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A brief comparison of legal and political constitutionality – The development of politicization, institutional and individual aspects*

ABSTRACT

The emerging constitutional court set an obstacle to the policy-making of democracy, and at the same time pushed the political system towards duplication, building the power mechanisms of juristocracy alongside democracy. The basic idea of the need to establish a constitutional court led to the recognition that the provision of cassation power also means interference in democratic processes. The study undertakes a short, sketchy presentation from the role of the 'Das Gericht als negativer Gesetzgeber' to the intervention close to the positive situation (or from Kelsen to Rawls as preferred).

KEYWORDS: juristocracy, democratic legitimacy, negative legislator, constitutional adjudication

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Introduction

Currently, particularly in advanced cultures, Pericles' statement that decisions regarding the constitution and, through it, governance should be placed in the hands of the majority rather than the minority can be considered fundamental in terms of political organisation. The concept of elections based on equal rights for millions of people and governance based on this (political constitutionalism/democracy) excludes the conclusion of collective agreements by a body of officials. In other words, the law cannot rule on its own, as the law is also embedded in 'political circumstances', and appropriate procedures ensure that citizens are treated with equal attention and respect. In this respect, the role of judges in ensuring legality is indispensable through the consistent and equitable application of enacted laws, but they cannot ensure that laws are not arbitrary; this is achieved through the self-determination of citizens[1].

The key concept in this study is political value choice and its manifestation and consequences in adjudication. According to Béla Pokol, anything that depends on political value choice cannot be made into a logically neutral decision[2]. It is therefore necessary to review the processes that lead to the politicisation of judicial decisions and to present the consequences of this.

Interest in the recent strong growth of "judicial power" has clearly gone beyond the realm of academic interest and is increasingly becoming a topic of public discourse. Titles such as "The Global Expansion of Judicial Power" (Tate and Vallinder 1995) and terms such as juristocracy (Hirschl 2004) and courtocracy (Scheppele 2002) appear precisely because this form of power has spread worldwide, in a development that only really began after the Second World War and has gained real momentum over the last fifty years[3]. It is worth starting with a distinction here in the introduction, as the previous sentence deliberately used the term form of power rather than the concept of branch of power. Form of power refers to the fact that the branch designated as a separate judiciary in the idea of separation of powers encroaches on the political sphere, on the one hand in a comprehensive manner (at the level of abstract constitutional adjudication/norm control), and on the other hand at the level of individuals, in which case a few – unelected – individuals may be able to shape political will, contrary to the decisions of millions. As a brief reference back to the earlier quotation, it is worth noting that Scheppele also used the term courtocracy to describe the Hungarian political system after the change of regime, emphasising the role of the Sólyom court[4].

In line with this, the first part of the study provides a historical overview of judicial power, attempting to show how it came about and how it reached its current form. The following chapters attempt to explore the driving forces behind this, and the study concludes with a presentation of the consequences.

I. Brief historical overview

Constitutional adjudication in the modern sense, i.e. the form of judicial power in which the courts can decide on the constitutionality of laws at the highest level, is the result of a long development. One of the earliest precedents can be traced back to the British colonial period, when the Imperial Privy Council was the highest judicial forum for the vast territories. This body initially functioned primarily as an appellate council and did not directly exercise constitutional review; however, the idea that the judiciary had powers distinct from those of the central legislature, particularly in legal disputes concerning the validity of laws, had already emerged in the legal systems of many colonies and dominions[5]. These precedents later gave rise to the widespread judicial activity that we now know as

[1] Bellamy, Richard: *Political Constitutionalism*, MCC Press Budapest, 2022. p. 22
[2] Pokol, Béla: *Kettős állam és jogduplázódás,* Alapjogokért Központ Budapest 2020 p.141
[3] Goldstein, Leslie Friedman: *From Democracy to Juristocracy*, Law & Society Review, Sep., 2004, Vol. 38, No. 3 (Sep., 2004), pp. 611-629
[4] Boulanger, Christian: *Europeanization Through Judicial Activism? The Hungarian Constitutional Court's Legitimacy and the "Return to Europe"* In book: Spreading Democracy and the Rule of Law? The Impact of EU Enlargemente for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders (pp.263-280)Publisher: SpringerEditors: Sadurski W, Czarnota A, Krygier p. 265.
[5] Silverstein, Gordon (2003): *„Globalization and the rule of law: 'A machine that runs of itself?'* International Journal of Constitutional Law 1(3): 427–445

"juristocracy", referring to the fact that in many countries, the courts – partly through agreement between social and political actors, and partly through practices developed over time – are able to exert considerable influence on the political decision-making process[6].

