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Pokol, Béla

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Constitutionalization and the Political Fighting through Litigation

By Prof. Béla Pokol, Budapest
E-mail: belapokol1@jgmail.com

Complicated relations in modern society cannot be regulated by law unless they are separated into several intrinsic layers. If we drop the textual approach to law, then we can have an unbiased view of the system of concept categories of each branch of law under the layer of the text appearing on the surface which constitutes the dogmatic layer of law; in addition to these, judicial case law - high court precedents, judicial practices making the open usage of acts and orders more accurate – represents the third layer of law. (For more detailed description of this multi-layer concept of law see Pokol:2000). The relations of these three layers of law, their proportions to each other are different in each law system, but to a certain extent all three have been present in modern legal systems of this last century. The appearance of constitutional jurisdiction, which subsequent to 19th century beginnings in America has spread in several European countries since the end of the 1940's and become a routine procedure after the changes in 1989 in Central and Eastern European countries, is a new product of development. Compared to dogmatically chiselled traditional administration of justice made more accurate by judicial case law, this new layer of law, which originally appeared in the form of human rights as the collection of ideological/political requirements outside legal systems in operation, is characterised by highly different features. One such difference is that the normative content of constitutional rights and freedoms and fundamental principles is more abstract than the rules of traditional fields of law. The other difference is due to the fact that relations between particular rights are mostly irreconcilably strained, and a certain right can be enforced only at the expense of another right or principle. These features did not cause any problems while people had to fight with them as ideal requirements, setting human rights against actual conditions, for the transformation of prevalent conditions. Judicial decisions based on them as constitutional rights and freedoms used for being applied in cases, however, often lead to legal uncertainty.

(Three dimensions of constitutionalization) This particular problem of the layer of constitutional rights and freedoms has not been serious for predictable administration of justice even while its effect has been exerted on the legislator and other lawmakers. This has represented the prime rule during the recent half century in the countries where the institution of constitutional jurisdiction has appeared. Constitutional rights and freedoms and fundamental principles have guided the alternative choice of the legislator and pushed the content of provisions of law in drafting acts and orders in the direction where the abstract instructions of fundamental rights and principles appear in them more properly. At this point, it is at most the question of democracy that is raised by the too wide power of judicial review exercised by the constitutional court. For the expression of the empirical will of the people in parliament formulated by the voting of millions is forced to the background on the grounds of the decision of a few constitutional court justices. In spite of the problem of democracy fundamental rights, which include overall aspects of justness, can reduce the amplitudes of the empirical will of the people based on short term and rather emotional moods of the masses. Making a somewhat

aristocratic remark, it can be said that 'the radically subversive' element built into mobocracy can be tamed by the constitutional court justices, who deliberate and make decisions in adherence to the standards of upper classes. Problems actually arise if this decision-making forum gets permanently and globally in conflict with legislature based on the empirical will of the people and the authoritative political elite.

It constitutes a new dimension when constitutional rights and freedoms go beyond determining the legislation and begin to exert directly determining pressure towards the micro-processes of law and judicial decisions in cases as well. In addition to these two dimensions, constitutionalization may touch jurisprudence and dogmatic activity: by connecting internal issues of various branches of law and dogmatic constructions of law to constitutional rights and fundamental principles; and by describing the dogmatic system of various branches of law more or less as being deduced from fundamental rights. Subsequently, a specific branch of law will appear as 'a constitutional branch of law' – 'constitutional criminal law', 'constitutional taxation law', 'constitutional labour law', etc. – and once this has been accepted by the lawyers in the given branch, then, in addition to law politics criticism alongside lawmaking, 'the constitutional rights of the branch of law' will be considered as the basis of interpretation of the rules of that branch by legislators as well. The constitutionalized jurisprudence of various branches of law may thus move in two, different directions: towards legislation they may appear as a new law politics assessment system, now condemning current legal conditions for lagging behind constitutionalized fundamental rights, and towards law enforcement as the supporters of judicial law enforcement with a new viewpoint driving law interpretation towards the constitutional rights under branches of law.

Out of the three dimensions of constitutionalization, only with respect to the constitutionalization of judicial proceedings is my intention in this study to examine the operation of the layer of fundamental rights, and to expound the problems that arise in this field. After that, in the final part of the study I shall describe the phenomenon of 'political fighting through litigation', which arise from these developments. By breaking elements up into three dimensions it is possible to assess the effect exerted by the layer of constitutional rights and freedoms on each layer of the legal system more accurately than by describing the constitutionalization of the entire legal system without any differentiation made. Thus, for example, at the comparative law conference arranged in 1998 in Bristol the papers prepared on this subject focused on 'the constitutionalization of the legal order' in summary, while they commented the current state of constitutional court's judicial review of *the legislation* in various countries (see Koch 1998; Poplawska 1998). The subtle treatment of the subject allows that the effects of constitutionalization can be assessed in each dimension separately, and that the negative or positive assessment of one dimension should not influence the assessment made in the other dimension.

1 Two aspects of the constitutionalization of judicial proceedings

If the layer of fundamental rights go beyond the judicial review of legislation and begin to influence judicial decisions in cases, then the influence can be examined from two different aspects. Firstly, regarding that *the judge can decide the case by taking into consideration, in*

addition to the relevant legal rules, constitutional rights and freedoms. That is, in this event, constitutional rights and freedoms exert their effect on the judicial decision not only through drafting laws to be enforced by the judge but in addition to/instead of that they directly appear in the formation of decisions. Secondly, regarding that it exerts an effect towards the constitutionalization of the legal order when participation in the litigation is disconnected from the state of being personally concerned and more comprehensive groups, associations can enter the judicial proceedings for whom it is not the specific subject of the litigation that counts but the possibility to fight for a definite outcome of the litigation using it as means of shaping an overall issue. Let us look at these two aspects of constitutionalization, possibly called the substantive law and procedural law side of this process respectively, and the questions related them in more detail.

1.1 The substantive law aspect of constitutionalization

While in most of the countries where the institution of constitutional jurisdiction has been established, it has been confined to the judicial review of legislation, subsequently constitutional rights and freedoms and fundamental principles have not been granted a direct role in the micro-processes of law; in Germany and the United States since the mid 1950's attempts have been made in this direction. In Germany this problem area has been called 'the horizontal' effect of fundamental rights or, looking at it from another aspect, 'the tertiary direction effect' (Dritwirkung); in the United Sates since the 1960's when the theoretical treatment of the issues concerning new legal developments commenced, studies on the subject have been prepared under the headword: 'the constitutionalization' of solving problems in the administration of justice and society. The problems arising here are grasped in different width by the two thematic interpretations, and the wider, American thematic interpretation has corresponded to the actual situation that the constitutionalization of law enforcement has been performed on a wider scale and touching the operation of law more profoundly in the U.S. than in Germany.

