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Opening of the Judicial Year

Seminar

The Authority of the Judiciary

Separation of Powers and Judicial Independence: Current Challenges

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1. The fundamental principles of the separation of powers and judicial independence are considered central tenets of all liberal democracies, everywhere and in every time. And rightly so.

«There is no liberty, if the judiciary power be not separated from the legislative and executive» (C.L. de Montesquieu, *The Spirit of Laws*, Book XI, 6 *Of the Constitution of England*, 1748).

It is no surprise that an adjudicator of individual rights and liberties such as the European Court of Human Rights has drawn attention to the separation of powers and judicial independence. Separation of powers is not only a matter of constitutional architecture for the sake of the rational organization of powers. It is a matter of liberty for each person and for society as a whole. It is a basic condition for the effective protection of individual rights and liberties, in order to assure each individual an effective remedy against any breach of her or his rights.

2. Liberty, democracy and the balance of powers are not overnight achievements that can be established once and forever. Many steps have been taken since the time when *The Spirit of Laws* was written, but preserving liberty against the abuse of power is always an endless business. Risks for judicial independence and the separation of powers have always been there: at the time of the Act of Settlement of 1701 and under the constitutional monarchies in the XIX centuries, not to speak of the authoritarian regimes between the two World Wars. During the twentieth century new institutions were set up over time in most European countries in order to defend judicial independence. Many constitutions established Councils of the Judiciary as a safeguard against the pressures of other branches of government and, for decades, European liberal democracies were free from major attacks.

Over the last decade, however, the overall atmosphere has changed drastically.

To use once again the word by Montesquieu, contemporary Europe is facing the bitter truth that «constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. [...] To prevent this abuse, it is necessary from the very nature of things that power should be a check to power» (de Montesquieu, *The Spirit of Laws*, Book XI, 4, *In what Liberty Consists*).

Unexpectedly powerful leaders supported by strong majorities have dismantled all restraints; the separation of powers has eroded and the rule of law, as well as judicial independence, are at risk in many countries and even in some western liberal democracies. Many international actors are sounding the alarm and sending warnings in the form of recommendations, resolutions and other documents: from the institutions of the European Union to the Council of Europe and the Venice Commission.

The value of the separation of powers is evergreen, but it is also always at risk.

3. While the separation of powers is a perennial value, the historical context has changed dramatically since John Locke penned the *Two Treatises of Government* in the late seventeenth century (1690) and Montesquieu expounded upon it in *The Spirit of Laws* in the mid-eighteenth century.

And it is important to reason about the present challenges to the separation of powers and the authority of the judiciary in concrete, rather than abstract, terms.

The main dividing line to be preserved is once again between *political institutions* on the one hand and *safeguard institutions* on the other. The historical dichotomy between *gubernaculum* – government – and *iurisdictio* – judicial branch is topical again today: judicial independence is put at risk when a clear duality between *gubernaculum* and *iurisdictio* is blurred.

The times have changed in many respects. The judicial power today is no longer the mute, null power of the nineteenth century. The current dangers for judicial independence are materializing after a period of the “rise of the judiciary” within the constitutional system, as Mauro Cappelletti wrote. Today, the judiciary plays a much more significant role than the *bouche de la loi*, the mouthpiece of the law, described by Montesquieu. In truth, this image of the judge was not much more than a myth even in the Nineteenth century, but in any case it certainly does not match with the contemporary reality.

Here I would like to pause and elaborate a bit on some (of the many) factors that have brought the role of the judiciary to a place of prominence in contemporary public life: for the sake of clarity I will group my remarks on this point under four headings: judge made law; the rights revolution; the judicialization of political issues; and the role of courts in a global world.

3.1. *Judge made law*. In 1984, Mauro Cappelletti published an important book entitled *Giudici legislatori?*, *Judge legislators?* (*Le pouvoir des juges* in the French translation released in 1990), in which he addressed the growing importance of the judiciary in Twentieth-century societies in whatever form it may take, be it *judicial legislation* or *constitutional adjudication*. Cappelletti points out that, in reality, the mission of the judiciary overlaps to some extent with that of legislatures. On this basis, in the last decades of the Twentieth century and onward, civil-law and common-law countries are converging thanks to a number of factors, among which one could at least include the following factors.

First, the establishment of judicial review of legislation, to be conducted by Constitutional courts (or equivalent bodies charged with the duty to review legislation). Although Kelsen called them negative legislators, they have also shaped their remedies so that they can also fill the gaps in the legal order and act as occasional positive legislators, for example by means of interpretative decisions, decisions that construe legislation or correct it.

