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**CONFERENCE ON**  
**“SUPREMACY OF LAW AND THE INDEPENDENCE OF**  
**THE JUDICIARY - GUARANTEES FOR THE STABILITY OF**  
**DEMOCRATIC INSTITUTIONS”**

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**REPORT**

**“A BRIEF OVERVIEW OF THE SUPREMACY OF LAW**  
**AND INDEPENDENCE OF THE JUDICIARY**  
**– GUARANTEE OF THE STABILITY OF DEMOCRATIC**  
**INSTITUTIONS”**

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## 1. INTRODUCTION

The principle of the *Separation of Powers* (Legislative, Executive and Judiciary) as described by Montesquieu, where each branch of power controls the other, has led in the old European evolution to the concept of *Rechtsstaat* while it entered rather directly as the Rule of Law into the American Constitution. Basically the Rule of Law means that the branches of power have to move within the limits of the given law (in its widest sense). The aim is - simply expressed - the protection of the citizens from arbitrary acts, especially, but not exclusively of the Government.

In this context the *Supremacy of Law* is a further development of this principle connected to the concept of *Democracy*.

It is self-understanding that the limitation of the different powers needs to be optimised by a system of checks and balances. In this system the Judiciary power plays a key role.

Should the Judiciary not be sufficiently independent, it becomes obvious that the supremacy of law is in danger and with this also the stability of the democratic institutions.

## 2. THE SUPREMACY OF LAW

### 2.1 Definition

The Supremacy of law is the absolute predominance of the laws over the powers of the State, mainly over the Government. It tends to avoid arbitrariness and abuse of power.

While the supremacy of law used to be seen in the past mainly to be only formal, the newer view is to give also importance to the material interpretation, in the sense that all rules have to be based on largely and commonly shared moral aspects.

The mere fact to formally be law would not be enough to comply with modern standards. The content of the law must correspond to the rudimentary moral codices as widely recognised by people and it must be followed not only be written down.

The Supremacy of law is also narrowly connected to the equality before law and the fight against arbitrariness and – in general - to the respect of human rights.

### 2.2 CHECKS AND BALANCES

When there is a rule, its breach is not far.

The control over the power of the State in order to ensure the respect of the supremacy of law is fundamental. Without such control the Power has the natural tendency to expand into the direction of the least resistance.

The ways how the supremacy of the rule of law might be violated are numerous; history as well as present times show examples of extraordinary importance as well as the daily violations which might even be the most serious simply because less spectacular.

Often, but not always, the biggest danger of undue influence from one branch of power over the other comes from the Executive power although we have examples in modern history (like in the Italy of the 1990-ies) where the Judicial and the independent Prosecutors strongly press on exponents of the executive and the legislative power.

In a modern State and especially in modern democracies the powers of the state have to control and check each other in order to ensure a sane balance; checks and balances of the democratic institutions over each other and over the respect of the supremacy of law are the guarantors of democracy itself. By the exercise of checks and balances it is guaranteed that one branch of power does not gain more weight than what is allocated to it by the constitution.

### 3. The Judiciary power

Thus the Judiciary power plays a key role in the control of the respect of the laws in general and – at a higher level – on the control of the respect of the supremacy of law which might result in the respect of the constitutional norms.

#### 3.1 Constitutional competences of the Judiciary Power.

The competences given by most modern democracies in their constitution to the Judiciary might slightly differ from one nation to another but comprises in general:

The competence to repress breaches of law. Generally speaking this is the competence of the criminal Judges who act upon the initiative of Public Prosecutors who prosecute offenses to the law.

In the civil courts individuals are looking for justice mostly against other individuals,

and, before the administrative courts the individuals seek their rights against the power of the State; mostly, if not exclusively, against the Government and its administration; this part of competences may also comprise military and other specific courts according to the individual constitutions of a specific nation.

Finally, on a constitutional level, justice is rendered by controlling and guaranteeing the supremacy of law, protecting individuals in their constitutional rights against other courts, against the Government and protecting the human rights of citizens.

Depending on the various constitutions, the constitutional courts often also rule disputes of competences between the different courts and branches of the State's power, like disputes of competence between administrative courts and civil courts and so on and, last but not least, are the authority which may be called to statute on the legitimacy of an institution or an exponent thereof. A typical case may be the decision on the legitimacy of the winner of an election and the like.

#### 3.2 Internal checks and balances

##### 3.2.1 Hierarchy

Within the judicial system itself the checks and balances are organized on one hand by a *hierarchical structure*, where one degree, upon demand of the involved parties checks the operate of the lower degree by means of appeals ;

##### 3.2.2 Control of the Ministry of Justice

on the other hand a certain type of control is exercised also by the Ministry of Justice, with the possibility to seize the Disciplinary Authority for repression.

#### 3.3 Responsibility [Civil, criminal and disciplinary]

The activity of the Judges and Courts although normally independent is not absolutely free; the existing ordinances, laws and the constitution are to be observed. In this context damages

which have been created by a Judge either intentionally or by heavy negligence will lead to the obligation of the State to reimburse damage to the damaged part; in various cases the State may revert against the faulting Judge.

