

ACCOUNTABILITY AND TRANSPARENCY OF THE HIGH JUDICIAL COUNCILS- BEST PRACTICES AND EXAMPLES *

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ABSTRACT

The Judicial Power is one of the Organs of Sovereignty and it's an independent power. The Public Prosecution System, according the Constitution, is part of the Judicial Power, and its professionals are magistrates, in a parallel way to judges, even if they have a hierarchy.

Judges are independent and Public prosecutors are autonomous, and this double circumstance does the independency of the Courts in general. To ensure this independency, judges and Public prosecutors have respective Superior or High Councils.

All professionals have the responsibility of their work in front the Society, as the judges and Public Prosecutors have. However, it's understandable that these ones may have a specific modus to define that responsibility taken into account the special mission: to administrate justice, including criminal justice.

Even so, as they share the management of the judicial system, respective High Councils have the duty of accountability to the Community, giving to it the necessary explanations about the activities developed, the problems and the objectives they have.

The HJC should also act with external and internal transparency, as a contribution to reinforce the credibility of the system, and to be fair in the internal proceedings.

Key Words: Constitution; Judicial Power; "Self-Government"; Independency; Autonomy; Transparency; Accountability.

ÖZET

Yargısal Güç, egemenliğin organlarından birisi olup, bağımsız bir güçtür. Anayasaya göre Cumhuriyet savcılığı sistemi, yargısal gücün bir parçası olup, hiyerarşi de olsa bu sistemin profesyonelleri, hakimlere paralel olarak magistrate hakimlerdir.

Hakimler bağımsız, Cumhuriyet savcıları özerktirler ve bu iki durum genel olarak mahkemeleri bağımsız yapmaktadır. Bu bağımsızlığı sağlamak için,

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hâkimlerin ve Cumhuriyet savcılarının temyiz ya da yüksek konseyleri bulunmaktadır.

Hâkimler ve Cumhuriyet savcıları gibi tüm profesyonellerin toplum önünde çalışma sorumluluğu bulunmaktadır. Ancak, bu kişilerin bu özel misyonu dikkate alan sorumluluğu tanımlayan belirli bir tarzları olabileceği de anlaşılmaktadır: cezai adalet dahil, adaleti yönetmek.

Yine Yüksek Konseylerin, yargısal sistemin idaresini paylaştıkları gibi, ilgili geliştirilen faaliyetler, yaşadıkları problemler ve hedefleri hakkında topluma hesap verme görevleri de bulunmaktadır.

Yüksek Yargı Konseyi ayrıca, sistemin güvenilirliğini güçlendirmeye katkı olarak iç ve dış şeffaflıkla hareket etmeli ve dahili davalarda adil davranmalıdır.

Anahtar Kelimeler: Anayasa, Yargısal Güç, “Öz-yönetim”, Bağımsızlık, Hesap verebilirlik, Özerklik, Şeffaflık.

INTRODUCTION

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The text aims to present, in a general view, the Portuguese organization of the judicial power, as a sovereignty power, including the role of the Public Prosecutor's System, and it tries to explain the reasons to the existence of High Judicial Councils. Furthermore, the text gives some words on the question of accountability of the system face to face the Community and on the question of transparency.

I. GENERAL REMARKS ON THE ORGANIZATION OF THE JUDICIAL POWER: THE CONSTITUTION

Introduction and Constitutional Principles

Portugal only in 1974, by the revolution of April, conquered the Democracy. A Constituent Assembly approved the Constitution of the Portuguese Republic, in 1976, the basis for all law system.

Even if the Constitution of 1976 has been modified, it maintains the same architecture of the political organization of the State and of the functions of sovereignty, exercised by several powers: President of the Republic; Parliament, Government and Judicial Power.

The Constitution gives the framework to the all judicial system. It states that **the judicial power administrates justice in the name of the people,**

thus conferring democratic legitimacy to that power. In this sense citizens are the source of the power to administrate justice and, in the same time, their receiver.

Constitution recognizes and establishes a package of important principles and rules:

- According to the **“rule of law” principle**, Portugal is a rule of law and democratic State, which means, at least, the respect of law, by private and public entities. And it means also that relationship between citizens and the State is conducted under the law.

- And taking into account **the rules on the division of powers**, the several powers should not interfere in the action of another power, even whether they should have reciprocal collaboration, and in consequence the independency of Courts and the Autonomy of Public Prosecution are also recognized.

The Fundamental Law conceives Judiciary as a Sovereignty Power, with the competence to administrate justice. This power is exercised on **behalf of the People**, but it's exercised under the laws approved by the representatives elected to the Parliament or even by the Government.

