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Pokol, Béla

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**BÉLA POKOL**

## **Forms of Judicial Power**

The power of the judiciary has been expanding in a number of European and Latin American countries in recent years. This phenomenon could be observed much earlier, and, in the wake of this observation, comparative studies have been launched. Then, in the beginning of the nineties, this expansion was amply demonstrated at a conference held in Bologna, Italy (the lectures delivered at the conference are included in a volume edited by Neal C. Tate and Torbjörn Vallinder in TATE/VALLINDER 1995). However, judicial power made its presence felt, and expanded, in a number of additional countries, and this phenomenon was not unrelated to a transition to political democracy from dictatorship that was going on at that time in many Latin American and East European countries. This pattern of development took over these two, very different regions, both in terms of culture and society. This happened, in many respects, due to motivations and urging emanating from the United States of America, including grants and ideological exports, just as the demonstration of the judicial power in the United States as an example to follow. Considering its role in making decisions in the area of societal management and the determination of the political life of the country, American judicial power has reached unparalleled heights in the world, and this wide ranging judicial power has been emulated in the past decades, and, also, before the nineties. In the adaptation of this model, it has been tailored to fit the local structures and mechanisms of the legal and political systems in the importing countries. Thus, it seems to be expedient to briefly summarize the various forms of judicial power in the United States and its operational conditions (1), then to analyze the variances that have manifested themselves in the countries of Southern Europe, lending new emphases to this power (2), and to examine the idiosyncrasies of the judicial power developed in Latin America (3), and, finally, to dissect judicial power in Hungary, the country that has forged the farthest ahead among the countries of the former Soviet bloc in solidifying an independent judiciary (4).

*1. The model country of the all-round judicial power: the United States of America*

As a point of departure, it is important to stress that the Constitution of the United States, based on the principle of the separation of powers, is, from its inception, about judicial power as separate from the legislative and the executive branches, but the factual role of the judiciary as a strong, separate sphere started to take shape only from the thirties, and, from the fifties on, this judicial branch has been expanding with newer and newer forms. Looking back at the process of development of the various forms of judicial power on the basis of the various conditions arrived at, it seems to be convenient to make a distinction between two main directions. One of these directions of the development in judiciary power is an increasing participation of the courts in making decisions in the control and management of society in addition to deciding in the cases of individuals. The other direction is an increasing participation of judges in the competition of political groups vying for making decisions in the area of societal control in such a way, too, that they were able to change the outcome of elections by finding fault with leading politicians and government officials criminally or ethically. Let us, then, look at the forms of judicial power that have evolved.

*1.1. Judicial power as a form of controlling society*

In this area, three distinctive forms of judicial power can be separated. These forms complement each other and they are the repositories of the role the judiciary plays in controlling society. They are as follows: 1) judicial power representing the making of rulings in controlling society deduced from the stipulations of the federal Constitution, concentrating foremost in the federal Supreme Court; 2) the second form represents the judiciary executive power which means the supervision of the execution and monitoring of the above fundamental rulings and which present themselves at the federal district courts by filing thousands of motions requesting institutional remedies; 3) the third form is constituted by the judiciary's task to oversee the regulatory work of federal agencies, which can be termed as the empowerment of the federal courts to issue orders of implementation. The latter has developed within the sphere of activities of the appellate courts at the federal level (cf. SHAPIRO 1994: 15).

*1.1.1. Judicial power to control society*

Traditionally, judicial rulings have been made in adjudicating specific, individual cases between two contenders, and the judge is able to decide by using legal standards that are more or less defined beforehand. An

empowerment toward social control has taken place in the United States in such a manner that, on the one hand, judges have been enabled to issue rulings over global social conflicts instead of specific, individual cases, and, on the other, these rulings could be made not along minutely regulating legal norms, but abstract constitutional principles and constitutional laws that have provided the adjudicators with ample leeway. By these two changes, court rulings have been elevated to the level of legislative regulations in legislative bodies, for it is the legislature that traditionally makes decisions that control society, as limited by the abstract principles of the Constitution. Such a shift in the rulings by the judges has been made possible by a development of a judiciary ruling based on constitutional rights, that made its first appearance already from the eighteen hundreds, and led to serious political tensions in the thirties by continuously obstructing the New Deal government and the legislation, but it had reached its full potential only by the end of the fifties (cf. EPP 1998:9–23). From that time on, a practice started to spread whereby political forces competing to change the status quo continued to wage their battle, if defeated in the elections and the legislative sparring, at federal level courts by filing lawsuits, and requesting the relating laws to be declared unconstitutional, and they tried to convince the court, based on constitutional principles or a fundamental right, to issue a ruling to change the current social conditions. This way, a number of decisions shaping how society functions has been brought by the highest level federal judicial forum on the basis of the Constitution, running against the majority either in the Congress or the state legislation. This represented the development of the power of the judiciary controlling society from the sixties on in the United States.

However, this change could come about only in the midst of various preconditions, and they should be given emphasis since, later, the copying of this model in other countries has led to different results due to a lack of the preconditions existing in the United States. By looking at the farther lying social preconditions first, it is important to stress the continued subsidy by powerful financial entities contributing to the development of this form of judicial power. The financial groups standing behind the American Fund for Public Service, operating also as an engine for change, played a decisive role in the creation and ongoing financing of the American Civil Liberties Union (ACLU). This was also demonstrated by the fact that, when the 1929 financial crisis led to liquidity woes for the banking sphere, the ACLU stopped operating for a while, and it did nothing but agonize until the end of the Second World War (cf. Epp's detailed analysis in EPP 1998:58–59). It seems that the political battles waged within the establishment between the financial and commercial lobbyists and the conglomerate of the agricultural and industrial entrepreneurs accounts, basically, for the partial shift in the decisions to control society to the judiciary from the legislative branch. The financial elite that could not change the status quo via the ballot box and the legislation forced its way through

“constitutionalizing” the judicial rulings and executed, thereby, a shift in decisions controlling society in the direction of the courtroom.

A more direct preconditions for this has been that administrations ran by Democrats in the sixties lent their enthusiastic support, in the appointment of judges, to law professors and attorneys committed to political fighting via litigation and “constitutionalizing” rulings and by having the treasury take over the costs of litigation and they assisted the spread of this practice through a number of changes in the legal proceedings (cf. SARAT/SCHEINGOLD, 1998:3–29; EPP:1998:26–43). An important precondition to the the creation of courts empowered to control society was the spread of “pro bono law offices” and associations and movements working in the field of human rights, which were giving incentives to this process by filing thousands of lawsuits, and they have been exerting pressure on the courts, instead of using traditional legal reasoning, by developing constitutional and human rights arguments (Chayes 1982). As Charles Epp puts it: in India, members of the Supreme Court have become receptive to the American type of social engineering via court rulings, but this attempt has been thwarted after a while due to a lack of supporting networks of pro-bono law offices (EPP 1998:90–110). Finally, a continued support on the part of the national dailies and the mass media has been an important precondition to change the prevailing power structure and their preference expressed in the interest of increasing the power of the courts vis-à-vis the legislature. In the case of a mass media hostile to such changes, the judges are afraid of facing the pressure coming from an opprobrious and indignant public, coupled with a growing power share of the judges.

#### 1.1.2. Judicial executive power

The executive power of the judiciary has been created by the “institutional remedy” in the effort that the rulings fought for at the highest judicial forums, aimed at controlling society, had to be implemented as against the prevailing social conditions, and, therefore, thousands of lawsuits had to be launched against the individual institutions. The abolishment of the schools based on racial segregation, and, later, the transformation of the life in prison, and the enforcement of provisions protecting the environment against some plants, and so on, in a number of other areas, the creation of a new type of schools, jails, factories, and other institutions has been achieved through lawsuits and judicial rulings. The main vehicle for this has been the “institutional remedy,” by which the court instructed the school, etc. in litigation how to remold its operation and its structure with a view to the Constitution (cf. SHAPIRO 1994:13–15). These lawsuits were processed at the level of the federal district courts. If the instructed changes in operation and organization did not materialize as a result of the rulings, a complaint could be lodged with these courts, and the courts tried to enforce their rulings by applying fines to the non-

complying schools or other organizations. The compliance had to be checked, and, therefore, these courts hired experts. However, as changes in the prevailing conditions often forced the courts to change the directives, and, as a result of the huge amount of earlier “institutional remedies,” a large number of changes in the directives were kept on the courts’ calendar at the same time, and the opinions of experts and the collection of data were also necessary to issue newer directives (cf. SHAPIRO 1994). Thus, by virtue of the thousands of lawsuits, continued judicial power and an army of contracted experts were building up around the district courts, in a way redoubling the supervisory role of the executive branch over the schools, the penitentiaries and the environment. In the wake of this solution applied to the problem, the judiciary developed its own executive power in parallel with the executive sphere beside the judiciary; the judiciary power controlling society made it necessary to develop its own executive power just like earlier the legislative branch had to do the same in controlling society. However, while these spheres were separate in the case of the legislative branch, in conformity with the principle of the separation of powers, this did not happen within the judiciary where the executive sphere developed within the judiciary sphere, beside the district courts.

