

Al Sig. Procuratore generale

Pres. Luigi Salvato

Sede

Oggetto: *Trasferta in Armenia dal 29 giugno 2023 al 2 luglio 2023*

Il sottoscritto, dottor Fulvio Baldi, ai fini della corretta documentazione circa le attività svolte, Le ricorda di aver partecipato, in accompagnamento alla S.V., alle celebrazioni per il centocinquesimo anniversario dall'entrata in funzione della Procura generale della Repubblica di Armenia, tenutesi in Yerevan dal 30 giugno 2023 al 2 luglio 2023. Nell'occasione la S.V., nella mattinata del 1° luglio 2023, ha tenuto in inglese un discorso, molto apprezzato dai partecipanti, sull'indipendenza interna ed esterna del Pubblico ministero partendo dall'esperienza dell'ordinamento italiano (v. allegato 2). Il convegno, che si è svolto in lingua inglese ed armena, ha visto la partecipazione dei massimi vertici della magistratura, della politica e della cultura armena. Nel corso di esso sono intervenuti, su analogo tema, i Procuratori generali di Croazia, Estonia e Lituania, con i quali sono stati avviati proficui e finanche cordiali rapporti di collaborazione, il che assume evidente importanza ai fini del miglioramento della cooperazione giudiziaria con detti Paesi oltre che, naturalmente, con quello ospitante. Altri efficaci interventi sono stati effettuati da rappresentanti della Corte Edu, del CCPE, di Eurojust e dello I.A.P..

All'inizio del *meeting* è stato sottoscritto dalla S.V. e dalla Sua omologa Anna Vardapetyan un *Memorandum* di intese tra il nostro Ufficio e la Procura generale della Repubblica di Armenia, che lo scrivente ha oggi consegnato in triplice copia (inglese, italiano ed armeno) ai responsabili dell'Ufficio Affari internazionali. Tale primo atto pattizio apre un rapporto di amichevole collaborazione tra i due Uffici ai fini dello scambio di informazioni sui rispettivi ordinamenti nella prospettiva del miglioramento reciproco delle relative prassi applicative anche attraverso iniziative di formazione professionale.

Va infine ricordato che, durante tutto il corso dell'evento, la delegazione italiana è stata costantemente accompagnata da S.E. Alfonso Di Riso, Ambasciatore italiano presso la Repubblica di Armenia, che viene contestualmente ringraziato con missiva a margine del presente *report* per la squisita disponibilità ed il prezioso apporto.

Si resta ovviamente a disposizione per ulteriori eventuali chiarimenti.

Sentiti ossequi.

Si allegano:

- 1) Il programma del *meeting*;
- 2) Il discorso depositato dal Procuratore generale.

Roma, 3 luglio 2023

Il sostituto Procuratore

Dr. Fulvio Baldi



Prosecutorial Independence in defending the Rule of Law

I am very glad for your invitation to today's ceremony to celebrate the establishment of such a key Office for your Country. I am honored to return the Armenian delegation's visit to Italy on 26 October 2022. Therefore, I would like to greet and thank the Prosecutor General, and I wish good work to all the Authorities attending.

Prosecutorial independence (P.M.), unlikely judges' independence, is not always clearly established. The variety of criminal justice systems in Europe and worldwide, and their foundation in different legal cultures give reason to the lack of a uniform model for all the States. According to the European Court of Human Rights, public prosecutors are members of the judicial power (public prosecutors are «*civil servants whose task it is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term*», as in the Judgment *Lesnik v. Slovak Republic* of 11 March 2003). However, also following the EU Court of Justice's opinion, it is up to the choice of the national legal systems whether to ensure their independence- owing to their position as parties and the lack of a single prosecutorial model. Nevertheless, the Court states that independence from the political power and executive power shall be taken into account in considering the public prosecutor as issuing judicial authority, under Article 6 sec. 1 of the Council Framework Decision 2002/584/JHA on the European Arrest Warrant.

(Among others, see judgments in C-508/18 and C-82/19 PPU of 27 May 2019; C- 509/18 of 27 May 2019), and as executing authority, under Article 6 sec. 2 (judgment C-510/19, 24 November 2020).

Under the impulse of the case law of the mentioned Courts, even as a result of the establishment of the EPPO (European Public Prosecutor's Office), we can see that the establishment of prosecutorial independence is a common goal, despite the complexity of different experiences.

In the Italian legal system, the grounds for prosecutorial *external* independence shall be found in the Constitution, ruling that “judges are subject only to the law” (Article 101, second section). The limits of the function are then fixed, and any direct or indirect interference from the government or any other body shall be prevented. That is why “the judiciary is an independent branch of government and shall not be subject to any other” (Article 104). The autonomy and independence of the judiciary is also safeguarded by the High Council of the Judiciary (Articles 104-107 of the Constitution), which avoids the separation of the judicial system within the unitary State because of its composition and connection with other powers.

