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КОМИССИЯ ПО ПРАВАМ ЧЕЛОВЕКА
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ГРАЖДАНСКИЕ И ПОЛИТИЧЕСКИЕ ПРАВА, ВКЛЮЧАЯ ВОПРОСЫ НЕЗАВИСИМОСТИ СУДЕЙ, ОТПРАВЛЕНИЯ ПРАВОСУДИЯ, БЕЗНАКАЗАННОСТИ

Вербальная нота Постоянного представительства Италии при Отделении Организации Объединенных Наций в Женеве от 3 марта 2003 года в адрес Управления Верховного комиссара Организации Объединенных Наций по правам человека

Постоянное представительство Италии при Организации Объединенных Наций и других международных организациях в Женеве выражает свое почтение Управлению Верховного комиссара Организации Объединенных Наций по правам человека и имеет честь препроводить ответы правительства Италии* на ряд замечаний, высказанных Специальным докладчиком по вопросу о независимости судей и адвокатов г-ном Парамом Кумарасвами после его визитов в Италию. Постоянное представительство Италии будет весьма признательно Управлению Верховного комиссара за распространение упомянутых ответов в качестве официального документа Комиссии по правам человека.

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* Воспроизводится в приложении в полученном виде на том языке, на котором они были представлены, и на английском языке.

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Annex

With regard to the feeling magistrates have that their independence is threatened, no mention is made of any specific, concrete cases. In fact, the only draft organizational legislation on judicial reform submitted by the Government does not change the regulations governing magistrates and does not affect the guarantees of their independence. It contains rules designed to enhance magistrates' professionalism. In this connection, access to the competitive public examination is reserved for those who have already passed several competitive civil-service examinations or followed courses in law schools, and who have already qualified as lawyers or have a university doctorate. It is expected that 50 per cent of the positions of magistrates in courts of cassation will be filled by means of a second-stage competitive examination. There is no separate career path for judges and prosecutors, but magistrates who after a certain period wish to be transferred to another office to perform duties of a different nature must move to another district.

With regard to the view that the Italian judicial system allows procedural mechanisms to be taken advantage of, notably in cases before the Milan courts, it should be stressed that the right to a defence is a constitutional principle under the Italian system and its use in criminal procedure is a guarantee of equality. For this reason it cannot be taken away or restricted in the case of specific individuals, such as politicians. The latter therefore have full access to a legal defence in the form and with the effects provided for by law for all accused persons.

With regard to the claim that "the legislative process was used ... in cases already before the courts", it should be noted that, in the Italian system, legislative initiatives are the exclusive prerogative of Parliament and that the work undertaken by Parliament is determined solely by each house. In the past there have been links between legislative initiatives and developments in court cases; this is true of more recent cases. The following examples can be mentioned here:

(1) The new definition of the crime of abuse of authority (article 323 of the Penal Code) contained in Act No. 234 of 16 July 1997, which narrowed the description of behaviour considered as criminal and specifically abolished the crime of non-pecuniary abuse of authority. At the time, the Prime Minister had been charged with abuse of authority in connection with the privately negotiated transfer, when he was chairman of the Institute for Industrial Reconstruction (IRI), of Cirio-Bertolli-De Rica to the Fisvi company. In the case of Mr. Burlando, a minister, magistrates have announced that the proceedings against him have been suspended pending a decision by Parliament;

(2) Act No. 405 of 23 November 1998, on territorial jurisdiction for judicial review. This reform gave the Court of Appeal new powers to derogate from the ordinary territorial criteria, in order to prevent judicial reviews from being carried out by a court in the same district as the judge concerned (this meant that the review of the Sofri case could be heard away from Milan);

(3) Another example of practical steps taken in the judicial field is the reform of article 277 of the 1930 Code of Criminal Procedure, by means of the so-called Valpreda Act (at the time, Valpreda was being held in pre-trial detention for the Piazza Fontana massacre of 12 December 1969). The Act, sponsored by the second Andreotti Government, was adopted with the support of left-wing parties in December 1972 after intensive lobbying. It opened up for the first time the possibility of granting bail to those accused of very serious crimes, even those punishable with life imprisonment. The campaign to have limits set on pre-trial detention dates from the adoption of this act.

