

Judges in democracy: The relation between the Judiciary, the Executive and the legislature.

1.-Introduction.-

The paradigm of the Constitutional Law State is actually, a double subjection from the law to the law, who affect the form and the substance, formal legitimating and essential.¹

We can add next approaches made by Ferrajoli: in consideration of discretion and the subjection from both Kinds of rules, it is not true that the value of law depends -like Kelsen estimate only from formal requirements, and the legal modern reasons by like Weber "wise"- only a formal rationality: "all fundamental rights, including those of freedom and negative duties who restrict his interventions" are equivalent to substantial bonds who conditioned the value of the norms, and express also the purpose of the Constitutional Law State.²

2.- Formal democracy and substantial democracy.

2.1.-I think it is a logic development, to arise in the question of rights and securities to citizen.

And there, we can refer real democracy and formal democracy. And we can add that "fundamental rights configured, like other substantial bonds that are imposed to the political democracy: negative bonds, generated by the rights of freedom, by any majority can't violate, positive bonds generated by social rights that any majority can't leave without satisfaction.

¹ .- Cf. Ferrajoli: "Derechos y garantías", p. 22

² .- ob. Cit. P. 22

And the political democracy, which is identified with the figure of that who can be decided, delimited and perpetuated by the rights. Not any majority, even unanimity cannot legalize lawful and resolve the violation from a right of freedom.

Basic rights, who are secured for everybody, and to evade of the political, is the sphere of undecible who, and the undecible not.

One Constitutional State of right is, normally, an imperfect order, and we can't think in a perfect coherence and fullness of the system in different levels.

The perfect plenitude is produced in the absolute State.

A substantial conception of democracy, who secures basic rights of citizens, requires the possibility of matters not covered by the statute of law. In this sense, the possibility of a invalid right- that, of a divergence between "normality" and effectiveness, between to must be ant to be from the right- is the previous condition of the Constitutional State of right, and also the substantial dimension of democracy.

And also we can talk about securities, who assure the maxim efficacy of basic rights in accordance with Constitution.

3.- The role of the Judge and the domestic legitimating of his independence.

The subjection from the judge to the constitution, like a responsible of the fundamentals rights, constitutionally established, is the most important and actual basis legitimating of the Constitution and also from the independence of the Judiciary Power respect the others powers – Legislative and Executive-.

The circumstance that the fundamental rights who are in the basic democracy, guaranties all and each one unconditional serve to establish Judiciary Power independence.

And then, the fundamentals of the legitimating from the Judicial Power and his independence are the equity of rights: this is the basis of the demand of a impartial and independent judge.

This legitimating does not lead from the majority: it is founded in the intangibility of fundamentals rights.

We judge the principle of majority, because contradict the principle of legitimating: no one majority can make true that who is counterfeit, and legitimate a groundless sentences, when she is decided without proofs.

Considering those principles, no one consensus, even the majority or the accused, can be valued like a criterion of formation of the proof. Warrants of rights are not repeatable or disposables.

4.- The Division of Powers and his effects.-

We can say that the question is the link between the three classic Powers. When this problem is translated to the functioning of the judicial system – and it is a permanent problem in Procedural Law – it appears interested problems of functioning, conducted to preserve the effectiveness and transparency from judges' proceedings.

Barrios De Angelis ³ says, as the situation of a Tribunal, is opposite to the parties, but he also participate in the interest to maintain the judicial order.

From this development, we can infer the concept of impartiality, structural-when the interests of the object are strange to the tribunal-, or functional, who is objective and who give raise from a duty of objectivity.

The structural impartiality, arise even the Supreme Court, because she has the administration of tribunals; but also arise each office of Tribunal when decide about regularity of process acts.

And we can include the attributes that usually are given to the judicial organs: independence, authority and responsibility.

We can add that independence is a supposition from impartiality, and consist in not be submitted, don't be obliged to obey, in the exercise of the functions, to orders, instructions, indications, pressures from any organ or person: at last, the independence is a postulate belonging the people dignity.

Referring the tribunal's authority, they permit to demand to the others public organs, the collaboration and the public force (cf. art.168 inc.23 of Uruguayan Constitution)

³ V. Barrios De Angelis- Teoría del proceso. Buenos Aires 1979-pag.116 y sigs.

In my opinion, this authority is more than roman auctoritas: is a party of imperium.

It has been indicated, that there is a second expression of authority, who made that acts of the others public organs with be performed by the jurisdiction, but not in the invoice sense.

Finally, referred to responsibility, alluded by Couture ⁴, he has a compensatory contents, with the attribute of the jurisdiction organ.

We will see, latter, that procedural doctrine have engaged that question: about judicial independence, from 1930 Chiovenda and Calamandrei have approach this important matter

The World Association of Procedural Law has a special dedication to this theme, in 1983,⁵ and 1991. ⁶

Also entail problems were studied at Utrecht Congress of 1987, and Vienna 1999. Then, we affront a question with an increasing contents, in the middle of a translation of problems to judges, and they are usually a few (and don't have enough impartiality or are not obey adequately)

This is the basis of the need to establish minimum standards, like in Bangalore, or by the ABA, or the proposed statutory we are now considering.