The example of the Privy Council is also significant because in the first half of the twentieth century, the view that parliament was the sovereign power and that the courts had no power to override the will of the legislature was still strongly held[7]. For a long time, British thinking took parliamentary sovereignty as its starting point, according to which the courts were merely enforcers of already adopted laws and not institutions exercising constitutional control. Over time, however, especially in the states that became independent after the break-up of the British Empire, the view emerged that a court could declare a law unconstitutional and thus invalidate it in certain cases. This process was complemented by the experience of the United States: the practice that developed following the Marbury v. Madison (1803) decision pointed out that the constitution itself is above the legislature and is guarded by the Supreme Court.

This marked the emergence of constitutional adjudication in modern history, which at that time was still largely jurisdictional adjudication and was limited to deciding disputes between federal and state authorities over their respective powers. All this changed in the early 1900s, when, invoking constitutional fundamental rights and principles, the highest federal court began to strike down laws on the grounds of unconstitutionality, even beyond jurisdictional disputes[8]. As a result, constitutional adjudication largely became fundamental rights adjudication and began to function as a competitor to democratic decision-making and congressional lawmaking.

We cannot omit to mention the New Deal and the "switch in time" in the 1930s, which meant judicial obstruction of Franklin D. Roosevelt's policies (*Schechter Poultry*, 1935), after which the conservative members of the Supreme Court (e.g. Justice Roberts) spectacularly "changed direction". This led to the famous saying: *"the switch in time that saved nine"* – i.e. the court's strategic retreat prevented Roosevelt's "court-packing" plan. From then on, the Court began to operate *as a more active political player*.

This approach became even stronger in the period following the World War and then the Cold War, especially in Europe: independent constitutional courts were established (in Germany, Italy, Spain and Portugal), and it became established practice that courts could review the constitutional limits of legislators' powers[9].

The fundamental rights movements of the 1950s and 1960s further reinforced this change, the reasons for which will be discussed later. Suffice it to say that, with human rights movements standing alongside/above the legislature, fundamental rights constitutional adjudication became the main norm-setter, not only controlling the creation of laws, but also allowing for direct constitutional litigation on fundamental rights[10]. Cause lawyers, or lawyers for good causes, appear to represent minority movements, fighting for the political goals of the movement in courtrooms by using constitutional fundamental rights and setting precedents (Scheingold 1998:115-150). The Warren Court period (1953–1969) was characterised by activism and the pursuit of social justice. During this era, the Supreme Court implemented a number of radical changes: the abolition of racial segregation (*Brown v. Board)*, the Miranda rights, and equal electoral districts. The judges derived new rights from the Constitution that were not explicitly mentioned in its text (e.g. the right to privacy). This provoked a reaction from originalists, leading to the counter-movement led by Bork and Scalia in the 1970s and 1980s.

In many states, this control extended to civil law, human rights, economic and even administrative and budgetary areas. The parallel strengthening of the international treaty system, the global protection of human rights and the emergence of European Union regulations also increased the importance of the role of judges, so that in many places, courts are able to encroach on the powers of parliaments with human rights and constitutional references, thus "politicising" the judiciary. The term

[6] Moustafa, Tamir & Tom Ginsburg (2008): „*Introduction: The Functions of Courts in Authoritarian Politics."* In Rule by Law: The Politics of Courts in Authoritarian Regimes, ed. Tom Ginsburg & Tamir Moustafa, Cambridge University Press
[7] Williams, Robert F. (2006): *„Juristocracy in the American States?"* Maryland Law Review 65(1): 68–83
[8] Pokol, Béla: *Autentikus jogelmélet*, Dialóg Campus Kiadó Pécs, 2010. p 126
[9] Goldstein op.cit
[10] Pokol (2010) op.cit

'judicialisation of politics' has become commonplace, referring to the fact that disputes over public authority are often brought before constitutional courts.

The scope of this study does not allow for a comparison of the relevant theories of political philosophy. Suffice it to say at this point that there is a conflict between the legal constitutionalism represented by Rawls and the political constitutionalism of Oakeshott, Dicey and Bellamy and neo-republican theories. At the same time, it is necessary to note that since the 1950s, courts have been moving away from the Kelsenian procedural approach and have been steadily taking over political decision-making on legal grounds. As mentioned in the introduction, this is also reflected at the institutional level, but it is necessarily based on individual preferences.