In the Italian legal system, public prosecutors are also members of the judiciary. According to the Constitution, if not every member of the judiciary is clearly a judge, a public prosecutor is necessarily a member of the judiciary.

However, some principles underlying the judges' guarantees only refer to judges (Article 25, section 1, Article 101, section 2 of the Constitution). Besides, Article 107 of the Constitution is a watershed (“The public prosecutor shall enjoy the guarantees laid down in his favor by the laws on the organization of the judiciary”). This provision keeps the public prosecutor and the judge together within the judiciary, hence adjusting their *external* independence, and excluding that statutory law may establish

organizational models to subject him to external forms of control/conditioning and curtail him to the rank of a civil servant or a “*police attorney*”. Prosecutorial *external* independence also comes from the principle of mandatory prosecution (Article 111 of the Constitution; Judgment No. 420/1995 of the Constitutional Court), i.e. a “convergence point of a set of key principles of the constitutional system” (Judgment No. 88/1991 of the Constitutional Court). This implies that a prosecutor is subject only to the law, just like a judge; hence, he has the same guarantees of functions.

Internal independence can be a challenging issue, because it is very complex to balance the interests involved.

On one hand, the rule of law applied to prosecution, resulting from mandatory prosecution, would seem not to allow hierarchical forms of organization for prosecution offices.

On the other hand, the framework of constitutional provisions, the need for a uniform prosecution and the reinterpretation of mandatory prosecution in the light of the introduction of “priority criteria” would seem to allow an organizational model built upon an internal hierarchy, as partly accomplished by the Legislative Decree No. 106 of 20 February 2006. However, this model was attenuated by the application of the High Council of the Judiciary, i.e. the top organizational body of the judiciary. It provided a constitutionally oriented interpretation towards the autonomy and professionalism of individual public prosecutors.

The Law No. 71 of 17 June 2022 has recently interpreted this model once more, by lining up the procedure for approving organizational projects of Prosecution Offices to the Courts’ procedure. Therefore, it rules that

internal independence shall be ensured as well as the proper choices of Chief Prosecutors (such as the assignment of cases, the allocation of resources), hence good performance and effectiveness, legal certainty and predictability that duly characterize prosecution (from crime registration to the investigation management).

In Italy, after a complex evolution that I cannot summarize here, such a trait of both *external* and *internal* independence accomplished the transition of public prosecution from “legality body” to “justice body” (Judgment No. 88/1991 of the Constitutional Court). It shall ensure the compliance with the principle of equality, and the effectiveness of guarantees and safeguards, and it shall contribute to a fair and impartial administration of justice. These goals assume the public prosecutor’s independence as the first stronghold of the system when a notice of crime is under examination. Consequently, prosecutors shall perform their functions without any conditioning from other Institutions, private individuals, politics, lobbies, the press, and big business. The statements included in many international documents also follow this line. Among these documents, we can find at European level:

- the Recommendation Rec(2000)19 of the Committee of Ministers to the Member States on the Role of Public Prosecution in the Criminal Justice System;
- the Recommendation 1896(2010) and the Resolution 1685(2009) of the Parliamentary Assembly of the Council of Europe;
- the *Report on European Standards as Regards the Independence of the Judicial System: Part II –The Prosecution Service*, adopted by the Venice Commission in its 85th Plenary session in 2010;

- *The Bordeaux Declaration on “judges and prosecutors in a democratic society”* (adopted by the CCPE and the CCJE on 18 November 2009), stating that both judges and public prosecutors shall be “independent and impartial”.

These documents outline the minimum standards of prosecutorial *external* independence (in short, the independence from the executive power or the political power with respect to specific cases) and prosecutorial *internal* independence (in short, the guarantees of non-interference from higher rank prosecutors, unless it is justified and regulated).

Independence can be explained and justified because the interest pursued by the public prosecutor’s action during trial is a matter of general interest. Although he plays the formal role of party in the course of trial debate, his task is to cooperate with the judge in view of the proper enforcement of the law, with the aim of ensuring the values of the rule of law, pertaining to the social community as a whole. The public prosecutor is required to ascertain the truth through the correct application of the law: he shall act fairly and impartially, he shall not necessarily pursue the defendant’s conviction as a goal (Article 358 of the Code of criminal procedure).

The compliance with the law is the reason for independence, but also the guiding light for keeping it, since both prosecutors and judges are subject to it. They shall interpret the law in the light of the Italian Constitution and the transnational and international Charters, and they can submit a request for constitutional review, if needed.

