Juristocracy
Trends and Versions

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Part One
Aspects of Juristocracy

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Foreword

The chapters of this part analyze the processes by which a democracy-based state is increasingly transformed into the juristocratic basis in a number of countries in the Western world and by their impulse elsewhere in the world too. This is essentially created by the wider and wider competences of the constitutional courts, but the change of the decision-making process of the other supreme courts shows this direction also. What has been politically debated within the democratically elected bodies in the state of democracy - and the millions of masses cast their votes in order to determine the direction in which these issues should be resolved – it is based in the juristocratic state on the struggle with legal arguments, and the final decisions are made by the supreme court or constitutional court. The constitutional courts are at the center of these developments, and thus the book's analysis starts with the research of the changes by which the originally limited constitutional courts were transformed into chief organ of the state. This transformation has caused the situation today in which the final decisions of society and the state are ultimately decided by the constitutional courts.

The analyses of this book find the answer to this - after the initial modest American and then Austrian beginnings - in the radical enhancement of the German Constitutional Court, which was achieved by the US military government during the occupation of Germany after the Second World War. The constituent work for the new constitution was directed by the Americans and they wanted to make here a controlled democracy over the millions of German masses. There has been an explicit intention to limit the democracy of the millions of Germans and in order to do this a powerful body was planned that intervened and blocked the possible misguided political shift of the German masses from the point of view of the Great Powers and the US. While at home, in America at the time, such a degree of control over democracy by the constitutional judgments of the Supreme Court was still inconceivable, so it was for the Germans to do so. This limited democracy was then brought to the public with a narrative that this should be a quality democracy enhanced by constitutional guarantees. And because the aversion of millions are caused by the shadowy side of democracy - with its controversial parliamentary debates and the often mischievous clashes of politicians in the media - the solemn

announcements of the constitutional courts and their working behind the public achieve a great support for them. In view of the great success, the model of limited democracy in the Germans as an improved quality democracy then became one of the main tools of the US-led powers after the overruled dictatorships - most of the time, it was pushed out and the overthrow was supported from outside by the US - which they strongly recommended and also financially supported for the transforming countries. Over the last decades, a lot of constitutional courts have emerged in a number of countries in the world, and the constitutional courts have become increasingly powerful over the democratic bodies. Indeed, if good governance and quality democracy mean being decoupled from the election by the millions, and the strong constitutional court over the democratic bodies means the sublimation of democracy, why stop halfway and not create the best and most quality democracies?! While, of course, this change has caused an even greater stifling of democracy, and, in many cases, democracy was almost annulled by this.

The analyses of the book, therefore, will then remove the already broken taboos over the research of the creation of the German Basic Law and show that the path towards ever-growing constitutional courts has been created by the US occupying military government explicitly in order to limit democracy and this has later become the beginning of the juristocratic state. The analysis also shows that this state operation has not only become popular in a number of countries around the world, but it has also a special legitimacy base for this. Apart from some share-out in the principles of democracy, the justification of the state's decisions is here that these decisions are always made - with fewer or more chains of reasoning – by deduction from the constitution. This special legitimacy makes it a top priority for examining how the decision-making processes of the constitutional court actually take place and whether there are structural distortions in deriving these decisions from the constitution.

By the analyses seven such distortions are shown, and in the last chapter of the book, some modalities for the refinements are analyzed. It is stated that by these refinements the juristic decision-making processes will be more appropriate to match this legitimacy promise. On the other hand, the analysis suggests that even if we admit the state's juristocratic base, we still have to strive to at least partially fasten it back to the principles of democracy.

Chapter 1.
The functions of constitutional courts – in a realistic perspective

In the mid-1970s outside the United States there were only three countries in Europe that had a constitutional court while nowadays the majority of the countries in Latin America, Europe, Asia and Africa have some form of constitutional adjudication. In addition to these, the new constitutional courts were given increasingly wide powers in monitoring and shaping the law and politics. In the following, this expansion of functions will be analyzed in the first part of the study. Subsequently, the consequences of international judicial function will be highlighted which some new constitutional courts began to exert. Finally, the following analysis tries to show some typical distortions in the activity of the constitutional courts that emerge in their decision-making. By way of conclusion and as a gesture of providing a wider perspective, the study raises the notion of the gradual establishment of the juristocratic state by the expansive power of the constitutional courts and the other higher courts.

