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# The Limits of the Power of Judges

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## 1. Crisis of the elected democratic representation in Bohemia and Moravia

In the last decade, there has been a parliamentary crisis of the elected democratic representation. This is caused partly by the election system, which usually produces governments based mostly on a wide unstable coalition. A government's average lifespan is less than two years.<sup>1</sup>

1 Since 1992, when the four-year parliamentary term and the subsequent governmental term was established, there have been 15 governments – the first government of Václav Klaus between 1992–96, the second government of Václav Klaus between 1996–98, the government of Josef Tošovský in 1998, of Miloš Zeman between 1998–2002, of Vladimír Špidla between 2002–04, of Stanislav Gross between 2004–05, of Jiří Paroubek between 2005–06, the first government of Mirek Topolánek between 2006–07, the second government of Mirek Topolánek between 2007–09, of Jan Fischer between 2009–10, of Petr Nečas between 2010–13, of Jiří Rusnok between 2013–14, of Bohu-

Petr Fiala sees the only solution in the change of the election system aiming at creating a stable political government: “If we do not do it... we should not wonder and be offended by the political performance (of both the government and the parliament), since it is simply not possible to do it much better in the existing system.”<sup>2</sup> In 2013, President Václav Klaus said: “Not the power abuse, but weak governance has become the main problem of the Czech politics in the last more than fifteen years... The sticking point is also the election system contributing to the existence of weak governments... The system of proportional repre-

slav Sobotka between 2014–17, the first government of Andrej Babiš between 2017–18, and the second government of Andrej Babiš from 2018 until now. However, only two governments were in power for the 4-year term anticipated by the Constitution – the first government of Václav Klaus and the government of Miloš Zeman. P. Fiala, *Politika, jaká nemá být*, Brno 2010, p. 18, 26–29.

2 P. Fiala, *Politika, jaká nemá být*, p. 28, 48.

sentation creates fragile and politically heterogeneous coalitions that are exposed to permanent crises.”<sup>3</sup>

Another fact is a permanent growth in medializing everything that relates to politics. Politicians have come under such scrutiny of media that only the very strong individuals realize their political visions. Others are trying to hide behind somebody else not to be seen. This pressure is purposefully aimed at the elected politicians. If a politician gets drunk, it is in the news immediately. If a judge does the same, it usually remains without notice or the affair quickly fades away. Judges are not the subject of such media pressure as politicians. Let me give you an example. Number of people in the academic sphere in Bohemia and Moravia acquired associate professorship or professorship in Slovakia. If a judge from highest courts or the Constitutional Court obtained this title that way, it is not the subject of public debate. If this title is acquired by an academician who is also a politician, immediately there are speculations as to whether it is a proper title. Of course, it is. It is usually the consequence of not-so-good relations in the domestic workplace.

The aforementioned leads to the loss of authority of the elected representation in the public sphere, that is to say of the parliament and the government, and to the transfer of authority to courts, namely administrative courts and the Constitutional Court. This trend is supported by the weak political representation itself and by taking the disputes over political direction – which should have been and should be decided primarily by the ballot boxes – to courtrooms, because the opposition regularly takes its loss in the Parliament to the Constitutional Court. An activist Constitutional Court does not hesitate to grasp the offered opportunity and enters, under cover of constitutionality protection, the political arena of the opposition against the coalition.

Lenin’s words about the seizure of power by the Bolsheviks can be used here: “Power was lying on the street, so we picked it up. It is now picked up by the constitutional courts. The Constitutional Court is, however, only one of the state authorities with an indirect bond to the people as the source of power in a democratic state. Democracy may be weakened,

but the government of elected is still its essence. And I see nothing better than democracy, at least for now.”

The judiciary in a democratic state should not become a political tool in the sense of implementing the objectives of power of its representatives. If that happens, it is owing to the judicial activism, so to say owing to the judges themselves.

