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REPORT

"THE NATURE AND IMPORTANCE OF JUDICIAL REASONING IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURTS"

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The nature and Importance of Judicial reasoning in the jurisprudence of the constitutional courts

... the written reasoning shapes the thinking itself, and thinking shapes writing, becoming a decisive aid to thinking.

Sir Owen Dixon
Chief Justice of Australia (1952-1964)

Judicial reasoning as an essential element of the judicial truth

Judicial reasoning is undeniably a fundamental part of the justice-making process. It is unanimously accepted that it is not just a matter of technique or volume of argumentation, but a matter of substance capable of giving the necessary purposefulness to the act of justice. Justice is based on truth, and the path to determine the judicial truth lays on an exhaustive judicial argumentation. Whether it's a matter of constitutional justice or the justice made by the ordinary courts, the lack of substantial, or formally reasoned argumentation makes it difficult to ascertain the judicial truth, hence transforming the act of justice into an act of injustice. This is why no other public decisions are under such a heavy obligation to explain the reasons behind their decisions.

Judicial reasoning refers to both - the process of thought by which a judge reaches a conclusion to the appropriate result in a case, and to the written explanation of that process in a published judgment. Prof. Tony Blackshield defined the Judicial reasoning as *a principal mechanism of judicial accountability: "an explanation of the reasons for decision is owed not only to the unsuccessful litigant, but to everyone with an interest in the judicial process, including other institutions of government and ultimately the public"*[1].

The nature of the process of judicial reasoning can be very well understood by analysing the remark of Sir Owen Dixon[2], the Chief Justice of the High Court of Australia (between 1952 and 1964)[3]. Between 1935 and 1965 Dixon kept a diary, known as 'The Dixon Diaries'. In his diary Dixon mentioned that when he was „*completing his written judgment, found that he had reached the opposite conclusion to that which he expected to reach when he began to write".*

Even in cases where the reasons for the decision can be objectively analysed, the inherent thought process, which is at the core of the examination and solution of a legal problem, is so complicated and variable that the judge cannot simply follow a standardized explanatory or prescriptive model when making case law. Therefore, the line of arguments of a judgment must reflect exactly the author's process of thinking. As Dixon has mentioned "*the written reasoning shapes the thinking itself, and thinking shapes writing, becoming a decisive aid to thinking".*

[1] Blackshield, Coper, Williams, mq-iris:MQ88501612. The Oxford Companion to the High Court of Australia. Australia: Oxford University Press; 2001.
[2] http://adb.anu.edu.au/biography/dixon-sir-owen-10024
[3] Professor of Australian and United States constitutional law in the University of Sidney, Helen Irving stated about Dixon: *"The man and the court are so blended in the jurisprudential record and historical memory, that is difficult to consider them apart".*

A typical written judgment begins by outlining the facts of the case, and then proceeds to a discursive exploration of the relevant legal doctrines and principles. The most important part in the argumentation process can be reduced to a syllogism: the major premise and the minor one.

- The major premise is provided by the relevant propositions of law
- The minor premise is provided by the facts of the case

Therefore, the conclusion follows simply from the *application of the law to the facts*. According to Blackshield, the difficulty is that neither premise is given: *both premises need to be established, and tailored to each other in such a way that the explicit or implicit construction of the final syllogism is possible*[4]. Once established, the premises are to be adjusted to each other in such a way that the construction of the final syllogism is possible.

This syllogism works differently in ordinary courts than in those of constitutional jurisdiction. In ordinary courts, the fact-finding process is onerous and uncertain, involving the sifting and interpretation of complex, and often contradictory, evidence. In constitutional litigation that burden is far less demanding, than in ordinary courts, because the minor premise - relevant *facts - are the provisions of the challenged law. The provisions of the challenged law, themselves become the facts of the case.* This explains why constitutional courts don't need a specific legal mechanism to establish the relevance of the facts.

