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Judicial Review in the Democratic System

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Abstract: When judges are authorised to invalidate legal acts for being unconstitutional, the competence of the legislator is directly concerned. The question raises, if thus judges do not usurp legislative power. In the traditional doctrine of the separation of powers the parliament is the first power, based on its direct democratic legitimacy. Yet cancelling legal acts completely or partially does evoke more irritations in the public that could be expected. The people seem to have more confidence to the assumed impartiality of the judges than to the results of the parliamentary work which seems to be dominated by the struggles of the parties. The necessity of judicial review mainly is based on the consideration that individual rights even in an authentic democratic system may be violated by a legal act of the parliament. In this case constitutional courts have the very task to defend individual rights, principles of liberty and authentic equality. Therefore it is justified to speak of the "jurisdiction of liberty", as the Italian constitutional expert Cappelletti has said. But also without such legitimacy in many countries the Courts intervene in the field of the legislator. The courts themselves discuss the limits of judicial interventions, emphasising themselves, that they have to respect the legislative decisions principally, but do not abide always by their own proclaimed principles. In Spanish recent publications it is spoken of the principle "in dubio pro legislatore", (in case of doubt in favour the legislator), reminding of "in dubio pro reo", in order to treat the legislative power not worse than the defendant in a criminal process..
Keywords: separation of powers, judicial review, judicial activism,..

I. Introduction

I would like to add some remarks to the discussion on the judicial review in democratic systems. The idea of the judicial control of stature laws had been developed by the US Supreme Court; it was introduced soon also in Spanish America, first in Venezuela and Mexico, but later also in Brazil, where the judiciary power in recent times has been playing an eminent role.The idea of the judicial review had been developed by the US Supreme Court; it was introduced soon also in Spanish America, where the principle of the supremacy of statute law properly still kept prevailing since the Spanish law system. In the traditional doctrine of the separation of powers the parliament is the first power, based on its direct democratic legitimacy. But the obvious detraction from the legislator's reputation, by cancelling legal acts completely or partially, does irritate the public in democracies less than it could be expected. Yet there are some critical publications of academic authors whose number seems to be growing. A possible explanation is the rather low standing of the parliamentary work,

maybe also because of the some times disgusting qualities of the political discussions, which seems to be dominated by the struggles of parties. Therefore a lot of people prefer to have more confidence to the impartiality of the judges than to the results of democratic debates.
The number of the countries with a constitutional jurisdiction is still growing around the world, although in some countries harsh conflicts between government and parliament on the one hand, and the constitutional court on the other can be observed. Even in France where the primacy of the parliament since the French Revolution was one of the most sacred principles, in the last years lawyers and politicians use to demonstrate that there also exists a system of a real constitutional jurisdiction, exercised by the Constitutional Courts.

II. Origin of the American judicial review

The historical origin of the judicial review already has been researched many times around the world very thoroughly.[1] The famous decision "*Marbury versus Madison"*, more than two hundred years ago, generally considered the greatest of all landmark cases, became the topic of international discussions and congresses. It became the object of an almost religious adoration, only disturbed by some critical examinations of the legal qualities of its reasons, circumstances and motivations. These aspects deserve some more examinations.

After the victory of *President Thomas Jefferson* in the elections of 1800 the Congress still with a majority of the Federalists enacted a controversial Judiciary Act that created 58 new judgeships, including 42 judgeships of the peace. President John Adams, the loser of the elections, in his last night in office March 3, 1801, signed their commissions of the famous "midnight judges". His still acting Secretary of State, *John Marshall*, had to affix the great seal of the United States. In the confusion some commissions went undelivered. But the commission on the appointment of John Marshall himself as chief justice of the Supreme Court obviously did not remain undelivered. The new Secretary of State, James Madison, directed by President Jefferson, withholds 17 of the 42 commissions, including that of William Marbury, the plaintiff of the famous process.

His way to the Supreme Court was opened by the so called writ of mandamus according to the Judicial Act of 1789. Marshall stated the validity of the appointment of Marbury as judge of peace and admitted that the *writ of mandamus* is properly a right remedy, but he denied the question if the Supreme Court is the right court. This smart solution was possible by declaring unconstitutional the law because of the maintained contradiction to the article 3 of the Constitution, which had laid down the competences of the Supreme Court. Yet it is the

[1] E. g. by Charles F. Hobson, 2000, and critically by Roland Bork, 1990, and forthcoming 2003, but especially also in Spanish, as e.g. Fernández 1997 and 2003, and Fix-Zamudio & Carmona 2000.