These are constitutionally conforming tools of strengthening the power of judges. There will always be power in the state. If the power of the parliament and the government, either formally or informally, weakens, it is transferred somewhere else – to the judges and central bank councils, which are the bodies not primarily established by elections.

Such a sceptical attitude towards judges can be found even in the New Testament in the Gospel according to Luke in Jesus’s words: *In a certain town, there was a judge who neither feared God nor cared about men. And there was a widow in that town who kept coming to him with the plea: “Grant me just against my adversary.” For some time, he refused. But finally, he said to himself: “Even though I do not fear God or care about men, yet because this widow keeps bothering me, I will see that she gets justice, so that she will not eventually wear me out with her coming!”*<sup>4</sup> It is a picture of a judge who acts well only to set himself free from a party in the dispute.

## 2. Material core of the Constitution and cancellation of constitutional laws as an uncontrollable source of judicial power

However, a new element joined the game – theory of the material core of the Constitution and attempts of some judicial courts at seizing the cancellation of constitutional laws without the explicit constitutional authorization. Even with the great factual power, the judges in continental law were considered interpreters, not establishers, of the law. The truth is that an interpretation may be very extensive but the judges were not those who grasped the roles of constitutional establishers. Material core of the law alone is nothing new. In the past, the states expressly recognised the priority of the right of God, which is still binding for the believers nowadays. The contents of the right of God

3 V. Klaus et al., *Česká republika na rozcestí. Čas rozhodnutí*, Praha 2013, p. 95, 96.

4 Luke 18, 2–5.

has been obvious for millennia and its interpretation cannot be arbitrary today. It is possible not to obey it, but then it is obvious that it is not obeyed. Even the pope as the Christ's deputy on Earth, although there were popes with great powers, is only an interpreter, never the creator of the right of God. That is his limit, restriction of his power. If a pope does something bad, his position as the pope does not change the nature of the deed. Even Alexander VI, the famous Rodrigo Borgia, could commit sins against the right of God, but he did not have the power to pronounce his sins the right – he was not the creator of the right of God as the material core or the transcendental source of the human right.

ple may always be changed by the people, although it pronounces itself to be eternal. A transcendental rule may only come from a transcendental legislator. If the transcendental source (creator) of a right is God, the judge is subject to it. If it is another material core (focus) of the constitution, it is created by the judge and the judge is superior to it, he plays the God himself. An attempt at a transcendental and thus unchangeable rule without God is an attempt at the third path in law. From the viewpoint of Christianity and Judaism, it is an idol, since there is no God other than the God, there is no other transcendental legislator.<sup>8</sup>

Power is tasty and its tastiness was described by Ladislav Mňačko, a famous Slovakian and Moravian



## Judges should always be considered interpreters, not establishers, of the law.

However, the theory of the material core independent of the right of God is newly applied, whereas it is factually created with reference to unchangeable and perpetual provisions of the constitution by the judges. Especially the judges of the constitutional courts through appropriation of the power to cancel a constitutional act.<sup>5</sup> This way, they react to the fact that the human right may be changed anytime by the people and they search for its new transcendental basis. In the words of Ernst-Wolfgang Böckenförde: “A free, secularized state lives from the presumptions that it is not able to guarantee.”<sup>6</sup> In the words of Petr Hájek: “... a person who lost God is left to the mercy of – a person.”<sup>7</sup>

The creator of a rule is the master of the rule and the rule depends on them. A rule created by the peo-

writer born in Valašské Klobouky in Moravia. The judges enjoy it, too. Thus they have higher responsibility to prevent themselves from unlimited disposal of this power, prevent themselves in the gradual process of connecting the power to interpret the law with the power to create constitutional rules by making themselves superior to the democratic constitution-maker.

### 3. Democratic point of view

There is no other legitimacy in secularized democracy than the consensus of the majority. Although the government of the majority has its problem points as any other government, it is the essence of democracy that cannot be removed without the state losing its democratic regime. In democracy, a citizen is the subject and object of the power. He/she is subject to the power but can wilfully co-create it, since he/she elects those who co-decide. During deciding by constitutional courts, central banks and similar institutions, a citizen is the object of the power, its vassal. He/she cannot participate in the decision-making.