From a *technical standpoint*, the legal reasoning has to take the following path:

1) **Issue** - *What specifically is being debated*?
2) **Rule** - *What legal rule governs this issue?*
3) **Facts** - *What are the facts relevant to this Rule?*
4) **Analysis** - *Apply the rule to the facts.*
5) **Conclusion** - *Having applied the rule to the facts*.

It must be taken into consideration the fact that the decisions of constitutional courts serve as *a source of law* for both - the lawmakers and the courts. For both of them, to understand the effects and to apply correctly a decision of the constitutional court is absolutely necessary to have clear, and well-reasoned judgment. This is why the requirements of reasoning for constitutional courts are far more rigid: a constitutional court being under strong obligation of respecting the above-mentioned syllogism (*conclusions must result from the major and minor premise*).

[4] *Ibid*

Thus, the decisions of the constitutional courts, *as a major premise,* must excel through the judicial legalism and*, as a minor premise*, through the clear logic of the facts. Both premises must be synergically adjusted with one another in order to generate an exhaustive and convincing argumentation.

The public justification is often imperfectly generated due to the specific nature of the judicial speech. The explanation might be insufficient, or lack comprehensiveness for those outside the legal profession. Therefor is necessary that the *constitutional judges design their judgments, in such manner that they generate coherent and clear conclusions, creating a clear connection between constitutional provisions and constitutional facts.*

Judicial legalism

When talking about the Judicial legalism, the following question arises: *Is the meaning of "judicial legalism" in the constitutional litigation identical to its meaning in the litigation before ordinary courts?* The process of constitutional jurisdiction, unlike the justice before the ordinary courts, implies the interpretation of the constitution. Therefore, the constitutional courts, often interpreting the constitution, create the law. The ordinary courts (especially those from the continental system) accept the theory of declaratory effect of judicial decisions, which means that the judges have a passive role and are not in fact creating the law. According to this theory, the judge simply identifies an existing law and applies it to the facts of the case. By this rationality, the process of judicial decision-making is reduced to the following: the court's conclusion is derived automatically from the *major* and the *minor premise*.

Due to these differences, the theory of judicial legalism cannot be applied mechanically in constitutional litigation. In the cases of constitutional judges, the *theory of declaratory effect* must be understood while keeping in mind the particularities of constitutional litigation, where the active role of the judges is widely accepted. Therefore, in cases where the constitutional provisions are silent, unclear, or incomplete, the judge cannot "deny a justice" and is bound to give an adequate doctrinal interpretation in order to improve them.

A strictly positive interpretation of the law by a constitutional court represents nothing more than an artificial self-limitation, which in fact prevents a court from exercising its mission. For example, if, in 1990, in the *Case of the abolition of capital punishment*, the Constitutional Court of Hungary had resorted to an exclusively positive interpretation of the constitutional provisions,

the death penalty would have still existed until the amending of the constitution[5]. Another example is the *Australian Communist Party case*. If the Australian Supreme Court had limited itself to an exclusively positive interpretation, by accepting the Parliament's unconditional right to intervene as it thought necessary in order to prevent subversion, the outcome of the case would have been slightly different. Likewise, on the 9th of February 2016, the Constitutional Court of Moldova (CC) interpreted the article 135(1) of the Constitution (the role of Supreme Court of Justice in the process of raising the exceptions of unconstitutionality), so that the term 'Supreme Court of Justice' (SCJ) was to be understood as any judge and any court, in that context. This decision has removed the deadlock of raising the exceptions of unconstitutionality, and enabled all litigants, judges and courts to address the Constitutional Court without the SCJ. Had the CCM construed the provision positively, the citizens' access to the Court would have still been blocked.

As a former constitutional judge, I understand one thing clearly: There is no such thing as an imperfect constitution, only constitutional courts incapable of functionally interpreting its provisions. Therefore, the cases which are to be further analysed are as convincing as possible about the fact that *in constitutional litigation, as opposed to the trial courts, the judicial legalism must be understood as a cumulation of the following elements*:

1. The *respect for the Rule of law* and fundamental social values;
2. *Stare Decisis*[6] - respect for the previous case-law;
3. Pursuing clear *doctrinal principles of constitutional interpretation*.