Second, a robust *constitutional culture and consciousness* permeates the mentality of all judges, also first-level judges, and gives them a broad discretionary power; this constitutional culture is also disseminated through legal education and the ongoing formation of the judges performed by the “school of the judiciary”, that have been implemented in many countries.

Third, the *judicial empowerment* that was prompted by the European courts – both the ECHR and the Court of Justice of the EU – that encouraged judges who had previously been strictly “subject to the law” (i.e. art. 101 of the Italian Constitution) to disregard the law when appropriate.

Fourth, the success of *new methods of interpretation* oriented to avoid any construction which could lead to results that conflict with higher norms – interpretation in conformity with the constitution, the European Convention, and EU law. Given the poor quality of parliamentary legislation, the interpretative power of judges has hugely expanded, in the form of interpretation value-oriented (N. Zanon-F. Biondi, *Il sistema costituzionale della magistratura*, Zanichelli, Bologna 2014⁴).

3.2. This brings us to a second feature of our legal habitat: a special mention is due to the *rights revolution* or, if you prefer, the flourishing of a culture of human rights, which stimulates the judiciary to take a more proactive role. Late post-modern constitutionalism is based on the centrality of individual rights. *Iura* has overcome *lex*. Most of the new issues of social life are framed in terms of individual rights: a number of new rights have stemmed from the right to private life, the right to self-determination, and the right to non-discrimination, and they touch upon new, sensitive, and unsettled issues of our day. Rights can be claimed directly before the courts. Whereas political bodies can be paralyzed by divisions and lack of consensus and might be unwilling to deliberate on controversial issues, courts are bound to decide even on the most sensitive ones. New rights claims concerning bioethical issues, the transformation of family law, multicultural concerns, law and religion, and immigration are part and parcel of the everyday work of courts. In many cases, courts have to decide new rights issues without the support of a clear piece of legislation. These cases push the judiciary to the forefront of the public debate and keep it always under the spotlight.

3.3. The third feature that I would like to highlight is the *judicialization of political issues* that means that *political issues are more and more often brought before the bench*.

During his visit in America, the French aristocrat Alexis de Tocqueville was struck by the powerful position of the judiciary in that legal and political system. Among other things he noticed that, «there is almost no political question in the United States that is not resolved, sooner or later into a judicial question» (*Democracy in America*, New York, Adlard & Saunders, 1838, Book 2, 8).

Nowadays his remark could be easily applied to many legal orders of Europe, although belonging to the so-called “civil law tradition”, or continental tradition. “Judicialization” of political questions – to borrow from Martin Shapiro and Alec Stone Sweet (*On Law, Politics and Judicialization*, Oxford, Oxford University Press 2002) – is a common trend in many countries: a large part of questions once reserved for politics and legislators are now handled by the courts. To illustrate this, allow me to briefly mention the two major decisions of the Italian Constitutional Court on electoral laws (no. 1 of 2014 and no. 35 of 2017), by means of which the Court incisively corrected, and almost re-wrote, the legislation approved by Parliament. For a long time, electoral laws have been considered the “domain of politics”. However, for many years, political bodies had been unable to reach any agreement on new legislation, and the public debate was growing more and more critical of the legislation in force because of its misrepresentative effects. As a result, the electoral legislation was challenged before the Constitutional Court.

Another example that cannot be overlooked is the famous Miller case decided by the Supreme Court of the UK, which required, in the name of the parliamentary supremacy, that the Parliament have a say on Brexit, after the referendum approving it.

We can see everywhere an «ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy and political controversies» (Ran Hirschl, *Towards Juristocracy*, Cambridge, Harvard University Press 2004, pp. 12 ss.) And, again, this trend brings the courts under the spotlight, indeed.

3.4. Fourth, courts are to be included among the *main actors of legal globalization*. Whereas parliaments, governments and in general democratic institutions do not fit into large systems, courts seem to be suitable for the grand scale. This fact is remarkable and almost ironic: it proves that a dramatic change is taking place in the judiciary. After all, the judicial function has traditionally been considered intrinsically “national” or “domestic”. Now courts are more affected by the globalizing process than other branches of government.

A number of judicial or quasi-judicial bodies have been established in the international arena (S. Cassese, *I tribunali di Babele*, Donzelli, Roma 2009).