In Germany the Constitution declares fundamental rights to be directly enforceable rights, and since the 1950's during the course of making judicial decisions the question has arisen what role constitutional rights and freedoms that seem relevant in the given case may have alongside applicable legal provisions (Alexy 1985). Logically, in this respect, three positions are possible. The first can be that the judge shall not take fundamental rights into consideration because the legislator has already been controlled and determined either by them or the constitutional court decisions interpreting them. In this direction the role of fundamental rights is somewhat stronger when the judge needs to take into consideration the guiding of the relevant fundamental rights and constitutional court decisions basically in formulating his decisions tied to the relevant provisions of law, but also in his interpretation work because of the openness of the provisions of law, and needs to implement his deliberation in view of these. Finally, fundamental rights will attain the strongest position in the forming of the judge's decision when the judge can (and shall) both refer to fundamental rights in the interpretation and *strike the applicable provisions of law down and base his decision entirely on constitutional provisions.*

These three positions emerged in German law literature from the beginning of the 1950's in the analysis of the possible effects exerted by constitutional rights and freedoms towards direct

judicial decision; and the problem was called 'the horizontal effect' of fundamental rights in view of the fact that fundamental rights had originally protected the individual 'in vertical direction' against the state and the overall community. And now their effect in the interrelations, i.e. in the horizontal relations, between citizens was put into focus. The German Federal Constitutional Court thoroughly considered its decision made on the issue, and after the Federal Labour Court had ignored the provisions of labour law in a labour lawsuit and decided the case directly on the grounds of the Constitution, and a huge debate evolved in the literature on the consequences of this revolution in law enforcement, the Constitutional Court took the position that fundamental rights might exert only indirect effect on judicial decision, and judicial decision might be based on them only to the extent of analysing the openness of the provisions of law, but laws should not be ignored. If a judge deems that a particular provision of law is in conflict with one of the constitutional rights and freedoms, then he can suspend his proceedings, and may appeal to the Constitutional Court requesting the examination of that particular provision of law. He himself, however, shall not ignore it.

Germans have been left alone with even this middle-of-the-road position of theirs because Austrians and Italians, who have had constitutional jurisdiction since as early as the 1950's, having examined the matter have decided that they do not approve of the horizontal role of fundamental rights even to such an extent. Also, in Germany, in spite of the declarative recognition, the inclusion of constitutional rights and freedoms into judicial decisions has remained moderate even in such an indirect function.

Constitutionalization has been performed on a much wider scale in the United Sates, and it has exerted a much broader effect on both the operations of the legal order and political life. Subsequently, since the 1970's a new tendency has begun to replace the old one, first by stopping further constitutionalization, then by a resolute reversal from the beginning of the 1990's (see Epp 1998).

In the United States the constitutionalization of judicial proceedings was greatly connected to the different dominance of political forces on member state and federal level and the opposition of the two levels for that very reason, which eventually resulted in the Civil War in the 1860's. The federal government, the federal legislature and the separate federal court system established on it traditionally constituted the depositories of the central formation of will in the United States just becoming uniform against member state laws and member state authorities; and the continuous extension of federal competencies during the recent one hundred years has been accomplished by the more and more broadening interpretation of the Constitution by the federal courts, and by the Federal Supreme Court, in the first place. One aspect of this has been (in addition to the widening legislative power of the federal Congress to the account of member state legislatures) *the inclusion of constitutional provisions pertaining to federal issues into judicial law enforcement, and through that the striking down of member state laws (and member state courts ordered to enforce them).* To make this understandable it might be worth referring to the legal case from the beginning of the 1980's when a college in the U.S. entered a two-year contract with a PE teacher, but gave him notice after a year. The PE teacher intended to argue with the lawfulness of the notice not in compliance with labour rules, which would have fallen under the jurisdiction of the member state court, but by interpreting the loss of his salary as loss of property and basing his

claim on the provision of the Constitution that sets forth that "no person shall be deprived of property without due process of law". This basis of litigation transferred the case into the competence of the federal court, and if the judges were inclined to interpret property in such terms, then a considerable part of labour cases would be executed as an action of infringement of a constitutional right and redress thereof. This case, however, happened to be allocated to Richard Postner, Chief Justice of the Chicago Federal Court of Appeal, who being an opponent of constitutionalization rejected the claim, and indicated to the PE teacher that in a member state court judgment would be made pursuant to labour rules probably in his favour (see Cohen 1985:1117-1118). *What counts here is that litigation is doubled by creating the option of constitutionalized litigation, and the plaintiff has the option of either prosecuting a constitutional lawsuit or trying to solve his or her problem pursuant to simple laws.*

This tendency reached its peak by the mid 1970's and in federal courts a parallel 'constitutionalized' administration of justice evolved in addition to traditional techniques of litigation. The opposition evolving among lawyers and in courts made public opinion and politics aware of the emerging problems, and especially the law politicians of the Republican political side began to claim, more and more dramatically, the necessity of turning this process back. President Reagan put the issue in his election program at the beginning of the 1980's asserting that in the event that he was elected President, he would attempt to appoint federal justices who are against 'the constitutionalization' of judicial decisions. After he had been elected, his administration of justice managed to break through in the 1980's and once the federal judiciary had been replaced, constitutionalization ceased to be pursued in judicial proceedings to such a great extent. Eventually, through filling vacancies with the nine justices coming in turn in the federal supreme judicial forum by the beginning of the 1990's, it was possible to turn the majority of justices towards stopping constitutionalization. Against the line of 'constitutionalization' that began in 1953 with Chief Justice Earl Warren, and continued with Hugo Black, then with William J. Brennan, William O. Douglas, Abe Fortas, the camp for reversing the process was represented by Felix Frankfurter, John M. Harlan, William H. Rehnquist, Sandra Day'O Cooner, Antonin Scalia, who fought a hopeless struggle with them in the beginning, and who have constituted the majority of the supreme judicial forum in America in recent years. Among law scholars Ronald Dworkins has to be considered the arch supporter of the constitutionalization trend, while it was Alexander M. Bickel who began to fight to cut it back in the 1960's, then since the 1970's Robert Bork and since the 1980's Antonin Scalia have written important works to carry on with the issue. (Eventually Scalia was appointed the associate justice of the Federal Supreme Court in the middle of the 1980's, but Robert Bork's nomination failed because of the political and media strength of the opponents who acted uniformly.)

Compared to the German 'horizontal effect', the constitutionalization of law enforcement in the United States was thus accomplished with a more penetrating force for a while. Constitutional rights and freedoms and supreme court decisions interpreting them in the U.S. are made part of law interpretation just like in Germany, but through the independent course of constitutional litigation it is also possible to strike down laws the way referred to above. A broad interpretation of constitutional rights and freedoms, and the deduction of numerous normative points of reference from constitutional fundamental principles, are instrumental in completely striking down simple laws and the law dogmatic constructions behind them; and judicial decisions in

cases can be made on the grounds of constitutional rights and the points of reference applied in the literature of rights that elaborate on them, instead of provisions of law made more accurate by law dogmatics. (with regard to family law in the U.S. see Schneider 1988:79-121). In terms of legal techniques it might not be out of the question that a new kind of predictability will evolve after a longer period, although because of the multitudes of necessary changes it is unforeseeable in what way this could happen, if it is possible at all; nevertheless, after a twenty years period of this trend the mainstream of American law has shifted towards reversing it.

