

THE ROLE OF CIVIL SOCIETY IN HUMAN RIGHTS AND CONSTITUTIONAL ADJUDICATION.

SOME CONCERNS ABOUT “JUDICIAL LOBBYING”^{*}

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Civil society organizations are increasingly playing a significant role in the different phases of human rights litigation, contributing to changing the nature of the functions performed by ordinary, constitutional and supranational courts in contemporary democracies. The primary purpose of this article is to analyse the different ways of involvements of NGOs and other organized forms of civil society in the administration of justice, with the aim of highlighting how their activity is proving to be quite similar to lobbying. Secondly, it discusses the perception of human rights courts as an arena of public debate and the consequent need for more clarity and transparency in the use of third-party interventions, public oral hearings and popular actions.

SUMMARY: I. Introduction: the judiciary as a political arena - II. The different forms of involvement of civil society in human rights adjudication - III. On the consequences of public participation in constitutional litigation: a paved way for judicial activism - IV. “In the name of the people”: whose interests do judicial decision makers really serve?

I. INTRODUCTION: THE JUDICIARY AS A POLITICAL ARENA

Many factors have contributed to changing the nature of the functions performed by apex, constitutional and supranational courts in contemporary democracies. Their task has been growing and changing ever since the advent of social democracy: parliaments have undergone significant transformations following the crisis of the liberal state and, similarly, constitutional and human rights courts have been required to meet new expectations based on the demand for effective welfare rights. The functions of constitutional courts have evolved constantly in the recent past due to various factors, including the crisis of representative democracy, the problems of democratic consolidations in certain areas of the world, and above all, the diversity and pluralism of contemporary societies. The latest, in particular, demands – as Häberle pointed out on

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many occasions— the involvement of constitutional judges in the guarantee of the constitution as a social contract, since they participate in its development and updating through their functioning as courts of the society in general, more than as state courts².

The expansion of constitutional adjudication throughout the globe and courts willing to bear the burden of social and legal change, to fill unconstitutional vacuums and possibly use their power to guide traditional decision makers are accompanied by a constantly increasing presence of a wide range of civil society organizations in the different phases of litigation. In the never-ending controversy over the legitimacy of so-called “strong” judicial review, *a new element must be taken into consideration*: the judiciary has become a locus for the exercise of democracy. This has to do with the very simple and irrefutable fact that constitutional judges and supranational courts such as the Court of Justice of the European Union, the European Court of Human Rights and its Latin American counterpart, namely the *Inter-American Court of Human Rights*, are political decision makers. Dahl’s contribution to the understanding of the role of the *Supreme Court* of the United States during the past century is far from updated: his idea of a judicial body that «cannot act strictly as a legal institution», since it has to «choose among controversial alternatives of public policy by appealing to at least some criteria of acceptability on questions of fact and value that cannot be found in or deduced from precedent, statute, and Constitution»³, is of paramount importance to determining and appraising the nature of the functions performed by contemporary constitutional and international judges. Since it has become clear that constitutional and supranational judges are important centres of policy making, civil and human rights organizations, labor unions, environmental NGOs and other kinds of public interest groups began to interface with courts more than seeking to influence the work of parliaments. After all, «when the notorious bank robber Willie Sutton was asked why he robbed banks he reportedly replied “because that is where they keep the money”»⁴.

² P. HÄBERLE, *Lo Stato costituzionale* (translation by F. POLITI AND S. ROSSI), Roma, 2005, pp. 159-160.

³ R.A. DAHL, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, in *Journal of Public Law*, 1957, vol. 6, pp. 279 ss., at 281. Attention to the political role of constitutional courts has also been paid by Italian legal scholarship very recently: see A. SPADARO, *Sulla intrinseca “politicità” delle decisioni giudiziarie dei tribunali costituzionali contemporanei*, in *Federalismi.it*, 8 marzo 2017.

⁴ R. PACHELLI, *The Supreme Court in a Separation of Powers System: The Nation’s Balance Wheel*, New York, 2015, at 172.