Moreover, an increasing number of issues brought before national courts have a “global side” (S. Breyer, *The Court and The World*, A. Knopf, New York 2015), so that these courts are more and more often called upon to solve disputes in which global or foreign law is involved: disputes related to people’s mobility and

immigration; disputes related to foreign investments; disputes involving global and supranational standards on trade, environment, or sports, for example; and disputes involving “individual rights”. The judicial branch appears to be more suitable than the other branches of government to act as a transmission belt between national and foreign legal orders, and courts are at the forefront of globalization.

Stringent interconnections among courts are taking place all around the world. They do not necessarily require “formal” procedures, even if these are very important (like Protocol 16 to the European Convention or the preliminary ruling in the EU law); they may also occur in “informal” and unspoken ways, like an underground river that emerges from time to time at the surface. Not to mention the judicial networks that favor cultural exchanges among judges.

There is no doubt that we live at a time in which the judiciary is thriving. Constitutional courts are not the only ones to have gained importance in Europe and elsewhere. Supranational and international courts’ authority has increased. At the national level, the judicial function by and large exceeds the traditional syllogistic implementation of written legal rules. Judge-made law is now a reality even in countries that can be ascribed to the continental tradition based on written parliamentary legislation. Human rights adjudicators have multiplied.

Le juge bouche de la loi is an archaeological relic in Europe (if he ever existed at all). The judiciary has gained relevance in public life. It is not at all a “null power”, as it was once considered, but has become, on the contrary, one of the most relevant actors in the constitutional system.

The judiciary cannot be longer depicted as «the least dangerous branch», as Alexander Hamilton wrote in Federalist no. 78, and an air of criticism is spreading, one that often condemns the “political role of the courts”.

Moreover, on a different level, in some countries judges have become much more visible in public debate. They make statements through the media and form an extraordinary pool of experts often called to the highest positions of the administration, working next door to the political bodies; significant numbers of them leave the judicial branch to compete in political elections and take seats in Parliament.

4. These are the conditions in which we have to consider the present, serious attacks on the judiciary.

In some cases, the attacks are *open and large-scale*; in other cases, they are *veiled, disguised and discrete*. They are different in nature and require different kind of remedies.

It is not my task today to elaborate on the possible remedies. On this point, we will listen to the presentations in the next session. Nor is my task to present an overview of the situation of each country of the Council of Europe. On this point, the background papers provided for the seminar are excellent and exhaustive.

I will simply mention some points of vulnerability and some current challenges.

4.1. As for the first class of attacks, those that are open and large-scale, we all have a number of countries in mind. Let me simply mention the endemic situation in Poland, which induced the Commission of the European Union to open the procedure under Article 7 of the Treaty of the European Union. The Commission noticed that «over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch». Therefore «despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has [...] concluded that there is a clear risk of a serious breach of the rule of law in Poland». The Commission believes that the country’s judiciary is now under the political control of the ruling majority and, in consequence, it has proposed to the Council to adopt a decision under Article 7(1) of the Treaty on European Union to protect the rule of law in Europe.

4. 2. In other countries there may be subtler underway attempts to control the role of the judiciary.

Let's start from this simple fact. The judiciary carries out its functions *under the law*. The status, salary, tenure and career of judges, as well as the organization and procedure of judicial bodies, are regulated by law.

The law is a fundamental guarantor of the independence of the judiciary; the law is a shield against arbitrary interference with judicial activity on the part of single personalities. But the law can also adversely affect judicial activity.

Overviews produced by a number of bodies within the Council of Europe enumerate several aspects of judicial organization and activity that are vulnerable.

Appointments and careers of judges should be regulated by the law, according to objective criteria, and applied by an independent authority, such as a "council of the judiciary". However, arbitrary changes in laws concerning the tenure, term, promotion, transfer, and responsibility of judges may affect the independence of the judiciary and render the national Councils for the Judiciary powerless.

Stability of tenure is an essential element for judicial independence. Unexpected and hasty changes in retirement age rules, arbitrary termination of terms in office of judges, or forced dismissal of judges and prosecutors are just some examples of intrusion by political bodies in the judiciary. Attention should be paid to those positions that are covered for a short fixed term (5-6 years) and are renewable at the discretion of the executive branch.

Another weak point may be judges' remuneration and funding of the judiciary. The enduring economic crises suffered by many Member States has required the imposition of severe cuts and the freezing of budgets and salaries for all the branches of the administration, included the judicial one. Whereas temporary sacrifices are inevitable, chronic underfunding can impair the working condition of the judiciary: lack of appropriate remuneration, security risks, cuts in staff, and cuts in peripheral judicial bodies can increase the workload of courts and undermine their ability to decide cases with the necessary quality and care and within a reasonable time. Moreover, cuts in legal aid may be an obstacle to access to justice.