1. The expansion of functions of constitutional courts

The idea of constitutional adjudication arose in the United States in the early 1800s as a consequence of the federal structure, which was historically the first one to be established. The collision of the federal power and the state power was the problem that historically caused the establishment of constitutional adjudication. The federal and state legislations collided because the federal government powers were exhaustively listed in the Federal Constitution and all the other powers were given to the Member States but there was no institution to resolve the possible collisions. The head of the Federal Supreme Court, Chief Justice John Marshall, in 1803 came to the idea that such conflicts must be decided by the Federal Supreme Court. For a long time only this function was associated with constitutional adjudication. This narrow function expanded in the second half of the 1800s in the United States, and the justices of the Supreme Court began to review the legislative acts on the basis of the incorporated fundamental rights, too. With this modification, what was initially a purely formal review of the legislative acts, was transformed into comprehensive content control, and, on the other hand, on the basis of the open nature of the fundamental rights, the constitutional adjudication was gradually transformed into the position of a strong political center over the legislature.

In Europe this new constitutional adjudication was watched with great respect and the federal statehood in Switzerland gave the first impetus to take over this institution. [1] In 1874 a constitutional amendment made it possible here for citizens to complain before the Federal Court concerning the state acts that violated their rights. Based on this experience, the

[1] See Georg Jellinek, *Ein für Verfassungsgerichtshof Austria.* Alfred Hölder K. K. Universitäts- und Buchhandlung. Wien. 1885 57 p.

prestigious Austrian lawyer, Georg Jellinek, in a study in 1885 outlined a comprehensive constitutional adjudication for Austria.[2] In this version of the constitutional adjudication, the constitutional court would not only review the legislative acts, but, in addition, would have control over the course of the elections as well as the protection of constitutional amendments requiring a qualified majority law against simple laws.

Finally, after these beginnings the takeover of constitutional adjudication happened in Europe in 1920 in Austria with the modification that here a separate constitutional court was established and it was not the higher ordinary courts that were charged with this function. By this modification the character change of the constitutional adjudication could be predicted. Unlike Georg Jellinek's plans - who designed the realization of the constitutional adjudication by the main ordinary Austrian court, the *Bundesgerichtshof*, as it exists in the exemplary US - the Austrian Constitutional Court was completely separated from the ordinary court and basically not judges but university law professors and other lawyers were included as judges of this new body. Namely, the then Social Democratic parliamentary majority had not the slightest confidence in the conservative Austrian higher judiciary and, in this way, the dominant politicians saw a separated Constitutional Court which could be filled by socialist lawyers and friendly professors as more appropriate. This was all the more important because this new kind of constitutional adjudication was not inserted at the end of judicial lawsuits – as originally in the United States -, but the legislative acts could be attacked before the Constitutional Court immediately after they had been promulgated. With this modification, constitutional adjudication came to the center of constant political rivalry between the government's parliamentary majority and the opposition parties and, in this way, it became the final political judge during the review of parliamentary acts.

The next milestone in the changes of the functions of the constitutional courts was the post-World War II reconstruction of the defeated Germany and Italy by the lawyers of the occupying American forces. In these countries new constitutions were created and the content of these constitutions was chiefly determined by American lawyers. (The transitions controlled by the United States could create such a constitution that was completely achieved by the lawyers of the US occupation forces and it was only translated afterwards as, for example, in Japan after 1945.[3]) At home in America constitutional adjudication was done by ordinary courts. However, just as in 1920 in Austria the left-wing social Democratic majority had an aversion against the conservative judiciary, so the occupying US military leadership did not want to give the big political power of constitutional adjudication to the judiciary socialized during the Hitler and Mussolini regimes. Thus the separately organized constitutional court in Austria gave the pattern to the new constitutional adjudication in Germany and Italy. The Americans filled the constitutional court in Germany with reliable law professors (who sometimes came back with the occupying forces) and this gave a strong background support to the constitutional judges in the 1950s. [4] The Italian Constitutional Court was organized outside the hierarchy of the ordinary

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[2] See Jellinek, supra note, 10-52.

[3] As Noah Feldman wrote, the forced nature of the Japanese Constitution by the American became known to the Japanese public's attention only after ten years, and then a committee was established for screening and possible revision of the provisions of the constitution. But in the end they kept everything from it. Today this would not be possible - Feldman adds – because of indispensable internal legitimacy of constitutions: “Less than a decade after the adoption of the Japanese Constitution, the document's imposed foreign origins became public knowledge in Japan. A commission was formed to consider redrafting – and despite the recommendations for changes, the existing constitution was preserved in its entirety. Half a century later, one cannot imagine this sort of acquiescence being reproduced in most places in the world. Today a new constitution must be understood as locally produced to acquire legitimacy.” Noah Feldman, *Imposed Constitutionalism.* Connecticut Law Review (Vol. 37.) 2005, 859.p.