1.2 The procedural law aspect of constitutionalization

In the United States, alongside the substantive law aspect of constitutionalization, from the 1960's developments on the procedural side began to shift traditional administration of justice to the domain of constitutional law/public law for a while. The core of this was that individual litigation was replaced by mass action, which extremely enhanced the importance of judicial proceedings in view of conducting the struggles of wider groups of society. *And the execution of mass action pursuant to constitutional rights and freedoms actually created the alternative for groups of society of either organising themselves into parties and attempting to attain their goals in the legislation through modifying laws, or fighting for them through judicial proceedings thus changed.*

Traditional litigation was shifted into this direction along two, intertwined tracks of development from the beginning of the 1960's. One of them represented the evolution of 'public interest litigation' or 'public law litigation', and the other that of 'class action'.

(Public law litigation) Entering a traditional, civil action, or joining an ongoing action is possible only by a person whose interest protected by law is directly affected by the case in such action. The outcome of a massive court action often affects the status of other people in similar situation, especially when judicial precedent law plays a powerful role in the legal system of the given country. In this event, in any subsequent litigation this decision will be taken into consideration as precedent on behalf of the persons in similar situation; subsequently, for the persons who are in a situation similar to the individual litigant the outcome of the action is important. It apparently goes back to the fact that in the United Sates attempts have been made by outside parties to join judicial proceedings since the end of the last century. The first form of this effort was the 'amicus curiae brief' (see Kristlov 1963). This consisted of the description of a lawyer's position written by some respectable lawyer or law professor in order 'to help' to decide the given case. These letters expounded arguments, regulations applied in other countries which urged the judges who decided the case to proceed into a given direction. This activity is usually pursued by respectable lawyers, government officials, experts of large companies prior to superior court decisions of general importance, when the outcome of the case is meaningful for them.

One version of the amicus curiae brief is the so-called *Brandeis-brief,* which expounds legal arguments and changes in social facts for the judges who decide cases, and attempts to attain secession from previous relevant precedents. Louis Brandeis, who later became the member of the supreme judicial forum, wrote his example setting letter in an important case in 1908, which, after a two page traditional legal argument, outlined in a 110 page study social changes calling for

new decisions to be made by judges against old precedents. In the midst of the euphoria of transforming law into 'sociological jurisprudence' that drew upon social sciences this kind of letter set a pattern for 'social engineer' lawyers for long decades.

This antecedent makes the evolution of public law litigation from the 1960's understandable. At that time a modification was made in the rules of court, which allowed that anyone whose interest should be affected by the outcome of an ongoing action might join such action, provided that the party in the action in similar situation should not be able to defend the given interest. The judge was obliged to permit the joining of the action; and another clause allowed that the interested party might join the action, even if the claimed interest was properly defended, when an overall fact or legal issue was concerned in the action. The judge, however, had the right of deliberation whether to permit the joining of the action (Vreeland 1990:279-310). Since this modification in the rules of court intervention has taken place in multitudes of lawsuits, and now judicial decision may be influenced not only from outside with an amicus curiae brief, or in the form of a Brandeis-brief by overall interest groups, associations but also by the parties involved in the lawsuit.

In such event, however, the action will be essentially transformed, and *the emphasis is shifted from an individual's interest to win the action to the enforcement of an overall social group's long term interest.* Subsequently, the lawsuit is executed for the sake of winning a permanently better legal position with the participation of the unions of the relevant social group. This change in character will make the courtroom similar rather to the plenary session of a legislative body, with huge media publicity, and not the place where neutral lawyer's argumentation takes place. Litigation appears to be an alternative for political interest groups to attempting to fight for the modification of law as a lobby or a political party in parliament (see Chayes 1982). Choosing the option of political fighting through public law litigation is especially advantageous for ethnic groups or minorities because they can enforce their will with more difficulty in the majority legislature. A cutting back attempted in 1984 was justified by a preparatory subcommittee of Congress by stating that "The members of a particular race or sex can easily set up a group, given the inclination of the federal judges to acknowledge the litigation right of social groups defined in terms of sociology. Abstract rights and freedoms constitute a basis for such groups, which makes rights litigation similar rather to legislation than traditional lawsuit between class litigants" (quoted by Feinberg 1984:272). The golden age of public law litigation was in the 1960's but even in the period between 1986 and 1989 171 such cases can be found when examining actions executed in federal courts, in spite of the fact that by then the staff of federal judiciary had been mostly replaced, and justices considered the possibilities for joining lawsuits stricter when granting permission; and, consequently, the transformation of lawsuits into public law litigation was to a certain extent forced back.

When analysing the American impact in this respect on Western European countries, it can be seen that the appearance of public law litigation has taken place only partially. Because here it usually falls within the public prosecutor's competence to join a lawsuit if the interest of the litigant is not properly represented and bears an overall social significance (for a comparative analysis of this see: Feldman 1992). In spite of this, certain developments have already begun with a view to attaining that the law of the European Union shall be enforced through judicial

proceedings against reluctant domestic laws by applying to the European Court of Justice regarding specific cases if the relevant social group has not been able to enforce it because of the resistance of domestic legislature (see Feldman 1992). In the form of a germ it is the same as what has resulted in 'the constitutionalization' of law enforcement in the fight between federal and member state political forces in the United Sates during the recent 40 years. In Europe quite often it is through the extension of the jurisdiction of the European Court of Justice based on the broadening interpretation of the Union's Treaty that member state legislatures are more strongly subject to the Union. Currently, however, on the level of the Union there is no fundamental rights charter (the European Court of Human Rights applies the European Human Rights Treaty regarding both the Union and each member state of the European Commission) and therefore 'the pushing forward' of the formation of will in Brussels has not been able to proceed by applying fundamental rights in a wider sense. Thus, although the status of the relation between the European Union and its members states is similar in every respect to the situation in the U.S. at the end of the 19th and the beginning of the 20th century, and there this situation led to the (federal) constitutionalization of law enforcement, this cannot generate similar phenomena among the member states of the European Union. But if a fundamental rights charter with proper legal force were after all established in the European Union, and attempts are being made to attain this goal by some political groups, then the creation of the United States of Europe would be supposedly accelerated through that channel as well.