5.- Some references of the theme

5.1.- The 7th International Congress of Procedural Law (Würzburg 1983).

One of the Congress topics was "the independence of judicature in the present time of law"⁷.

The general reporter take some expressions from Prof. Shetreet, when he establish that Courts are entailed with the function to resolve disputes on the society: basic premise in a civilized society...is the general rule to exclude the justice by own hand... and the conflicts to be resolved by tribunals must determinate rights and duties of citizens.

⁴ .- Estudios de Derecho Procesal T.1 pag.90

⁵ .- Vèscovi – p. 161 /214 Actas del Congreso de Würzburg

⁶ .- Shetreet – p. 113/194 Libro de Ponencias

⁷ - Vèscovi- from Uruguay

In Constitutional conflicts they must determinate rights and duties of individual citizens, and rights, powers and immunities of the government and in penal matter... they are called to resolve differences when there is a dispute between State system and the violations of Law.

5.1.1.

In the conclusions, is signalled the independence from the Judiciary against the Legislature. But between the special case who must be solved and the law, there is a long way to obtain a free and independent conclusion: different judicial systems authorize the judges to control legal acts, but also parliamentary control or special courts- changing the principle of legal judge- and altering legal system

5.1.2- Judicial independence against the Executive

The Executive is normally a political organ, and in this way, it removes judges, "judging" their conduct.

Those irregularities were an impulse to create the Judicature Counsels in several countries -Italy, Argentina, for example- with the participation of Judiciary Power, Executive, and lawyers Bars. The budget of Judiciary, when it is administrated by Executive makes an affectation of the independence of Judiciary.⁸

5.2 Independence of judges in their individual proceedings.

In this sense, there are different problems entailed with the nomination of judges (who design); to the free election of judges, of the guarantees of the independent exercise of his function, retributions, to be dismissed, etc.; and also special problems with judicial responsibility⁹.

Finally we can note the reference of the influence of modern factors: economic groups, political groups, social organizations, etc., who many times pursues act to pressure groups to the judges.

⁸.- In this moment, Uruguayan Supreme Court claim a modification of Constitution , in this sense.

⁹.- cf. Cappelletti-II Congreso of Comparative Law Academy-Caracas 1982

In some situations, the judge must be far away of the community, in the interpretation of the law: he can't be a social reformer: this is a work to Legislature, and even to the parties.

6.- The Lisbon-Coimbra Congress of 1991

6.1 From Würzburg to Coimbra is the time of United Nations: the 7th. Congress about Prevention of Crime -1985- and Draft Basic Principles about independence of lawyers and other connected problems (C.I.J)

6.2.- At Coimbra International Congress for AIPL, the theme of judicial independence and his entail with the powers separation, indicate that independence can be protected or not, even with constitutional norms: it is necessary the support of the community¹⁰.

And the reporters remember, the problems of the criminal system turns slow and finally incite the decrease of users.

The independence of judges is based in the principle of responsibility of acts and omissions by judges.¹¹ It is important to assure that control over judges is not made only by the Executive or Legislative.

In our legal system, it is necessary the senate permission to design Ministers from Appeals Tribunals, and designation of Supreme Court Ministers needs Legislature approval.

The most important are the norms who establish the causes of dismissal, the criteria to establish the retribution, etc.

6.3.- The most important attitude from the judicial system, is the resolution of conflicts, and in some places, as referred in Civil Law, they don't create "laws", because the system of precedent is not obligatory.

All kinds of problem arrive to tribunal, that is to say a civil problem, or constitutional, or criminal.

¹⁰ Cf. Shetreet paper

¹¹ Cf. Shetreet paper

And also we can add military justice, with competition in military offences, and in time of war -in some places, by constitutional norm-.

At this time, we arrive to the new structures in judicial matter, who we can call judicialization of the society: political organs, and even legislative organs, who cannot decided adequately internal problems, don't find a best solution to let those in justice hand (In the constitutional Uruguayan system, this is a task from Contentious Court: a jurisdictional Court with special powers, but not a Constitutional Court).

An the problem is, how can justice, the minor of three powers, with less personal, sometimes less retribution, exceeded in normal cases to be resolved, to dedicate efforts, to give a solution to problems, who, constitutionally exceed his normal competence?

It is a task, that somebody be engaged of the State problems, but there is a principle, the power separation, who establishes brakes and counterbalances who carry away the work of justice in actual time.

It is necessary to establish Constitutional Courts for this new era. In the meantime, collaboration of judges, lawyers and government technicians can help special solutions, and also consultative decisions of International Courts.

¹².

6.4.- Which is constitutional position of the judicial system?

Sometimes it is established by the law, and another times, not too much but important, by constitutional standards. This is common in the denominated "rigid constitutions", and is diverse in countries without a write Constitution-like Australia, f.e.- In the rigid Constitutions, different outlooks about judiciary organization, and rights, duties, and securities; the limits of individual freedom are anticipated in the Constitution. This is a warranty to citizens but also make difficult to bring up to date the norms.¹³

6.5 Substantial independence

¹² .- So, CIDH (Pacto de San José) and decisión of internacional Court of Justice, etc.