decisive question, if thus all other possibilities to apply the Supreme Court should be excluded as Marshall stated. Constitutional norms generally renounce to define completely all details in such context, but leave the execution of the constitutional norm to the ordinary legislator, a general idea, as it is also expressed at the end of the article 3 section 2 of the Constitution, mentioning "Regulations as the Congress shall make". Since the competence of the Supreme Court in the case of Marbury is not mentioned explicitly in the constitutional text, Marshall held it to be excluded according to the rule *argumentum e contrario,* without citing it. But the decision between *argumentum e contrario* and analogy is always a matter of a specific evaluation. An analogy to the competencies named in Constitution could be considered even more reasonable. "*Controversies to which the United States shall be a Party" are explicitly mentioned in art. 3 section 2 as object of the competence of the Court. Madison was not personall*y the defendant, but actually the government was sued. The fundamental issue of the relation between statute law and the Constitution was not the real object of the process. Insofar it can be said that the remarkable statements on judicial review which impressed so many people such a long time, essentially are mere *obiter dicta*, that means, general considerations which were not the essential base for the foundation of the sentence. Robert H. Bork has called the famous sentence a grave sin of judicial activism. [2]

III. Critical Trends of US Constitutional Jurisdiction

More than half a century went by, until the Supreme Court stated again the unconstitutionality of a federal regulation. In the case *Dred Scott versus Sandford* a Negro slave in 1857 lost his liberty again, when he was brought back to the State of Missouri by his master, where the Missouri Court 1850 had declared him free. The case of Dred Scott was discussed in the whole country. The hopes of President Buchanan and of many citizens were disappointed. The Court stated that the Congress of the United States had no power to limit the expansion of slavery by law, as the Missouri Compromise of 1820 had done. By this sentence the opportunity was failed to open a peaceful way to settle the slavery question. The final solution was only possible at the end the Civil War with more than 600 000 dead men.

After the Civil War the jurisdiction of the Supreme Court was reluctant to recognise the rights of the coloured population, which just got their liberty. In 1896 the decision *Plessy versus. Ferguson* was the base of a permanent jurisdiction, whose consequence was the establishment of an effective racial segregation, disguised by the euphemistic formula

[2] Robert H. Bork, The Tempting of America, The Political Seduction of Law, 1990.

separate but equal. Not until the year 1954.[3] the Court abandoned its jurisdiction, but only "with all deliberate speed"[4] the legislation could complete the slaves' liberation by a great legislation programme especially during the presidency of Lyndon B. Johnson.

The antagonism between judges and legislators was manifested several times in the field of social protection. In 1905 the Supreme Court cancelled a law which restricted the working hours for bakers in one week to 60, by the way against the dissenting vote of Chief Justice Holmes. In the time of the economic crisis certain legislative measures became indispensable to face the results of the great unemployment and the need of those who lost their money in the times after the black Friday. Urgent laws of social character in the frame of the politics of New Deal were annulled by a chain of no less than twelve decisions. "No issue so great or so deep has raised in America since secession", as Walter Lippmann commented.[5] The legislators did not succeed to achieve their goals by modifying acts to adapt them to the considerations of the judges. Roosevelt developed a plan "to pack" the Supreme Court" by enlarging it to get the opportunity o appoint new justices. The majority of five judges of the Supreme Court, called the "five horsemen", prevented mercilessly the President's policy of New Deal, approved by the American people in the elections of 1932, 1934 and 1936. Finally - as Roosevelt said – the Court began to interpret the Constitution instead of torturing it."

IV. Legitimacy and limits of judicial review

Already the first American Chief Justice, John Jay, clarified the indispensable *judicial restraint* early in the Supreme Court's history by declining to advice President George Washington on the constitutional implications of a proposed foreign policy decision. The Constitution limits the Court to dealing with "cases" and "controversies", like the Constitution says. Yet those old maxims in the real function of the Court have been modified by new procedural devices, like class actions, requests for declaratory relief and other means of raising abstract constitutional issues. The Supreme Court is less an ordinary court of appeals but in the same sense like the European constitutional courts *"*a special organ of constitutional review*"*.[6]

Thus it is possible to discuss the problems of the legitimacy and the limits of the judicial review in a worldwide context, for the fundamental arguments keep being the same since the beginning of the constitutional jurisdiction. The most important argument is that even in an

[3] US Supreme Court May 17, 1954 (Chief Justice Earl Warren) .
[4] US Supreme Court May 31, 1955.
[5] Mason & Beany, 1959, p. 179.
[6] Cappelletti & Cohen 1979, p. 95, Fernández 2003, p. 50.

authentic democracy it cannot be excluded, that individual rights may be detracted in an unbearable extent by a legal act of the parliament. In this case the courts are the best branch for defending the individual rights. Although we also have seen that important sentences in the history of the US Supreme Court did neglect the principles of liberty and authentic equality, in the long run they fulfilled their mission to protect human and social rights in an efficient manner. It had become a model for the world as *"jurisdiction of liberty",* as the Italian constitutional expert Cappelletti has expressed this essential idea in a convincing form.[7]

But the real task of the "jurisdiction of liberty" does not include a judicial activism as a base of bold political decisions, ignoring that the other two branches generally represent the popular majority, making fair decisions for most people, like it is emphasised in several judicial sentences themselves. Yet when nowadays in some countries the legislation does not have the rank, properly attributed by the constitution, that is not only the consequence of judicial activism interfering in the field of the legislation, but also of the reluctance of legislature bodies themselves to decide on controversial matters and of the tendency to wait for a sentence of the constitutional court to solve a difficult problem. In Germany the constitutional judges themselves urge the legislator in their sentences or in publications to decide political maters itself. Instead of showing courage to do so, prevail attempts to find out, what may be the Constitutional Court opinion, has been called a form of modern astrology.

