1 The Contribution of the Venice Commission to the Internationalization of the National Constitutional Law on the Organization of the Judiciary

*Sergio Bartole**

1.1 Introduction: Implementing the Separation of Powers

The principles and the standards of the national law on organization of the judiciary are part of constitutional law concerning the structure and the machinery of the powers of the State. This aspect has become evident in the history of the constitutionalism, even if judicial organization has had developments that have kept it separate and distinct from the other branches of the State's organization in view of ensuring its independence and autonomy. As a matter of fact, from a general and abstract point of view, the internationalization of this chapter of constitutional law could be studied with regard to both the organization of the judicial bodies of the international or supernational institutions, and/or looking at the organization of the national judges in the frame of the system of law of the States. Moreover, it has a growing international relevance as far as it is strictly connected with the developments of the safeguard of the human rights (more than other parts of constitutional law dealing with the organization of the State's power). This chapter will deal with this second, internal aspect of the problem, because it is devoted to the study of the activity of the Venice Commission (European Commission for Democracy through Law of the Council of Europe), the main concern of which has been the implementation of the principles of constitutionalism in the internal organization of the States.[1] Therefore, our attention will be paid to the Commission's experience in the elaboration of international principles and standards on organization of national judiciaries in the context of the promotion of the adherence of the national systems of law to the so-called European Constitutional Heritage.

---

* Emeritus Professor of Constitutional Law, University of Trieste.

1 Sergio Bartole, *International constitutionalism and conditionality. The experience of the Venice Commission*, Rivista AIC 4/2014.

In the last twenty-five years the intervention of the Venice Commission has been frequently required to support and advise the drafting and the implementation of the new liberal and democratic constitutions of the countries of the Central and Eastern Europe in the follow-up developments that occurred after the dissolution of the Warsaw Pact, of the Soviet Union and of the Yugoslavian Federal Republic. In the aftermath of these events many questions had to be settled. The choice of the possible model of the judicial organization to be adopted was confronted with a dilemmatic alternative either of establishing a reformed judicial organization, while keeping in office the old judicial personnel, or of substituting step by step new judges for the old ones, while proceeding with the contemporary reform of the existent judiciary. The first solution implied the possible immediate recognition to the old incumbent judges of the past regime of the prerogatives of the independence and autonomy that the principles of constitutionalism require: it would have followed that the old judicial personnel is kept in office without promoting the necessary processes of its renewal and reform, and with the risk of strengthening its corporatist tendencies. But, if the preference was to be accorded to the second solution, there was the risk of the initial concentration of all the relevant powers in the hands of the political bodies of the new democracies even with regard to the appointment of the new judges. The Commission clearly said: "choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist." Therefore, the choice of entrusting the Parliament with the power of appointing the ordinary (non-constitutional) judges could be acceptable at the time of the starting of the process of the transition to constitutional democracy, even if in principle "political involvement in the appointment procedure may endanger the neutrality of the judiciary." The ideal shall be a quick compliance with the principle of the separation of powers (CDL-AD(2007)028).

Not always the choices made in the matter have been satisfactory because the experience has raised doubts about the efficiency and the integrity of the reformed judiciaries, even when their independence and autonomy had been guaranteed at the moment of the take-off of the new constitutional orders. Some of the concerned States, for instance Hungary, Ukraine and Albania, have not only started a process a revision of the existing relevant legislation, but also tried to submit the incumbent judges to a vetting procedure aimed at the assessment of their integrity and professional ability. As it happened at the moment of designing the organization of the new judiciaries, also in these recent events problems have arisen in connection with the identification of the guidelines of the constitutionalism in the field of the organization of the judiciary. Which are the models that ensure the implementation of those principles? And which are the justifications and the limits of the possible process of judicial reform? And of a connected "lustration" of the judges presently in office?

The concept of the European Constitutional Heritage necessarily implies a historical approach. We have to look at the traditional legal experiences of the European countries to ascertain their common attitudes in the field, exploring the origins of the shared values and the spreading of these values in Europe from one State's system of law to another legal order. We have obviously to differentiate the different historical processes according to the different items we take into consideration. For instance, if our inquiry regards the general principles of the European Constitutional Heritage, the safeguard of the rights and the rule of law, the starting point is obviously the *Magna Carta* with all the following amendments and integrations of the document of the year 1215 aimed at ensuring its updating to the social and economic developments of the United Kingdom. If we want, in particular, to focus our attention on the principle of separation of powers and on its feedback on the organization of the judiciary, we have to make reference, first of all, to the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 and to the liberal Constitutions of the XIX century. Art. 16 of the *Déclaration* states the principle that all the societies where the guarantee of the rights is not ensured and the separation of powers is not established, don't have a constitution. This is a very general statement that does not say much about the institutional machinery that has to be established for the implementation of the principle. But it underlines the necessary connection of the status of the different branches of the organization of the State's powers, and therefore also the link between the establishment of an independent and impartial judiciary and the arrangements concerning the other powers.[2] It follows that we can derive useful suggestions from the old Constitutions of the XIX century, but they obviously regard arrangements that were compatible with monarchical regimes. Therefore, the reference to these experiences has to be completed and integrated with the analysis of the more recent Constitutions of the last hundred years, which allow us to look at our problems from an operational point of view and to consider the solutions adopted to comply with the principle of the separation of powers in the frame of the contemporary societies of the XXI century.[3] Moreover, in the past century and in recent times an important role in the developments of the Constitutional Heritage has been played by many international documents, especially in the field of human rights, from the Charter of the United Nations of 26 June 1945, and the United Nations Covenant on Human Rights to the ECHR.[4] Their importance derives from the fact that they are the result of a common effort to summarize the main constitutional values and ideals, which are shared by all the concerned countries. Eventually it is evident that when we mention the UN documents, we enlarge the scope of our attention by also including States that are not part of Europe. In this perspective we cannot forget, for

2 Alessandro Pizzorusso, *Il patrimonio costituzionale europeo*, Il mulino, Bologna 2002, 139.

3 Mauro Volpi, *I Consigli di giustizia in Europa: un quadro comparativo, Diritto pubblico comparato ed europeo* 2009, vol. III, n. 2, 948.

