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EXPERIENCE OF HIGH COUNCILS FOR THE JUDICIARY IN EUROPE AND IN THE MEDITERRANEAN AREA

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Theme I: Prosecutorial independence, autonomy and accountability: different models, common challenges in protection of human rights?

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**The independence, autonomy and accountability of prosecutors: different models,
common challenges in the protection of human rights?**

Experience of High Councils for the Judiciary in Europe and in the Mediterranean area

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1. Preliminary remarks

There is no uniform model of prosecutor among the countries of the Council of Europe. However, the belief is increasingly widespread that, beyond the differences between national judicial systems, the independence of prosecutors is an prerequisite to the rule of law.

The Consultative Council of European Prosecutors (CCPE) and the Venice Commission have repeatedly highlighted the need for a framework aimed at guaranteeing prosecutors against undue interference, external or internal, and the opportunity to entrust control over the application of such framework to an autonomous body, such as a Prosecutorial Council². The European Network of Councils for the Judiciary (ENCJ) has published a report on the independence and accountability of prosecutors, in which it concluded that the establishment of a Council for the Judiciary with responsibilities also for prosecutors, or a specific Prosecutorial Council, can contribute to the effective functional and organizational independence of prosecution offices³.

² Cfr. CCPE-BU(2020)4, *Report on the Independence and Impartiality of the prosecution services in the Council of Europe Member States*, Strasbourg, 30 March 2020, §§ 27, 29; CCPE(2018)2, *Opinion n. 13(2018)of the CCPE: Independence, accountability and ethics of prosecutors*, Strasbourg, 23 November 2019, par. 24; CDL-AD(2014)029, *Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia*, §§ 13-14. See also CDL-PI(2022)023, *Compilation of the Venice Commission opinions and reports concerning prosecutors*, Strasbourg, 26 April 2022, where a specific section is dedicated to Prosecutorial Councils.

³ Cfr. *Independence and Accountability of the Prosecution. ENCJ Report 2014-2016*.

The model of self-government, centred on the establishment of Councils for the Judiciary or other similar bodies⁴, does not, however, appear to be automatically replicable for the prosecution service. The Councils for the Judiciary were created for judges, to ensure the independence which is a prerequisite for the correct exercise of the judicial function. Prosecutors, on the other hand, are responsible for prosecuting, representing the prosecution in court and, in some countries, for supervising or directly conducting investigations. They do not, therefore, perform any judicial functions. Even when they order inspections, seizures and wiretapping, validation by a judicial body is generally required. Furthermore, the organization of the Courts is very different from that of the prosecutors: only the latter are in fact included in a hierarchical structure, justified by the need to ensure uniformity and consistency in the prosecution service. It is therefore difficult to equate the independence of judges with that of prosecutors.

To what extent, then, can the establishment of a system of self-government, traditionally designed for the judiciary, help ensure the proper functioning of the prosecution service and guarantee the independence of prosecutors?

My talk is divided into three parts. In the first, I will address the issue of prosecutors' independence. In the second, I will recall the principles regarding Prosecutorial Councils, where established. In the third, I will mention the main risks of extending the self-government model to the prosecution service.

2.- Independence and accountability of prosecutors

The ECtHR has ruled out that the same guarantees of independence and impartiality that the ECHR requires for judges can be automatically applied to prosecutors, who act as a party in the criminal trial⁵. However, in its most recent case law, the ECtHR has not failed to emphasize that, in any democratic society, both judges and prosecutors must be protected against political interference⁶. In the *Kövesi* case, it stated that the independence of prosecutors is an indispensable prerequisite for guaranteeing the independence of the judiciary as a whole⁷.

The European Commission shared the principles established by the ECtHR in the *Kövesi* judgment. In the Rule of Law Report for 2020⁸, the Commission expressed its serious

⁴ The self-government of the judiciary includes not only the traditional Councils for the judiciary, but also other bodies representative the judiciary power, which participate in the administration of justice, such as the Court Services or the Court administration in Denmark, Ireland and Scotland, which in fact belong to the ENCJ.

