

## **Judicial Education as a Support to Judicial Independence and Major Justice Reform**

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by

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The theme of judicial education is not foreign to the nature of contemporary constitutional democracies. As we are going to see, judicial independence is a key element of these political regimes and judicial education is related to the crucial role the human factor plays in the administration of justice.

From this point of view there is no radical differences between democracies, for example mature, consolidating or transitional democratic regimes. Of course, different is the context in which these regimes operate: available resources are different; the strength of the democratic culture – and therefore the attachment to the values of constitutionalism – can vary; often, deep variations exist in the so-called support structure, that is the network of rights-advocacy lawyers, rights-advocacy organizations and sources of financing which plays a so important part in supporting the working of the judicial process (Epp 1998: 18).

However, all these regimes share the same fundamental aim: building a system of government accountable toward the political community and, at the same time, restraining the exercise of political power, even that of the majority. Even though the success in pursuing these goals can vary, all democratic regimes are due to move in the same direction.

### **I. Some basic traits of the judicial function in a democracy**

The judicial function plays a fundamental role in a constitutional democracy (Guarnieri and Pederzoli 2002). Judicial action is a means of dispute resolution which employs a third party as a facilitator. Third party interventions are a widespread practice in society because they tend to promote a relatively rapid and peaceful means of dispute resolution. Various types of these triadic proceedings can be distinguished by the nature and importance of the third party<sup>1</sup>.

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<sup>1</sup> See also, for example, the cases of the mediator and the arbiter.

In judicial proceedings where an externally appointed judge acts as the third party, the freedom of action of the parties to the dispute is limited. Unlike what happens in the case of the mediator, the parties must comply with the judge's decision, even though they have no control over the choice of the judge, who (unlike the arbiter) is imposed on them by the state. Generally speaking, judicial proceedings are much more effective than other proceedings, because they do not need the consent of both parties to achieve a resolution of the dispute. However, this effectiveness must be weighed against the risks for the disputing parties who must relinquish much more control over the proceedings. Judicial proceedings are usually initiated without mutual consent, as legal disputes are usually triggered by the action of one party against another. In some cases, for example in criminal proceedings, a public prosecutor acting on behalf of the state can initiate proceedings, not only against the will of the accused, but also without the consent of the victim.

For these reasons, judges are inherently placed in a difficult position. They must resolve cases without the main element that makes the triad an effective means of resolving disputes in other proceedings: the willingness of the participants to submit to both the proceedings and the involvement of the third party. This is the root of the crisis of consensus that is always latent in the judicial process (Shapiro 1981: 8 ff.). In a society, other mechanisms of dispute resolution that do not lack this consensus can successfully compete with the judicial process. To address this weakness, the judicial process tends to include a number of principles creating the appearance of and reinforcing judicial impartiality. These include: (1) the prohibition against *ad hoc* justice means that the dispute must be resolved by a judge having pre-existing jurisdiction over the general subject matter; (2) the adversary principle (*et audi alteram partem*), which establishes the right of both parties to be heard by the judge; and (3) the principle of judicial passivity (*ne procedat iudex ex officio*), which forbids the judge from initiating proceedings independently (Cappelletti 1989). Another element that reinforces the appearance of judicial impartiality is the fact that judicial decisions tend to be bound by a system of legal norms or, in some cases, precedents. This reliance on pre-existing norms aims to temper the disappointment of the losing party and prevent the judge from appearing personally responsible for the decision (Eckhoff 1967).

The dispute resolution function performed by judges highlights the need to guarantee their independence. First of all, the need to guarantee judicial impartiality implies that judges must be independent from the parties in dispute and protected from

interference by them. Such independence is a necessary condition for safeguarding at least the appearance of judicial impartiality, as any judge who is dependent in some way on one of the parties cannot be, and especially cannot appear to be, impartial. The incorporation of the judge into the state apparatus creates the need to redefine judicial impartiality when one of the parties is the state itself or one of its representatives. In this case, only by defining judicial independence in relation to the state (Shapiro 1981: 19-20) can the judge act as an impartial third party in disputes between the state and citizens (for instance in criminal trials). Judges can then become an effective check on the way public functions are performed; guarantees of independence allow them to resolve such disputes and interpret the relevant laws without coming under pressure from the state.

Since one of the main objectives of constitutionalism is “to limit the arbitrary exercise of power and make it legally accountable” (Sartori 1990: 19), submitting the performance of public functions to the scrutiny of an independent body becomes an effective and essential check on the exercise of political power and ensures the supremacy of the law. It is also a fundamental step in building a constitutional state. The principle of the separation of powers evolved from this and, in Montesquieu’s view, encompassed the judiciary: “there is also no freedom when judicial power is not separated from legislative and executive power.... All would be lost if only one person, or one body of nobles or individuals exercised all these powers: legislating, executing public decisions, and adjudicating crimes or cases between individual citizens”<sup>2</sup>.