Nowadays, the most important critics are more against the **“results”** of justice and less against the legitimacy of the justice system!

This function of “administration of Justice” is bigger than of the “Judgment”. The judgment is inscribed on that one, is one of its parts.

With this I intend to explain a new concept to accommodate the role of Public Prosecution as part of the Judiciary! Indeed, if the Public Prosecutor doesn't “judge” he or she administrates justice! Really, Public Prosecutor does different tasks in relation to the judges but Public Prosecutors and judges act in the same direction!

To the judge the law commits the incumbency to “decide” on the case. He or she acts on the base of the conviction on the law to apply to the facts. On this free conviction the judge is only obliged to respect the law, and he or she must act in a impartial and objective way. The Public Prosecutor is qualified by law as magistracy, with a parallel statute to the judges!

Public Prosecution is a magistracy of initiative, action and promotion. The task is to supervise the values and public interests, promoting the protec-

tion of these values and interests or acting to repair them when they are violated!

It is only subject to the law (as the judge) and to the legal directives issued by the hierarchies, meaning that the Public Prosecution is Autonomous on its action, being avoided any kind of external interference by the others Powers.

II. REASONS TO THE EXISTENCE OF THE HIGH JUDICIAL COUNCILS

Being the Judiciary independent of the others powers (in which the autonomy of Public Prosecution is inscribed²) **the system appeals to a “self-government” as a tool to guarantee the independency and autonomy³.**

Today and everywhere is accepted the theory of Montesquieu on the principle of division and independence of the State powers.

² The judges, when they are deciding a case, should/must be totally independent, meaning that their decision should be the result of a) the facts submitted in the case, b) the law to be applied, c) the conviction of the judge

The third plan (e.g., the conviction....) is the plan where the real independency has its own place!

When the judge is establishing in his or her mind the conviction on the case, all external or internal circumstances should be avoided in the sense of “in-justified interference”.

Such kind of interference can come by the way of interests (external or internal), preferences, and so on.

But, in criminal matters, the independency of the Courts/Judges could be granted without the autonomy of Public Prosecution? No! Indeed, if a Public Prosecutor receive order to go or not to go to the Court in a different way of his or her conviction and the evidences he or she has collected this means that the Judge only will judge what the Power before the Public Prosecutor wants to be judged!

This is the reason to “give” the qualification of magistracy to the Public Prosecutors and to granting them the autonomy!

The Public Prosecution Service does not depend upon the Government for purposes of its management, a task entrusted to a high body – **the Prosecutor General’s Office** -, which comprises the **High Council of the Public Prosecution Service**. This so-called ‘self-government’ does not control, however, basic issues such as the financial resources, the human resources allowances, and so on.

³ The Portuguese Law provides that: “The autonomy of the Public Prosecution Service is materialised in its being bound by criteria of legality and objectivity and in the exclusive submission of the Public Prosecutors to the directives, orders and instructions set out in this law”.

This means that, side by side with the others powers (executive and legislative) we have the judicial power.

There is no unique model or a standard uniform to this power. So, even in a homogeneous space (as the European Union), there are several models, based on different factors as the history, the culture or economy.

In Europe we know, at least, the continental and the English models. And the European models are different of the United States models.

However, there are some common characteristics to all the models. One of them is of the independency/autonomy to the other powers. This means that the *judicial power must benefit of external and internal conditions to take decisions (to exercise the function...) in an absolute independency, without any improper influence.*

Along the times, it were being recognized that it was necessary to create autonomous mechanisms, separate of the politic power, mainly of the Executive (Ministry of Justice) as the best guaranty to an effective and real independency.

The idea was to establish or *to built a own management capacity* (above all in the assessment/evaluation, promotion, mobility and disciplinary issues), *immune to the influence of the other powers (politic or economic)*, even if should be not totally strange to them (at least in its composition).

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All these reasons were the base to the creation of the High Judicial Councils, considered as “**self-government**”.

Evidently, *this is not an absolute self-government*, in the perspective that, normally, it has not the budget power, but it guaranties, at least, that there is no direct, improper or undue influence. In this sense, HJC share the management of the system with the Ministry of Justice, and, in this way, they also share the responsibility of the system.

In other hand – and accordingly to the most common models – in the composition of those High Councils are both members of the magistracy and from outside of magistracy, coming as representatives of the politic power or of the civil society (professors, experts, and so on...).

The objective of this mix composition is to avoid corporative perspectives in the internal decisions and to have news attitudes and new knowledge.

