

Judges - Legislative Authority in the Anglo-Saxon System

Lecturer Oana Raluca LUPU, PhD. candidate

“Spiru Haret” University, Faculty of Law, Constanta, Romania
greavur@gmail.com

Abstract

The independence of the justice was ensured in Great Britain by the Act of Settlement 1700 [1], which transferred the power to sack judges from the Crown to the Parliament. As a consequence, judges should theoretically base their decisions only on the logical deductions of the precedent, uninfluenced by the political considerations or by the chance of advancing in career.

Keywords: *judge, legislative authority, common law, judicial precedent*

William Blackstone, the XVIIIth century theorist, introduced the declarative theory of law, stating that the judges do not create law, but only, based on the rules of the precedent, discover and declare the law that has always existed: „ (the judge) swearing to decide not according to his feelings...or his own judgement, but according to the known laws and the customs: he is not appointed to create a new law, but to keep and preserve the old law [2]”. Blackstone doesn't accept that the precedent offers a choice between two or more interpretations of law: when sentenced wrong, he says, the new sentence annulling or changing the old one neither creates a new law nor does it state that the previous sentence was wrong but it simply declares the fact that the previous sentence wasn't “law”. His approach involves the existence of a right sentence, which can be identified following an objective study of the precedent.

Nowadays though, this position is considered somewhat unrealistic. If the precedent is the exact science that Blackstone is talking about, many cases for the superior courts would never be filed. Lawyers could simply look for the relevant case and anticipate the court's sentence and as a consequence to advise the petitioner who would obviously lose, not to file or to argue the case anymore [3].

In fact, judges' sentences could be not as neutral as Blackstone's declarative theory suggests. They must rule without any link to precedents. Still, instead of stating openly that they choose among two or more equally relevant precedents, the courts find ways to avoid the difficult ones, which gives the impression that the precedents they

choose to follow are the only option. There are more options for the judges to avoid the difficult precedents which at first sight might seem compulsory:

1. Distinguishing the difficult precedents relying on facts – arguing that the facts of the case in question are relevantly different from the previous case's that being the reason for the rule not to be observed. Since it is unlikely for the facts to be identical, this is the simplest way to avoid a difficult precedent and the courts made some extremely limited distinctions in this regard.
2. Distinguishing the judicial matter – arguing that the legal issue of the precedent is not the same with the one of the case in question.
3. Stating that the precedent was replaced by recent decisions this being the reason for not observing it.
4. Assigning a very limited ratio decidendi to the precedent. The only part of a sentence composing the compulsory precedent is ratio, the legal principle on which the decision is based. As long as the judges never state "this is ratio decidendi" certain debates are possible concerning the parts of the decision which in fact constitute ratio and as a consequence they bind the courts for the future cases. The judges wishing to avoid an inappropriate precedent can argue that the parts of the decision proper for their case, are not part of the ratio, but only obiter dicta, that they are not bound to follow.
5. Arguing that the precedent doesn't have a clear ratio decidendi. When each judge of a panel had a different reason to reach the same sentence in a previous case, it can be argued that there is no clear ratio decidendi.
6. Arguing that the precedent is inconstant due to a following decision of a superior court which annulled it.
7. Stating that the previous decision was per incuriam, meaning the court made an error, disregarding a Parliamentary Act or a relevant precedent. This method is rarely used because it definitely undermines the position of the lower court.
8. Arguing that the precedent is outdated, not according to the modern thinking anymore.

One can easily observe that there is enough space to maneuver in the doctrine of the precedent, so the question would be which are the factors guiding judges' decisions and to what extent? Here are some possible answers.

