Freedom of Speech on Political Issues vs. Independency of Judiciary Power

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Introduction

In November 2011, a Korean judge posted a message on his Facebook wall criticizing the possible approval of the KOR-US FTA[1]. As judges are expected to be politically neutral, a vibrant public debate followed up.

Arguments basically hinge on the competition between judicial freedom of speech on political issues and independency of the judiciary[2]. In order to establish to what extent judges are legally and ethically supposed to make public comments on political issues, it is firstly necessary to separately study the two values, recalling both their historical evolution and their legal force and, secondly, to compare the findings.

For purposes of convenience, the analysis will be limited to Greece, England and United States.

Evolution of Freedom of Speech

The first people formally acknowledging the freedom of speech was Ancient Greece. Such an achievement was very important because it implied that all the citizens, no matter their social status, could actively participate in the formation of the public policies by showing up at the *Demos*. This right of free speech was known as *isegoria*[3]. The introduction of *isegoria*, most importantly, clearly consecrated the belief for which freedom of speech and self-government were crucially interdependent[4].This desirable Greek footnote of history did not last. Moreover, it did not fully expand to other peoples[5] . In fact, it can be observed that people not acknowledging great freedoms of speech, were ruled by non-democratic regimes[6]. The issues related to the freedom of speech came back to be actual in occasion of the English democratic process, demonstrating once again the strong connection with the latter form of government.

The increased involvement of people in public policies started – in 1215 – with the concession of the Magna Charta in favor of the Barons. The consent of the latter was necessary for approving tax laws. For all the other subjects the Barons exerted a consulting role for the King. Barons were successively joined by Representative of the counties (therefore not noble people) and in 1285 the Model Parliament was established. This body, made up of aristocrats, clergymen and representatives, gained more and more importance, becoming the very body for the law making[7]. They

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[1] On line column at: http://www.hani.co.kr/arti/english_edition/e_national/507277.html

[2] As observed by Van Mills (2012) "we are socially situated and it makes little sense to say that Robinson Crusoe has a right to free speech". This observation hinges on the fact that freedom of speech must be appreciated in relation "to other important ideals such as privacy, security and democratic equality and there is nothing inherent to speech that suggests it must always win out in competition with these values" (Van Mills 2012).

[3] Berti (1978 p. 352) explains that in Athens, philosophers were prosecuted just because a certain freedom of speech was admitted; this is different from what happened in Sparta, where philosophers were not prosecuted because they were not even admitted.

[4] At that time, Greeks also prided themselves of another right related to the speech: *parrhesia*.
This right "referred to the content of what could be said. It included the right to criticize both persons and politicians, and to censure, admonish, berate, share, and insult one's fellow citizens and the leaders of the polis." (Roisman 2004). The right, anyway, also had some limits: "speaking against the gods or to the danger or detriment of the State were both forbidden". (Roisman)

[5] Mills (1859) provided a clear explanation about why governments shifted toward a less favorable treatment of freedoms, reaching different degrees of political rights and constitutional checks.

[6] For a very brief overview of the history of democracy, see
http://www.treccani.it/enciclopedia/democrazia_res-c4b3cff1-bd4f-11e1-bb7e-d5ce3506d72e_%28Dizionario-di-Storia%29/

[7] So not any more a body for mere consulting services.

initiated and won their struggle against the King for the acknowledgment of freedom of speech inside the Assembly. Practically, while debating Acts, members could freely express disagreement with the executive on public policy issues, resulting in a better or improved enactment of statutes. Similar path was followed in colonial America[8]. Freedom of speech for Assembly members involved two aspects: substantial – what they actually were allowed to say – and procedural – who exerted the control of what they were allowed to say. The Parliament itself established the limits and exerted the control. This model of governance, by the way, had two drawbacks:

a) the Parliament could prosecute any citizen that expressed a not welcomed opinion and, in fact, it used to do so;
b) it did not ensure the good quality of the Acts as members could freely act in the pursuing of their own interests than in those of people[9].