All these (and other) organizational aspects are, generally speaking, regulated by general rules. Written rules are an instrument for protecting judicial independence, but under certain political and cultural conditions they become instruments for taming and curbing the role of the judiciary, through *reforms of the judicial organization*.

As for *judicial activity as such*, a range of interference by political bodies can occur. An overview of the case law – especially on Article 6 of the Convention – shows that retroactive legislation can be approved by political bodies in order to interfere with a specific case or a class of pending proceedings; partisan pardon laws or milder legislation on criminal matters can stop trials in place and can be used in order to stop judges from issuing sentences or ordering convictions; the rules of procedure are in the hands of political bodies, because they are regulated by legislation. Moreover, any reform of procedural rule is to be applied immediately – *tempus regit actum* – and can therefore easily encroach upon trials in place; special attention is required for standing: *locus standi* is crucial for a judge's possibility to act. *The judicial function is a power on demand*. No court can initiate a case; a court is required only to respond to a case that is brought to its attention. Nor can it broaden the scope of its decision: the borders of its power are delimited by the plaintiff. Restricting the rules on standing or reducing the access to justice can neutralize the courts.

5. To sum up, many of the guarantees of judicial independence "depend" on legislation. But what if legislation itself takes an illiberal turn? Many European legal orders have a Constitutional Court and it falls to the Constitutional Court to make sure that constitutional principles – including the separation of power and the independence of the judiciary – are complied with by all actors. To this end, the constitutional courts have many competences that may be triggered according to the rules of each legal system: judicial review of legislation, direct complaint, conflicts between powers.

Constitutional courts can do a lot of work, as can the European Court of Human Rights.

However, since my presentation is focused on challenges – and not on remedies – I am not allowed to conclude on a positive note. Even constitutional courts have weak points. The constitutional courts are the keepers of the Constitution; but they themselves are judges.

And, like all the other judges, they may be attacked on tenure, funding, salaries, and procedures, as the Polish experience shows.

Moreover, like all other judges, they do not have the power of sword: if their decisions are disregarded, or are not implemented, they are mute. They are disabled; their decisions go unenforced or ignored.

In most cases, in the face of specific or individual challenges to judicial independence, constitutional courts can defend, strengthen and support other courts. Courts are networked and can do a great deal to support one another. However, when the disruptive effect on judicial independence comes from the system, and not from a single piece of legislation – when the culture is permeated by “constitutional bad faith”, as Lech Garlicki puts it (L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Poland? = Disabling the Constitutional Court in Poland?*, in B. Banaszak and A. Szmyt (eds.) *Transformation of Law Systems. Liber Amicorum in Honorem Professor Rainer Arnold*, Gdańsk University Press, Gdańsk 2016, p. 63) – then it would seem that courts are disarmed.

As Kim Scheppelle has pointed out, in some European countries the crisis of the rule of law is more cultural than (il)legal. Better: it was cultural before becoming (il)legal and (un)constitutional. To oppose and to prevent this cultural crisis we the courts can do a lot of work to strengthen our authority even when our powers are under threat. Notice: I am using the word authority in the original Latin meaning. *Auctoritas* and *potestas* (or *imperium*) were not equivalent in Roman law, as Giorgio Agamben says (*Stato di eccezione*, Bollati Boringhieri, Torino 2003; English translation: *State of Exception*, Chicago, University of Chicago Press 2005). *Auctoritas* has to do with reputation, consideration, respect, and legitimacy. Even in similar legal frameworks, judges are more respected in some countries than in others: for this reason, comparative constitutional scholarship sometimes makes a distinction between “strong” and “weak” courts. The powers are the same, but the reputation and the effective role of the courts can differ. A number of factors affect – enhance or undermine – the *auctoritas* of judges: respect for *stare decisis*; the credibility of the reasoning and opinions; due consideration for all the arguments brought before the bench; the political exposure of judges; good relations with public opinion, and so on and so forth. There are challenges that blatantly and grossly harm judicial independence by means of legislative and constitutional reforms, and others that silently erode the credibility of the judiciary. We, the courts, can do a lot on both levels: protecting the separation of powers as well as enhancing the *auctoritas* of the judiciary in the long term, in the public sphere.