In cases of intention, often the criminal law applies additionally or alone.

### 3.4 Disciplinary Measures

Disciplinary measures have the scope to repress behaviours which are not of criminal relevance and they tend to maintain the Trust into the professional category by sanctioning unethical behaviours of the Judges not only during the exercise of the profession but also in private.

#### 3.4.1 Disciplinary Authority

Depending on the fact of who is the disciplinary authority, i.e. Ministry of Justice or independent body, the issue of the disciplinary measures may become very delicate and even an instrument of pressure and repression.

## 4. NECESSITY OF INDEPENDENCE OF THE JUDICIARY FOR STABILITY OF THE DEMOCRATIC INSTITUTIONS

The independence of the Judiciary as a constitutional principle has been generally accepted since a long time in constitutions of countries of all types of governmental systems. Often, but not necessarily, the independence of the Judiciary is also accompanied by a great autonomy.

### 4.1 Primordality of the Independence of the Judiciary

#### 4.1.1 Visibility of Justice

However, it has to be stated that there is no absolute independence of nobody, nowhere. Each person somehow depends on others and is embedded in the social, political and cultural environment. But the independence, as used in the present context, has to be understood as absence of interferences or pressures of direct or indirect nature. Therefore we mean a functional independence.

The independence of the Judiciary is in fact a crucial necessity for the Trust and confidence of the citizens into their political system; the certainty that the authorities are controlled, is the basis of such trust and confidence. It is therefore an absolute necessity to give the population the strong feeling that the exercise of the democratic rights in political sense and the protection of the human rights and – more general – of the constitutional rights and the constitution and laws are guaranteed by an independent Judiciary which exercises not only a lawful control, but administers a generally accepted Justice in a visible way and gives the strong sensation to the citizen that the democratic system can be trusted.

The visibility of Justice means that Justice needs not only to be done but it needs also to be seen to be done. The public exercise of Justice is essential for the building up of the trust into the Judiciary and thus into the democratic institutions themselves.

#### 4.1.2 Acceptance of Justice

But Justice needs also to be accepted.

This might not be very difficult when it has to follow the screams of the street; but as soon as a Judge has to administer unpopular but lawful Justice, acceptance becomes more difficult. In those cases the acceptance of the Justice by the other democratic institutions and a large part

of the population becomes a sign of respect and trust, first into the judicial system and then into the institutions in general.

#### 4.1.3 Confidence and Trust

Such respect and trust, however, cannot be imposed; it has to be earned. The respect towards the Judiciary as such is the basis of the respect and trust into the work itself of the Judiciary. From there the trust and respect will expand to the other democratic institutions.

It is clear that the respect and trust towards the judiciary itself is not necessarily the trust and respect towards an individual; it is the trust and respect towards the office which the individual exercises. Therefore the work may have been started by the predecessors in office until it becomes institutionalised.

#### 4.1.4 Equality of treatment

All men are equal before the law.

It becomes evident that the simple fact to know that, if you are right, you may obtain Justice and, if you are wrong, you will not obtain it, is fundamental. It is an aspect of the equality of treatment; equal facts have to be treated equally and unequal facts unequally.

The principle of the equality before the law brings you also the certainty that everybody submitted to the same law, including the Judge himself or herself, will be treated the same way than everybody else.

However, in order to achieve the principle of equality of treatment, the Judiciary needs to be independent.

#### 4.2 Appreciation of Independence

The independence of the Judiciary has not only to be appreciated upon what is written in the constitution and the laws but on the reality of facts. Within a system of checks and balances, the Judiciary itself has to stay within the limits of the laws made by the Legislative and the ordinances emitted by the Executive. And this really guarantees the Supremacy of Law for everybody, included the Judiciary.

But, and this cannot be underlined enough:

A Judiciary which is not independent will not be able to respect the equality of treatment.

As soon as the population becomes aware that the Judiciary is not independent, it starts to lose trust or never will gain it; the lack of respect of the other institutions will soon lead to a total loss of respect by the population. Strangely enough, the fact that the more powerful and influential parts of the state power like the executive and the legislative might lack of respect towards the Judiciary reflects back on them; the population having not respect and trust into the Judiciary will lose also respect and trust into the other democratic institutions. And if this happens, many individuals or groups will see no harm to disregard the democratic rules of how acceding to government and the doors are open for the fall and decline of the democratic system and its institutions.

### 5. THREATS TO THE INDEPENDENCE OF JUDICIARY AND MEANS OF PROTECTION

Now, the independence of Justice can be threatened by a series of factors:

#### 5.1 NOMINATION PROCEDURE OF JUDGES

One factor is the nomination procedure.

The procedure of nomination of Judges can reside either in a deep research of individual characteristics of candidates such as professional skills formerly demonstrated, socio-political and ethical backgrounds and the like, leading at the end to an election for a certain period of time or for lifetime; or, it can be grounded in objective choices given through the result of public competitions or, it can be the choice left to a commission or other institutional body.