5 Z. Koudelka, “Zrušení ústavního zákona Ústavním soudem”, *Státní Zastupitelství* 11, 2011, p. 9–23.

6 E.-W. Böckenförde, *Recht, Staat, Freiheit. Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, 2<sup>nd</sup> ed., Frankfurt am Main 2006, p. 112; P. Holländer, *Ústavní změny. Mezi neurózou a surrealismem. Ústavné právo 20 rokov po páde komunizmu*, Plzeň 2011, p. 8–9.

7 P.P. Hájek, *Smrt v sametu*, Praha 2012, p. 85.

8 Z. Koudelka, “Transcedentální pramen práva”, *Trestní Právo* 11–12, 2013, p. 10–21.

Most of the democratic states introduced the rigidity of the fundamental legal rules called constitutional. Thus, in order to create or amend them, it is not enough to have simple majority – qualified majority is required. This secures a wider consensus of the society over constitutional rules in comparison with the lower consensus necessary for the adoption of ordinary acts. This wider consensus is accompanied by higher stability of constitutional rules. Nevertheless, the determination of constitutional rules remains in the hands of the parliament as a representative group elected by the people or is decided directly by the people in a referendum or there are various combinations possible. Everything remains within democracy which, in its essence, does not and cannot have a different basis of the sovereign power than the people.

Democracy is based on trust in people, which is fully expressed in the words of Tomáš Garrigue Masaryk: "...democracy is an opinion of life, it lies in trust in people, humanity and humanness, and there is no trust without love and no love without trust."<sup>9</sup> The quality of a democratic government is dependent on the quality of the majority, which gave the power to govern to the power holders.<sup>10</sup> This quality either exists or does not exist, but the consent of the majority as the source of government in democracy cannot be replaced. Other sources of government are possible but not in democracy.

If we accept the existence of a legally undefined material core of the constitution and thus the possibility of cancelling constitutional acts by the Constitutional Court for other reasons than a defective procedure of their adoption, then in reality, the superior state body becomes the Constitutional Court which takes off people's sovereignty and seizes it by itself. Constitutional judge Jan Musil said: "...adopted solution (cancellation of the constitutional act – author's note), in my opinion, violates the subtle balance between the principles of democratic nature and lawfulness to the harm of the principle of democratic nature." Then he

continues: "This trend is the expression of the elitist concept of the "law interpretation key holders", which has regularly repeated itself in human history. In my opinion, it is a destructive concept not leading to good endings." He also recalls Churchill's comment describing democracy as the best of all bad governing models. The constitutional court gains the rule in the state, its sovereignty.<sup>11</sup>

The extent of performing the power based on the material core of the constitution depends only on the self-limitation of the Constitutional Court. That is in the situation when it is secured by the material core of the constitution, however, without its express defining by the constitution-maker, which leads to uncertainty as to the understanding of this concept by the Constitutional Court. The rule factually applies to each uncontrollable power holder. It can cancel whatever and explain it with the interpretation of the material core of constitutionality. Although, at first, each power holder argues with the necessity of a correct result before the correct process, it is only a question of time, when the result is arbitrariness. Radoslav Procházka talks about a "gospel over freedom, the protection of which stops being, in the regime of a preferred correct result before the correct process, perceived as the first and the fundamental reason of existence of a state".<sup>12</sup> American judge Learned Hand talks about the desire of some judges to be superior to the parliament: "I would have hopeless feeling, if I was to be ruled by a group of Platonic guards, even if I knew how to select them well, which I definitely do not know. If they were making decisions, I would lack the impulse contained in the possibility to live in the society, in which I at least have a theoretical participation in the administration of public affairs."<sup>13</sup>

11 J. Musil, points 13, 17, 20 of part III. *Změna paradigmatu demokratického a právního státu* of his dissent standpoint to resolution of the Constitutional Court dated September 15, 2009, no. Pl.ÚS 24/09 in the matter of constitutional complaint against reduction of the term of Chamber of Deputies by a constitutional act.