The relationship between law and social movements is stricter than ever: litigation and reliance on the courts for advancing their right-based goals has undoubtedly proven effective. This can be seen as both the cause and the effect of the increased popular confidence in the judiciary, since the involvement of civil society in the delivery of justice is both the result of the political power of courts and an instrument judges use in order to gain legitimacy. The danger of an excessive judicial insulation breeding “ivory tower attitude” feared by Cardozo in the early 20th century⁵ has been largely averted: the judiciary is all but apart from the mainstream of society. The basis of apex and constitutional courts’ legitimacy does not seem to be solely legal expertise anymore: public support has clearly emerged as a new source of legitimation, thus breaking the monopoly elected assemblies had on claiming to hold public mandate⁶.

II. THE DIFFERENT FORMS OF INVOLVEMENT OF CIVIL SOCIETY IN HUMAN RIGHTS ADJUDICATION

Individuals and organized forms of civil society can play their role at different stages of judicial proceedings, each with its peculiar characters and impact on final judicial outcomes. Well aware of the fact that preliminary to such analysis is the meaning we attach to civil society and also that an exhaustive review of the immense literature exploring the notion would go beyond the scope of this paper, it would be sufficient here to clarify that the expression is here intended as opposed to political society and also distinguished from the economic sphere. Therefore, one of the most appropriate definitions is the one given by the World Bank: *«The wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil society organizations there for refer to a wide array of organizations: community groups, NGOs, labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations»*⁷.

⁵ B.N. CARDOZO, *The Nature of Judicial Process*, New Haven, 1921, at 129.

⁶ See O. BASSOK, *The Supreme Court's New Source of Legitimacy*, in *University of Pennsylvania Journal of Constitutional Law*, vol. 16, 2013, pp. 153 ss., reflecting on the rise of the so-called “public opinion culture”, where «opinion polls have served in the public discourse as an authoritative democratic legitimator» (p.158).

⁷ World Bank, 2010, at www.worldbank.org.

The first and more direct way all these groups have to “speak law to power”⁸ is lodging a complaint in the public interest in all legal systems providing individual access to constitutional justice through *action popularis*. This is the case of many Latin American countries and a few Central and Eastern European democracies, but also of some Asian jurisdictions where individual direct access to supreme courts for the protection of fundamental rights is granted in the public interest⁹. Besides, different kinds of associations have a legal standing in a *variety of civil rights* claims at the domestic and supranational level. For example, the European so-called “equality directives” allow a variety of civil society organizations to challenge discriminatory conduct either on behalf or in support of the complainant in collective discrimination cases, as well as in cases where no individual victims can be identified¹⁰.

Secondly, following the “public interest law movement” of 1950s and 1960s in the United States, more and more organized forms of civil society around the world engage in strategic litigation, taking on legal cases as part of a strategy to achieve broader systemic change¹¹.

Moreover, non-profit organizations tend to concentrate their advocacy work before the judiciary filing briefs as *amici curiae*. The global rise of third-party interventions - even in civil law countries¹² - can be attributed to the influence of international jurisdictions such as the European Court of Human Rights and the Inter-American Court of Human Rights, and has been transforming an ancient legal

⁸ This expression has been used for the first time by R. ABEL, *Speaking Law to Power. Occasions for Cause Lawyering*, in A. SARAT, S. SCHEINGOLD (eds), *Cause lawyering: Political Commitments and Professional Responsibilities*, New York, 1998, pp. 69 ss., explaining the use of legal mechanisms and processes to change dominant power relations.

⁹ Among these countries, India, Pakistan and Bangladesh (M. CAIELLI, *Cittadini e giustizia costituzionale. Contributo allo studio dell'actio popularis*, Torino, 2015, pp. 36-60).

¹⁰ Article 7(2) of Directive 2000/43 and Article 9(2) of Directive 2000/78 provide that «Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of [these Directives] are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under [these Directives]». A similar provision is contained in art.17 of Recast Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

¹¹ The reasons behind the success of public interest law, particularly in post-authoritarian countries, are explored by S. L. CUMMING, L. G. TRUBEK, *Globalizing Public Interest Law*, in *UCLA Journal of International Law and Foreign Affairs*, vol. 13, 2008, pp. 1 ss.

