



**Resolution 1685 (2009)<sup>1</sup>**

## **Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states**

Parliamentary Assembly

1. The Parliamentary Assembly stresses the fundamental importance, for the rule of law and the protection of individual freedom, of shielding criminal justice systems throughout Europe from politically motivated interferences.
2. Successful co-operation between member states of the Council of Europe in the field of criminal justice (in matters such as extradition and obtaining evidence, as specified in pertinent conventions of the Council of Europe) depends on mutual trust in the basic fairness of the criminal justice systems of all member states and the absence of politically motivated abuses.
3. The independence of the judiciary, in law and practice, is the principal line of defence against such abuses.
  - 3.1. The independence of the courts and of each individual judge is recognised, in principle, in all member states of the Council of Europe. This should also be reflected in their constitutions. True independence of judges also requires a number of legal and practical safeguards, including:
    - 3.1.1. recruitment and promotion of judges must be based solely on merit (qualifications, integrity, ability and efficiency);
    - 3.1.2. protection against unfair disciplinary sanctions (in particular, dismissal) must be effective;
    - 3.1.3. salaries and allowances must permit judges and their families not to depend on the provision of housing and other amenities by executive authorities;
    - 3.1.4. the independence of judges vis-à-vis court chairpersons and judges of superior courts shall be protected, *inter alia*, by the allocation of cases on the basis of predetermined, objective systems, by strict rules protecting judges from being taken off individual cases without reasons specifically defined by law and by ensuring that the assessment of a judge's performance is not determined by the ratio of judgments upheld or quashed by superior courts.
  - 3.2. Prosecutors must be allowed to perform their tasks without interference from the political sphere. They must be shielded from instructions pertaining to individual cases, at least where such instructions would prevent an investigation from proceeding to court.

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1. *Assembly debate* on 30 September 2009 (32nd Sitting) (see [Doc. 11993](#), report of the Committee on Legal Affairs and Human Rights, rapporteur: Mrs Leutheusser-Schnarrenberger; and [Doc. 12038](#), opinion of the Committee on Economic Affairs and Development, rapporteur: Mr Sasi). *Text adopted by the Assembly* on 30 September 2009 (32nd Sitting).



3.3. In order for the practical safeguards of judicial independence to be effective, a judicial council with strong powers could play an important role in supervising the implementation of judicial independence:

3.3.1. judicial councils must have a decisive influence with respect to the recruitment and promotion of judges and prosecutors, as well as concerning disciplinary measures against them, without prejudice to any judicial review mechanisms required by certain constitutions;

3.3.2. the number of elected representatives of judges and prosecutors should be at least equal to that of members representing other groups in society that are appointed by political bodies. The latter members should be representative of all main political currents in the country. The existing practice followed by many states of involving parliamentary committees in the process of appointing certain senior judges – also followed for the election of judges to the European Court of Human Rights – is also acceptable.

3.4. The division of labour between judges and prosecutors is a question of national legal traditions. The right balance, ensuring the best possible protection from politically motivated interferences, also depends on the degree of independence granted to prosecutors as well as the procedural rights and material resources available to the defence.

3.4.1. In countries such as the United Kingdom and Italy, where prosecutors enjoy a high degree of independence and the defence has access to the case file and to the suspect at an early stage, the role of judges may safely be limited to legal oversight and final decision making.

3.4.2. In countries such as France and Germany, where prosecutors are more closely tied into their hierarchies, judges and defence lawyers must be able to play a more active role also during the investigation.

3.5. The success of any changes to the system – such as the planned abolition of the position of *juge d'instruction* in France or the strengthening, in Germany, of the *Bundesanwaltschaft* under recent anti-terrorism laws – depends on maintaining the right balance between actors enjoying full independence (judges, defence lawyers) and the prosecution and the police. Such reforms may also require an increase in the independence of the prosecution so as to safeguard the overall independence of the criminal justice system and to protect it from politically motivated interferences.

4. The situation in the four countries examined as examples of the principal types of criminal justice systems in Europe – the United Kingdom (England and Wales), France, Germany and the Russian Federation – is characterised by the following factors:

4.1. In the United Kingdom:

4.1.1. the adversarial character of the criminal justice system is underpinned by considerable, though recently dwindling, resources available for legal aid to ensure equality of arms between the prosecution and the defence;

4.1.2. the long-standing culture of independence and professionalism among judges as well as prosecutors is buttressed by their high social status and further enhanced by the recent establishment of the Judicial Appointments Commission;

4.1.3. the government's traditionally active supervision by Parliament and by the lively, pluralistic and free media;

4.1.4. recent cases (including the British Aerospace and cash-for-honours cases) have shown that the role of the attorney general needs to be changed and clarified; a reform proposal to this effect is currently under discussion.

