priority, in terms of the organisation of public prosecutors, as well as in terms of training and in terms of careers. Recourse to teams of specialists, including multi-disciplinary teams, designed to assist public prosecutors in carrying out their functions should also be developed.

All public prosecutors must be thoroughly familiar with most areas of the law. In that sense, they must be generalists rather than specialists. None the less, for reasons of effectiveness, specialisation is essential in fields that are highly technical (business-related and financial crime, for example), or fall into the category of large-scale organised crime.

Accordingly, two types of specialisation are envisaged:

- firstly the traditional form of specialisation in which the prosecution service is organised to include (in larger offices or at regional or national level) teams of prosecutors specialising in specific sectors. Dissociating grade from post might be a way of encouraging such specialisation, as envisaged in Recommendation (95) 12, paragraph 13:
“Career development planning should be actively pursued, *inter alia* through furthering specialisation, dissociating grade from post where appropriate, and by creating other opportunities for staff to develop new skills and expertise [...]”;
- the second type of specialisation that should be encouraged is the formation, under the direction of prosecutors who are themselves specialists, of truly multi-disciplinary teams whose members are drawn from a variety of backgrounds (a team dealing with financial crime and money laundering, for example, might include chartered accountants, customs officers and banking experts). This pooling of expertise in a single unit is a vital factor in the operational effectiveness of the system.

9. With respect to the organisation and the internal operation of the Public Prosecution, in particular the assignment and re-assignment of cases, this should meet requirements of impartiality and independence and maximise the proper operation of the criminal justice system, in particular the level of legal qualification and specialisation devoted to each matter.

A hierarchical structure is a necessary aspect of all Public Prosecution services, given the nature of the tasks they perform. But relationships between the different layers of the hierarchy must be governed by clear unambiguous rules so that personal considerations do not play an unwarranted role. Such is the thinking behind paragraphs 9 and 10, as amplified by paragraph 36a.

Paragraph 9 requires in principle that the same level of impartiality employed in determining public prosecutors' status should be reflected in the internal organisation and functioning of each Public Prosecution office.

10. All public prosecutors enjoy the right to request that instructions addressed to him or her be put in writing. Where he or she believes that an instruction is either illegal or runs counter to his or her conscience, an adequate internal procedure should be available which may lead to his or her eventual replacement.

With regard to instructions delivered within the hierarchy - a particularly sensitive question in legal systems where senior levels of the service are entitled to issue instructions about specific cases and about general criminal policy - there are two extremes that should be avoided.

On the one hand, affording all public prosecutors a "conscience clause" right would lead to excesses that could not be dealt with satisfactorily through appeal mechanisms. Moreover, the introduction of such mechanisms would have the effect of bringing relationships between the different levels of the prosecution service within the jurisdiction of the courts in a manner likely to impede the smooth operation of the system.

On the other hand, it is unacceptable in human terms, and potentially dangerous in terms of civil liberties, to require that all members of the prosecution service carry out instructions which they may regard as unlawful or to which they have a conscientious objection.

It is therefore recommended that, in such circumstances, two types of guarantee should be available:

- the first (already enjoyed by all those who have dealings with the administration or come before the courts) is that of being able to request that instructions are delivered in writing so that the hierarchy assumes direct responsibility. Because instructions from superiors vary widely - from the most routine everyday decisions to rulings on matters of principle - it was considered inappropriate to require that they all be delivered in writing, as to do so would plunge public prosecutors into a jungle of red tape (but see paragraphs 13c and d, on government instructions, which differ on this point).
- the second guarantee is offered by the introduction into Public Prosecution services of an internal procedure enabling subordinates, at their own request, to be replaced in order to allow the disputed instruction to be carried out.

It should be understood that these guarantees are established in the interest of both individual prosecutors and the public. In other words, they are intended to come into play only in exceptional circumstances and must not be misused - for example, as a means of impeding the smooth running of the system. It is clear, too, that the hierarchy must be organised so as to leave ample scope for co-operation and team spirit.

At the same time, public prosecutors who have recourse to these guarantees in circumstances that warrant their so doing must not suffer any consequences prejudicial to their careers.