4 Mauro Volpi, *L'indipendenza della magistratura nei documenti del Consiglio d'Europa e della Rete europea dei Consigli di giustizia, Diritto pubblico comparato ed europeo* 2010, vol. 4, 1754.

instance, the documents of the American Revolution and of their historical evolution, analysis and study of which is an essential part of the modern doctrines of constitutionalism.

As a matter of fact, the reference to all these constitutional and international documents has to be appreciated in the light of the intermediation of the legal constitutional culture.[5] We cannot stick to the mere content of the legislative texts alone. We have to consider that their historical relevance makes sense through their cultural elaboration, which can give evidence of their meaning by identifying the ideological basis of the relative institutional choices and their political orientations. In some way we can enlist the legal constitutional culture between the sources of the European Constitutional Heritage. At least, we may say that the products of the legal constitutional culture are part of the materials we have to use in view of the identification of that Heritage in a historical perspective.

When we pay special attention to the legal constitutional culture, the question arises of the relevance of some documents that are not frequently mentioned in the main texts of the doctrine of constitutionalism. I mean, for instance, the Polish Constitution of 3 May 1791, the Hungarian *Bulla Aurea* of the XIII century, the Lithuanian Statutes adopted in the XVI century, but other important texts could be mentioned if we look at the historical developments of the ancient Statehood of the Crown of Bohemia, the Georgian Statehood and of the Croatia Kingdom and so on. Can we say that these documents contributed to the elaboration of the European Constitutional Heritage?[6] When we advance this question, we underline the importance of the analysis of the involvement of the relevant countries in the building of the modern constitutional State. If we look at the history of the doctrines of constitutionalism, we see that the statutes and the constitutions of the Central Eastern Europe are rarely mentioned as constitutive elements of the tradition of the European Heritage. We can find an explanation of this fact when we compare, for instance, the different content and history of the *Magna Carta* and of the *Bulla Aurea*. The first of these texts has been implemented as a guarantee of a general extension of the protection ensured by the customs and freedoms that it mentions, and has opened, therefore, the way to a modern approach to the safeguard of the rights and freedoms, while the *Bulla Aurea* was always interpreted according to a restricted idea of the guarantees that it ensured in partial connection with the fruition of the land and, therefore, in view of the protection of the ruling class. As a matter of fact, in the European historical legal literature Central and Eastern Europe are mainly described as having had a peripheral character in respect to other parts of the European constitutional civilization.[7]

5 Kaarlo Tuori, *Critical Legal Positivism*, Farnharm – Burlington, 2009, 121 and *Ratio and Voluntas*, Farnham: Burlington 2011, 173.

6 I dealt with a preliminary analysis of this problem in SERGIO BARTOLE, *Standards of Europe's Constitutional Heritage, Journal of Constitutional History*, 30/ II, 2015, 17.

7 This conclusion is mentioned in the legal literature as a result of important contributions of Egidijus Jarasiunas concerning the European contest of the Lithuanian constitutional developments.

Notwithstanding the existence of this gap, it could be interesting underlining that, for instance, according to art. VIII of the old Polish Constitution, "as judicial power is incompatible with the legislative, nor can be administered by the King, therefore tribunals and magistratures ought to be established and elected." But additional rules for the implementation of these principles have not been identified or have been missing, therefore the contribution of the Polish tradition appears to be not very conspicuous. The same can be said with regard to the Hungarian document, which reserved the exercise of the judicial power to the king and his *palatini comites* in the cases concerning indifferently all people, with the exception of the ecclesiastical matters. However, the members of the Hungarian nobility were not required to have a legal preparation, they had only to swear to accomplish correctly the judicial tasks before starting their mandate. It follows that also the Hungarian historical tradition had been very poor in the matter of the status of the judiciary. Only in the XIX century were there developments in the field as far as what Ludwig Gumplowicz called the *Gerichteverfassung in Ungarn*,[8] that is the organization of the Hungarian judiciary, was affected by the constitutional developments of the Austro-Hungarian Empire, which implied a progressive nearing, step by step, to a parliamentary government. Art. 1 of the Law 27 October 1862 provided for the guarantee of the natural judge established by the relevant legislation, which fell in the competence of the Council of the Empire as far as the fundamental traits of the organization of the Judicial Authorities were concerned (§ 11, of the Law, 21 December 1867). The Emperor still retained a central position in the organization of the judiciary. For instance, the Fundamental Law of the State, 21 December 1867, entrusted to him the appointment for life of the president and the vice-president of the Tribunal of the Empire and of its twelve effective and four substitute members nominated in equal number by the Chamber of the Deputies and the Chamber of the Nobles. Moreover, on the basis of art. 5 of the Fundamental Law of the State of 21 December 1867 n. 144, the judges were appointed "definitely and for life" by the Emperor or in his name. But it is true that their dismissal from the office was only allowed in the cases provided for by the legislation and on the basis of a judicial decision. And they could be transferred from one office to another only with their consent.