12 R. Procházka. *Lud a sudcovia v konštitučnej demokracii*, p. 7.

13 L. Hand, "The Contributionsofan Independent Judiciary to Civilization", *The Spirit of Liberty*, New York 1952, s. 73–74; R. Procházka, *Lud a sudcovia v konštitučnej demokracii*, p. 98–99, 105.

9 K. Čapek, *Hovory s T. G. Masarykem*, č. 3: *Myslení a život*, kapitola *Politika*, podkapitola *Demokracie*, Praha 1990, p. 328.

10 R. Procházka, *Lud a sudcovia v konštitučnej demokracii*, Plzeň 2011, p. 55.

If we replace the people with the Constitutional Court, we are replacing democracy with another regime.

Pavel Hasenkopf sees the doctrine of the material core of the constitution as deeply undemocratic: “The doctrine of the material core of the constitution itself is very problematic... This vague basis can be used to reason basically everything regarded by the Constitutional court as incorrect, and any time it is given opportunity to do so. This doctrine is deeply undemocratic, in its very essence... In other words, the judicial power exceeds the borders of its own powers to the harm of the constitution-holder.... And it is up to the responsibility of other state bodies not to make this approach, completely denying legal safeguards, a common method of legal interpretation.”<sup>14</sup>

The popularity of the theory of material core of the constitution may also be supported by the disappointment from the practice of parliamentary democracy and party politics, as well as the efforts at attaching to some other non-elected human authority – Constitutional Court. However, there is only the people and God above constitution-maker in democracy. If somebody refuses God, only the people remain. If we replace the people with the Constitutional Court, we are replacing democracy with another regime. Trust in courts may lead to disillusion just as in the case of party politics. People-judges are as good or bad as people-deputies.

The USA example clearly shows how the Supreme Court restricted the rights of the people and supported slavery in the 19<sup>th</sup> century. This issue was decided by the people to the disadvantage of the court in the civil war of the North against the South subsequently. But even then, the Supreme Court promoted the preservation of racial segregation. In 1857, the U.S. Supreme Court used the case of *Dred Scott*, a slave, to determine that slaves are not part of the people and citizens who have the right to freedom and cannot claim any rights whatsoever, including court protection. In addition, it proclaimed the laws of the Congress which forbade slavery in some states unconstitutional, which was the

second case of applying the court’s possibility to proclaim the act unconstitutional and annul it after the first case in 1803 (*Marbury v. Madison*).<sup>15</sup> After the war of the North against the South, constitutional amendments were adopted – the Thirteenth Amendment in 1865 forbidding slavery and serfdom, the Fourteenth Amendment in 1868 of equality of citizens and a regular court process, and the Fifteenth Amendment in 1870 forbidding election discrimination based on the race. In 1875, the Congress adopted an act on civil rights containing a ban on discrimination. A part of this act was proclaimed unconstitutional by the Supreme Court, when the court admitted that a black man might be refused a job in public accommodation. In its following decisions, it also admitted racial segregation in the education system, transport and other services. Its concept of equality was based on the statement that if there is segregation on railway, both the blacks and the whites must have the same services available, albeit separated first classes and sleeping cars.<sup>16</sup> The decisions of the U.S. Supreme Court made in the 19<sup>th</sup> century show that judges may fight with the democratic parliament based on the principles that we today see as unacceptable. Some anti-segregation decisions of the U.S. Supreme Court from the second half of the 20<sup>th</sup> century are only remedies of the preceding undemocratic acts of this institution. And it was the U.S. Supreme Court, which sanctified the mass internment of American citizens of Japanese origin during World War II for the reasons of their origin.<sup>17</sup>

The desire of those who are not able or willing to enforce their ideas by a regular change in the law and by defending their issues in elections, but only use their power regardless of the law, is aptly characterized by the statement of the Nazi legal theoretician Carl Schmitt: “We are changing the comprehension of

14 P. Hasenkopf, “Jak to bylo s ratifikací Římského statutu Mezinárodního trestního soudu”, *Právní Rozhledy* 20, 2009, p. 732.