RELATIONSHIP BETWEEN THE PUBLIC PROSECUTION AND THE EXECUTIVE AND LEGISLATIVE POWERS

Legal Europe is divided on this key issue between the systems under which the public prosecutor enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action.

Inasmuch as this is an institutional question - concerned with the fundamental distribution of power in the state - and currently, in many countries, a key factor in internal reforms occasioned either by changes in the historic context or by the existence of problems in the relationship between justice and politics, the very notion of European harmonisation around a single concept seemed premature.

Therefore the committee sought, by analysing the two types of system currently in operation, to identify the elements for achieving the balance that is necessary if excesses in either direction are to be avoided. As well as laying down common rules for all public prosecutors (see paragraphs 11 and 12), it took pains to create “safety nets” specifically intended for either those systems where prosecutors were to some degree subordinate (see paragraphs 13 and 16) or those where they enjoyed independence (see paragraphs 14 and 15).

11. States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties and responsibilities without unjustified interference or unjustified exposure to civil, penal or other liability. However, the Public Prosecution should account periodically and publicly for its activities as a whole and, in particular, the way in which its priorities were carried out.

There are two requirements for the proper functioning of Public Prosecution in all circumstances:

- on the one hand, public prosecutors must enjoy such independence or autonomy as is necessary for the exercise of their duties⁸, and in particular to be able to act whatever the interests at stake, “*without unjustified interference*” (unjustified i.e. in cases other than those provided in the law) not only from any other authority, whether executive or legislative - this being most relevant

⁸ See in particular Resolution (97) 24 on the twenty Guiding Principles for the Fight against Corruption.

in systems where the public prosecutor is subordinate - but also from economic forces and local political authorities. Generally speaking, the law itself provides such a safeguard, indeed in some cases unjustified interference is a criminal offence. But interference can be more insidious, for example taking the form of a squeeze on the Public Prosecution's budget, thus making the service more dependent on sources of financing not originating in the State.

- on the other hand, while there must be provision for public prosecutors - given the substantial powers they enjoy and the consequences that the exercise of those powers can have on individual liberties - to be made liable at disciplinary, administrative, civil and criminal level for their personal shortcomings, such provision must be within reasonable limits in order not to encumber the system. The emphasis must therefore be on appeal to a higher level or to an ad-hoc committee and on disciplinary procedures, although individual prosecutors must, like any other individuals, be held responsible for any offences they may commit. Clearly, however, in systems where public prosecutors enjoy full independence, they carry greater responsibility.

These requirements go hand in hand with the need for transparency. Apart from individual decisions that are the subject of specific recommendations, all public prosecutors - because they act on behalf of society - must give account of their work at local or regional level, or indeed national level if the service is highly centralised. These regular accounts must be made to the general public - either directly through the media or a published report, or before an elected assembly. They may take the form of reports or bodies of statistics indicating work done, aims achieved, ways in which crime policy was implemented considering the discretionary powers in the hands of Public Prosecution, and sums of public money spent; and setting out priorities for the future. This type of reporting, already a feature of many systems where the public prosecutor enjoys substantial independence, can also have a positive impact on other systems inasmuch as it makes for greater consistency in the prosecutor's work.

12. Public prosecutors should not interfere with the competence of the legislative and the executive powers.

This paragraph - a corollary to the preceding one - restates the familiar principle of the separation of powers.

In particular, where the law provides otherwise, the final interpretation of statutes and other legislative measures, and any evaluation of their constitutionality, is the preserve of the courts, not the public prosecutor. While the public prosecutor may recommend changes in the law and, where appropriate, give opinions on its interpretation, it does not have the authority to impose a legal interpretation.

13. 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 either the competent public prosecutor or the body that represents the Public Prosecution;**
 - duly to explain its written instructions, especially when they deviate from the public prosecutor's advice and 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 paragraph *d.* above but also to an appropriate specific control with a view in particular to guaranteeing transparency.**

This provision specifically concerns systems in which the public prosecutor is subordinate to the executive authority. It details how the two entities must relate to one another at the level of practical, rather than institutional, arrangements so that the form of subordination leaves scope for a certain degree of autonomy deemed essential to the functioning of all public prosecutors, particularly in dealing with individual cases.

