

THE PORTUGUESE PUBLIC PROSECUTION SERVICE: INSTITUTIONAL CONCEPT AND MAGISTRACY.

COMPETENCES and PRINCIPLES (constitutional, organizational
and interventional principles, and related guarantees)

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1. INTRODUCTION.

1 - Assuming that the Portuguese Public Prosecution Service (PPS) fits into a certain model, the inherent risk of trying to define this “model” is always to simplify what is complex or to understand a given “example” as an “accomplished form”.

Once made this epistemological warning, it is important to remark that “models” have the benefit of favouring analogy and contrast.

2 - What distinguishes the Portuguese PPS model within the Western European context?

In the historical conception of PPS there has always been a political tension between the completion of law and the interests of the executive power, which aren't, quite often, coincident. This tension is revealed into two types of institutional options:

- The option for a more liberal model of Public Prosecution, with an own controlling power, designed as a judicial body that, in the functional division of the administration of justice, has competences of initiative and promotion of its own; and
- The option for a model of Public Prosecution as a State agency, which may be used by the circumstantial political power interested in constraining the administration of justice through the adoption of certain criminal policy options¹.

3 - We can start pointing out that the current Portuguese PPS model has evolved into a State organ within the judicial system, with powers of initiative and promotion that constitutionally completes the “field” of the judiciary, according to the constitutional accommodation of the different existing powers².

¹ Cf. MESQUITA, Paulo Dá. Estatuto do Ministério Público: Raízes, programas, desenvolvimentos, sedimentações e desvios normativos. In 40 anos de políticas de justiça em Portugal (Maria Lurdes Rodrigues, Nuno Garoupa, Pedro Magalhães, Conceição Gomes, Rui Guerra Fonseca, organizers). Almedina: Coimbra, 2017, pp. 271-309. There are, in fact, two great examples that translate these two political-institutional options: the French model and the Italian model of PPS. In simple terms, in the French model, the mark of the executive representation remains alive, its agents are removable, hierarchically subordinate to the executive and responsible for executing orders received. In the Italian model, its agents are magistrates, immovable, independent of political power and judges. The differences and current models in CoE framework can be seen in CoE Parliamentary Assembly Resolution 1685 (2009).

² While assessing the quality of a State “power”, it is necessarily considered the independence of the body that performs sovereign functions. This independence is based on the possibility of initiative in the exercise of its functions. Thus, PPS, as a State body endowed with constitutional autonomy, gives the judicial power the initiative that allows courts to perform independently the functions that the Constitution has empowered them with. The PPS is thus understood as an organ of the “judicial power”. Cf. CLUNY, António Francisco. O Ministério Público e o poder judicial. In Cadernos da Revista do Ministério Público, n.º 6, “Ministério Público: Instrumento do Executivo ou órgão do poder judicial?”, IV Congresso do Ministério Público, 1994, pp. 37-55. In the same line of thought, Cunha Rodrigues alludes

4 – The driving force of the political-constitutional option was to provide the Public Prosecution with a judiciary status and the co-related rules of operation, organization and statute, focused on defending democratic legality and the public interest, institutionally placed in the courts, but separated from, and independent from, judges albeit being a parallel career; autonomous from the executive power, thus moving away from the Napoleonic-inspired model, which has in its links with the executive power a prevailing feature.

5 - In the Portuguese case – while differing from the Italian model - PPS is structured by an internal or functional hierarchy, which ultimately depends from the Prosecutor General; the Prosecutor General's Office - a complex body that also integrates the High Council of PPS – exercises its own competences as the superior body for the management, discipline and functional lead of prosecutors.

6 - There are, let's say, a set of characteristics that give their own imprint, perhaps **hybrid**, to this model while comparing it with the two main examples or models of prosecution mentioned above ³.

7 - The various functions of the Portuguese PPS, corresponding to a multi-functionality of its intervention, can be seen as an interaction between powers and bodies, to which principles can be matched.

to the PPS as a procedurally autonomous judiciary in two ways: the non-interference of political power in the concrete exercise of prosecution and the conception of the PPS as a magistracy itself, guided by a principle of separation and parallelism with regard to the judicature, a concept reaffirmed in several steps of the Criminal Procedure Code, namely as regards the obligation to the strict subjection to objectivity (article 53 CPP), in the application to prosecutors of the provisions on impediments, refusals and excuses (Article 54 CPP), the obligation of the PPS to investigate *à charge et à décharge* (Article 262 CPP), the exclusion of the PPS from the rules of conduct of defence lawyers (Article 362 CPP)) and in the recognition of a legitimacy to appeal in the sole interest of the accused (article 401 CPP). Apud CLUNY, Antonio Francisco, *Ibidem*.

In this context, the Preamble of the 1987 CPP ensures that “[...] the Public Prosecution Service is granted the ownership and lead of the criminal inquiry, as well as the exclusive competence for the procedure promotion: hence it is granted, not the status of a party, but that of an authentic magistracy, subject to the strict duty of objectivity.”

³ Cf. MOURA, José Souto de, *Direito ao assunto*. Coimbra: Coimbra Editora, 2006, pp. 25-26. Cf. SALGADO, António Mota. *Uma brevíssima história do Ministério Público*. Lisboa: 2016, pp. 5 e ss. This evolution, without delving into historical details, was affirmed after the democratic revolution of 1974 and was consolidated in the 1976' Constitution. In the democratic period, the normative framework in which the PPS was structured became governed by Law 39/78 of July, the 5th, and then by the Public Prosecutor's Statute [EMP, approved by Law 47/86 of October, the 15th, with the designation of the Organic Law of the PPS, a designation that was later amended by Law 60/98 of 27 August, whose text suffered the vicissitudes resulting from the Amendment Notice N. 20/98 of 2 November; and successively Law 42/2005 of 29 August; Law 67/2007 of December 31st; Law 52/2008 of 28 August; of Law 37/2009 of 20 July; Law 55-A /2010 of 31 December and Law 9/2011 of 12 April]]. A better understanding of the PPS model which is in force today may perhaps be done in a negative way: PPS is neither an organ of public administration nor an organ of government or of the executive or legislative political power. It is not court or judge or state lawyer. In criminal jurisdiction it is neither a party in a substantial sense nor a supra-third party, as is the case of the judge. Unlike the passive party, which is the judge, PPS is the active part of the judiciary, due to having a procedural promotion capacity.

Accordingly, I will start by providing you with two complementary perspectives:

- **Firstly**, one in which the Portuguese Prosecution model can be defined by its functions and by its organizational connection; and
- **Secondly**, one which identifies this model by the principles that outlines the institutional concept of the PPS, together with the description of its own guarantees, since, without the latter, principles become void proclamations.

8 – On the basis of the analysis of its functions and principles, one can identify the PPS as an active magistracy, an autonomous power that constitutes part of the judiciary, institutionally shaped and legitimated by constitutional, organizational and interventional principles and based, above everything else, on its independence from the other State powers. Besides, its impartiality of action, through which the PPS promotes and defends both the democratic legality and the public interest, solidifies such legitimacy. Therefore, it is obvious that both the guarantees and the conditions for the effectiveness of those competences should be assured ⁴.

9 - Both the content of the competences of the PPS, along with the description of the conditions under which these may be exercised, and its principles of action are mainly found in the Statute of the PPS (EMP), to which the Constitution of the Portuguese Republic (CRP) refers. This EMP, partly adjusted by the new judicial organization, is today set in a new legal framework, approved by **Law No. 68/2019 of August the 27th**.

2. THE COMPETENCES AS A MODEL SYNTHESIS.

10 - The identity of the Portuguese PPS model can be analysed from its competences, as defined by the Constitution and the ordinary law. As an example, we can state that the PPS is nowadays responsible for the promotion and defence of democratic legality, the defence of society against crime, the completion of the principle of equality in the access to justice and the defence of court's independence. These are some of the competences, or powers if you prefer, of the PPS and it is from these competences that its functions arise.

11 – Powers, or competences, are embodied in functions, which are the **material and objective side** of their own, while the organs in charge of exercising these powers and competences constitute their **subjective side**. Therefore, through their interaction they justify the legitimacy of themselves. **It is like saying that function or the exercise of powers makes the organ**, if we have an operative perspective, in which functions precedes the organ and the latter precedes the powers, all ending-up synthesized in **the "model" of PPS**.

12 - This circular and practical relationship between powers, functions and organs in action, from an ethical-institutional perspective, constitutes the virtuous circle where

⁴ What does this all mean? In the one's hand, the principles help the ideal convergence towards the best model of PPS and, in the other hand, principles remain valid if the models of PPS are not pure in practice or variable in geometry.

the legitimacy of the PPS intervention is either confirmed or denied. **We think this is the most meaningful epistemological path given that functions accommodate in themselves the purpose of the intervention of organs while guiding the praxis and the intentionality of powers.**

13 - The PPS has the basic function, *statu nascendi*, of promotion or initiative. This elementary function translates itself into a complex of interventions, a polymorphic characteristic grounded on the plurality and variety of its competences. However, this quite unusual trait may not contribute to an easy understanding of the Portuguese PPS model ⁵.

14 - There are essentially four groups of functions assigned to the Portuguese PPS ⁶.

- **Functions or statutory tasks in the criminal field** that include (i) the lead of criminal investigations and court prosecution (ii) representation in criminal proceedings, in the stages of judicial pre-trial inquiry, trial and appeal (iii) powers to enforce penalties and security detention measures (iv) criminal prevention actions in the framework of both its statute and of the Criminal Investigation Organizational Law that include powers of supervision and coordination of the activity of police bodies (v) enforcement of the criminal policy, lawfully established by the political-constitutional organs of sovereignty.
- **Judicial functions or duties, to be promoted in the courts, of defence and promotion of social rights with personal dimension or that are relevant to the community's life and its guarantee or protection.** Examples of these kind of powers can be given when the PPS has a main intervention in the defence of the children's interests, young people, the elderly, adults with disabilities or particularly vulnerable, let alone those whose whereabouts are unknown. Also in this same category we may include the defence and promotion of collective and diffuse interests, such as environmental protection, territorial planning, consumer rights; the representation *ex-officio* of workers and their families in view of the defence of their social rights, under the terms of the law or when the PPS intervenes in bankruptcy and insolvency proceedings. In short, whenever the law attributes a given competence for main or ancillary intervention or in all proceedings embodied of public interest. These powers include not only promoting the proceeding but to enforce final court decisions.
- **Judicial functions or powers, to be promoted before the courts, in defence of the independence of the courts and of the democratic legality and the Constitution, thus contributing towards a judicial activity in accordance with the State of Law.** These tasks include the powers of submitting requests or appeals,

⁵ These are not administrative functions, but judicial ones, as they are performed before the various types of courts. The PPS also has consultative functions, which are, within the general framework of its judicial polyfunctionality, somewhat residual and alien both to the judicial nature of its intervention and institutional positioning and to the magistracy, as the condition of its agents.

⁶ Among the many authors of reference, see for all, MOURA, José Souto de. *Direito ao assunto*. Coimbra. Coimbra Editora, 2006, pp. 241 e ss.