In constitutional litigation, judicial legalism implies an interpretation wider than a strictly literal one. This is why a constitutional court is under the obligation to manifest itself on a reasonable level of judicial activism, or as Prof. Thomasz Stawecki defined it: *"moral and intellectual courage of not limiting itself to the literal interpretation, and instead look for adequate solutions which would take into account fundamental social values"*[7].

The clear logic of facts

The classic Kelsenian model of constitutional jurisdiction mainly implies the process of analysing some legal norms through the constitutional provisions. Thus, the establishing of facts is a thing that constitutional courts rarely do. More often, in constitutional litigation, the necessity of interpretation of facts occurs in systems where there is an *instrument of individual*

[5] Hungary has ratified Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms regarding the abolition of the death penalty in all circumstances only on 13 July 2003.
[6] *Stare Decisis* is a legal doctrine that obligates courts to follow historical cases when making a ruling on a similar current or future case. Stare decisis ensures that cases with identical facts be approached in the same way.
[7] Thomasz Stawecki (Independence of the Legal Professions and the Rule of Law in Post-Communist Society, Independence of the Judiciary and Legal Professions as Foundations of the Rule of Law: Contemporary Challenges, LexisNexis, 2009, la p. 360 și urm.)

constitutional complaint to the Constitutional Court. But even in these cases, the facts on which the conclusions are based have already been established by the ordinary courts (in whole or partially), and therefore the constitutional courts have the task of reassessing the conclusions to be drawn from those facts, or their evaluative interpretation. As a general rule, the constitutional courts, depending on their legal competence, interact with the process of determining facts in cases regarding the *review of legal acts of individual nature, elections, parliamentary procedure and circumstances which justify its dissolution, impeachment procedures, as well as resignation of the president and the interim function*.

A relevant case from the point of view of establishing facts is the decision of the Constitutional Court of Austria on July 1st, 2016[8] regarding the annulment of the presidential elections. The Court decided that repeated elections must be held after an investigation revealed several irregularities as to vote counting in many districts. The *Österreichisches Verfassungsgericht* founded its decision on a multidimensional inquiry and evaluation of the facts and circumstances of the presidential elections. A similar case can be found in the jurisprudence of the Constitutional Court of Moldova when it declared the 2011 presidential elections unconstitutional, due to breaches of procedure in regard to vote secrecy. The Court decided that *"the secrecy of the vote is expressly provided by the constitution, it is an indispensable part of the democratic process and it cannot be violated.* [9]*"* In order to reach this conclusion and to determine the *judicial truth*, the Court had to investigate and establish a clear logic of the facts so that it would be convinced that the constitutional provisions have been violated.

Nevertheless, in some cases the facts are established through the decisions of ordinary courts which have the *authority and power of a judgmen*t. This means that a *constitutional court cannot review or override them*. A relevant Moldovan case at this subject is the decision in regard to the *confirmation of the 2014 parliamentary election results*[10]. During the 2014 elections, one party was excluded from the political campaign through a decision by the SCJ from November 29th 2014, which was irrevocable. After the elections, during the confirmation of the results, the eliminated party asked the Constitutional Court to nullify the results on the grounds of arbitrary exclusion. The Court decided that the facts which served as grounds for SCJ's decision also benefit from the authority of the force of *res judicata*. Consequently, they could not have been reviewed by the Constitutional Court.

[8] https://www.vfgh.gv.at/downloads/VfGH_W_I_6-2016_EN_2.pdf
[9] http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=10&l=ro
[10] Sesizarea nr. 61e/2014 http://www.constcourt.md/ccdocview.php?tip=hotariri&docid=524&l=ro

We will now analyse the modality of judicial reasoning used by the Supreme Court of Australia, the Constitutional Court of Hungary and the Supreme Court of Canada in different cases, notorious for their extraordinary judicial argumentation.