Instructions of a general nature, for example on crime policy, must be in writing and be published (sub-paragraph (c)) more for the information of those who come before the courts than as a safeguard for public prosecutors. It is also advisable to see to it that such instructions, in particular when they aim at exempting from prosecution one or another category of facts, respect strictly equity and equality; moreover, it must not be possible to seek a solution to an individual case under cover of instructions of a general nature.

Instructions in respect of specific cases are more problematic, particularly in systems where the principle of discretionary prosecution applies. Indeed, it is just such systems that have raised questions in several member states in recent years as the risk of government partisanship has been recognised.

The committee worked from the premise that the authority to issue instructions in respect of specific cases is not an essential element of systems based on the principle of subordination: in certain cases, public prosecutors, despite being subordinate to governments or parliaments, may only be given instructions of a general nature. If there is scope for instructions in respect of specific cases, that principle must be stated explicitly in the legislation (see (a) and (d)).

After much reflection, the committee also concluded that instructions of a specific nature should be confined to the conduct of particular prosecutions, recommending that instructions not to prosecute should be prohibited - see (f) - given that, in the absence of monitoring by the courts, they pose a particular threat to the principle of equality before the law. This means that discretionary decisions not to prosecute should be the exclusive preserve of the public prosecutor. In systems where such discretionary decisions are currently possible, it is recommended that, as a minimum step, existing safeguards should be strengthened by introducing a specific system for the retrospective monitoring of instructions given, in order to ensure transparency.⁹

Instructions in relation to specific prosecutions should also be subject to all or some of the safeguards listed in sub-paragraph (d): the stipulation that the public prosecutor must be consulted in advance; the duty to explain the instruction; the requirement that it be recorded in the case file; and the insistence on the public prosecutor's freedom in arguing cases before the court.

14. In countries where the Public Prosecution is independent of the government the State should take effective measures to guarantee that the nature and the scope of the independence of the Public Prosecution should be established by law.

Where the public prosecutor is independent of the executive authority, the nature and extent of that independence must be fixed by law so as to rule out (a) informal practices that could undermine that principle and (b) any risk of drift towards self-interest by public prosecutors themselves

⁹ By way of an example : in the Dutch law that came into force on 1 June 1999, the following guarantees are laid down:

- If the Minister of Justice should consider an instruction, he is obliged to seek the advice of the Board of Attorneys-General (head of the public prosecution). The minister can deviate from the advice, but only when he gives an adequate explanation.
- The instruction and the advice will have to be given in writing. The public prosecutor is obliged to put these documents in the file of the case. As a consequence the judge and the suspect can take notice of these documents and make comments.
- Although the instruction is binding, the public prosecutor remains free to submit any other legal arguments to the court.
- If the minister gives an instruction not to prosecute, he is obliged to inform the Parliament. This information includes the written advice of the public prosecution on the matter. As a consequence there can be full public scrutiny.
- Victims and other interested parties can appeal against the decision not to prosecute to a court.

15. In order to promote the fairness and effectiveness of crime policy, public prosecutors should co-operate with government agencies and institutions in so far as this is in accordance with the law.

Because the public prosecutor is independent, there is a risk that it may be out of step with other branches of the state administration involved in directing and implementing crime policy. The public prosecutor must therefore co-operate closely with these various services, which as a rule are answerable to the government, and the principle and methods of such co-operation must have a legal basis.

In order to co-operate with these administrative bodies, the Public Prosecution service itself must be rigorously organised and possess representatives empowered to enter into agreements. Moreover, rigorous internal organisation is essential for ensuring overall consistency in the work of the different public prosecutors, in particular with respect to the crime policy actually applied by them within the framework of their discretionary powers ¹⁰

16. Public prosecutors should, in any case, be in a position to prosecute without obstruction public officials for offences committed by them, particularly corruption, unlawful use of power, grave violations of human rights and other crimes recognised by international law.

Although applicable generally, this recommendation specifically concerns those systems where the public prosecutor is subordinate to the government, a situation that must not prevent it from prosecuting public officials - or, by extension, elected representatives or politicians - who commit offences, particularly where corruption is involved.

