

## PUBLIC PROSECUTION AND RULE OF LAW IN EUROPE<sup>1</sup>

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I.

Anche se parlerò in inglese per i nostri partecipanti dall'estero, lasciatemi rivolgere le mie prime parole in italiano per ringraziare *Magistratura Democratica*, *Questione Giustizia* e il *Dipartimento di Scienze Giuridiche dell'Università degli Studi di Firenze*, che ci ospita oggi.

A Mariarosaria Guglielmi (segretaria generale di *Magistratura Democratica*), a Nello Rossi (direttore di *Questione Giustizia*), al Professore Alessandro Simoni e al Rettore Luigi Dei (dell'*Università degli Studi di Firenze*) vorrei esprimere la mia profonda gratitudine per aver reso possibile che questa conferenza avesse luogo, organizzata in condizioni così difficili.

Continuing now in English, let me also thank all our speakers – those present here and the ones speaking online – , that kindly accepted to share with us their expertise and experience on the matter that brings us together today.

II.

The topic of today's conference is one of vital importance to any democratic society.

As the Secretary-General of the United Nations stated yesterday at the Peace Bell Ceremony on the anniversary of the International Day of Peace: “*We have solid evidence that human rights, respect for the rule of law, access to justice and opportunities for all are the building blocks for peaceful communities and societies*”<sup>2</sup>.

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<sup>1</sup> Speech given at the conference “*Public Prosecution and Rule of Law in Europe*”, organized by MEDEL, *Dipartimento di Scienze Giuridiche dell'Università degli Studi di Firenze*, *Magistratura Democratica* and *Questione Giustizia*, September 18<sup>th</sup>, 2020, Firenze, Italy.

<sup>2</sup> <https://www.un.org/sg/en/content/sg/statement/2020-09-17/secretary-generals-remarks-the-peace-bell-ceremony-the-occasion-of-the-39th-anniversary-of-the-international-day-of-peace-delivered> .

The absolute need for an active and full protection of the judiciary is not a recent concern. Already in 1788, Alexander Hamilton justified the need for a specific statute of magistrates that could defend them against any interference of the other powers of the State, saying it was the *"weakest of the three powers"*, with no ability to influence the remaining two and depending on them for the performance of its duties and for the execution of its decisions<sup>3</sup>.

Moreover, the judiciary finds its legitimacy not on the majoritarian will of the citizens expressed in a voting, but in the law and in the reasoning of its decisions. As Luigi Ferrajoli explains, the legitimation of the judiciary cannot be a political one, but only the one founded in the truth revealed in the process and the reasoning of the motivated decisions. That is why the judiciary is frequently a counter majoritarian power – *"a good judge is the one capable of acquitting – if there are no evidences – when everyone (public opinion, political power, media) asks for a conviction, or the one that has the courage, the strength, to convict the strong and powerful when everyone asks for the acquittal"*<sup>4</sup>.

It is this specific nature of the judiciary that makes it more vulnerable to unlawful influence and, therefore, more in need of specific measures directed to safeguard its independence.

In recent years, the attacks against the independence of the judiciary have increased in number and in intensity.

In their book *"How Democracies Die"*<sup>5</sup>, Steven Levitsky and Daniel Ziblatt describe how the democratic system is being captured and subverted from the inside by autocrats: *"This is how elected autocrats subvert democracy – packing and "weaponizing" the courts and other neutral agencies, buying off the media and the private sector (or bullying them into silence) and rewriting the rules of politics to tilt the playing field against opponents. The tragic paradox of the electoral route to authoritarianism is that democracy's assassins use the very institutions of democracy – gradually, subtly, and even legally – to kill it."*

It is not a coincidence that the first step these authors describe in the road to authoritarianism is the manipulation of courts – only independent courts are

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<sup>3</sup> HAMILTON, Alexander, "The Judiciary Department", in *The Federalist*, nr. 78 – available at (<https://constitution.org/1-Constitution/fed/federa78.htm>)

<sup>4</sup> FERRAJOLI, Luigi, interview by Eduardo Maia Costa and José Mouraz Lopes, in *Julgar*, nr. 06, Coimbra Editora, September-December 2008, p. 13.