¹² S. KOČEVAR, *Amici Curiae in Civil Law Jurisdictions*, in *Yale Law Journal*, vol. 122, 2013, pp.1653 ss.

instrument into a way of performing an activity that «raise[s] the attention of public opinion, playing an important role in a democratic court system»¹³ and an activity that is far from neutral, but rather takes on the traits of lobbying¹⁴. Judges seek advice in much the same way as members of parliament use information provided by interest groups and experts during committee hearings to determine policy options.

With regard to European courts, there is a crucial difference between the roles third parties can play before the European Court of Human Rights and the Court of Justice of the European Union: while third-party intervention before the European Court of Human Rights is explicitly admitted by Article 36(2) of the European Convention of Human Rights, allow in any State or person concerned not party to the proceeding to submit written comments or take part in hearings, the Court of Justice of the European Union’s current procedures do not allow for the submission of amicus briefs, since the possibility to submit written observations on pending cases is only granted to EU member states and the European Commission. Yet, NGOs, research centers, academics, human rights associations and so on, are likely to begin to perform their advocacy activity also before the judiciary of the European Union. The desire to “talk to” Luxembourg judges has recently determined a not for profit European citizen’s initiative to set up an online platform inviting everyone to «share with the Court [their] knowledge, perspective or interests in a particular case, in the form of an *amicus curiae* brief», following the premise that «a sound adjudication of such complex and/or high impact cases requires the Court to consider all available knowledge and perspectives, the balancing of all interests at take and a well informed assessment of the implications of its decision for third parties and society at large»¹⁵.

Furthermore, the increasingly widespread practice of public oral hearings has been transforming some supreme and constitutional courts into places for political participation where people feel that their voice is heard. The Latin American case is emblematic. Significant experiences of public oral hearings as a tool for fostering popular participation have been characterizing the Colombian and Argentinian judicial review of

¹³ L. VAN DEN EYNDE, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, in *Netherlands Quarterly of Human Rights*, vol. 31, 2013, pp. 271 ss, at 275.

¹⁴ S. KRISLOV, *The Amicus Curiae Brief: From Friendship to Advocacy*, in *Yale Law Journal*, vol. 72, 1963, p. 694.

¹⁵ The online platform is available at <https://www.amicus-ecj.eu>.

legislation for a while¹⁶. Interestingly enough, the Brazilian legislator, through Laws 9868 and 9882 of 1999, has extended to the judiciary the possibility granted to the Chamber of Deputies and the Federal Senate to hold public hearings with civil society entities¹⁷. Right after the first two notorious public hearings on biosafety and embryonic stem-cell research had been held, the rules for summoning and holding public hearings have been broadened with the effect of *de facto* admitting the possibility of adopting a public hearing in any sort of claim or appeal¹⁸. In fact, it's now stated that it is upon the rapporteur to listen publicly to depositions by people who have experience with and authority on the matter, «whenever he/she understands the clarification of matters or factual circumstances are needed, in cases with general repercussion and that are of relevant public interest»¹⁹.

The importance of the role played by oral hearings is becoming evident even at the Court of Justice of the European Union. Its (recast) *Rules of Procedure* undertaken in 2012 and the *Practice Directions to Parties* adopted in 2013 allow a hearing to be arranged «whenever it is likely to contribute to a better understanding of the case and the issues raised by it»²⁰, but only upon a reasoned request from the parties and other interested persons and if the Court agrees to hold it, since it may consider, «on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling»²¹. Yet, according to former Justice Allan Rosas, oral hearings can be considered as «a point of contact between not only the Court and the parties and interested persons but also the public at large»²², since «they draw spectators like academics, students, journalists, NGO representatives and other interested milieus»²³.

¹⁶ R. GARGARELLA, *El papel del Poder Judicial dentro del nuevo "constitucionalismo diálogico"*, in F. GONZÁLES (ed.), *Governança e democracia representativa*, São Paulo, 2017, pp. 101 ss., p. 107-110.

¹⁷ Art. 58 of the 1988 Constitution.

