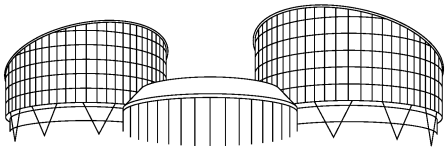

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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, intended to secure the rational organization of powers. It is a matter of liberty for each individual and for society as a whole. It is a basic condition for the effective protection of individual rights and liberties, in order to guarantee to 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 which can be considered as established once and for all. Much has been done since the time when *The Spirit of Laws* was written, but preserving liberty against the abuse of power remains an endless business. The risks to judicial independence and the separation of powers have always existed: at the time of the Act of Settlement of 1701 and under the constitutional monarchies in the 19th 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 safeguards 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 Montesquieu's words once again, 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 been eroded, and the rule of law and judicial independence are at risk in many countries and even in certain western liberal democracies. Many international actors – from the European Union's institutions to the Council of Europe and the Venice Commission – are sounding the alarm and issuing warnings in the form of recommendations, resolutions and other documents.

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 Treaties of Government* in the late seventeenth century (1690) and Montesquieu expounded upon it in *The Spirit of Laws* in the middle of the eighteenth century. It is important to discuss present-day 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 *institutions of protection* on the other. The historical dichotomy between *gubernaculum* – the government – and *iurisdictio* – the judicial branch – is again topical today: judicial independence is put at risk when the clear duality between *gubernaculum* and *iurisdictio* is blurred.

Times have changed in many respects. Judicial power is today no longer the mute, insignificant power of the nineteenth century. The current dangers for judicial independence are emerging after a period during which the "rise of the judiciary" within the constitutional system, as Mauro Cappelletti described it, was clear. Today, the judiciary plays a much more significant role than that of *bouche de la loi*, or mouthpiece of the law, as 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 event it certainly does not correspond to the contemporary reality.

I should like to pause here and elaborate slightly on some (of the many) factors which have brought the judiciary's role to 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 judicialisation 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?*, or "Judge legislators?" (*Le pouvoir des juges* in the French translation, issued in 1990), in which he addressed the growing importance of the judiciary in twentieth-century societies in whatever form it may take, whether *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 beyond, civil-law and common-law countries were converging as a result of a number of factors, among which one could include at least the following.

First, the introduction of judicial review of legislation, to be conducted by constitutional courts (or equivalent bodies charged with the task of reviewing legislation). Although Kelsen has described them as negative legislators, these courts have also shaped their remedies in such a way that they can fill the gaps in the legal order and occasionally act as positive legislators, for example by means of interpretative decisions, that is, decisions which construe or correct legislation.

Second, a robust *constitutional culture and consciousness* permeates the mentality of all judges, including first-instance judges, and gives them broad discretionary power; this constitutional culture is also disseminated through legal education and the ongoing training of judges by "schools of the judiciary" which has been introduced in many countries.

Third, *judicial empowerment* as prompted by the European courts – both the ECHR and the Court of Justice of the European Union – which has encouraged judges who were previously strictly "subject to the law" (see Article 101 of the Italian Constitution) to disregard the law when appropriate.

Fourth, the success of *new methods of interpretation*, oriented towards avoiding any construction which could lead to results that conflict with higher norms – that is, interpretation in conformity with the national constitution, the European Convention and EU law. Given the poor quality of parliamentary legislation, the interpretative power of judges has expanded hugely, in the form of value-oriented interpretation (N. Zanon-F. Biondi, *Il sistema costituzionale della magistratura* (4th ed.), Zanichelli, Bologna, 2014).

3.2. This brings us to a second feature of our legal habitat: special mention must be made of the *rights revolution* or, if you prefer, the flourishing of a human-rights culture, which stimulates the judiciary to play 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 facing society 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 may be paralyzed by division and a lack of consensus and might be unwilling to deliberate on controversial issues, courts are bound to rule on even the most sensitive cases. New 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 must decide issues relating to new rights without the support of clear legislation. These cases push the judiciary to the forefront of the public debate and keep it constantly under the spotlight.