It is evident that the elaboration of the models of the organization of the judiciaries have been strictly connected with the historical developments of the forms of the government of the States concerned. The precedents of the Venice Commission take into consideration these aspects when, recognizing the existence in Europe of "a variety of different systems for judicial appointments," the Commission has stated that "systems may work well in practice and allow for an independent judiciary" in older democracies, even if "the executive power has sometimes a decisive influence on judicial appointments," because "these powers are restrained by legal culture and traditions, which have grown over a long time." For the Commission the existence of some interesting moves in

8 Ludwig Gumplowicz, *Das Osterreische Staatsrecht*, Manziche k.u.k. hof-Verlags, Wien 1907, 155.

the direction of the establishment of the independence of the judiciary in the national past of the other States is not sufficient to demonstrate a satisfying compliance with the principles of the European Constitutional Heritage, if a historical continuity – from that past to the more recent times – is missing, or if there are relevant ruptures in its cultural and practical elaboration. Therefore, in the "new democracies," which "did not have a chance to develop these traditions, which can prevent abuse," "explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges" (CDL-AD(2007)028).

1.2 THE JUDICIAL COUNCILS (AND OTHER SOLUTIONS)

This way of reasoning evidently required a special attention on the part of the Commission to the European historical models of the organization of the judiciary, elaboration on which could offer an overview of the guidelines, which today internationally preside over the implementation of the principle of the separation of powers and its consequences on the status of the judges and the related offices. From the very beginning of its activity, the Commission recognized that in Europe there were at least two different organizational models that appeared able to render the judicial bodies autonomous and independent.

On one side, there was what can be roughly defined as a judicial self-management (or self-government) model, which has been apparently patterned after the experience of the Constitutions of some Western European States (Italy, France and Spain, in particular), and in which all decisions on the career of the judicial personnel are entrusted to a council, the majority of whose members is elected by the judges among themselves. This solution gives the impression that the judiciary is in some way self-governing as far as the judges elected apparently take care of the interests of the judiciary in a position of separateness from the other branches of the State. But if this is the substance of the matter at stake, and at the centre of the adopted solution are the State's interests aimed at avoiding interferences of the legislative and executive bodies of the State in the functioning of the judiciary, it is easy to understand that interests dealt with by the members of the judicial councils are not the corporatist interests of the judges. Moreover, corporatist deviations find an obstacle in the constitutional provisions of the concerned States, which integrate the composition of the relevant councils by adding – at least – a minority of members elected by the legislative assemblies, whose mandate is the checking of the correct interpretation of the management of the interests entrusted to the care of the judicial councils themselves.

Another model adopted for the regulation and organization of the judicial-staff management implies that the power of administration of the judiciary is largely assigned to the executive branch of the State. This power is counterbalanced by the recognition of special personal rights granted to individual judges, or by consultative interventions of

the judicial ordinary bodies in the relevant decision-making procedures. Judges may uphold their specific rights or the observance of the relevant procedural rules by way of appeal before the appropriate judicial bodies. Thus the independence of the judiciary is assured by means of specific guarantees of the judges or by specific articulations of the procedural formation of the relevant decisions. In this way the constitutional legislators avoid the inconvenience of a concentration of a great deal of power in a body, separate from all other State organs, whose membership is made up – at least partially – by magistrates who are personally interested in the matter.

As a matter of fact in the Central Eastern Europe, after the dissolution of the Warsaw Pact and of the Yugoslav and Soviet federal Unions, some countries adopted a kind of mixed or intermediate model of organization of the judiciary by providing for a coexistence of deliberative powers of the political State authorities and of the entrusting of specific technical functions to judicial councils or committees.[9] This solution was preferred in view of avoiding the adoption of an overall judicial self-management. The political authorities were supposed to be in a better position than a body of elected magistrates to check the persisting corporatist old-fashioned attitudes of the judges of the past communist regimes who were still in office. Some specific arrangements were justified by the concurring of the will of avoiding a general lustration of the incumbent judges and the political intention of updating the organization of the judiciary according to the Western principles of constitutionalism. Moreover, even the Explanatory Memorandum to the European Charter on the Statute for judges concedes that "some countries would find it difficult to accept an independent body replacing the political body responsible for appointments" of judges (DAJ/DOC898)23).

The Venice Commission elaborated this point by underlining that the appointment of judges by the Parliament is "a method for constituting the judiciary which is highly democratic but ... the balance might be tilted much too far towards the legislative power" (CDL-AD(2002)026). Therefore, as it happens in the case of the appointments made by the Executive, some guarantees should be introduced to avoid the prevailing of political interferences, "it would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge" (CDL-AD(2005)005).

The problem of the intervention of the elected parliamentary assemblies in the procedure for the appointment of the judges has been especially present in the new democracies at the moment of the transition from the old communist regimes to the democratic and liberal systems of government, in particular when the substitution of a new judicial personnel for the old one was at stake. But at the same time it has been recognized – as it was underlined in the previous paragraph – that "in some older democracies, systems exist in which the executive power has a strong influence on judicial appointments." Even

9 Sergio Bartole, *Organizing the Judiciary in Central and Eastern Europe, Eastern European Constitutional Review*, Winter 1998, vol. 7, n. 1, 62.

if the documents don't mention the example of the United Kingdom, which has given interesting and peculiar evidence of this kind of organizational arrangements, in any case it is frequently conceded that such systems work well "because the executive is restrained by legal culture and traditions, which have grown over a long time," while the States where new democracies have been established, missed "a chance to develop these traditions, which can prevent abuse" (CDL-AD(2007)028).

While distinguishing among the European States – the older democracies and the new democracies – the papers of the Venice Commission adopt a more flexible approach than important documents of other international institutions. A determining role is, therefore, played by the substantive factors of the legal traditions and of the constitutional culture, which are essentially identified in the traditions and culture of Western Europe. The contribution of the historical heritage of the States that are characterized by the advent of the new democracies is considered irrelevant or insufficient to guarantee the independence and separateness of the judiciary, which is, instead, ensured in some older European democracies notwithstanding the decisive role played in their legal systems by the executive in the procedures for the appointment of the judges. As we have seen, a positive evaluation is given of the organization of the judiciary in these States even if they don't formally comply with the different solution of entrusting a judicial council with the power of adopting the decisions concerning the selection and the career of the judges. Therefore, the position of the Venice Commission has to be clearly distinguished from the conclusions drawn, for instance, by the Committee of Ministers of the Council of Europe in its Recommendation (94)12 and by the Consultative Council of European Judges in its Opinion n. 1 and n. 10.