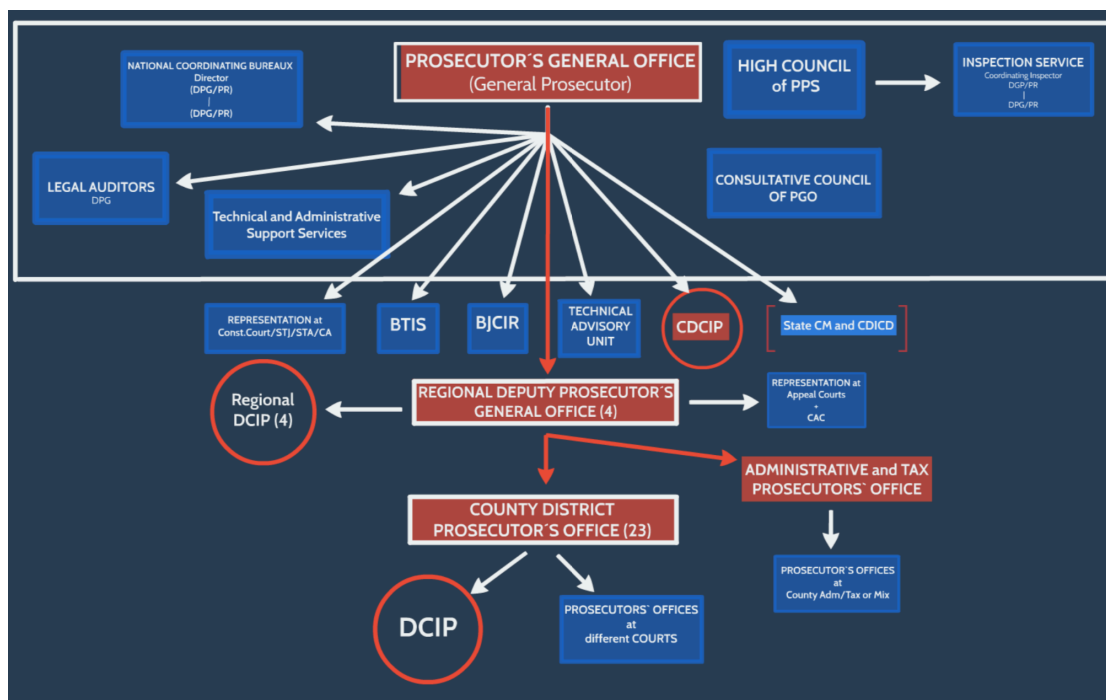
either on the basis of a procedural impulse to oversee the constitutionality of normative acts or while surveilling the legality of public administration's actions towards the public interest and the protection of fundamental rights, within the framework of administrative litigation.

- **Functions or ascriptions, to be promoted before the courts, in the representation of the State, the Autonomous Regions, the local municipalities,** by main or ancillary ways, being the main intervention subject to the non-appointment of an authorized representative or lawyer.

It looks also important to identify which organs are empowered to exercise the competences named above, along with the status of their agents, in order to fully understand the PPS model.

2.1. THE ORGANIZATIONAL STRUCTURE OF THE PORTUGUESE PPS.

15 - The structure of the PPS comprises several organs and sub-organs, with singular and collegial holders, as institutionalized centres of functional powers, according to criteria of material competence (article 12 of the EMP).



1) **THE PROSECUTOR'S GENERAL OFFICE** is the highest body of the PPS. The Prosecutor's General Office, which is a complex organ, comprises:

- a) The Prosecutor General, (unipersonal body) which presides and leads the Prosecutor's General Office (article 19 and those that follow of the EMP). The General Prosecutor represents the PPS at the Constitutional Court, at the

Supreme Court of Justice, at the Supreme Administrative Court and at the Court of Auditors. He may be assisted or substituted by Deputy Prosecutors` General.

- i) The appointment of the Prosecutor General, which does not need to be a magistrate, is a pure political act made under no specific conditions. The mandate lasts for six years to ensure minimum conditions of stability and exempt the PG from eventual external pressure. The appointment is, according with the Constitution, made by the President of the Republic, under a proposal made by the Government. This type of appointment is envisaged in order to assure the holder a relative autonomy from the executive power and, therefore, while facing political changes in government. However, it is a fragile regime of legitimation, without constitutional or legal guarantees, that only the political tradition of appointing a magistrate as PG has balanced. We know how much the PG appointment system and other prosecutors is a decisive aspect in ensuring the independence of the PPS. In this particular regard Portugal seems not to be in line with the recommendations of the Venice Commission ⁷.
- b) **The High Council of the PPS (CSMP)** is a body with both disciplinary and management powers over public prosecutors (article 21 and those that follow of the EMP), within which operates the PPS Inspection Service (article 39 and those that follow of the EMP). It is composed by 19 members, 7 of them elected by their peers, the 4 Regional Deputy Prosecutors General, 5 members elected by the Assembly of the Republic, 2 appointed by the Government, with the PG chairing. This structure has remained in the current statute, although in the legislative process there have been some proposals for amendments that intended either to reverse the majority of magistracy members by a majority of non-magistracy members or to reduce the number of elected members. The HCPPS sits in plenary session or in sections.
- c) **The Consultative Council of the Prosecutor General's Office** is a body with consultative competences, mostly by delivering legal opinions (article 43 and those that follow of the EMP).
- d) **The Legal Auditors** (article 51 and those that follow of the EMP).
- e) **Technical and Administrative Support Services** (article 56 of the EMP).
- f) **National Coordinating Bureaux** (article 55 EMP).

Under the authority of the Prosecutor General's Office operates as:

- g) **Central Departments:**
 - i) The Bureau of Technologies and Information Systems (article 53 of the EMP).

⁷ 2010' report adopted at the 85th Plenary Session.

- ii) The Bureau for Judicial Cooperation and International Relations (article 54 EMP).
 - iii) The Central Department of Criminal Investigation and Prosecution (article 57 and following of the EMP).
 - iv) The State Legal Matters and for Collective and Diffuse Interests Central Department (article 61 EMP).
- h) **The Technical Advisory Unit** (article 64 EMP).
- 2) **The 4 Regional Deputy Prosecutor General's Office** (Lisbon, Oporto, Coimbra and Évora, e.g. article 65 and those that follow of the EMP). The PPS is also represented at the 5 regional Courts of Appeal and at the 2 Central Administrative Courts by the Regional Deputy Prosecutor General and by the Deputies Prosecutors General. The representative function assumed by a Deputy Prosecutor General with coordinating powers at the Appeal Courts may take place outside the head-office of its own Appeal Court, as is the case of the Guimarães Court of Appeal.
- a) Regional Department of Criminal Investigation and Prosecution (article 70 and those that follow of the EMP).
- 3) **The 23 County District Prosecutors' Offices** (article 73 and those that follow of the EMP), that integrate:
- i) Departments of Criminal Investigation and Prosecution.
 - ii) Prosecutors' Offices at Specialized Courts of Law, at General Competence Courts of Law, at Proximity Courts and at Extended Territorial Competency Courts.
- 3.1) **The 4 Administrative and Tax Prosecutors' Offices** (article 88 and those that follow of the EMP).
- iii) Prosecutors' Offices at the County Administrative, Tax or mixed Administrative and Tax Courts.

16 - It is an organizational structure with three hierarchical layers and successive levels, which is governed by the General Prosecutor's Office at the highest level, and at the subsequent level by the Regional Deputy Prosecutors General, that lead the respective Regional Deputy Prosecutor General's Office, and at the lowest level, by the Coordinating Public Prosecutor Magistrate, each of whom leading the prosecution services at the 23 counties.

17 – The PPS magistrates, regardless of the hierarchical functions they may perform, have the sole categories of Prosecutor and Deputy Prosecutor General. The so called “plane career”, newly introduced by the new statute seems to be, however, a very incomplete one since access to certain functions or positions or even certain remuneration rates, although obtained by open contest, as regard to the access to the

category of Deputy Prosecutor General still remain being by way of promotion, based on seniority and merit.

3. THE INSTITUTIONAL ARCHITECTURE OF THE PORTUGUESE PPS.

3.1. CONSTITUTIONAL PRINCIPLES.

3.1.1. The principle of autonomy and the defence of Courts` independence.

18 - The Portuguese model of PPS is based on five main pillars ⁸:

- The autonomy of PPS ⁹;
- Its self-governance;
- The independence and parallelism from judicial magistracy;
- The core and reserved competence as the holder of criminal prosecution, and
- In the main mission of defending democratic legality.

19 - In the recent historical evolution of the Portuguese PPS, **the progressive empowerment from the executive branch was a democratic achievement** with effective and express constitutional declaration after the 1989' revision of the Portuguese Constitution and with statutory translation in 1992 (Law 23/92 of August, the 20th).

The autonomy of the PPS is today enshrined in the Constitution, which provides in its Article 219 that "The Public Prosecution Service has its own statute and autonomy, under the terms of the law."

20 - This autonomy is then translated and explained in the EMP as a statutory feature of effective **external independence**.

According to article 3 of the EMP: "*The Public Prosecution Service owns autonomy in relation to the other organs of central, regional and local power, (...)*."

That this autonomy corresponds to an effective independence is a conclusion that is still based again on the Constitution that provides, in its article 220, paragraph 1, that

⁸ Cf. MAXIMIANO, Rodrigues. A Lei Orgânica do Ministério Público (análise e experiência) Perspectivas e divulgação social do Ministério Público. In O Ministério Público numa sociedade democrática. SMMP. Lisboa: Livros Horizonte, 1984, pp. 106-124.

⁹ The independence of the judiciary, due to its separation from the executive, is the "cornerstone" of the rule of law, an independence that has two faces: one institutional, which has to do with the institutional position within the political structure of the State, and another, individual, which has to do with its performance. Independence primarily means independence from other central, regional and local authorities (the so-called external autonomy).

“The Prosecutor General’s Office is the superior organ of the Public Prosecution Service, with the composition and competence defined by law.”

21 - Being the Prosecutor General’s Office the superior organ of the PPS, any organic-institutional dependence on other State organs and of any political powers is excluded¹⁰.

22 - In concrete terms, independence means that all prosecutors, starting with the Prosecutor General, should not ask for or accept instructions from any persons, institutions, bodies, offices or agencies of the State, falling upon them the duty to respect that independence¹¹.

23 - Independent of the executive branch, the PPS is easily characterized, as we have seen, as a body of the administration of justice, part of the judiciary, fully integrated in the judicial function as this is broadly understood. **This is the institutional aspect** that, at the final limit, precludes that instructions may be given in specific cases while establishing, as a principle, the self-determination in the performance of duties, limited only by law (**absence of external pressures**).

24 - This autonomy also qualifies for its preminent attachment to strict legality and objectivity criteria and for the exclusive submission of magistrates to the directives,

¹⁰ The Constitutional Commission, in its Opinion 8/82, reporting judge Messias Bento, considered that, in one’s hand, the independence of the PPS would be diminished if its activity was dependent from judgments of opportunity from the Executive and, in the other hand, that the autonomy of PPS is also, to some extent, a guarantee of the judges’ own independence, since the latter constitutes a passive instance.

¹¹ The inclusion of the reference to autonomy, after the 2nd Constitutional revision, did not, by itself, remove some problems in the specific measurement of its content. That was mentioned by the Constitutional Court in its ruling 254/92, in 1992, as being the right way forward if the exact content of the autonomy of PPS was to be accurately established and, in particular, if it was to be distinguished from the concept of independence reserved to the courts. It is true that the Court assured us in that ruling that the completion of the concept by the legislator will prevent the PPS, which is responsible for defending democratic legality, from being transformed into an instrument of political power. It must therefore be organized in such a way as to ensure its “exemption and impartiality”. Thus, the institutional position of PPS vis-à-vis the other organs of political power will be strengthened and will contribute to ensure the separation of powers (legislative, executive, judicial) in a representative democracy, Montesquieu's old theory according to which power limits power (mutual balance, cooperation, support and control) and only the separation of powers and the guarantee of the independence of the judiciary ensured effective respect for rights, freedoms and guarantees. In the various international forums and even in the recent institutional design of a European Public Prosecution’s Office (despite the huge asymmetries of the different PPS in the EU and beyond), independence from other powers is of seminal and structural importance.