3.3. The third feature that I would like to highlight is the *judicialisation of political issues*, by which I mean that *political issues are increasingly brought before the courts.*

During his visit to America, the French aristocrat Alexis de Tocqueville was struck by the powerful position of the judiciary in that country's 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 easily be applied to many legal orders in Europe, although they belong to the so-called "civil-law" or continental tradition. "Judicialisation" 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: many questions once reserved for politics and legislatures are now handled by the courts. By way of illustration, allow me to mention briefly the two major decisions of the Italian Constitutional Court on electoral laws (no. 1 of 2014 and no. 35 of 2017) through which that Court incisively corrected, and almost re-wrote, legislation that had been approved by Parliament. For a long time, electoral laws were considered the "domain of politics". For many years, however, political bodies had been unable to reach any agreement on new legislation, and public opinion 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 United Kingdom's Supreme Court, which required, in the name of parliamentary supremacy, that Parliament have a say on Brexit after the referendum approving withdrawal from the EU.

We 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 et seq.) Again, this trend really does put the courts under the spotlight.

3.4. Fourth, courts are to be included among the *main actors of legal globalization*. Whereas parliaments, governments and democratic institutions in general do not fit into large systems, courts seem to be suited to 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, however, 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 frequently called upon to resolve disputes in which international or foreign law is involved: disputes related to individuals' mobility and immigration; disputes related to foreign investments; disputes involving global and supranational standards on trade, the 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.

Strong interconnections are being formed between courts all around the world. They do not necessarily require "formal" procedures, even if these are very important (such as Protocol No. 16 to the European Convention or the preliminary ruling in EU law); they may also occur in "informal" and unspoken ways, like an underground river that emerges from time to time on the surface. Not to mention judicial networks which favour cultural exchanges among judges.

There is no doubt that we are living at a time when the judiciary is thriving. Constitutional courts are not the only ones to have gained importance in Europe and elsewhere. The authority of supranational and international courts 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 it 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 can no longer be 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, judges in some countries have become much more visible in public debate. They make statements through the media and form an extraordinary pool of experts who are often called to the highest positions of the administration, working next door to political bodies; significant numbers leave the judicial branch to compete in political elections and take seats in Parliament.

4. These are the conditions in which we must consider the present serious attacks on the judiciary.

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

It is not my task today to elaborate on these possible remedies. On this point, we will listen to the presentations in the next session. Nor is it my task to present an overview of the situation in 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 areas of vulnerability and some current challenges.

4.1. With regard to the first category 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 a procedure under Article 7 of the Treaty on 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 that it 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 subtler attempts may be underway 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 organisation and activity that are vulnerable.

The appointment and careers of judges should be regulated by the law on the basis of 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 of 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 held 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 have required the imposition of severe cuts and the freezing of budgets and salaries for all areas of State administration, included the judicial branch. Whereas temporary sacrifices are inevitable, chronic underfunding can impair the working conditions of the judiciary: lack of appropriate remuneration, security risks, staff cuts, 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 organisation.*

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 amnesty laws or milder legislation on criminal matters can halt pending trials and can be used to stop judges from imposing sentences or convicting defendants; the rules of procedure are in the hands of political bodies, in that they are regulated by legislation. Moreover, any reform of procedural rules is usually applied immediately – *tempus regit actum* – and can therefore easily encroach upon pending trials. Equally, special attention should be paid to standing: *locus standi* is crucial for a judge's possibility to act. T*he judicial function is a power exercised on demand*. No court can initiate a case; a court is required only to respond to a case that is brought before it. Nor can it broaden the scope of its decision: the parameters of its power are delimited by the plaintiff. Restricting the rules on standing or reducing access to the justice system 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 ensure that constitutional principles – including the separation of powers and the independence of the judiciary – are complied with by all actors. To this end, there are several areas of jurisdiction in respect of which proceedings may be brought before the constitutional courts, according to the rules of each legal system: judicial review of legislation, a direct complaint, and conflicts between the branches of power.

There is much that constitutional courts, and the European Court of Human Rights, can do.

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 made up of judges.

And, like all 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 the sword: if their decisions are disregarded, or are not implemented, they are mute. They are disabled; their decisions go unenforced or are 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 Scheppele has pointed out, in some European countries the crisis of the rule of law is more cultural than (il)legal. It might be better to say that it was cultural before becoming (il)legal and (un)constitutional. To oppose and prevent this cultural crisis, we the courts can do much to strengthen our authority, even when our powers are under threat. Note: 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 observes (*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 with 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 effective role of the courts may differ. A number of factors affect – that is, 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; a good relationship with public opinion, and so on and so forth. There are challenges which blatantly and grossly harm judicial independence by means of legislative and constitutional reforms, and others which 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.