Therefore, in any constitutional state whose main objective is to safeguard the rights of citizens, judicial independence is primarily aimed at guaranteeing and supporting judicial impartiality in the adjudication process. Its main point of reference must be the state and its institutions, particularly the executive, which directly or indirectly is most often a party to such adjudication. The best illustration of this is in criminal trials where one of the parties to the dispute is usually the public prosecutor. On the other hand, the political significance of judicially resolving disputes should be clear. Adjudication is, after all, a case in which the basic political function of the “authoritative allocation of values” is performed (Easton 1965: 21). And while the ability to resolve disputes is increased through the judicial process, the political significance of the judiciary also increases through a judge’s participation in the political function of rule application.

However, if the intervention of a judge in a dispute is made according to legal norms or precedents, and judicial subservience to the law or legal system is assured, the role of

the judge does not raise any problem in a democracy. For Montesquieu, because judges were only *la bouche de la loi*, their power was “next to nothing”. This concept is supported by a theory of legal interpretation that rests mainly on two assumptions: “that in some way there is a proper, or true, meaning of norms, constituted before, and independent from, the process in which and through which legal actors use legal norms; that the very nature of the norm imposes specific criteria or canons in order to discover that meaning, so that it is possible to distinguish between a true interpretation and a wrong interpretation...” (Tarello 1974: 393). Critiques of these assumptions have highlighted the creative element in judicial decision-making. In the second part of the XX century, the diffusion of forms of judicial review of legislation in many democratic regimes has made even more visible this development.

## **II. The expansion of judicial power**

Acknowledging that some degree of creativity is inherent in the process of interpretation leads to recognition that discretion is involved in judicial decision-making. Even though this does not imply an unrestricted choice on the part of judges, it does include the ability to choose among alternative interpretations. If judges can choose among alternatives, their judgments become a source of uncertainty for those affected by their decisions. In this way, judges acquire power that, given their position and the consequences of their decisions, is political power. This is particularly significant, for example, in the case of supreme court judges, who acquire law-making powers by developing general norms to be applied by their colleagues in the lower courts. In the contemporary legal world judicial creativity is a well-recognized phenomenon, even though such creativity should not be confused with arbitrariness because judges are always constrained to some extent in the process of interpretation (Feeley and Rubin 1998: 349 ff.). The exercise of this creativity can vary according to specific cases and institutional settings, yet it is characteristic of modern democratic societies, since it is related not only to cultural changes (for example, “the revolt against formalism”, that is the critique of the mechanistic theory of norm interpretation) but also to a deeper evolution in the relationship between the state and society (Cappelletti 1989: 9 ff.). The types of decisions that contemporary democracies entrusts to courts is consistently on the increase as the public hand reaches deeper into the lives of individuals and develops new areas of regulation, often under a growing demand for justice. The social and political significance of the

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<sup>2</sup> Of course, there are differences in the way judicial independence has been implemented, especially between the common and civil law traditions (Merryman 1985; Guarnieri and Pederzoli 2002).

judiciary has become a common trait of contemporary democracies: as it is well known, a phenomenon described as “the judicialization of politics” (Tate and Vallinder 1995).

In democratic regimes, recognizing the political significance of judicial action necessarily raises some central questions. Answering these questions has become even more important as political participation has broadened and made the political branches more representative of the community at large. These questions include: If the judiciary exercises political power and its decisions are significant, to what extent are its guarantees of independence justified? Don't these guarantees have to be consistent with the fundamental principles of a democracy, whereby those who exert political power must be accountable to the political community? How can judicial accountability be balanced with the need to ensure judicial impartiality, that element which justifies the guarantees of judicial independence? In short, how can judicial power and democracy co-exist?