Ronald Dworkin states that the judges do not really have the freedom to create jurisprudence. He sees law as a network of impeccable principles offering a right answer – and only one – for any possible problem. Dworkin argues by the fact that even the legal rules might be „outdated” (not directly applicable to a new case) the legal principles stay always the same and that is why the judges never need to use their freedom to act. The state, through its authorities must act in an unified, concerted manner regarding both the separation of the powers and their limitation to a greater extent, as well as their interference, “the separation of powers” being a fundamental principle for the democratic state [4]

In his book *Law’s Empire*, professor Dworkin [5] states that the judges appeal first to the old cases and get the principles applicable to the case in question. Then, they relate to their own sense of justice and consider also what the point of view of the community would be regarding justice. When judge’s point of view concurs with that of the community there is no problem, but if they completely disagree then the judges have a dilemma: would it be fair for them to impose their point of view disregarding the community’s? Dworkin defines this as interpretative approach and although it seems to request a series of choices, he believes that the legal principles on which decisions are based imply that in the end there can be only one result in any situation.

Dworkin’s approach was severely criticized as unrealistic: his opponents think that the judges do not consider the legal principles but the facts of the case, having a more empirical approach.

Critical legal theorists as David Kairys [6] have a different point of view. They state that the judges are free in the precedent doctrine. Kairys suggests that there is no judicial reasoning such as a logical method, separated from determining the rules and the results of previous cases. He says that the decisions are actually based on a “complex mixture of social, political, institutional, personal factors” and they are justified by referring to the previous cases. Law offers “a generous and conflicting variety” of such justifications, “from which courts choose”.

The process is not as cynical as it appears. Kairys underlines the fact that he is not stating that the judges rule prior to determining which precedents they can choose to justify it. More likely it is their own personal opinions and bias determining them to

consider the precedents supporting these points of view. For the critical legal theorists though, all decisions of this kind may be regarded as reflecting social and political decisions rather than objective, purely logical deductions.

Similarly, Griffith [7] states in his book *The Politics of the Judiciary* that the judges found their decisions on what they consider to be public interest, but their point of view concerning this interest is influenced by their past and the status they have in the society. He suggests that a limited social past – usually public schooling – of the superior judges [8], combined with their position as part of the established authority, lead them to the conclusion that it is for the public interest to maintain the order; in other words that those who have the power – country or office level – should stay there and that traditional values should be preserved. This leads them to “an affection for private property and antipathy for the unions, a powerful adhesion for maintaining the order, antipathy for the minority opinions, demonstrations and protests, avoiding the conflicts with the Government policy even when it’s obviously oppressive for the vulnerable ones, supporting the governmental secret, preoccupying for preserving the moral and social behavior they are accustomed with.”

As Griffith reveals, judges’ point of view concerning public interest assumes all society members’ interests are approximately the same, ignoring the fact that different groups – employers and employees, men and women, rich and poor- might have diametrically opposite interests. What is called public interest will usually mean favoring a group over the other so it can’t be regarded as neutral.

In his book, *The Law*, Waldron [9] agrees with the fact that judges exercise their discretion and their choices are influenced by political and ideological decisions, but doesn’t see it as an ominous aspect. Waldron claims that while it would be wrong for the judges to be biased or to rule based on political factors hoping to be promoted, it is unrealistic to expect them to be “neutral from a political of view- lacking all main values and commitments”.

Waldron points out the fact that being a judge means first and foremost a commitment to the values surrounding the legal system: acknowledging Parliament’s supremacy, the importance of precedent, objectivity, public safety and interest. He argues that this means by itself a political choice and the choices to follow are made

when judges are forced to balance these values when they conflict with each other. The responsible thing to be done, according to Waldron, is anticipating these conflicts and establishing the priority order of the above mentioned values. These will inevitably be political and ideological decisions. Waldron argues that since these decisions must be made, "what must be done is not to hide them but to try to be as explicitly as possible". Instead of hiding such decisions behind "some smoky windows of legal mystery....if judges conceived particular theories on morals, politics and society, they should state it openly and consider these theories in making decisions."

Waldron suggests that whenever judges have second thoughts related to the decision, it could be a sign that they should reexamine their bias and conclude if it is an appropriate thinking to be influenced by. Moreover, if the public knows the motivation which is the base for judges' decisions, "we could evaluate them and conclude if we want to rely on such motivations in the future."