[4] A lot of information concerning the radical elite change towards transatlantic spirit after the Second World War is provided by the excellent book of Stefan Scheil, see: *Transatlantische Wechselwirkung. Der Elitenwechsel in*

court too, but here it had only a limited character. Until the end of the 1950s, the constitutional court could not begin its activity here because of internal struggles between political forces, while during this period the German Constitutional Court was able to build up its power over the activities of the German state. Later in the 1980s and '90s, during the spread of constitutional adjudication over Europe, Africa and Asia, the Italian model did not exert significant influence and the German model has become a major pattern for the takeover. So this study wants to concentrate on the analysis of this model.

The direct control over the legislative acts by the constitutional judges was left here - as was in Austria – but this model tried to partly tie constitutional adjudication to the higher courts. In Germany it was made possible to challenge the final judgment of the ordinary judicial litigation by constitutional complaint, and very soon it became the largest in workload of the constitutional judges. On the other hand, in order to create a higher degree of binding of the constitutional adjudication to the higher judiciary, it prescribed that a third of the constitutional judges are to be elected from among the members of the five supreme courts.

Retrospectively it can be said that only the German Constitutional Court could really unfold the Constitutional Court's power potential, namely that this court is elected by the political forces. A stable background support for this was secured by the US occupying forces during the political struggle with a majority government. This support was most needed, as the extensive power of the constitutional judges for the annulment of the legislative acts had no precedent and the German constitutional judges have only further widened this power. [5] (In the US, the constitutional adjudication did not reach such a level of power by 1940; it was implemented there only in the 1960s.) Another power base for the German constitutional judges was given by those very abstract and almost normatively empty formulas and declarations, which were incorporated in the 1949 German *Grundgesetz* as basic constitutional rights. One such example was the "right for the expansion of all-round personality" and the other the "inviolability of human dignity." The German Constitutional Court constructed these formulas as the general aspects of human essence, and they were used to create new fundamental constitutional rights that comprehensively transformed the original constitution.

There was an important modification during the later development, which the German constitutional judges started to apply parallel with the annulment of parliamentary acts. Originally, the separately organized constitutional court created directly for the control of the legislation had only a capacity of the *negative legislation* (in other words: the annulment of the law), as the founding Father of the Austrian model, Hans Kelsen wrote. But in the practice of the German Constitutional Court this began to gradually change and in the reasoning parts of their decisions – parallel with the annulment – the constitutional judges began to provide dense regulations that were recorded in detail concerning the way the new law had to be created in order to be accepted by the constitutional judges as constitutional. In this way, the negative legislation began to slide toward becoming a stronger positive legislation. Then the new

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Deutschland nach 1945. Duncker und Humblot. Berlin. 2012; regarding the Constitutional Court see, in particular, pages 155-159.

[5] The role taking of the German Constitutional Court was decisively determined in the first years between 1951-71 by Gerhard Leibholz returned form the exile on 1946. In his so-called *Status-Denkanschrift* (memorandum) he outlined the privileged position of the Constitutional Court against the government and the parliamentary majority government in 1952. Under his leadership, the German constitutional judges began a bitter struggle against the Adenauer government in order to enforce their primacy over each state body. For details see: Justin Collings, *Gerhard Leibholz und der Status des Bundesverfassungsgerichts. Kareere eines Berichts und seines Berichterstatters* In: Ann Bettina Kaiser (Hg.): *Der Parteienstaat*. Nomos. 2013, 228-258.

constitutional courts, which were established in the 1980s and 1990s based on the German model, took over and expanded this change into a more positive legislation.

Adopting the activist style of constitutional adjudication that had been developed by the German judges, the Spanish Constitutional Court has become another vanguard since the early 1980s. In fact, the Spanish constitutional judges even further intensified this activist style and step by step they began pushing aside the provisions of the Constitution, and basically used their old case law for the annulment of the new parliamentary acts instead. The frequent use of its own case law has always been characteristic of the Germans also, but in their decision making the analysis of the text of the constitutional provisions also appears. (True, they are very often far away from this text and use such standards for the foundation of their decisions that are created by them from general constitutional declarations.) However, in the case of the Spanish Constitutional Court the provisions of the Constitution also happen to be completely pushed aside, and their decisions are solely based on their own case law instead. [6] In this way, by enhancing the German initiative, the Spanish practice of decision making has established here the phenomenon of *pseudo-constitution*, which is the dominance of the case law of the Constitutional Court which pushes aside the written Constitution.