This approach gives a significant answer to our initial question about the matrices of the European Constitutional Heritage, which are mainly individuated in Western constitutionalism. Important historical signs of the presence of the rule of law doctrine in other European countries, especially in Central and Eastern Europe, are considered insufficient to the consolidation of a relevant tradition as far as a long continuity of the relevant practices is missing and a correct implementation of the connected principles is not present in recent times.

It could be objected that also in the Mediterranean countries, such as France, Italy and Spain, in the past the judicial organization and the recruitment of the judges were left in the hand of the executive power, the independence and separateness of the judiciary were inexistent or imperilled and a clear implementation of the principles of constitutionalism was missing. But the objection can be easily rejected by underlining the readiness in the adoption of democratic and liberal constitutions, which characterized the transformation of these legal systems after the end of the Second World War and the fall of the fascist and Nazi dictatorships. Many international documents share the opinion that the fundamental principles of the statute for judges have to be set out in internal norms at the highest level, and its rules at least at the legislative level, and the Venice Commission have agreed

with this approach (Opinion n. 1 of the CCJE and Recommendation (94)12 of the Committee of Ministers of the Council of Europe; CDL-AD(2010)004). At the moment of the adoption of the new constitutions, all those countries chose the modality of the creation of a judicial council as the best arrangement to guarantee the independence of the judiciary, and refused the past tradition of its dependence on the executive power. The solution appeared especially adequate to the compliance with the principle of separation of powers as far as it implied, on one side, the creation of an independent authority that is separated from the other branches of the State, and, on the other side, that such authority has a membership made up by a substantial representation of judges elected by the judges themselves, and has deliberative functions that are decisive in view of the adoption of the acts concerning the professional career and the selection of the judges. Therefore, it is understandable that the large majority of the documents adopted by expert bodies of the international institutions in the field of the organization of the judiciary follow the example of the more recent and modern liberal and democratic constitutions and show a qualified preference for this model of organizing the independence of the judiciary. The guidelines of the position adopted by the Venice Commission in the matter derive from these international sources and from the mentioned Western constitutions. Their extension to the constitutional choices of the new democracies is justified by the general acceptance of the model while the model entrusting the executive power with the relevant deliberative functions is admitted only in the case of the older democracies, which are characterized by a legal culture and traditions that have grown over a long time.

Notwithstanding the general preference accorded to the judicial council model, the experts are conscious that it entails a clear danger of the influence of corporatist prejudices and opinions. Two elements are normally introduced in the configuration of the model and the Venice Commission has taken care to underline their importance in the elaboration of its position. On one side, it has been clearly stated that in order to avoid the danger of corporatism it has to be ensured that the membership of the judicial governing institution "should not necessarily be entirely in the hands of judges" and "the law must provide for the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society" (CDL-INF(1998) 009), who are normally elected by the Parliament. The purpose of this arrangement is not opening the doors of the council to the implementation of the political guidelines of the parliamentary majority, but introducing a factor of checking the coherence of its activity with the general interests and avoiding the prevalence of corporatist factors. Therefore, a balanced articulation of the functioning of the concerned body has to be established by excluding a direct participation of members of the executive power in the exercise of the relevant functions, by restricting to a formal role the possible involvement of the Chief of the State and by excluding an active role of the Minister of Justice (CDL-AD(2007)028).

On the other side, the self-administration of the judiciary excludes decisions that imply the free and autonomous adoption of political choices as far as "all decisions concern-

ing appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law" (CDL-AD(2010)004). Therefore, the competent body is bound to stick to the relevant legislative provisions taking care of the exigency that the appointed persons satisfy the general legislative requirements (CDL-AD (2014)008). In CDL-AD(2010)004 the Commission explicitly reminds the Recommendation (94)12 of the Committee of Ministers of the Council of Europe, according to which "there should guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above" in the same document.

1.3 THE FUNCTIONS OF THE JUDICIAL COUNCILS

A great deal of the materials elaborated by the Venice Commission in the field of the judiciary accounts for the functions that have to be entrusted to a judicial council. The Commission "is of the opinion that a judicial council should have a decisive influence on the appointment.... of judges" (CDL-AD(2007)028). But the decisions concerning the appointments should be a part of a larger deal of decisions, which have to fall in the competence of the councils and affect the professional career of all judges (CDL-AD (2010)004).

Therefore, the implementation of the system of the separation of powers and of the independence of the judiciary requires the legislative identification of different functions that concern the different stages of the career of the judges – from their initial appointment to subsequent promotions and transfers to diverse offices, from the disciplinary control of their behaviour and activity to their eventual termination of office or retirement. The exercise of all these different functions has its own peculiarities, which are singled out by the legislative provisions concerning the organization of the judiciary, which is the main task of Parliament in the constitutional systems whose compliance with the principles of independence and impartiality of the judiciary has to be integrated by the observance of the basic principle of the rule of law.