### 1.1.3. Judicial power to issue executive orders

This form of judicial power has been built around the overseeing of executive orders, and provides a new political battleground for the clash of the various political groups of society. The fact of the matter is that a number of laws provide only a general framework for legal regulatory work, and it authorizes one of the main agencies of the executive branch to issue detailed regulations. For a long time, the regulatory work in the executive sphere has been independent from judicial supervision, and it has been an accepted idea that the main agencies working with a large expert staff fill the general regulations of the laws with provisos and issue detailed regulations (see SHAPIRO 1994). However, an increase in the power of the courts and the spread of the battle waged via litigation have also led to changes in this field, too, and social groups interested in any regulation in relation to a given law have become increasingly willing to attack, at the courts, the executive orders that have been inimical to their interests by reasoning that it had misinterpreted the basic law and pushed rulings to inappropriate directions, such as overregulation. Judges that have become increasingly political in the course of “constitutionalization” started to feel more and more friendly toward such attacks. In the course of these lawsuits, judges have worked out a number of directives regarding the creation of such implementation orders, and, if they have been breached, they immediately squashed the executive order issued earlier. Thus, whereas attacks against the executive order was an unknown phenomenon during the fifties,

there has been practically no executive order that has not been attacked by the beginning of the eighties, and, finally, they were the judges who decided on the fate of the individual orders. This process engendered hundreds of politically motivated litigation, and, thereby judicial power have become increasingly engaged in the transformation of society. This form of judicial power has come about at the level of federal appellate courts, and it continues to wield influence in the battles waged within the American political system.

### *1.2. The punitive judicial power*

It is the United States where a shift in rulings to control society to the courtrooms from the legislature has taken place in the most dramatic fashion, and it was in that country where this shift has been the most important form of manifestation of judicial power within the last decades. However, coupled with this shift, judicial power within the area of political struggle developed also in another direction that could be described as the tendency to have recourse to criminal courts. Until the beginning of the seventies, it had occurred only rarely that high-level politicians or government officials used criminal courts as a means of the political struggle. We have at our disposal a set of statistics with regard to government bureaucrats, which shows the changes there. According to these figures, the number of people against whom criminal charges were made was under fifty a year during the seventies, and only a half of them were convicted, while this number has reached about 1,300 per year by the second part of the eighties, and about one thousand of them were convicted (cf. LOWI/GINSBERG 1999:135). The rate of increase was similar – at least in terms of investigations started – with regard to members of Congress, senators, secretaries and undersecretaries. All the while, it has been generally accepted that corruption has not grown at all, and all that happened was that the following of age-old practices has been increasingly challenged in front of criminal law courts. Before we would go into a detailed analysis of this matter, let us look at events that helped this trend progress.

The first spectacular step made in this area was the 1972 Watergate scandal. The departing situation here was that President Richard Nixon, a politician of the industrial and agricultural conglomerates, got embroiled into an increasingly bitter fight with the dominant national media outlets that operate, basically, as the presenter of opinions held by banking and financial lobbies, their interests and ideology (Halberstam 1988). In order to break the political monopoly in the field of opinions of these mass media outlets, Nixon threatened with a change in the legal regulations that would have forced the big TV corporations to sell their local channels and networks in order to ensure a balanced and pluralist diet of news and opinions (cf. LOWI/GINSBERG 1999:34). Nixon was re-elected in this quasi-war like situation in 1972. Shortly thereafter, The Washington Post, a daily with the most rancorous stance against Nixon,

highlighted the details of a secret penetration into the campaign center of the Democratic Party among the semi-legal and illegal tricks of the campaign battles. Considering that, after a while, the names of Nixon's close associates have also come up in the organization of the penetration, the entire media sphere in opposition brought the Watergate scandal to center-stage, and they were successful in enforcing the resignation of President Nixon.

This event, in itself, represented the fighting out of political enmities before criminal courts, but, in reality, they were the institutional changes that took place thereafter that led, genuinely, toward this direction. The public in general perceived the fighting at the highest political level, following the damning disclosure and commentaries offered in the mass media, as a moral morass. This, in spite of the fact, that similar tricks and illegal activities – even stretching to contracted killing – were not at all unknown during earlier campaigns. The only difference was that the mass media by then provided immense publicity and an atmosphere of ire vis-à-vis their political opponents in connection with the events. At any rate, a new institution, the Office of Ethics in Government, was set up, and a new law passed in the wake of the public outcry, the latter making it possible to start investigation in the case of the most minor suspicion of an illegal act, against the President of the United States, congressmen, senators and the highest officials. Subsequent events have shown that, though the motive was a noble one, the cumulative effects of the institution established have proven to be catastrophic.

The fact of the matter is that if, amidst the conditions of a political contest, investigation can be launched in the case of the most minute infraction or its suspicion against any of the participants of the contest, and, thereby, the position of the contestant can be wronged, the use of this recourse will necessarily escalate. An example of this is the case of Michael Espy, secretary of urban development in the Clinton administration during the first part of the nineties. A law bans the acceptance of gifts for upper level government officials, and Espy accepted two tickets (!) to a rugby game from a big food company. This was not overlooked by the attention of the vigilant political opponents, the republicans, and they immediately demanded the appointment of an independent inquirer in the matter, who then, having worked for several years with a battery of lawyers and detectives, brought, gradually, President Clinton himself and his narrower entourage into the inquest (cf. ETZIONI 2001). Finally, Espy resigned. It's true, the investigators were able, later, to discover suspicions of corruption on a larger scale, but it was during the course of this case that the regulation itself was not properly thought through, since it mentions only "wrongdoing" in order to launch an investigation, and this investigation can be started if the politician commits an offence of jaywalking in his capacity of a pedestrian (cf. YODER 1999).

The gist of the institutions developed for the protection of "government ethics" is that investigation can be started against a politician in the case of the

most minor wrongdoing, and, thereby, it transcends the traditional field of criminal justice. This expansion gives unlimited possibilities to discredit the political enemy, since it is sufficient just to start the investigation, and no conviction is needed. The most recent example of this practice is the case of senator Toricelli, who, as a long serving senator of his state, was leading sky-high above his scarcely known Republican contender. However, when his political opponents started to talk about their suspicions about his allegedly corrupt practices, his popularity started to nose-dive, and, after a while, he himself resigned from participating in the campaign for his re-election as he felt he had no chance of winning. (See the commentaries on the case in the summer issues of American dailies.)

An 1978 act regulated the procedure for probing into government ethical wrongdoings as follows. If the Attorney General receives any information – that is, a report – regarding any politician in a position identified in the act giving rise to suspicion of having committed a wrongdoing or criminal act, he is obliged to request the appointment of an independent counselor from a special panel of judges. If he fails to do it, the informant himself may request the panel to appoint such an independent counselor. This special panel consists of three federal judges appointed by the highest federal level judicial forum for two years. (This appointing has been made during the past 20 years by Chief Justice William Rehnquist.) Following the filing of the request, the judiciary panel appoints the independent counselor from among lawyers independent from the government, and specifies the scope of the investigation. However, the scope of investigation is basically unlimited since the purview of the act is extended to all related areas of investigation under the control of the independent counselor (MASKELL 1998:4–6). The independent counselor, once appointed, is unimpeachable even on the part of the President of the United States, and his office has a budget guaranteed by law. Many such independent counselors – for instance, Kenneth Starr who investigated Clinton – carried on with the investigation for eight years, and could block the work of the entire presidential administration (ETZIONI 2001b).

The investigative machinery of ethical-criminal probing was introduced by the opponents of the conservative Republicans, the liberal Democrats at the end of the seventies, and they used it successfully against the policy of Ronald Reagan in the eighties. For instance, an investigation was made into the conduct of many of Ronald Reagan's staff and secretaries during the Iran-Contra affair, and, therewith, they were able to limit the political maneuvering space of Ronald Reagan and his political program to a large extent (see YODER 1999 and GRIESBACH 1999). During the presidency of Bush senior at the turn of the nineties, this was the incentive that caused the Republicans to wield the weapon of ethical investigation on a broad front against Democratic opponents. Using the charge indicated above against, first, Jim Wright, they forced the Democratic Speaker of the House to resign, and, the Democrats, as a way of

response, “got” New Gingrich, the chief organizer of the campaign of investigation, and forced him to resign. In his case, ethical investigations were directed against his acceptance of an unusually large sum of royalty that he signed for his new book, alleging implicit and illicit campaign financing, and this was sufficient to force him to resign, facing an irate public. When the Democrats won the presidency as well in 1992 with President Clinton, the Republicans tried to use this ethical weapon to stymie the work of his presidential machinery, just as their opponents had done during the Reagan years. They used, as a pretext, the already mentioned Espy case. However, the real success was the trophy of the President himself by the second half of the nineties when the Lewinski affair caused a tectonic shift in voters’ preferences and in the body politic.