In the US, problem a) was resolved by the approval of the First Amendment of the Constitution. Accordingly, Horward (2006) remarks "…the First Amendment provides that the Congress shall make no law abridging the freedom of speech. In a democratic society we consider this freedom to be essential for participation in decision making by all members of society."

Another confirmation comes from Cooley (cited in Eliel 1924) in whose opinion the purpose of the First Amendment was "to protect parties in the free publication of matters of public concern, to secure their right to a free discussion of public events and public measures, and to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion… To guard against repressive measures … by means of which persons in power might secure themselves and their favorites from just scrutiny and condemnation was the general purpose…The evils to be prevented were any actions of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens".

The First Amendment, therefore, gave full meaning to the historical tradition of the freedom of speech: a tool to participate in the political activities.

Yet, it must not be forgotten that the acknowledgment of the freedom of speech was also a result of the establishment of natural right theories[10].

Problem b) was resolved through recognizing the power of judicial review. This power stems from the principle of separation of powers which is going to be discussed in the next paragraph.

Judicial Independency

The judicial independency is a value which basically characterizes all the current democracies. Thousand evidences can support such statement (national statutes, academic literature, magazines, newspaper etc.); it is worth, anyway, to mention the most representative one, which is the Universal Declaration of Human Rights: it affirms that everyone must be judged by an "independent and impartial tribunal".

Although independency and impartiality look closely related each other, these two values deserve a separate attention.

[8] See Corwin (1920).
[9] This is the agency problem abundantly discusses in literature. See Fama and Jensen (1983).
[10] See Hamburger (1991).

A tribunal is believed to be independent if it is free from the interference of other governmental branches[11]. Therefore, laws must provide mechanisms that ensure the separation of powers[12].

If one assumes this notion of judicial independence, it is very hard to argue that a judge speaking out about political issues is actually doing something that she/he should not. Interestingly, the two things seem even unrelated: there cannot be identified any interference into judicial activity[13].

But if one pays attention to the goals judicial independence is expected to pursue, then a different opinion may be brought up.

These goals are[14]:

a) the maintaining of the rule of law;
b) the overturning of unconstitutional laws[15];
c) the full execution of laws.

The goal in letter a) basically represents the impartiality of the judge. Therefore, if judicial speech on public policies affects the impartiality of the judge, it in turns affects the independency itself. Judicial speech on public policies and independency are hence related.

Accordingly, the attention has to be focused on when judicial speech on political issues affects the impartiality – and the independence – of the judge.

In order to accomplish this investigation it is firstly necessary to check what actually impartiality means.

According to case law[16], impartiality can be seen in three different ways:

a) judges do not have bias for any of the parties in the trial;
b) lack of preconception in favor or against a particular political/legal view;
c) openmindedness, meaning that the judge is impartial when he/she is not reluctant to consider legal issues that are contrary to his/her preconceptions.

The most accepted notion of impartiality is the one expressed by letter a)[17].

Clarified the concept of impartiality, the analysis should be continued by answering the question: in which cases the judicial expression of thoughts render the judge biased in favor of one of the parties?

To begin with, it must be specified that two different situations might occur. The first one is that the judge expresses his/political thoughts about issues which are very far from the courtroom. The second one is represented by cases where the judge expresses opinions about issues on a pending or imminent case that he/she her/himself or even different court is dealing with.

The distinction between the two situations is clear.

In the latter, the opinion of the judge might affect the jury[18] or "the outspoken opinion of a respected federal judge might influence the prosecutor's decision about whether or not to proceed"[19]. A biased behavior from the judiciary is therefore likely to

[11] See Judicial Office for Scotland (n.d.).
[12] Concerning these mechanism see for example Lord Justice Brook (n.d.).
[13] This perspective takes into consideration the historical struggle between people and authority. In particular, people have never been happy with courts serving Government's will. Emblematic is the case of England, where this struggle was resolved only in the 17th century, with the adoption of the Bill of Rights 1688 and the enforcement of Act of Settlement in 1701. See Diescho (2008)
[14] *See Republican Party v. White*
[15] For a more detailed discussion about the judicial review see Gerber (2007).
[16] See footnote n. 14
[17] *Ibid*
[18] See the case of Judge Lance Ito in Chemerinsky (1995).
[19] See Freedman (2001).

happen and for this reason restrains on speech in this kind of speeches might be considered fair.

