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"JUDICIAL REVIEW AS A SUBSTITUTE FOR NOT YET CONSTITUTED INSTANCES OF POPULAR SOVEREIGNTY"

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Development of human rights?

Our seminar focuses on the definition and development of human rights. The topic addressed in this paper is the relationship between the sovereign lawmaking and the judiciary. I have the feeling that we presuppose that human rights are *developing*, indeed. I am afraid that the reality is more pessimistic. Although I admit that there is a clear historical tendency of the development and proliferation of human rights, the beginning of the 21st century marks a crisis and decline in the protection of human rights. Among the causes of this decline one can mention the weakness of the international community to respond effectively to mass violations of human rights. Another trend redefines the hierarchy of human rights, and in order to protect human dignity and to fight different forms of hatred, both at international and national level classical political liberties as freedom of speech are restricted.

The legitimacy of judicial review that is an antimajoritarian institution spreads from the presumption that judicial review contributes to a higher level of protection of human rights. As properly and so nicely said by US Supreme Court justice, Judge Jackson:

> *"The very purpose of a Bill of Right was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's rights to life, liberty, and property, to free speech, a free press, freedom of worship and assembly may not be submitted to vote; they depend on the outcome of no elections."*[1]

However, the positive role of judicial review sociologically is not approved: judges might contribute to the development of human rights, and sometimes might erode them.

From 'the mouth of the law' to 'government by the judiciary'

The classical approach to the role of the judiciary is based on two divisions:

> first, the separation of powers that reduces the role of the judiciary to the application of laws (especially in civil law countries as classically formulated by Montesquieu calling the judge the mere mouth of the law (*bouche de la loi*);
> second, the division of politics and law, namely that the political decision-making pertains to the organs of popular sovereignty (representative and/or direct democracy), separated from the world of law.

However, the presumption of this strict dichotomy has been challenged at least since the 1920s. At that time was born the concept and accuse of 'Government by Judiciary'. Legal realism that became very influential in the US during the 1930s also contributed to the new view of judicial activity. Kelsen remarked as early as in 1926 that judicial decisions are not simply declaring the law and accenting the legislator's will. Judges when interpreting the law in a judicial decision create individual legal norms.[2]

The problem of political and judicial decision-making is even more complicated in the case of judicial review.

Judicial review at its birth in the American experience was understood as the tension between higher law and popular sovereignty. Eighteenth-century American political and legal thought

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[1] *West Virginia State Board of Education v. Barnette*, 319 US (1943) 624, 638.

[2] Kelsen, Grundriss einer allgemeinen Theorie des Staates. Wien, Rohmer, 1926.

developed two concurring theories: that of fundamental law as a higher law, and the will-of-the-people concept of popular sovereignty. American constitutionalism developed in the interaction of the two values, popular sovereignty and rule of law. The two values are embodied in the political departments and the judiciary, respectively.

> "Popular sovereignty suggests *will*; fundamental law suggests *limit*."[3]

Popular sovereignty might be exercised in different ways: either directly or by the representatives of the people.

The Venice Commission has recently in an Amicus curiae brief explained the meaning of popular sovereignty.[4] "It is evident that in a constitutional State the idea of a power which does not face limitations and obligations based on the Constitution cannot be accepted. The sovereignty of the people established in the framework of a constitutional legal system cannot be mistaken for the constituent power and it is perfectly compatible with popular sovereignty to require that its exercise has to follow specific procedures… The sovereignty of the people is a very general principle which becomes operational through the more specific provisions of the Constitution and cannot be used to set aside these provisions."

The limited role of the judiciary compared to the 'political' branches underwent dramatic changes during the 20th century, and the general accusation was raised against judges under the label of 'government by the judiciary', formulated first by Lambert in 1922.[5]

Judiciary and democracy

The basic tension between judicial review and democratic theory is the counter-majoritarian character of the former. As clearly formulated in the above citation, judicial review *limits* the *will* of the people. However, the extension of judicial review and the growing importance of constitutional courts overstepped those boundaries that Kelsen, the father of the European model of judicial review, attributed to this delicate institution.[6] European judicial review did not remain within the boundaries of the *negative legislator*, but often prescribes positive rules for the legislator or the ordinary judge. Moreover, it became clear that judges routenily participate in the formulation and implementation of public policies, thus responding to social demands.[7]

The orthodox understanding of the dichotomy of politics and law was exceeded in the late 1950s.