¹⁸ M.C. HENNIG LEAL, *Public Hearings in the Ambit of the Brazilian Federal Supreme Court: A New Form of Participation in Public Affairs*, Paper presented at the IX World Congress of Constitutional Law, Oslo, 2014, available at <http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws16/w16-leal.pdf>.

¹⁹ Amendment of Procedural Rule no. 29 of 2009.

²⁰ *Practice Directions to Parties*, para. 45.

²¹ *Rules of Procedures*, Art. 76, para. 2.

²² A. ROSAS, *Oral Hearings Before the European Court of Justice*, in *Maastricht Journal of European and Comparative Law*, vol. 21, 2014, pp. 596 ss., at 609.

²³ *Ibidem*, note 45.

III. ON THE CONSEQUENCES OF PUBLIC PARTICIPATION IN JUDICIAL PROCESSES:
A PAVED WAY FOR JUDICIAL ACTIVISM

The involvement of civil society in human rights and constitutional adjudication produces interesting effects at various levels.

In the first place, one consequence of the process of democratization of constitutional judicial review has to do with the enforcement of judicial decisions.

It's worth recalling Hamilton's description of the judiciary in the Federalist n. 78, where he explained how the power of the Supreme Court, with no control of the purse or the sword, *«must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments»*²⁴. This does not seem to correspond to the truth anymore, since the admission of a wide range of third party interventions or oral hearings has proved to be a good resource to address potential non compliance. In other words, courts might strategically use resources like public oral hearings to increase the chances of gaining compliance. To mention just one example, a recent empirical study showed how the German Constitutional Court seeks to attract popular attention through public oral hearings when holding government officials accountable for breaches of their constitutional obligations in order to maximize the chance such rulings will be accompanied by electoral pressures on the government to comply²⁵. Implementation of constitutional courts' decisions is an issue also with regard to the classical function of constitutional justice: it is well known that the exercise of judicial review of legislation can provoke legislative reactions in the sense that parliaments may find the way not to adequately implement constitutional courts' rulings and always have the power to override a decision through constitutional amendments. But it is known that when courts enjoy a high degree of popular support, the risk of legislative decisions not to comply with judicial rulings lowers significantly, since they may result in a negative public backlash²⁶.

Secondly, this sort of cooperation between the people and courts ends up having significant consequences on the separation of powers, since it often leads to judicial

²⁴ A. HAMILTON, *Federalist no. 78*, in J.E. Cooke (ed.), *The Federalist*, Middletown, CT, 1961, at 523.

²⁵ J. N. KREHBIEL, *The Politics of Judicial Procedures: The Role of Public Oral Hearings in the German Constitutional Court*, in *American Journal of Political Science*, 2016, vol. 60, pp. 990 ss.

²⁶ G. VANBERG, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, in *American Journal of Political Science*, vol. 45, 2001, p. 346 ss., at 347.

activism and therefore to encroachment on legislative and executive functions. Constitutional and, more generally, human rights judges, are no longer conceived as kelsenian “negative legislators”, since they tend to act as assistants of traditional political bodies and are elevated to the rank of prestigious key dialogue partners of parliaments and governments, with the often uncontroversial power to issue orders containing provisional rules to be applied pending the enactment of legislation aimed at filling normative gaps²⁷. Therefore, it’s not surprising that constitutional courts all around the world are increasingly perceived as “third chambers” or «Überparlaments»²⁸: what is particularly interesting and worthy of mention is how such an interference does not generally bring about any strong reactions from elected legislative assemblies. Parliamentary support for judicial authority and for a high level of judicialized politics is a widespread phenomenon in contemporary democracies susceptible of multiple explanations.

It has been suggested how «*at the very least, the judicialization of fundamental political questions offers a convenient refuge for politicians seeking to avoid making difficult no-win moral and political decisions*»²⁹. This is certainly a theory which is hard not to agree with. But Hirschl’s critical reflection suggests another, disturbing, reason behind the delegation of power to courts: the transfer of policy-making power from legislatures and executives to judges can be considered as «*a conscious strategy undertaken by threatened political elites seeking to preserve or enhance their hegemony by insulating policy-making from popular political pressures, and supported by economic and judicial elites with compatible interests*»³⁰.

