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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS ON**  
**EUROPEAN STANDARDS AS REGARDS THE INDEPENDENCE**  
**OF THE JUDICIAL SYSTEM:**  
**PROSECUTION SERVICE**

**by**  
**Mr James HAMILTON (Substitute Member, Ireland)**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. I have had the benefit of reading the observations of Ms. Suchocka, Ms. Nussberger and Mr. Sorensen. I propose to focus on the issue of the prosecution service which is of course not the main subject of the request.
2. I agree with Mr. Sorensen about the complexity of the issues concerning the independence of the prosecution service and the impossibility of preparing detailed opinions at this stage. For this reason these comments are also intended as preliminary observations.
3. I personally favour the independence of prosecution services. I have always had a niggling doubt about the effectiveness of the guarantees for independence at the level of the individual case in systems which in principle leave open the possibility of instructions being given, albeit subject to rules concerning transparency. Having said that, I am not aware of any evidence to support my doubts other than of the most anecdotal and unattributable kind. It would be interesting to commission a survey of prosecutors to determine to what extent, if at all, undisclosed instructions are given.
4. However, like Mr. Sorensen I have to accept that the three main codes concerning prosecutors, the UN Havana Guidelines, the IAP Standards and the Council of Europe's Rec (2000) 19, all allow for systems where the prosecution system is not independent of the executive, and in relation to such systems concentrate on the necessity for guarantees at the level of the individual case that there will be transparency concerning any instructions which may be given. Like Mr. Sorensen I agree that there is no point in formulating new standards that would not survive a reality test.
5. However, I see no harm in noting the increasing tendency towards more independent prosecution services. This is true not only among the member states of the Council of Europe but in the common law world. The federal prosecution service in Canada recently moved from the model of a service as an integral part of the Attorney General/Ministry of Justice to the model of an independent DPP. Northern Ireland has now also established its DPP's Office as independent. England and Wales, Northern Ireland and Ireland have also all seen the elimination of police powers to prosecute independently of the prosecutor which was a traditional feature of common law systems.
6. I agree with most of Ms. Suchocka's paper which I think could provide a very good basis for a chapter on the independence of and non-interference with the prosecutor. I would like to add a few comments on what she has said which for the most part complement rather than contradict her views.
7. I think it is important to distinguish between the external independence of prosecutors and the independence of individual prosecutors within the prosecution system as Mrs. Suchocka does. The independence of individual prosecutors, unlike that of individual judges, is not an absolute value. There is a tension between the need to decide on the approach to the individual case on the basis of the prosecutor's conscience and the need to ensure consistency of approach and the application of the principles and guidelines which have been established. It is legitimate to have a system of prosecution which is organized on a hierarchical basis, and in which a decision of a prosecutor may be overruled by a senior prosecutor. All the Council of Europe's REC 2000 (19) requires is that where an individual prosecutor is given an instruction he or she has a right to have it put in writing, not that such an instruction may not be given. The prosecutor is also entitled to have a procedure to allow for replacement by another prosecutor where an instruction is believed to be illegal or contrary to his or her conscience. I do not agree, therefore, that in a hierarchical prosecution system instructions may not be given at the level of an individual case provided these safeguards are met. (Incidentally, I do not think these safeguards are

adequate. An allegation that an instruction is illegal is very serious. Furthermore, any instruction to reverse the view of an inferior prosecution should in my view be reasoned.)

8. With reference to paragraph 7 of Mrs. Suchocka's opinion, while I agree with her that some system of outside assessment or inspection of the performance of a prosecutor's office is desirable I would not be very happy with the use of such language as oversight, supervision or control. There are various possible models. For example, in the United Kingdom there is a system whereby an inspectorate examines the work of prosecutor's offices. However, as I understand it this does not extend to second guessing individual cases. In many jurisdictions in the common law world there is some degree of accountability to an Attorney General, who although a political appointee is usually expected to perform prosecutorial functions independently of the executive. Prosecution offices like other branches of government are accountable for public expenditure through whatever public auditing procedures are in place and this would be so in every jurisdiction. The fact that so much of the prosecutors work is subject to scrutiny by courts of law also provides a form of accountability. In many systems there is accountability to parliament, although again if this can extend to the individual case it is problematic. In systems where the prosecutor does not control the investigation, the relationship between the prosecutor and the investigator necessarily creates a degree of accountability. I also think it is necessary to be clear about what aspects of the prosecutors work do or do not require to be carried out independently. For example, the crucial element seems to me that the decision whether to prosecute or not should be for the prosecution office alone and not for the executive or the legislature. However, the making of prosecution policy seems to me an issue where the legislature may properly be given a role, and possibly even a decisive role.

8. I understand and share Mrs. Suchocka's concern, expressed in paragraph 8, concerning the danger, especially in the so called new democracies, of an over powerful prosecution service becoming a fourth authority without accountability. I think that this ties in with the question of what powers the prosecution service should have. To my mind there is a very strong argument for confining prosecution services to the powers of criminal prosecution and not giving them the sort of general supervisory powers which are commonly found in "prokuratura" type systems. The question seems to me very much one of checks and balances within the system. While it is of course normal and permissible for prosecution services to control the investigation, in some ways where the prosecutor does not control the investigation this in itself reduces the possibility for an over powerful prosecution which can abuse that authority. While there are, I believe, weaknesses in the model whereby the prosecutor and investigator are separate, one advantage of such a system is to reduce the risk of an over powerful institution abusing its power. On the other hand, it creates a greater risk that the police will abuse their power. The whole question of the prosecution exercising powers outside the criminal law field has recently been the subject of intense debate within the Council of Europe's prosecutor's network.

9. I agree with Mrs., Suchocka's comments about the importance of the rules concerning the appointment and recall of prosecutors playing a significant role in guaranteeing the independence of the prosecutors office. In my view it is important that the prosecutor should not be liable for re-appointment, at least not by either the legislature or the executive. A prosecutor who is seeking re-appointment by a political body is likely to behave in such a manner as will obtain the favour of that body or at least to be perceived as doing so. I would therefore favour the appointment of a prosecutor general for a relatively long period without the possibility of renewal at the end of that period. Ideally, if some arrangement for further employment (for example as a judge) after the expiry of the term of office is to be made this should be made clear before the appointment so that again no question of attempting to curry favour with politicians arises.

10. Another issue which is important both for prosecutors and for judges is the question of security. Obviously it is important that prosecutors and judges are not intimidated by anybody and are given the necessary physical protection to enable them to carry out their duties impartially and without favour. The International Association of Prosecutors has recently adopted standards in relation to security for prosecutors.

11. Another important issue which may need to be looked at is the whole question of whether prosecutors should have discretion not to prosecute where a prosecution is not in the public interest as in countries where the opportunity principle applies, or alternatively whether the principle of legality should apply. While common law countries invariably operate the opportunity principle both the legality principle and the opportunity principle are found in civil law systems.