<sup>5</sup> New York: Crown Publishing Group, January 2018.

able to defend the citizens' fundamental rights against excesses from majorities or unilateral readings of society. That is why the first move of any authoritarian or populist government is to undermine the independence of the judiciary.

If we look closely to some recent moves of governments in the European Union, we find clear examples of that, like in Poland, where since in October 2016 the Law and Justice Party won the parliament election, an orchestrated campaign has been carried out to put the judiciary under total control of the executive power.

In a clearly not random chronology (the Minister of Justice has openly stated that the basis for the "reforms" of the judicial system in Poland would be to "overthrow" the Constitutional Tribunal), these are the steps that have been undertaken to end judicial independence in Poland:

1. disable the Constitutional Tribunal;
2. merge the positions of Minister of Justice and Attorney General;
3. modify the system of training and appointment of new judges – reintroduction of a position of a lower court judge/evaluator, previously deemed unconstitutional;
4. change the law on common courts, increasing the influence of the Minister of Justice;
5. take control of the High Council of Justice;
6. take control of the Supreme Court.

These moves were accompanied by an intensive media campaign against magistrates, with billboards and adds published in the media, including social media. Magistrates are depicted as dishonest, corrupt, incompetent, dependent and with roots in the Communist system (although the average age of a judge in Poland is 40).

The Polish example, among many others, shows how essential it is to have clear rules protecting the independence of the Judiciary and of magistrates.

But if in the case of judges, the essentiality of their independence vis-à-vis the Executive power is almost unanimously accepted (even by those who try to break it), in the case of prosecutors that conclusion is not undisputed, and in several States the Prosecution is part of a hierarchical structure fully controlled by the Government. In France, for example, the *Parquet* does not have any kind of autonomy and Germany has already been expressly urged by the Parliamentary

Assembly of the Council of Europe to "abolish the possibility for Ministers of Justice to give instructions to Prosecutors concerning concrete cases"<sup>6</sup>.

However, the protection of prosecutors is as important as that of judges, as they actively exercise the punishing power of the State against those who break the law, putting them in an even more delicate position when it comes to possible manipulation by the Executive branch.

III.

MEDEL has constantly reaffirmed that an autonomous and independent public prosecution is one of the cornerstones of a truly independent Judiciary.

In the Palermo Declaration ("*Elements of a European Statute of the Judiciary*"), adopted on January 16<sup>th</sup>, 1993<sup>7</sup>, MEDEL affirmed that the autonomy of the public prosecutor constitutes a ***fundamental instrument of the independence of the judiciary*** and that prosecutors ensure the equality of citizens in front of the law and carry out their functions autonomously regarding the political power, subject only to legality and the law.

Three years later, in the *Naples Declaration ("MEDEL Declaration of Principles Concerning the Public Prosecutor"*, approved in March 2<sup>nd</sup>, 1996)<sup>8</sup>, MEDEL clearly stated that the Public Prosecutor is a ***judicial organ***, and consequently ***autonomous from the executive***, the autonomy of the Public Prosecutor constituting an ***indispensable tool*** for guaranteeing the independence of the judiciary and equality in front of the law. Therefore, the organs of the executive cannot give either general or specific instructions to the Public Prosecutor, as the Public Prosecutor is subject to the law alone, governed exclusively by criteria of ***legality, impartiality and objectivity***.

More recently, in its contribution to the *Assises de la Justice*, organised by the European Commission in Brussels in November 21<sup>st</sup> and 22<sup>nd</sup>, 2013, MEDEL reaffirmed that there is no independence of the Judiciary without an autonomous body of prosecutors, and that the selection, appointment and career of prosecutors should have no influence from the executive, and they should have guarantees of irremovability established by law.