Australian Communist Party case[11]

A notorious case which dates back to 1951 is the *Australian Communist Party case*. On the 19th of October 1950, the *Communist Party Dissolution Act 1950* was passed by the Australian Parliament, at the initiative of Robert Menzies[12]' Liberal-Country Party coalition government, who had swept to power in the federal elections just a year before. The Act purported to dissolve the Australian Communist Party and to confiscate all its property[13].

The draft Law on the dissolution of the Communist Party[14] was introduced into the House of Representatives by Prime Minister Robert Menzies on April 27th, 1950. The project began with a long preamble, referring to the objectives of the PCA, as facts that cannot be questioned. These recitals included "facts" like:

> *'The Australian Communist Party…engages in activities … designed to assist or accelerate the coming of a revolutionary situation, in which … [it] would be able to seize power and establish a dictatorship…'*
>
> *'The Australian Communist Party also engages in activities … designed to bring about the overthrow or dislocation of the established system of government of Australia and the attainment of economic, industrial or political ends by force, violence, intimidation or fraudulent practices…'*

Prime Minister Robert Menzies said that the measures taken by the law were necessary for the defence and security of Australia and for the execution and maintenance of the Constitution and its laws.

The Act was challenged on the very same day that it received the Royal Assent from the Governor-General, and entered into law. All seven judges accepted that the Commonwealth had legislative power to deal with subversion and that it had validly done so in the Crimes Act

[11] Australian Communist Party v Commonwealth ("Communist Party case") [1951] HCA 5; (1951) 83 CLR 1 (9 March 1951)
[12] https://www.britannica.com/biography/Robert-Menzies
[13] *The Party had been banned before: following the Molotov-Ribbentrop Pact, the Party had opposed Australian involvement in the Second World War in 1939, which gave Menzies' United Australia Party-Country Party government the opportunity to dissolve it on 15 June 1940 under the National Security (Subversive Associations) Regulations 1940, (Cth) relying on the defence power of the Constitution of Australia. These regulations were invalidated by the High Court in the Jehovah's Witnesses case (Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (1943) 67 CLR 116.) Before that, the ban on the Communist Party (now supporting the war after the invasion of the Soviet Union) was lifted by the Curtin government in December 1942.*
[14] The communist party dissolution act 1950 (Cth)

1914[15]. The Court also held that the Crimes Act 1914, which criminalized subversive activities, left for the courts to determine the guilt of individuals or organizations involved in subversive activities. *The validity of the dissolution law of the Communist Party depended on the existence of facts which the contested law presented in the preamble as a reality that no longer needs to be proved.*[16].

Although the Parliament has the competence to intervene in order to prevent subversion (or to protect the Constitution), the law would be valid if its purpose was fighting subversion. The Australian Parliament, through the preamble to the law, simply "established" this connection, and consequently the Australian Communist Party would have been dissolved, and the individuals and groups affiliated - "declared" guilty, *regardless of whether there is a link between the facts of that organization, or people, and the undermining of the state order*.

The Judgment's reasoning is based on the principle of "judicial review" taken from *Marbury v Madison*, which was also highlighted in the Supreme Court judgment by Justice Wilfred Fullagar[17]. The Australian Parliament is limited in power by Article 107 of the Constitution. Therefore, *it can only exercise powers expressly or implicitly conferred by the Constitution*. However, the critical question is: *Who decides whether the power actually been conferred?* The Supreme Court's answer was: the courts (ultimately, the Supreme Court). This was clearly the intent of those who drafted the Constitution (even if not explicitly mentioned in Japan, for example), and has never been doubted by Australian courts.

Therefore, the validity of a law cannot depend on the opinion of the Parliament about the nature of the facts, even the constitutional ones, and the validity of a law, or an administrative act, cannot depend on the opinion of the law-maker, that the law or the consequence of the act is within the constitutional power upon which the law in question itself depends for its validity. These should be determined by a court.