The nomination may follow the principle of amovability for life time or until a certain age and foresee specific steps of career; or it may be a nomination or election on time.

Whenever the procedure of nomination of Judges is politically dominated, the selection of candidates becomes the first threat to the independence.

The question to know who is making the selection of candidates and under which criterias is almost the same power than the nomination competence itself; in fact: having the possibility, within a number of possible candidates to choose the one who is closest to the ideas of the one who chooses, gives enormous influence to this body of person. The same problem accompanies a Judge throughout his career at all times he should climb the ladder of hierarchy; the question to know who and upon which criterias decides, becomes fundamental for the independence of the individual Judge and thus for the whole Judiciary.

It has to be clearly stated that the nomination process, in almost all democracies, rises questions and critics which – to my knowledge – cannot be resolved definitively; since it is necessary that the nomination body receives proposals, someone or some groupments, often political parties, are required to make propositions. The more public and the more transparent such procedures are, the more it becomes difficult to hide pressures and undue influence. In a working democracy pressures becoming public, for example via the press, normally lead to a reaction of institutions or the population in order to restore the supremacy of law and the independence. The protection mechanisms of publicity is usually rather efficient.

## 5.2 FINANCIAL AUTONOMY

### Budget of the Courts, Salaries and Subsidies

Theoretically at the same level than the Executive and the Legislative, the Judiciary Power is in many countries financially treated at lower level. Often the exponents of the Judiciary, at the difference of the Executive or Legislative, have no official cars at all or only very old ones; the offices often are unappropriate, too small and never enough for all needs.

But these very signs are nothing else then the apparent part of the budget allocated to the Judiciary. More generally speaking all this corresponds to the level of consideration and respect shown to the Judiciary by the other institutions.

The budget might be autonomous for the Judiciary or it might depend on the General Budget; but it is a matter of fact that the budget remains a heavy method to keep the judiciary under pressure and control, especially when the salaries of the Judges and the other civil servants depend on it.

In countries with a generally low budget the salaries might be low but still normal; but, if in practice the salaries are not paid or not paid regularly we reach an alarming level. A Judge will have no way to maintain decently a family and the fact to accept undue money for a favorable treatment before Justice might become an economical necessity.

From occasional bribing to institutionalised bribing is only a short step; but with it the last traces of honourability vanish; for the individual Judge and for the Judicial Power itself.

The financial aspects in the Judiciary are an enormous threat to loose independence. It is crucial to let the Judicial participate equally in the whole state budget and to allow the Judges a decent salary of higher level in order to insure a way of life corresponding to the high level of authority and trust put in the Judiciary.

Given the financial basis, an efficient repression of corruption becomes more feasible together with the critics of an uncensored press.

### 5.3 DIRECT POLITICAL INFLUENCE

Direct influence is the exercise of power reverted directly towards a Judge in order to either intimidate the person or – in some cases – let the person understand that it would be advantageous to follow the so-called “good advises” of exponents of the other Powers. This type of influence is sometimes so strong that it is not even necessary to explain the type of disadvantages or advantages which could be linked to such pressures, nor even to mention that there might be a disadvantage or advantage involved. The more powerful a person is, the more influence such a person is able to exercise if the system lets it happen.

There is in reality very little the Judiciary itself might undertake against such temptatives of intimidation and pressure. The real solution lies in the selflimitation of power from the other exponents of the State. Taking into consideration that such type of intervention is not something very rare, it is the more important not to underevaluate this phenomene. However, experience shows that selflimitation of power is not something to rely upon and the publicity given by a strong press on the one hand and the determination of the other institutions, not only the Judicial, to exercise all of their competences, but not more, can lead to a solution of independence, especially, if the finances of the Judicial do not depend on the arbitrariness of other powers. As already mentioned: a strong uncensored press and selfrestraint of the powers under political responsibility are one of the keys of success to combat undue influence and attacks against independence of the Judiciary.

#### 5.4.2 Traffic of Interests

Less financial, but still close to bribery, the so-called traffic of interests takes a very large place in the undermining of independence. The phenomene is generally not perceived as so crude than bribery itself; nevertheless the consequences are not less harmful for the independence of the Judiciary. The observation of the work of the Judiciary may also bring light into such kind of hidden activities and once again the publicity given by the press may be very helpful, if not essential to fight the phenomene.

## 6. CONCLUSIONS

The independence of the Judiciary must of course be achieved by a correspondent wording of the constitution itself and the laws; but the reality of facts have to match with the theory. In that sense it can be taken as a sign of independence of the Judiciary when the other institutions and the public tribute respect to the exponents of the Judiciary as such, not necessarily as persons but to the institution. It is only then, when the Judiciary is not only independent, but also seen and recognised to be independent and well respected, that the other institutions and the public will have the necessary trust to let them believe in Democracy and its institutions. When this is the case, one can rely on the democratic institutions to achieve what ever needs to be achieved and to seek for remedies if remedies are needed.

Therefore no further need for action aside or outside the democratic system exists and this is a guarantee of stability of the democratic institutions.