Among the different questions inspired by such thought-provoking idea, which follows the line of thinking of other well known scholars arguing that judicial review may legitimize majoritarian policies³¹, the present article intends to address the issue of the

²⁷ On constitutional courts’ interference with parliaments regarding legislative omissions, see the detailed analysis by A.R. BREWER-CARÍAS, *Constitutional Courts as Positive Legislators*, Cambridge, 2011, pp. 125-171.

²⁸ A. SPADARO, *Di una Corte che non si limita ad “annullare” le leggi, ma “corregge” il legislatore e, dunque, scrive – o “riscrive” per intero – le leggi (il caso emblematico della giurisprudenza normativa sulle adozioni)*, in A. RUGGERI, G. SILVESTRI (eds.), *Corte costituzionale e Parlamento. Profili problematici e ricostruttivi*, Milano, 2000, pp. 337 ss., at 357, suggesting how the legislative role of the Italian Constitutional Court can be considered as a phenomenon on which is not pathological, but can rather be understood as a natural evolution of the constitutional state (pp. 357-361).

²⁹ R. HIRSCHL, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*, Cambridge, MA – London, 2004, at 213.

³⁰ *Ibidem*, at 99.

³¹ Half a century ago Dahl suggested that «*the policy views dominant to the Court are never for long out of line with the policy views dominant among the law making majorities of the United States*»

possible contribution civil society can bring to a truly counter-majoritarian functioning of judicial review, entailing the protection of political minorities not merely as the result of an occasional convergence between majority and minority interests.

The present considerations on the process of democratization of judicial review are built upon a basic assumption: the core of constitutional justice, to say it in Sunstein’s words, is to «*aggressively review any effort to stifle political dissent*»³², agreeing that courts should play «*an especially large role when rights central to democratic government are at stake, or when groups not able to protect themselves through ordinary politics are at risk*»³³. Given the above, popular participation in constitutional and human rights litigation can really play a prominent role to «ensure that judicial review reliably promotes a core democratic value - freedom from government domination – without seriously threatening other democratic values»³⁴.

As mentioned before, supreme and constitutional court judges around the world, with few exceptions, enjoy popular trust also because they are increasingly perceived as a forum – sometimes the only forum – of public debate.

There is another factor possibly explaining the acceptance of an intrusive judicial review, namely the emerging representative function of the courts. It is apparent that contemporary supreme and constitutional courts are trying to increase their representativeness: written or customary rules concerning their composition often seek to reflect the society they serve and judicial appointments pay a great deal of attention to public opinion. The practice of confirmation hearings for Supreme Court justices offers just one paradigmatic example: recent scholarship has insisted on how greater public support strongly increases the probability that a senator will vote to approve a nominee since «*presidents often “go public” in support of their nominees in the hope of shifting public opinion*»³⁵ and electoral incentives do the rest, with the effect of *de facto* tying the Court back to the public.

(R.A. DAHL, *supra* note 2, at 285). See, more recently, M.E.K. HALL, J.D. URA, *Judicialmajoritarianism*, in *Journal of Politics*, vol. 77, 2015, pp. 818 ss.

³² C.R. SUNSTEIN, *Introduction - The Legitimacy of Constitutional Courts: Notes on Theory and Practice* Feature: *Questioning Constitutional Justice: Introduction*, in *East European Constitutional Review*, 1997, pp. 61 ss., at 63.

³³ *Ibidem*.

³⁴ M.E.K. HALL, *Judicial Review as a Limit on Government Domination: Reframing, Resolving, and Replacing the (Counter)Majoritarian Difficulty*, in *Perspectives on Politics*, vol. 14, 2016, pp. 391 ss., at 391.

³⁵ J. P. KASTELLEC, J. R. LAX, J. PHILLIPS, *Public Opinion and Senate Confirmation of Supreme Court Nominees*, in *Journal of Politics*, 2010, vol. 72, no. 3, pp. 767 ss., at 772.