15 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). H. Petrův, “Kruh americké koncepce rovnosti (Od diskriminace menšin k diskriminaci většiny)”, *Právník* 10, 2008, p. 1085–1086; R. Procházka, *Lud a sudcovia v konstitučnej demokracii*, p. 5–6.

16 *The Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Mc.Cabe v. Atchison, Topeka & Santa Fe Railway*, 235 U.S. 151 (1914); H. Petrův, “Kruh americké koncepce rovnosti...”, p. 1089–1093.

17 *Korematsu v. United States*, 323 U.S. 214 (1944).

legal concepts... We are on the side of future things.”<sup>18</sup> In other words, if I lack democratic majority to properly change a legal rule in the parliament, I give it new contents through the court. But what are those future things? And do we all want them or is it just a certain group of us?

An example is the introduction of same-sex marriages. Sometimes the advocates of their legalization take the road of a political fight through parliaments and referendums. This road led to success in catholic Ireland on the 22<sup>nd</sup> May 2015, when the referendum accepted the possibility of a marriage of two peo-

And are 5 people superior to the thousands of members of the U.S. Congresses and the member states, who have a constitutional right to a constitutional change? And do the judges stop there? Certainly not. It is only a question of time when somebody wants to recover polygamy. After all, the USA have experience with the polygamy of the Mormons. The fundamental life questions should be decided by a sovereign. Even some judges realize so. The Chief Justice John G. Roberts as the member of a disagreeing minority of judges stated to the advocates of the change: “They are not celebrating the Constitution. It does not have



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ple regardless of their sex, or in Finland, where this requirement was legalized in February 2015. In some other countries, these efforts are taken by a court fight. When the defenders of this understanding of marriage lose their fight through political tools, they try to recover the change as their constitutional right.<sup>19</sup> The courts then change the comprehension of legal concepts. In 2015, the U.S. Supreme Court pronounced the prohibition of homosexual marriages practiced in some states of the American union unconstitutional.<sup>20</sup> Thus its close majority of 5 to 4 accepted the new concept of marriage as a union of two women or two men. I am positive that the originators of the American constitution in the 18<sup>th</sup> century would be surprised about what they are being told by the Supreme Court in the 21<sup>st</sup> century. In those times, other marriage than bond of a man and a woman was unthinkable.

to do with it. (...) This court is not legislature. Whether a homosexual marriage is a good idea should not be our interest.”<sup>21</sup> Justice Antonin Scalia wrote: “Today’s decision means that my ruler and the ruler of 320 million Americans from one coastline to another is the majority of nine lawyers of the Supreme Court. This standpoint expands the court powers in such a manner, of which the Constitution or the amendments did not even think. The practice of such constitutional revision of the unelected committee of nine, always supported by a great appraisal of freedom, robs people of the most important freedom enforced in the Declaration of Independence and won in the revolution of 1776 – the freedom to be their own rulers.”<sup>22</sup>

The sovereign in democracy is the people who can decide either directly or through their temporarily elected representatives. If the decisions are made by judges not elected by the people, who hold their offices for a lifetime or for a very long time, democratic quality

18 C. Schmitt, “Nationalsozialistisches Rechtsdenken”, *Deutsches Recht*, 1934, p. 229.

19 B. Banaszkiwicz, *The New Wave of Interest in Marriage in Constitutional Law. Reflections on the Central European Experience*, Warszawa 2016.

20 Decision of the U.S. Supreme Court from the 26<sup>th</sup> June 2015. *James Obergefell, et al., Petitioners v. Richard Hodges, Director, Ohio Department of Health, et al.*

21 Introduction of the dissent standpoint of the Chief Justice John G. Roberts, p. 2, [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf) (10.12.2020).