With regard to public law litigation reference should be made also to the phenomenon of *strategic litigation*. This phenomenon evolves due to the existence of precedent law in the countries where precedent law plays a larger than usual role, and because of that in the United States public law litigation assumes the nature of strategic litigation. The point is that strong interest groups are interested not only in winning a particular case, they litigate not primarily to win a particular action but for the sake of enforcing a decision in a leading case in favour of them. One of the consequences of this is that if prospects in the particular lawsuit are unfavourable, then interest groups attempt in any way to come to a agreement with the opposing party, possibly by accepting worse conditions than the ones that they could after all obtain in the action, just to avoid that a sentence is made, so that no legal 'trace' of the given case should remain. On the contrary, if conditions for winning are good, then under no circumstances are they willing to come to an agreement because the prime aim is to attain precedent in the given case (see Tushnet/Schneider/Kovner 1988:975).

(Class action) This form has evolved primarily in mass claims for damages when due to a large company's responsibility for particular products or because of an environment polluting event crowds of several thousand or ten thousand people become affected. In this event those affected, forming a litigation group, enter the action as a quasi interest group so that the judge attain the payment of damages by fighting. But the spreading of 'class action' has transferred this form of litigation to numerous other fields, and measures of public administration agencies, school authorities, etc. are often attacked in this form. And through this spreading, class action often gets fused with public law litigation (see Elhauge 1991:72-77). In this event, a single judicial decision decides the case of ten thousands of people; what is more there are tendencies that on condition that anyone shall prove that he or she shall 'rank among the class', that is, shall be in a situation identical with the situation the parties involved in the action were in, a judicial certification may

be issued to such person regarding the judgment of his or her claim without the need of such person formally taking part in the action because it is apparent that the judge – as any lawmaker – decides the case of huge social masses, and not the case of a particular individual.

2. Attempts made at constitutionalizing law enforcement in Hungary

Right from the outset it should be noted that in Hungarian judicial law enforcement no major shifts have taken place in the direction of constitutionalization; nevertheless, recently there have been attempts that indicate the appearance of concepts with an impact in this direction. In the description of the state of affairs in Hungary the analysis of these attempts is again worth splitting into two parts, and after exploring the substantive law dimension of constitutionalization the realm of procedural law needs to be looked at separately.

2.1 The substantive law aspect of constitutionalization. The first point that should be made in the analysis of the state of affairs in Hungary is that the Constitutional Court created in 1989 by the change of regime was vested with an enormous power to review legislation, and the tribunal itself further augmented this power, but did not push forward to review judicial proceedings and decisions. (In adherence to the model evolved in Western Europe, in Hungary the Constitutional Court is operated as a separately organised body and it is not the Supreme Judicial Court that undertakes this task.) Nor did the provisions of the Constitution allow this pushing forward, but – because in another respect it did not cause any problem for the judges of the Constitutional Court when extending their competence – it was much more important that feeling the tension generated by their expansive action against the legislature the judges of the Constitutional Court decided themselves in 1991, in the initial period of their operation, that they did not intend to compete with the law interpretation activity of the Supreme Court covering the entire judicial system (see the Constitutional Court Resolution of 57/1991).

A new attempt to create the path for the Constitutional Court's judicial review of the resolutions made by the Supreme Court on the unity of law seems to have changed this position. (The resolutions on the unity of law made by the supreme judicial forum are binding pursuant to the Constitution on lower courts when later they deal with cases similar to these.) The problem here is that this would make the direct effect of constitutional rights and freedoms and fundamental principles on judicial law interpretation formally recognised. So far the judges of the Constitutional Court have been able to intervene only in the drafting of laws pertaining to judges, and thus constitutional rights and freedoms and fundamental principles have exerted their formative effect only in this domain. By this step a fundamental breakthrough would take place, and abstract rights and freedoms would be directly asserted in the realm of judicial proceedings and decisions as well.

There is further cause for concern that should the path for constitutional court's direct judicial review of the resolutions on the unity of law be opened, then the halt prior to the decision made by the other, supreme judicial forum, also constituting judicial precedent law, will become simply unjustified. The path once opened for the constitutional law review of judicial law interpretation would be constrained to run through the entire high court case-law material. And if that happens,

then for lawyers it will become a primary task to search for help in the field of constitutional rights and freedoms and fundamental principles in addition to the provisions of law unfavourable for their clients. These are abstract and flexible enough to make any case that seems to be losing defensible. And courts, either at lower or medium level, shall not reject to transfer the action to the domain of the Constitution as it is done today with reference made to the Constitutional Court Resolution 75/1991. See the judicial decision BH 223. in 1998, for example.

In summary, if the resolution on the unity of law were made subject to constitutional court's judicial review, then within a short time we would get through the necessary steps to the constitutionalization of law enforcement in the realm of substantive law, even if this would not be supported by the majority of constitutional court judges at all. And whether it would stay on "medium" level, as it was the case with the horizontal effect of fundamental rights in Germany described above, or would be transferred to the level of direct constitutional law litigation as happened in the federal jurisdiction in the U.S., cannot be predicted. This latter case has once occurred in Hungarian administration of justice when a local judicial court striking down the relevant provisions of legal rules decided an abortion case on the grounds of the Constitution. It was approvingly welcome by minor jurist circles but overall public opinion formed among lawyers and the judiciary reacted negatively to this case.

It should be noted that in Central-Eastern Europe it is Poland where attempts have been made to constitutionalize law enforcement, and until 1997 the constitutional court there had the power of obligatory law interpretation vis-á-vis judicial courts. Law interpretation pursuant to abstract rights and freedoms always draws ideological/political aspects more intensively, and finally this led to open clash between the supreme judicial forum and the constitutional court judges. As a result of the clash the new Polish Constitution in 1997 voided the obligatory law interpretation power of constitutional court judges and their option to intervene in law enforcement. See Poplawska 1998:132-133).

2.2 The procedural law aspect of constitutionalization. As it has been described in the analysis of the constitutionalization of American judicial proceedings, in this domain legal actions are made subject to public law and constitutionalized by overall social groups who join the action alongside private persons directly interested in and affected by the action. *This shifts the emphasis from winning a particular action in the short run to indirect, long-term effects.* That brings along both permanent legal effects (e.g., obtaining a high court precedent which may create legal basis for later claims for a wide range of people affected by the given issue) and the involvement of a broader, political public opinion in the procedure of the action.

Looking at the activity of jurists, judges and lawmakers in Hungary, it can be immediately ascertained in summary that, contrary to the extensive presence of public law litigation and class actions intertwined with political implications in the U.S., these are not frequent in our country. The aforesaid abortion case, which has been the only example, even in terms of substantive law, of any attempt made at constitutionalization, appeared in the media and was considered by political public opinion as a place for clashing with advocates of contrary social views; and it involved the anti-abortion association and the data protection ombudsman, who referred to the protection of a constitutional right, as well as the law politicians of the small group of activist

lawyers who were fighting for an overall constitutionalization of the judicial proceedings. Furthermore, in some of the criminal procedures with ethnic implications it can be observed that the representatives of human rights activist organisations with noticeable media support, the Roma Parliament, the National Ethnic Minorities Legal Aid Office, e.g., take firm action to defend perpetrators of Gypsy origin, and approach the problems of the criminal procedure in the light of constitutional law instead of the criminal law and the rules of criminal code. This phenomenon, however, has not yet evolved in wider areas in domestic jurisdiction.