The paper of Robert A. Dahl presented at the *Role of the Supreme Court Symposium* and published in 1957 (*Decision-making in a democracy: the Supreme Court as a national policy-*

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[3] Robert McCloskey, The American Supreme Court. The University of Chicago Press, Chicago, 1960. 12.

[4] DRAFT *AMICUS CURIAE* BRIEF FOR THE CONSTITUTIONAL COURT OF ALBANIA ON THE ADMISSIBILITY OF A REFERENDUM TO ABROGATE CONSTITUTIONAL AMENDMENTS, CDL(2009)030.

[5] E. Lambert, Le gouvernement des juges et la lutte contre la legislation sociale aux Etats-Unis. Paris, Giard, 1922.

[6] Hans Kelsen, "La garantie jurisdictionnelle de la Constitution (La justice constitutionelle)", Revue de droit public et science politique, XXXV, 197-257.

Wesen und Entwicklung der Staatsgerichtsbarkeit. Berlin-Leipzig, W. de Gruyter. 1929.

[7] T. Becker, Comparative Judicial Politics. Chicago, Rand McNally, 1970.

maker)[8] opened the way to a dramatically new approach on the political role of judges. Dahl proved the thesis that the Supreme Court is not only a legal institution but "it is also a political institution, an institution, that is to say, for arriving at decisions on controversial questions of national policy."[9] Dahl approved his thesis by sociological analysis, and argued for in a convincing way that the Court often must choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found or deduced from precedent, statute, and Constitution.[10] These alternatives sometimes reveal severe disagreements in the society, as in segregation, economic regulation, or later, abortion cases. Dahl also made clear that the Court manoeuvring between majority criterion and the criterion of Right or Justice, (1) might accord with a minority against the majority, (2) accord with the majority, or (3) accord with one minority against other minorities. Doing all this the Court can either promote certain policies, or delay them.

A few years later, Gabriel Almond in *The Politics of the Developing Areas* (1960) described a functional approach of governmental activities. Governmental 'output' functions consist of the rule-making, rule-application, and rule-adjudications functions. According to Almond the structures of government are multi-functional. This means that rules are made by civil servants and judges as well as by legislatures; rules are applied by the courts as well as by the executive; and judgements are made by civil servants and ministers as well as by judges.[11] The functional doctrine of separation of powers replaced the pure theory of separation of powers. Taking the example of the courts, a judge when dealing with a case exercises all three functions.[12]

Dahl himself returned to the subject and repeated some of his earlier findings. He called the role of judges exercising judicial review 'quasi guardianship'.[13] "If fundamental rights and interests cannot be adequately protected by means consistent with the democratic processes, then the remaining alternative is to ensure their protection by officials not subject to the democratic process. Because these officials would make their decisions within the context of a generally democratic system, yet would not be democratically controlled, they might be called quasi guardians."

Taking into account American and comparative experience, Dahl formulated some noteworthy remarks. First, he noticed an inverse ratio between the authority of the judges as quasi guardians and the authority of the people (demos) and its representatives. The more competences have judges, less space is left for the demos. The first rule thus sounds as follows: "The broader the scope of rights and interests subject to final decision by the quasi guardians, the narrower must be the scope of the democratic process."

Moreover, the power of the quasi guardians is not merely negative: a court may find it necessary to go beyond mere negative restraints and attempt to lay down positive policies. So the second rule: "The broader the scope of the rights and interests the quasi guardians are

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[8] Robert A. Dahl, *Decision-making in a democracy: the Supreme Court as a national policy-maker* The Journal of Public Law, 6(1957), 280.

[9] *Ibid*., 279.

[10] *Ibid*., 281.

[11] G. A. Almond and J. S. Coleman, *The Politics of Developing Areas*, Princeton, 1960. 16-17.

[12] M. J. C. Vile, *Constitutionalism and the separation of powers*. Oxford, Clarendon, 1967. 318.

[13] Robert A. Dahl, *Democracy and its critics*. New Haven, Yale University Press, 1989. 187.

authorized to protect, the more they may take on the functions of making law and policy."[14]

Popular sovereignty and individual rights in the framework of judicial review

Judicial review may either act against popular will (or majority rule) or substitute it. The concept is based on the idea that the defence of human rights is expanding and growing.

Judges decide instead of politicians – to put in the simplest way.

Thus judicial review does not limit popular will but substitutes it as a forerunner of future political decisions. Some examples: *Brown v Board of Education* in 1954 declared unconstitutional racial segregation. Another decade was needed for the legislator to enact Civil Rights Act (1964).

Roe v Wade (1973) legalizing abortion is another example of a judicial decision that went against popular belief.

