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EXPERT SEMINAR ON

**“THE INDEPENDENCE AND INTEGRITY
OF THE JUDICIARY”**

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**“EXTERNAL AND INTERNAL ASPECTS OF THE
INDEPENDENCE OF THE JUDICIARY”**

REPORT

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1. Preliminary remarks

All of us know that integrity and independence of the judiciary are essential conditions to prevent corruption within the judiciary itself; in its turn an independent judiciary is the indispensable premise for the judiciary to be able to conduct preliminary investigations, to implement criminal proceeding against corruption in all the sectors of state and local administration, and to ascertain the criminal responsibility of corrupted public officials.

Granted that the main focus of the seminar is just the independence of the judiciary as a whole and of the single judges, I have been asked, as a member of the Venice Commission, to make a presentation of its last comprehensive report on the matter, adopted in 2010. In fact, from the very beginning of its activity in 1990, the Venice Commission dealt very often with the various aspects of external and internal independence of the judiciary, giving opinions on the judicial and prosecutorial systems of dozens of countries in Europe, Asia, Africa and South America. We can say that the Venice Commission gave an important contribution to the framework of the European standards on the matter.

2. The sources of European standards

At the European and international level there exist a very large number of texts on the independence of the judiciary: as for the legislative field, the most important is without doubt Article 6 of the European Convention of Human Rights, which guarantees the right to an independent and impartial tribunal established by law.

Probably the most comprehensive overview is the 2001 Opinion No. 1 of the CCJE (Consultative Council of European Judges) and the most authoritative text at the European level is the Recommendation of the Committee of Ministers on "Judges: independence, efficiency and responsibilities", adopted on 17 November 2010 (CM/Rec (2010)12). As I told beforehand, today I will follow the outline of the Venice Commission report "On the independence of the judicial system: the independence of judges", adopted on 13 March 2010 (CDL-AD(2010)004), which takes into account the most important documents on the matter of the last ten years, starting with the opinions of the CCJE, the Committee of Ministers Recommendations and the previous opinions of the Venice Commission itself.

All the documents I mentioned deal with the principles that are considered to be essential for guaranteeing the independence of the judiciary as a whole and the independence of single judges when they exercise judicial functions. It is worth mentioning that there is a substantial agreement on the essential principles and very often the difference among the contents of the documents rests only on the order the principles are dealt with.

3. General and constitutional principles

First of all it is important to underline that the independence of the judiciary is neither and end in itself, nor a personal privilege of the judges. The main function of the independence is to guarantee the right of an individual to have his/her rights and freedoms determined, protected and implemented by an independent and impartial judge. We could say that the independence of the judiciary as a whole is the essential condition which enables judges to play their fundamental role of guardians of the rights and freedoms of the people. By this point of view the independence of judges is an indispensable premise of the rule of law.

The close relation between the judiciary's independence and the rule of law suggests that the basic principles ensuring the independence of the judges should be set up in the Constitution or equivalent texts, that is to say at the highest level of the national legislative system. So, the fundamental principles cannot be repealed or modified by an ordinary law, and perform a role of binding guidance of the ordinary laws in the matter.

All that said about the close relationship between the independence of the judiciary, the safeguard of rights and freedoms of the people, and the rule of law, the independence of the judges can be viewed from two distinct but interlinked viewpoints:

- that of the relations of the judiciary as a whole (and of the single judges) with the political power – notably the government, the legislative power, the political parties, the economic power centers, etc. When we deal with this kind of problems, we refer to the so-called external independence.
- that of the relations of each judge with the president of the court and higher judges, that is the independence and autonomy in carrying out the judicial functions in respect to the structure to which the judge belongs: the so-called internal independence.

4. External independence

Starting with the external independence, exhaustive and detailed standards have been proposed and adopted at the European level, even though they are not always followed by all States.

We can say that there is a progressive agreement on a system whereby the judges are appointed through an independent body composed largely – I would say at least half of the members - by judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary. Since such a body – normally called High Judicial Council or High Council of the Judiciary – must also be competent to take all measures concerning the legal status of judges (promotions, transfers, disciplinary measures, dismissals, etc.), and to promote the efficient functioning of the judicial system, it is normally composed by full time members. The main objective of the Judicial Council is to avoid undue influence and pressures of the political power on the judges, removing from the government all the decisions concerning the legal status and the career aspirations of the judges.