In the case of the Communist Party (1951), the essential issues did not refer to the primary legislative objective of suppressing communism, *but to the effect of the considerations set out in the preamble without the possibility of an efficient judicial review of the provisions in question*. In order to express his opinion, Justice Fullagar used the following metaphor: *"A power to make laws with respect to lighthouses does not authorize the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse".*

[15] https://www.legislation.gov.au/Details/C2018C00274
[16] https://www.austlii.edu.au/au/journals/MelbULawRw/1992/6.pdf
[17] http://gnet.geelongcollege.vic.edu.au:8080/wiki/FULLAGAR-Hon-Justice-Richard-Kelsham-1926-2001.ashx

Despite the general lack of trust towards communism, as well as the clear democratic mandate conferred upon the executive by Menzies, the *High Court was firm and did not dodge its duty as a protector of constitutional order and, maybe more importantly, of human rights* and liberties, by declaring the Act invalid.

The Supreme Court's decision is made out of seven separate judgments. Six out of the seven judges have decided that the law was unconstitutional. The only one who was against this solution was the president of the Court, John Latham[18]. Although the seven judgments taken separately slightly dilute the overall message of the Court, they do not undermine the power of the decision as a precedent for future threats towards the rule of law.

This case it is probably the most important decision ever rendered by the High Court of Australia[19]. Through this decision, the Australian legal system has restated the principle established in *Marbury* v *Madison* and accepted it as an axiom, modified in varying degrees in various cases, but never excluded. The analysis of the facts from the standpoint of the fundamental values of the rule of law, made this case a great example of the court's power force a democratically elected government to respect the constitutional and the rules established half a century earlier.

Prof. Galligan from the University of Melbourne rightly noted that *the decision in the Communist Party case was "not just about civil rights and liberties, but also about the limits of legislative and executive powers, as well as the supremacy of the judiciary in taking of such a decision"*[20].

The abolition of the capital punishment in Hungary[21]

In 1989 the Constitutional Court of Hungary was petitioned in regard to a person being sentenced to death. In the applicant's opinion, capital punishment "*cannot be justified ethically speaking, it is incompatible with human rights and it is an irreversible form of punishment which is inadequate and undue for prevention of serious crimes, as well as a means of discouraging the committing of such crimes*."

This case is of increased significance because, at the time, the Hungarian Constitution did not expressly forbid capital punishment. However, Hungary has ratified Protocol no.13 of the

[18] http://www.hcourt.gov.au/artworks/portraits-of-chief-justices/sir-john-latham
[19] Winterton, George. "The Significance of the Communist Party case" (PDF). (1992) 18 Melbourne University Law Review 630
[20] Galligan, High Court, supra n. 210, 203. See also supra nn. 107, 230.
[21] https://hunconcourt.hu/uploads/sites/3/2017/11/en_0023_1990.pdf

ECHR (concerning the abolition of the death penalty in all circumstances) only on 13th of July 2003, thirteen years after the Court's judgment.

Article 54 of the Hungarian Constitution from 1989 provided[22]:

> (1) In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights.
>
> (2) No one shall be subject to torture or to cruel, inhuman or humiliating treatment or punishment. Under no circumstances shall anyone be subjected to medical or scientific experiments without his prior consent.

Through its decision on 31st of October 1990, the Constitutional Court has declared capital punishment, which was provided by the Hungarian Criminal Code at the time, unconstitutional in the following way: Chapter I of the Constitution, which includes the general provisions, provides that: „*The Republic of Hungary recognizes the fundamental human rights as inviolable and inalienable. The state's main duty is to ensure that these rights are respected*". It is mentioned in Chapter XII, 'Fundamental rights and duties' that: „*In the Hungarian Republic, every person has the inherent right to life and human dignity and cannot be arbitrary deprived of these rights."* Article 8(4) provides that the right to life and human dignity are considered fundamental rights that must be exercised even in moments of danger or emergency.

From the above-mentioned provisions, it can be concluded that, regardless of citizenship, the *right to life and human dignity is a fundamentally inherent, inviolable and inalienable right of every human being in Hungary*. It is a crucial responsibility of the state to respect and protect these rights. Article 54(1) of the Constitution states that no one can be arbitrarily deprived by the right to life and human dignity. Nevertheless, the wording of this restriction does not exclude the possibility of someone being deprived of his life and human dignity in a non-arbitrary mode. However, the Court has decided that, when reviewing the legal permission of the capital punishment, the provision of control was that of Art. 8(2): *In the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights*.

