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REPORT

OVERVIEW ON THE EXISTING STANDARDS AT INTERNATIONAL LEVEL AS REGARDS THE INDEPENDENCE OF THE JUDICIAL SYSTEM FROM THE EXECUTIVE POWER AND THE LEGISLATURE

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1. In this presentation I'll deal with a group of documents which come from bodies of the Council of Europe and from associations which work in the frame of the Council. They are: the Reccomendation of the Committee of Ministers n. 12 (1994), the European Charter on the Statute for judges, and a Vademecum of the opinions of the Venice Commission on the judiciary and a draft report on the independence of the judicial system which is under preparation by the Venice Commission.

2. All these documents are based on the recognition of the connection between the protection of the human rights and fundamental freedoms, on one side, and, on the other side, the independence of the judges in the light of art. 6 ECHR. The point is very important: the construction of art. 6 offers a yardstick to measure the correct extension of the independence of the judiciary which should be proportional to the exigencies of the protection of the human rights and fundamental freedoms. According to the mentioned documents the relevant rules should avoid the temptation of connecting the independence with the corporatist interests of the judge and of giving space to cronyism between the judges. Independence is not a mean to promote the appointments and the promotions of the judges on the basis of their personal friendships and to take care of their economic interests.

3. The last remark reminds us that the danger of corporatism and cronyism is specially evident if we take in consideration the evident preference of the documents for the establishment of a Superior Council of the Judiciary as a mean to insure and implement the independence of the judiciary. The idea of entrusting to this body all the functions concerning the career of the judges previously held by the Executive or by the Parliament is generally accepted according to the evidence offered by the new European constitutions. As a matter of fact the new democracies follow the suggestion of the bodies of the Council of Europe providing for the election of at least the 50% of the membership of the new body by the judges. The dangers of cronyism and corporatism should be avoided by the presence in the Council of members elected by the Parliament or appointed by the Chief of the State or by the Bar and its associations.

4. I'll spend only few words to explain the connection between the guarantee of human rights and the independence of the judiciary. The independence is aimed at insuring an interpretation of the law which is not affected by the interests of other constitutional institutions, of the political parties, of the economic organizations and of every other social interest which could be promoted through an interpretation of the law adopted in conflict with the principle of fairness and of conformity with the law. The extension of the judicial independence has to be proportional to these principles to avoid the use of the judicial power instrumental to bypass the rule that the judges are subject only to the law.

5. The complexity of the membership of the body which should be in charge of insuring the independence of the judiciary is strictly connected with the problem of the compliance with the law by the judiciary. On one side, all the documents of the Council of Europe require that the rules concerning the career of the judges shall be objective, that is that they shall not offer space to the discretion of that body. But all of us know very well that the ideal of a legal interpretation which is not conditioned by the intervention of the discretion of the interpreter is only wishfulthinking. Therefore the aim of the fidelity to the ideal of the objectivity of the rules concerning the judiciary cannot be achieved through the individual interpretation of a single interpreter but only through the mutual checking of the their personal interpretations by the members of a body with a complex membership. This can be the justification for the creation of the Councils of the judiciary, where the different contributions of the members of the body insure their mutual balancing in view of the achievement of a satisfying objectivity.

6. On the other side, the selection of the judges which is made through the machinery of a complex body with a plural membership should guarantee the appointment and the promotion

of judges who – in the frame of their mutual cooperation – are able to guarantee an objective exercise of the judicial function.

7. Now I want to deal with a problem which is not very frequently dealt in the mentioned documents. The constitutions presently in force very frequently provide for the creation of more than one judicial organization distinguishing common or ordinary judges and special or specialized judges. The existence of these different organizations can arise problems with regard to the their independence as far as the Council of the judiciary is frequently entrusted with the functions dealing with the common judges only. If this happens, we have to solve the problem of the independence of the special judges. Two ways are possible, on one side the legislator could concentrate all the matters concerning the independence of all the judges in the hand of one Council of the judiciary, or it could provide for the establishment of more than one Council, one for every each judicial organization. Finding a solution is not very easy, because the question is connected with the problem of the unity or not of the judicial system. Taking in consideration the historical message of the United Kingdom legal system (where in recent years the number of administrative tribunals is in any case growing up), we could have a slight preference for the existence of only one common judicial system and, therefore, we could try to balance the existence of special judges with the creation of only one Judicial Council. This last choice could guarantee the omogeneity of the judicial personnel: all judges should have the same culture and professional education according to the ideal aim of the unity of the judicial system in view of insuring a common attitude of all judges with regard to the interpretation of the law. But the establishment of special judges has frequently the different aim of creating special judicial organizations whose judges have a special and peculiar legal culture and professional education. If we need to get these results we shoul adopt the solution of having a specific Judicial Council for every each judicial organization.