And, in some way, this contributes to the legitimacy of the judicial power, especially in the systems where the magistrates are not elected.

The ‘self-government’ of Judges and of the Public Prosecutors is operated by the respective High Councils, as provided for in the Constitution and the law.

In this context, in our system we have:

- The High Council for Judges (common law judges)
- The High Council for Public Prosecutors
- The High Council for Administrative Judges.

The establishment of these three Councils is justified by the fact that we have three “kind” of magistracies (common judges, public prosecutors and administrative judges) with parallel but different Statutes.

III. PRINCIPAL MISSIONS OF THE HJC (EVALUATION, MANAGEMENT AND DISCIPLINARY MATTERS)

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Although they share similarities in the sense that they are entrusted with the management of the respective bodies of magistrates, these High Councils differ in several other aspects. To these Councils is incumbent to do the general management of magistrates (judges and Prosecutors) and exercise disciplinary tasks.

In the context of this self-government, incumbent and exercised by the High Judicial Councils, these main tasks are, in a common way, developed by them:

to assess/evaluate the performance of the judges and public prosecutors;

to do the general management: to appoint, to promote, to move, judges and public prosecutors;

to exercise the disciplinary action or to supervise in general the activity of the judges and public prosecutors.

Evidently, two of these tasks are sensitive issues:

the evaluation, which one allows the eventual promotion in the career with the opportunity to occupy better places in the system

and the disciplinary action, which one can be an obstacle to that promotion and source of problems!!!

IV. ACCOUNTABILITY IN AN EXTERNAL AND INTERNAL VIEW

“**Accountability**” is interpreted as a duty to explain to the Community, in a perspective of communitarian responsibility, the activities, the results and the omissions by one Public Organization, taking into account the goals and the missions to which is incumbent.

A famous Professor of Penal Law, in a speech on the theme “**Autonomy and communitarian accountability of the Public Prosecution System - a difficult balance**” said: *“Concerning the principle of communitarian responsibility, I take it in the sense of the united states doctrine (...) speaks in a democratic principle of accountability connected to the responsiveness (...) as necessity and indispensability of the representatives and owners of public charges to take into account the interests, the expectations and needs of citizens; and accountability as a duty of the owners of the public jobs to give explanations to the Community, concerning their functions or concerning the outcomes of the execution in the politics, namely in the criminal politics”.*

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The High Judicial Councils, acting as a guaranty of the independency of Judges and of the Autonomy of the Public Prosecutors, and sharing the management of the system, they have a double responsibility in that exercise:

an accountability in a external way, as they share the management of the judicial system, namely in the management of the human resources;

a responsibility in an internal perspective, in front of the members of the judiciary (Judges and Public Prosecutors), because they should do their tasks in an objective, legal and fair missions (namely within the evaluation and disciplinary tasks).

Every public organization has the duty to explain what it does, or doesn't, in favour of the Community. As they are invested in a public power, and as this has the source in the Community, such Public Organization should respond before that Community.

It's sure that the accountability of the politic power is expected in a different way of the accountability of judicial power.

Indeed, the representatives of the politic power receive their legitimacy directly by the people (elections). In Justice there are the High Judicial Councils that, indirectly, reflect the popular sovereignty. So, it's necessary reinforce also legitimacy, asking for more accountability of the Judicial power.

In this way, and considering that the High Judicial Councils share the management of the judicial power, should they, also, in a public, objective and clear line, inform both the others powers and the people,

about the movements, and their reasons, of the judges from a Court to another Court (taking into consideration the principal of the natural jurisdiction);

about the promotions

and about the sanctions it applies.

how they do the management of the human resources

why this or that Court is not ruling as the others

306 why the decisions of the Courts comes so late or without a minimum of quality.

why this judge or that public prosecutor has no sanction when he or she doesn't work, or doesn't work well.

They have the duty to explain the cases that, by several different reasons, become broadcast in the media or they are polemic or they have a great social relevance.

The idea is not to “censure” or criticise the concrete judicial decision - because this belongs to the private conviction of the concrete judge - but because there is the obligation to give social explanations, in accordance with this principle of accountability.

As the judicial power is exercised on behalf of the people (this is the rule in Portugal), this people has the right to the information on the management and administration aspects. However, this genre of “supervision” has some limits and conditions, in consequence of the division of powers and independence of the judiciary.

So, the judicial power is not supposed to give explanations (in a subordinate perspective) to the Executive or Legislative. This is the standard model in Europe, including in Portugal⁴. But I know that there are other

⁴ The history shows that the process of “autonomy” of the Public Prosecution Service towards the political power has been and is currently is a gradual process, which has not yet come to an end!