As regards the appointment of the Prosecutor General, the Venice Commission considered in its report CDL-AD (2010) 040, and in the Hungarian case, that it was of fundamental importance that the method to select the Prosecutor General wins the public's trust and the respect of the other members of the judiciary and of other legal professions, although recognising that the temptation of the political power to influence this choice, if excessive, should preferably favour a selection made by a committee of sages. The same Commission emphasized that the Prosecutor General should not be reappointed or have a term of office renewed, given the risk of acting to obtain such a favour. Greater independence is guaranteed if the mandate is single and non-renewable for a period that does not coincide with the legislative session. Also, the possibility of dismissal must have pre-established legal or constitutional grounds.

orders and instructions provided for in its Statute (a particularity defined as **internal autonomy** and which is enshrined in mitigated terms in Article 3 (2) of the EMP). **This individual feature of autonomy**, which is less categorical, because it-self refers to the limits imposed by hierarchical subordination (to directives, orders or instructions from superiors), means that the actions of prosecutors do not require prior approval or subsequent superior confirmation, having there some legal guarantees of non-interference by hierarchical superiors (**absence of internal pressures**)¹².

25 - Autonomy and objectivity are the main expressions that resume the identity of the PPS. These are in close relation, after all, with the independence and impartiality of the judiciary and can be construed as a consequence of the constitutional status of the PPS. Not only the constitutive element of this autonomy is legally binding (as in the case of the independence of judges), but also its objectivity is translated into an **“impartial”** loyalty while carrying out the completion of law or performing other procedural functions. Both are indispensable and imposed by the idea of the Rule of Law¹³.

26 - Within the legal-constitutional framework that highlights their independence and internal autonomy, prosecutors are magistrates, primordially defenders of the democratic legality (Article 4 (1) (a) of the EMP), in terms comparable to the one of the judges¹⁴.

27 – They are part of a magistracy, **which is parallel to, but independent of, the judicial magistracy**, as expressly stated in Article 96 of its statute, while being a judicial body with powers of initiative and promotion. This means that prosecutors receive no orders or censure from judges¹⁵.

¹² Embodied with conscientious objection, or in the written stipulation of orders within, of course, the limits of law (article 97 of the EMP). Refusing the epistemological justification of internal autonomy, which dilutes itself within the framework of a unitary autonomy, necessarily including single prosecutors, as holders of singular organs with self-determination powers of the PPS, and preferring to look at autonomy in three aspects (institutional, organic and functional), cf. FÁBRICA, Luís Sousa da. A Autonomia do Ministério Público nas vésperas do novo Estatuto. Not yet published.

¹³ Cf. DIAS, Jorge Figueiredo. Sobre a instituição do Ministério Público, hoje e aqui (algumas notas). In Ministério Público, que futuro? Mário Gomes Dias/Carlos Sousa Mendes - Coordenadores. PGR-INCM, 2012, pp. 164-165.

¹⁴ The PPS also carries the values of the jurisdiction. This explains the consonant designation that the PPS is an autonomous organ of the administration of justice, an organ of justice or an organ of the judiciary, even when the PPS performs duties and functions in non-criminal jurisdictions, being it civil, labour, administrative or constitutional. In these cases, it is still a characteristic of an autonomous organ of the administration of justice with powers of initiative that proves it, considering the purposes pursued in the defence of democratic legality, the observance of procedural rules, the achievement of the public interest and the defence of the Rule of Law.

¹⁵ The intention to consecrate the parallelism came from the historical, and today eccentric, fact that the PPS and its agents were a simple vestibular magistracy of the judicial career, a vision politically contaminated by its hierarchical dependence from the political-executive power of the previous regime. From this model, and in a democracy, we moved to a system of complete separation of careers. The advantage of this independence and parallelism is evident: no one can be convicted without two independent institutions coming to the same guilty verdict: one is the judge, the other the prosecutor. This is the impressive way in which one of the greatest achievements of the Rule of Law is signalled by Heinz Stötzel. Cf. Cadernos da Revista do Ministério Público, n.º 6, “Ministério Público: Instrumento do Executivo ou órgão do poder judicial?”, IV Congresso do Ministério Público, 1994, p. 15.

28 - For this same reason, the autonomy of the PPS seems indispensable to the independence of the courts themselves, especially on what relates to the exercise of its prosecution powers, since any external constraint on these would result in the loss of independence of the courts through the risk of manipulation of the prosecution. The only guarantee lies in the autonomy of PPS.

29 - That role of defence of the independence of Courts along with the special power that ensures that the judicial function is exercised in accordance with the Constitution and the Laws is expressly stated in Article 4 (1) (j) of the EMP ¹⁶.

Therefore, the defence of the independence of Courts is a decisive competence for the qualification of the PPS as an organ of justice, as a guarantor of the legitimacy and democratic legality in the administration of justice and as a holder of an integrity status that qualifies it as a magistracy, in line with the international standards on what relates to the institutional position of the PPS ¹⁷.

In my opinion this is the decisive argument that justifies the establishment and institutional acceptance of the PPS as a body of justice endowed with external autonomy or independence and internal autonomy ¹⁸.

The scope of defending the independence of courts necessarily entails the roles to monitor and to control the compliance of the judicial function with the democratic law. Its effectiveness lies in the use of legal instruments that allow the review of judicial decisions; accordingly, the PPS must be serviced with all the final decisions handed down by all courts (Article 4 (3) of the EMP).

30 – Of course, the judicial nature of the PPS and, above all, its independence, are on the basis of other characteristics that allow the definition of other essential principles that shape this body. Among these, we can identify the principles of impartiality, proportionality and objectivity, which will be discussed later.

31 - As we have seen, the principles are intertwined, some being primary or secondary derivations of others and most of them requiring guarantees in order to assure their own effectiveness. Above them all, the principle of independence and the nature of the

¹⁶ Any regime implying subordination to other powers is incompatible with the “functional and organic autonomisation of PPS”, even though the temptation of the political power to interfere with the PPS is as old as the politically organized society. The risk is that criminal prosecution might then be used for political, repression or corruption purposes, as it happens in dictatorial regimes. Even in democracies the “tyranny” of the majority can lead to the use of prosecution as an instrument of oppression, either because majorities are easy to manipulate, or because politicians may face populist pressures they are afraid to oppose, especially when supported by media campaigns. This is the purpose of independence, even in democracy (liberal democracy, of course, which is different from illiberal democracy) (See Report of the Venice Commission, CDL-AD (2010) 040).

¹⁷ What we are trying to emphasize is that the independence of the PPS is more than parallelism and independence from judges. Cf. ALBUQUERQUE, José P. Ribeiro de, Procurador-Geral da República. In Enciclopédia da Constituição Portuguesa, Quid Juris, p. 299.

¹⁸ Nor could this task be understood otherwise. What would it mean to give the PPS the task of defending the independence of the courts, if the PPS had not a statute of external independence and internal autonomy with a constitutional consecration?

PPS as an organ of justice imply that its members, the prosecutors, must offer all guarantees of independence, a trait to which contributes both the procedure of their nomination and the previous definition of their professional profile.

32 - That independence implies, therefore, guarantees of stability in the office, a trait of particular relevance that is translated in special rules governing their mandate, careers, disciplinary regime and dismissal.

33 - The judicial nature of the PPS, as an organ of justice, implies respect for the CRP, the international conventional instruments, headed by the ECHR and the CFREU and, in particular - within the scope of its powers to prosecute -, respect for fairness (equality of arms and procedural loyalty) and the rights of the defence while leading criminal investigations, gathering evidence or exercising any other procedural task.

34 - These principles mean that the PPS, in the scope of its procedural and functional activity - with special emphasis on prosecution -, must conduct investigations with impartiality, seeking all relevant evidences in order either to indict or to acquit. Seeking the procedural truth, irrespectively of its legal consequences appear to be the only reason for the promotion of criminal justice on a case-by-case basis.

35 - On the other hand, independence does not preclude liability, which also marks the prosecution magistracy and which, in external terms, mainly falls within the GP powers while broadcasting general activities of the PPS or rendering account on the implementation of criminal policy (Article 19 (2) (t), (u) and (v) of the EMP).

36 – That resumes the so-called principle of democratic “accountability”, to which the procedure of appointment and dismissal of the General Prosecutor is linked. In the Portuguese model a political imprint on this procedure can be identified, via the method of selecting and appointing the same General Prosecutor or via the possibility of renewing his/her mandate. In any case, the Prosecutor General is politically accountable only before the President of the Republic (elected by direct and universal vote), a kind of “**accountability**” that grants democratic and constitutional legitimacy to the PPS¹⁹.

3.1.2. The principle of the defence of democratic legality or the primacy of Law.

37 – Several dimensions may be identified within the constitutional mandate to defend the democratic legality. In other words, this task is, after all, outright, since the defence of legality is inherent to all areas of activity and functions of PPS, corresponding to a procedural performance strictly linked to the law and elapsing from the division of powers. Hence, likewise, the hardship of tracing its conceptual and identity contours for not being exclusive²⁰.

¹⁹ Cf. MAXIMIANO, Rodrigues. Ibidem.

²⁰ Cf. DIAS, Jorge Figueiredo. Sobre a instituição do Ministério Público, hoje e aqui (algumas notas). In Ministério Público, que futuro? Mário Gomes Dias/Carlos Sousa Mendes Coordenadores. PGR-INCM, 2012, p. 158.

38 - Those dimensions are largely translated into law enforcement and its constitutional compliance. In this field of assignments, the PPS is responsible for ensuring that laws are in conformity with the constitution, for promoting the uniformity of jurisprudence or for defending the rights of the “unjustly convicted”²¹ [Article 4 (1) (a) (j) and (q) of the EMP]²².

39 - Being a magistracy of public intervention, the PPS has necessarily to trigger a decision on its merits, as a response of the legal system seen as a whole while facing an infringement of democratic legality and in view of its re-establishment²³.

40 – The assignment to defend the democratic legality also signifies that PPS cannot replace legal criteria with political ones. This means that such defence must be exercised even against acts of the public administration.

41 - Alongside this dimension, performance in strict connection with the law means, “[...] none of its legal and procedural decisions can be governed by free discretion, subjective or personal considerations, ideology, convictions or even commands, real or alleged, of ethical conscience. They can only be accomplished by its bound discretion, that is, by its obedience to the law, to legal value judgments and, above all, to democratically defined political-criminal programs, to which PPS owes obedience and for which it is accountable.”²⁴.

42 – As we know, the specific, typical or primary function of the PPS is **prosecution**. The prosecution does not only mean bringing charges. It implies the effective upholding of prosecution at judicial pre-trial phase and judgment phase, the possibility of appeal against a judicial decision that is non-compliant with the punitive claim of the State or eventually lodging an appeal on behalf of the defendant if so imposed by law or the due justice of the individual case, and implies, lastly, the competence to enforce criminal sanctions.

²¹ Cf. SILVA, Germano Marques. Reflexões sobre as atribuições do Ministério Público na defesa da legalidade democrática e na execução da política criminal. In Ministério Público, que futuro? Mário Gomes Dias/Carlos Sousa Mendes - Coordenadores. PGR-INCM, 2012, p. 109.