Moreover, public confidence in the courts has been increased as a consequence of the changing of the structure and style of judicial decisions since they seek to reflect their real audience, namely the citizens, while in some Latin American countries the phenomenon of judges explain their decisions personally, speaking out to the people and even «*adopting public relations strategies to make it harder for politicians to ignore or retaliate against their decisions*»³⁶, has recently become quite significant³⁷. Some Supreme Courts' plenary deliberations are broadcast as well. An interesting example comes from Brazil, where the Federal Supreme Court has a channel on YouTube, a Twitter profile and a radio station is partially dedicated to this agenda³⁸: its hearings (and the above mentioned public oral hearings) have been shown on TV and social media for over a decade, providing an excellent platform for the court and for every judge to reach a broad audience, thus providing «*the entire population with general, unrestricted, and immediate knowledge on the debates held there*»³⁹.

It's now known that highest courts have become more representative of aspirations and social demands than traditional political institutions: consequently, it has been argued how, in many contemporary democracies, the representative function of constitutional jurisdiction has become more visible and can be considered «*the most important institutional transformation of the last decades*»⁴⁰. Therefore, popular participation in judicial decision-making plays multiple roles. On the one hand, it serves the courts' "search of legitimacy"⁴¹. On the other hand, it seems to ease the tension between judicial review and the democratic process as suggested by Alexy's idea of constitutional review "argumentative representation" of the people, insisting on the necessity of incorporating constitutional jurisdiction in the democratic process in the sense that constitutional courts should be designed as centers of reflection of the political process and found their

³⁶ D. W. Arguelhes, *Judges Speaking for the People: Judicial Populism Beyond Judicial Decisions*, in *I-CONnect/Verfassungsblog*, 4 May 2017 (<http://www.iconnectblog.com>).

³⁷ With regard to Mexican jurisdiction, see the detailed analysis of J.K. Staton, *Judicial power and strategic communication in Mexico*, Cambridge, 2010.

³⁸ J.A. DA SILVA, *Deciding without Deliberating?*, in *International Journal of Constitutional Law*, vol. 11, 2013, pp. 557 ss.

³⁹ M.C. HENNIG LEAL, *supra* note 17, at 10.

⁴⁰ R.L. BARROSO, *Reason Without Vote: The Representative and Majoritarian Function of Constitutional Courts*, in T. Bustamante, B. Gonçalves Fernandes (eds.), *Democratizing Constitutional Law*, Switzerland, 2016, pp. 71 ss., at 75.

⁴¹ From the title of the second chapter (*Constitutional Courts in Search of Legitimacy*) of the volume by W. SADURSKI, *Rights Before Courts. A Study of Constitutional Courts in Post communist States of Central and Eastern Europe*, The Netherlands, 2014, pp. 45 ss.

pretensions so that citizens (or, in his wording, the “constitutional persons”) can rationally approve their reasoning⁴².

IV. “IN THE NAME OF THE PEOPLE”: WHOSE INTERESTS DO JUDICIAL DECISION MAKERS REALLY SERVE?

The involvement of civil society in constitutional adjudication raises at least two inextricably intertwined concerns.

In the first place, it is crucial to ask ourselves how do courts use civil society in order not to dismiss the risk of what we might call “judicial populism”: the courts claim to speak for the people and present themselves as channelling popular sentiment and speaking for the true interests of the people. India, beginning in the Nineties⁴³, and Brazil in the very recent past, are emblematic examples of countries where the only public institutions with a consistently high approval rate are federal supreme courts. But the phenomenon is wide spread and common to many consolidated democracies sharing the political representation crisis contributing to make the judiciary the best interpreter of the majority sentiment in certain contexts. But a major problem arises with regard to the individuation of the true “majority sentiment”. We must face the same old dilemma concerning participatory democracy and the real role of direct citizen participation in government decision-making. Therefore, it is possible to imagine two different hypotheses about the real relationship between judges and civil society or, in other words, the “common people” qualitative contribution to the court’s reasoning.

Under the first hypothesis, judges defend their authority from political attacks using the persuasive argument of popular will, especially when a case raises sensitive and controversial issues related to morality or ethics. It will be sufficient here to mention how judicial recognition of same-sex marriage, passive euthanasia and abortion, to name a few issues, in different domestic and transnational courts is the result of either popular actions or strategic litigation anticipated and followed by brilliant social media campaigns,

⁴² R. ALEXY, *Balancing, Constitutional Review, and Representation*, in *International Journal of Constitutional Law*, 2005, pp. 579 ss.