In the creation of a pseudo-constitution and in enhancing the other activist activities of the German constitutional judges, the Hungarian Constitutional Court has become another vanguard since the 1990s. After the collapse of communism in the '90s, the idea of constitutional adjudication was not at all known in Hungary in the legal profession and in the political public sphere. This idea was propagated just as the supreme achievement of the long-awaited political democracy. The first constitutional judges chosen at random in 1990 did not even know what their role actually was and what role belonged to the new multi-party political system. In the chaotic political situation the first freely elected parliamentary majority and its government had such circumstances in Hungary that gave specific opportunities to unfold constitutional adjudication with the greatest power. Indeed, a majority of the national-conservative parties could form a government, but beyond its governmental power the opposite parties of the leftwing and left-liberal enjoyed full media support, the resources of the economic power and the university and the academic sectors also. In this situation, the vast resources of power behind the opposition virtually paralyzed the government for the first few months, and in November 1990 there was also a taxi drivers' blockade in the capital, which aimed to overthrow the government.

The Hungarian Constitutional Court started to develop its decision-making style in these months and, encouraged by its charismatic president, László Sólyom, it took over the most activist formulas from the practice of the German one. [7] In addition, the Hungarian

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[6] The most obvious example of such a decision-making style of the Spanish constitutional judges was their decision in 2012, in which they decided over the Civil Code provision permitting same-sex marriage. The Spanish Constitution literally states that marriage is a legal tie between a man and a woman, but this provision was recognized as consistent with the constitution by the Spanish constitutional judges. The relevant provision of the Spanish Constitution in English translation reads: "Art 32.1. A man and a woman will be entitled to marry in terms of full legal equality." This is interpreted by the constitutional judges as follows: "Otherwise, if strictly and literally interpreted, Article 32 CE only identifies the holders of the right to marry, not the other spouse, although, we must insist, systematically speaking it is clear this does not mean that there was a wish in 1978 to extend the exercise of this right to homosexual unions" STC No. 198/2012, 5.p. However, despite the declared admission of the opposition of their decision to the constitution, they declared the same-sex civil marriage as consistent to the constitution.

[7] Kim Lane Scheppele – based on her positive assessment - compares the charismatic presidential role of László Sólyom to the role taking of the president of the Russian Constitutional Court, Valery Zorkin role, and she keeps them as the most prominent personalities of constitutional courts in the post-Soviet times. See Kim Lane

constitutional judges were not burdened by the huge workload of the complaints against the decisions of the ordinary courts, which was the situation in Germany and in the other European countries. In Hungary - in line with the Austrian solution – constitutional adjudication was initially set up to directly control the legislation and not the ordinary courts. In addition, this direct control - unlike that of the Austrians - could be initiated by everyone, and therefore the annulment of the parliamentary acts by the constitutional judges took place almost daily in the early years. During the frequent annulment of parliamentary acts, it emerged that the basis of the decisions of the constitutional judges was not the written constitution but an "invisible constitution" set up by the Constitutional Court's own decisions. This decision-making style was used by the German and the Spanish constitutional judges earlier also, but they did not dare declare it openly. In a political situation where the full media power, university and academic intellectual power and economic elite stood behind the opposition parties, the constitutional judges with their "invisible constitution" became heroes of democracy in the eyes of social groups that supported the opposition. In this political atmosphere they could cross out the constitutional provisions, and the more laws they destroyed, the more recognition was given to them by the mass media and the representatives of the academic intellectual power. With such tremendous backing - when the criticism against the Constitutional Court's decisions was almost forbidden in public - the Hungarian Constitutional Court's practice began to take over all the established forms of the competence expansion and the determination of the content of the future law.

These competence enhancements were then legalized by the new Constitutional Court Act of 2011, which was based on the new Hungarian Constitution. In this way, beyond the simple annulment of parliamentary acts, the following tools have become available for the Constitutional Court in order to determine the content of the future law. 1) Beyond the possibility of full annulment, it can change the statutory provision under investigation to annul part of it and leave the rest untouched. In this way, this provision will basically have a different content in the future. 2) It is possible also that the constitutional judges let all of the statutory provisions under investigation untouched, but a constitutional requirement will be appended to it by them and thus the ordinary judges and the authorities will apply it in the future only in combination with this addition. 3) A third possibility is that they investigate a statutory provision involving a constitutional principle of law, a constitutional provision or a fundamental right and they will reach the conclusion that there is a constitutional omission here which must be filled by the legislation on the basis of their instructions. Supported by these possibilities, the Hungarian Constitutional Court has received a broad toolkit to determine the future positive laws beyond its power of negative legislation.