In authoritarian regimes, as well as in systems that don't implement the principles of the separation of powers, the minister of justice is always entrusted with the power of governing the judiciary, which is in such a way submitted to the control of the executive; in democratic systems, based on the division of powers, the Judicial Council performs the role of a self-governing body, excluding any direct interference of the political power on the judges.

As for the role, composition and functions of the judicial council it suffices to refer to the standards contained in the CM/Rec (2010)12 (points 26 to 29), the Opinion 1 (2001) of CCJE, the European Charter on the Statute for Judges in Europe, the numerous opinions of the Venice Commission, in particular the Report adopted in 2007 on Judicial Appointments (CDL-AD(2007)028).

The large participation of judges in the Judicial Council has a decisive influence in safeguarding the autonomy and independence from political power, but it does not imply that judges may be quite self governing. It is necessary to provide a proper balance between self administration and the accountability of the judiciary, in order to avoid negative effects of corporatist management within the judiciary. One way to achieve this goal is to establish a balanced composition among the Judicial Council members.

In order to provide democratic legitimacy of the Judicial Council it seems reasonable that the council be linked to the representation of the will of the people, as expressed by the Parliament. Non judicial members should be elected by the Parliament among persons with appropriate legal qualification, as lawyers, law professors, civil society exponents. The need to insulate the judicial council from politics suggests that non judicial members should not be current members of the Parliament. The depoliticization of such a body should be favored by

the election of non judicial members with qualified majority of the Parliament, for instance two thirds. Following this method, a compromise has to be sought with the opposition, which is more likely to bring about a balanced and high professional composition.

The presence of the minister of justice in the Judicial Council is quite common, but it raises some concern, above all in matters relating to transfers and disciplinary measures. So, it is advisable that the minister of justice, if an ex officio member, be not involved in decisions concerning these matters, as this could lead to inappropriate interference by the Government.

As for the President of the Judicial Council, the best solution in order to avoid possible corporatist tendencies within the judiciary should be to entrust the Council itself with the power to appoint the President from among non judicial members, with the qualified majority of two thirds. The system guarantees a right link between the judiciary and the political power expressed in a pluralistic way by the Parliament. Some systems provide that president of the Judicial Council be the president of the highest court of the judiciary, who normally is ex officio member of the body, but the solution could have the negative effect of judicial corporatism within the council.

All the decisions of the Judicial Council on the legal status of judges might be submitted to judicial review by a judicial body, such as the Court of Cassation, the highest administrative court, or the Constitutional Court, as for instance in Croatia.

5. Internal independence

While great attention has been devoted to the standards of the external independence of the judiciary, the internal independence has received less attention, at least from a quantitative point of view. The fundamental principles of independence within the organization of the judiciary are contained in the already mentioned Recommendation of the Committee of the Ministers and in numerous opinions of the Venice Commission, in particular they are set out in the 2008 Document "European Standards on the Independence of the Judiciary. A systematic Overview" (CDL-JU(2008)002), under the subtitle "Independence within the Judiciary".

The first constitutional basis to ensure internal independence is the implementation of the principle of the natural judge established by law, that is to say the right of everybody to a lawful judge. Such a right means that the judge who rules a specific case must be identified on the basis of objective criteria predetermined by law, and not on the basis of discretionary choices of any individual, be he or she internal or external to the judiciary.

It has been noted that in the frequent cases of a court with more than one collegial body or more individual judges, the allocation of the work to the specific section or judge is often left to the subjective and discretionary choices of the president of the court. In such a way it should be possible to influence the outcome of the case by choosing a judge with certain ideological or political inclinations or, if we want to deal with the corruption within the judiciary, a judge who is supposed to be susceptible to corrupting proposals.

In order to overcome the risk of discretionary choices, which are inherent in the power of the head of the office, the rule has been adopted that the natural judge is identified - which specific exceptions which are also provided for by law or by special regulations - on the basis of objective and general criteria, as for instance the alphabetical or chronological order of the cases, the categories of cases, a computerized system. The exceptions should take into account the workload, the specialization of the judges, the complexity of legal issues, etc.