The Constitutional Court found that the provisions of the Criminal Code in regard to capital punishment and the above-mentioned provisions *are in conflict with the interdiction of limiting the*

[22] http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.HUN.3-Annex2.pdf

essential content of the right to life and human dignity. Not only do the provisions in regard to deprivation of life and human dignity through capital punishment require a limitation of the essential meaning that right, but it also allows for the complete and irreversible exclusion of life and dignity. Consequently, the Court has established that these provisions are unconstitutional and invalidated them.

This decision offers an excellent occasion to reflect on the importance of the founding symbols of transition periods, the effects of which linger in the constitutional and democratic process long after the furry and fever of the transition have cooled off. For example, the Constitutional Court of Hungary, in the absence of explicit constitutional provisions, has even disallowed the discussion about the death penalty in the post-communist Hungary. In consequence, since 1990, there hasn't been a single serious attempt of re-establishing capital punishment in Hungary and the idea of restoration has never been publicly discussed[23].

Persons Case[24]

Officially known as *Edwards* v *AG of Canada*, the *Persons Case* is a famous constitutional case which established the women's right to hold office in the Canadian Senate. The case was brought forward by a prominent feminist group, known as the *Famous Five*[25].

In May 1918, most Canadian women over the age of 21 were allowed to vote in the federal elections. The year after that, women were allowed to run for office in the House of Commons. Nevertheless, women did not have the right to be elected into the Senate, due to the way that the Canadian government was interpreting section 24 of the *British North America Act (BNA Act)*[26]. Five different governments between 1917 and 1927 suggested that, although they would like it for a woman to be in the Senate, the BNA Act did not allow this. Consequently, the Supreme Court of Justice was asked to answer the following question: *Did the word 'person' form s.24 of the BNA Act include females?*

On April 24th 1928 the *Supreme Court unanimously decided that women are not 'persons' as to the meaning under s.24 of the BNA Act and accordingly are not eligible to hold office in the Senate.* The main ground for

[23] Only some marginal political forces have appealed to the rhetoric of the reinstatement of the capital punishment.
[24] Henrietta Muir Edwards and others v The Attorney General of Canada [1929] UKPC 86, [1930] A.C. 124 (18 October 1929), P.C. (on appeal from Canada)
[25] Henrietta Muir Edwards, Nellie McClung, Louise Crummy McKinney și Irene Parlby
https://www.thecanadianencyclopedia.ca/en/article/famous-5/
[26] British North America Act - Statute enacted 29 March 1867 by the British Parliament providing for Confederation. In April 1982 it was renamed the Constitution Act.

this decision was the fact that the BNA Act should be construed in 1928 the exact same way as it was in 1867 when it was passed. It has been unanimously agreed upon that, in 1867, the term 'persons' would have included men only, due to the fact that women weren't allowed to detain any political function at that time. Thus, the Supreme Court explained that the BNA Act would have referred expressly to women if the legislature had the intent of doing so.

'Famous Five' went to appeal at the Privy Council[27], which reversed the Supreme Court's decision in 1929, and allowed women to hold office in the Senate. '*The legal recognition of women as "persons" means that they cannot be refused their rights on the basis of a narrow interpretation of the law.*'

Lord Sankey[28], who pronounced the Privy Council's judgment also noted that '*the exclusion of women from all public functions is a relic belonging to barbaric days … the obvious answer to the question 'why would the word "persons" include women?" is: why wouldn't it?*

The Privy Council held that, although in 1867 women in Canada were not allowed to hold political functions, the situation in 1929 was very different because the majority of women could vote and run as candidates in all elections. Therefore, the Council's decision was one compatible with the previous amendments between 1910 and 1920 in regard to women's vote.