²² The control of the constitutionality of laws is a control exercised over the legislative power, and its initiative also falls in the PPS area of competences. It is above all a defence of the Rule of Democratic Law, since the Portuguese State is subordinated to the Constitution and is based on democratic legality - Article 3 (2) of the CRP. In relation to this control, the PPS should prevent Judges from applying rules deemed unconstitutional by the Constitutional Court (Articles 70 and 72 of the Organization, Functioning and Proceedings of the Constitutional Court - Law 28/82 of 15 November) or not applying those they consider unconstitutional, issue appeals against decisions rejecting its promotion and, finally, the Prosecutor General may request the successive abstract review of any norms (cf. Article 280 (2) (d) and Article 281 (2) (e) of Portuguese Constitution).

²³ Cf. CARVALHO, Inês Seabra Henriques. Em defesa da legalidade democrática – O estatuto constitucional do Ministério Público. Edição SMMP, colecção: Estudos sobre o Ministério Público, 2012, p. 72.

²⁴ DIAS, Jorge Figueiredo. Sobre a instituição do Ministério Público, hoje e aqui (algumas notas). In Ministério Público, que futuro? Mário Gomes Dias/Carlos Sousa Mendes Coordenadores. PGR-INCM, 2012, p. 163.

43 - **That function is oriented by the principle of legality.** To this extent it is not subordinated to the idea of administering justice by objectives, whether they might be the number of convictions or bargains, as in other systems. Accordingly, the PPS can and should promote for an acquittal when such decision is imposed in the interest of justice. **Such is the true meaning of being directed by the principle of objectivity.**

44 - **Both the principles of legality and objectivity impose on the PPS the duty to defend and guarantee the fundamental rights and freedoms of citizens,** whether they are suspects, defendants or victims. This is a crosswise duty to criminal policy enforcement, to criminal investigation and to prosecution, as well. This is what distinguishes PPS as magistracy for it demands effective independence, integrity and impartiality.

45 - The prosecution does not start with the written accusation, but begins exactly with the initial and exclusive decision to open a criminal proceeding, followed by preparatory investigations, where the power to direct them is reserved to the PPS. This task envisages supporting a decision either to prosecute or to close the investigation or, even, the option for a consensual or opportunity solution, if applicable.

46 - All investigative measures are determined by the PPS, which is liable to them.

47 – **Police or Criminal Police Bodies (OPC) is charged with carrying out the investigative actions determined by PPS.**

48 – The judgment of the merits and the legality of the investigations carried out or to be carried out by OPCs is exclusively the responsibility of the PPS.

49 - Whenever investigative measures may in any way restrict rights or freedoms, this judgment of merit and legality also rests with the Examining Judge, as judge of liberties.

50 - That is to say that the intervention of the PPS does not occur after the criminal investigation is carried out by OPCs. It is both original and contemporary to it and implies an effective guidance of the criminal investigation. It is not just a matter of coordinating police activity in this field. It is about ordering it.

51 - The effective lead of criminal investigations supposes that the PPS should be able to supervise how these are carried out and includes the power to call-back the case-file at all times, the power to request information on their progress, the power to give concrete instructions, the power to decide on the means of obtaining evidence, whether they may be examination of witnesses or others, collecting criminal information, all in view to decide whether to prosecute, discharge the case or opt for opportunity and consensus solutions.

52 - Opting for opportunity and consensus solutions, the so-called criteria of opportunity (or plea-bargaining/plea-guilty), never implies the exercise of any discretion in the prosecution, like in the American system. The limits are always established by the legal system, those of legality and objectivity. This means that submission to law characterizes the procedural lead of criminal investigation by PPS,

without interference from direct or indirect orders or instructions from the political power.

53 - **Regarding interactions between the PPS and the Police in criminal investigations, one can identify a principle of assistance as well an obligation to assist the PPS by the police.** This is what is called the police's functional dependency towards the PPS during the investigation phase.

54 - **However, these relations find their limits in the hierarchical organization of the police, which organically are not dependent from the PPS but from the government.** The SMMP has already proposed changes to this design in order to bring it closer to systems, such as the Italian, where police rely more directly to the PPS.

55 - In any case, **in the Portuguese model, the concept of functional dependency has been understood by the doctrine as a strict delimitation of competences between police and PPS, in which it directs and the police perform investigative duties.** This is the only way to continue to give useful content to the autonomy of PPS. That is, even though they are administrative police officers and has their own organizational autonomy and hierarchy, "when acting in criminal proceedings, OPCs are under (the responsibility of) the judicial authority and not under the orders of the hierarchy to which they belong."²⁵

56 - **Functional dependency has ensured that criminal investigation is not kept in the hands of the police** and that the prosecutive structure and the investigative competence are safeguarded and belonging entirely to a judicial authority, the PPS.

3.1.3. **The principle to serve and protect the public interest: The interests determined by law.**

57 - The nature of an institution such as the PPS is primarily that of magistracy oriented to the defence of eminently public interests. This is what is encompassed in the EMP as one of its main assignments [cf. Article 4 (1) (f) or (m) of the EMP].

Whether in the defence of legality, or in the defence of society against crime, or in the defence of the unity of law and equality in the access to the law, or in the defence of the most disadvantaged, the persons lacking legal capacity or in the defence of the collective and diffuse interests, it is always the public interest that is being promoted.

3.1.3.1. *Interests of persons lacking legal capacity, the workers, the collective and diffuse interests.*

58 - The defence of the interests determined by law, according to the Constitution, gives the PPS the responsibility to perform a set of functions that fall into three

²⁵ CUNHA, José Manuel Damião da. O relacionamento entre autoridades judiciárias e polícias no processo penal. I Congresso de processo penal. Coimbra: Almedina, pp. 99 e ss.

dimensions (thus it may be more appropriate to say that the PPS is defined by a multidimensionality of action than by the multifunctionality resulting from its tasks).

- **The dimension of “orphanage” representation or of promoting the interests of the most vulnerable**, which is social in nature and aims to defend the interests of unprotected persons, children, young people, the elderly, adults with diminished capacity and other people who are especially vulnerable and lack adequate representation for the defence of their rights (here we can include the representation of persons lacking legal capacity, the persons having no permanent residence or those whose whereabouts are unknown).
- **The social dimension of defending and representing the interests of the weakest or economically dependent**, such as the ex-officio patronage of workers and their families in view of the defence of their social rights.
- **The dimension of the defence of collective and diffuse interests**, such as the protection of sustainable environment, cultural heritage, public health or consumer’s interests.

We find the ascription of these different dimensions of intervention of the PPS in Article 4 (1) (b), (d), (e), (g) and (h) of the EMP.

3.1.4. **The principle of legality versus the principle of opportunity in the prosecution. Mandatory prosecution and officiality.**

59 – To say that it rests in the PPS, according to the principle of legality, the obligation to initiate ex-officio criminal investigations and prosecute crimes mean, first of all, that the PPS cannot select whether or not to initiate such investigation or whether or not to proceed with investigations and prosecution for all crimes it is aware of. In principle, there are no opportunity-based judgements furthering criminal proceedings.

60 - The obligation to prosecute, in a broader sense, as a result of the principle of legality, ensures equality before the law and upholds the sense of impartiality, objectivity and independence in the administration of justice. As a result, the public accusation cannot be renounced or removed, as it is also assumed that reporting offenses is mandatory for civil servants and that everyone else is given the right to report them.

61 - Compliance with the principle of legality in prosecution by the PPS implies the possibility to control a decision of “not to indict”, although limited.

62 - Although the legality is still the general alignment of the constitutional system with regard to prosecution, **the legislator has enshrined in the criminal proceedings code the principle of open legality through a principle of limited opportunity, with the possibility of dismissing the case in the event of exemption of penalty, provisional**

suspension of the criminal proceedings or if a request for a special simplified procedure is issued.

62 - These institutes of opportunity are all subject to judicial control, which is in line with the principle of objectivity and impartiality (non-discretionary), deterring any opening to negotiated justice, which seems to be in line with the officiality, as a rule, of the PPS' action.

63 - Such open legality or limited opportunity is **submitted to strict conditions** foreseen by the law, with a limited scope (usually in the context of petty crime and less-serious criminality punishable by imprisonment of not more than 5 years). In those entire solutions one can always find a concern for equality and proportionality in the choice and concrete shape of each one of them, apart from the above-mentioned judicial review.

64 - Concerns for equality under the principle of opportunity have led the legislator to undertake changes to the institutes of opportunity set out in the Code of Criminal Procedure (CPP), withdrawing from the PPS the option ("may") to replace it with the duty ("ought") to use the institutes of opportunity whenever the respective preconditions are met.

3.1.5. Principle of participating in the enforcement of criminal policy.

65 - **The Constitution of the Portuguese Republic also assigned to the PPS the partaking in the enforcement criminal policy** as defined by the organs of sovereignty (a competence of the Parliament following a Governmental proposal), as established by article 219 (1) of the CRP and Article 4 (1) (c) of the EMP

66 - That role is not assigned to the investigation police, namely the Judiciary Police. The criminal investigation carried out by these bodies is not detached but merged in the prosecution led by the PPS. To this extent, the police appear in a second line towards the fulfilment of this function, as they are entities that only assist the PPS in the enforcement of criminal policy.

67 - The constitutional consecration of PPS's participation in the enforcement of criminal policy began by being a "sparsely" norm, a "mere proclamation" or "of little use". However, it has gained a growing importance that - at least in system's comparison - makes it today one of the most relevant features of the PPS's institutional position, even though it exposes it to the risks of confusion between the executive (or legislative) power and the judiciary or to the risk of being considered as an instrument of whom sets out the criminal policy.

68 - Due to the overload of criminal justice systems there are increasingly limited resources to deal with trifle cases equally. Therefore, a growing use of the above-mentioned procedural institutes of opportunity has been seen as a suitable answer to that problem. As a consequence, the PPS has gained decisive importance and has

become the centrepiece of the criminal justice system, as it tends to have the exclusive ownership of prosecution. De facto et de jure, PPS holds the role of instructor and decision-maker in most cases which are brought for opportunity and consensus solutions and which are seldom rejected by the judge when submitted to his agreement.

69 - In the Portuguese case, the introduction of a principle of pure opportunity was refused (no crime can be exempt from prosecution), but the political-criminal mediation made through the PPS, even if programmatic, ends up making valuable adjudications regarding the social demands on the priorities of criminal prosecution or the preferential use of certain procedural remedies over others.

70 - In fact, the Criminal Policy Framework Law (Law 17/2006 of 23 May) has gone beyond criminal prevention regarding the scope of PPS's partaking in the enforcement of criminal policy, which was conditioned by a criminal policy law that considers that Criminal policy includes the set-up of objectives, priorities and guidelines (applying to crime prevention, criminal investigation, prosecution and enforcement of sentences and security measures) merged having in view an enhanced speedy procedure.

71 - Under this Framework Law, the PPS undertakes the objectives and adopts the priorities and guidelines enclosed in the biannual Laws on Criminal Policy that will not jeopardise its own autonomy²⁶. In our opinion, it is both the appropriateness of criteria and the rational time management - not the intervention in itself - that allows our model to work smoothly, turning the PPS in a focal point between political power and the judiciary, fulfilling the principle of popular sovereignty as a political foundation of democracy.

72 - This position in the criminal justice system, although meaning more power also implies the increased accountability²⁷ mentioned above, which some see (notably when the PPS has to answer for the enforcement of criminal policy laws) as a responsibility that represents a compression of external autonomy²⁸. **Therefore, it can be questioned whether criminal policy laws are a way of interference from political power in the autonomy of PPS**, as they establish obligations of priority and effectiveness in criminal investigations and prosecution, as regards certain criminal phenomena²⁹.