According to a guideline stated in the European Charter on the statute of the judges (DA-DOC(98)23), the legislator has to provide "for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties." The Venice Commission fully agrees with this way of thinking as it is demonstrated by frequent quotations in the Commission's documents. It interprets this guideline requiring of the legislators of the interested countries the identification of objective criteria in the relevant statutes to be applied in the adoption of the decisions concerning judges (CDL-AD(2010)004). As a matter of fact objective criteria are considered an important element of guarantee in view of the exigency of avoiding the risk of corporative interferences in the decision-making processes of the

judicial councils. At the same time, the responsibility for adopting such criteria is allocated to the Parliament, which clearly indicates the separate role of self-administration of the judiciary, which is entrusted to the judicial councils and has to be performed in the frame of the unity of the State's legal system and in the compliance of the relevant legislative provisions. The opinions of the Commission certainly provide an important contribution to the elaboration of the international law of the judiciary as far as the core of the competence of the judicial councils is concerned, while, when the modalities of the exercise of the relevant functions are at stake, the general relevance of its comments is minor, especially when they concern the legislative drafting.

Therefore, the task of the judicial councils is, first of all, the execution and application of the legislative provisions concerning the general requirements that the judges need to satisfy with regard to their appointment, their career and their possible transfers from one office to another office (see, for instance, CDL-AD(2014)008, CDL-AD(2014)031, CDL-AD(2012)001). In these cases the council shall perform administrative functions, which means that the judicial self-administration has a substantive administrative content.

The administrative nature of the council's decisions concerning the appointment, promotion and career of the judges is sometimes specially emphasized in the national legislation by the provision of the intervention of the Chief of the State (President of the Republic) in the formal adoption of the relevant acts. The Venice Commission have not contested this solution, but it clearly said that "as long as the President is bound by a proposal made by an independent judicial council.... the appointment by the President does not appear to be problematic" (CDL-AD(2007)028). The idea is that in these cases the president "acts in a 'ceremonial' way, only formalising the decision taken by the judicial council in substance" (CDL-AD(2013)034, and CDL-AD(2015)027 concerning Ukraine and at the same time approving the removal of the Parliament's power to appoint judges).

The suggested exclusion of the admissibility of a discretionary power of the president is a consequence of the fundamental principle that in the appointment of the ordinary judges the danger has to be excluded that "political considerations prevail over the objective merits of a candidate." It is the corresponding face of the guideline that "appointments of ordinary judges.... are not an appropriate subject for a vote by Parliament" (CDL-AD(2007)028).

Special attention needs to be paid to the disciplinary control of the judges. The Venice Commission recognized that also in this field "internationally, there is no manifest approach" (CDL-AD(2014)018). A common detailed approach is apparently missing, but the Commission drew inspiration from the general principles of the rule of law and stated important principles in the matter, especially with regard to the grounds for the disciplinary proceedings, some basic elements of the procedural aspects of the examination of the disciplinary cases and the relevant rights of the concerned judges.

> There is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their functions. (CDL(1995)074 rev)

Moreover, the principles of legality, respect for judicial neutrality and impartiality, fair procedure, proportionality of the sanction with the committed offence, transparency shall be in line "with international standards" (CDL-AD(2014)006). Compliance with the rule of law and the exigency of avoiding that judicial councils be entrusted with large discretional power entail that it is "a good practice/approach in conformity with international standards" that "an exhaustive list of specific disciplinary offences" should be drawn up "rather than giving a general definition which may prove too vague" (CDL-AD(2014) 006). "Disciplinary proceedings should deal with gross and inexcusable professional misconduct, but they should never extend to differences in legal interpretation of the law or judicial mistakes" (CDL-AD(2011)012). "A judge may not be limited to applying the existing case-law. The essence of his/her function is to independently interpret legal regulations" (CDL-AD(2014)06). "It would be problematic to discipline judges for merely criticising judicial decisions.... or assessments with regard to the activities of state authorities and of the heads of those authorities" (CDL-AD(2013)035).

The opinion of the Venice Commission is that the procedure of adoption of the disciplinary measures is comparable to jurisdictional procedures. It requires compliance with the principle of the "natural judge," which implies that disciplinary trials have to be conducted by a competent jurisdiction previously established by the law. This guideline excludes an ad hoc establishment of a disciplinary panel "composed on a case-by-case basis" (CDL-AD(2014)038). The reporting member of the panel, "whose position is similar to that of a prosecutor, should be excluded from the deliberations and the vote" (CDL-AD(2010)026). The concerned judge shall have the right to be heard and represented in the procedure (CDL-AD(2009)011). Moreover, if the legislator dealing with disciplinary control does not regulate a procedural issue, "one of the procedural codes can be applied by analogy.... the fact that the criminal procedural codes provide generally better safeguards to ensure the fairness of the procedure should be taken into account" (CDL-AD(2014)032).

1.4 BUDGETARY AND FINANCIAL MATTERS

Judicial councils don't have a decisive say about the remuneration of the judges. The main aspects in the matter should be addressed by the ordinary legislation (CDL(1995) 074 rev). "The Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the

scope of their duties. Bonuses and non financial benefits, the distribution of which involves a discretionary element, should be phased out" (CDL-AD(2010)004).

These guidelines have to be possibly considered in connection with the general idea of the budgetary autonomy of the judiciary. The problem of the personal treatment of the judges is part and parcel of the problem of the financial independence of the judiciary itself. Sometimes the Commission, while it has stressed the deliberative role of the Parliament in the matter, suggested that "it would be more practical to entrust one institution as the judicial council with the competence to draft all the parts of the budget for the system of the judiciary as a whole" or, at least, to condition the possibility for Parliament to reduce the budget of the courts without the consent of the judicial council itself, "except in the case of a general reduction of the State Budget" (CDL-AD(2013)005).

This move is the sign of an opening to an enlargement of the concept of the scope of the functions of the judicial councils by extending them to cover not only the personal status of the judges, but also the organization of the courts as a whole. This solution can imply a self-administration of the judicial budget by the courts (CDL-AD(2013)15). Some sort of supervision of the relevant judicial council could be envisaged. But the line of the Venice Commission in this specific field is still hesitating between the idea of entrusting the judicial councils to represent the judiciary in the parliamentary budgetary procedures (CDL-AD(2011)012) and the fear that the involvement of that body in the relative battles could endanger its position by its being "engulfed in the political debate" (CDL-AD(2002)026).