4.2. In France and in Germany:

4.2.1. the traditionally inquisitorial criminal justice systems have taken on more adversarial elements; but in both countries there has been no commensurate increase in the resources available for legal aid; in addition, in France, defence lawyers have not yet obtained the same degree of access to the suspect and to the pre-trial investigation as their colleagues in the United Kingdom and in Germany;

4.2.2. the independence of judges is respected in law and practice, but their social status has been allowed to erode considerably;

- 4.2.3. in both countries, the independence of prosecutors is considerably less developed than in the United Kingdom; in France, a marked regression in practice has recently been deplored by senior prosecutors and elected representatives of judges and prosecutors;
- 4.2.4. the French Conseil supérieur de la magistrature, which plays an important role in career and disciplinary matters for judges and, to a lesser extent, for prosecutors, still does not have an equivalent in Germany; in France, it was recently decided to double the number of members appointed by the president of the republic and the presidents of the two chambers of parliament, thus placing elected representatives of judges and prosecutors in a minority;
- 4.2.5. the proposed abolition of the position of *juge d'instruction* in France and the transfer of most of their competences to the prosecution is widely suspected as being part of an attempt by the political authorities to increase their influence on the handling of sensitive cases;
- 4.2.6. in both countries, parliaments and independent media provide fairly solid safeguards against abuses of the criminal justice system by the executive powers.
- 4.3. In the Russian Federation:
- 4.3.1. strong improvements in the social status of judges and prosecutors in recent years have all but eliminated their dependence on executive bodies for housing and other basic needs and should help to reduce judicial corruption;
- 4.3.2. legislative reforms taking into account European standards, including the creation of a federal council of judges in charge of career and disciplinary matters, have strengthened the status of judges in law;
- 4.3.3. the creation of a separate investigative committee, within the Prosecutor General's Office, may in time somewhat dilute the overwhelming influence of the latter over the criminal justice process;
- 4.3.4. a number of legislative acts have recently been adopted, strengthening the independence of the judicial system and the protection of defence lawyers from groundless criminal prosecution: an order for the lifelong appointment of federal judges has been introduced, a special order for the commencement of criminal prosecutions in relation to defence lawyers has been established, and a special judicial body – the Disciplinary Bar – has been constituted to examine appeals from judges deprived of their powers;
- 4.3.5. the traditionally subservient attitude among many judges and prosecutors inherited from the past has not yet been fully overcome; on the contrary, after an encouraging new beginning in the early 1990s, judges are subjected to an increasing level of pressure aimed at ensuring convictions in almost all cases brought to court by the prosecutor's office;
- 4.3.6. the vectors of pressure still include old-style unofficial methods described as “telephone justice”, but also official performance evaluation and disciplinary mechanisms. The number of judges dismissed from their functions on different grounds is comparatively high. Court chairpersons have disproportionate power over other judges, in particular because of their power to decide on the distribution of cases. Legal protection for judges resisting such pressures is very limited, as the judges' councils have not yet developed sufficient independence and standing;
- 4.3.7. lawyers are still subjected to searches and seizures and other forms of pressure in violation of Russian and European legal provisions;
- 4.3.8. a number of high-profile cases, such as the second trial of M. Khodorkovsky and P. Lebedev, the proceedings against the managers and lawyers of HSBC/Hermitage, the investigation into the murder of A. Politkovskaya, the prosecution of Y. Samodurov and the dismissal of Judge Kudeshkina and several other judges, give rise to concerns that the fight against “legal nihilism” launched by President Medvedev is still far from won;
- 4.3.9. Parliament and the media still do not provide sufficient safeguards against abuses, although some recent, open debates in certain media give rise to hope for the future.