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<sup>6</sup> Resolution 1685(2009), of September 30<sup>th</sup>, 2009 – available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17778&lang=en>.

<sup>7</sup> Available in <https://www.medelnet.eu/images/stories/docs/Palermo.pdf>.

<sup>8</sup> Available in <http://medelnet.eu/images/stories/docs/naples%20eng%20rev.pdf>.

#### IV.

The main principles that should guide the statute of the Public Prosecution and its institutional and constitutional role are set up in a series of international reference documents, of which we can say the most relevant are<sup>9</sup>:

- At a global level:
  - o The “*Guidelines on the Role of Prosecutors*”, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, August 27<sup>th</sup> to September 7<sup>th</sup>, 1990)<sup>10</sup>;
  - o The opinion of the Human Rights Committee of the United Nations, in Communication Nr. 521/1992 (Vladimir Kulomin v. Hungary)<sup>11</sup>;
  - o The Standards of professional responsibility and statement of the essential duties and rights of prosecutors, adopted by the *International Association of Prosecutors* on April 23<sup>rd</sup>, 1999<sup>12</sup>;
  - o The annual reports of the Special Rapporteur of the UN on the Independence of Judges and Lawyers<sup>13</sup>;
  - o The 2014 document “*The status and role of prosecutors – a United Nations office on drugs and crime and International Association of Prosecutors Guide*”<sup>14</sup>;
  
- At the European level:
  - o The Council of Europe’s Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System<sup>15</sup>;

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<sup>9</sup> I follow here closely the analysis of ALBUQUERQUE, José P. Ribeiro de: “O estatuto da Procuradoria Europeia e os estatutos dos Ministérios Públicos dos Estados-Membros da União Europeia”, in *Revista do Ministério Público*, nr. 144, October-December 2015.

<sup>10</sup> Available at <https://www.ohchr.org/EN/Professionalinterest/Pages/RoleOfProsecutors.aspx> .

<sup>11</sup> Available at <http://hrlibrary.umn.edu/undocs/html/VWS52156.htm> .

<sup>12</sup> Available at [https://www.iap-association.org/getattachment/5f278b49-dd58-49ee-97d0-3d2d51a1af37/IAP\\_Standards.aspx](https://www.iap-association.org/getattachment/5f278b49-dd58-49ee-97d0-3d2d51a1af37/IAP_Standards.aspx) .

<sup>13</sup> Available at <https://www.ohchr.org/en/issues/judiciary/pages/annual.aspx> .

<sup>14</sup> Available at [https://www.unodc.org/documents/justice-and-prison-reform/14-07304\\_ebook.pdf](https://www.unodc.org/documents/justice-and-prison-reform/14-07304_ebook.pdf) .

<sup>15</sup> Available at <https://www.refworld.org/docid/43f5c8694.html> .

- The “*Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service*”, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010)<sup>16</sup>;
- The Resolution 1685(2009) of the Parliamentary Assembly of the Council of Europe – “*Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states*”<sup>17</sup>;
- The Recommendation 1896(2010) of the Parliamentary Assembly of the Council of Europe: “*encourages the Consultative Committee of European Prosecutors (CCPE) to persevere in its role as guardian of the due application of Committee of Ministers Recommendation Rec(2000)19 on the role of public prosecution in the criminal justice system, bearing in mind particularly the independence of prosecutors*”<sup>18</sup>;
- The conclusions of the *Conferences of Prosecutors General of Europe*, mainly the “*Budapest Guidelines*” (“*European Guidelines on Ethic and Conduct for Public Prosecutors*”)<sup>19</sup>;
- The CCPE opinions, mainly the “*Bordeaux Declaration*”, jointly adopted by the CCPE and the CCJE – “*Judges and Prosecutors in a Democratic Society*”<sup>20</sup>.

From these important documents we can schematically draw these main lines, which we could say are the **framework of minimum standards of a truly democratic and independent prosecution service**:

- existence of a fair and equitable recruitment process, preventing any form of discrimination or political influence;
- career management based in objective criteria of competence and experience;
- adequate conditions of service, which include appropriate remuneration, proportionate to the importance of the function;

<sup>16</sup> Available at <https://rm.coe.int/1680700a60> .