In any case the question deserves some more attention. Notwithstanding that, on one occasion the Commission explicitly admitted that "it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures" and that the judicial council "could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary" (CDL-AD(2011)012), and it therefore envisaged a solution which is very similar to arrangements of the relations between the judiciary and the Parliaments, which exist in some countries of the Northern Europe (Denmark, Norway and Sweden). The Commission has not yet elaborated on the experience of the autonomous self-administration of the courts and its extension to financial and budgetary matters, which is practiced in those countries.[10] Further developments in the direction of a convergence cannot be excluded especially if we take into consideration the tendency of the Northern European countries to entrust the bodies, which are competent for the administration of the courts but are apparently different from the Mediterranean judicial councils, with functions about the formation and the continuous information of the judges, the evaluation of their behaviour and the drafting of deontological codes. This tendency is counterbalanced by the progressive growing of the role of the Mediterranean judicial councils. But, on the other side, it is not clear if the

10 Volpi, *I Consigli di giustizia in Europa: un quadro comparative*, 948-954.

preferred solutions will go in the direction of the centralization of the self-government of the judiciary in the hands of one body only, or if a pluralistic approach will be adopted allowing or suggesting the creation of more than one body active in the field as it happens in the Northern European countries. The Venice Commission has been confronted by this alternative.

1.5 THE PROSECUTION SERVICE

What a report of the Venice Commission (CDL-AD(2010)040) calls the prosecution service, is not always a part of the judiciary. There is a variety of models throughout Europe and the world, in connection with the different legal cultures and the different conceptions of the relation between the investigative activity and the judges. But the same document also recognizes that over the centuries European criminal justice systems have borrowed extensively from each other so that today there are probably no pure systems that have not imported any important elements from outside. In principle it is suggested that the prosecution service should not be overly powerful and has to limit its competence to the criminal law field. The Commission is of the opinion that the rebirth of a prosecution service designed according to the soviet and czarist model of prokuratura should be avoided because "it reflects a non-democratic past and is not compatible with European standards and Council of Europe values" (CDL-AD(2009)048).

In any case, according to the Commission, as far as the criminal prosecution is "a core function of the state," the prosecutors "must act fairly and impartially," even if they are not regarded as a part of the judiciary. They are "expected to act in a judicial manner" (CDL-AD(2010)040). Therefore, the Constitutions and the laws aimed at implementing them have to guarantee both the organizational and functional independence of the service and of its personnel. When the independence of the prosecutorial branch of the executive is not guaranteed, safeguards shall be ensured at least "at the level of individual case that there will be transparency concerning any instructions which may be given" (CDL-AD(2010)040).

When we look at the problem from the different points of view of the "internal" and "external" independence of the prosecutor's office, the position of the Commission looks very articulated because, while the exigency is underlined that external independence "resides in the impermissibility of the executive to give instructions in individual cases" to the service, the prevailing conception of its internal organization allows a system of hierarchical subordination of the inferior offices to the superior ones (CDL-AD(2010) 040).

But, while there are still systems where the Prosecutor general is elected by the Parliament or appointed by the Chief of the State in compliance with the legislative requirements of professional and ethic qualities (CDL-AD(2010)040), a growing tendency goes

in the direction of the administration of the prosecutorial personnel by (or with the consultative intermediation of) a Prosecutorial council including prosecutors elected by their colleagues and lay members as lawyers and law academics (CDL-AD(2008)019 and CDL-AD(2010)040). The establishment of such a body is suggested even with regard to countries where prosecutors are part of the judiciary: in this case the prosecutorial council could be designed as a special section or branch of the judicial council. But the existence of a single body with general competence covering judges and prosecutors is in any case admissible.

The effects of the decisions of the prosecutorial councils can vary.

1.6 CRISIS AND DIFFICULTIES OF THE MEDITERRANEAN MODEL

In the last years the model of the independence, impartiality and efficiency of the judiciary designed by the Venice Commission for the new democracies according to the experience of the Mediterranean countries entered in a state of evident crisis. On one side, the judicial councils established by the new democratic and liberal constitutions were criticized for not having always ensured a real guarantee against the temptations of corporatism and of seniority, and, on the other side, the economic difficulties of the concerned countries opened the way to a large spreading of the judicial corruption caused by the exiguity of the judicial salaries and by the great financial relevance of many questions submitted to the decision of the judges.

The constitutional reform adopted by Hungary in 2011 and the following cardinal acts aimed at its implementation offer an example of a transition from a model of judicial independence based on the wide competences of a strong National Council of Judges (CDL-AD(2012)001) to a different model of administration of the judiciary, where the traditional functions of the Executive of the old systems of government are not attributed any more to a judicial council but to a new individual body entrusted with the administration of the judiciary, whose independence from the Executive and from the Parliament should ensure the compliance with the principle of separation of powers. The reform was evidently introduced to facilitate a great deal of changes in the personnel of the judiciary by adopting new modalities for its enrolment and for the substitution of the old judges whose time for retirement was modified with the reduction of their upper age limit. It could be considered as a kind of indirect lustration as far as this last novelty interested many old judges who had started their career during the past regime.