⁵ ECtHR, judgement 8 December 2009, *Previti c. Italia*, app. n. 45291/06 § 255.

⁶ ECtHR, Grand Chamber, judgment 12 February 2008, *Guja c. Moldova*, app. n. 14277/04, § 86.

⁷ ECtHR, Grand Chamber, judgement 5 May 2020, *Kövesi c. Romania*, app. 3594/19, § 208.

⁸ European Commission, *2020 Rule of Law Report. The rule of law situation in the European Union*, Bruxelles, 30.9.2020, COM(2020) 580 final, pagg 10 ff.

concerns due to the fact that, in Poland, the Minister of Justice is at the same time the Prosecutor General and has the power to issue instructions in individual cases and to transfer prosecutors⁹. The Commission also pointed out that, according to the case law of the Court of Justice of the European Union (CJEU), only prosecutors offering adequate guarantees of independence can be regarded as an “issuing judicial authority” within the meaning of Article 6 (1) of the Framework Decision 2002/584 on the European arrest warrant. The requirement of independence, according to the CJEU, cannot be said to be satisfied in the presence of rules allowing the executive power to issue formal instructions to the prosecutors on individual cases¹⁰. On the other hand, the concept of “issuing judicial authority” may include “the public prosecutors of a Member State who are responsible for conducting prosecutions and act under the direction and supervision of their hierarchical superiors”, provided “that their status affords them a guarantee of independence, in particular in relation to the executive, in connection with the issuing of a European arrest warrant”¹¹.

In its subsequent Rule of Law Report, the Commission called on Member States to strengthen the autonomy and independence of prosecutors, highlighting, among other things, that “the independence of prosecutors has important implications for the ability to fight crime and corruption”¹².

That a certain degree of independence of prosecutors is an indispensable prerequisite to the Rule of Law and the independence of the entire justice system, has been repeatedly reiterated

⁹ European Commission, *2020 Rule of Law Report. Country Chapter on the rule of law situation in Poland*, Bruxelles, 30.9.2020 SWD(2020) 320 final, pag. 8.

¹⁰ The issuing judicial authority, the Court observed, “must be in a position to give assurances to the executing judicial authority that, as regards the guarantees provided by the legal order of the issuing Member State, it acts independently in the execution of those of its responsibilities which are inherent in the issuing of a European arrest warrant. That independence requires that there are statutory rules and an institutional framework capable of guaranteeing that the issuing judicial authority is not exposed, when adopting a decision to issue such an arrest warrant, to any risk of being subject, inter alia, to an instruction in a specific case from the executive: cfr. CJEU (Grand Chamber), judgement 27 May 2019, *OG e PI (Procure di Lubeca e Zwickau)*, C-508/18 e C-82/19 PPU, EU:C:2019:456, par. 74, and judgement 27 May 2019, *PF (Procuratore generale di Lituania)*, C-509/18, EU:C:2019:457.

¹¹ Cfr. CJEU, I Sez., judgment 12 December 2019, *Parquet général du Grand-Duché de Luxembourg (Procureurs de Lyon et Tours)*, cases C-566/19 PPU and C-626/19 PPU, ECLI:EU:C:2019:1077, in which the Court considered, in particular, that the elements submitted to it were sufficient to demonstrate that, in France, “prosecutors have the power to assess independently, in particular in relation to the executive, the necessity and proportionality of a decision to issue a European arrest warrant and exercise that power objectively, taking into account all incriminatory and exculpatory evidence.”(paragraph 55).

¹² European Commission, *2021 Rule of Law Report. The rule of law situation in the European Union*, Bruxelles, 20.7.2021 COM(2021) 700 final.

by the Venice Commission¹³, the Group of States against Corruption (GRECO)¹⁴, the CCPE¹⁵, the Committee of Ministers of the Council of Europe¹⁶ and the ENCJ, in its report on the independence and accountability of prosecutors¹⁷.