«Obstruction» means any hindrance placed in the path of prosecution; it also means any practice amounting to reprisal upon public prosecutors.

RELATIONSHIP BETWEEN PUBLIC PROSECUTORS AND COURT JUDGES

The committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status and certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions - which inevitably come into frequent contact - must be characterised by mutual respect, objectivity and the observance of procedural requirements.

¹⁰ This means all the discretionary powers that are granted to public prosecutors and not only their prerogatives as regards the power to institute or not to institute criminal proceedings.

17. States should 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. In particular States should guarantee that a person cannot at the same time perform duties as a public prosecutor and as a court judge.

Firstly, any ambiguity about the respective status and roles of public prosecutors and judges should be removed so that each profession is clearly identified in the eyes of the public and no confusion exists in the minds of those who come before the courts. The first step in this regard is to lay down clear rules of procedure concerning the public prosecutor's capacity to act.

The second element is a restatement of the basic principle that a person cannot at the same time perform duties as a public prosecutor and a judge. There is no inconsistency between this principle and paragraph 5*h*, which is intended to provide for the possibility of public prosecutors becoming judges, or vice-versa, in the course of their careers. Likewise, the fact that some prosecutors can be employed temporarily as judges at the beginning of their careers, in order to evaluate their qualifications, is not contrary to the principle.

18. However, if the legal system so permits, States should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.

The possibility that public prosecutors become judges and vice-versa is based not only on the complementary nature of their duties but also on the fact that similar guarantees in terms of qualifications, competence and status are required in relation to both professions. This provision also constitutes a further safeguard for the public prosecutor.

19. Public prosecutors must strictly respect the independence and the impartiality of judges; in particular they shall neither cast doubts on judicial decisions nor hinder their execution, save where exercising their rights of appeal or invoking some other declaratory procedure.

The close relationship between public prosecutors and judges must not affect the impartiality of the latter. Public prosecutors, whose job it is to guarantee the application of the law, must be vigilant on this point while at the same time scrupulously respecting the court decisions which it is often their duty to implement, save where exercising their normal right of appeal.

It is obvious that the reverse is also true: judges must respect public prosecutors as representatives of a distinct professional body and not interfere with the exercise of their functions.

The term "*declaratory procedure*" means any procedure having the same effect as an appeal, though not technically an appeal as such.

20. Public prosecutors must be objective and fair during court proceedings. In particular, they should ensure that the court is provided with all relevant facts and legal arguments necessary for the fair administration of justice.

The third recommendation under this heading concerns the need for objectivity on the part of public prosecutors and for transparency in their dealings with judges, so that the latter have a sound basis on which to deliver a ruling. The first priority for ensuring transparency must be the communication of all relevant facts and arguments. In addition, apart from information on individual cases, it is useful for judges to be kept informed about the public prosecutor's general priorities and criteria for action.

RELATIONSHIP BETWEEN THE PUBLIC PROSECUTION AND THE POLICE

The question of institutional links between the Public Prosecution and the police is another stumbling block in the pursuit of harmonisation at European level. There is a distinction between those states in which the police service is independent of the Public Prosecution, and enjoys considerable discretion not only in the conduct of investigations but also often in deciding whether to prosecute, and those in which policing is supervised, or indeed directed, by the public prosecutor. However, this is another field in which the requirements of human rights and respect for individual liberties have recently led to change - based on the premise that internal monitoring in the police service is inadequate given the extent of police powers and the particularly damaging consequences of any illegality - with a tendency towards convergence. It is for this reason that the committee laid down a general principle common to both systems before proceeding to specific recommendations for each.

21. In general, public prosecutors should scrutinise the lawfulness of police investigations at the latest 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.

All public prosecutors must have at least two functions vis-à-vis the work of the police: namely scrutinising the lawfulness of police investigations before any decision to proceed with public prosecution can be taken and, at the same stage, monitoring in general terms that human rights are respected.¹¹

¹¹ The form of words chosen represents a compromise designed to reflect the farthest that certain common law systems could agree to and the minimum that other systems could accept.