The Venice Commission, while complaining again about the poor flexibility in implementing the cardinal acts that have to be adopted and revised with a two-thirds majority in the Parliament, underlined the novelty of this new constitutional arrangement of the judicial independence but expressed "serious doubts about the reform model chosen, which concentrates.... very large competence in the hands of one individual person, the

President of the newly established National Judicial Office" (CDL-AD(2012)001). In the same opinion, the wide range of the functions of the Office was criticized: "this raises concern, especially because they are exercised by a single person," even if most of the relevant functions "do not relate to decision-making in individual cases" pending before the judges. In this frame the accountability of the president of the new body, which was presented as one of the main purposes of the new legislation, appeared "clearly insufficient," as far as the principal supervisory body, that is the National Judicial Council, was depending on him/her and was not apparently able to counterbalance the influence of Parliament, which appoints the president. As a matter of fact the competence of the Council looked very poor and "its role ... as negligible." In particular the reform apparently offered "guarantees that the appointment of judges" – according to the Commission – "is based on merit, applying objective criteria," but, at the same time, the president of the National Judicial Office had significant powers of interference, whose regulations "do not contain sufficient safeguards in order to exclude that improper considerations play a role." Analogous remarks were extended to the disciplinary proceedings. Moreover, the Commission criticized the legislative provisions concerning the internal independence of the judges in the light of the standardization procedure falling in the competence of the central and superior judicial body, that is the Curia, a procedure that was defended by the Hungarian government by referring to precedents of the XIX century (CDL-AD(2012) 001).

The Hungarian authorities took note of the Venice Commission's remark by adopting new provisions and by attributing to the National Judicial Council the power of expressing a preliminary opinion on persons nominated as candidate for the Presidencies of the National Judicial Office and of the Curia. Important powers were transferred to the Council from the president of the Office, whose accountability was strengthened. Nonetheless, according to the Commission (CDL-AD(2012)020) the capacity to control the activities of the president by the National Judicial Council was weak, notwithstanding the limitation of his interferences in the judicial appointments.

Moreover, the Commission is still of the opinion that the internal independence of the judges is not sufficiently safeguarded in the frame of a controversial standardization procedure. Therefore, the supervision of the judges by chairs and division heads of courts and tribunals should be abolished.

Last but not least, the sudden reduction of the upper age limit for the retirement of the judges, unconstitutionality of which was declared by the Constitutional Court, has been producing unacceptable effects as far as the legislator has not yet adopted provisions reinstating the dismissed judges who so wish, in their previous positions without requiring them to go through a re-appointment procedure.

In 1995 the Venice Commission already observed that "the low level of salaries of judges in Albania, relative to other professions and activities though not comparable positions in the civil service, was repeatedly identified as an objective factor contributing

to corruption among judges and to the consequent reduction of public confidence in the courts" (CDL(1995)074 rev.). This problem has for a long time called the attention of the Albanian political authorities, but also of those of other new democracies, while – at the same time – in other countries complaints have been growing, as it happened in Georgia, for judicial decisions adopted according to political choices and for political reasons, which constituted possible cases of miscarriages of justice and raised questions about the way of restoring law and justice (CDL-AD(2013)013).

In Georgia a temporary State commission was proposed whose activity in examining possible cases of miscarriages of justice was considered admissible by the Commission if regulated in conformity with the principles of separation of powers and independence of the judiciary, and leaving in any case the decisions on the criminal charges against the interested persons to a court (CDL-AD(2013)013). In Ukraine, instead, the existence of corruption, professional incompetence and political miscarriages of justice among the judges justified the adoption of extraordinary measures on the basis of "a choice needed to be made between dismissing all the judges and inviting them to reapply for their position on the basis of a new evaluation, or assessing them" and their qualifications "with respect to their professionalism, ethics and honesty" (CDL-AD(2015)027). In Albania, on the other hand, an inescapable general vetting process concerning all the incumbent judges required the design of exceptional transitional institutions outside the frame of ordinary self-government of the judiciary.

In all these cases a form of assessment of the qualification of the judges or of the correctness of their decisions appeared as an exceptional measure to be made subject to extremely stringent safeguards to protect both, on one side, the judges who have been fit to occupy their position and, on the other side, judicial decisions made in accordance with the law (CDL-AD(2015)027). But both the hypotheses required a wider reform of the judiciary in order to strengthen its independence and impartiality (CDL-AD(2013) 013). The same conclusion was adopted by the Venice Commission with regard to the reactions of the Armenian authorities in the presence of the equally dangerous phenomenon of "instructions or pressure on individual judges made by their fellow judges and vis-à-vis their judicial superiors." In such a situation a possible opening of disciplinary proceeding on the basis of the overall results of a specific evaluation was considered admissible, but only in case of the concerned judge's wrongful conduct and of the unlawful exercise of his or her functions (CDL-AD(2014)07).

The comparison between these different experiences is really food for thought. While Armenia solves its not exceptional but engaging problems through a reform of the system of the administration of the judiciary and the utilization of the ordinary institutions and means of that system, quite peculiar are the solutions adopted in other countries, which have been dealing with exceptional problems concerning the actual behaviour of the incumbent judges. On one side, as in Ukraine, a constitutional reform has opened the way to a general assessment procedures with respect to their professionalism, ethics and

honesty in the frame of the traditional model of government of the judiciary, on the other side Albania has also aimed to starting a vetting process of the judges presently in office by adopting a revision of the constitution, but it has designed a temporary institutional machinery especially justified and destined to deal with the critical situation of the country in the field of the judiciary, which requires – as the Venice Commission recognized – "radical solutions." If the Ukrainian legislation provides for its implementation through the High Judicial Council or the High Qualification Commission of Judges, the Albanian solution should imply the creation of a completely new system of specialized bodies that are entrusted with the functions concerning the vetting procedures of the judges.

As a matter of fact, the Venice Commission is ready to accept the information given by the Ukrainian and Albanian authorities about the existence of general problems of judicial corruption and inefficiency in the relevant countries, which justify the adoption of exceptional constitutional measures. But it received with some doubts the information of the Georgian authorities about the existence in that country of many cases of judicial miscarriages and refused to take a position on whether there really were miscarriages of justice in Georgia, on whether they were of a systemic nature and on whether they required the creation of a temporary State commission (CDL-AD(20139013). In all these situations the Commission admonished the concerned authorities to stick to the fundamental principles of constitutionalism in the matter of the judiciary, having regard both to the external aspects of its independence and impartiality and to the internal organization of the system of courts.