In the former situation, there is no ground for charging a judge to undermine impartiality, as no trial exists and no parties can be favored by biased conducts. Yet, a judge expressing thoughts on political issues may be seen as undermining the appearance of impartiality: as a consequence of the judicial speech, people will get more familiar with the conviction that judges' decisions are shaped by their preferences rather than by the rule of law.

Appearance of impartiality is by no means "weaker" than impartiality; though, before deciding that it would lose the competition against the freedom of speech, it is indispensable to remark that both appearance of impartiality and impartiality itself are values whose force strictly depends on on which perception of the law is adopted[20].

In the opinion of Legal Formalism thinkers "law is deterministic, meaning that there are "right" legal decisions dictated by a correct application of the relevant legal principles. Judges may make mistakes in deciding cases, but Formalism suggests that judges correctly applying the appropriate rules to a given case should reach the same legal result"[21].

To better understand Legal Formalism, one can refer to a school of thought that is on the other extreme: Legal Realism. In particular, these intellectuals claim that law is "indeterminate and judges' decisions depended as much on context as upon strict application of rules of law"[22].

On one hand, if one assumes the Legal Formalism perception of law, the value of impartiality and, obviously, of appearance of impartiality, turns out to be dramatically reduced. According to this stream of thought, in fact, law admits only one correct solution to cases, being judges nothing more than the *bouche de loi* and their discretion rather limited. Therefore, even though they make public statements on political issues, their application of the law cannot be partial by definition: appearance of impartiality does not represent a danger because the law does not leave room for impartiality itself.

On the other hand, if one assumes the Legal Realism approach, then the both the impartiality and the appearance of impartiality gain importance. While, as seen earlier, the former seems to deserve a greater protection than the freedom of speech, the second would rather lose the competition. In particular, according to one stream of thought within the Legal Realism itself known as Legal Political Realism, most of the time the judge takes a decision, he/she does not purely apply the rule of law, but he/she applies also his/her own political beliefs: all law is political. Since it is very important, for a question of certainty of law, that judges comply with the rule of law as much as they can, then it is likely important people expect them to do so.

To protect the "appearance of impartiality", that is to say to reassure people by saying: "no worries, judges are strongly committed to the rule of law", judges have been asked to observe a duty of political neutrality. If a judge does not speak out, the citizen can still be confident that rule of law shall

[20] See Marshall (2011).
[21] *Ibid*
[22] *Ibid*

prevail on personal inclinations: expectations for the judge to be as much loyal as possible to the legal principles, strongly increase.

The formalization of such standard of behavior, anyway, does not look like having a very long tradition.
The key date is the 1924, when the first Code of Judicial Conduct was adopted in the United States[23].
This document did not provide any canon concerning judicial participation in political activities. Amazingly enough, such issues were addressed only in 1972 when the 1924 was updated and rendered compulsory[24].
This could be due to two reasons: judges actually did not involve themselves in political debate; judges were involved in political debate in such a way that no other interests, as the impartiality, of the society were undermined.
According to literature, the reason is likely to be the first one[25].

Comparison of Findings

The foregoing discussion demonstrates that freedom of speech has a very long tradition, especially in relation to political issues. It is a value which is strictly connected with the democratic state. Independence of judiciary is also a value which has a long tradition and it is basically implemented through the impartial application of law.
If law is political, as Legal Political Realism maintains, it means that most of the judicial decisions are expected to carry with them some degree of partiality. Even though everybody would agree that the State should restore public confidence in that judges will be as less biased as they can, it would turn out difficult to claim that such State interest might be able to sacrifice an individual and natural right such as the freedom of speech.
Along with that, US legal doctrine has defined the appearance of impartiality as not representing a "compelling interest" for the State (Spottswood 2007, p. 352).
It can be concluded that, from a legal point of view, a judge publicly expressing opinions on political issues is protected, unless such opinions undermine the impartiality itself, as it possibly happens when a judge express opinions on pending case[26].
Even though judicial freedom of speech is supposed to enjoy great protection, still it would be professional for the judges to not openly disclose their views, and leave the public believing they are going to decide the case according to the rule of law.