Indeed, it is widely believed that prosecutors, in order to be able to adequately perform the role entrusted to them, must act fairly and impartially, making available to the judge all the reliable evidence acquired in the course of the investigations, also when in favour of the suspect¹⁸. However, it is clear that the independence of prosecutors cannot be compared to that of judges. In fact, prosecutors may be subjected to directives, guidelines and instructions from their superiors, provided that such instructions are in writing, so that the person concerned can raise objections should the instructions not comply with the law or with the criteria for prosecution which have been made public in advance¹⁹. Also, while specific instructions on individual proceedings are prohibited, the executive and the legislature may formulate general criteria on priority in the prosecution of certain types of offences²⁰.

It is worth underlying that independence cannot be separated from accountability. Prosecutors, like judges, are accountable for the way in which they exercise the power conferred on them. In any democratic state, the possession of a power implies accountability for the way it is exercised²¹. Accountability, for prosecutors as well as for judges, implies not only compliance with the law and professional codes, but also a duty of transparency towards the community about the results achieved and the work programme. Prosecutors, like judges,

¹³ The Venice Commission noted that “the rule of law requires independence of decision making, but not necessarily full institutional independence”: cfr. CDL-AD(2018)029, *Georgia - Opinion on the provisions on the Prosecutorial Council in the draft Organic Law on the Prosecutor’s Office and on the provisions on the High Council of Justice in the existing Organic Law on General Courts*, § 19. See CDL-AD(2010)040, *Report on European Standards as regards the independence of the Judicial System: Part II – The Prosecution Service*, Strasbourg, 3 January 2011.

¹⁴ *Fourth Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors*, adopted by GRECO at its 63rd Plenary Meeting (Strasbourg, 24-28 March 2014), § 50 ff.

¹⁵ See CCPE-BU(2020)4, *Report on the Independence and Impartiality of the prosecution services in the Council of Europe Member States*, Strasbourg, 30 March 2020.

¹⁶ Recommendation Rec(2000)19 on *The role of public prosecution in the criminal justice system*, adopted by the Committee of Ministers of the Council of Europe on 6 October 2000.

¹⁷ *ENCJ Report 2014-2016 on Independence and Accountability of the Prosecution*.

¹⁸ Venice Commission, *Report on European Standards as regards the independence of the Judicial System: Part II – The Prosecution Service*, cit., § 15.

¹⁹ Cfr. CCPE, *Dichiarazione di Bordeaux*, cit., § 9; *Opinion n. 13(2018) “Independence, accountability and ethics of prosecutors”*, cit., §§ 38 ff.

²⁰ CCPE(2018)2, *Opinion n. 13(2018) of the CCPE; Independence, accountability and ethics of prosecutors*, cit., §§ 34-36; CCPE, *Dichiarazione di Bordeaux*, cit., § 9.

²¹ CDL-AD(2010)040, *Report on European standards as regards the independence of the judicial system: Part II – The prosecution service*, Strasbourg, 3 January 2011, §§ 41 ff.

cannot gain the trust of society if they do not operate with independence, impartiality and efficiency²².

Where the responsibility of the prosecution service is not entirely vested in the executive power, the establishment of a Prosecutorial Council is generally considered as an useful solution to strengthen the independence and accountability of prosecutors²³.

3.- Councils for the Judiciary and Prosecutorial Councils

The autonomy of each State in organising its judiciary makes differences in the composition and powers of Councils of the Judiciary inevitable. The Consultative Council of European Judges (CCJE), in its recent opinion on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems, did not want to suggest a specific model, but rather to identify a set of common principles and standards that all the Councils of the judiciary should respect, in order to be able to fulfil their role as guarantors of the independence of judges²⁴.

For the prosecution service, the differences are obviously even more marked. Three models prevail today, reflecting the greater or lesser degree of separation between judges and prosecutors. In some states, a Council for the Judiciary has been established that is responsible for both judges and prosecutors (e.g. Italy, Belgium and Greece). Other states have provided for a section for judges and a section for prosecutors within the Council for the Judiciary (e.g. France, Bulgaria, Romania, Morocco and Algeria). In other jurisdictions, a Prosecutorial Council has been established (e.g. Spain and Portugal).