II. Reasons for politicisation, review and open norms – institutional level

With regard to the causes, it is worth looking back to where the idea of adjudicating jurisdiction, or in other words the procedural approach, is replaced by the substantive view that there should be an organisation independent of the legislature that examines (reviews) the laws on their merits. Hans Kelsen recognised the danger of this early on. At the much-cited conference of German constitutional law professors held in Vienna on 23 and 24 April 1928, Kelsen emphasised that constitutionally enshrined political declarations ("justice", "freedom", "equity", "morality") is "a power that must simply be considered intolerable"[11].

At the same time, this was not exclusively a legal recognition. The danger – to quote Hegel indirectly – was also an opportunity. From the beginning of the 20th century, especially from the 1910s onwards, certain groups of American big capital, recognising the transformation in the nature of political power, gradually moved away from traditional mechanisms of interest representation based on elections and legislative majorities. Instead, they began to use judicial forums, primarily bodies authorised to interpret the constitution, as a strategic tool. Referring to fundamental rights, which play a central role in legal discourse, and focusing on the grievances of various social minorities, these groups developed a political strategy that enabled them to build long-term influence against the conservative majority forces in society. The aim of this strategy was to gain a hegemonic position in the discourse that determined the direction of society, while ousting their competitors – primarily the interests of productive capital and their social base – from key decision-making positions[12].

According to Bork, from the 1950s and 1960s onwards, the US Supreme Court took on an overly politicised role when it read new rights into the text on the basis of the principle of the 'living constitution'. He considered this to be the "political seduction" of the law, as referred to in the title of his book The Tempting of America: The Political Seduction of the Law (1989). According to Bork, judicial activism undermines the principle of democracy, as unelected judges impose their own views on society. The case of Robert H. Bork (1927–2012), a law professor who was one of the intellectual leaders of the conservative legal movement of the 1980s, is particularly noteworthy in this regard, especially . As a Supreme Court nominee, he emphasised during his Senate confirmation hearing (1987) that only a person *"who understands and is committed to the philosophy of originalism"* is fit for the Supreme Court. After the Democrats openly obstructed his nomination for political reasons, Bork's nomination was ultimately rejected in such a heated political battle that his name became synonymous with the verb "to Bork," meaning to use political means to defeat a nominee.

In practical terms, the emergence of the demand for judicial review also represented a political opportunity for hegemonic groups that wanted to gain social influence by means other than elections. Four theories are worth briefly discussing.

According to Martin Shapiro, in countries with federal or highly decentralised political structures, judicial review necessarily develops as a means of managing conflicts between different levels. Federal systems (such as those in the United States, India, Germany or Brazil) require, by their very nature, an institution capable of deciding whether the central or state level has the authority to regulate certain issues. Due to the nature of these conflicts, the court, as an "independent third party," becomes the arbiter of political disputes, and thus the separation of powers is not merely a declaration

[11] Kelsen, Hans: *Die philosophischen Grundlage der Naturrechtslehre und des Rechtspositivizmus*. Charlottenburg: Pan-Verlag Rolf Heise 1928 p. 68
[12] Pokol op.cit 2010. p. 127

but also an institutionalised practice. Here, the theory is shaped purely by a procedural approach and does not take into account the role of the individual.

In his work Rights from Wrongs, Allan Dershowitz argues that the institutionalisation of human rights and constitutional protection is not based on natural law, but stems from injustices suffered throughout history. According to Dershowitz, modern states create legally enforceable rights because they want to learn from the mistakes of the past: after experiencing totalitarian regimes, war crimes, colonial oppression, racial segregation or state violence, society wants to enshrine norms at the constitutional level that can prevent similar abuses from recurring. As examples, Calabresi cites Germany, where an extremely powerful and independent Constitutional Court was established after Nazism, and South Africa, where the new constitutional order was also embedded in guarantees of the rule of law after the dismantling of the apartheid system. It is worth mentioning that Calabresi does not take into account the well-known fact that it was the lawyers of the victorious American occupying forces who drafted the new German constitution, enshrining the institution of the constitutional court in it[13].

The third example is Tom Ginsburg, who developed the so-called "insurance theory". According to this theory, the political elite is willing to establish independent courts when it perceives its power to be unstable or temporary. The possibility of being ousted from power motivates the creation of institutional safeguards that allow former leaders to count on legal protection if they find themselves in opposition. This is particularly true during democratic transitions, when former ruling parties often see the courts as the last guarantee of their own protection. Ginsburg's examples include Taiwan, Mongolia and the new democracies of Eastern Europe.