The concept of democracy that has traditionally been most influential in continental Europe emphasizes the Jacobin tradition, in which any form of political power must be directly or indirectly accountable to the people or their representatives.<sup>3</sup> In this sense, a contradiction exists between judicial power and democratic principles: in order to safeguard the democratic character of the political system and avoid the danger of “government by the judiciary”, judges must not be totally independent. Specifically, their independence must always be limited by the need for the democratic will to be respected. This relates directly to conceptions of the judicial role that emphasize the duty of judges to defer to the will of representative institutions, especially the legislature which usually represents the popular will (Pasquino 1994: 21 ff.). It is clear that if judges confine themselves to simply executing the law or even to filling in the lacunae left by legislators, their actions cannot be considered contradictory to the democratic principle. Of course, these models require mechanisms to prevent judges from straying beyond the boundaries of their function or from exercising “excessive” creativity. Yet, as previously emphasized, there are good reasons for recognizing the limits of the concept of the judge as executor, and perhaps only a significant decrease in the guarantees of judicial independence could force judges to conform to this stereotype or at least to restrict their creativity to the extent to which they can act as the delegate of the legislator. But such weakening of judicial

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<sup>3</sup> See Sartori (1987) and Rebuffa (1993) who analyse the implications of this concept for the judicial function. Pasquino (1994: 21-30) relates this tradition to the ideas of Rousseau, Condorcet, and Kant. Dahl (1956: 34 ff.) defines this type of democracy as 'populist', contrasting it with 'Madisonian democracy'. However, populists do acknowledge the need to check the majority's power, although they rely on the internal restraints of the majority or on social checks rather than the constitutional system.

independence could only negatively affect both the actual and perceived impartiality of judges.

However, the traditional view that all power in a democracy must be derived directly from popular sovereignty is generally rejected today on the grounds that all contemporary democracies are, in fact, constitutional democracies because they recognize that there are limits to what the majority can do.<sup>4</sup> As a consequence, today the judiciary's role in a democracy is seen as defending the rights of citizens against political majorities, and protecting citizens from potential abuses by representative institutions and the majorities that control them. It is not always easy to define precisely the rights of citizens, and the current trend in most democracies towards an expansion of fundamental rights can only broaden the scope of judicial interventions. In a constitutional democracy, judicial power plays a vital role in checking political power. But precisely because all power must be limited, the judiciary must also be checked, and the real difficulty may be in envisaging barriers to the expansion of judicial power. Judicial independence must be compatible with the fundamental principles of constitutional democracy, since without checks, "judicial independence would indeed spell judicial 'tyranny'" (Friedrich 1950: 110).

However, in a constitutional democracy there is no single ideal way of organizing the relationship between judges and the political system, and democratic principles leave a variety of options open. It is therefore possible to envisage different ways of balancing the contrasting but legitimate needs of protecting judicial impartiality and ensuring democratic accountability. As a minimum, the judicial guarantee of rights (that is, rights protected by judicial proceedings managed by impartial judges) must be effective for those rights which allow citizens to participate in the democratic process (for instance, those related to voting and electoral participation). Variations in the limits of judicial independence, in the structure of the judicial system, and in the methods of recruitment and socialization are all ways in which judicial power can be balanced differently in different democracies (Stone 2000; Guarnieri and Pederzoli 2002). As it has been pointed out, judges must be independent at retail not at wholesale: we expect them to be independent in the single case but to make decisions according to the norms of the legal system (Shapiro 2001: 280). Although often there is no complete agreement on the way these norms have to be defined, a judiciary cannot be for too long out of step from the main beliefs of the political community (Dahl 1957).

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<sup>4</sup> The literature on this theme is extensive. Good historical discussions include von Hayek (1960) and Matteucci (1988). For a more analytical approach see Sartori (1987) and Murphy (1993).

### III. The need for major reforms

The judicialization of politics, that is the expansion of judicial power, cannot but have an impact on public expectations. As long as the judicial process is getting more and more relevant for the life of ordinary citizens, their expectations about judicial performance tend to rise. The need to ensure the quality of justice is increasingly felt (Fabri et al. 2003). It is not easy to provide a clear definition of the concept of quality of justice. However, it must include an organizational dimension: that is, an efficient allocation of resources and some degree of effectiveness. From this point of view, the length of the judicial proceedings is one of the most important element: as it is often reminded, justice delayed is justice denied. Therefore, the present effort in many countries on reducing court delay. But also a substantive dimension must be present: judges need not only to produce quick decisions. They must give us “good “ decisions, that is decisions positively evaluated by the legal community – fellow judges, law professors, attorneys, lawyers in general – and also by the political community at large, at least on the long run<sup>5</sup>.

The reforms of judicial procedure have to be analysed in this context. Not only they aim at improving the performance of the judicial system, for example by streamlining the process or by reinforcing the power of the judge in civil proceedings in order to better respond to the demands of the parties. They are also designed to strengthen the appearance of judicial impartiality. This is the case of the reforms of criminal process, especially those aiming at substituting the inquisitorial setting – traditionally predominant in civil law countries – with a more accusatorial set-up (Langer 2004), characterized by a more clear distinction between judge and prosecutor. In this way the criminal process can better protect the appearance of impartiality of the judge and therefore take advantage of the logic of triadic structure of conflict resolution.