Dissolving this summary statement and separating relevant legal frameworks, it can be said about the sociological institutional and practical background concerned in the issue that *on the level of legal frameworks nothing would thwart the shifting of judicial proceedings towards public law.*

In civil actions in Hungary, pursuant to the European prime rule, public prosecutors also have an extensive right to enter an action and intervene in an action, although this right has been narrowed by the statutory modifications made after the changes in 1989; also, the Constitutional Court Resolution 1/1994 deemed that a part of public prosecutors' power to enter an action was anti-constitutional. But even today public prosecutors apply to take legal proceedings quite freely when the obligee is unable to defend its rights (see clause (1) §.9 of the Civil Procedure (CP)). Also, numerous special rules of law empower public prosecutors to bring a lawsuit or take firm action in civil lawsuits already initiated (see pp. 36-47 of the explanation of CP), In addition to public prosecutors, social organisations are also authorised by law in certain areas to bring an action or intervene in a lawsuit. Thus, Clause (2), §.109 of Act LIII of 1995 shall empower citizens' environment protection organisations to take an action in general provided that they shall notice any activity that endanger the environment anywhere. Likewise, consumer protection social organisations shall be authorised under §.39 Act CLV of 1997 to do so in the event of any infringement of customers' rights (see pp. 40-41 of the explanation of the CP).

Also, wide legal frameworks for civil actions to attain the function of public law/political actions are created under §.54-57 of the CP, which regulate intervention in a lawsuit. It can be said that they allow intervention into an action on a much wider scale than the above outlined American solutions because there interested parties may intervene on condition that the interest in the action is not properly represented. The Hungarian regulation, on the contrary, does not make the rule subject to this restriction, and "anyone who is legally interested in what the outcome of the action in progress between other persons will be, may, prior to the trial preceding the passing of a judgment by a court of first instance has been adjourned, intervene in order to facilitate the winning of such action by the party with identical interest" (CP Clause (1) §. 54.). And, the points what the legal interest shall be and how directly one shall be concerned is left by the vague phrasing to be determined by the prevailing judicial practice. In the United States in the 1960-70's, e.g., when general political opinion greatly supported the implementation of social changes through law, judges were willing to approve any citizen's compliance with the condition of being legally concerned asserting that as a taxpayer any citizen should be concerned in some way in any legal case with broader impact (see Chayes 1982). In the judicial practice in Hungary the interest by which one is entitled to intervene is interpreted in a restrictive sense; and this regulation has remained problem free primarily because Hungarian civil organisations have not entered in their repertoire the attainment of their goals through lawsuits.

Furthermore, for assigning public law function to civil actions the institution of ‘joinder’ set forth under Hungarian regulation, provided for under §. 51 of the CP, is also at hand. It is in every respect basically identical with the American institution of class action, and a possible change in the strategy of domestic civil organisations can make it a suitable means of pushing actions into the direction of public law as it happened in the United Sates in the 1960-70’s. Clause (c) of the aforesaid Section, e.g., allows the option of applying the institution of joinder, i.e., joint action, in a broad sense provided that “the claims in the action arise from similar content and legal base”.

The joining of criminal actions by wider social groups, possibly associations, is allowed by the fact that §.57 of the Criminal Code secures participation in the action for “other interested parties”. This innocent power under procedural law will, of course, exert a genuine overall effect when other interested parties who appear in criminal proceedings, or, possibly the association (or the representatives thereof) of a wider circle of the interested parties, base their claims on constitutional rights and freedoms instead of the procedural law and criminal substantive law, and thus change the function of the lawsuit. The same applies, as a matter of course, to joining civil actions. Such actions assume public law function also by their substantive law basis being shifted towards constitutional rights and fundamental principles and constitutional court decisions made on them alongside the procedural aspect of mass action. The joint effect exerted by the two domains will actually transform the traditional judicial proceedings.

Thus, in Hungary legal frameworks are available in the domain of procedural law for the constitutionalization of law enforcement; and, in addition to the confining effect exerted by the European law culture, it has been actually the lack of a strategy in this respect of domestic civil organisations that has fortunately safeguarded domestic law enforcement from being shifted towards constitutionalization. It seems, however, that the intense responsiveness of dominant groups in the sphere of intellectuals and the media to the intellectual influence of American intelligent circles, makes this kind of shift more probable in our country than it has been possible in the Western European countries in the recent decades.

3. Political fighting through litigation

In European legal systems continuous political fighting and the competition between various decision alternatives, which have evolved after the attainment of political democratisation (thus, in the Western parts of the Continent since the second half of the 19th century, and in the Eastern parts, in their recreated form, since the political changes in 1989), are organised in parliament and around it. Political decisions becoming state decisions, thus laws, government decrees, etc., constitute the main path for attained results, agreed compromises of political fighting to become law. The different logic of law and politics will be at this point *transformed by an intermediary law politics sphere,* which nears them to one another through a series of transformations. This way the different logic of the two subsystems, the righteous/unrighteous approach in law, the assessment duality of either taking over the government or going into opposition as the logic of politics, will remain more or less intact, and politics will, after all, be able to transfer the majority priorities of the empirical will of the people into the law, the content of acts.

The intermediary law politics sphere between the distinct subsystems of law and politics rests partly on the side of the legal subsystem: in the form of lawyer associations and other professional organisations, which are no longer forums for elaborating law dogmatic models but forums for choosing between them – by paying attention primarily to social consequences and not simply to technical aspects of how to avoid contradictions in terms of law dogmatics when choosing between various regulatory models de lege ferenda. On the other hand, law politics institutions evolve also on the side of the political system as the divisions of the law politicians of each political party: law work teams of parliamentary party factions, law departments and events of party colleges, e.g., can be referred to in this respect. This dual structure of law politics transforms the regulatory models that arise from within the law in two phases, and turns those supported by the majority in parliament into statutory orders. The organisation of law politics can be identified everywhere where a multiparty system and a parliamentary legislature is in the centre of the political system and the legal order. In Western European countries and after the political changes in 1989 in Central-Eastern European countries this law politics model represents the main path for the connection between law and politics.

It is possible to observe another model for connecting law and politics, which *attempts to transfer political aims to the realm of the law through court proceedings*; this model began to develop in the United Sates in the 1960's and became a dominant phenomenon for one and a half decade, but since the 1970's it has been forced back. Owing to American intellectual/political impacts, however, this model has appeared, since then, to a certain extent, in some Western European countries, in spite of the fact of having been forced back in its mother country; and, especially in the new Central European democracies certain jurists show responsiveness to it.