²⁶ According to the Framework Law, the definition of objectives, priorities and guidelines cannot contain directives, instructions or orders on concrete cases or exempt any crime from being prosecuted.

²⁷ We must not forget, too, that all or almost all procedural intervention by the PPS has the scrutiny of the courts, which constitutes an obvious form of accountability.

²⁸ The Framework Law establishes the duty of the Prosecutor General to submit to the Government and the Assembly of the Republic a report on the implementation of the Criminal Policy laws, which in fact represents a political responsibility of the PG and, through it, of the entire PPS, towards the effective execution and enforcement of criminal policy and not only for a "participation" in such enforcement.

²⁹ António Cluny warns to the risk that temporary criminal policy laws may pose to the autonomy of the PPS, in so far as they may limit the constitutional and statutory obligation to act in the procedure according to criteria of strict legality and objectivity. This limitation has, downstream, the perverse effect of conditioning the independence of the judges themselves. The author thus emphasizes the risk of a prosecution politically manipulated by criminal policy laws. Cf. CLUNY, António. *Autonomia do Ministério Público, governo próprio e hierarquia: Instrumentos, condicionantes e pressupostos da independência do poder judicial*. Revista Vértice, n.º 142/Setembro-Outubro 2008, pp. 33-35. **In the opposite direction**,

73 - How can the PPS, as an autonomous magistracy, with an exempt status, whose primary task is to promote legality, exchange parameters of independence for opportunity criteria, albeit limited, for political-criminal conformation? This is a question that remains open to debate, but constrained by the statute of autonomy and the guarantees of legality and impartiality required from PPS to involve itself in this assignment.

3.2. ORGANIZATIONAL PRINCIPLES.

3.2.1. Principle of self-governance.

74 - Article 219 of the CRP, paragraph 5, states that the appointment, placement, transfer and promotion of prosecutors, as well as the exercise of disciplinary action are of the responsibility of the Prosecutor General's Office, which the EMP then assigns to the High Council of the PPS (CSMP) (Article 21 EMP).

75 - The CSMP is the superior body of management and discipline of the PPS, politically independent from the Prosecutor General. This body is composed by five members elected by the Assembly of the Republic, eleven members of the PPS either elected by their peers or by inherence, and two personalities of recognized merit designated by the Government, a requirement that undermines their independence from the same government that appoints them. This body is chaired by the Prosecutor General. Its resolutions are taken by a majority of vote (Articles 22 and 33 of the EMP).

76 - Both the external or institutional autonomy or independence from political power, as well as the internal, organic and functional autonomy of PPS (binding prosecutors to a criterion of legality and objectivity while conducting their tasks) is embodied and ensured by the existence of the CSMP, as a self-governing body of PPS, where a majority of prosecutors is found, a significant proportion of whom are elected by their peers³⁰.

3.2.2. Principle of hierarchy and liability of prosecutors.

77 - The PPS is organized according to a hierarchical structure, a general rule in comparative law; although in some of the systems it may be more accentuated than in others, each prosecutor owes obedience to the one who is functionally superior to him,

cf. SILVA, Germano Marques. Reflexões sobre as atribuições do Ministério Público na defesa da legalidade democrática e na execução da política criminal. In Ministério Público, que futuro? Mário Gomes Dias/Carlos Sousa Mendes - Coordenadores. PGR-INCM, 2012, p. 110

³⁰ The Constitutional Court, in its rulings' No. 254/92 and No. 279/98, acknowledged that the CSMP should defend the autonomy of the PPS enshrined by the Constitution highlighting that this guarantee is also ensured by the proportionality of its composition, which in turn also limits external or internal hierarchical constraints, being those direct or indirect.

in a structure that progresses from lower to intermediate and higher degrees, the latter's having powers of direction and hierarchy, in a structure that culminates in the Prosecutor General (cf. article 97 of the EMP).

78 – Article 14 of the EMP strictly specifies that prosecutors who have powers of direction, hierarchy and procedural intervention relate these to their posts, thus establishing more a hierarchy of organs rather than a hierarchy of agents ³¹.

79 - This structure is of a functional nature, having nothing to do with disciplinary, appointment or evaluation issues, which are the exclusive responsibility of the CSMP ³².

80 - It is within the established hierarchy aspect that the most evident tensions in the context of internal autonomy arise, as each specific case demands a resolution according to the conscience of each prosecutor. Nevertheless, it is also important to assure that the action of the PPS as whole shows consistency of intervention, a goal achieved by the observance of Directives ³³, namely on what concerns the use of the institutes of opportunity in criminal proceedings. Still, the Directives must be in accordance to the existing law and must be based on appropriate reasons.

81 - The hierarchical structure and the corresponding hierarchical power have their own scope and limits and, to that extent, they are not incompatible, in principle, with the autonomy of each prosecutor, who remains being the owner of the power of decision-making, self-determined within the framework of his assigned competences.

82 - Regarding the mentioned scope and limits, the hierarchy consists in the subordination of the lower ranked prosecutors to the higher ranked ones, in accordance with the Statute and without prejudice to their autonomy, as they are all equally bound by the law and the applying principles ³⁴.

³¹ Cf. FÁBRICA, Luís Sousa da. A Autonomia do Ministério Público nas vésperas do novo Estatuto. Not yet published.

³² The functional understanding of hierarchy allows us to accommodate this organizational dimension of the PPS within the functional dimension of internal autonomy, both with the same constitutional emphasis. This is how the practical agreement between hierarchy and autonomy should be handled, as each constitutes a material limit to the other. As such, it prevents disciplinary power from being in the hands of the hierarchy and rather concentrates it on the Superior Council of the PPS.

³³ Conceptually, according to Directive 5/2014 of November, the 19th the following should be considered as hierarchical instruments:

a) **Directive:** Contains commands and general criteria for the interpretation of norms, also serving to structure the functioning of the organs and agents of the PPS. They are addressed to all subordinates or to those occupying a certain category or position, bindingly defining the meaning in which certain legal rules or principles should be construed or applied (interpretative) or recognizing the existence of a legal gap (integrative).

b) **Instruction:** It contains general provisions, of a reinforced binding nature, on the action and organization relating to more concrete and minor issues and subjects than those that should be the contents of directives. They involve guidelines for future action in future cases.

c) **Order:** Contains binding obligations on agents of a specific action or abstention, on the grounds and according to a particular object, to and from the organization and operability of the respective services.

³⁴ This is clear from Article 9 (2) of the LOSJ.

83 - There is only a duty of obedience to hierarchical orders in the cases defined by law, not to compress the area of autonomy or self-determination of each organ subject to a hierarchical link. Hence the EMP provides in its Article 100 that prosecutors may request that orders or instructions are conveyed in writing. A refusal to comply with them is only possible if they are unlawful or if they impose a serious violation of conscience, a possibility that remains being subjected to control. Therefore, one can say that the principle of autonomy is a prevailing principle as it entails a corresponding functional "duty" of disobedience that may ultimately overlap hierarchy, on behalf of the legality and impartiality of prosecutor's acting (article 79, 2, of the EMP).

84 - Liability consists, according to the statute, in the fact of prosecutors being responsible, under the law, for the fulfilment of their duties and for the compliance to the contents of directives, orders and instructions, according to article 97, paragraph 2 of the EMP. One may notice here, again, that responsibility is more a consequence of the "duty" of autonomy than a limitation of the latter - which is only precariously restricted by the hierarchy -, although being true that the violation of the duty of hierarchical obedience, when not justified in the above terms, generates responsibility whose appreciation lies in the CSMP and not in the hierarchical superior ³⁵.

85 - The purpose of hierarchy goes beyond the simple exercise of administrative functions, rationalization of resources or the optimization of organizational methods. These coordinating powers, which are their essential core, have as their fundamental purpose the promotion of the unity of the law and to this extent also promote - as we shall see with regard to the principle of equality - the defence of the equality of citizens in the access to law and justice.

86 - In the new Statute it is stated that the hierarchy has a functional nature and that the criminal procedural law shall govern the hierarchical intervention in criminal proceedings, which means that the only possible hierarchical interventions in this field are those provided by the CPP (Article 97 (3) and (4) of the EMP)³⁶.

87 - As all result on a limited and punctual intervention of the hierarchy, each magistrate becomes a single institutionalized structure for the expression and ascription of the functional "will" of the PPS, which leads back to the notion of singular "organ" ³⁷.

³⁵ Cf. FÁBRICA, Luís Sousa da. A Autonomia do Ministério Público nas vésperas do novo Estatuto. Not yet published. The statutory content of the responsibility of prosecutors is similar to that of judges, which is to say that a prosecutor should not be responsible except for personal misconduct in the performance of his duties (that may lead to disciplinary liability) but which do not imply procedural tax liability, meaning that they cannot be ordered to pay any fees or charges as any applicant, and cannot be held responsible for the functional positions taken in a particular case, having the effectiveness of liability the limits contained in the Statute as can be seen from the Article 98 of the EMP. In addition, prosecutors who are affected by acts or regulations issued by the Coordinating prosecutor of the County District Prosecutors' Office can appeal from them to the CSMP.

³⁶ On the topic and related bibliography, see for all, CARDOSO, Rui. Intervenção hierárquica no processo penal no novo Estatuto do Ministério Público – primeiras notas para a reavaliação da questão. In RMP, n.º 159: Julho-Setembro 2019, pp. 23-42.

³⁷ Cf. FÁBRICA, Luís Sousa da. A Autonomia do Ministério Público nas vésperas do novo Estatuto. Not published yet.

87A - This balance or practical concordance, which was assumed to be tacitly based on the Statute and the Constitution - as we understand it -, was recently put at risk of serious break resultant from a Directive by the Prosecutor General, which imposed that it be followed by the PPS, as mandatory doctrine, an Opinion of the Consultative Council that, among other aspects, advocates that a hierarchical superior can issue directives, orders or instructions, general or concrete, in criminal proceedings, and that these directives, orders or instructions should be kept out of the concerned proceedings³⁸.

That Directive caused - and causing is - huge internal perplexities. There are those who accuse it of being illegal, in view of what the new Statute establishes in this regard; others pointing the risk of opaque, hidden or parallel criminal procedure, subtracted from the transparent control of other procedural subjects.

It is also causing a significant public turmoil, with voices coming from various political and social quarters, warning against the risk of launching a systemic distrust about the impartiality of the prosecution's actions in the exercise of criminal proceedings and the risk of coming to be permeable to undue interference, without democratic control, that would hinder the internal and external autonomy of the PPS. The matter is under fire...

88 - Apart from criminal proceedings, the new EMP expressly provides that the immediate superior has a power to review the final decisions issued by prosecutors, in order to ensure the unity of application of law (Article 97, EMP (5)), a statement that translates more a dispositive competence than a true hierarchical power³⁹.

3.2.3. Principle of indivisibility.

89 - One of the characteristics of the PPS is that it is an indivisible or unitary magistracy⁴⁰. Each prosecutor represents the whole, and as such, they are neither fungible nor punctually interchangeable with the exception of situations linked with the establishment of special teams, mission' units or specific appointment of prosecutors for certain interventions (Article 59 (1) (j), Article 70 (5), 72 (e), Article 85 (7), Article 90 (2) (3) and Articles 91, 92, all of the EMP).

90 - What does the principle of indivisibility signify in practical terms? It means that a procedural act performed by a prosecutor compromises and involves the entire PPS, stemming into a function of representation, decision-making or of promotion with external relevance, as an unambiguous sign that each prosecutor is an organ of the PPS

³⁸ Directive 1/2020, of February the 4th.

³⁹ Cf. FÁBRICA, Luís Sousa da. A Autonomia do Ministério Público nas vésperas do novo Estatuto. Not published yet.