<sup>17</sup> Available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17778&lang=en> .

<sup>18</sup> Available at <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17806&lang=en> .

<sup>19</sup> Available at <https://rm.coe.int/conference-of-prosecutors-general-of-europe-6th-session-organised-by-t/16807204b5> .

<sup>20</sup> Available at <https://rm.coe.int/1680747391> .

- the State must be responsible for providing a harmonized legal framework and adequate working conditions (proper number of public prosecutors and staff, proper premises, etc.);
- internal allocation of cases conditioned only by objective criteria of impartiality, independence and maximum effectiveness of the criminal justice system;
- guarantee of independence of public prosecutors in the performance of their duties in front of the Executive and Legislative branches, as well as of the economic power and other political forces;
- the duty to cooperate with other institutions, particularly the police, bringing effectiveness to criminal policy, must not jeopardise the power to act against members of other public authorities when they commit crimes;
- external independence: independence from instructions of the executive or political power in relation to individual cases, although there may be generic guidelines for the definition of the criminal policy;
- internal independence: despite the internal hierarchical organization, prosecutors shall carry out their duties without the need to obtain prior approval from their superiors, nor need confirmation of their actions – written and objective guarantees of not interference from superiors shall be established, so that the activity of prosecutors, for example on trial, is free from any external or internal pressure, which includes rules regarding appointment, discipline and allocation of cases, as well as rules regarding the management of cases and decision-making procedures;
- the appointment of public prosecutors:
  - i. must not be in the hands of the hierarchy of the Public Ministry: the methods and the procedures must be transparent;
  - ii. cannot be temporary or be subject to renovations;
  - iii. transfer without consent must be forbidden;
- as for the Attorney General:
  - i. system of appointment must guarantee its non-politicisation (to be allocated preferentially to a parliamentary committee), should ensure public confidence and the respect of legal actors and legal professions;
  - ii. institutional stability (the mandate should not coincide with legislatures, should not be temporary or renewable);

iii. the composition and appointment of the office, the term of office and the conditions and procedures for dismissal are other relevant aspects that must be clearly and objectively established by law;

iv. the need to provide public account of its activity (accountability) should not be reported to specific cases, but to general matters of criminal policy or organisation;

- the existence of a Superior Council of the Public Prosecutors, the majority of which must be composed of prosecutors democratically elected by their peers, as a guarantee of ensuring democratic legitimacy and independence.

The rules are there, written in all the documents mentioned above, some of them decades old, and are known to all. All we have to do – and fight for – is putting those rules in practice.

MEDEL hopes and believes that today's conference will be an important contribution for that goal.

V.

Concludo così come ho iniziato: nella bella lingua di coloro che ci accolgono oggi. Quando abbiamo cominciato a preparare questa conferenza, più di un anno fa, nessuno poteva immaginare i tempi difficili che il mondo, e soprattutto l'Italia, avrebbero dovuto affrontare.

Ma voglio credere che non sia stata una coincidenza che nel momento in cui abbiamo bisogno, più di ogni altra cosa, di speranza nel futuro, ci saremmo riuniti qui, a Firenze, il luogo di nascita del Rinascimento, il luogo dove si sviluppò dalla cultura locale e dall'umanesimo un diverso modo di pensare il mondo e l'uomo.

Le sfide che dobbiamo affrontare oggi per la protezione dello Stato di diritto nelle società democratiche sono enormi. Chiedono un dibattito aperto, una riflessione approfondita e azioni coraggiose.

In nessun posto migliore di Firenze potremmo iniziare questa strada. Grazie all'Italia e a Firenze che ancora una volta ci mostrano il cammino verso quella che speriamo sia una nuova era, basata sull'umanesimo e sul rispetto della libertà e dei diritti umani.

Auguro a tutti voi un buon lavoro e una buona conferenza.