On February 15th, 1930 Cairine Wilson was sworn in and so became the first female senator in Canada. The Privy Council's decision in the *Persons Case* was decisive in that sense. The fact that women have been recognized as 'persons' meant that women could no longer be refused certain rights through a wide interpretation of the law. This case was a very important one in the history of women's rights, even though the fight for equal rights has continued for decades after this.

[27] Official name: **Her Majesty's Most Honourable Privy Council**. It is a formal body of advisers to the Sovereign of the United Kingdom. Its membership mainly comprises senior politicians, who are current or former members of either the House of Commons or the House of Lords.

[28] http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-35942

Conclusions

In 1949 the legal philosopher Lon L.Fuller published in the Harvard Law Review his famous article - *The Case of the Speluncean Explorers*[29], which is probably the most notorious case of legal fiction. The article is a real *magnum opus* of dispute between morality and the law. It is said to be inspired from two reputable cases: *R* v *Dudley & Stephens* (1844)[30] and *US* v *Holmes* (1842)[31]. The imaginary case is heard in a mythical future, in the year 4300 by the imaginary Supreme Court of Newgarth and it consists of the separate arguments by six judges. Over the years, I have recommended this case to my students, because I have always believed that the best way to understand the law is by reading judicial decisions. Moreover, *The Case of the Speluncean Explorers* is not only a great example of the debate between *morals and the law*, but also because it is a true masterpiece of judicial reasoning, where the values of rights are connected in a balanced manner with the analysing of facts from the standpoint of legality and morality. Thus, Fuller expressed two perfect syllogisms: first – *"Justice is based on the truth"*, and the second one is about the essence of judicial argumentation: *where the conclusion results from the two premises, the major one (the law) and the minor one (the facts of the case), both being perceived from the moral standpoint.*

The importance of coherent judicial reasoning is mentioned as an essential element in the jurisprudence of the European Court for Human Rights, which underlined the fact that the argumentation of the decisions is not a technicality. Instead, it is a warranty for the parties, as well as the only way which allows for judicial review, falling within the definition of a fair trial as provided by art.6 of the European Convention of Human Rights. The European Court constantly held in its jurisprudence that *the argumentation of a decision is a matter of essence and content, not volume*. Judicial decisions must be clear, concise, accurate and consistent with the facts and the evidence of the case. Thus, the Court has established that, not only is judicial reasoning and indispensable element of an equidistant justice, but also a fundamental element of the rule of law.

In constitutional litigation, the judicial argumentation is an essential component for a coherent and stable jurisprudence. The cases analysed earlier: *the Australian Communist Party case, the abolition of capital penalty in Hungary and the Persons case*, are the emanation of three different jurisdictions on three different continents and took place in three absolutely distinct time periods. Nonetheless, these decisions have something in common: *all three of them have been*

[29] http://w.astro.berkeley.edu/~kalas/ethics/documents/introduction/fuller49.pdf
[30] https://la.utexas.edu/users/jmciver/357L/QueenvDS.PDF
[31] https://law.resource.org/pub/us/case/reporter/F.Cas/0026.f.cas/0026.f.cas.0360.pdf

made by completely independent courts and brave judges with wide thinking who opened a new perspective for each of those societies, as well as overstepping the traditional approach. This detail comes to reconfirm the fact that the evolution of our civilization depends mostly on the functionality and the impartiality of justice, which is under the guardianship of *independent trial courts and courageous constitutional courts*. Without these aspects, the degradation of our civilization, and consequently the establishing of some form of tyranny, could become a reality.

Only an infallible, impartial and fearless justice may become, as Hans Kelsen said, *a true guardian of the Constitution*[32]. Only an impartial justice system and a vigorous constitutional court, which exercises its powers, are capable of ensuring that *perfect legalism* that I mentioned in the beginning, thus preserving the fundamental values of a democratic society. Accordingly, the *complete legalism* and impartial justice are inconceivable without a good argumentation of the judicial decision.

The best way to conclude this article is with Sir Owen Dixon's admirable observation when taking the oath for the presidency of the Australian Supreme Court: *There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism".*

[32] The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutioal Law (Cambridge Studies in Constitutional Law)