22. In countries where the police is placed under the authority of the Public Prosecution or the police investigations are either conducted or supervised by the public prosecutor, that State should take effective measures to guarantee that the public prosecutor may:

- a. give instructions as appropriate to the police with a view to an effective implementation of crime policy priorities, notably with respect to deciding which categories of cases should be dealt with first, the means used to search for evidence, the staff used, the duration of investigations, information to be given to the Public Prosecution, ... etc;**
- b. where different police agencies are available, allocate individual cases to the agency that it deems best suited to deal with it;**
- c. carry out evaluations and controls in so far as these are necessary in order to monitor compliance with its instructions and the law;**
- d. sanction or promote sanctioning if appropriate of eventual violations.**

These provisions relate exclusively to systems in which the public prosecutor is empowered, to any extent, to supervise the police and police activities. In this context, while the committee chose not to express a view on the recurring question of whether all or part of the police service should be attached to the public prosecutor, it sought to voice its concerns about the public prosecutor's real capacity to direct and supervise, given that there is a significant discrepancy, in many cases, between the prosecutor's statutory powers and their actual exercise on a routine basis.

The effective exercise of such authority depends, first and foremost, on the public prosecutor being fully empowered - over and above its capacity to issue instructions in relation to specific cases - to give general instructions with a view to ensuring that crime policy priorities (which it is often responsible for implementing) are followed in every respect. For example, the priority requirement might be a concerted effort to solve certain types of crime (such as petty theft or money laundering) depending on the government's policy choices; an emphasis on particular methods of evidence-gathering (e.g. specific inquiries to be made in cases of burglary, or the use of DNA profiling); the allocation of certain types of resource to certain investigations or to the detection of certain types of offence; an effort to limit the duration of investigations (which often take too long); or a duty to notify the public prosecutor systematically of all offences of a certain gravity, and of progress with investigations.

In addition, where more than one police agency has the capacity to conduct a specific inquiry, it is up to the public prosecutor to decide which is the most appropriate, paying due regard, of course, to the territorial jurisdiction and particular fields of competence of the different agencies and to the practical and operational constraints placed on them.

Lastly, police officers are all the more in a position effectively to apply instructions issued by the Public Prosecution when the latter participates in their training process.

While interaction and co-operation must be the keynotes in dealings between the public prosecutor and the police, it is also important that the former should have the necessary resources to ensure that instructions are complied with and to penalise any failure to comply.

23. States where the police is independent of the Public Prosecution should take effective measures to guarantee that there is appropriate and functional co-operation between the Public Prosecution and the police.

In the absence of institutional links between the public prosecutor and the police, the two institutions must none the less co-operate and it is up to the government to determine what form the co-operation should take.

DUTIES OF THE PUBLIC PROSECUTOR TOWARDS INDIVIDUALS

As a necessary corollary to the safeguards enjoyed by the public prosecutor in the performance of its functions, it must have certain duties towards those who come into contact with the legal system whether as suspects, witnesses or victims of crime.

24. In the performance of their duties, public prosecutors should in particular:

- a. carry out their functions fairly, impartially and objectively;**
- b. respect and seek to protect human rights, as laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms;**
- c. seek to ensure that the criminal justice system operates as expeditiously as possible.**

Here, the text underscores the two vital requirements mentioned in recommendation 1 - respect for the rights of the individual and the pursuit of effectiveness - for which the public prosecutor is partly accountable.

25. Public prosecutors should abstain from discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, health, handicaps or other status.

The fact that the public prosecutor is in charge of prosecutions must not overshadow its primary function as a custodian of the law: this means that it must behave impartially, and the practical implications of that principle are set out in the following paragraphs of the recommendation.

26. Public prosecutors should ensure equality before the law, and make themselves aware of all relevant circumstances including those affecting the suspect, irrespective of whether they are to the latter's advantage or disadvantage.

27. Public prosecutors should not initiate or continue prosecution when an impartial investigation shows the charge to be unfounded.

28. 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.

Because it is answerable for the way the law is applied, the public prosecutor must take account of the manner in which incriminating evidence is obtained.