Similar examples might be brought from the jurisprudence of European Constitutional Courts when the respective Court responded to questions and social needs that the legislator or other beneficiary of the popular will was not able to answer adequately.[15]
In present day European democracies the legislative and executive power (the latter being controlled by the parliamentary majority) form a 'power bloc', against which the only and one counter-balance is judicial review.

Some Hungarian examples

The Constitution determines those political decisions that are antecendently likely to reflect prejudices and other negative preferences of the majority at any given time. It removes these decisions from the majoritarian political institutions altogether. In Hungary it is within the competence of the Constitutional Court to review the constitutionality of legal norms with special consideration given to the protection of fundamental rights.[16] Therefore the Court is authorized to pass constitutional decisions when what is at stake is whether some legal provisions passed by a majority vote violate fundamental rights, with special emphasis on the principle of equal human dignity.

In the very first year of constitutional adjudication the Capital Punishment Decision signalled the significance of constitutional review and shocked an unprepared Parliament and the general public. The Court declared capital punishment unconstitutional and abolished it. The reasoning of the Court was rather summary, and the justices enlarge upon their own theories in concurring opinions. Nevertheless, it is clear that the Court analysed the connection of the right to life and the right to human dignity and declared them inviolable.[17] This reasoning was subsequently taken up by the South African Constitutional Court,[18] the Lithuanian Constitutional

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[14] *Ibid.,* 189.

[15] Alec Stone Sweet and Thomas L. Brunell, Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community. American Political Science Review. Vol. 92, No. 1 (March 1998). 63-81.

[16] The jurisdiction and the functions of the Constitutional Court are regulated in Article 32/A of the Constitution and in Act No. 32 of 1989 on the Constitutional Court, *available at* http://www.mkab.hu/en/enpage5.htm.

[17] See the English translation of the Capital Punishment Decision *in* CONSTITUTIONAL DEMOCRACY. THE HUNGARIAN CONSTITUTIONAL COURT, at 118 (László Sólyom & Georg Brunner eds., Univ. of Michigan Press, 2000).

[18] *The State v. T. Makwanyane and M. Mchunu*, CCT/3/94, Judgment of 6 June 1995.

Court,[19] the Constitutional Court of Albania,[20] and the Constitutional Court of Ukraine.[21]

The realm of personal data protection was another example of the Court's effort to modernise various spheres of legal regulation even against the will of the parliamentary majority. In 1991 the Court invoked the right to informational self-determination and declared unconstitutional the unrestricted use of the uniform Personal Identification Number (PIN) system. It also set a deadline for the legislature to modify the system according to the requirements set out in the decision.[22]

The same progressivist urge that the Court exhibited in the case law on data protection also lay behind its decision on the Legal Equality of Same Sex Partnerships in which the Court enforced the recognition of the same sex partnership in the Civil Code and in all respective laws.[23] The decision emphasised that the State "can maintain and support traditional institutions, as well as create new legal forms for acknowledging new phenomena, and with this it can, at the same time, extend the boundaries of 'normality' in public opinion".[24] Based upon this authorization in December 2007 Parliament adopted the Act on Registered Partnership. The Act would have enabled same-sex and different-sex couples to enter into registered partnerships. In its Decision 154/2008 the Court found unconstitutional the Registered Partnership Act, which accords recognition to unmarried and same-sex partnerships, as the Act downgraded marriage. However, under the same decision a partnership scheme only for homosexual couples would be constitutional.[25] While with its first decision the Court was going ahead popular sovereignty, by the second decision decelerated a step taken by the parliamentary majority (with the reference to the protection of marriage enshrined in the Hungarian constitution).

Last but not least I should mention the Court's decision on environmental protection, in which the Court spelled out a non-derogation rule: the legally secured level of nature protection may be reduced only under conditions that are valid for the restriction of any fundamental right.[26]

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[19] Case No. 2/98. Judgment of 9 December 1998.

[20] Case No. 65. Judgment of 10 December 1999.

[21] Case No. 11-rp/99. Judgment of 29 December 1999.

[22] See the English translation of the PIN Decision in *supra* note 2, at 139.

[23] See the English translation of the Same Sex Partnership Decision in *supra* note 2, at 316. I should mention, however, that the applications failed in their challenge of the notion of marriage as a union exclusively of a man and a woman.

[24] *Id*. at 318.

[25] Following the Constitutional Court Decision 154/2008, in April 2009 Parliament has adopted a revised Act on Registered Partnership.

[26] See the English translation of the Environmental Protection Decision in *supra* note 2, at 298.