⁴⁰ This is also a corollary of autonomy, since unity or indivisibility as magistracy presupposes self-determination and exclusive subjection to legality and objectivity (cf. TC 581/2000). Criticizing the idea of indivisibility of PPS and emphasizing the organical nature of each prosecutor, see FÁBRICA, Luís Sousa da, A Autonomia do Ministério Público nas vésperas do novo Estatuto. Ibidem

91 - During the different stages of the proceeding, even at trial, prosecutors may substitute each other without constraining the procedure. One may note that this is not allowed for judges conducting the trial; otherwise the judgment will be declared invalid.

92 - The conditions and postulations for such interchangeability should be in accordance with the EMP, the laws of procedure, the laws governing the organization of the judiciary and the rules governing the organization of PPS organs [Article 90 (1)]. The same applies to the conditions under which prosecutors may be assisted by others [Article 90 (2)] and the setting up of teams [(90 (3))].

93 - In the same manner, the new EMP provides nowadays rules and limits on what concerns substitutions (Article 81) – e.g. the reassignment of a given prosecutor (his transitional placement in a court, County District Prosecutors’ Offices or section of a Department other than the one in which he is placed - Article 77) - and on what relates to the (re) allocation of cases (the redistribution, random or by assignment, of case groups or specific investigations to a prosecutor other than its original holder, in terms to be regulated by the CSMP - EMP Article 78).

3.2.4. The principle of merit.

94 - Autonomy, for prosecutors, is not a privilege. Rather, it is a genuine ethical-legal duty, a vocation, since prosecutors, who are co-responsible for carrying out the democratic rule of law, must, in applying the law to specific cases, fulfil its goals without submission to orders or instructions other than those the same law provides.

95 – While acting on behalf of the society and given the seriousness of a criminal prosecution and conviction, PPS must reach high standards of competence in order to honour its role. This means that autonomy is not satisfied with constitutional or legal decree, it has to be conquered, proven and defended by each prosecutor, in the same way that vocation is also guaranteed, encouraged and recognized.

96 - The CRP granted the disciplinary and evaluation’ competences of prosecutors to the Prosecutor General’s Office, namely to the CSMP. Within this body there is a group of inspectors that assess individual prosecutors (Article 21 (2) (a), Article 39, 40, Article

⁴¹ Something that for Professor Luís Fábriça has the meaning that prosecutors are “[...] endowed with a sphere of competence defined by law, which should qualify as their own or as common, depending on the County Prosecutors’ Office, Department or in the service where there is a single prosecutor or several prosecutors, submitted to a governing body. From the qualification of prosecutors as an organ results, v. g., the binding nature of its decisions; the respective accountability for them; the limitation of the governing powers to specifically regulated terms; the submission of the operative interventions of other bodies to the general substitution or supply figures (including their preconditions) and the impugnability of acts that invade its sphere of competence or in any way restrict the legally designed autonomy. Cf. FÁBRICA, Luís Sousa da, A Autonomia do Ministério Público nas vésperas do novo Estatuto. Ibidem

139, Article 146 and following of EMP) and advise the CSMP on the definition of the merits of each one of them.

97 – Such definition has very important consequences, as merit is a true condition for the provision of certain positions of leadership and hierarchy or to accede certain departments or functional categories. The lack of merit also deters progression to certain salary levels (Articles 146 and following of the EMP).

3.3. INTERVENTION PRINCIPLES.

98 - Before listing the principles of intervention, it is important to clarify the terms under which the State is represented by the PPS. Above, we have discussed the internal autonomy and the embodiment operated by art. 2 of the EMP which, in its paragraph 2, states that autonomy of the PPS is characterized by being bound to “criteria of legality and objectivity and by the exclusive submission of public prosecutors to the directives, orders and instructions provided for in this Act”⁴².

99 - The statutory aspect of internal autonomy, on what concerns the submission of its intervention to a legality and objectivity criteria and the reserve of law in relation to the execution of directives, orders and instructions, applies in the same terms (and not in other speculative terms) to cases in which the PPS acts as a legal representative of the State in courts, namely when the Minister of Justice, in this context, is entitled to give specific instructions in civil proceedings where the State decides to sustain an interest (Article 101 (a) and (b) of the EMP).

100 – In these situations the position is similar to that of a constituent vis-à-vis his lawyer, as Inês Seabra points out, adding that “even in such cases, where respect for or the possibility of conflict with democratic legality is at stake, instruments are provided to shield the safeguard of democratic legality”⁴³.

101 - This representation of the State is a standard competence, besides being one of the most traditional competences of PPS, which does not lead back to the proper and typical activity of PPS, which is to prosecute. As such, the prosecution's intervention on behalf of the State is similar to that of a state lawyer, but even so, PPS cannot and should not dismiss its role as a defender of legality. This remains in accordance with the criteria that must characterize the State's action in the judicial defence of its interests,

⁴² Although the hierarchy apparently moves away the PPS from an independence comparable to that of the judges, in so far as they owe exclusive obedience only to the law (with nuances, since the superior courts must be obeyed by the inferior to the extent that they appreciate the same case and decision on appeal), this removal is not effective, since the PPS cannot fail to obey and be bound by Law and its Statute. This means that the hierarchy cannot, nor should not, break the duty of impartiality that characterizes the magistracy of the PPS in the context of its intervention. Such breach of impartiality or its relativisation due to hierarchical orders is forbidden by law, as prosecutors are legally obliged to refuse illegal orders from their superiors.

⁴³ Cf. CARVALHO, Inês Seabra Henriques. Cit.

as Jorge Miranda and Rui Medeiros point out, a defence that cannot escape the parameters of legality, strict objectivity and impartiality⁴⁴.

102 - It is therefore wrong to say that the defence of legality is incompatible with the position of PPS as a representative of the State, as such representation should not be confused, nor could it be confused, with the exercise of State autonomy, which only political-administrative bodies can perform, in particular the Minister of Justice. What is worth adding here is that it is surely constitutionally unbearable that the PPS, when assuming the patronage of the State, may be allowed to express opposing views to those resulting from legality⁴⁵.

3.3.1. Principle of impartiality.

103 – In relation to the criteria that should govern the exercise of functions assigned to the PPS, impartiality is a major one. Arala Chaves and Alberto dos Reis pointed out that the procedural intervention of PPS should be, solely and always, to uphold the truth and justice and to maintain the strictest impartiality, being alien to passions or personal interests, since it represents the general interests of the State and society. The CoE and the Venice Commission, while stating that the PPS must be objective and fair, act impartially and, in particular, ensure that the court has all the necessary factual or legal elements, also recommended this as a necessity towards an adequate administration of justice (see CoE Recommendation Rec (2000) 19 and Venice Commission CDL-AD (2010) 040).

104 – There are references to the promotion and defence of truth and justice in Articles 3 (2) and 4 (q) of the EMP, granting to the PPS an exemption status, of impartiality and defence of legality.

3.3.2. Principle of objectivity.

105 – Objectivity, as a principle and criterion for the PPS activity, is understood as the requirement that such activity should obey only the truth and the completion of Law. This is the programme of action in criminal procedure. In this regard, Figueiredo Dias wrote: "PPS arises in criminal procedure - and it is this characteristic that gives unity to its status of intervention - as a justice administration organ, with the particular function of, in the words of article 53 (1) of the CPP 'to collaborate with the court in truth-finding and in accomplishing the Law'"⁴⁶.

106 - The PPS is not a procedural part and its commitment is the disclosure of truth. Therefore, its power to direct, enforce and supervise acts of criminal prosecution

⁴⁴ Cf. MIRANDA, Jorge; MEDEIROS, Rui. Constituição Portuguesa anotada. Tomo III. Coimbra editora. Coimbra, 2007, p. 215.

⁴⁵ Idem, ibidem.

⁴⁶ DIAS, Figueiredo. in Jornadas de Direito Processual Penal. O novo código de processo penal. Coimbra: Almedina, 1988, p. 25.

includes that of closing the file (cf. Article 53 of the CPP)⁴⁷. This is also the reason why PPS is a procedural body without the nature of a party. It will be interested in the outcome of proceedings as long as that outcome corresponds to the completion of justice and, not necessarily, because it has accomplished its reasons.

3.3.3. Principle of equality.

107 - The PPS also promotes the principle of equality in the access to Law and Justice, creating the conditions for a biased uniformity in adjudication.

That intervention is achieved through means of a contest that is assigned to the PPS, both in the Statute and in the law, namely in the CPP, but also in the constitutional, civil, criminal, administrative and tax areas, highlighting the application for trends-based case-law, the appeals from decisions contrary to mandatory case-law, all in the interest of the unity of Law. We find this principle of intervention enshrined in Article 4 (1) (I), Article 19 (m) of the EMP and in Articles 437 and 446 of the CPP.

3.3.4. Principle of proportionality.

108 - Although not often emphasized as such, the PPS should regard proportionality as a parameter to be considered while selecting and implementing investigative measures or while shaping concrete solutions of opportunity, consensus and promptness. This principle runs throughout the judiciary system and is particularly present in criminal and procedural criminal law.

3.3.5. Principle of integrity and functional exclusivity.

109 - The CPP and the EMP give prosecutors the same limits and restrictions that apply to judges, on what concerns impediments, refusals and excuses (Articles 39 and 54 of CPP). The EMP also imposes a functional exclusivity regime parallel to that of judges (Articles 107, 108 of the EMP), in line with CoE Recommendation Rec (2000) 19 and the Opinions of the Venice Commission.

3.3.6. Principle of compliance with the confidentiality requirement.

110 - The Statute of PPS imposes to prosecutors a confidentiality requirement and a duty of reserve regarding judicial proceedings or documents to which they have had access by reason of their duties (Article 102 EMP)

⁴⁷ What justifies the words of Figueiredo Dias (ob. e loc. cit.) when this author states that “[...] given, therefore, the unconditional intention of truth and justice - as unconditional as that of the judge - that presides over the intervention of the PPS in criminal proceedings, it is clear that his attitude is not that of being interested in the prosecution, but rather that it meets criteria of strict legality and objectivity”.

111 - The new EMP has enshrined, in matters of duties, rights and incompatibilities, the duties of secrecy [cf. Article 102 (1)] diligence (cf. Article 103), integrity and objectivity (cf. article 104) and of courtesy (cf. article 105).

112 - The duty of confidentiality crosses all of the above and applies to other requirements of conduct and of office.

113 - In a democracy, trust in the magistracy is an essential condition for the effectiveness and the credibility in the justice system. However, today, justice is permanently involved in controversy; magistrates are being called into question and some of them are permanent heralds in the media. It is a state of affairs that undermines confidence in justice, deteriorates the magistracy image and penalizes impartiality and independence. The duty of confidentiality should constitute a barrier to this dysfunctional framework, without prejudice to due courage.

3.4. GUARANTEES OF AUTONOMY AND INDEPENDENCE.

114 - Guarantees are the legal conditions or measures that assure the effectiveness of principles ⁴⁸.

We have already seen that some principles are expressed in such a way that we can identify on their respective definition which are their own guarantees. Still, we can identify some additional specific ones, related to independence, relevant both to the external and internal autonomy of public prosecutors.

3.4.1. **Stability or irremovability in function.**

115 - The CRP has established that prosecutors may not be transferred, suspended, promoted, retired or removed from office or have their position in any way changed unless in the situations provided for in the EMP. In addition, the appointment, placement, transfer and promotion of prosecutors and the exercise of disciplinary action shall be incumbent upon the Prosecutor General's Office and not to any external body ⁴⁹ (article 219 (4) (5) of the CRP).