⁴³ The legal literature on the representative role of the Indian Supreme Court is conspicuous: see R. DHAVAN, *Judges and Indian Democracy: The Lesser Evil?* in F.R. FRANKEL (ed.), *Transforming India: Social and Political Dynamics of Democracy*, New Delhi, 2000, pp. 314 ss.

the participation of many powerful NGOs as *amici curiae*, and, in a few cases, well attended public oral hearings.

However, sometimes, the contribution of civil society seems to be merely functional to the legitimacy of certain decisions without any evidence of real and effective participation. With regard to public hearings as an emerging tool to foster people participation in constitutional litigation, attention should be drawn to the recent Brazilian experience that shows how often public dialogues between judges and civil society end up being a mere rhetorical strategy lacking any real impact on the outcome of the controversy before the Supreme Federal Court⁴⁴.

On the other side, even when courts effectively borrow from third party interventions and – with regard to all different forms of public interest litigation where civil society organizations exercise their law-based advocacy activity- do not “cherry pick” the cases they wish to rule on when granting certiorari or declaring the admissibility of an individual constitutional complaint, some attention should be paid to the real nature and ambitions of associations, groups, foundations engaging in litigation both as parties to the proceedings and as friends of the court. To put it other wise, considerations on lobbying and legislative activity⁴⁵ – conceived as a way to increase the representativeness of certain institutions⁴⁶ - apply to public interest litigators, *amici curiae* and third-party oral interveners as well. North-American studies at the end of the last century⁴⁷, as well as more recent studies concerning the *amicus curiae* practice before the European Court of Human Rights⁴⁸, suggest that this is the case for what we might call “judicial lobbying”, since the *amicus curiae*’s role is far from delivering independent information and advice. *Amici curiae* are more friends of one of the parties, sometimes simply reinforcing their briefs rather than contributing new arguments, than friends of the Court. Furthermore, it is not uncommon for lawyers of the parties to build coalitions with *amici curiae* for the very simple reason that repeated information is useful and it shows consistency across actors and strong support with an obvious impact on how

⁴⁴ M.C. HENNIG LEAL, *supra* note 17, pp. 8-12.

⁴⁵ On the topic, see the recent work by R. DE CARIA, «Le mani sulla legge»: *il lobbying tra free speech e democrazia*, Torino, 2017.

⁴⁶ With regard to the institutions of the European Union, see the study by S. SASSI, *I rappresentanti di interessi nel contesto europeo. Ruolo e sinergie con le istituzioni*, Milano, 2012, pp. 93 ss.

⁴⁷ G.A. CALDEIRA, J.R. WRIGHT, *Lobbying for Justice: Organized Interests Supreme Court Nominations, and United States Senate*, in *American Journal of Political Science*, vol. 42, 1998, pp. 499 ss.

⁴⁸ L. VAN DEN EYNDE, *supra*, note 12, at 288-293.

justices view the credibility of arguments. With regard to the Supreme Court of the United States, it has been repeatedly noticed that its decisions often represent the struggle of interest groups to put their policy views into law⁴⁹. Recent European and North American data tell us that there is room for non-parties to provide information that can really influence judicial choices⁵⁰. Therefore, it seems urgent to ask ourselves a few questions such as: who are really the individuals and associations intervening in judicial proceedings in the public interest? To put it in other words: how transparent are NGOs and other associations with regard to their funding and finalities?

The traditional literature on judicial independence tends to discuss how judges are to be kept away from politics and from the other branches of government but less attention has been paid to the necessary insulation from undue influence from private interests.

Some criticism over the judicial activity of certain organizations seems well founded and has much to do with the huge resources and experience of some of them that might cause them to out match the litigants or with the fact that they are usually based in the developed and industrial world and therefore able to influence the law of non-Western countries without taking into account their traditions, culture, and peculiarities⁵¹. The promotion of international public interest law brought up many questions about national autonomy and identity: lawyers and activists on the ground often considerate as a sort of human rights imperialism and «*view it as an unwanted American export, a tool of social control that dissipates political conflict through legalization or displaces more emancipatory forms of legal resistance*»⁵².

