

**JUDICIAL INDEPENDENCE  
AND THE IMPLEMENTATION OF THE NEW  
UNIVERSAL CHARTER OF THE JUDGE:  
THE ISSUE OF INTERNAL INDEPENDENCE**

*Presentation for the International Conference  
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In the framework of the 61<sup>st</sup> Meeting of the International Association of Judges*

1. Dear colleagues,

Last year's intervention in Santiago de Chile, in the framework of the International Conference organised during our 60<sup>th</sup> annual meeting, was focused on the subject of High Councils for the Judiciary. As we have seen, we have a number of pros and cons about the idea of setting up such bodies or of strengthening their position in countries where they already exist.

This year I would like to focus on other possible remedies which, in the implementation of the IAJ Universal Charter, could help in the achievement of the hard task of having a judiciary which is really and fully independent.

We are here in a Country which was deeply influenced by French experience: exactly as my Country (Italy) was.

As I use to point out, we owe to France, of course, Montesquieu. But we owe to that legal culture also many other judges and jurists who, in hard times, were able to show their independence, like the Chancellors Michel de l'Hospital, Henri-François D'Aguesseau, Omer Talon and many others. Let us think for instance to Lefebvre d'Ormesson. He is less known than the others, but he was president at the court judging Fouquet, the former minister of Louis XIV. He was under pressure from the king to sentence Fouquet to death, but he refused to bow down to the royal plans. One day, he replied to the king's emissaries: "The court gives judgments, not services." ("La cour rend des arrêts, non des services !").

Despite such good examples, we owe, unfortunately, to France also Napoleon. This French general had—and still has—a much stronger influence than Montesquieu on modern judiciaries. In many parts of continental Europe, the judicial power is organised in a Napoleonic way, which is to say, like an army. This is the paradox of many of our legal systems: on one side, constitutional and theoretical principles are influenced by Montesquieu and by the separation of powers, whilst ordinary laws and the very structure, the concrete arrangement, of the judicial body still is ruled by canons which are closely linked to a hierarchical, pyramidal shape.

Unfortunately, many of my colleagues in Italy still think this. Supreme Court judges are the generals, Appeal Court judges are the officers, and the other judges are the troops, the GIs. Many of us still have this mentality, which was shrewdly exploited by Napoleon, in order to have a "troop" of judges ready to obey, by encouraging mean careerism, whereas the very idea of the judicial function has

nothing to do with hierarchical degrees or career. This misrepresentation exploits and distorts the undeniable fact that judgements should be submitted to some form of appeal or revision, and that panels of judges need to have one or more experienced colleagues organising the discussions and the work of a given court. But of course these aspects have nothing to do with the alleged “need” to have “superior” courts or “superior” judges.

Whoever joins the judiciary should be moved by the will of being a judge, not of making a career.

2. Unfortunately, the pyramidal structure of the judiciary not only jeopardizes internal independence, but exposes the judges to additional risks.

Taking Italy as an example, we must acknowledge that in the last years the radicalisation of the aggressiveness of lawyers (also due to the abnormally high number of them: 260.000, i.e. roughly five times the number of French lawyers...) has brought about the practice of blackmailing and threatening judges with “complaints” to the heads of courts, who, unfortunately, many times (fearing complaints against them or simply for the sake of avoiding troubles or of endangering further developments of their careers) intervene on judges, or take measures against them (sometimes even without hearing the concerned judges!).

This despicable state of things is worsened by the fact that, as I pointed out last year, the choice of the heads of courts in my Country is made not by the courts themselves, but by a High Council which is fully in the hands of the wings of the National Association, with the consequence that such choices are made on the basis of agreements on sharing posts and power games among such wings, very often not taking into account *curricula* and personal skills of candidates, but their loyalty to the leaders of the group and the need to “balance” the appointments in proportion to the electoral score of the respective wing.

As I reminded recently in Vienna, in the framework of an UNODC international conference on judicial integrity, corruption in the Italian judiciary practically does not exist. This is good news, of course. The bad news is that in my Country lawyers do not even need to bribe judges, as they think it is enough for them to threaten the concerned judges with sending complaints to their “superiors”, when they want to win their cases. This is, in my modest opinion, the real challenge of the Italian judiciary in these years, even though nobody wants to seriously address (or even to admit the existence of) this issue.

Therefore I highly appreciate and praise the norms of our new Charter, which take a clear stand on the issue of hierarchy among judges.

3. Actually, some new and, to a certain extent, revolutionary principles are enshrined in Article 3 of the IAJ Universal Charter, as an unprecedented importance is duly bestowed on the very idea of the so-called internal independence, which is to say the “the independence of each individual judge in the exercise of adjudicating functions” (see also Article 22 of the Recommendation No. R 2010/12 of the Council of Europe).

Now, according to Article 3-1 of the IAJ Universal Charter, “In the performance of the judicial duties the judge is subject only to the law and must consider only the law.” Furthermore, “A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity, save for the review of opinions as described below (see Article 3.2), would be a violation of the principle of judicial independence.” This rule—which appears to be much stronger than its equivalent within the Recommendation No. R 2010/12 of the Council of Europe (“Hierarchical judicial organisation should not undermine individual independence”)—takes a clear stand against the setting up of any form of hierarchical structure within the judiciary.

The above mentioned rule is inspired by a report of the Venice Commission.

Actually, in Article 68 of the Venice Commission Report on Judicial Independence (2008), we can read the following words: “68. The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that ‘judges are subject only to the law.’ This principle protects judges first of all against undue external influence. It is, however, also applicable within the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle.”

On this topic we can quote further Article 10 of the “Magna Charta of European Judges” (CCJE): “In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law.”

4. Always in the framework of the protection of internal independence, Article 2-5 of the IAJ new Charter provides that “The judge must benefit from a statutory protection against threats and attacks of any kind, which may be directed against him/her, while performing his/her functions.” Although mainly intended to protect external independence, this provision may very well serve the purpose of defending internal independence too, as the issue of protecting judges against the aggressiveness of lawyers tends to influence (as I have tried to show above) the relations between “superior” courts, or “superior” judges, and judges who have concretely to deal with a given case.

On this topic we may point out that, according to Article 8 of the Recommendation No. R 2010/12 of the Council of Europe, in the above mentioned cases judges must “have recourse to a council for the judiciary or another independent authority, or they should have effective means of remedy.”

Among such “effective means” we might mention what in my opinion is the most efficient remedy, which may protect external, but also internal independence. I am referring here to the “contempt of Court” remedies, which are well known in the Common Law systems and are also explicitly approved by the said Recommendation of the Council of Europe. We may quote here Article 21 of the Explanatory Memorandum of the Recommendation No. R 2010/12: “The Recommendation calls

for all necessary measures to be taken to protect and promote the independence of judges. These measures could include laws such as the ‘contempt of court’ provisions that already exist in some member states (Recommendation, paragraph 13).”

My hope is therefore that the approval of our new Charter may awake the awareness about the need and the urgency to take concrete steps in order to safeguard that essential part of judicial independence, which is the internal independence.

Thank you.