116 - The content that translates the immovability of judges is closely the same ⁵⁰. There is a restricted reserve of law that prevents discretionary acts, disguised disciplinary punishments or acceptance of reasons of political expedience to justify,

⁴⁸ Objectivity, legality and exclusive binding to truth and justice, as Claus Roxin warns, will be a lie if there is no institutional basis that guarantees material and personal independence. Cf. ROXIN, Claus. Posición jurídica y tareas futuras del Ministerio Público. In AAVV. El ministerio público en el proceso penal. Buenos Aires: Had Hoc, 1993, reprint, pp. 50-51.

⁴⁹ According to the Venice Commission, one of the possibilities to influence a magistrate is to move him elsewhere without his consent. Transfer threats can be an illegitimate pressure on a "disobedient" magistrate, which can thus be removed from a sensitive case.

⁵⁰ The Constitutional Court ruled in its judgment 336/95 that public prosecutors constitutionally enjoy a relative immovability similar to that of judges.

outside the legal framework, the transfer of prosecutors. The CSMP is the only body empowered to transfer prosecutors, as provided for in Article 21 (2) (a) of the EMP, as regards the jurisdiction of the CSMP, and in Article 152 (1) on what relates to transfers and exchanges.

117 – Bearing in mind this context, we can conclude that there is - rather than a presumption - a functional guarantee of immovability applying to public prosecutors, and although its contents may not be absolute, only the law can establish exceptions to immovability, which must be typified beforehand. One also should note that these exceptions are decided by the organ that, within the PPS, has no direction powers ⁵¹.

118 - The immovability principle of the magistracy, whether applying to judges or prosecutors, expressly accepted in our Constitution, is a guarantee of the principle of independence of the courts and of the autonomy of PPS ⁵².

⁵¹ Regarding the stability or immovability of prosecutors, the Constitutional Commission, in its Opinion 33/82, pronounced that the rules that allowed the transfer for convenience of service and on the grounds of their assessment as “sufficient” were unconstitutional. This opinion states, after comparing the constitutional statute of the judiciary and of the PPS, that: “[...] consider it or not, however, the exact position of the Judge and the Public Prosecutor regarding the immovability, two things seem right. One is this: at least in view of our current Constitution, which seeks to dignify the PPS, the agents of this magistracy enjoy a special stability. The other is that, in the matter referred to in this Opinion (transfer, for the sake of convenience, of prosecutors classified as 'sufficient'), there is no reason to distinguish between the two magistracies.” And further it adds that “[...] it would be unacceptable for the constituent legislator, in matters of such sensitivity, to open wide the doors to the ordinary legislator, allowing exceptions or limitations to the principle of immovability that would truly subvert or denature such principle. What is reasonable for the constituent legislator to have wanted - and, according to hermeneutic canons (Civil Code, Article 9 (3)), presumably wanted - was to limit the scope of ordinary law. How? Certainly, by limiting the area of the mobility of magistrates, both judicial and of PPS, to counted hypotheses, unambiguous or defined at least with a minimum of precision that precludes vagueness and unfixity. This is the case, as already noted, of the request or consent of the parties concerned, the sexennial rule or the decision in disciplinary proceedings. In these 'types' of solution the presuppositions of the transfer are precisely defined. And, we would rightly say that Article 221 (1) as well as Article 225 (1) involve beyond the pointed principle of legality, a sort of ‘legal type’ principle.”

⁵² There are systematic elements that weaken this conclusion through the institutional position of the Prosecutor General and his exoneration regime. For this reason, one of the defeated votes in Opinion 33/82 of the Constitutional Commission referred to the following: “How can we maintain that the Fundamental Law guarantees the immovability of the Public Prosecution Service if the Constitution itself, in Article 136 (1) allows the President of the Republic, at any time, on a proposal from the Government, to dismiss the Prosecutor General? If this magistrate, placed at the top of its hierarchy, and unquestionably, does not enjoy immovability, why should the other prosecutors have such a privilege?” The sense of the constitutional Opinion was, however, that in relation to immovability there was no reason to distinguish between the two judiciary magistracies.

The signs of fragility of the principle of immovability, with a corresponding attack on the prevalence of autonomy over hierarchy, appear to be sharpened in the new Statute, on the account of the access regime to leadership positions or to some departments. They are, in most cases, fulfilled on a special commission basis, with the inherent insecurity linked to the same regime. To the very same conclusion are added arguments related to the mobility instruments provided for in articles 76 et seq. of the EMP that, although subjected to regulation by the CSMP, seem to breach the primacy of the law and as such are of very dubious constitutionality. In that sense, cf. FÁBRICA, Luís Sousa da, *A Autonomia do Ministério Público nas vésperas do novo Estatuto*. Not yet published.

3.4.2. The lifetime tenure in office.

119 - Prosecutors must be appointed until retirement. Nominations for limited periods with the possibility of reappointment or renewal entail the high risk that the nominee may transform his decisions into pleasant requests for renewal instead of just deciding based on the law, as stated by the Venice Commission (CDL- AD (2010) 040).

120 - The Statute, combining the rules of appointment and the retirement age, allows the conclusion that the mandate in office of a prosecutor is for life, without prejudice to any disciplinary sanctions leading to its early termination. Even after retirement, prosecutors maintain obligations that suggest the lifetime tenure of duties (Article 190 (2), 193 (1) of the EMP).

3.4.3. Financial autonomy.

121 - Financial autonomy is assumed by numerous international bodies (UN, African Union, GRECO, CCPE, Venice Commission), which certify the status of independence of the judiciary, as essential to the division of powers and effective independence of the PPS.

122 - The New EMP has enshrined the financial autonomy of PPS, still to be defined by a piece of legislation, although in somewhat limited terms as to the structure covered, only to be attributed to the Prosecutor General's Office and not to the entire PPS (article 18 of the EMP).

3.4.4. The irreducibility of salary.

123 - The financial security and stability of prosecutors envisages the same objectives of ensuring the division of powers and effective independence, if the possibility of arbitrary reduction of salary by the political power is excluded. According to the Venice Commission, this statutory guarantee is part of its rule of law's checklist ⁵³.

124 - The New EMP has enshrined the irreducibility of salary, albeit as a principle that may carry exceptions if exceptional events occur; in any case, the dignity of the duties and the responsibility inherent to its exercise should never be jeopardised (article 128 of the EMP), in line with CoE Recommendation Rec (2000) 19.

4. THE FUTURE CHALLENGES TO THE PORTUGUESE PPS MODEL.

125 - There are many future possibilities to explore, among them the institutional challenge of radicalizing the PPS in the defence of the public interest within a framework of proximity justice.

⁵³ Text adopted at the 16th Plenary Session that took place on the 11-12 March 2016.

126 - The “big picture” that nowadays challenges the PPS is the one of overlooking the defence of common goods, be it justice, knowledge, public health, environment, urbanism, territorial planning, quality of life, cultural heritage or State’s assets, in contrast to a depressed society where the bonds of the social sphere have been diluted and where the administration of justice is being weakened by the “musts” dictated by the economy ⁵⁴.

127 - There is a spiritual void in the political culture of “government for the market” that has left abandoned the “work on democratic citizenship”. We face a worn-out society of success measured by wealth and the wealth by success, where almost everything is for sale. This path has led to loneliness, the dilution of proximity and solidarity ⁵⁵.

128 - What is to be expected from public prosecutors in this paradigm favouring inequalities? How to root PP in a justice of proximity and hospitality?

129 - The idea of this renewed PPS is that of PP as a **MAGIS**tracy endowed with social responsibilities... an idea that should have practical consequences, and as such, should be placed in the centrality of the social, democratic life as well as of citizenship.

This model of PP as a **MAGIS**tracy endowed with social responsibilities supposes a magistracy of promotion and initiative, which finds in society the bases for its own legitimacy, objectives, methods and accountability.

130 - Alongside these challenges, **which we developed elsewhere** ⁵⁶, far more urgent ones will be dictated by the establishment of the European Public Prosecutor's Office and the stimuli brought by the latest CJEU case-law.

4.1. EPPO ESTABLISHMENT: CHRONICLE OF A METAMORPHOSIS FORETOLD.

131 - The institution of the European Public Prosecutor's Office (EPPO) ⁵⁷ is an ambitious and symbolic act of effective operational importance, as it represents the emergence of a new judiciary unparalleled in Europe that will bring consequences that will go far beyond the mere protection of the EU's financial interests.

⁵⁴ Society tends to change and the last years have been exemplary in this transformation, especially technological, communicational, financial, mercantile and economic, but also ideological, cultural and philosophical, where the nation-state has been wiping out, phenomenon that has resulted in the so-called globalization or the mere internationalisation of free trade.

⁵⁵ Cf. Han, Byung-Chul, *A agonía de Eros*. Lisboa: Relógio de Água, 2014.

⁵⁶ ALBUQUERQUE, José P. Ribeiro de. Public prosecutors to defend the public interest: Legitimacy, objectives, methods and accountability. In *Revista académica da Escola Superior do Ministério Público do Ceará – Brasil*, ano 9, n.º 1, Jan/Jun. 2017.

⁵⁷ Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation for the establishment of the European Public Prosecutor's Office (OJ 31-10-2017, No 283).

132 - The EPPO meets minimum independence standards, even though this is not expressly stated in Article 86 TFEU. In this context, the EPPO Regulation establishes in its Article 17 that European Delegated Prosecutors must offer all the guarantees of independence, to which their own system of appointment, term of office and professional profile contributes, summarizing various documents, especially those issued by the CoE on the parameters of PPS independence in Europe, also upholding the case-law which the ECHR and the CJEU have built on the independence that should characterize PPS or, in a broad sense, the concept of 'judicial authority' or 'judicial functions' or 'judicial body' by affinity with the independence proper to the judiciary.

133 - Pursuant to Articles 6 and 14 (2) (b) of the Regulation, the EPPO - be it the European Prosecutor General, the 2 Deputies, the College and the Permanent Chambers, the European Prosecutors, the Deputy Prosecutors and the staff - they should neither seek nor take instructions from any person external to the EPPO, any Member State or any institution, body, office or agency of the Union while performing their duties, being incumbent upon them the duty to respect that independence.

134 - Alongside independence, the EPPO will be a body of justice bound by the rule of law. According to Article 5 (4) the EPPO conducts investigations impartially and seeks all relevant evidence, whether inculpatory or exculpatory.

135 - Proportionality is also a parameter that must be obeyed by the EPPO and by the European Delegated Prosecutors when considering, opting and implementing investigative measures [Article 5 (2)].

136 - It provides guarantees of impartiality - Article 12 (2) - and observes the CDFUE regarding the fairness of proceedings (equality of arms) and respect for the rights of defence in the direction of investigations, evidence gathering and procedural intervention (see Articles 5 (1) and 41 of the Regulation).

137 - The EPPO is an autonomous and independent body, with stable and permanent structure, according to the rules of appointment, mandate and dismissal (articles 14, art. 15, 16 and 17), from which a principle of stability emerges.

138 - The European Delegated Prosecutors are fully integrated into the EPPO, act under the exclusive authority of the Permanent Chambers and of the European Prosecutors and follow only their instructions, guidelines and decisions in the conduct of investigations and prosecution (cf. Article 8, 9, 12 and 13), thus establishing a principle of hierarchy and indivisibility.

139 - Ensuring effective autonomy and independence, the EPPO has its own budget according to article 91, which allows it to equip itself with the material and human resources appropriate to the fulfilment of its mission.