When is defining the Public Prosecution Service, the Constitution states that it is autonomous from the political power.

Neither the President of the Republic, the Government nor the Parliament may give guidance on particular cases.

And no intervention can/should be done unless through the representatives chosen to comprise the High Council, concerning general issues, with general interest to justice or to the magistracy, and in accordance with the rules of the competences of the Council.

Nevertheless, the Statute allows the Minister of Justice some other types of intervention. A) One of them is the possibility granted to the Minister of Justice to take part in the Council meetings in order to give information or to enlighten (article 80^o) (without the right to vote...). The Minister sometimes goes the Council meetings, in particular when new projects are to be displayed. B) Another is the possibility for the Minister of Justice to give to the Public Prosecution Service, in representation of the State, specific guidance on **civil actions** to which the State is a concerned party. While playing this role, the Public Prosecution Service acts as the State Attorney.

Does this mean that the political power may give «orders» to the Prosecutor General or to the High Council?

As to the Council, the answer is no. And in what concerns the Prosecutor General?

It cannot be forgotten that the Prosecutor General is appointed by the President upon proposal of the Government, which grants him a double political legitimacy. But is there a double link or any kind of subordination?

It can be said that in case of change of the Prosecutor General, because they are not satisfied with his or her tasks accomplishment, both Government and President have to agree thereupon. And that is the only binding plan: neither the Government nor the President may give orders to the Prosecutor General or to the High Council.

The Parliament exerts no general «supervision» over the Public Prosecution Service’s activities and, failing any political link, the Parliament can do nothing, directly, in case it intends to «criticize» politically the Prosecutor General!

However, something is changing after the approval of an Act on the settlement of priorities for the criminal investigation, case in which the Prosecutor General will have to submit a report on the implementation of the priorities program to the Parliament. Furthermore, he will have to respond before the Parliament for the effective implementation of such a program. According to some individualities, this obligation is already statutorily foreseen in the sense that the Public Prosecution Service puts in practice the criminal policy established by the sovereignty bodies.

On the opposite side, there are the other two Councils – the High Council of the Judiciary and the High Council of the Administrative and Taxation Courts.

Their relationship with the political power is clearer: the only direct relationship is that resulting from the fact that some of the members are designated by the President and others by the Parliament (and not the Government).

models in which, in a certain dimension, the judicial power responds before the Parliament.

The dilemma is on this: if all the powers are under the rule of responsiveness or accountability, and to some kind of the supervision of another power, it can exist one, the judicial power, which is not obliged? But, if it can escape to that rule - in respect of the division of powers and independence of justice - how to ensure the duty of “accountability”?

The judiciary should, in this so high complex situation, act in a cautious dimension.

V. TRANSPARENCY OF THE MISSION OF HIGH COUNCILS

And what are the tools of the HJC to effective their missions including this principle of accountability, in a objective and transparent way? In the subject of the transparency of the exercise of the HJC in my opinion it's possible face it in two plans:

External plan, giving visibility to the other powers or to the public, combating the idea of “class”.

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Internal plan, to the members of the sector (judges and public prosecutors), applying legal and objective proceedings with clear criteria in the internal decisions, both to the assessment and disciplinary measures.

A. External Plan

The High Judicial Councils elaborates an *Annual Report* of the situation and sends it to the Parliament, according to the Law. It is published in the Official Journal.

His peers elect the respective president for the Supreme Court, and he or she holds the office of president of the Council ex-officio.

Here, the relationship with the politic power is more clear, because we are in front of “judges”, and, we can say, the politic power has no doubt that it must respect the real independence of the judges and of the Courts.

Concerning to the Public Prosecutors, and their system, there are politics, opinion makers thinking that we, public prosecutors, are not magistrates, we don't belong to the judicial power and, finally, we must (perhaps in the next future...) depend in absolutely of the Minister of Justice.

The General Prosecutor's Office/High Council of Public Prosecutors elaborates also a Annual Report, relating all the activities of the Public Prosecution System, of the previous year, discriminating the tasks did in respective jurisdictions, illustrating the most important cases and giving statistic numbers of proceedings solved or that remain in the system.

And the High Council elaborates also another Annual Report on its specific activity on the evaluation and disciplinary action.

They are published in the websites of the Institutions and with this method all persons are able to know all the activities carried out by the HJC. They can criticise, do remarks and suggestions. Unfortunately, normally this doesn't happen!! Only the journalists and newspapers are interested to the bad things (*disciplinary actions...*).

