

Full transcript of the speech delivered by Mr. Sergio Bartole
3rd meeting of the Project Team “Councils for the Judiciary”
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1st part:

Thank you, Chairman. First of all, let me thank you and this committee for this kind invitation. Also on behalf of the Venice Commission. The Venice Commission is named according to the place where we meet but the first name is the European Commission for Democracy through Law and it was an invention of a distinguished Italian lawyer, Antonio La Pergola. He proposed to the Council of Europe the creation of a commission aimed and supporting states in promoting the values of democracy and freedom. As a matter of fact, the Venice Commission is a body of the Council of Europe but at the same time, we have a special separated agreement, according to which we have our own organization, our own budget, and a complete autonomy in promoting our activity on this other quest, of the other member states and the Council of Europe. I think that this is sufficient to give you an idea about this commission. I would like to enter immediately into our topic. First of all, I would like to tell you that we didn't write an opinion in an report about the councils of the jurisdiction. We prepared two reports on the independence of the judicial system. And there are two of them: The Independence of judges and the prosecution service. So we didn't focus our attention only on the specific mode of councils for the judiciary, but we had a look about the different solutions that can be implemented to ensure independence and autonomy of the judiciary. So if you look for instances in the first document I mentioned, the report of the independence of the judicial system, the independence of judges, you can see that we started from the recommendation of the committee of ministers of the council of Europe, and only in the last part of our presentation we dealt with the problem of the judicial council of the council of the judiciary. The problem is that the situation in Europe is extremely pluralistic. I mean that there are many different solutions with regard to the independence of the judiciary and so we had to keep in mind all these different possible solutions because obviously if we adopted only the line of the judicial council or the council for the judiciary, we would have been in the situation of saying that some of the systems adopted in other states were in conformity with European standards. And this was not possible. We also have our friends in the commission who are not member of a state where a council of judiciary exists. So if you look at the recommendation 12 of 1999, you can

see that it speaks about notoriety, taking the decision on the selection and career of the judges should be independent of the government and administration in order to safeguard its independence. Rules should assure that, for instance, its members are selected by the judiciary and that the authority itself decides on its procedure alone. It means that here a council for judiciary is not directly provided for. It is a proposal for an establishment for an authority which has to be independent of the government to safeguard the independence of the judiciary. We can find nearly the same position in one of the first documents of the Council of European Judges where also an independent authority is provided for with substantial judiciary representation chosen democratically by other judges. Only in the opinion number 10 of the consultancy commission of European judges, a council of the judiciary is mentioned and it is a state that the council is the service of society. So the first point is that we have in Europe different solutions. One of them is council for judiciary. If you look at one of the most important documents of the Venice Commission, we can find such a statement. In all the democracies, the executive power has at some times a definite influence on the judicial appointments. Such systems may work well in practice and the law for an independent judiciary because these powers are restrained by legal power and tradition which have grown over a long time. This is especially important because we adopt, as a matter of fact, a different line with regarding older democracies of Europe and newer democracies of Europe. With the older democracy of Europe, we are always attentive to the practical implementation to the independence of the judiciary. But we don't take care of the solution. They can also give the appointment of the judges to the executive. This is a very large approach. I have to confess that I have some doubts about this solution because I think that not always the older democracies are implementing the autocracy and independence of the tradition. But in any case, we avoided to take a strong position against this solution. New democracies, however, did not have a chance to develop these traditions. Which can prevent abuse and therefore, at least in these countries explicit constitutional legal provision are needed as a safeguard to prevent political abuse in the appointment of judges. It means that in the practical work of the Venice commission was especially supported the proposal of establishing a council for the judiciary in the new democracies. For example, if you look at the Balkan States, all these states have adopted a supreme council or a high council for the judiciary. This is a important passage but at the same time, it creates a lot of problems because, as you know very well, one thing is saying that we adopt the high council for tradition. Another thing is to discover which are the real solutions which can ensure the independence of the judiciary with regard to the participation of