Other reforms aim at the role of human factor in the administration of justice and therefore at the way judges are recruited. A first focus is no the representativeness of the judicial corps, that is the extent to which judges represent the community in which they work. The need for representativeness is related to the growing significance of judicial decisions and especially to the growing perception that they are not the automatic consequences of legal norms<sup>6</sup>. If the judge is not a simple slot-machine but enjoys some discretion in the application of the law, it becomes stronger the demand that this discretion be exerted according to the basic values of the community and therefore that judges be

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<sup>5</sup> It is diffuse rather than specific support that matters here, that is support not related to a specific decision but to the judicial institution.

<sup>6</sup> See Cappelletti 1989; Tate and Vallinder 1995; and also DCA 2004.

relatively similar to their fellow citizens. The experience of the United States suggests that a more representative judiciary will become more responsive to its social and political environment, and any subsequent rise in judicial activism is therefore less likely to be met by challenges to judicial legitimacy and independence. On the other hand, it is not easy to decide the traits that must be privileged in the composition of the judicial corps: social or ethnic origin, sex, religion or political attitudes? And we know that the relation between social and cultural traits of the judge and her decision is rather weak. In addition, the pursuing of social or cultural representativeness could endanger professional qualifications, with negative consequences for the quality of justice. Therefore, the task is not easy but a more representative judiciary is likely to reinforce the appearance of judicial impartiality because social and political minorities can see that they play a role in the judicial process. In any case, the citizens must not perceive the judiciary as a caste rigidly separated from society (Garapon 1996).

Another and related element is the quality of the judiciary. A essential condition of a good administration of justice is the recruitment of good judges, because no justice can be better of the judges who administer it (Vanderbilt 1956). Traditionally, Anglo-American judiciaries tend to employ individuals with lengthy legal experience outside the judiciary. So, there is less emphasis on internal controls. In contrast, in the European continent because judges are recruited without significant professional experience, young judges are placed at the bottom of the judicial pyramid, and their organizational socialization is constantly monitored through a career based on moving up a hierarchical ladder. Therefore, all judicial organisations have checks to ensure that their members pursue the institutional goals<sup>7</sup>.

In many countries - and especially in those in transition – the legal profession is not enough developed to provide a sufficient pool of experienced lawyers from whom good enough judges can be chosen. While lateral recruitment into the judiciary must always be encouraged, it is likely that a large part of the judicial corps in those countries will be recruited from among young graduates or in any case among lawyers without a strong professional experience. The role of judicial education comes out greater.

However, today the rising complexity of judicial tasks, together with the increasing role judges are playing in our societies and the growing consideration for the need of

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<sup>7</sup> Gross and Etzioni (1985: 127) suggest that “the same level of control can be maintained by high selectivity [in recruitment] and a low level of organizational socialization as by low selectivity and a high level of organizational socialization”.

safeguarding their independence, make more relevant the role of judicial education for all sort of judges. To this theme we are going to turn.

#### **IV. The role of judicial education**

Exactly because of the significance of the human factor in the administration of justice, the role of judicial education in improving its quality should be obvious. The subject has already been dealt with extensively<sup>8</sup>. Here I would like to emphasize some points, related to judicial independence and legitimacy.

First of all, judicial education can address fields not traditionally covered by the university curricula but today of growing significance for judicial action. The social sciences is the first example at hand: they provide essential information about the way society, economy and politics actually work. Increasingly often the judge is confronted with decisions having dramatic consequences, without having enough knowledge of the way they will impact on the human environment. It is likely that many of the cases of judicial “omnipotence” could be avoided, if judges were able to realize the complexity of the context in which their decisions have to be implemented.

Another area in which traditional university education needs to be supplemented is the field of political theory. The increasing participation of judges – even lower courts judges – to the process of constitutional review makes more likely that they will have to deal with constitutional values, their meaning and the way they have to be balanced one against the other in a political system. It is a process of assessment which cannot be effectively made without some previous knowledge of main democratic political theories. Even in this case the judge should be made acquainted with the complexity of her task and therefore with the advisability of some form of self-restraint.

Education can also inspire attitudinal change (Oxner 2001), an essential element of any successful judicial reform. We have already underlined why reforms seem to be a persistent trait of contemporary judicial systems. But it is not enough to change the “law in the books”, in order to achieve real change: we must be sure that the law has been correctly applied and the reform’s design coherently pursued<sup>9</sup>. In this process a role can be played also by the comparative dimension, since no system is perfect and everybody can always learn from the experience of others. The comparative analysis of judicial systems is an essential step in order to understand the real character of a national system

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<sup>8</sup> See, for example, Oxner 2001.