The expression “*methods which are contrary to the law*” 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.

Typically two sets of situations may occur: either there is no room for doubt as to the illegal nature of the evidence and the public prosecutor must act on its own account in refusing to admit that evidence; or else there is an element of doubt and the public prosecutor, either before or at the time of conducting the prosecution, must ask the court to rule on the admissibility of the evidence.

29. Public prosecutors should seek to safeguard the principle of equality of arms, in particular by disclosing to the other parties – save where otherwise provided in the law – any information which they possess which may affect the justice of the proceedings.

The duty of parties in a case to disclose information - a corollary to the stipulation in paragraph 20 that public prosecutors must be objective and fair in their dealings with judges - is a key factor in the adversarial nature of court proceedings. However, the committee wished to make an exception for those cases where an overriding public interest justifies keeping certain documents or information confidential (for example, where the law provides that certain sources of information shall not be disclosed for security reasons), but such cases must remain the exception.

The principal of equality of arms is contained in Article 6 (1) of the European Convention on Human Rights: “it is only one feature of the wider concept of fair trial by an independent and impartial tribunal” (European Court of Human Rights, Delcourt Case, judgement of 17 January 1970, § 28).

“Under the principle of equality of arms [...] each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent. [...] In this context, importance is attached to appearances as well as to the increased sensitivity to the fair administration of justice [...]” (European Court of Human Rights, Bulut v. Austria, judgement of 22 February 1996, § 47).

30. Public prosecutors should 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.

The public prosecutor must maintain the presumption of innocence, which is recognised under all democratic systems, on the understanding that there may be (exceptional) cases where information obtained cannot be kept confidential: such breaches of confidentiality must be authorised or required by law.

31. Where public prosecutors are entitled to take measures which cause an interference in the fundamental rights and freedoms of the suspect, judicial control over such measures must be possible.

Depending on the legal system in question, the public prosecutor - acting either directly or via the services that it controls or supervises - may be empowered to take measures that interfere with the freedoms of the individual. While the committee did not think it worthwhile to restate the principles and safeguards laid down in the European Convention on Human Rights and other international texts, it was concerned to emphasise the need for judicial review, given that ultimately only the courts can guarantee freedoms.

32. Public prosecutors should take proper account of the interests of the witnesses, especially take or promote measures to protect their life, safety and privacy, or see to it that such measures have been taken.

Efforts to combat organised crime increasingly necessitate the adoption of measures for the protection of witnesses. It is usually the task of the public prosecutor leading the prosecution either to take effective measures or to use its best endeavours so that such measures are taken by the police.

In this respect it is useful to refer to Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence.

33. Public prosecutors should take proper account of the views and concerns of victims when their personal interests are affected and take or promote actions to ensure that victims are informed of both their rights and developments in the procedure.

The place accorded to victims in criminal proceedings varies from one legal system to another, depending in particular on whether a civil action may be brought in the criminal courts. None the less, consideration for victims is now a major element of European crime policies. The committee therefore decided it was necessary to include in the recommendation the public prosecutor's main duties regarding victims, whatever the legal system.

While some legal systems are obviously more ambitious in this respect, it is useful to refer to the main instruments already adopted by the Council of Europe:

- Resolution (77) 27 on the compensation of victims of crime;
- Recommendation No. R (85) 11 on the victim's position in the framework of criminal law and procedure;
- Recommendation No. R (87) 21 on assistance to victims and the prevention of victimisation;
- European Convention on the Compensation of Victims of Violent Crimes.;
- Recommendation No. R (99) 19 concerning mediation in penal matters ...

34. Interested parties of recognised or identifiable status, in particular victims, should be able to challenge decisions of public prosecutors not to prosecute; such a challenge may be made, where appropriate after an hierarchical review, either by way of judicial review, or by authorising parties to engage private prosecution.

In all legal systems, in particular those systems under which the public prosecutor exercises discretion on whether or not to prosecute, decisions to discontinue proceedings where an offence has clearly been committed - and many such decisions are accompanied by proposals for an alternative to prosecution (e.g. a compromise settlement, mediation, a caution or warning or the imposition of conditions) - pose a difficult problem if they are contested by the persons concerned and/or their grounds are controversial.