In addition, for the same purposes, investigative measures that it may request or order are mandatory for the MS and their national authorities that will have to provide them

(see Articles 28 and 30 of Regulation and Article 5 (6) concerning sincere cooperation). Therefore, a principle of material and budgetary autonomy is also outlined here.

140 - Due to these characteristics, in addition to the political and legal challenges, the EPPO will be challenging the national judiciary, and it is precisely here that the EPPO's independence status will put under scrutiny the status of the national PPS, for constituting on a model, on a reference institution, of gradual accession, with obvious internal implications and substantial impact on the judicial architecture, both for participating MS and for others.

141 - Given the fragmentation and diversity of the PPS statutes within the EU, the aspect of this asymmetry with regard to such external autonomy or independence can be a source of complexity and paradoxes⁵⁸.

142 - In models where PPS has a hierarchical structure that ends in the political-executive power, the independence of the EPPO's action may be held hostage to political motivations, which were originally intended to be precisely excluded, namely when the police is also under the purview of the executive power.

143 - Although the effort to endow the EPPO with independence and having been foreseen some guarantees of independence to the Delegated prosecutors, its mixed configuration (“double casquet”), due to the inherent variation of powers concerned, does not guarantee coherence of action nor it does provide sufficient guarantees of effective independence to the EPPO.

144 - The institutional set-up of the national PPS will be challenged with the need to correspond with equivalent autonomy to the independence of the EPPO and will dictate an in-depth reform of some MS PPS or at least to those who will support the EPPO.

The establishment of the EPPO and the way its operation is defined in the Regulation will therefore have a strong impact on the structures and functioning of the national PPS, which may imply reforms of statute and perhaps constitutional amendments, either in cases where the national PPS is independent from the government and

⁵⁸ As regards **institutional harmonization**, the differing status of national PPS, their investigative powers and their investigative direction raises difficulties for them to cooperate, as a relative result of the different framework of their missions to investigate crimes and prosecute, which differ from each other, depending on whether or not the principles of legality and opportunity are prevailing or combining.

The hierarchical and decentralized model will certainly entail the establishment of cooperation formulas between EPPO and the PPS hierarchy in the different MS to ensure the effectiveness of investigations and their quality, and will certainly entail arrangements in the internal hierarchical model in view of the possibility for EPPO to endorse instructions to the European Delegated Prosecutors.

The establishment of the EPPO will also lead to reforms in national judiciary and procedural systems, at least as regards the preliminary criminal procedure, in the sense of an harmonization or approximation of the powers and measures of investigation and of the structure of fundamental rights and the standardized guarantees of respect for them (this is the purpose of Article 41 of the Regulation).

If not so, the reference to national law as the applicable law (in matters not covered by the EPPO Regulation - see Article 5 (3) of the Regulation) will imply asymmetry of EPPO powers and will result in further fragmentation of the AFSJ.

unaware of any hierarchical or centralized structure that culminates in the executive power, such is the case in Italy, or in cases where the national PPS, even though hierarchical and centralized, is not independent from the political power.

145 – Here, perhaps, lies one of the greatest structural tensions in the establishment of the EPPO in which the consolidation of the role of the PPS in the prosecution, along with the recognition of its relevance in international judicial cooperation in criminal matters, greatly via the EPPO proposal, will entail alignment of statutes and above all of external independence.

146 - This tension, even without the establishment of the EPPO, has already begun to be faced and resolved by the most recent CJEU case-law.

147 - As was reiterated in the CJEU Order of 14 November 2013 in Case C-49/13 to determine whether a referring body is a “court” within the meaning of Article 267 TFEU, which is a matter which falls solely within the scope of EU Law, the Court took into account a number of elements, such as the legal origin of the body, its permanence, the binding nature of its jurisdiction, the contradictory nature of proceedings, if it applied to rules of law and whether it was independent⁵⁹.

148 - In the case *Commission v Poland* (C-619/18), as one of the most relevant developments of the *ASJP* judgment⁶⁰, the CJEU clarifies that the legitimacy of any compression of the principle of judicial independence is subject to the proportionality test and that this principle constitutes itself almost an absolute value.

149 - The requirement for independence contains, according to the same judgment, two aspects:

- The first aspect, of an external nature, requires the body concerned to perform its functions in full autonomy, without being subject to any hierarchical or subordinate relationship to any entity and without receiving orders or instructions from any source, thus being protected against external intervention or pressure likely to affect the independence of its members and

⁵⁹ See, in particular, Judgments of 17 September 1997, *Dorsch Consult*, C 54/96 [1995] ECR. I 4961, No 23; 31 May 2005, *Syfait and Others*, C 53/03, Colet., p. I 4609, No 29; 14 June 2007, *Häupl*, C 246/05, Colet., p. I 4673, paragraph 16, and of 31 January 2013, *Belov*, C 394/11, paragraph 38. Such guarantees of independence and impartiality, which are necessary for a body to qualify as a ‘court or tribunal’ within the meaning of Article 267 TFEU, postulates the existence of rules, in particular as regards the composition of the judicial body, the appointment, the duration of the duties and the reasons for the abstention, impugnation and appointment of its members, to preclude any legitimate doubt, in the spirit of those seeking justice, as to the impermeability of that judicial body in relation to external factors and to its neutrality with regard to the interests in dispute (see, in particular, the Order of 14 May 2008, *Pilato*, C 109/07 ECR I 3503, paragraph 24, and judgment of 31 January 2013, *D. and A.*, C 175/11, paragraph 97, or Judgments of 19 September 2006, *Wilson*, C-506/04, EU: C: 2006: 587, paragraph 53 and case law cited, and of 25 July 2018, *Minister for Justice and Equality*, C-216/18 PPU, EU: C: 2018: 586, 66 and the case-law cited).

⁶⁰ Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses* (C-64/16) ECLI:EU:C:2018:117.

to influence their decisions (Judgment of 27 February 2018, ASJP, C-64/16, EU-C-2018: 117, n. 44 and the case-law cited).

- The second aspect, which is internal, is in turn linked to the concept of impartiality and seeks equal distance from the parties of the proceedings and their interests, having regard to the subject-matter of dispute. This aspect requires respect for objectivity and the absence of any interest in deciding the dispute other than the strict application of the rule of law (Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), 216/18 PPU, EU-C-2018: 586, paragraph 65 and case law cited)⁶¹.

150 - Both the concept of independence of a judicial authority and the guarantees that support it **are extensible to PPS** and constitute criteria of equal degree of requirement in assessing that nature. In 2016, the CJEU argued in Poltorak (C-452/16 PPU, paragraph 33) and Kovalkovas (C-477/16 PPU, paragraph 34) whereas the term “judicial authority” should not be interpreted strictly, correspondingly only to judges or courts of a MS, but more broadly encompassing “the authorities participating in the criminal justice administration” of a given MS, such as the PPS (Özçelik Case C-453/16 PPU)⁶².

151 - On 27 May 2019, the CJEU handed down a decision in Joined Cases C-508/18 OG (Public Prosecutor's Office of Lübeck) and C-82/19 PPU PI (Public Prosecutor's Office of Zwickau) and in Case C-509/18 PF (Prosecutor General of Lithuania), following preliminary rulings from the Irish Supreme Court, which also confirmed that the PPS is an authority participating in the administration of criminal justice and that the concept of judicial authority applies to it.

152 - As regards the issuing of an EAW, the independence of the issuing judicial authority must be guaranteed and, actually, it must be shown that there are statutory

⁶¹ In particular, the indispensable freedom of judges from any outside intervention or pressure requires, as the CJEU has repeatedly pointed out, certain adequate safeguards to protect those whose task is to judge, such as immovability. See Judgment of 25 July 2018, Minister for Justice and Equality, C-216/18 PPU, EU: C: 2018: 586, paragraph 64 and the case-law cited.

In particular, the principle of immovability requires that judges may remain in office until they reach the mandatory retirement age or until the end of their term of office when the latter is of a fixed duration. Although not absolute, that principle can admit exceptions only when legitimate and overriding reasons justify them, always submitted to the principle of proportionality. Thus, it is commonly accepted that judges may be dismissed if they are unable to continue to perform their duties on the grounds of incapacity or serious misconduct provided that appropriate procedures are followed.

In that regard, it results more precisely from the case-law of the Court that the requirement of independence demand that the rules governing the disciplinary regime and, consequently, any dismissal of those who have the task of giving judgment provide the necessary guarantees to avoid any risk of such a scheme being used as a system of political control over the content of court decisions. Accordingly, the adoption of rules defining in particular both the constitutive behaviours as disciplinary offenses and the penalties specifically applicable, providing for the intervention of an independent body in accordance with a procedure fully guaranteeing the rights enshrined in Articles 47 and 48 of the CFREU, in particular the rights of the defence, and providing for the possibility of challenging judicially the decisions of disciplinary bodies, is a set of essential safeguards for the preservation of the independence of the judiciary [Judgment of 25 July 2018, Minister for Justice and Equality (Deficiencies in the system of justice), C-216/18 PPU, EU: C: 2018: 586, No. 67].

⁶² This broad interpretation is supported by the logic of the EAW, which aims to facilitate the free movement of judgments, including pre-trial ones, as regards the lead of criminal proceedings.

rules and an institutional structure capable of ensuring that it is not exposed, when adopting a decision to issue an EAW, to any risk of being subjected, inter alia, to any instructions from the executive on a specific case ⁶³.

153 - The CJEU concluded that this was not the case of the German PPS, whose prosecutors are directly or indirectly subordinated to the Minister of Justice and may be subjected, directly or indirectly, to orders or instructions from a political agent in a particular case connected with the decision to issue an EAW.

154 - The conclusion drawn from this line of jurisprudence is the same as the one mentioned above regarding the cross-fertilization promoted by the EPPO establishment: The CJEU views will have a decisive impact not only in Germany, but also on the MS which keep a Napoleonic model of PPS and which have already been, or are about to be, exposed to the CJEU's jurisprudential accuracy.

155 - The effects on the AFSJ will be the long-term metamorphosis of these PPS models and will lead to the need for reforms on the organization of criminal investigation and criminal justice in general, particularly on what concerns the ability to initiate and participate in judicial cooperation through legal instruments based on mutual recognition, which will not fail to adjust the independence status of the national PPS.

156 - What seems clear to us, from this case-law, is that the CJEU will not stop being inspired by it whenever assessing the independence of the European Delegated Prosecutors after the establishment of the EPPO ⁶⁴.

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⁶³ That is exactly what was reaffirmed in the judgments in Joined Cases of 12 December 2019, Parquet général du Grand-Duché de Luxembourg (Procureurs de Lyon and Tours) (C-566/19 PPU and C-626/19 PPU) ECLI:EU:C:2019:1077, and in judgment of 12 December 2019, Openbaar Ministerie (Parquet Sweden) (C-625/19 PPU) ECLI:EU:C:2019:1078 and judgment of 12 December 2019, Openbaar Ministerie (Procureur du Roi de Bruxelles) (C-627/19 PPU) ECLI:EU:C:2019:1079.

⁶⁴ The greatest tensions with the Portuguese PPS model result from the provisions of Articles 35 and 36 of the EPPO Regulation and the compression of the so-called internal autonomy. Cf. ALBUQUERQUE, José P. Ribeiro de. EPPO – Building Federal? A instituição da Procuradoria Europeia e os estatutos dos Ministérios Públicos dos EM da UE: Parâmetros mínimos de independência. In “Os novos desafios da cooperação judiciária e policial na União Europeia e da implementação da Procuradoria Europeia” (eBook). CIIDH: Escola de Direito da Universidade do Minho, 2017, pp. 135-172.

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