This attitude confirms the line adopted by the Venice Commission in the contemporary overview of the legislative drafts of judicial reform submitted to its attention by Montenegro (CDL-AD(2014)038) and Macedonia (CDL-AD(2015)042), when it took into consideration the preoccupation of the authorities of the two States about the efficiency and fairness of the exercise of the judicial functions, but underlined that the criteria for the evaluation of the judges and of their behaviour have to be primarily qualitative and to focus on the professional skills, personal competence and social knowledge of the judges (CDL-AD(2015)042).

Corruption, inefficiency, miscarriages of justice, wanting of professional qualifications are all signs of a poor ability of governing and administering the judiciary that the bodies presently entrusted with the relevant functions reveal. The institutions that were established in the days of the take-off of the new democracies have not always given positive results. Therefore, it has been necessary to provide for a reform of all the organizational systems of the judiciary. Somewhere the scope of the reforms has been restricted to the revision of the disciplinary rules for the judicial personnel and of the relevant disciplinary procedures, as it happened in Montenegro and Macedonia. In other countries it was considered necessary to underline the role of specific and peculiar institutions as the High Qualification Commission of Judges, which has to work in conjunction with the High Judicial Council in Ukraine, or the establishment of a temporary State Commission

for the assessment of the miscarriages of justice was deemed appropriate as in Georgia. But in Albania the purpose of a general vetting of all the judges has affected even the High Judicial Council and the High Prosecutorial Council, and it has entailed the creation of a separate and distinct institutional organization especially destined to the exercise of the relevant activities: the establishment of a two-instance Independent Qualification Commission at the centre of the system is provided for.

In analysing all these developments the Venice Commission has been very attentive that all these reforms don't become means of interference by the other State powers into the merit of the exercise of the judicial functions. Therefore, special qualification requirements had to be introduced for the appointment of the members of the Independent Qualification Commission; their election depends on a qualified majority vote of the Parliament; specific rules have to guarantee their impartiality and independence. Moreover, specific substantive and procedural rules guarantee the rights of the judges and prosecutors subjected to the vetting.

1.7 CONCLUSIONS

A lesson of the crisis of the preferred model of the self-administration of the independent judiciary should be drawn by the Venice Commission in view of the adoption of new opinions in the matter. In the light of the past experience the position could be revised and rethought. Certainly dangers of corporatism and seniority connected with the continuous presence in the office of the old judicial personnel of the communist regimes in the new democracies are due to disappear as the time runs. But they can be still present after the entering in the career of the new judges as they are present in the other democracies of Western Europe.

In the presence of the alternative between the judicial council model and the executive-centred model, a constitutional choice has to be made, which is important and relevant for the developments of constitutionalism in the concerned countries. But the adoption of one or the another model has to be supplemented by choices that fall in the competence of the ordinary legislator and regard the identification of the objective criteria that shall be implemented by the bodies and organs entrusted with the administration of the judiciary. The fight against the corporatist and seniority tendencies of the judicial personnel especially depends on the legislative decisions that have to be at the basis of the measures affecting the career of the judges (CDL-AD(2010)004).

The elaboration of general guidelines for the above measures can be of common interest and relevance for both the principal models, which the Venice Commission has taken into consideration as far as the adoption of the relevant legislative provisions affect the judicial career whatever is the model of judicial administration that is preferred. The work of the Commission should draw inspiration from the different experiences of the

diverse countries and from the mutual exchange of information and suggestions. Also in these hypotheses the Venice Commission can play an important role in view of the identification of criteria and standards, which can ensure the status, the independence and the potential efficiency of the judiciaries of the countries that seek its advice and support. The search for an organizational model should be complemented by the identification of the regulations that affect the individual status of the judges and the content of the relevant administrative and disciplinary acts.

The purpose shall be the avoidance of situations that could exceptionally require a general lustration of the judges as in Albania or the adoption of measure of early terms of retirement of the judges as in Hungary. Such kind of solutions is not easily accepted by the Commission, which shared the justification of the declaration of the unconstitutionality of the early retirement of the judges adopted by the Hungarian Constitutional Court, and suggested to the Albanian authorities the introduction of procedural and substantive guarantees in view of the general vetting of the judges (CDL-AD(2012)001 and CDL-AD (2015)045). Many problems have arisen out of the legislative interventions in these cases. For instance, even the request for a personal declaration of the patrimonial and financial situation of the judges, adoption of which the Commission accepted. In the case of legislative reforms in Ukraine and Albania (CDL-AD(2015)057 and CDL-AD(2015)045) in the presence of an extensive spread of judicial corruption can arise doubts with regard to the right of privacy of the people concerned. This is true notwithstanding the fact that this request is very frequent in the case of the holders of political and public offices.

Reducing the presence of judges sitting on the judicial council is a solution which is frequently proposed. The Venice Commission has preferred arrangements that imply the presence of a majority of judges in the council, but in Europe there are countries where the judicial members are the minority.[11] This choice can be dangerous and favours political interferences in the life and functioning of the judiciary. If the purpose is elimination of corporatist and seniority tendencies that lie at the root of corruption or unfair deviations from the principles governing the judiciary, a legislative solution has to be pursued. Moreover, at the level of the institutional and organizational arrangements, the search for a strengthening of the parliamentary control or the introduction of individual complaints by the persons affected by the judicial miscarriages could be envisaged. Eventually the creation of the Georgian Parliamentary Commission could be accepted despite objections, but it would be advisable that a more flexible, fair and less intrusive machinery of parliamentary supervision of the judicial activity is provided.

11 Ibid., 948.