Whatever the model adopted, the objective pursued with the establishment of these bodies is always to ensure respect for the principles of the Rule of Law, helping to guarantee the independence, accountability and proper functioning of the proxy service. Many of the principles and standards applicable to traditional Councils for the Judiciary can therefore, in principle, also apply to Prosecutorial Councils²⁵.

²² CDL-AD(2014)008, *Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, §§ 71-72.

²³ Cfr. CCPE, CCPE(2018)2, *Opinion n. 13(2018) of the CCPE; Independence, accountability and ethics of prosecutors*, cit., § 24; CCPE-BU(2020)4, *Report on the Independence and Impartiality of the prosecution services in the Council of Europe Member States*, Strasbourg, 30 March 2020, §§ 27, 29; CDL-AD(2014)029, *Opinion on the Draft amendments to the Law on the State Prosecutorial Council of Serbia*, §§13-14; *Independence and Accountability of the Prosecution. ENCJ Report 2014-2016*.

²⁴ CCJE Opinion No. 24 (2021): *Evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems*, CCJE(2021)11, Strasbourg, 5 November 2021.

²⁵ The ENCJ Compendium on Councils for the judiciary does not specifically address the issue concerning prosecutors, considering the wide variety of the organisation of prosecution services in Europe. However, the Compendium notes, "this does not prevent the standards and recommendations set forth in this document also applying to Councils for the judiciary safeguarding the independence of both judges and prosecutors".

The Venice Commission has repeatedly highlighted the need for constitutional coverage also for Prosecutorial Councils, in order to guarantee them against possible interference by the governing majority²⁶. The principle of stability of mandate, which prevents the government and Parliament from ordering the early termination of the mandate of members of Councils for the Judiciary, obviously also applies to Prosecutorial Councils²⁷. For the prosecution, too, there is the need to avoid situations of incompatibility that could jeopardize the image of independence and impartiality of the body²⁸. Finally, Prosecutorial Councils also are accountable for the exercise of the powers entrusted to them²⁹.

The different organization of prosecutors and judges, however, should be considered. According to the Venice Commission, the hierarchical nature of the prosecution offices could lead prosecutors to vote en bloc together with the Prosecutor General³⁰. The Venice Commission therefore held that, while in the traditional Councils for the Judiciary judges must be the majority, the need to avoid the risk of corporatism can justify a majority of lay members in Prosecutorial Councils. In such a case, in order to avoid risks of politicization, the appointment of lay members by Parliament must be subject to qualified majorities or other mechanisms aimed at preventing the government majority from controlling the body³¹.

Finally, each State has autonomy in organizing the prosecution service. The scope of the powers conferred on the Minister of justice obviously has an impact on the powers that can be attributed to a Prosecutorial Council. The Prosecutorial Council set up in Portugal, for example, has significant powers in relation to appointments, promotions, transfers, professional appraisals and disciplinary measures, while the one set up in Spain plays an essentially advisory role. The French Council for the Judiciary, which is divided into two sections, exercises decisive powers over the appointments of the judges, while it only provides a non-binding opinion to the Minister of Justice on the appointment of prosecutors.

²⁶ CDL-AD(2021)015, *Bosnia and Herzegovina: opinion on the draft law on amendments to the law on the high judicial and prosecutorial council (HJPC)*, § 13

²⁷ Cfr. CDL-AD(2021)030 *Montenegro - Urgent Opinion on the revised draft amendments to the Law on the State Prosecution Service*, § 46; CDL-AD(2021)051, *Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo*, §§ 59-64.

²⁸ CDL-AD(2015)039, *Joint Opinion of the Venice Commission, the Consultative Council of European Prosecutors (CCPE) and OSCE Office for Democratic Institutions and Human Rights (OSCE/ODIHR), on the draft Amendments to the Law on the Prosecutor's Office of Georgia*, §§ 60-64.

²⁹ CDL-AD(2017)013, *Opinion on the draft revised Constitution of Georgia*, § 82.

³⁰ Cfr. CDL-AD(2021)012, *Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption*, § 36.