Thus, the arm of ethical-criminal probe wielded and perfected from the beginning of the seventies have been used in recent years as a standard part of the political arsenal, and analysts demonstrate three major negative effects in this regard. The most important effect is that the mutual revelations, the dramatized demonstration of “moral cesspool” on the other side, make people stay away from politics. While in earlier times, the rate of participation in elections in the United States varied between 60 and 80 percent, just as in the countries of Western Europe, this rate fell to 30 to 33 percent in legislative elections, and it is already only about 50 percent in presidential elections (LOWI/GRINSBERG 1999:48). Another negative effect is a radical narrowing of the administration’s scope of action, since, in essence, any higher ranking politician becomes immediately impeachable no matter how slight the offence is, and no one can be certain if there has been a genuine act of wrongdoing until the completion of the investigation. Finally, a third effect is the negative selection of politicians and public administrators as a result. Whoever is capable of going to the private sphere and may have a choice, would rather opt for a career in the private sector, and only the losers of that sphere and those that are willing to do “dirty tricks” would go to politics. All this of course reduces trust in the state to a minimum (ETZIONI 2001).

## *2. Modified form of judicial power in Southern Europe*

As against the solution accepted in the United States, the practice of “constitutionalization” has not become a task of the ordinary courts, but, wherever it has come about, a specially organized constitutional court takes care of these matters. As a rule, such a judiciary panel does not consist of career judges, but law professors engaged in politics and lawyers, and such a constitutional court functions as a counterbalance of a parliamentary majority in accepting bills, and it does not have a function of ruling in individual, specific cases. (According to Stephen Holmes, such constitutional courts

should not be considered courts, but a special kind of second parliamentary chamber which makes the quick implementation of the plans to change new laws difficult, and makes necessary newer considerations under the heading of the constitutional verification process). This is especially true in the case of European constitutional courts where the verification of this agency is directed only towards the legislation, and, in the case of court rulings, the interpretation of the constitutional court is not taken into consideration, but this interpretation of the law represents the monopoly of the highest court of the country. Therefore, I will not make a detour to deal with the power of the constitutional courts, but I will only touch upon the issue if it has a bearing on the activities of the ordinary courts.

In Europe, it has been a tradition for the judges not to meddle in politics, but the entire structure of the legal culture (the style of ruling tied to the provisions of the laws, the socialization of the disciplined legal-dogmatic measures, and the age old tradition of the political neutrality of the judges, etc.) stood in contrast to the development of the power of the judiciary. From the end of the fifties on, changes occurred, first, in Italy, then, also taking the Italian example into consideration by Spain and Portugal, two countries that started out on the road to democracy in the beginning of the seventies, and where new constitutions were also adopted. Let us have a look at the forms of appearance of the judicial power in these two countries.

### *2.1. Judicial power in Italy*

For a long time, the judicial branch in Italy had been functioning just like in the rest of Continental Europe: a judicial culture strictly following the legal provisions and the legal-dogmatic categories; a de-politicized judiciary and administration of the judiciary by the Ministry of Justice. A departure could be observed from the years immediately after World War II. This story shows unequivocally the immediate causes and procedures having emerged in a number of countries. Casting a look at all the developments that can be observed in several South-European countries, we can conclude that if the prevailing value judgements of the judges in a country (even if they do not participate in the day-to-day political fighting) are closer to a dominant political force, and, from the other side, the instability of the relations of power of the parliamentary parties make probable a changing parliamentary majority, then the dominant party of the day, by profiting from its given parliamentary majority, tries to separate the judges from the parliamentary majority at any given time in the hope that the shift in the judicial power to autonomy would strengthen its position, and, at the same time, it could prevent the access of political forces rallying behind the subsequent governments to the judges by this maneuver. This was the situation in Italy toward the end of the forties, and the Christian Democrats in Italy managed to include the self-governance of the

judges, thus isolating the judicial sphere from the government of the day. However, after they had won a stable majority at the 1948 elections, and it seemed reasonable to expect that they would continue to have a majority for several terms, they were in no rush at all to implement this, and, indeed, they created the Supreme Judicial Council in 1959, fourteen years later, as a supreme body of self-governance when the elections started to indicate the weakening of their hegemony. In contrast, the Communists and the Socialists that did not have political sympathies within the judiciary regarded the fact that the election of the members of this supreme body was tied to casting of votes within the judiciary and isolated from the parliamentary majority as an “authoritarian distortion” of the parliamentary form of government (GUARNIERI/MAGALHAES 2001:26). However, this situation did not last long, as the small number of judges and attorneys started to increase precipitously from the sixties due to the increasing importance of the law in conflict resolutions of everyday life, and the internal conflicts of the judiciary, getting ever serious, between the conservative views of elderly judges of the appellate courts and the left-leaning activism of the younger judges of the lower level courts, tipped the balance of power within the judiciary. The first step in this process was that the activist, younger judges harboring left-wing sympathies created their own, independent association, and they started to organize the election of activist judges into the Supreme Judiciary Council. The next step of this association was to start establishing tight relations with members of the Communist, and, to a lesser extent, the Socialist parliamentary factions. After this, the supreme judicial self-governing body brought, amidst sharp political divisions and continuous in-fighting, decisions regarding the promotion of judges and the nomination of judges to superior court positions depending on which side the appointee had manifested its political stance. In this system, the promotion of judges started to become more and more contingent upon an affiliation of the particular judge to a political *lager*, and, as a consequence, the Italian judiciary has become totally politicized by the early nineties, and it has disintegrated into organizations that have been waging war against each other (“brown judges” and “red judges,” as the saying goes), and these warring judicial factions were fighting each other also in the supreme judicial self-governance (HORVÁTH 2000:5; FERRARESE 2001:7–8).

The image of the autonomous and politicized judiciary in Italy conforms perfectly to the one that I have outlined with regard to the United States, although two circumstances have pushed the Italian judiciary power to a different direction. One of these circumstances has been that the Court of Cassation representing the supreme ruling judicial forum prevented the “constitutionalization” of the individual judicial rulings in Italy, that is, the building of rulings immediately onto constitutional “goals,” “fundamental principles,” etc. This was done by such a way that it dissected the text of the Constitution to three layers: *norms providing programs* that give guidance only

to the legislation with regard to the content of subsequent bills; *norms to be implemented*, which, although they include constitutional provisions, should be specified by laws, and the judges have to use these norms of the Constitution indirectly; and, finally, *the immediately effective norms* represent the third layer of the text of the Constitution that the judges use in their rulings directly. Since the latter mean specific provisions applied to exactly defined situations, and not abstract objectives, the judges were not given the privilege of a “creative” interpretation of the Constitution, which was used by their American counterpart to free themselves from under the obligations of the laws. *Thus, in this manner, the politicized judicial power in Italy could not interfere into the basic issues of societal control, and it remained tied to the laws passed by the parliament.*

A break-out was made possible by another peculiar circumstance in Italy in the role the Italian judiciary was playing in the power game. The fact of the matter was that, beginning with the seventies, the legal position of the state prosecutors started to become similar to that of the judges in order to give the prosecutors a freer hand vis-à-vis the public administrators that might have become corrupt. In the course of this, the education of the prosecutors and that of the judges, and, then, their professional organizations became completely intertwined, and, as a result, the organization of the prosecutors became entirely separate from the government. Along the lines explained above, the organization of the judges and the prosecutors have become thoroughly politicized in addition to having become intertwined. In contradistinction to most of the West European countries, the judges and prosecutors are not banned there to manifest their political beliefs and even to accept party functions. It happens that, often, “red” judges clash with “brown” judges during street demonstrations, but, the same way, a parliamentary membership representing a political party can also be part and parcel of the career of an Italian state prosecutor (cf. FERRARESE 2001; HORVÁTH 2000).

As a matter of fact, this power of the prosecutors and the judges created, from 1992, a “criminalization of political responsibility, which, at the time of the movement of the Clean Hands, toppled the entire political elite, save the Communists that were well-nigh excluded by this political elite. Although, in the beginning, the Socialists cooperated with the activists left-wing judges at the time of the governance of the Christian Democrats, but, from the mid-eighties, they were trying, in the government and under the leadership of Bettino Craxi, to roll back the frayed judicial power. For instance, they were trying to establish the civil law responsibility of the judges by amendments of the laws, reaping, as a result, considerable resistance on the part of the judges (GUARNIERI/MAGALHAES 2001:46). The activities of the Clean Hands broke the backbone of the earlier political elite, and, after that, the new right competing with the Communists, the only force left from the old parties, and they were even successful in depriving the Forza Italia founded by Berlusconi

of its grip on the government. *The criminalization of the political battle* is an Italian specialty, added by the autonomous and politicized Italian judicial power, to the Italian power game, thereby also providing a model for judicial power plays going on in other countries.