References

Berti, E. (1978). Ancient Greek Dialectic as Expression of Freedom of Thought and Speech. *Journal of the History of Ideas*. 39 (3), pp. 347 - 370.

[23] Attempted actually were mad in 1907 and 1917, see Strawn (2008 p. 786).
[24] In 1990, further Canons concerning judicial political conduct were added. *Ibid* p. 787.
[25] The past 25 years have seen a growing judicial activism. See Salzberger, E. (2007)
[26] See Freedman, M. (2001)

Chemerinsky, E. (1995). Is the Siren's Call?: Judges and Free Speech while Cases are Pending. *Loyola of Los Angeles Law Review*, 28, pp. 831-

Corwin, E. (1920). Freedom of Speech and Press under the First Amendment: a Resume. *The Yale Law Journal Company*. 30 (1), pp. 48 - 55.

Diescho, J. (2008). The Paradigm of an Independent Judiciary: Its History, Implications and Limitations in Africa.
Available:
http://www.kas.de/upload/auslandshomepages/namibia/Independence_Judiciary/diescho.pdf. Last accessed 25th April 2013.

Eliel, R. (1924). Freedom of Speech During and Since the Civil War. *The American Political Science Review*. 18 (4), pp. 712 - 736.

Fama, E. and Jensen, C. (1983). Separation Ownership and Control. *Journal of Law and Economics*. 26 (2), pp. 301 - 325.

Freedman, M. (2001). Free Speech for Judges: a Commentary on Lubet et al. v. Posner. *Court Review,* pp.4 - 5.

Gerber, S. (2007). The Political Theory of an Independent Judiciary. *YLJO Essay,* pp. 223 - 228.

Judicial Office for Scotland. (n.d.). *Judicial Independence.* Available: http://www.scotland-judiciary.org.uk/Upload/Documents/JudicialIndependence_2.pdf. Last accessed 10th April 2013.

Hamburger, P. (1991). Natural Rights, Natural Law and American Constitutions. *The Yale Law Journal, Inc.,* 102 (4), pp. 907 - 960.

Howard, R. (2006). The Limitations on Judicial Free Speech. *The Justice System Journal,* 27 (3), pp. 350 – 353.

Lord Brook, J.(n.d.). *Judicial Independence - Its History in England and Wales.* Judicial Commission of New South Wales. Available: http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbbrook.htm Last accessed 18th April.

Marshall, W. (2011). Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor. *Duke Journal of Constitutional Law & Public Policy*. 6 (1), pp. 1 - 35.

Mills, J (1859). *On Liberty*. London: J.W. Parker and son. 207 pp.

Rosiman, H. (2004). Woman's Free Speech in Greek Tragedy. In: Rosen R. and Sluiter I. *Free Speech in Classical Antiquity*. Boston: Brill Academic Publishers. pp. 91 - 114.

Salzberger, E. (2007). Judicial Activism in Israel: Sources, Forms and Manifestations. *Working Papers Series*, pp. 1 – 104.

Spottswood, M. (2007). Free Speech and Due Process Problems in the Regulation and Financing of Judicial Election Campaigns. *Northwestern University Law Review,* 101 (1), pp. 331 – 364.

Strawn, B. (2008). Do Judicial Ethics Canons Affect Perceptions of Judicial Impartiality? *Boston University Law Review*, 88 (3), pp. 781 – 813.
Van Mill, D. (2012). *Freedom of Speech.* Available: http://plato.stanford.edu/archives/win2012/entries/freedom-speech/. Last accessed 13th April 2013.

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