22 Introduction of the dissent standpoints of justices Antonin Scalia and Clarence Thomas, p. 2, [http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf) (10.12.2020).



given as the governing of the elected and the governing for time are reduced. Such change in the fundamental characteristics of the state is possible, however, it must be made by amending the constitution, not by violating pro-judicial interpretation of the judges as such.

#### 4. Conclusion

Judges are people, their legal education does not make them any better, and even they are attracted by the power and try to adapt the rules to their advantages. That is corroborated by the President of the Constitutional Court in Brno, Pavel Rychetský, who let himself be reappointed not only the judge of the Constitutional Court in 2013, but also its President. This way, his act denied the reasoning of the finding of the Constitutional Court<sup>23</sup> preventing other court Presidents from

dispute between the right and the wrong, is absolutely incorrect and rebut in history countless times.... Or did the lawyers prevent totality regimes from existing and working? Did not the judges assist in the crimes of fascistic and communist justice?"<sup>25</sup>

"Judicial state" existed in Bohemia and Moravia in times of World War II, when the emeritus President of the Highest Administration Court, Emil Hácha, was the state President of the Protectorate of Bohemia and Moravia and Jaroslav Krejčí, who from 1938 and during the Protectorate had held the function of the President of the Constitutional Court, was the long-term Prime Minister between 1942–45. Great lawyers, poor politicians, who remained in their functions even after the Lidice massacre. Regretfully, judges often fight for democracy and human rights in the



## Regretfully, judges often fight for democracy and human rights in the time when the state is democratic, not in the time when it is needed to go to the barricades.

repeating their functions. Rychetský's words seem hypocritical after having himself reappointed the President of the Court: "I have been a long-term permanent opponent of the possibility to repeat the mandate of a judge of the Constitutional Court. I reckon it should last longer but should not be repeated."<sup>24</sup>

The assessment of judges and lawyers may suitably be used in the words of Jan Musil, a judge of the Constitutional Court in Brno: "The idea that lawyers may be those, who in the final instance manage to solve the

time when the state is democratic, not in the time when it is needed to go to the barricades. How odd are in this relation the words of the President of the Constitutional Court, Jaroslav Krejčí, from the times when he was its secretary, when in reaction to the prevention from a scientific research in Germany and to defend the legality of the Night of the Long Knives by Carl Schmitt<sup>26</sup>, he stated: *It is natural that under such circumstances, when objective scientific work may not only be inconvenient, but also dangerous, decent*

23 Část IV. výroku a část V.e, bod 65 of the reasoning of the finding no 294/2010 Coll. (Pl.ÚS 39/08). Z. Koudelka, "Funkcionáři justice a ústavnost", *Trestní Právo* 2, 2013, p. 4–9.

24 J. Rychetský, "Šéf Ústavního soudu Rychetský o soumraku civilizace a Zemanovi", *Parlamentnilisty.cz* 30.10.2013, <http://www.parlamentnilisty.cz/arena/rozhovory/Sef-Ustavniho-soudu-Rychetsky-o-soumraku-civilizace-a-Zemanovi-291453> (10.12.2020).

25 J. Musil, *Změna paradigmatu demokratického a právního státu*, Bod 23, část III of his dissent standpoint to resolution of the Constitutional Court dated September 15, 2009, no. Pl.ÚS 24/09 in the matter of constitutional complaint against reduction of the term of Chamber of Deputies by a constitutional act.

26 C. Schmitt, "Der Führer schützt das Recht", *Deutsche Juristen-Zeitung* 15, 1934, p. 945.

lawyers become silent.<sup>27</sup> Neither he, nor others stayed silent as lawyers even after occupation in 1939 and collaborated with the Germans.

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27 J. Krejčí, *Problém právního postavení hlavy státu v demokracii*, p. 7.