Yet another very important difference between the Italian judicial power and its counterpart in the United States should be mentioned, and this is also valid with regard to the judicial power in the rest of the European and Latin American countries vis-à-vis the United States. The essence of this difference is that whereas in the United States the federal-level judiciary exercising national judicial power is unable to influence directly the individual judges in their ruling, in the Italian case and the cases of other countries the individual judge – while separated and made independent from the influence of the rest of the branches of power – is profoundly subordinated to the self-governing bodies of the judiciary and their supervising judiciary-political organizations. The fact of the matter is that these self-governing organizations of the judiciary make decisions in the appointment and promotion of judges and other forms of changes in the career and remuneration of the judges. If a judge does not join an internal political organization of the judges, or if he/she joins it, but his/her rulings are different from the expectation of these organizations, he/she does not even have the remotest chance of making a career, not to mention the fact that he/she may expect disciplinary actions in matters brought up as a pretext. In contrast, federal judges in the United States are nominated for life, they cannot be removed, and no judiciary body has authority over them. *In summarizing, the exposure of the individual judges to the new corporative judiciary power should be stressed in the case of the individual judges in the countries of Europe and Latin America, whereas the independence of the individual judges remained stronger in the American judiciary vis-à-vis the entire body of judges and not only the executive and the legislative branches of power.*

## 2.2. *The Spanish judicial power*

The departing situation was similar both in the establishment of the Spanish judicial power, as we have seen during the above discussion of the Italian case. The judiciary, and, especially, the majority of the judges of the appellate courts, had a conservative political stance. This also led to the fact that while the conservative Union del Centro Democrática (UCD) enthusiastically supported those efforts within the judiciary that created the judiciary self-governance and its separation from the parliamentary majority, the Communists and the Socialists were sharply opposing these efforts. At the 1979 parliamentary elections the conservative forces supporting this separation emerged victorious, and especially since they could govern only with a slight majority, they created the supreme judicial self-governing organization, the Consejo Superior del

Poder Judicial, that is, the Council of Supreme Judicial Power, in 1980, before the foreseeable change of government, and, by this, they separated the judiciary sphere entirely from the government and the legislative majority (GUARNIERI/MAGALHAES 2001:24 and WELLHAMMER 2001). The 12 judges elected by the judges had a solid majority in the Consejo, and every judicial appointment, every judicial appointment to leading positions, disciplinary action, transfer, etc. have become the bailiwick of this Consejo. The conservative leaning judges had a dominant influence in the Society of Career Judges, and they set a very high minimally required membership of newly established judicial organizations in order to thwart the emergence of politically opposing forces, and this provided an efficient defense against the disintegration of the judiciary to the detriment of the conservative majority. The socialists wanted to break this conservative dominance when they got elected to govern in 1983, and they carried out the “parlamentarization” of the Consejo in 1985 by using their parliamentary majority, that is, members of the Consejo got elected, including the twelve career judges, from that moment on by the legislation. This reinforced the development of political forces within the Spanish judiciary, and their forming of alliances with their ideologically kindred political parties. However, this has not yet reached the level of internal political fragmentation of the Italian judiciary. In spite of this, internal political fighting already made its debut within the Spanish judiciary, and in 1999, for instance, the majority of the Consejo with its pro-Socialist sympathies conducted disciplinary actions vis-à-vis judges reputed to be conservatives, thereby triggering considerable storms among politicians and in the public (cf. GUARNIERI/MAGALHAES 2001:73).

In such a way, even if the Spanish self-governing judiciary did not return to be governed entirely by the parliamentary government majority – due to the staggered terms of the parliament and of the Consejo –, the judiciary gets attached to the government majority in the case of a longer and more stable parliamentary majority. The fact of the matter is that if a government majority lasts for two terms, the reelection of the Consejo will be its fruit to pick, and, by its majority, the government will be able to make the Consejo reflect its own image. This possibility reduces the weight of the independent judiciary in Spain in relation to the power of the judiciary both in Italy and the United States. The weight of the judiciary is rendered lighter also by the fact that in Spain the prosecution is operating solidly under the government, and, thus, even if an action against the parliamentary majority emerges on the part of the judges, the prosecution will not support it, just like in Italy, in the case of the “Clean Hands.” However, it could be seen in the beginning of the nineties that if a judiciary inquiry was launched against members of the Socialists’ government for corruption, the conservative Partido Popular in opposition and the daily *El Mundo* ensured the greatest possible publicity and support to this inquiry. It goes without saying that such an inquiry was rare within the judiciary, since the

socialists had a solid majority within the Consejo, that is, the supreme self-governing body of the judiciary, and the conservatives in opposition were rather accusing the government of the Socialists during these years that it was starting, by instigating its friends in the Consejo, politically motivated disciplinary and investigative procedures against members of that supreme judicial body whose ruling practices they did not like (GUARNIERI/MAGALHAES 2001:74). However, the partial independence of the judiciary from the government was shown by the fact that even the Minister of the Interior could be put in the dock for secret government actions in connection with the ETA, and a criminal action was pursued from 1995 going all the way to Felipe Gonzales, the Prime Minister, and this also contributed to the fall of the socialist government.

It can be seen then that the Spanish judiciary power is only partially independent in relation to its Italian counterpart, and it is less politicized than the Italian judiciary. This has also contributed to the fact that although in Spain there has also been progress in the “criminalization of the political responsibility”, in Spain it was only the government and not the entire system that could be toppled as it was the case in Italy.

Of the components of the power of the judiciary – beside independence and politicization –, the third element was the *transposition of the judiciary ruling onto a free instance of deliberation*, which is shown in its most mature form by the judiciary power in the United States, and we have seen that it has remained limited in Italy. What is the situation in this respect in Spain? The answer to this question can only be that although the change of the ruling practice there was completed on a broader base than in Italy by using constitutional provisions, objectives, and fundamental principles in sentencing, it lagged by a long shot behind the extent of transformation experienced in the United States. Spaniards may take recourse to the constitutional complaint (“amparo”) if they feel their constitutional rights have been wronged by the action of a governmental body or agency, and an overwhelming majority of these complaints represent, in practice, an attack against court verdicts. (The number of amparos filed with the Spanish constitutional judges is about two thousand a year.) By this, the constitutional watchdogs have become the foremost judicial forum above the ordinary courts, but, in the Spanish legal sphere, this has remained with the Constitutional Court to rule on individual cases, and the lawsuits have not been used, as in the United States, in overall social issues. That is, *the practice of using the amparo has become an area of deciding on narrow legal matters, and they have not been transformed into rulings over social control*. In the United States, political activist law associations and “pro-bono law offices” and similar entities enrobed in human rights garb have been born, and, according to information, this legal activist background has not been developed in Spain. Thus, an otherwise appropriate institutional framework has not developed into a practice of political litigation based on the constitution (cf. EPP 1998; SARAT/SCHIEINGOLD 1998). In spite of this, a recurring critique

within the Spanish judiciary is the meddling of a “politicized constitutional court” into the ruling practices of the judiciary (cf. GUARNIERI/MAGALHAES 2001:44).

### *2.3. Portuguese judicial power*

In Portugal, the transition to dictatorship from democracy proceeded, from the seventies onward, by causing more ruptures than in Spain, where, in essence, the ruling elite itself managed the transition. The role of the upper echelon of the Portuguese army presiding over the change of the system also found its echo for a few years during this transformation in a body standing above the parliament (Conselho da Revolução), and the absoluteness of the elected supreme power came into being only from 1982 (cf. GUARNIERI/MAGALHAES 2001:24). With regard to the judicial sphere, the departing situation was the same as we have seen with the Spaniards: an apolitical judiciary attached to the provisions of the law, which was conservative in terms of its values, and, therefore, the more conservative political forces went to the battlefield to bring about the separation of the judiciary from the parliamentary majority (the center-right Partido Populare Democratico – PPD/PSD – and the conservative Centro Democratico Social – CDS – were anchored here), whereas the Socialists and the Communists here, too, were militating to the election of the judiciary self-governing body by the parliamentary majority.

