Court sovereignty as a criterion of democracy. The apologia of judicial activism in the American political-legal thought, in the context of the question as to what the subject of democracy is

The article dwells on a concept, according to which, it is the legislative power of the courts which is the criterion of democracy. The research tool adopted by the author is an ideal type of modern democracy, as posited by Claude Lefort, whereby democracy is a manner of self-understanding in a society and, on the grounds of this understanding, it is impossible to point to a defined subject of authority. The political process in this type of democracy is to consist in its transient, symbolic identifications. This objective is to be served by efforts aimed at an institutional recognition of subjective rights, individual and collective. Such an understanding of democracy corresponds to the modern tendency in the philosophy of law and politics, whereby the legislative role of the courts is legitimised. This thread finds a particularly characteristic expression in the apologia of the political position of the U.S. Supreme Court. It results from the changed criteria of democracy, which is no longer the rule of the people or its influence on the rulers, but rather an individual’s belief that their claims, justified on the ground of subjective laws, will be settled openly and impartially, with the settlement only providing provisional answers, in order not to close the road to acknowledging successive claims. It is in this way that both the idea of the people as a subject of democracy and that of the individual as a subject of specific rights undergo deconstruction. If democracy, understood in such a way, at least appears to implement Lefort’s requirement for the subject of power to be undetermined, then at the same time, in view of the undetermined character of its concept, which manifests itself in acknowledging it to be an expression of the rule of an elite body fulfilling particular interests, it becomes devoid of the ability to shape a common and unifying political symbolism.

Tags: theory of democracy, Claude Lefort, judicial activism