8. In any case we have to remind that the problem of guaranteeing the independence of the judges regards not only the ordinary or common judges, but also the other judges which are present in the legal system, whose organization has also to comply with the principles of the European constitutional heritage.

9. Which is the preferable composition of the Council? The mentioned documents show a clear preference for a solution which reserves to the members elected by the judges at least 50% of the seats. The choice is correct but I think that we should avoid giving to the judges a too large majority: in a recent contribution Cass Sunstein, an outstanding American constitutional lawyer, underlines the fact that when the membership of a body is largely rappresentative of people who have the same interests and the same way of thinking, the body is naturally pushed to support an extremist interpretation of these interests and way of thinking. The creation of a Council for the judiciary should instead guarantee an objective and fair examination of the problems at stake. Therefore the 50% or more of members elected by the judges should be balanced by the strong presence of members who have a different origin and legitimacy in such a way that the decisions of the Council shall be the result of a compromise between members elected by the judges and members appointed or elected by other bodies.

10. What about the presence of the Chief of the State and of the Minister of Justice in the Council? Only if the Chief of the State has functions of constitutional guarantee and is not the promoter of choices concerning the policy of the Cabinet and of the Parliament, his presence in the Council is not a danger, while the presence of the Minister of Justice – even if he is not a member, and this is the preferable solution – can be useful to insure the coordination of the respective activities.

11. As a matter of fact, the problem of the relations between the Council and the Chief of the State or the Minister of Justice is very delicate, specially in the legal orders which entrust one of them with the task of implementing the decisions of the Councils concerning the career of the judges. Both of them frequently pretend to check the conformity of the Council's deliberation to

the law, but it frequently happens that the legality reasons hide the refuse of the merit of the decisions (the Chief of the State or the Minister don't like the concerned judges, they have different political preferences, they don't appreciate the previous jurisprudence of the judges who are affected by the decisions of the Council). In principle the possibility of a control of legality cannot be excluded but an interference in the choices of merit is not acceptable. Therefore the independence of the judiciary is really guaranteed only where the Judicial Council is allowed to complain about the interference of other bodies (for instance, the refusal of implementing its decisions) before the Constitutional Court: this is the case of the legal orders where the Constitution entrusts to the Constitutional Court the solution of the conflict between the powers of the State.

12. The solution which implements the independence of the judiciary through the establishment of a Judicial Council, is not the only arrangement adopted by European democracies. The mentioned documents of the Council of Europe are conscious of this fact. They approve even arrangements which entrust the executive power with the adoption of the administrative acts concerning the career of the judges if a country which has a long history of democracy and respect of the rule of law, is at stake. But the approval of these practices is always balanced by the recognition or by the suggestion that the exercise of the relevant functions of the Executive has to be supported by the (mandatory) advise of neutral technical or judicial bodies. The Executive shall follow the opinions of these bodies and, if it does not accept them, it has to justify its choice. In any case a judicial review of the executive acts shall be provided for.

13. It happens that in some countries the last word on the acts concerning the appointment and the promotion of the judges is in the competence of the parliamentary assemblies. The bodies of the Council of Europe think that such a solution can open the doors to a dangerous influence of the political parties. The mentioned documents underline the recognition of the difficulty of the establishment of a new Judicial Council in countries of recent democratization where it is not convenient giving to the old judges the rights of elect and of being elected members of the Council, specially if a lustration process cannot be easily promoted. But they would prefer that in any case the intervention of the parliamentary assemblies is avoided, or, if avoiding it is not possible, is connected with a machinery which implies neutral and fair choices.