It can be observed that constitutional Courts realize their own opinions neglecting [8]the legislative intentions without reasons prescribed by the constitution. Even in matters of mere technical character, the experiences of experts and of specialised high courts were ignored. In the case of the raising of the fees for public broadcasting the parliaments of all German Länder (states) had unanimously decided a raise of 88 cent monthly instead of 1,09 € as the broadcasting companies had requested, that means a difference of 28 cent. The Federal Constitutional Court stated in its sentence of 2007 a violation if the freedom of broadcasting and invalidated the laws of the Länder.[9]

In the year 2010 the German Court invalidated a law on data storage of telecommunications, as it was requested in a complaint of unconstitutionality.[10] The fear that individual liberty may be jeopardized, is not justified essentially, for the storage refers only to

[7] Cappelletti 1961.
[8] Cfr. Frankfurter Allgemeine Zeitung, July, 8, 2011 „Nach Anruf Selbstmord" (Suicide after call)
[9] Sentence of Septembe, 11, 2007, 1 BvR 2270/05, 1BvR 802/06
[10] Sentence from March, 2. 2010. i BvR 256, 263 und 585/08

the date of the call, but not to its contents. Anyway thus it becomes more difficult not only to discover terrorists, but also swindlers who deceive especially old persons by dirty tricks pretending for instance that someone is grandson needing money. [8] Another field where constitutional courts intervene in the competence of parliaments are social regulations. The German Federal Constitutional Court had cancelled complicated regulations on social security ("Hartz IV").[11] Now it is a reason of harsh discussions on the real intentions of the Court. But is typical that in the public opinion hardly nobody blames the court, but the politicians for neglecting the problem of the poor unemployed people.

The parliamentarian decisions are based on an open discussion including the arguments of the several groups of the population. From the beginning of the judicial review the US Supreme Court developed doctrines of *judicial restraint*, which in similar forms are playing important parts in many other legal systems, especially in Germany, Italy and Spain, whilst the original "doctrine of political question" has not the same ranking as in the USA, where it became an element of the moderate judicial activism.[12] Obviously all the decisions of the highest courts always have a political impact, also when they themselves pretend to avoid any intervention.

The doctrine of judicial restraint includes several points of view as the doctrine of strict necessity, particularly in view of possible consequences for others stemming also from constitutional roots and the inherent limitations of the judicial process. As the US Supreme Court stated in a sentence of 1911, it is one of the most important maxims of constitutional interpretation, that courts are concerned only with the constitutionality of legislation and not its motives, policy or wisdom.[13] Justice Frankfurter has said "We do not sit like a kadi under a tree, dispensing justice according to considerations of individual expediency."[14] In Spanish recent publications it was spoken of the principle *"in dubio pro legislatore",* (in case of doubt in favour the legislator), reminding of the clause "*in dubio pro reo*".[15] For it would be absurd to treat the legislature power worse than the defendant in a criminal process. In the USA the idea to presume in favour of the law's validity was expressed already 1827 by Justice Bushrod Washington.[16]

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[11] Sentence February, 9, 2010, 1 BvL 1, 3 und 4/09

[12] Bruce Ackermann, (1998) *We the People. Transformations*, Cambridge/Lonon, p.99-119, 345-382, in the same way Martin Shapior (1964), *Law and Politicas and the Supreme Court*, London p. 180 ff. , César Landa, (2000) Justicia constitutional y political questions, in: *Anuario Iberomaericano de Justicia Constitucional* 4/2000, p. 173, 178.

[13] Noble State Bank vs. Haskell, 219 U.S. 575, 580 (1911).

[14] Justice Frankfurter (dissenting) in Terminello vs. City of Chicago, 337 U.S., 1, 11 (1949).

[15] Horn 2002, 242.

[16] in Ogden vs. Saunders, 25 U.S. (12 Wheat) 213, 270 (1827). There are decisions in the same sense also already in 1810 and 1871.

It calls the attention that the necessary doctrines to protect the legislators against inadequate interventions of the judges, are expressed in dissenting opinions – as it happened several times also in sentences of the German Constitutional Court - or in rather old American sentences. Often it could be observed that opinions, which originally were dissenting, later became the ruling ones. This desirable development can be promoted by laying down the essential principles in constitutional or legal texts to ensure that judges do no usurp legislative faculties. There is a serious warning against a transition from the democratic state of rule of law to a "state of an obligarchy of judges" in which the judicial review does not abide by the frames of the democratic system.

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