³¹ Cfr. CDL-AD(2021)012, *Montenegro - Opinion on the draft amendments to the Law on the State Prosecution Service and the draft law on the Prosecutor's Office for organised crime and corruption*, §§ 36- 43; CDL-AD(2021)051, *Kosovo - Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo*, § 25-26; CDL-AD(2021)030, *Montenegro - urgent opinion on the revised draft amendments to the law on the state prosecution service*, § 13.

4.- Prosecutorial Councils, Politicization and Corporatism

The Councils for the judiciary have, in general, proved to be well functioning. However, they are constantly exposed to strong internal or external pressures. The most recent experience shows that such pressures constitute a risk, that should not be underestimated. In fact, in some states of the European Union, political power has managed to gain control of the Council for the judiciary. In other states, forms of control and conditioning of the Council by members of the judiciary have taken place, which have created a different, but no less serious, danger to the independence of judges.

That of Poland is the best-known example of the “capture” of a Council for the Judiciary by the political power. The National Council for the Judiciary (*Krajowa Rada Sądownictwa* or *KRS*) is made up of three ex officio members - the First President of the Supreme Court, the President of the Supreme Administrative Court and the Minister of Justice - six MPs and fifteen judges. In 2017, the legislature transferred the power to elect judicial members of the KRS from the judiciary to the Parliament and prematurely removed from office KRS judicial members who had been elected under the previous system. The constitutional balance between judges elected by their peer and component elected by the Parliament was therefore altered, with the politically component prevailing. The KRS, now controlled by the governing majority, is no longer able to protect the independence of the Polish judiciary³².

While in Poland the Council for the Judiciary was “captured” by the political power, in other States it has been “captured” by the judicial power itself. It happened that groups of magistrates managed to build a majority within the Council and to approve choices inspired by logic of belonging. In other words, the paradox of a judicial system has occurred which, although autonomous from political power, has failed to guarantee the independence of individual judges. Such cases occurred, for example, in the Slovak Republic³³ and, more recently, in Italy³⁴.

³² Cfr. ECtHR, decision 3 February 2022, *Advance Pharma sp.z o.o c. Polonia*, app. n. 1469/20; 22 July 2021, *Reczkowicz c. Polonia*, app. n. 43447/19 e 8 November 2021, *Dolińska-Ficek e Ozimek c. Polonia*, ricc. nn. 49868/19 e 57511/19.

³³ The story of Štefan Arabin, former minister of justice and president of the Supreme Court, is well known, who managed to form a strong majority within the Council for the judiciary and therefore to exercise a strict control over the decisions of the same.

³⁴ The Italian media spread the news of a meeting in May 2019, in which two MPs, one of whom on trial, would have discussed with five member of the High Council for the Judiciary strategies on the imminent choice of the Rome chief prosecutor. The Head of State, in a speech held on 21 June 2019 before the plenum of the High Council for the Judiciary, spoke of “a disconcerting and unacceptable picture”, which affects the prestige and authority of the Council and of the entire judicial order, “whose credibility and whose ability to gain trust are indispensable to the constitutional system and to the life of the Republic”.

Experience therefore shows that the self-governing bodies of the judiciary are constantly under pressure from both the political power and the judiciary itself. Similar dangers can obviously also affect Prosecutorial Councils.

6. Concluding remarks

Let's now try to answer the initial question.

Prosecutors are part of a hierarchical system, in many cases linked to the executive power, and can be called upon to implement priority criteria connected to the State's criminal policy choices. The independence to be granted to prosecutors, therefore, cannot be identical to that of judges. A certain degree of independence for prosecutors, at least with regard to the choice of whether or not to prosecute in individual cases, is nevertheless indispensable to ensure the proper implementation of the Rule of Law principles.

The establishment of a Prosecutorial Council (or of a Council that is responsible for both judges and prosecutors) can certainly help to ensure the independence and the proper functioning of the prosecution service. Comparative experience shows, however, that such bodies are constantly exposed to risks of being conditioned externally, by political power, or internally, by corporate interests.

The Prosecutorial Councils must therefore be protected from the twin dangers of political and corporate pressures. The constant search for a balance between these opposing forces is necessary for ensuring the independence and proper functioning of the prosecution office and of the entire justice system.



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