In contrast, Ran Hirschl offers a more radical interpretation. According to his theory, judicial review does not serve to strengthen democracy, but often has the opposite effect: it serves to "cement the power legacy of the hegemonic elites". Hirschl argues that when the ruling political, economic or cultural elite perceives its position as threatened by democratisation or social mobility, it tends to "pass on" constitutional rights to independent courts in order to preserve its own value system and privileges. The aim of such strategic constitutional reforms is therefore not to extend democratic rights, but to maintain elite political stability, now with a legal safety net. Examples include Israel, Canada, New Zealand and South Africa, where the strengthening of judicial power has often been accompanied by the political decline of the former hegemonic forces[14].

The above analyses must necessarily be supplemented by the individual level, where political preferences emerge and have a direct impact.

III. The concrete manifestation of politicisation – the individual level

Judicial politicisation – that is, the increasing political role of the courts – is not simply an institutional anomaly or moral deviation, but a phenomenon that can be understood historically and structurally, which has developed at the intersection of several factors. As noted above, since the second half of the 20th century, the role of the courts, especially constitutional courts, has grown to such an extent in many countries – from the United States to continental Europe – that they have become equal or even superior opponents of the executive and legislative branches. Béla Pokol calls this trend a "juristocratic form of government," in which constitutional adjudication is no longer merely an element of the separation of powers, but functions as an independent, quasi-sovereign centre of power[15.]

Here it is worth mentioning the phenomenon of political selection and the filling of judicial positions. One of the main drivers of the politicisation of the judiciary is the mechanism of judicial appointment controlled by political actors. Whether selection is made by a parliamentary majority or by presidential authority, the political preferences of judges – especially in the case of constitutional judges – are almost inevitably reflected in their judicial practice. According to Pokol, a distinction must be made between party-affiliated judges and judges bound by political values: while the former actively

[13] Feldman Noam: *Imposed Constituttionalism*. Connecticut Law Review (Vol. 37) 2005. 851-865. p

[14] Hirschl, Ran: *Towards Juristocracy The Origins and Consequences of the New Constitutionalism* Harvard University Press 2004. p 22

[15] Pokol, Béla: *A jurisztokratikus kormányforma és szerkezeti kérdései*, Pázmány Law Working Papers 2016/8 p. 5

pursue the political goals of the appointing party, the latter's decisions are guided by their ideological orientation, but with legal coherence and case law construction.

The structure and selection mechanisms of the judiciary fundamentally determine the political sensitivity of a given judicial system and the degree of so-called "politicisation". The differences between the European and American judicial systems illustrate how different types of judicial habitus and institutional role perceptions develop in the two models. In the European system, the judicial career is of a "career model" nature: after completing their legal training, young people enter the judicial system at an early age and, subject to strict evaluation, promotion and disciplinary regulations, they rise to higher judicial positions16. The career path is therefore structured according to an internal bureaucratic order, which promotes the development of a type of judicial personality that is conformist, good at managing hierarchical relationships and easily integrated into the organisation[17.]

In contrast, the majority of American judges are "merit judges", i.e. they are appointed on the basis of their merits in other areas of the legal profession (e.g. in positions as lawyers, academics or in public administration), usually with a lifetime mandate. This type of judge is independent of the internal promotion pressures and disciplinary hierarchy of the system, and thus relies more heavily on their own professional and political worldview, thereby enjoying greater decision-making autonomy[18.] However, it is important to note that the selection of American judges is typically overtly political in nature, especially at the federal level. The filling of judicial positions depends on the decisions of the political elite – primarily the government and the Senate – so that the "recognition" aspect actually becomes political recognition (Garoupa, 2011).

European constitutional judges, who can also be considered “recognition judges”, form a separate category: they are elected not on the basis of their career path, but on the basis of their previous achievements in the legal community. Moreover, due to the institutional logic of constitutional adjudication, these judges are inherently closer to the political sphere than members of ordinary courts.[19.] As a result, constitutional judges are more politicised at both the structural and personal levels.

On this basis, two degrees of political commitment can be distinguished: (1) party-committed and (2) politically value-committed constitutional judges. The former closely follow the political will of the appointing party and are primarily active in cases that affect party political interests , while in other cases they act formally, relying on their delegated colleagues, they do not seek to develop coherent case law, and they often ignore the internal logic of the constitutional system of norms[20]. The latter type of judges, on the other hand, pursue a more independent decision-making practice, their deliberations are guided by their political values, but they interpret the constitution within a coherent system of cases. This requires that the institutional level provide the existential and operational guarantees that make them independent of the constraints of party political loyalty.

Both attitudinal (behaviourist) and strategic approaches to judicial behaviour theory attempt to describe these two types. The former emphasises the dominance of individual political preferences, while the latter argues that these only have a reduced weight in judges' decisions, with institutional logic and strategic considerations prevailing. A distinctive feature of European constitutional adjudication is that these models can be applied simultaneously: both party-affiliated and value-bound judges can be found, and their behaviour can be clearly identified through longitudinal analysis.