The existence of a code of laws with constitutional value represents an essential condition for the democratic state functioning, for settling the conflicts of laws and especially for limiting the powers. The privileged position held by the constitution is justified, besides the already mentioned aspects, also by a practical necessity, because every legal system needs a law of supreme legal force to protect a minimal number of essential values, to ensure a strong organization of the main state authorities and a clear limitation of powers [10].

Conclusions:

Do judges really create law? Although judges consider they represent an authority that rather declares and identifies law than creates it and often state that the Parliament has the prerogative of enacting the law, there are certain domains in which they obviously create law.

First, from a historical perspective, most part of the law is and has always been the jurisprudence made up by judges' decisions. Contractual and prejudice law are mostly the result of judges' decisions and most of the very important progress had a deep impact. Though Parliament's acts have been lately enacted in these domains and occasionally the Parliament tried to incorporate whole areas of the common law in the statute form, they still embody the original principles created by the judges.

Second, judges have been allowed to define their own role as well as the role of the courts. For example, they took the power of reviewing the decisions of a public authority even when the Parliament decided they can't be revised. And in spite of their frequent assertions claiming they have no authority to intervene in Parliament's role of a legislative body, judges made it very clear that they won't interpret statutes as infringing upon the rights of the common law or the law created by them, unless obliged by a very explicit wording.

Whenever the precedent is not clear about what should be done in a particular case, judges must still rule. They can't decide only that the law is not clear enough and send it to the Parliament, though in certain cases they point out that it would be more appropriate for the decision – that they should make- to be made by the appointed authority to decide the changes of laws.

Third, enforcing the law – jurisprudence or statutes- to a particular case is not usually an automatic matter. The terminology might be vague or ambiguous, new dynamics of the social life must be adapted and the procedure requires both interpretation and enforcement. As already suggested, judicial precedent does not always bring along a certain obvious and compulsory ruling – there may be conflicting precedents, their implications may be unclear and there are ways of avoiding a precedent that could otherwise lead to undesirable decision.

If it is accepted that Blackstone's declarative theory can't be applied, then judges clearly create law, they don't just explain the existing law. Kairys's, Griffith' and Waldron's theories all accept the fact that judges have the freedom to act and this is why they create the law to a certain extent.

Bibliography:

Blackstone W., Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765-1769, University Chicago Press, 1979.

Dworkin R., Law's Empire, Harvard University Press, 1986.

Elliot C. and Frances Q., English Legal System, Pearson Longman, 2009.

Griffith J., Politics of the Judiciary, Manchester University Press, 1977.

Kairys D., The Politics of Law: A progressive Critique, Basic Books, 1998.

Waldron J., The Law, Routledge, 1990.

References:

[1] With Bill of Rights 1689, it is one of the most important constitutional laws governing the succession not only to the United Kingdom's throne, but to the domains of the Commonwealth also.

[2] Blackstone W.- Commentaries on the Laws of England, Volume 1: A Facsimile of the First Edition of 1765-1769, University Chicago Press, 1979, p. 34

[3] Elliot C. and Frances Q.-, English Legal System, Pearson Longman, 2009, p. 57

- [4] Olteanu C., Principii Constituționale, Conferința Științifică Internațională, Dezvoltare socială, administrație și justiție, Tg Jiu, 2014, pag.126
- [5] Dworkin R., Law's Empire, Harvard University Press, 1986, p.86
- [6] Kairys D., The Politics of Law: A progressive Critique, Basic Books, 1998, p. 126
- [7] Griffith J., Politics of the Judiciary, Manchester University Press, 1977, p. 93
- [8] Idem, p. 162
- [9] Waldron J., The Law, Routledge, 1990, p. 77
- [10] Olteanu C., Principii Constituționale, Conferința Științifică Internațională, Dezvoltare socială, administrație și justiție, Tg Jiu, 2014, pag.124