¹³ Cf. Greif- La tutela constitucional del Proceso-en libro de homenaje a los 100 años de la UFMG, pag.139.

As we have noted, substantial independence of Judges, refers the law and the conscience, his neutrality, his impartiality and his freedom, in front of the external pressures – the art.84 of the law 15.750 establish the absolute independence of the judges in the practice of jurisdictional function, and the immovability during all the time they have a good conduct, nevertheless they can be accused in legislative power, in the case of violation of the Constitution or others serious crimes (cf. art.250 Constitution), and also they are ceased when accomplish 70 years old.

And the judge must be impartial, he must to take alike: he must act with honour.

But others norms take care of his immunity: in this sense, they are exclusive norms who permit judge inhibition that is decided by a superior judge or tribunal.

6.6 Personal independence.

To preserve personal independence of judges, it is necessary that the duration and conditions of the position must be reasonably assured.

The problem of the extension of job, cited before- 70 years old, and 10 years at the Supreme Court-, is another theme.

The Constitution establishes also who name the judges (the Legislature or Senate, or the Supreme Court in some cases). The retribution is established by a special law. (90% of a Minister until 25%, depending the position).

On the other side, the Constitution establishes that budget is made by the Executive and cannot be surpassed by Legislative: it is a limitation of independence, and the Court asks for a constitutional change.

6.7 The collective independence.-

This kind of independence, allude the independence of the Judiciary system like a corporation, and has the need of the tutelage from the judicial system, between Parliament and material interference from the Executive Power.

They are different models of responsibility: in some countries they are executive participation separated from the Courts; in other countries the

Executive Power has definitive responsibility with the intervention of a mediator judge.

The universal Declaration of Justice Independence, establish that the principal responsibility in the administration is attributed to the judicial system, who prepare the budget, according legal system, and the judicial system is the sole responsible to carry out.

6.8 – The internal independence.

To assure internal independence, judges must be independent of instructions or pressures arising from colleagues. In countries of Civil Law this is relatively possible, but it is not so possible in Common law countries, in the presence of obligatory precedent.

In these cases he has an anomalous situation, which goes to a hierarchical system, which violates the independence.

In my opinion, it is necessary the administrative supervision of judges, to improve the efficiency of judicial administration.

6,9.- Legal responsibility of judges.-

6.9.1. Disciplinary

As it is common, judges are submitted to a disciplinary responsibility, which is usually made by Supreme Courts, or parliamentary organs.

We have indicated the Constitution criteria about permanence of judges (all the time of his good conduct) with exceptions, and in the case of existence of the Magistrate Council, there is the organ who make the disciplinary control.

6.9.2. Civil and criminal.

In same cases is anticipated the possibility to initiate actions against a judge – in the case of violation of his functional duties.

It is discussed the responsibility from the State or the judge by judicial activities: in our system this is possible, and it is to establish a revision resource.

Also, it establish the State responsibility in the case of illegal prison (like in France, Spain, Italy, and so on)

6.10.- Informal Controls

The control made by equals of judges, and also by lawyers, or media, is normal effective.

6.11.- Some final considerations.

It is necessary to maintain judges independence like a way to accomplish the function of apply the law, the Constitution ascribe to jurisdiction services.

With reference to the execution of decisions, we must anticipate an effective system who allows the most extensive competition as possible.

Protection of basic rights and individual freedoms- and why not collections - is a principal objectives of justice. If justice demand from the administrators of the system, a significant task, a relevant level of knowledge and a consecration nearly exclusive (that nearly is the possibility given to judges to learn law at universities, to permit to get up to date).

6.12.- We can insert the idea of reasonable term of a process, who has been a real preoccupation of the Justice service.

There is a permanent "fight" to preserve the "constitutional judge"- is the ordinary judge, pre-established, predetermined by the law. This situation excludes judges ex post facto and also judges ad hoc. They must be independent and impartial. (cf. Vallespin, Picò y Junoy, Chivario, and also Couture Studies, from Berizonce, and Greif)

Even we have not arrived at decisions like Strasbourg Court: there is one of major challenges of the new jurisdiction. And it will be convenient that principles have consecration like art.14 form General Code of process-Uruguay- and art. 8.1 From Costa Rica Convention of Rights.

Obviously we must azure equal rights against law, in accordance art. 8 of the Constitution, and the impartiality of Judge (art.22 and 23 of the Constitution) who is the essence of an esteemed process.

Couture had indicated at 1942 the Constitution tutelage of process; the antecedent of what Mauro Cappelletti called the constitutional tutelage of freedom.¹⁴

¹⁴ .- V. in extenso Greif: “La tutela constitucional en del proceso penal en el derecho uruguayo” (Homenaje a la UFMG; o “El debido proceso constitucional” en Derecho Procesal – La Ley año 2009 , p. 1/10