In addition to recommending - in item 13e - that government instructions not to prosecute should be prohibited, the committee sought to help reinforce the whole system of checks and balances designed to ensure that the criminal justice system is not diverted from its objectives, all without prejudicing other rights enjoyed by the parties under national law.

It encountered two types of difficulty. Firstly, while the great majority of offences produce identifiable (individual or groups of) victims, others - such as corruption or interference with the financial interests of the state or a regional or local authority - do not. To create a right applicable only to victims would thus mean accepting the absence of democratic checks on the public prosecutor's activities in a number of particularly sensitive areas. On the other hand, indiscriminately permitting anyone who considered themselves affected by offences to contest decisions not to prosecute would effectively bring public prosecutions grinding to a halt and increase the incidence of appeals being lodged as a delaying tactic.

Thus the committee wished to recognise not only victims' rights but also the rights of "*interested parties of recognised or identifiable status*", for example a person having reported facts to a judicial authority (subject to certain conditions) or associations empowered, or authorised in exceptional circumstances, to defend an area of public interest.

The second difficulty concerns the type of control machinery needed, given that it must not have negative effects such as the paralysis of the system or the introduction of a general requirement for judicial review of all the public prosecutor's decisions, however well-founded and lawful. On the other hand, systems of hierarchical review or appeal have not always been adequate or even appropriate, particularly in cases of decisions taken by public prosecutors on the instructions of their superiors.

Building on Recommendation No. R (87) 18 concerning the simplification of criminal justice, the committee has recommended the introduction of procedures for either judicial review - aware that this concept may vary from one country to another - or for authorising the parties as defined above to bring private prosecutions. Such authorisation could be given generally or on a case-by-case basis.

In some jurisdictions, although remedies exist such as those described in this recommendation, they are limited in their scope.

35. States should ensure that in carrying out their duties, public prosecutors are bound by “codes of conduct”. Breaches of such codes may lead to appropriate sanctions in accordance with item 5 above. The performance of public prosecutors should be subject to regular internal review.

Public prosecutors should in particular demonstrate high standards of decision-making and professional conduct.

As public prosecutors become increasingly independent or autonomous, and thus of necessity assume a greater burden of responsibility, existing statutory and procedural regulations may become insufficiently detailed as a guide to the ethics and conduct of the profession.

However, the drafters do not envisage the proposed “*code of conduct*” as a formal code, but rather as a reasonably flexible set of prescriptions concerning the approach to be adopted by public prosecutors, clearly aimed at delimiting what is and is not acceptable in their professional conduct.

Regular monitoring is an appropriate way to ensure the observance of such rules.

- 36. a. With a view to promoting a fair, consistent and efficient activity of public prosecutors, States should seek to:**
- **give prime consideration to hierarchical methods of organisation, without however letting such organisational methods lead to ineffective or obstructive bureaucratic structures;**
 - **define general guidelines for the implementation of criminal policy;**
 - **define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making.**
- b. The above-mentioned methods of organisation, guidelines, principles and criteria are decided by parliament or by government or, if national law enshrines the independence of the public prosecutor, by representatives of the Public Prosecution.**
- c. The public must be informed of the above-mentioned organisation, guidelines, principles and criteria; they shall be communicated to any person on request.**

Ensuring that citizens are equal before the law and that the criminal justice system functions efficiently demands a certain level of co-ordination and an effort at consistency, extending beyond the handling of individual cases. These requirements are even more pertinent in systems where the public prosecutor is an independent authority or enjoys considerable autonomy.

Three elements should take precedence in the pursuit of consistency:

- a well designed hierarchy, with no place for insidious bureaucracy, in which all members of the Public Prosecution service should feel responsible for their own decisions and capable of taking the initiatives needed to do their particular job (see also paragraphs 9 and 10 on this point);

- general guidelines on the implementation of crime policy, setting out priorities and the means of pursuing them having account of the discretionary powers recognised to the public prosecutor;
- a set of criteria to guide decision-making in individual cases, with the aim, for example, of preventing inconsistencies such as that of certain offences systematically attracting prosecution in certain public prosecutors' offices and not in others or being dealt with under different procedures or categorised differently.