With regard to the establishment of a committee consisting of representatives of different parts of the judicial system to study the system as a whole, the following points can be made.

If this remark was intended to draw attention to the need to set up a parliamentary committee, it should be noted that, under the Italian Constitution, parliamentary committees can be established only by ordinary statute and that they generally consist only of members of Parliament in such a way as "to reflect the size of parliamentary groups" (article 72 of the Constitution). The establishment of parliamentary committees therefore requires broad political consensus. Recently, committees consisting of members of both houses of Parliament (bicameral committees) have been introduced to examine and resolve the problems of the Italian judicial system, but their introduction (by ordinary statute) was met with serious objections with regard to their recognition as committees with true parliamentary status. Hence, it is difficult to see if they really can make an impact on legislative procedure. If, on the other hand, the remark refers to the establishment of study groups by the Ministry of Justice, it should be noted that the Ministry has already set up committees to make proposals for reforms of the various parts of the judicial system. These committees, which include representatives of the legal profession, academia, the judiciary and so on, examine the general problems relating to the functioning of the judicial system as a whole. With regard to these initiatives, it should be pointed out that the Italian system provides for an institutional linkage with the Higher Council of the Judiciary (CSM), the independent body that oversees the judiciary, by virtue of article 10 of Act No. 195 of 24 March 1958, which regulates the relationship between the Council and the Minister insofar as it recognizes the Council's power to express "opinions to the Minister on bills concerning the judicial system".

Moreover, it has always been possible to coordinate with the body representing the judiciary through consultations between the Minister and that body, with a view to dealing with proposals and amendments.

With regard to the recent adoption and enactment of the law on the transfer of criminal proceedings, it should be pointed out, firstly, that it reintroduces the concept of "legitimate suspicion". This concept had already been expressly provided for in article 55 of the 1930 Code of Criminal Procedure and by Directive No. 17 of article 2 of Act No. 81 of 1987 giving the Government legislative authorization to issue the current Code of Criminal Procedure. When the time came to act on that authorization, the lawmakers omitted to include "legitimate suspicion" as grounds for transferring a trial to another court. This led the Court of Cassation, through Ordinance No. 25693/02 of 30 May 2002, to raise the question of the constitutional legitimacy of article 45 of the Code of Criminal Procedure before the Constitutional Court.

The recent law therefore put into effect a specific provision of the law containing the authorization, by ensuring that the act delegated once again corresponded fully to the act of delegation, in accordance with article 76 of the Constitution, thereby filling a gap in the rules on all possible grounds that might compromise the impartiality of the judge and the independence of the witnesses and parties in a trial.

It should be noted that the new rule is the result of a parliamentary, not government, initiative.

As for the time taken to adopt the law, it is underlined that the work of Parliament is for each house to decide and is governed by parliamentary rules (article 72 of the Constitution).

Lastly, with regard to the time taken to enact the law, it is pointed out that, under the Constitution (art. 73), this is a matter for the Head of State alone.

With regard to the issue of the Prime Minister's testimony, it should be pointed out that article 205 of the Code of Criminal Procedure expressly stipulates that the Prime Minister may request a hearing in the circumscription where he performs his duties, in order to ensure that he can continue to perform them correctly. This rule was laid down in accordance with the instructions of the Constitutional Court (ruling 76/1998), which, in keeping with the previous Code, had confirmed that it was perfectly legitimate to have special arrangements to deal with the testimony of so-called "high officers of State", saying that the judge should meet the Prime Minister, once an appropriate agreement had been reached, "in the place designated by the witness". According to the Court, this particular rule is justified by the "indisputable requirements and guarantees of the office held by individuals occupying certain high offices of State". The current provision thus does no more than recognize these principles.

With regard to the fact that one of the Prime Minister's lawyers currently chairs the Judicial Committee of the House of Deputies, it is pointed out that every citizen has the right to be elected (articles 56 and 58 of the Constitution). There is no rule stating that acting as defence counsel is incompatible with being a deputy and member of a parliamentary committee.

With regard to the alleged concerns of the Council of Europe about the effectiveness of the criminal justice system in Italy, it should be pointed out that the Council of Europe has considered only the length of procedures in Italy and that, after receiving a number of reports from the Ministry of Justice, the Council has taken note of the efforts being made while it continues to monitor the situation.