3.1 The evolution of political fighting through litigation

Wherever political democracy and alternative political efforts and interests may be openly asserted, on the sites of law determination opposing political forces will most probably appear as well. Thus, wherever within the legal system high court precedents play a major part in the determination of law, each political group will, understandably, push forward to influence them, because such precedents will determine the possibilities of taking action for thousands of concerned parties later on as law. How such pushing forward towards judicial decision takes place is determined by plenty of structural circumstances. To understand them it is worth comparing the two countries applying common law, the UK and the U.S. where judicial precedent law traditionally plays an important part, because in these two countries, in spite of having a common starting point, political fighting through judicial litigation has developed in strikingly different ways.

In the United Kingdom lawyers and especially barristers, authoritative in determining law, and the judiciary evolving from them have remained internally homogeneous in terms of politics, from first to last, essentially by being rested on the interests of the upper classes interested in the maintenance of the status quo. In most of the cases only political parties have been able to attain political changes in the existing institutions and prevailing solutions. It has contributed to this situation that -after the university training of lawyers the mechanisms of the professional career of

barristers/judges select those promoted on the grounds of their commitment to the existing institutions. Barristers shall enter the circle of the Queen's Counsellors subject to the proposal of the Lord Chancellor, and the appointed shall enter high courts from there, but always from the row of judges one grade lower, thus the judges who accede to the position of Law Lords go through several screenings during a period of long years. This course of the professional career prevents lawyers with activist lawyer's attitude from playing a part of any importance in the determination of the English Law. On the contrary, from 1900 in the United Sates the focal point of tertiary level lawyer's training was more and more shifted to universities, and by the 1960-70's owing to the opening of the universities to the widest layers of society lawyers were recruited from the entire scale of society. Since then American jurists have consisted of black activists who studied Marxism and Leninism, just as well as bellicose feminists, activist lawyers of homosexual/lesbian groups, etc., and combative conservative activist lawyers organised as a reaction against them. And this internal distribution of political camps have taken roots in university departments with staffs of department professors working pursuant to different concepts of law; and, in like manner, renowned feminist activists, black civil rights activists and combative conservative judges opposing them have been appointed to the judiciary, subject to whether the conservative Republicans or the liberal Democrats have given the President of the United States and the legal administration.

These two opposing forms of professional organisation of lawyers have given different chances for political fighting through litigation to evolve; and, while in the UK this has blocked its way, and therefore political forces attempt to attain the changes important for them through parliamentary laws instead; in the United Sates the internal groups of lawyers having become politically heterogeneous and their spreading to most of jurist professor's and judicial positions have provided proper precondition for its evolution.

The lawyers split into political camps would, however, not have been able to establish the institution of political fighting through litigation themselves. And indeed another development, "the rights revolution", commenced after Earl Warren's accession to the Chief Justiceship of the Supreme Court in the U.S. in 1953 contributed to its establishment as well. There are records from earlier of chief justices deciding cases pursuant to constitutional rights and freedoms instead of the provisions of laws, but after the appointment of Justice Warren, step by step, a majority evolved who deemed it possible to reshape the society of the United Sates through litigation for social changes based on fundamental rights. Numerous political efforts had been unsuccessful in getting through the legislation of either Congress or member states because they were supported only by minor groups of society, and the majority of society opposed them. It was in this situation when Warren became Chief Justice, and once Felix Frankfurter who opposed activist jurisdiction had left the forum of justices in 1962, "the rights revolution", the trend of social changes through litigation based on constitutional rights and freedoms, could begin to develop unimpeded.

It was of course also of prime importance that in the 1960's the Democrats gave the Presidents of the United States, first J.F. Kennedy, later assassinated, then Lyndon Johnson, who in their practice of appointing federal court judges promoted with the greatest enthusiasm law professors, activist jurists considered to be the advocates of the rights revolution. Federal court judges so appointed were more and more ready to approve litigation based on fundamental rights pursuant

to the supporting precedents of the Supreme Court, and thus struck down laws passed by Congress and member state courts. Lawyers, citizens, following suit, became more and more "rights conscious", and under the stimulus of support by federal courts based their lawsuits more and more on fundamental rights, avoiding legal actions based on simple provisions of laws.

This development was overwhelmingly supported by the majority of competent dailies and the media, and all this gradually built up a favourable atmosphere for rights service throughout the universities and in intelligent circles. (A typically recurring favourite scene of the films made in the 1960's and 70's showed a simple black workingwoman (a cleaning lady or a secretary, etc.) engaged in a lawsuit, who looking up at the figure over the entrance of the court and reading the words of the Constitution suddenly realised that she had rights and expressing it with simple words in the courtroom put verbose lawyers to shame.) Based on favourable media support and climate of opinion, in the beginning black civil rights movements, then, in the 1970's, feminist movements, and finally, in the 1980's, homosexual/lesbian movements built up their institutions. These three rights movements, which, mostly in association, have been able to dominate numerous American universities and cultural institutions since the 1980's, have set an example for various efforts how to engage in political fighting through litigation. The movements of immigrants, environmentalists, the homeless, protectors of animals, etc. have all attempted to attain their political aims by applying the litigation strategy thus worked out.

Alongside the formulating of political will based on legislature, parties and parliamentary lobbies, all this generated a "secondary political system" in the United Sates from the 1960's, which based on constitutional rights and freedoms led through judicial litigation. This tendency of development, however, began to break more and more since the middle of the 1970's, and during the term of the Republican presidents (Reagan, Bush) in the 1980's was very much forced back, but political fighting through litigation continues to maintain considerable positions.

3.2 The legal frameworks of political fighting through litigation

Lawyers split up into camps within the profession can use judicial action for political fighting only in the event that some rules of substantive law and the code of procedure are redrafted, or reinterpreted, so that instead of/alongside an individual party engaged in a legal action overall social groups may appear in the action and litigate in line with abstract and thus politically easily flexible fundamental rights, instead of simple provisions of laws. Now that the aspect of fundamental rights has been discussed, let us examine the rules of procedural law, which help this process.

One of them is the broadening of the legal term "standing", the right to initiate an action or intervene in an action, which gives power both to the party who is directly and personally involved in the case and parties who are just loosely concerned. This broadening was made in the beginning of the 1960's in the United States, and, as it has been referred to above, there were judges who were willing to approve any litigant party's compliance with the condition of being legally concerned by asserting that as a taxpayer any citizen should be concerned in some way in any legal case with broader impact. A further process to widen proceedings was the broadening of the term 'class action', as a result of which several thousands of people and the lawyers of their

associations could participate in the action: in a damage suit initiated because of the damaging effect of a product of a manufacturing company; for example, or, in a class action against an authority's order. Another form of this was 'public interest litigation', or in other words "public law litigation", which evolved also in the 1960's, the main point of which was that when an overall legal issue or fact was in focus in an action, then anyone who were somehow concerned in the issue could join the action. Social movement lawyers specialised in political fighting through litigation made sure that the lawsuit focused not on simple provisions of law and the restricted legal deliberation thereof, but overall rights issues.

Finally, it was an important legal support in the development of political fighting through litigation that from the 1960's, under pressure of presidential administrations supporting it federal laws were passed which allowed the assumption of legal costs by the state if in a rights action the plaintiff had won the action; and in such proceedings the postponement of the payment of legal costs until the end of the proceedings was permitted.