To conclude this chapter, it can be said that constitutional judges necessarily make political value choices and can therefore be interpreted as actors of state power, albeit not in the same way as government actors. Their politicisation differs from the party-political determinations of the executive, but they have independent political weight, which often influences political processes through constitutional interpretation. They can therefore be placed within the concept of a ‘juristocratic form of government’, which interprets the courts not only as supervisory actors but also as decision-making political actors.

[16] Pokol op.cit (2016)
[17] Garoupa & Ginsburg op.cit
[18] (Garoupa & Ginsburg, op.cit
[19] Pokol 2016. p. 98
[20] Pokol op.cit 2016.

Conclusions

Before concluding, it is worth recalling that in the United States, the appointment of chief justices is preceded by specific election campaigns, similar to presidential election procedures, of which there are three main types: partisan elections, where candidates run under the colours of political parties; non-partisan elections, where no party affiliation appears on the ballot, but political backing is common; and so-called "retention" elections, in which judges who have already been appointed participate in a confirmation vote. A common feature of these electoral systems is that campaigning – including media appearances, fundraising and support from interest groups – plays an increasingly important role. This raises several serious problems: on the one hand, the risk of political and financial influence jeopardises judicial independence; on the other hand, the pressure to campaign exerts populist pressure on judges, especially in criminal cases, where judges seeking re-election often hand down harsher sentences. In addition, the campaign influence of interest groups, especially PACs using 'dark money', raises the issue of institutional bias. The system therefore operates in a delicate balance between democratic accountability and impartial adjudication, while it is becoming increasingly clear that the logic of elections is profoundly reshaping the perception of the role of judges and decision-making.

There is no sign of this on the European stage, as conflict of interest rules do not allow judges to openly approach political parties (see, for example, Section 42 of the Hungarian Judges Act - a bírák jogállásáról és javadalmazásáról.). An interesting exception is Germany, where the Richtergesetz does not expressly prohibit party membership; indeed, under Section 39 of the Act, German judges are free to exercise their full civil rights, including membership of political parties or trade unions and active participation in political life. This image of the German "judge as citizen" is very important, both from the point of view of the ongoing process of democratic integration and the internal democratisation of the judiciary[21].

The following conclusions can be drawn from the above. Politicisation occurs when, as a result of elections by millions of people, a legislature comes to power alongside an institution of norm control that no longer operates on a procedural basis. By recognising the possibility of substantive review, a more stable and deeper social influence can be built through the courts than through legislation tied to electoral cycles. Thus, building on constitutional fundamental rights (rather than parliamentary majorities), social coalitions can be formed through legal discourse (e.g., the protection of minority rights, which in the United States was the structural displacement of productive capital factions from the centre of political dominance (cf. Gramsci, 1971; Lindblom, 1977; Horwitz, 1977).

This is necessarily accompanied by the spread of unnecessarily open norms (fundamental rights) and their teleological interpretation. In the process, the courts have in many cases created something "new" through their interpretative activity, extracting (or reading into) provisions or rules from the constitution that are not actually there. It would go beyond the scope of this study to detail the textualist and contextualist approaches, but it suffices to refer to two examples. Béla Pokol 27/2015 (VII. 27.) AB decision, where he explains that deriving the right to a name from human dignity means "overstretching" the law, and refers to his previous rejection of the constitutionalisation of civil law name rights (ABH 2015, 695). In the more comprehensive wording of Varga Zs. András, the previous (under the provisional Constitution) normative declaration of the rule of law without a substantive background gave the Constitutional Court a free hand to freely shape the concept of the rule of law, thereby becoming the unrestricted master of legislation[22].

Considering the above together with the practice that, for example, in the American system, judges are appointed for life, this allows for lasting political influence, especially when (as another structural reason) the Court itself decides which cases to hear (writ of certiorari).

All this can work as long as the law unnecessarily allows for the prevalence of open norms and the idea that fundamental rights are prerequisites for political decision-making[23]. In this regard, Bellamy

[21] Böttcher, Hans-Ernst: *The Role of the Judiciary in Germany*, German Law Journal, Vol.5. No. 10 p. 1324
[22] Varga Zs. András: *Eszményből bálvány? A joguralom dogmatikája* Századvég Kiadó 2015. Budapest p. 122
[23] Rawls, John: *Political Liberalism* Columbia University New York 1993. p.

is most convincing in his view that the strengthening of judicial control is a limitation on democratic self-determination[24].

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