At that time, the parliamentary balance of power favored the right-of-center and conservative forces, and, this way, the judiciary sphere, coming together in the supreme self-governing body in 1976, became separated from the actually prevailing parliamentary majority. However, unlike in Spain, the Portuguese Socialists, dominating in the eighties, were not able to revert this body to be under parliamentary control, and the majority of this body remained to be elected by the judges, i.e., from inside. However, it was not only the apex of the judiciary power that continued to be independent from the parliamentary majority of the day, but considerable autonomy has also come about with regard to the prosecution, that is, we can here talk about a case similar to the one in Italy and a judiciary power (of the judges and the prosecutors) separated from the government (GUARNIERI/MAGALHAES 2001:74). However, there is an important difference vis-à-vis the Italian situation with regard to the case of the power of the Portuguese judges and prosecutors. The fact of the matter is that, contrary to the Italian conditions, but quite unlike the Spanish judges that have remained less politicized, the Portuguese judges remained in a state of complete depoliticization, and it never remonstrated against the government or the parliamentary majority in matters political. This, however, does not apply to the independent Portuguese prosecutors. We should indicate that their independence have come about in such a manner that the chief prosecutor is nominated, and may be recalled, by the head of government and the head of the

state jointly. This legal framework has been filled with life both for the chief prosecutor and his underlings in the sense that, for years on, the antagonistic political forces provided their appointees with these posts. It is to be noticed that the Portuguese Constitution gives a much stronger power to the head of the state compared to a head of state possessing symbolic power, and the parliamentary opposition could obtain important positions by relying on the head of state. In the backdrop of a competing head of state and government power, it is understandable that, up until the nineties, the chief prosecutor – and, with him, the entire hierarchy, was unapproachable from the part of the government. That was not so with regard to the opposition as Cunha Rodrigues, the Chief Prosecutor, whose position was firmly anchored, has gradually become the chief clashing point vis-à-vis the government during the period of 1987 to 1995 (GUARNIERI/MAGALHAES 2001:75). In the clashes between the head of state and the parliamentary majority, the Chief Prosecutor and the public prosecutor's office have increasingly functioned as if it were looking at cases from the point of view of the opposition, and, as cheered on by the media, one of their main targets has increasingly become the exposure of corruption by high government officials. This, however, came to an abrupt halt with the electoral victory of the Socialists in 1995, the reason for this being that the head of state and the head of government were of the same "camp" and this, understandable, dampened the zeal of the prosecutors in "criminalizing the political responsibility." Thus, the Portuguese Prosecutor's Office was forging ahead with its political mission for years, but it is important to stress that this has not led to the disintegration of the area of prosecution into internal political fractions, in contradistinction to the Italian case. Rather, it was the willingness of the Portuguese Chief Prosecutor, a charismatic person who did not hide his political ambitions, to play a role, and the "trickle-down" effect of this role-playing to the lower rungs of the hierarchy led to a politicization of the prosecution.

We have seen the situation of the independence of the judiciary from the government, the nature of politicization, and, now, the question must be posed as to what has happened with regard to the change-over of the judges to issue verdicts on the basis of free deliberation. This phenomenon exercises a decisive influence on the evolution of the power of the courts and the prosecution. A brief answer to this can be that the activism of the judges in Portugal has not reached the level of that in Spain. Although the Portuguese Constitutional Court has also become the last resort for appeals in the individual lawsuits (the losing party may attack the verdict by referring to unconstitutionality), but it has not led to an activist legislation hovering about the precise provisions of the laws, similarly to the Spanish case. In summary, the conclusion can be drawn that, in Portugal, the judiciary power created structurally and at the level of the laws has not become a battlefield of independent political forces, and such

striving shown by the prosecution has been blocked, following charges laid in politically colored cases, by the depoliticized courts themselves.

### *3. Judicial power in Latin America*

Due to our different social and cultural conditions, we usually do not turn much attention to this region, and the geographic distance does not whet our interest either. However, in examining judicial power, we cannot afford to ignore that region for two reasons. One of these reasons is that judicial power has reached unusual heights in the countries of Latin America and the other reason is that this strong judicial power has developed there, just like in the countries of Southern Europe and in the post-Communist countries after 1989, during the transitory period to democracy from dictatorship. We can also say that the establishment of the judicial power has been planned and implemented in these countries *as a result of the operation of the democratic institutions regarded skeptically and as their surrogate*, and this has been a factor in the developments experienced of the countries in transition in Southern Europe and Central Europe.

**(El Salvador)** El Salvador introduced the institution of a Human Rights Prosecutor in 1991 within the framework of a constitutional reform, and it was, basically, an “upgraded” ombudsman-type of office. The position has been filled, ever since, with an appointee of the National Assembly’s two-third majority, and he/she has the task of exposing, in addition to human rights complaints, misuse and abuse of power in public offices. He/she is elected for a 3-year, renewable term. The first elected official, Carlos Molina Fonseca could fulfill only parts of his functions as the United Nations Mission took over a number of functions from him in 1991 to 1994. However, the second official elected to the office, Victorio de Avilés, who was the deputy of Fonseca, could already function as mandated. However, the governing party of the time looked at him, a man with the full backing of the media, as the enthusiastic supporter of leftist agendas, and, this way, he was not re-elected. The third man in the office was Eduardo Penata, but, during his reign, his office was more reticent (DODSON/JACKSON 2000:15–25).

In addition, the sphere of the judiciary, taken in a narrower sense, has also been transformed in El Salvador from the beginning of the nineties. In the period of 1985 to 1987, a sum of 331 million dollars was spent on this sphere financed, mostly, by the Inter-American Development Bank. A National Council of Justice was established, overseeing the career of the judges, the judiciary nominations, disciplinary actions, and the education of judges. According to empirical surveys, the parties control the judiciary sphere through judges elected into the National Council, that is, the separation from the parties

is not complete, and the individual judges can be influenced via the self-governing body of the judges. Not to mention the important fact if a judge does not issue the proper verdict in a manner that is expected from him by political forces, an investigation can be launched against him on spurious grounds. A judge going against strong economic and/or financial interests may soon find himself under investigation (BARTON 1997; DODSON/JACKSON 2000:15).

**(Guatemala)** As a point of departure, it is important to note that, here, the government was successful in crushing the guerillas more brutally than in El Salvador, and, following a repressive cycle of governance during the nineties, as egged on and supported by the United States, the government itself led the democratization process. In addition, it was also important that the National Action Party, presiding over the agreement, was a new and a rootless party, and its opposition, the United Revolutionary Party, managed only to achieve minor electoral results. Thus, while the institutional reform of the transition has been overseen by two political forces, they had no strong positions within society. Other groups had their hold over these societal positions, and, in such a way, a “parallel power situation” characterized both the transition and the period after it (DODSON/JACKSON 2000:17). It followed from this that the new institutions, such as the judiciary sphere, were invaded by persons coming from the economic sector that was independent from the government. For instance, the judiciary played an ignominious role in stopping the transition in 1993. The Supreme Court has also been thoroughly politicized, but exercised no control over the government. It is characteristic of American financial interests that Americans provided 116 million dollars in 1997 to support the reform of the sphere of justice. Members of the Supreme Court are elected by the legislation for five years, and, after that, these members appoint the judges to all the lower level courts. In 1998, all the members of the Supreme Court were renewed, and not a single Supreme Court justice was re-elected. It is characteristic of the new members of the Supreme Court that they were appointed from candidates who had not had any training in the Center for the Education of Judges. The Supreme Court does not prefer those judges that complain about some misuse, and, instead of an inquiry being launched, they are usually transferred to another position. And, to boot, the National Council of Justice does not do anything to protect such justices, although it would have the duty to do so. Yet another problem for the American specialists supporting the reform is that the idea of human rights has been discredited in Guatemala, since it is an accepted opinion there that the guerilla war itself was due, mostly, to the fact that the guerilla organizations themselves had developed along the lines of the human rights ideology exported from the United States, and, after a while, they started their armed struggle. Thus, there is considerable skepticism there in the new process of democratization vis-à-vis the human rights ideology.

Guatemala also has a Human Rights Prosecutor who was, back in the early nineties, quite active, but, in the past years, he has become politicized in favor of the government, and, today, his position serves more like a springboard to other political posts. Thus, there is no horizontal check on the government, contend two authors who think in the evident terms of the separation of powers (DODSON/JACKSON 2000:21).

**(Columbia)** From the point of view of an overall social-political situation, it is important to note that Columbia was a place of stability in Latin America until the start of the drug war in 1984. From the end of the fifties, following Rojas Pinella's military dictatorship, two parties, the Liberal Party and the Conservative Party, united in a National Front, and managed society until 1974 without fluttering an eyelash. This was done by using tough methods, with the minimum of democratic guarantees, and it was only in the mid-seventies when a gradual liberalization started, but, from the mid-eighties the drug war made imperative the introduction of the state of emergency on many occasions. Finally, a new constitution was passed in 1991 under the pressure, and with strong support, of the United States.

The development of the judiciary can be understood from looking at it from this background. The fact of the matter is that the two parties constituting the National Front sent their own men to every and each position of power on a parity basis, but, in the judiciary, the positions in the Supreme Court have been filled, following the reform of the Constitution in 1957, for life. In addition, the principle of co-opting has been introduced at the court level, following the filling of positions with judges elected for life. This way, they cut the judiciary from the rest of the powers. In the mold of the French model, the supreme justices, nominated for life, or, more precisely, until retirement, sitting on the two most senior judiciary panels, the Supreme Court and the Council of State, they themselves have already for a long time been co-opting the successors of the departing judges, but they were also those that have appointed judges to the lower courts. In this situation, the critique aimed at a "judiciary clientele" has often been leveled (HAMMERGREN 1998).

Although the supreme judiciary bodies have been authorized to do a constitutional check on the provisions of the legislation and the execution of the laws, they have been exercising this power only in a very limited manner. They have rationalized this low-key approach with a conclusion that the provision in question is more of a political rather than a legal character, and they attacked the provision only if it was in formal contradiction to the Constitution. This restraint may also be accounted for the fact that their budget, the geographical location, and the size of their administrative staff have been under the control of the Ministry of Justice and, this way, the judiciary has been under control to a certain extent.