Are there any tools available to avoid the degeneration of this peculiar form of participatory democracy?

⁴⁹ L. EPSTEIN, *Interest Group Litigation During the Rehnquist Era*, in *Journal of Law and Politics*, vol. 9, 1993, pp. 639 ss.

⁵⁰ The North-American literature on how organized interests influence Supreme Court's decision making has become highly conspicuous in recent times: since the publication of the land mark study by P.M. COLLINS, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making*, New York, 2008, significant research has been conducted in the field of interest group litigation: see, most recently, P.M. COLLINS, P.C. CORLEY, J. HAMNER, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, in *Law & Society Review*, 2015, vol. 49, p. 917 ss.; L. Manzi, M.E.K. HALL, *Friends You Can Trust: a Signaling Theory of Interest Group Litigation before the US Supreme Court*, in *Law & Society Review*, vol. 51, 2017.

⁵¹ S. KOCHEVAR, *supra* note 13.

⁵² S. L. CUMMING, L. G. TRUBEK, *supra* note 10, at 4.

Among the possible solutions, we might imagine the adoption of clear procedural rules before the courts for both public oral hearings and the admission of third party interventions, as well as *a priori* control over associations before recognizing their legal standing to bring cases in the public interest.

Recent rules adopted in certain Latin American jurisdictions offer some interesting examples. Be it sufficient here to cite the Argentinian Supreme Court's recently amended procedural rules. The *Acordada* no. 7/2013 stress the importance and prominent role of amici curiae, explaining that they «*help increase the public constitutional debate and the legitimacy of judicial decisions*»:but they must prove their expertise on the issue or declare whether they received financial or other material support from *any* of the *parties*, *if the outcome of the case might grant them an economic benefit and if they have any relationship with the parties to the dispute*⁵³. To put it in other words, it seems urgent to accelerate the adoption of initiatives aimed at increasing the transparency and accountability of NGOs and other associations that pretend to act as a counter weight to state power in order to avoid the risk of some of them being nothing more than the old ruling elites, the so-called “talking classes”⁵⁴ in disguise.

I would argue that the so-called “judicialization” of politics and the tendency for groups unsuccessful at pursuing their goals through the electoral and legislative processes to seek policy change by judicial decision are not pathological, but a natural and physiological phenomena even if the risk that the judges will be seen as just another bunch of politicians subject to the same pressures as other politicians, is a concern⁵⁵. Popular participation in judicial decision-making might be considered as an excellent tool to allow different forms of organized civil society to give voice to those “discrete and insular minorities” mentioned in the famous Footnote 4 that greatly influenced North American jurisprudence on the Equal Protection Clause⁵⁶. Human rights adjudication is the place where a new form of citizenship, that we might call “global citizenship”, may emerge, since members of today's most subordinate groups (namely foreigners) do not have access to traditional political representation.

If it's true that the new constitutionalism – and, more precisely, the enormous impact that the constitutionalization of human rights had on the size and scope of

⁵³ Art. 2, *Acordada* no. 7/2013.

⁵⁴ C. LASCH, *The Revolt of the Elites and the Betrayal of Democracy*, New York – London, 1995.

⁵⁵ M. SHAPIRO, A. STONE SWEET, *On Law, Politics, and Judicialization*, 2002.

⁵⁶ The most famous foot note in constitutional law is part of the decision of the United States *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

judicial review - is to be understood as part of a larger effort by elites to insulate policy making from democratic impulses⁵⁷, there seems to be enough room to remain convinced of the great opportunity represented by the interaction of civil society groups with domestic and international judicial bodies.

These considerations on courts as fields of political battles and new democratic arenas, although posing more questions than providing answers, intend to raise a crucial issue regarding the true nature of popular involvement in constitutional adjudication and draw the attention to the consequent need of legal regulation of the emerging phenomenon of judicial lobbying which has been largely side lined in legal and political scholarship.

⁵⁷ R. HIRSCHL, *supra* note 4, *passim*.