These criteria must be framed in such a way as to have the desired effect without rigidly impeding the necessary evaluation of each case individually and in the light of local circumstances, or creating a grey area, within which offenders may operate with impunity.

The committee considers it to be of prime importance that such guidelines, principles and criteria should be approved by parliament or government. Only where national law enshrines the independence of the public prosecutor can the Public Prosecution itself be empowered to establish them.

Because such instruments are intended primarily to safeguard the members of the public rather than the public prosecutors, they must be brought to the attention of the public or at least of all those concerned. This is a particularly important requirement in systems where the public prosecutor is independent or enjoys substantial discretionary powers.

INTERNATIONAL CO-OPERATION

Given the number of existing international instruments and recommendations and the fact that this field is under specific scrutiny within the Council of Europe itself, the committee concentrated on identifying practical measures for improving the current situation, bearing in mind the important role normally played by the public prosecutor in international judicial co-operation on criminal matters.

37. Despite the role that might belong to other organs in matters pertaining to international judicial co-operation, direct contacts between public prosecutors of different countries should be furthered, within the framework of international agreements where they exist or otherwise on the basis of practical arrangements.

The committee acknowledged that, as a result of international agreements, some States currently resort to central authorities. Direct contacts should nevertheless be encouraged, in particular within member States.

38. Steps should be taken in a number of areas to further direct contacts between public prosecutors in the context of international judicial co-operation. Such steps should in particular consist in:

- a. disseminating documentary tools;
- b. compiling a list of contacts and addresses giving the names of the relevant contact persons in the different prosecuting authorities, as well as their specialist fields, their areas of responsibility, etc;

- c. **establishing regular personal contacts between public prosecutors from different countries, in particular by organising regular meetings between Prosecutors General;**
- d. **organising training and awareness-enhancing sessions;**
- e. **introducing and developing the function of liaison law officers based in a foreign country;**
- f. **training in foreign languages;**
- g. **developing the use of electronic data transmission;**
- h. **organising working seminars with other States, on questions regarding mutual aid and shared crime issues.**

The documentary tools referred to include, for example, documents providing information on the legislation applicable in the different countries.

The requirement for training and awareness-raising sessions can be met by organising regular international training seminars for members of the various national Public Prosecution services, under the auspices of the Council of Europe, as well as language training.

The objective in the medium term should be to set up a pan-European judicial network.

39. In order to improve rationalisation and achieve co-ordination of mutual assistance procedures, efforts should be taken to promote:

- a. **among public prosecutors in general, awareness of the need for active participation in international co-operation, and**
- b. **the specialisation of some public prosecutors in the field of international co-operation,**
- c. **to this effect, States should take steps to ensure that the public prosecutor of the requesting State, where he or she is in charge of international co-operation, may address requests for mutual assistance directly to the authority of the requested State that is competent to carry out the requested action, and that the latter authority may return directly to him or her the evidence obtained.**

Public prosecutors could, for example, usefully be empowered to:

- receive requests for mutual legal assistance that fall within their sphere of responsibility;
- assist the body in charge of executing such requests;
- co-ordinate investigations where appropriate;
- participate (in their capacity as custodians of the interests of international co-operation), either directly or by submitting memoranda, in all procedures relating to the execution of requests for mutual legal assistance;
- lastly, the possibility should be considered of extending existing mechanisms¹² facilitating spontaneous exchange of information between public prosecutors of different countries.

¹² See Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg 9.11.1990.

In order to reinforce both police co-operation and judicial co-operation in this field and where the legal system so allows, the Public Prosecution should liaise with and, where appropriate, be represented in the national bodies that manage information of interest to international criminal assistance, as well as international organisations devoted to police co-operation.

Bearing in mind the key role of public prosecution within the framework of the rule of law and in particular in the criminal justice system, this Recommendation aims at laying down a number of fundamental principles that should guide its action, notably by defining its functions and the safeguards that are necessary for carrying out such functions, its relationship with the executive and legislative powers, court judges, the police, its duties towards individuals, lastly its role in international co-operation.