All these formed the basis, even on the level of procedural law, of the unhindered growth of political fighting through litigation in the United Sates.

3.3 The organisation of political fighting through litigation

The organisation basis of political fighting through litigation is constituted by non-profit, "public interest" lawyer's offices, jurist departments of human rights institutions and various movements, associations. The existence of such organisations en masse in a country is a precondition required for this kind of litigation to develop to a noticeable level simultaneously with traditional litigation. For lack of these, it is vain that the high court judiciary becomes responsive to political fighting through litigation, it is vain that through their decisions they attempt to urge certain segments of society to attain remarkable changes; mass actions will fail, and without sustained effect the entire political fighting through litigation will come to a sudden stop. The supreme judicial forum in India, e.g., following the American pattern, commenced a practice of activist judgement to shape society at the end of the 1970's, but due to aforesaid causes it died out without any effect after a while (see Epp 1998:110).

It was not like that in the United States. There the organisation of political fighting through litigation began as early as the beginning of 1900, although at that time the judiciary firmly resisted the appeal of fundamental rights and their adherence to the law was characterised by a rigid, conservative attachment to the words and phrases of legal rules. When quite rarely they acted firmly against certain laws in line with fundamental rights, even then they did that in the interest of the forces that protected the existing conditions and relations between forces; as in the Lochner case, e.g., which became the symbol of conservative activism for decades. In spite of all these, ACLU (American Civil Liberties Union) the first great fundamental rights organisation was founded in the United Sates as early as the beginning of the 1920's followed by NAACP (National Association for the Advancement of Colored People) that fought for equality of rights for black people and numerous other fundamental rights organisations. Right from the outset the most important one of these had always been ACLU, which had been funded since its setting up by American financial circles interested in changes, and in the beginning this organisation was the

leaven in setting up several similar organisations, both by contributing to their organisation and funding them (see Epp 1998:27-49).

Without these organisations it would have been impossible to launch the rights revolution since legal costs that cover long, multiphase litigation were far more than the financial means of individual litigants. Only the financial support given by ACLU and the other fundamental rights organisation established with its help could guarantee that simple litigation was to be extended to litigation based on constitutional rights and freedoms. Indispensable was the presence of fundamental rights organisations in actions also because with traditional jurist's expertise and methods there would have been no chance for fundamental rights argumentation marshalling facts of moral philosophy, sociology and other branches of science. Only lawyers of organisations specialised in these fields were able to elaborate that.

After these beginnings, by the end of the 1930's, when by breaking the position of the conservative justices who opposed the New Deal the majority of the supreme judicial forum was turned gradually towards supporting the 'progressive' change, the spirit of 'Let's turn society from fundamental rights to progressive direction!' slowly began to spread at the peak of federal judiciary vis-á-vis the conservative majority in the legislature. This had been almost completed by 1947 but finally it was Earl Warren's appointment in 1953 that accomplished the revolution. The readiness of the majority of the justices of the Supreme Court, who turned against the legislature, to apply fundamental rights on an activist basis gave a further push to the development of cause lawyering organisations, and by the 1980's masses of them had been set up (Menkel-Meadow 1998:31-68). Alongside rights legal aid associations either incorporated into movements or built up as ancillary organisations of these, from that time began to take shape *the system of non-profit public interest lawyer's offices*, which were formally independent lawyer's offices just as any normal lawyer's office but the staff committed to specific causes were – and continue to be – actually regarded as activist lawyers, rather than neutral lawyers who worked purely for retaining fee. (The latter were called derogatorily 'hired gun' by activist lawyers contrasted with their unselfish, committed legal work.) But because on the grounds of legal regulations made from the 1960's the funding of constitutional rights litigation from public sources commenced and huge masses of such actions were initiated, alongside the initial committed lawyers entered neutral lawyers working primarily for money; thus, 'lawyer technicians', who worked essentially for retaining fee but continued to maintain a neutral relationship with the case and the client, were now distinguished from genuine activist lawyers (see MacCann/Silverstein 1998:261-292). Since the 1970's in the several hundreds of lawyer's offices of this kind five-six thousand social movement lawyers have worked, including neutral lawyer technicians, and this number has not decreased ever since; although since the 1980's because of the federal judiciary having been shifted towards textual approach to rules of law the chances of this activity winning lawsuits have considerably diminished (Scheingold 1998:118-150).

Litigation based on social movement lawyers (or, as they call themselves 'cause lawyers') show some fundamental differences beside traditional, normal leading of actions by lawyers, and these features well indicate that political viewpoints directly enter the realm of procedure through the various legal aspects kept separately in traditional lawsuits. Five major differentiating features

can be discerned in the legal actions of social movement lawyers compared to traditional lawsuits (see a summary on this in Trubek/Kransberger 1998:202-205).

1. *'Humanising the action',* which means the attempt to confront argumentation confined to traditional legal aspects and the constraint to mould the case into legal categories; and the statement of the facts of the case with as exhaustive sociological data as possible. This kind of action has a great advantage in the American type litigation which is based on an extensive involvement of lay jurors with jurors present, in addition to criminal cases, both in civil actions and lawsuits that fall under other branches of law; and where the advocates of rights activism permanently require that the function of the jurors be augmented. Instead of reduction to legal aspects a wide-ranging statement of facts with emotional, moral, political overtones, addressed as much to the jury as the professional judge – this is what makes an action 'humane'.
2. *'Politicising actions'*, which means that instead of legal arguments and concepts that are traditional and politically mostly neutral (or, as phrased by social movement lawyers: that apply more concealed political considerations) overtly feminist, antiracist movement, etc. legal arguments are used subject to which particular sector of social movements the political fighting through litigation concerned falls under. It should be noted here that the university sections of American social movement lawyers, who have been able to establish themselves since the 1970's and 80's at law schools of universities, have consciously attempted to work out modifications of concepts and out of them systems of concepts under various branches of law which represent overtly feminist, racial (protective towards black or coloured people) or homosexual/lesbian legal constructions. And social movement lawyers use these in actions, preferably avoiding traditional law dogmatics concepts. Because these are, they believe, antifeminist, racist and heterosexually biased.
3. *'Making actions collective'*, which means that alongside the individual litigant as many number of other parties in similar situation are to be involved as possible. As it has been indicated, since the 1960's this has been made possible by joining public interest actions, class actions and by filling the federal judiciary in these years with judges who are responsive in this respect.
4. *'Making actions media events'*, which means that in the procedure of the action alongside the aim of winning the suit appears the aim of presenting the case (and the 'cause of movement') in the mass media. What is more, the broadest possible presence in the media through litigation constitutes an impact which outdoes the benefit of winning of the action, because the 'cause' becomes known to the general public, multitudes of sympathizers might be won, and the initiation of similar lawsuits in other parts of the country pursuant to the pattern presented in the media might be urged. Therefore, social movement lawyers often acquiesce in losing the action when the circumstances of the lawsuit make huge presence in the media probable. This may, however, be in conflict with the aim of attaining an important precedent, which is one of the essential goals of social movement lawyers in rights actions (strategic litigation), and this urges them to refrain from litigation doomed to be lost. And, indeed, materials on 'cause lawyering' notice that quite often raging battles are fought between non-lawyer activists who prefer presence in the media at any cost and activist lawyers of movements who keep strategic legal aims much more in view (MacCann/Silverstein 1998:263-274).