<sup>9</sup> Obviously, many others are the conditions of a successful reform, although a correct implementation of its projects is in any case necessary.

and its limits. Above all, by confronting our own system with others of the same political inspiration, judges can better realize the need for, and the possibility of, change.

Judicial education can play an even more important role in relation to judicial independence. I am not here referring to institutional independence, that is to guarantees of independence. They are an essential prerequisite for judicial independence but cannot guarantee real, behavioral independence<sup>10</sup>. From this point of view, judicial ethics should be a compulsory subject for every judge: her behavior must not be in contradiction with the basic tenets of her role and especially with the need of preserving impartiality and the appearance of impartiality. Although judicial integrity has to be policed also by some sort of disciplinary control, judges must be acquainted with the principles that should govern their behavior and be encouraged to adjust themselves spontaneously to them.

However, judicial education can contribute in a more effective way to the development of judicial independence. In fact, one of the most important functions of organizational socialization is building commitment and loyalty toward the organization. More precisely, an important aspect of this process is the identification of the individual with the organizational goals (March and Simon 1958), and those professionals who feel themselves competent are more likely to be attached to professional norms (March 1994). Therefore, as judges become more professionally competent, their identification with the norms of the judicial profession – and also of the judicial organization – is likely to grow. In short, more professionally competent judges will tend to exhibit more independence and integrity.

Moreover, another positive consequence of increasing professionalization is that competent judges need less intrusive, day-to-day controls on their performance, since they tend to spontaneously pursue the institutional goals of the judicial system. In this way, a satisfactory solution can be found to the problem of how reconcile internal controls and judicial independence. In fact, internal controls – that is, those exerted by higher ranking judges – can impinge on judicial independence. Therefore, in some countries they have been practically dismantled, although with negative consequences on judicial performance<sup>11</sup>. A strengthening of the process of judicial education – both initial and permanent – can at least in part offset a reduction of internal controls.

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<sup>10</sup> For a clear distinction see Russell 2001.

<sup>11</sup> This is the case of Italy, where the dismantling of the career has not been counteracted by improved training and education. Similar trends can be spotted in other Latin European countries – like France, Spain and Portugal - although here more attention has been given to the need of reinforcing judges' identification with the organization.

Judicial education, if correctly designed, can have another important effect. It tends to influence the reference group of judges, that is the relevant others toward whom they tend to orient their behavior. As it has been once underlined, “the training of the judge ... will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due” (Cardozo 1921:176). We have already stressed the fact that some sort of representativeness of the judicial body is an important element for its legitimacy in a democratic polity. Even more important is a process of education that would put the judge continuously in touch with a sufficiently diversified reference group. Obviously, it should be composed of the legal community: other judges, attorneys and law professors<sup>12</sup>. But also of all those actors who in a democratic community express its basic cultural values<sup>13</sup>. At the end, what the law is is a matter too important to be left only to the judges to decide. In this way, the social and political responsiveness of the judicial corps come out reinforced, an important element of legitimacy in a situation in which the process of judicialization makes the independent status of the judiciary more in need of justification.

Traditionally, the reference group of judges had a predominantly national composition. Although cross-national influences were not uncommon, the main interlocutors were national: often, higher ranking judges and legal academics (especially in the civil law tradition). Today, it seems that the international and transnational dimensions are achieving an increasing importance. As it has been recently said, “a global community of courts” is emerging, constituted, above all, “by the self-awareness of the national and international judges who... see each other... as fellow professionals in an endeavor that transcend national borders” (Slaughter 2003: 192-3). This process of “globalization” of justice is increasing the capacity of judicial systems of forging answers to citizens’ demands but it is not without flaws. The transnational dimension is not a “clean” area, regulated only by law, devoid of the struggles for power which characterize all human societies. On the contrary, transnational justice often sees powerful national interests clash one against the other. Therefore, the risk is real that transnational influence can be interpreted as a form of pressure designed to privilege foreign interests.

However, the emergence of a global judicial community plays an important role in supporting judicial independence in those countries in which it could be at risk and in

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<sup>12</sup> We have to take into account that the Bar is often the most important supporter of judicial independence (Feeley 2002).

<sup>13</sup> It goes without saying that only values compatible with a constitutional democracy should be taken into account.

spreading the influence of fundamental human rights. Much will depend on its structure, that is on its more or less pluralistic composition. In any case much will depend on the capacity of the judge to be at the same time judiciously responsive to external communities and independent in her decision: a capacity to which judicial education can much contribute.

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