The principle of the natural or lawful judge, established in art. 6 of the European Convention of Human Rights, is also present in numerous Constitutions, such as Austria,

Germany, Greece, Portugal, Luxembourg, Estonia, Spain, Slovakia, Italy, mostly in a negative form such as “Nobody can be removed from the natural judge established by law” (see for instance Article 25.1 of the Italian Constitution). As a consequence, a case could be withdrawn from the natural judge only on the basis of objective criteria provided for by the law and following a transparent procedure before a pre-established authority within the judiciary.

The right to a lawful judge is an essential but non sufficient guarantee. The internal independence is jeopardized by a hierarchical organization of the judiciary. In such a system the decisions taken by a given judge are subjected to the control of the president of the court over the subordinated judges and, more in general, through preliminary instructions, directives and subsequent checks by higher judges, be they appeal or supreme court judges.

As regards to hierarchical systems it must be recalled that the presidents of courts can be the privileged channel for the executive power to exercise pressure on the whole judiciary. In a corrupted judiciary system, sometimes the Court's presidents can also be the easier channel to practice corrupting pressures on individual judges. These are the main reasons why a hierarchical structure of the judiciary has been unanimously criticized as incompatible with the independence of the single judge.

The constitutional principle that more directly sets out the incompatibility between the hierarchical structure and the independence of the judges is formulated in some constitutions with the formula “Judges are subject only to the law” (see for instance Article 101.2 of the Italian Constitution). At the same time the principle guarantees the independence of the individual judges from undue influences, instructions and recommendations coming from within the judiciary, and from external pressures coming from the political power or from illegal power centers out of the judiciary.

From another viewpoint, the principle sets out the rule that the control over the decisions of the single judge can be exercised only through procedural remedies, that is an appeal to a higher judge, and not through preventive recommendations, explanatory directives or legal interpretations addressed to the lower courts.

The subordination of the judge only to the law is closely linked to the constitutional principle of equality among judges. On the one hand the principle implies the refusal of a hierarchical power of control of upper judges on lower judges, on the other it means that judges can be distinguished only by their different functions, such as first instance, appeal, legitimacy, investigative, adjudication. Both meanings of the principle are incompatible with any form of hierarchical organization or supremacy within the judiciary.

In the framework of the internal independence we can say that the two constitutional principles of the natural judge established by law and the subjection of the judge only to the law play an important role in contrasting the corruption within the judiciary; at the same time they make easier for individual judges to defend themselves from unlawful corrupting interferences coming from outside the judiciary.

6. Corollaries of the judges independence

Before ending I would like to deal with some essential corollaries of the external and internal independence of the judges, which can be summarized as follows:

- **The tenure until the mandatory retirement age** or the expiry of the term of office is a fundamental guarantee of the external independence. In effect, when the recruitment procedures provide for a trial period before confirmation on a permanent basis or the appointment is made for a limited period capable of renewal, the independence of judges is

undermined, since they may feel under pressure to decide cases in a particular way which can favor the renewal or the reappointment.

In order to reconcile the need of probation and evaluation with the independence of judges some systems provide probationary periods during which candidate judges can assist in the preparation of adjudication without taking judicial decisions which are reserved to permanent judges.

- **The guarantee of irremovability**, normally established at the constitutional level, is strictly linked to external and internal independence. The transfer of a judge to another court or to another judicial function, even by the way of promotion, should be provided only with his/her consent, or in case of disciplinary sanctions, lawful alteration of the court system, temporary assignment to reinforce a neighboring court. In fact, the fear to be transferred without consent to another court or office can undermine the freedom of judgment, influence the decision and interfere more generally with judicial independence. It can also be a channel through which corrupting pressures on individual judges are carried out.

- **The remuneration of judges**, corresponding to the dignity of the profession and adequate for protecting judges from undue outside interference, should be established and guaranteed by law. Non monetary remunerations, such as apartments, cars, holiday resorts, etc., even if defined by law, always involve scope for discretion and are a potential threat to judicial independence and a privileged channel for corrupting pressures on individual judges.

- The independence of the judiciary requires that **Courts should be financed on the basis of objective and transparent criteria established by law**, and not on the basis of discretionary decisions of the executive or legislative power. In particular, the judiciary should be given the opportunity to express its views about the proposed budget through the Judicial Council.

- **External independence needs to be protected from civil liability** in case of judicial errors or other failings done in good faith in the administration of justice. In these cases civil liability should lie only against the State. On the contrary, when not exercising judicial functions, judges must be liable under civil, criminal and administrative law in the same way as any other citizen.

Torino, June 25, 2012