the head of the state in the work of the council, with regard to the presence of the minister of justice, with regard to the membership of the council. But let me also underline one point. If you look at a European document, very frequently you see that this document doesn't say that the council for judiciary has to have a decision of power, the power of adopting the final power. They speak about the intervention of this authority in the proceedings concerning appointments or dismissal of judges and if you try to interpret these provisions, you can understand that with the expression intervention they mean giving opinions, they mean making recommendations, they mean expressing proposals. On this point the Venice Commission has a clear position. When it is established, the council for judiciary has to have final power of decision. The liberation has to stay with the council. It is not acceptable if the decision is given to other bodies on the basis of proposals, opinions or something else adopted by the council and this is an important and crucial point if you want to have a clear idea about our proposal. The point concerning the chairmanship of the council for judiciary, our opinion is that definitely the chairmanship cannot be given to the minister of justice- this is against the principle of separation of power but there is also a follow up, even the chairmanship given to the president of the republic is not always the best solution-- especially when the president is an expression of a political majority, especially when the president is leader of a political majority. I completely understand Mr. Sarkozy when he said, I cannot stay in a country where I am not able to have a majority for my proposal. He is a leader of a political majority. He is a supporter of a political line. He is not interested in the work involved and at the same time, he is not interested in ensuring the independence and neutrality of the point. Instead, in Italy the position in the role of the president of the republic is a different one. The president of the republic is a neutral guarantor of the constitution and in this way, we support the possibility that such a mode of the president of the republic allow the attribution of the chairmanship to the head of the state. But on the other side, we don't have anything against the chairmanship given to the president of the supreme court. Perhaps some problems tend from the fact that in such a solution, this man will be a very busy man and in this, it will be very difficult to comply with all his obligation and all his work. But this is a problem of practical function. Another point, the existence of a special regulation for the prosecutors. In some countries, Italy, France, and Turkey, prosecutors are members of the council of the judiciary. The council of the judiciary deals with matters concerning judges and prosecutors. But there are also solutions, according to which, for instance, the prosecutors don't have a special housing for them or they have a special cousin ensuring the independence of the service. This can be a problem. The Venice commission

has in some way the obsession with all the *procura*, all the totalitarian system of government. And we are afraid about the possibility of having an independent body without external controls obsessed by the prosecutions' ideas. This is a problem. We think that in some way the professional interests of the prosecutors have to be balance with other interests. For example, the interest of the political bodies, the interest of the civil society, the principles of independence of the judicial service. In this way, we don't take an explicit position against the creation of prosecutorial councils but we suggest to avoid the creation of a body which can be completely independent and supporting a prosecutorial energy of the service. It is better to have a council as in France where there are two sections for the judges and the prosecutors but at the same time, these two sections are part of one body. And we have this idea that this can be a better solution. But before dealing with the problem of the membership for the council of the judiciary, let me say something about countries where there are many authorities dealing with the problems or the organization of judiciary. For example, the Venice Commission, and also the European documents frequently quote a lot of bodies . There is a body for appointments. There is a body for disciplinary measures so we have an idea that these creations of many bodies concerning judiciary is not against the standards of European democracy but we have to give an evaluation of this system in view of the implementation of the dependents of the decision. Sometimes the concentration of power in one body is a good solution. Sometimes the diffusion of power across a lot of bodies can be useful. It depends on the tradition of the countries. Sadly, the idea of the high council for judiciary is supporting the idea of a concentration of power in one body, all powers, appointment, disciplinary, and so on. With regard to the membership of the councils, we support the idea that the majority of the members has to be elected by judges. And the second point, that space has to be given to representatives of the parliament, elected by the parliament with a qualified majority. Recently, there are frequent statements from other bodies which have supported the idea that in the council of the judiciary we have to have the presence of the representative of the civil society. This can be an acceptable solution but it depends on the way of the appointment or electing these people. The problem is this: if the appointment of these people is left to the minister of justice, the independence of the body can be in danger. As a matter of fact, if you look at the experiences of the states where for the first time council of the judiciary were established, there is no space for people appointed by the ministers. But obviously, everything can change in the time. Another point which is a really important is that these lay persons, people not in robes but elected by the people in parliament, has to be in a substantial