5. Noting that the criminal justice systems of all member states are exposed to politically motivated interferences, although to very different degrees:
- 5.1. the Assembly calls on all member states to:
    - 5.1.1. further strengthen judicial independence and the equality of arms between the prosecution and the defence, in particular by providing sufficient resources to the judicial system, including legal aid, by granting strong procedural rights to defence lawyers, including during the pre-trial investigation, and by strengthening judicial self-administration;
    - 5.1.2. ensure that the competent authorities for deciding on extraditions and other types of judicial co-operation take into account the degree of independence of the judiciary in the requesting state – in practice as well as in law – and refuse extradition whenever there are reasons to believe that the person concerned is unlikely, for political reasons, to be given a fair trial in the requesting state;
  - 5.2. the Assembly calls on the United Kingdom to:
    - 5.2.1. complete the reform of the attorney general's role without further delay, strengthening his/her accountability before Parliament;
    - 5.2.2. fully implement the Organisation for Economic Co-operation and Development's Convention against Bribery, including its Article 5;
    - 5.2.3. halt the recent erosion of resources available for legal aid, in order to avoid the development of a two-tier justice system dependent on the suspect's ability to pay for an effective defence;
  - 5.3. the Assembly calls on France to:
    - 5.3.1. reconsider the proposed abolition of the position of *juge d'instruction*; in the event of abolition and the transfer of this institution's competences to the prosecutor's office, to strengthen the independence of prosecutors, and to grant defence lawyers at least the same access to the pre-trial investigation by the prosecution as is presently the case before the *juge d'instruction*;
    - 5.3.2. gradually increase the salaries of judges and prosecutors to a level commensurate with the dignity and importance of their office until they reach the average of all European countries (in comparison with average earnings of the general population);
    - 5.3.3. increase the resources available for legal aid commensurately with the introduction of more adversarial elements in the criminal justice system;
    - 5.3.4. consider restoring a majority of judges and prosecutors within the Conseil supérieur de la magistrature or ensuring that the members appointed by political bodies also include representatives of the opposition and making the Conseil supérieur de la magistrature's opinion binding also for decisions concerning prosecutors;
  - 5.4. the Assembly calls on Germany to:
    - 5.4.1. consider setting up a system of judicial self-administration, taking into account the federal structure of the German judiciary, along the lines of the judicial councils existing in the vast majority of European states, as a matter of securing the independence of the judiciary in future;
    - 5.4.2. gradually increase the salaries of judges and prosecutors and increase the resources available for legal aid (as recommended for France in paragraphs 5.3.2 and 5.3.3 above);
    - 5.4.3. abolish the possibility for ministers of justice to give the prosecution instructions concerning individual cases;
    - 5.4.4. strengthen in law and practice the supervision by judges of the exercise of the prosecutors' increased powers, in particular in the fight against terrorism;
  - 5.5. the Assembly calls on the Russian Federation to:
    - 5.5.1. strengthen the independence of judges by ensuring that the evaluation of their performance is not based on the material content of their judicial decisions;
    - 5.5.2. increase the independence of the judicial council and the transparency of its proceedings;

5.5.3. strengthen the system of allocation of cases among the courts and to individual judges or sections within the courts, in such a way as to prevent any “forum shopping” by the prosecutor’s office and the exercise of any discretion in this respect by the court chairpersons;

5.5.4. promote the development of a spirit of independence and critical analysis in legal education in general and in initial and continued training of judges and prosecutors in particular, and to robustly sanction any local, regional or federal officials that continue to try to give instructions to judges, as well as any judges who seek to obtain such instructions;

5.5.5. effectively protect defence lawyers from searches and seizures of documents pertaining to the privileged lawyer–client relationship and from other forms of pressure, including abusive prosecutions and administrative harassment;

5.5.6. contribute to the development of independence of the media when investigating and publicising abuses in the criminal justice system.

6. The Assembly calls on the European Commission for Democracy through Law (Venice Commission) and the European Commission for the Efficiency of Justice (CEPEJ) to continue upholding the independence of the judiciary throughout Europe and to speak out in support of colleagues in difficulty and against any politically motivated interferences, wherever they may occur.

7. The Assembly believes that the Committee of Ministers should review Council of Europe conventions in the field of legal co-operation with a view to ensuring that they cannot be misused for purposes of politically motivated prosecutions, as long as comparable standards of judicial independence have not been reached in law and practice in all member states of the Council of Europe.

8. Finally, the Assembly encourages the European Court of Human Rights to consider giving priority to applications pertaining to alleged violations of the independence of judges and politically motivated abuses of the criminal justice system. In view of the fundamental importance of independent courts for the protection of human rights at national level, such a policy could help stem the flood of applications to the European Court.