5. *'Emotionalising the action'*, which means that the litigant, often multitudes of parties, and the lawyer share emotional grounds. Social movement lawyers, cause lawyers are not simply 'hired guns' in the hand of the litigant who are ready to put into action their brilliant legal technique on behalf of any client for a proper fee, but 'associates sharing ideas and principles' who live for the 'cause' very much like their clients represented by them. This, however, often gives rise to the conflict that the client, with a view to concentrating on *his or her own particular interests*, might be inclined to come to an agreement and in general attempts to focus on his or her own specific case, while committed 'cause lawyers' fight for the *overall cause*. This tension can be eased by involving in the action as many clients as possible, because that way the all-embracing nature becomes manifest and the social movement lawyer concentrating on such all-embracing cause can act rather free from the requirements of the individual litigant.

All these features can develop in a powerful form if the costs of constitutional rights lawsuit are undertaken by the state, and in this event social movement lawyers will search for the client indispensable for the action purely as a justification; they may even pay, under some pretext, the person formally involved as plaintiff so that they could initiate the lawsuit based on the client. In this event, because the client is not to bear any costs, social movement lawyers can freely shape the action in line with the above-described features. That is why it means the greatest danger for political fighting trough litigation when public funding of constitutional rights litigation is curtailed either by federal or member state legislature; and this has occurred several times in the United Sates in recent decades; to say nothing of the endless number of bills lying submitted to federal and member state legislatures.

After the descriptive presentation let us now briefly look at the track along which law and politics are connected in terms of assessment. While the law politics sphere organised around the parliament is based on keeping the logic of the two subsystems sound, and brings over regulatory propositions from the law dogmatic sphere through double transformation without damaging the closed construction of law, political fighting through litigation takes political fighting and its viewpoints directly into the courtroom. Furthermore, as a precondition of that it politicises law departments of universities, and creates there overtly political law theories, legal constructions that overtly assume political viewpoints. *Political fighting through litigation thus evades legislature and using abstract constitutional rights and freedoms as weapons turns straight towards the courtroom, and with social movement lawyers, university activist law professors or courtroom cause lawyers, realises its goal directly inside law, preferably with huge presence in the media, broadcast live to public opinion.*

3.4 The appearance of signs of political fighting through litigation in Hungary

The legal culture and the organisation of lawyers in Europe do not favour the evolution of political fighting through litigation in Hungary as it has not been the case in other European countries either. In Hungary the organisation of politics takes place rather steadily around the parliamentary field, and the departments of university law faculties are mostly attached to the politically neutral set of traditional law dogmatics constructions. Here the deep-seated attitude of lawyer's ethic represents adherence to dry/elegant argumentation in courtrooms, and the

obligation to exclude direct political overtones. Therefore, political fighting through litigation has not been able to get a foothold even in the countries where constitutional jurisdiction has evolved. (In the beginning, from the end of the 1940's, this referred to Germany, Italy and Austria; then from the end of the 1970's Greece, Portugal and Spain followed suit; and after the political changes in 1989 most of the Central-Eastern European countries have also introduced this institution.) Germany has gone the farthest towards it by acknowledging the effect of fundamental rights in the interpretation of laws, but this legal possibility has not developed into political fighting through litigation, to the contrary, the inclusion of fundamental rights into the interpretation of the provisions of law made them 'embedded in legalese'. That is, it has been more typical that fundamental rights have been supplied with dogmatics and thus 'tamed' than fundamental rights have politicised judicial courtrooms.

After these antecedents it seems surprising that in spite of the fact that the existence of constitutional rights and constitutional jurisdiction in Hungary, as an institution created after the political changes in 1989, goes back only for ten years, but minor lawyer's circles have already set out to exploit the possibilities of political fighting through litigation. Looking at the sources of financing and intellectual motivations, these developments arise directly from the social groups interested in American political fighting through litigation, and they are actually the transplantation of institutions and solutions tested for decades into Hungary. Their basis is represented by the Central European University, the Fudamentum Human Rights and Documentation Centre and some social movement lawyers of various legal aid organisations and movements of various ethnical groups basically built up on the financial basis of the American Soros Foundation. Let us look at what chances they have for introducing the practice of American political fighting through litigation in our country.

What increase their chances are factors primarily outside law. Very strong support from the media creates the advantage which this little group enjoys, and the extremely centralised operation of the media in the capital city shaping public opinion of the entire country as well as personal ties between executives of the press, the radio and television makes this advantage very serious. Political fighting through litigation rests on the media, as it has been the case in the United Sates described above where 'the rights revolution' has been slowly attained also through the media since the 1920's.

Factors inside the law, however, do not favour this law politics strategy. The internal courses of judicial career separated from politics in 1997, and the appointment of judges and their promotion in the hierarchy of the profession is not possible unless in adherence to the patterns accepted by the entirety of the judiciary. This course of the career gives not much chance for activist lawyers breaking away from the European legal culture with a tradition of several hundred years – we can state our hypothesis; and, at this point, reference can be made to the effects arising from the patterns of the English judicial career which also hinder the spreading of activist lawyers for the same reasons.

A further obstacle in the way of the spreading of social movement lawyers is the fact that current Hungarian activist lawyers are almost exclusively university jurists, or legal experts at some organisation, but they may not act as lawyers. The few lawyers who quite frequently use human

rights motives in their argumentation, either for defence against the abuses in the phase of police investigation in criminal cases, or when threatening to apply to Strasbourg after having lost a case at home, are broadening the range of traditional tricks of lawyering rather than actually acting as social movement lawyers.

Among university jurists, however, a climate of sympathizing with social movement lawyering is more intensely present but it is probably based on the fact that they are not fully aware of the effect exerted by social movement lawyering and political fighting through litigation on the material of specific branches of law – and specific law departments! The positive attitude means much rather that "After all, constitutional rights represent a highly noble aim!" And, this, looking at it in itself, is true.

As a conclusion, it should be noted that in the United States the euphoria of the 1960's and 70's, once the effect of political fighting through litigation endangering the legal system had been experienced, was followed by a vehement reversal, and by now political fighting through litigation has become just a shadow of what it used to be. Information regarding this was totally lacking when after 1989 we began to introduce constitutional jurisdiction as a counterpole of dictatorship, and public opinion often regarded the taking of constitutional rights further to the courtroom of normal forums of justice as the augmentation of democracy. This article can be nothing else but a brief introduction to throwing off one-sidedness.

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