Independence is rooted in the need for the correct application of the law and maintained by its strict compliance, as a necessary tool for defending the

rule of law. Law, independence and democracy are linked in turn by an inseparable relationship. They co-exist, live and fall together.

However, independence cannot free itself from the polarity connected to power, the liability, which is accounted for in several matters in the Italian legal system, through mechanisms needed to ensure it. This ensures that public prosecutors shall be subject to the law, hence the proper performance of their functions and the compliance with the duties pertaining to the status of judges and prosecutors, even in relation to their deontological duties. They are ruled by the disciplinary code of conduct, the Council's guidelines and the ethical Code of the National Association of Judges and Prosecutors. Therefore, independence is an essential safeguard to be conquered and defended rigorously every day in the functional and extra-functional conducts, in strict compliance with the law, with consideration and courage. This way, it cannot be pierced and destroyed.

The mentioned *new* dimension of Public Prosecution, where the guarantee of independence is pivotal, well characterizes the Prosecutor General's Office at the Italian Supreme Court (P.G.).

The Office stands at the summit of prosecution offices, but it does not hold a hierarchical position. It cooperates with the above Court to provide a correct and uniform interpretation of the law; it is the holder of public interest in the defense of the law and its unity; it brings a true independent point of view to trials. In criminal matters, the Prosecutor General's Office is not responsible for initiating and driving cases through appeals; it intervenes in trials before the Supreme Court where it is free to draw its final statements, with no obligation to provide support to the reasons of the appealing prosecutor. It also holds a decision-making function when it

solves the conflicts between prosecutors working in different districts, even different jurisdictions (ordinary jurisdiction and military jurisdiction), and conflicts of jurisdiction between the EPPA and Italian prosecution offices, as well as in the decisions concerning special cases. Thus, it performs the “nomophylactic” function¹, devoted to uphold and apply the Supreme Court’s case law.

By the means of a non-hierarchical and cooperative system with District Appeal Courts, the Prosecutor General’s Office is also the body promoting the performance of the system, by supervising prosecution offices’ activities to ensure:

- the compliance with the rules of fair trial;
- the punctual exercise of the direction, control and organization powers by chief prosecutors;
- the compliance with the provisions relating to the entry of any offence in the crime registry (Article 6 of the legislative Decree No. 106/2006), as well as “the supervision” of the Anti-mafia and Anti-terrorism Prosecution Office.

When the prosecutors of the Prosecutor General’s Office intervene in civil cases before the Supreme Court of Cassation, even by submitting an appeal “in the interest of the law” (Article 363 Code of criminal procedure), in the cases and ways provided for in the Code of civil procedure, the Office’s features as “justice body” are enhanced. This intervention is how the legal system complies with the need for assigning the task of providing any useful element for the correct application of the law to a public body, beyond the

¹N. of T.: the task of ensuring compliance with the law and its uniform interpretation.

litigants' interests. The Prosecutor General's Office performs a similar function as the Advocates General in the proceedings before the EU Court of Justice.

International activities are also relevant, and even more so is disciplinary action. The Prosecutor General is responsible for disciplinary action (as well as the Minister of Justice) against ordinary professional members of the judiciary (judges and prosecutors). He conducts the relevant investigations in view of any hearing before the Disciplinary Chamber of the High Council of the Judiciary, whose decisions can be appealed before the United Civil Chambers of the Supreme Court of Cassation. In this respect, the Prosecutor General does not only play his role in the investigation and prosecution, but also in decision-making. Thus, he combines his driving role (searching evidence, just like the public prosecutor during the preliminary investigation in criminal proceedings) with his guarantee functions. He can also decide on whether he wishes to conduct a disciplinary action, to file a case; hence, he enhances his role as justice and guarantee body.

This complex and delicate task must be accomplished by complying with the typicality principle and the rule of law, and the constitutional values governing the jurisdiction. This way, independence and autonomy are prearranged guarantees to ensure that judges and prosecutors are subject only to the law, assuming that we need to ensure the strict compliance with the duties imposed on them.

Finally - and I am moving to my conclusions -, this is a favorable occasion to recall and highlight that the independence of public prosecutors is one of the cornerstones of the constitutional State and the rule of law, and a value that we must safeguard and fulfill. We should keep in mind that cooperation

is our goal, so that all the States can assist in creating a “*Community of law*”, without prejudice to their autonomy and independence. There, the compliance with the *Rule of Law* shall be pivotal, and the action of independent public prosecutors essential to reach it, thus ensuring the maintenance of peace and the protection of fundamental rights.

I would like to thank you for your attention. I wish you all the best for the works of the Conference.

Yerevan, 1 July 2023

Luigi Salvato,
Prosecutor General at the Supreme Court of Cassation