At the end of the seventies, the President of the country attempted to curb the judiciary's power as it was manifest in its composition, but the supreme court judges flung into action, and they squashed, these legal provisions ruling them unconstitutional. That was the time when an activist type of ruling started and that has become the order of the day ever since the transformation in 1991.

The legislation and the head of state embarked upon a political reform in the second half of the eighties, but the highest judiciary forum stood in its way in every form and vetoed it. At that point in time, a Constitutional Convention was summoned in order to circumvent the opposing force of the judiciary. This Convention intended, initially, only to reform the 1886 Constitution, but members of the convention decided with a majority of the votes to frame an entire new Constitution. The new Constitution has radically transformed a number of earlier solutions (SPRINGER 1998:9). Two important changes should be mentioned with regard to the courts: on the one hand, it increased the independence of the independence of the judiciary, but, on the other hand, it went about "weeding out" judges from many areas, due to the extreme judiciary activity of the past.

By looking at the specific changes in the judiciary, the most important change has been that the life-long appointment of the judges has been terminated, and, instead, election for an eight-year cycle was introduced, with no possibility of the renewal of the term. A National Council of Judges was also set up there as the highest local government body of the judiciary sphere, thereby separating these tasks from the authority of the two highest judicial forums. An additional change has been to set up a separate constitutional court, with judges also elected for eight, not renewable, years. However, the election of the three judicial forums is done in a different manner. Members of the Supreme Court and the National Council are elected by judges of the entire judiciary from a list composed by the National Council of Judges, although only those persons can be included in this list who has not functioned as a judge for at least a year prior to his/her election, and he/she may not function as a judge either following the termination of the cycle. By this, they attempted to prevent the formation of cliques and other types of informal coalition building within the judiciary (KUGLER/ROSENTHAL 2000:23). The National Judicial Council appoints the members of the lower courts to an indefinite period of times. The Senate elects the constitutional judges from a list prepared by the head of state, and, this way, this body has nothing to do with the judiciary sphere.

The uppermost organ of the judiciary is the National Judicial Council that has two chambers with 7 members each. Members of the administrative chamber are selected for eight years by the supreme judicial forums and the members of the disciplinary chamber are elected by Congress for the same term. This body is also responsible for the budget and administration of the judiciary; its supply with staff, etc. It should also be noted that, in the beginning

of the nineties, considerable power clashes occurred among the three supreme judiciary forums after the fact that the constitutional judges squashed a great number of rulings of the other two supreme judiciary bodies on constitutional grounds, but, in the meantime, they recognized its primacy.

The highest prosecution forum has been accorded an independence even greater than that of the judiciary in terms of budget and other considerations, and its ties to the executive have been completely severed.

The Colombian judiciary was very active in the nineties as well. For instance, the Consejo de Estado (State Council) dragged to court a good number of MPs, and, as a result, they lost their seats. However, the office of the General Prosecutor was also very active in this area, and it initiated and pursued a number of cases against politicians in office. Its main target has consistently been Ernesto Samper Pizano, head of state from 1994 to 1998, although, ultimately, a special committee of the legislation did not condemn the head of state. However, as a result of the prosecutors, ministers, party bosses and representatives have been accused. A critique leveled against them was that they were rather going after politicians than serial offenders (cf. SPRINGER 1998:16; KUGLER/ROSENTHAL 2000:24).

The Constitutional Court is especially active thanks to the *accion de tutela* – rough equivalent of the Spanish *amparo* –, and it runs about 500 constitutional checks on decisions made by the government and the public administration. About half of them are decided in favor of the plaintiff and against the government (SPRINGER 1998:21). However, the number of laws and decrees by the head of states squashed on constitutional grounds is also high. On an average, about 200 such checks are made annually of which about one third ends up in the squashing of the legislative provision objected to.

In summary, we can say that the judiciary has amassed an extraordinary amount of power in Columbia, and the “criminalization of the political responsibility” has been done there just as in the model of Southern Europe as a result of the cooperation between the office of the prosecution that has become entirely independent and the State Council and an abstract check on the basis of the Constitution, on the American model of the activist constitutional judges. The only impediment to a long-term stability and the full enfolding of a judiciary and prosecution sphere inaccessible from without is that members of the National Judiciary Council can be elected only from lawyers that are not judges, and this is done by bodies that work outside the judiciary.

**(Costa Rica)** Here, the accepted Latin American model represented, from the end of the fifties, the judiciary power: the parliamentary majority or the strongest parliamentary parties elect, on the basis of parity, members of the supreme judiciary forum who, in turn, nominate all judges of the lower court. They also decide about their promotion, transfer and disciplinary actions against them. However, in contradistinction to most of the countries in Latin

America, a body of judges has been established in Costa Rica within the highest judiciary forum, and, thus, the self-organizing capability of the judiciary was able to become permanent. The fact of the matter is that the members of the Supreme Court have been, and are being, elected for a term of eight years with the simple majority of the legislation in such a manner that they should be considered re-elected following the expiration of their term unless the legislature decides, with a two-third majority, the termination of some of the offices of judges (WILSON/HANDBERG 1998). Considering that this takes place only very rarely, the judiciary has been functioning separately from the rest of the branches of power. Here, social conditions have been more consolidated than in most of the Latin American countries of the time. For instance, the military has been disbanded after 1949; the clout of the head of state has been deliberately whittled down vis-à-vis the judiciary. The economy, almost entirely nationalized, could produce only meager economic growth for decades. This state of affairs lasted until 1989 when the nationalized economy started to show increasing signs of stagnation. This was coupled with the United States pushing Costa Rica and the entire region toward denationalization. A wide-ranging constitutional reform was introduced in 1989 to assuage the growing discontent emerging in the wake of the expanding economic crisis, and this reform caused more radical changes in the functioning of the Costa Rican judiciary than planned (cf. MORA 2000; WILSON/HANDBERG 1998).

Although the justices of the Constitutional Court have been empowered prior to these reforms with running constitutional checks on laws and decrees promulgated by the head of state, but the judges with roots in the mentality of Continental Europe and attached to the provisions of the laws qualified the provisions attacked as unconstitutional only in a very limited number of cases. This has also been made difficult that such decision could be brought only by a two-third majority of 17 judges at the plenary session of the supreme judiciary forum, and this could be ensured only at considerable exertion. Regardless, however, there has been no genuine effort aimed at a check of legislative provisions based on abstract constitutional norms.

This has been changed profoundly following the 1989 constitutional reform. A constitutional judiciary organ, the Sala Courta has been established as the new chamber of the Supreme Court, introducing, here, too, the method of electability by the parliament and automatic renewal of the term for eight years here in the lack of a two-third vote for removal from office. In addition, the function of the new chamber to run constitutionality checks has been made easier by making it so that this body can pronounce by itself alone and not at the plenary session of the Supreme Court on the unconstitutionality of laws and decrees, and it needs no more for this than a simple majority. (Four votes out of seven constitutional judges suffice.) At the level of the legal framework, the constitutionality check was able to achieve its potential also by the fact that the

*amparo*, the complaint on constitutional grounds, was made very easy. Anyone, even a child or a foreigner can file, without any formality or legal representation, with the Sala Courta, a complaint on constitutional grounds just by signing, if he/she feels that his/her constitutional rights have been violated either on the part of the state or any individual. However, in addition to the legal framework the more decisive factor was that, in 1989, the political elite and the mass media, under the conditions of a general discontent, lent its support to the new body and egged it on to act against the government and the legislation (see WILSON/HANDBERG 1998). Sensing this support, the new constitutional judges started, without much hesitation, the attacked legal provisions, and this has led to a skyrocketing of the number of *amparos*. Already in the first years, their number exceeded one thousand, but, by 1999, its number has passed ten thousand (MORA 2000).

The new body of the Constitutional Court plays a double role. On the one hand, it has become the ultimate judicial forum over the entire judiciary sphere in specific tort cases. On the other, it has also become an alternative for the traditional parliamentary way of political fighting and lobbying. Interest groups, lobbyists, and other political forces resort already to constitutional arguments if one of their requests is rejected at the parliament. That is, we have been witnessing not only the “constitutionalization” of ordinary court rulings to a certain extent, but, equally, the battlefield of politics has also been transformed to include constitutional law as a tool of the arsenal.

It should, of course, be noted that, according to information at hand, the “constitutionalization” of the court procedures has not transformed the judiciary in Costa Rica as much as that happened in the United States in the sixties. There, it is limited only to the constitutional judges of the Sala Courta, and the lower courts basically remain attached to the written laws and the underlying legal-dogmatic guidelines. Incidentally, this phenomenon can be observed in most of the Latin American countries where the constitutional courts have shown considerable activism, and those who support this talk about “the shackles of the tradition of Continental Europe,” and blame the resistance of legal cultures developing on this foundation for a lack of “constitutionality revolution” (cf. PEDONE 1995:7). However, the Sala Courta has been busy enough during the nineties to engineer, by itself, considerable changes in the social, economic and political conditions of Costa Rica. By closing the argument, it is worth mentioning that foreign researchers noticed the extraordinary activism of the constitutional judges in Costa Rica and that of the Hungarian constitutional judges in the beginning of the nineties, and, as a result, comparative studies have been made to this effect (see WILSON/GAAL/HANDBERG 2001; BOULANGER 2001).