Another way is done by press releases, giving notice about this or that concrete proceeding, but with the limits of the "secret of justice".

Sometimes the top responsible give explanations on the TV... but this are not the best method, because it's very dangerous. In fact, and in my opinion, they are not prepared to face the clever journalists!!!

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The best way is to give this particularly mission to a press office within the Courts or the High Councils. And the Councils they have such offices. The idea is to extend them to the main Courts, in order to have experts (with special train...) to face the questions of the journalists and to the explain them the judicial decisions.

With these tools the system is able to overstep the limitation imposed by the duty of reserve to the judges, which impede them to talk on their cases!

B. Internal Plan

As I said above, in this internal plan is situated the concrete intervention of the HJC to do their tasks on the assessment, evaluation, promotion, transferring or dismissing of the judges or public prosecutors.

For example, and concerning Public Prosecutors, and according to the Statute (article 27º) "*the High Council of the Public Prosecution Service is competent:*

a) To appoint, assign, transfer, promote, dismiss or remove from office, consider the professional merit, take disciplinary action and carry out, in general, all acts of an identical nature with regard to the Public Prosecutors, except for the Prosecutor General;

f) To **acknowledge claims** falling within this Act;

g) To approve the annual plan of inspections and to order the carrying out of inspections, investigations and inquiries”

The High Council when intends to do an assignment, a transfer, or wishes to promote the magistrates, organizes the so called “**Movements**”. To prepare all the procedures concerning the movements, there is established a working group, within the Council. And there are legal rules to respect! But, this is a issue to which people does strong critics because *it is not totally clear and transparent!*

Indeed, many times we don’t know very well why a public prosecutor that doesn’t accomplish with the legal criteria is moved for a place asked by another prosecutor that accomplish with those criteria!

310 The professional Association and individual public prosecutors did many objections to the system but until now things remain in the same.

Assessment criteria and effects

The District Prosecutors and the Deputy District Prosecutors are assessed by the High Council of the Public Prosecution Service.

The assessment must consider **the manner** in which the Public Prosecutors carry out their duties, the caseload and the difficulties encountered, the working conditions, their technical training, intellectual abilities, any legal works published and civic aptitude.

The District Prosecutors and the Deputy District Prosecutors are assessed at least **every four years**.

Each year the High Council approves a plan of inspections, including inspections to assess the professional merit of the Prosecutors and to determine how this or that judicial circumscription or service is operating, on the perspective of the Prosecutorial obligations.

Disciplinary liability

One of the most important competences and tasks of the High Council is the exercise of the disciplinary action.

Effectively, the Public Prosecutors are subject to disciplinary measures under the terms of the Statute (*article 162º*).

The law determines that the disciplinary offences consists of those acts committed by Public Prosecutors in breach of their professional duties, as well as those acts and omissions of their public life – or which have a consequence on them – that are incompatible with the decorum and dignity necessary to the performance of their duties.

Another set of powers granted to the High Council concerns the **professional deontology and supervision**. Within these powers, the Council proposes to the Prosecutor General the issuing of directives on how the Prosecutors should hold their office and with which the Prosecutors are to comply.

On the other hand, the High Council is entrusted with the supervision of the Prosecutors' conduct and the improvement of both the Public Prosecution operation and the judicial agencies (*article 12 (2) (g)*).

But, today, everyone of these rules can be nothing, because after a new law of 2007, established by the former Government in accordance with the “hierarchy” of the Public Prosecution System, it's possible to avoid the criteria of merit applying only the criteria of “confidence”.... to be appointed for this or that charge or post!

How can people or eventually individual prosecutors supervise this? This is transparency? Is it possible, or not, with this criteria to put the “right” person in the “right” criminal proceeding, for example?

In my opinion, this is not fair! This could be not transparent! This could be dangerous.

And all the opposition's Parties in the Parliament thought the same. A demand of constitutionality's supervision has been subscribed by the Members of the Parliament and submitted to the Constitutional Court in order to analyse if those rules are or not against the principle of Autonomy.

Meanwhile and until the decision on that comes, the law is applied!

CONCLUSIONS

A. The Judicial Power is one of the Organs of Sovereignty and it's an independent power.

B. The Public Prosecution System, according the Constitution, is part of the Judicial Power, and its professionals are magistrates, in a parallel way to judges, even if they have an hierarchy.

C. Judges are independent and Public prosecutors are autonomous, and this double circumstance does the independency of the Courts in general.

D. To ensure this independency, judges and Public prosecutors have respective Superior or High Councils.

E. All professionals have the responsibility of their work in front the Society, as the judges and Public Prosecutors have.

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