number to balance the number of judges. On this point, let me tell you my personal position. I have a feeling that if we leave, to the judges, a complete autonomy to adopt their decision without compromising with the other part of the council, there can be a danger. So for instance, I think that even in Italy, we could reduce the number of people elected by the judges. In any case, keeping more than half the membership but increasing the presence of other people to create the basis for a possible negotiation, a compromise between different positions. I was told-- I have never been member of the council for the judiciary, I am lucky but...-- I was told, for instance, that the relations between judges, people elected by judges and people elected by parliament is difficult because in some way the magistrate tends to monopolize the decision and this can be a possible reason for worries and dangers. Another point, this point was really to the attention of the Venice commission concerning the establishment of the high council of the judiciary council in Turkey. As a matter of fact, the establishment of the council for the judiciary is frequently connected with a very centralized organization of the judiciary. If we envision the adoption of the most important decision concerning the judiciary by the council of the judiciary, we are leaving leader spaces to the powers of the local authorities of the judiciary, the courts. It is evident that if you have a judiciary which is governed by central organization of the supreme council, in this case, you are leaving very little space to the local judicial boards and the problem is this, is this convenient or not? Perhaps it can give space in the more politicized government of the judiciary. Instead it could be advisable to have a more flexible organisation of the judiciary with some powers left to the local judicial bodies. And in this case, I would like to come to the so-called Scandinavian model. You know that in the doctrine, we distinguish when we study this topic, which is not very frequently studied by the professor of constitutional law, but when we studied this problem, we discovered two different models. The Mediterranean model: Italy, France, Spain, and the Scandinavian model. The Scandinavian model has recently got the attention of people studying this matter because... perhaps it could be better to respect our Irish friend to speak about the modern model. In this case, we have a council which has a more larger competence concerning, for instance, the practical functioning of the judiciary—buildings, financial means, and so on. And on the other side, the council is connected with a net of local judiciary authorities who have powers concerning the development of the careers of the judges which is a solution you can find also in other states where they don't have a council of the judiciary. Look for instance at Germany. Look for instance at Austria. So when we... our idea is that when we deal with a problem of the establishment of the council of judiciary, we have to keep in mind the total

organization of the judiciary to understand which kind of judiciary we are dealing with. Because, if we have a centralized system, we are creating the situation for a very powerful council of judiciary. If we give space to the autonomy of the local judicial body, we can have a more flexible solution, especially with regard to the powers of the judiciary. This is a point I think that this is a point that will be obliged to deal with in the future. Because this is a point that deserves our attention and of course, it could be helpful if you take into point this possibility. I think that I said the most important thing I had in mind. There are other points. For instance, the problem of the personal status of the members of the council of the judiciary. There are proposals for special status and so on. With regard to Turkey, the Venice Commission said that the creation of new special immunity should be avoided to ensure the equality of treatment of the people who are in power, who are not in power. Certainly the problem of disciplinary powers is deserves special attention and on this point, I would like to remind you that there are many entries where these powers were given to a special body, separated by the council. And the Venice Commission does not oppose these solutions. Even in our documents, we speak about the possibility of disciplinary courts to deal with these kind of problems. Certainly, I understand your difficulties because certainly between peoples in this room, we have many states which have many different solutions. For instance, we learned something about power other powers of the state with in regard to the judicial committee in Romania. We learned something about the election of all members of the superior council in Spain. Even the judges are elected by Spain, by the parliament in Spain. So I think that different solutions and it is difficult for you to summarize in one document the main principles of this matter. Perhaps it could be helpful to try to state by state make an evaluation of the concrete independence of the judicial and this can be made also from the point of the political science, not only from the point of the view of the law. There are recent American contributions on this point but it's obvious that they look at universal world so it's difficult to find an immediate suggestion for us. But I don't have more things to do. Or better, I am ready to answer to your question. As a matter of fact, we, the Venice commission, dealt especially with these states, Albania, Romania, Serbia, Georgia, with regard to the establishment of the council of judiciary. Bulgaria. So I think it is better to leave to you the possibility of putting me some questions and I thank you for your attention.

2nd part:

We can start with the powers of the local judicial bodies. I think that it is also one of the prospective we have to deal thinking about the future. But in any case, for instance, it could be helpful to have a participation of the local judicial offices in the decision making procedure of the council. I think that in some way, even in Italy, we have something in this direction. We opinions of these bodies on the dismissal and appointment of judges. Perhaps also something else could be decided, for instance on the local level, for instance the arrangement and distribution of the personnel between the different local offices. Judges are assigned to a court and the court decides about the composition of the internal offices. In Italy, also this decision is left to the council and it is a very heavy solution. So I think that this can be an idea which deserves our attention for the future. I have in mind some solution adopted in the Scandinavian countries. Perhaps our Norwegian friend can say something on this point. Because this is an interesting solution. But also, on the other side, we have very...in some way, we have powerful councils in these countries, for instance concerning the practical arrangements for the functioning of the judiciary. For instance, look at what our Irish friend said. Instead, even for the construction of a building in Italy, we depend on a decision from the ministry of justice. There are some bodies who are specially lucky, can help some... we can get some money from the agents but it is not a very easy way because formally the regions don't have powers concerning these buildings. This is one point. About the final decision, I expected your objection and I understand that it is something which goes against your practice but, your rules, but this point is clear in the ministration position. The final decision pertains to the supreme council and this point is especially underlined in all the documents. And do we take a different position from other documents in Europe where they speak about intervention? What does intervention mean. And we think that if we want to have an independent judiciary we cannot leave to the judiciary only powers of proposals and so on. And this is also a position which is shared by other associations which were in the field. The problem of membership and their connection with civil society. This is a really difficult topic. Who appoints these people? Who appoints the civil society? And second point, it could be helpful to have people who are not lawyers but in some way we should ensure the presence of people who are customers of justice. All of us are customers of judges but there are some bodies who are more frequent customers and some body who are not frequent customers. So I don't think we have to look for the presence of the civil society in the prisons. So I think, so my suggestion is. ..So I have to confess that in the Venice Commission, we didn't think about this topic because in some

way our mandate is to deal with proposals submitted by states. We tried to make this document, and I have to confess that it is an interesting result. Because at the very beginning, I was explaining this morning to our Irish friend that at the very beginning, we had requests regarding the organization of the judiciary but we were in the position not to have a clear yard stick for the evaluation of these proposals. And even the, for instance, the recommendation of the committee of ministers, or opinions of consultants or councils of European judges were extremely rare and so we tried in recent times to make an effort to clarify these problems and if you want, I can give you a reference. We adopt two reports on the independence of the judicial system. One concerning the independence of judges. The other concerning the judicial service. But you find a lot of materials in another document which is the Vademecum of the Judiciary, the summary of all the decisions of the Venice commission until 2008, Vademecum of the Judiciary. These are the three documents but perhaps you can find also suggestions in all the documents we adopted concerning judicial reforms in the member states in Europe. Thank you.

3rd part:

I understand your reasoning. It is all the story of the conditionality. I mean that the standards adopted by the international organization have strong effects if the authority which adopted it gives the standards, has the power to revise the behaviour of the states concerned. You know very well that in the 90's the council of Europe was in this position because we had the possibility of accepting or refusing membership in the council of Europe of states according to their compliance or not with the international standards. We have a lot of discussion and in some way, the Venice commission was one of the branches of the Council of Europe which was interested in this monetary process but more recently, we don't have such kind of problems regarding European states. European states have some problems with the European union but without criticizing anybody, we have sometimes the impression that the monitoring of the European union is more flexible than the position of the council of Europe. And we had some examples which I don't mention but some examples of a major flexibility on this point of the European union. Probably it also depends on the fact that it is a mandate of the European union to respect the national identity of the state. But, for instance, coming back to procuratura, can we say that procuratura is an essential feature of the states as Russian, Ukraine, Belarus? Because we find even mention of the procuratura in the novels of Dostoevsky. Or not. It is a problem. Can we imagine that this is a part of the tradition or not? In any case we have to state clearly the point

that procuratura has a solution, is a solution which has to be avoided for these reasons. So it is difficult to accept it... not only, but we have to avoid to create it as a parallel solution which can be a kind of masquerade of the procuratura.

4th part

Thank you for your intervention. I think that the problem of the presence of the civil society is strictly connected with role of the parliament. Finally, if the role of the parliament is seen as potential danger in the functioning of the judiciary, we have to balance the intervention of the parliament with other sources of legitimacy. For instance, the civil society but if the...the members, the representatives of the civil society are appointed of the executive it is not easy to say that it is a better solution. I think that these points deserve to be seen again or reviewed again by the Venice Committee, by other bodies. The fact is, in the council of Europe, there are other bodies which are engaged in the traditional problems. So we are only giving opinion about the proposals in this field made by the state. But the line of the council of Europe in the field of judiciary only to other institutions. So you know it happens also, it happened also in the United States before the arrival of the white people, the Indians were strictly monitoring their borders of their position so even in the council of Europe, the Indians are trying to keep separate the different positions. But in any case, I think you have the position to submit proposals to the council of Europe to have a general interest in this topic. And that the intervention of our French friend give me, gave me some interesting support about the results of the efforts of the international organization. It is interesting also that in your country, local judicial bodies have a relevance which is not always provided from in other countries. Your democracy, you are not so conditioned by the centralized condition as the other states, and this can be also an important point which deserves attention. Thank you.