*4. The power of the judiciary in Hungary and in Eastern Europe*

The Hungarian judiciary was transformed at the time of the 1989 change of the system on the mould of the Western European model, and independence was guaranteed for the individual judges in their ruling. Judiciary administration and nomination in the judiciary have been transferred under the authority of the Minister of Justice. However, the broad authority of the supervising judges in administration, operation and finances of the courts over the individual judges and their career provides them, in spite of the declared independence in ruling, with an informal influence. This way, the Minister of Justice making a direct decision with regard to their nomination could have an influence on the tendency of court ruling. On the one hand, this problem gave an impetus to the need for stepping up the independence of the judiciary in the first years of the change of the system. On the other hand, the same impetus was given by the fact that the winner of the first parliamentary election in 1990 was a nationalist-conservative government, and the overwhelming part of the judiciary, socialized during the decades of Communism, were dead set against this trend due to their political value system. Considering that the overwhelming majority of the social-economic elite disposing over the societal and economic resources were also facing the government with hostile intentions and attitudes as well as inimical interests, the separation of the judiciary as an independent power received the biggest possible support from the media and the shapers and makers of public discourse. With this backdrop, the verdicts of the Constitutional Court were increasingly forcing the legislature to allow the separation of the judiciary as an independent power (for a detailed analysis of the related decisions of the Constitutional Court, see POKOL 2003). In the wake of it, new acts have been passed from the end of 1997 on the legal status of the judiciary and the judiciary administration (Act LXVI of 1997 and Act LVII of 1997) that made a radical break with the Western European model, and placed the judiciary sphere in Hungary onto solutions adopted in the countries of Southern Europe.

We have seen in the first part of this study that judicial power and activism reaches its apogee vis-à-vis the rest of powers when changes occur in three dimensions at the same time: on the one hand, the judiciary is separated from the other branches of power in terms of its organization and remains inaccessible to them, and, on the other, internal political groups are organized in the judicial self-organization resting on the internal judiciary elections within the framework of internal judiciary elections, organizing one or the other part of the judiciary, and they carry out sustained political battles against each other; and, finally, if this separated and politicized judiciary is able to transform the practice of ruling into free deliberation by resorting to “constitutionalization”, that is, by pushing aside the laws or, at least, with their interpretation that is not burdened by considerations of the constitutional law. We have seen that this

has become a reality in all these three dimensions in the United States (or, more precisely, in Costa Rica and Colombia regarding only the Supreme Court), and in the countries of Southern Europe, the third dimension, remaining truncated, prevented the judges and the entire judiciary to take over decisions affecting the control of society from the other branches of power. Here, the judges and the prosecutors attached to the judges could forge ahead only by “criminalizing the political responsibility” that means, in terms of content, that the individual political forces attempt, in the fights fought within the politicized judiciary, to break the main political opponents also by using the judicial groups sympathizing with them, as we have seen it in Italy from 1993.

The idiosyncrasies of the new Hungarian judiciary power should be looked at under this light. However, attention should be called right at the outset to the fact that the organization of this judicial power is, in Hungary, in its infancy, since the self-organizing judiciary brought together without any domestic precedence has set out on this road only a few years ago. Thus, only the legal framework and the legal provisions can be analyzed, and, expectedly, it is still a matter of years until the framework is “filled with life,” and the directions of this are not really visible yet.

Regarding the legal framework, it can be said, however, that the separation of the judiciary in Hungary from the rest of the powers is quite vigorous, and, in essence, it corresponds to the Italian and Portuguese situations. (The Spaniards made a volte face on this road by “re-parliamentarizing” the election of the supreme judiciary body.) Thus, the entire judiciary administration, the nomination to top judiciary positions, the decision over the incorporation into the judiciary are matters to be decided by a local government at the highest level, the Board of National Justice (OIT). This body consists of 15 members, and the majority of them, nine judges, are elected indirectly by 2 500 Hungarian justices through electors. Its Chairman is the President of the Supreme Court who is elected by the National Assembly for six years, but, due to his past as a judge that had socialized within the judiciary, he can be counted to side with the nine judges, and, this way, a two-third majority can be guaranteed at the OIT decisions. (In addition to these 10 judges, the Chief Public Prosecutor, the national chairman of the Bar Association, the Minister of Justice, and two, delegated MPs make up the remaining 5 of the 15-member body.) Through this body, with a majority of ten justices, the judiciary has a complete control over self-organization and operation, and the only obstacle standing – for the time being – not cleared away is a lack of automatic allocation of the budget of this body (by, for instance, setting a certain percentage of the government budget), but it is the government that decides annually in its budgetary plan. The current government plans, according to information available, to introduce such a mechanism, and, in this case, the judiciary would be a sphere that could not be accessed from without.

This means that the independence and separation of the judiciary from the rest of the powers is one of the most watertight cases in Hungary from among the countries of Europe.

What is the situation of the politicization of the independent judiciary and its independent role playing, and what events are expected in this area? With regard to its political affiliation and values, the majority of the judiciary tend to favor the Socialists and the left-liberal Free Democrats, but no organizing along factional lines or any sign of coalition building of ideological enemies can be seen as of today. Looking at the legal framework, regulation tends to favor the maintenance of the amorphous and apolitical conditions in selecting members of the self-governing upper body, in distinction to the Italian case in which this process is equivalent to open political and associative warfare between groups of justices. The fact of the matter is that the nine members of the OIT are not elected for a six-year term directly by the judges, but by the interposition of a conference of the judiciary's delegates, and the delegates are elected in isolation at the meeting of county justices or that of the justices of the capital, and, also, the Supreme Court and the High Court justices elect one delegate each. Every 40 judges elect a delegate at these conferences, and, this way, about 70 conferences nationwide send nine OIT-members and nine alternate members to this body. Thus, in want of a national organization, a narrow coterie of judges can, presumably, have their influence felt at the selection of persons recommended for membership. This influence could be broken on the part of the judges of the lower courts only by a national organization, but this would lead, necessarily to a severe break up of the judiciary along political fault line just as it has happened in Italy, and, as the visible signs indicate, even in Spain.

It is also important to stress that with the above transformation the independence of the judiciary has developed only *vis-à-vis* the rest of the powers, since the individual judges have become, if possible, even more integrated into the judiciary in terms of livelihood, promotion and other factors. But, the fact of the matter is that verdicts now can be influenced not from the other branches of power, but within the judiciary. This, incidentally, fits completely into the South European model, and this stands in sharp contrast with the type of judicial independence in the United States that separates, at least at the level of the federal judges, not only the entire judiciary sphere from the rest of the powers, but makes the individual judge independent even from the influence exerted within the judiciary.

Thus, the situation of the Hungarian judiciary can be described by a strong degree of independence and a lack of politicization, and this resembles most of the Portuguese situation among the European countries. It is also important to note that Hungarian prosecutors have traditionally been separate from the judiciary and the subordination of the individual prosecutors to their higher-ups is strong, and, thus, the situation of the Hungarian prosecutors is diametrically

opposed to the independent role of the Italian prosecutors vis-à-vis the judges. With regard to the legal framework, the political role playing of the Chief Public Prosecutor in Portugal is a theoretical possibility in Hungary for even if the government majority of the day is able to choose a new Chief Public Prosecutor with a 50 percent casting of the votes, this is not probable due to assessment made from without. However, this potential has not been realized during the past decades. “The criminalization of the political responsibility” that meant the main terrain for the judiciary power in the countries of Southern Europe does not exist in Hungary, although this threat is sometimes voiced on the occasions of political bouts.

A full development of the judiciary power can take place only hand-in-hand with the “constitutionalization” of the ruling when court verdicts, competing with influences on the issue of social control, also take their place next to parliamentary decisions. The fact of the matter is that there are some efforts made in this direction on the parts of a handful of small coteries of legal politicians, but, so far, they have been unable to gain wider currency for their ideas. This pressure is reflected most directly in the area of civil law judgments in the sense that the undersecretary of the Minister of Justice responsible for civil matters has often tried to shift civil law judgments toward the constitutional law, for instance in the codification work of the civil code, but his efforts ran aground on the resistance exercised by the civil law attorneys. The former government also tried to brave these efforts, and, therefore, it will be interesting to see how, following the change of government, the current Minister of Justice who is closer to the Free Democrats will take up the challenge presented by the profession in this area, and will introduce those amendments that push toward “constitutionalization.” This cannot yet be seen, just like the politicization of the judiciary, or, the best scenario, its non-occurrence. However, it can be emphasized that the shift in sentencing to a freer deliberation on the basis of the constitutional law and, through this, bringing wider social issues in front of the courts may accelerate the break-up of the judiciary into internal political groups, while a more stringent attachment to the laws and sentencing only in narrower legal disputes hampers this possibility.

In the countries of Eastern Europe, it was Hungary where the effort aimed at developing a separate judiciary vis-à-vis the parliamentary majority and the government was the most successful. As mentioned, the National Assembly in Hungary has the only right to elect the President of the Supreme Court who is, at the same time, the Chairman of the judicial local government. Considering, however, that this vote also needs a two-third majority, no simply parliamentary majority of the government suffices. And if the parliamentary majority and the opposition fail to agree over the person of the new President to be elected every six years, it is the Vice President of the Supreme court that continues to fill this position since his/her mandate is for an indefinite term, and the separate

judiciary has no impediment to work off. The fact of the matter is that the only instrument to exercise pressure with on the judiciary is the budget allocated to the justices. This independence and isolation from the parliamentary majority is of the highest degree among the countries in Europe, and, in Southern Europe, it is only the Italian and the Portuguese judiciary that can be somewhat compared to it.

With regard to the supreme bodies of the judiciary local governments developed in the rest of Eastern Europe, the Lithuanians came close to this measure of independence by their judiciary reform introduced in May 2002, but a number of authorities were not handed over to the judiciary self-government there either, and these licences remained with the head of state, and the judiciary body plays only an advisory role in it. In the case of the Poles and the Slovenes – while the judiciary remained subordinated to the administration by the Ministry of Justice, this role has also remained strong in the appointment of the leading justices – the supreme judiciary self-governing body has a material role as well. The legal standing of the judicial self-governing body is similar to the one employed in Poland and Slovenia, but it has more limited authority than in the latter countries. The list is followed by the Latvian and the Bulgarian self-government body of the judiciary with even more limited independence.

The Czechs and the Estonians simply resisted the constant pressure coming from the mechanism of the European Union to separate the judiciary as an independent power: their national legislations rejected efforts aimed at implementing these recommended changes (Open Society Institute 2002). In essence, it is the traditional administrative rights of the Minister of Justice that prevail in both countries. However, the Constitutional Court in the Czech Republic entered the fray in the summer of 2002, and squashed, on constitutional grounds, the judiciary model organized around the Minister of Justice. It is not known how the Czech parliament will decide in the future, but it can be surmised that the self-governing judiciary model will be included in the new regulation. (There are no news on such plans on the part of the Estonians.) Finally, we should mention the case of Romania where, although, by way of camouflage, a judicial self-governing organ was created, the Ministry of Justice keeps full control over the courts, and, in addition, it can also monitor the individual justices through its inspection system, even during cases in process.

As to the prosecution, the differences among the three countries can be summarized in three major models. One of these models is the prosecution as an independent body that is separate from the government and the Ministry of Justices. Here, the hierarchy of the prosecutors with the Chief Prosecutor at its apex, reports only to the parliament, which represents an almost full degree of autonomy for the prosecution in terms of the way the legislation operates. However, the prosecutor, as an individual, is completely subordinated to the supervising prosecutor; the supervising prosecutor is subordinated to the

supervising prosecutor at the next level in the hierarchy, and, ultimately, all the prosecutors are subordinated to the Chief Prosecutor. This model includes Hungary, Bulgaria and Lithuania. In the next model, the prosecutors are answerable directly to the Minister of Justice who guides, in every major aspect, the daily operation of the prosecution from the promotion to the appointment of the prosecutors and the ongoing overseeing process. The most ideal typical case of the model is the Polish one where the Minister of Justice is the same person as the Chief Prosecutor, and the “national prosecutor,” meaning the “official prosecutor,” functions as his direct subordinate. However, the Czechs and the Romanians also belong to this model.

Finally, Slovenia and Esthonia cling to the third model in terms of the hierarchy of prosecution. Whereas the prosecution are not separate from the government and the Ministry of Justice in these two countries, the legal standing of the prosecutor has been brought closer to the that of the justices, and the individual justices can no longer be instructed. This means that they did not create the independence of the prosecution vis-à-vis the government, but the individual prosecutors are independent even from their fellow prosecutors and the Chief Public Prosecutor.

*5. Summary: some distinctions to understand the power of the judiciary and the prosecutors*

In the wake of this comparative analysis, we are already able to stress those distinctions that may help the analyst understand the power of the judiciary and the prosecutors in a given country and to pass a judgment over the degree and nature of this power.

I. Major aspects of the judicial power:

- independence or lack of it in terms of organization and constitutional law
- politicization or lack of it
- placing or not placing sentencing on free deliberation

II. Directions in the development of judicial power:

- taking over decisions in controlling society from the parliament and the executive by the courts (model: United States)
- criminalization of the political battles (model: United States and Italy)

III. Two models of the independence of the judiciary in terms of organization and constitutional law

- independence of the judicial corporation; an independent judiciary as separate from the rest of the powers, within it the individual judges subordinated to the judicial corporation (All the European countries in which the judiciary has been separated from the parliamentary majority, and the Latin American countries)
- independence of the individual judges (model: USA)

IV. Models of relations between the judiciary and the prosecutors:

- complete separation of the two; prosecutors subordinated to the Ministry of Justice or the government (Western Europe)
- body of prosecutors intertwined with the judiciary; the separation of the two from the rest of the powers (Italy)
- completely autonomous prosecutors from the judiciary with automatic budgetary allocation (Columbia)
- semi-separation of the prosecutors' hierarchy ending at its apex in the Chief Public Prosecutor, making it possible by their joint attachment to two, competing, power centers (Portugal).

V. Levels of politicization of the judiciary

- judiciary remaining completely apolitical (Portugal)
- political activity and politicization limited to the Supreme Court (Costa Rica, Columbia, and, in general, countries of Latin America)
- politicization of the entire judiciary and the formation of political camps within the judiciary (federal justices in the USA, Italy).

VI. Levels of politicization of the prosecutors

- political activity limited to the Chief Public Prosecutor and his entourage (Portugal)
- politicization of the entire prosecutors' hierarchy and formation of political camps of the prosecutors (Italy)

VII. Levels of making sentencing based on the constitutional law

- complete lack of transforming sentencing to be based on the constitutional law (Hungary, Austria, and most of the countries in Western Europe)
- effect of the constitutional rights partly incorporated in the interpretation of the law (Germany)
- “constitutionalizing” limited to specific constitutional provisions (Italy)

- decisions made in factional infighting in lieu of full “constitutionalizing” (USA, Columbia, Costa Rica).

By taking into consideration these major differences, we can give a nuanced response, not losing the specific differences between the individual countries if we want to carry out a scientific analysis with regard to a country concerning the existence of the power of the judiciary, its degree and nature. Scientific inquiry may proceed more consciously instead of a diffuse and opaque questioning practices by stressing these differences. In the wake of comparative analyses and the emerging differences, we are able to shed light on the structural elements in an inductive manner; to arrange them in clusters, and, as a combination of these clusters, understand the idiosyncrasies of the power of the judiciary and prosecutors in the countries under investigation.

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POKOL BÉLA

## A BÍRÓI HATALOM FORMÁI

(Összefoglaló)

A tanulmány a bírói hatalom különböző formáit elemzi a modern demokráciákban. Hosszabb vizsgálódások foglalkoznak az Egyesült Államokban végbement „alapjogi forradalommal”, és ennek a bírói ítélezésben megfigyelhető utóhatásaival. Ugyanígy vizsgálat alá került a politikai küzdelem büntetőjogiasítása, ahogy az különösen Olaszországban és Latin-Amerika országaiban figyelhető meg. Elemzések találhatók a tanulmányban Közép-Kelet-Európa államaiban – így Lengyelországban, Szlovákiában, Szlovéniában és Magyarországon – a bírói kar hatalmának növekedésére és ennek okaira. A tanulmány a magyar bírói ítélező tevékenység vizsgálata

alapján von le következtetéseket a magyar bírói hatalom működésére, amelyet a szerző a Fővárosi Bíróságon empirikusan végzett.

### **Zusammenfassung**

Die Studie analysiert die verschiedenen Formen der richterlichen Macht in der modernen Demokratien. Langere Untersuchungen der Studie beschäftigen sich mit der Grundrechtsrevolution in der Vereinigten Staaten und ihre Nachwirkungen auf die alltägliche Urteilstätigkeit der Gerichte, mit der Kriminalisierung des politischen Wettbewerbs, wie es in Italy und in der Latein-Amerikanischen Ländern beobachtet werden kann. Es gibt Untersuchungen in der Studie über die Erweiterungen der richterlichen Macht in Ost-Mittel-Europa, Polen, Slowakei, Slowenien, Ungarn etc. In einem Kapitel beschäftigt sich der Verfasser mit der Entscheidungstätigkeit der Gerichte in Ungarn und dieses Kapitel ist basiert auf eine empirische Entscheidungsuntersuchung, die der Verfasser in dem Hauptgericht von Budapest gemacht hat.