Summarizing the expansion of functions, the following can be stated. The focus of the functions of the constitutional courts is the protection of the provisions of the constitution, which must always be realized in the midst of the struggles between the parliamentary majority and the parties of opposition and eventually between the government and the head of state. Beyond binding the new parliamentary acts to the provisions of the constitution, the main purpose of the functions is to ensure the peaceful change of the government after the fall of the ruling party in the parliamentary election or in case of the government's ouster in the Parliament also. These functions include the review of the electoral litigation and the review of the creation of parliamentary acts and this latter can take place before the promulgation of law (*prior review)*, or subsequently after publication. The posterior review can take place in the abstract, when the deputies - a group of MPs (for example, fifty or a quarter of all MPs) etc.) may

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Scheppele, *Guardians of the Constitution: Consitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe.* University of Pennsylvania Law Review (Vol. 154.) 2006, 1757-1851. p.

challenge the new law, or, in federal-type states, the governments of the Member States or legislation can challenge the federal law, and vice versa, Member States' laws can be challenged by the federal government bodies. In some countries, however, this is broader, and this posterior review is possible for everyone. For example, in Hungary, the 1990 regime until 2012 made this *actio popularis* possible and anyone - even non-Hungarian citizens - could challenge any applicable laws and regulations before the Constitutional Court with resorting to constitutional complaint immediately after the publication of these said laws and regulations and demand their annulment.

In addition to these main functions - if they already exist - the constitutional courts have such functions also by which they can decide over the power abuse committed by the head of state or by the Prime Minister during the procedure that was started by the parliamentary majority or otherwise. To furnish some examples, it was in this way that the constitutional judges deprived the President of Lithuania – Rolanda Paksas – of his office in 2004. The Prime Minister of Thailand was also thus removed from office twice after the millennium. Although this has not occurred yet, the Hungarian Constitutional Court has this jurisdiction also and, started by the proposal of two-third of the MPs, it can remove the head of state from its office if the intentional violation of the Constitution or of the law is established. [8]

During the analysis of constitutional functions, a special analysis must focus on a function that was not included in the original US version of constitutional adjudication, but it emerged in several constitutional courts in Europe after the Second World War.

2. The Constitutional Court as an international tribunal

Constitutional adjudication migrated from America to Europe after the Second World War and received an additional function in respect to international law, which did not exist at its original site. The German Constitution of 1949 was created under the close control of the lawyers of the occupying US troops and because the division of Germany and permanent occupation was the aim, some provisions were also included in the German Basic Law to prevent the build up of a new totalitarian regime by the general elections, as it had taken place in 1932. [9] In this way, the direct subordination of the German law to the international law by the German Basic Law was another tool for the control of the German State and this control was given to the Constitutional Court: "The general rules of international law are part of federal law. They take precedence over laws and directly establish rights and obligations for the inhabitants of federal territory." (Article 29). Then, the precedence of the international law over the German law is specified by the Article 100 (2) in such a way that if doubt arises in a situation whether an international law is part of the federal law, then the Constitutional court decides in this case. In the past sixty

[8] See Article 13 of the Hungarian Constitution, and its detailed rules in the Constitutional Court Act, section 35.; the same rules were contained by the provisions 31/A and 32. of the old Constitution.

[9] During the constitution making determined by the Americans, Hermann-Josef Rupieper emphasized three main targets: “1949 hatten sich drei Stategien herauskristalisiert, um zu verhindern, dass die Deutschen jemals wieder zu einer Gefahr für die “demokratischen Welt” werden konnten: Sie sollten “zum überzeugten Glauben an die Demokratie” gebracht werden, sie mussten durch “Kontrolle und Überwachung” in Schach gehalten werden, und sie waren durch Europäische Integration” in breitere Beziehungen einzubetten. Alle Elemente dieser Politkik existierten weiterhin parallel zueinander.” Hermann-Josef Rupieper: Peacemaking with Germany. Grundlinien amerikanischer Demokratisierungspolitik 1945-1954. In.: Arnd Bauerkämper (Hg.) Demokeratiewunder. Tranatlantlische Mittler und die kulturelle Öffnung Westdeutschlands 1945-1970. Vandenhoeck und Ruprecht. Göttingen. 2005. 41-56. p.

years, the German Constitutional judges have exercised this competence only modestly [10], but in any case, this example has urged some European constitutional courts that were established later to incorporate this new function among the competences of constitutional adjudication. In this way, the national laws are controlled by these constitutional courts not only on the basis of Constitutional law, but on the basis of international law also. With this doubling and intertwining, constitutional law and international law started in some way to converge, although it is always determined by the attitude of the majority of the constitutional judges in a country what degree of "international court" in addition to the constitutional court they want to realize.

However, by the possibility of this intertwining, some new developments emerged which give new aspects to constitutional adjudication. One of these developments - with a strong global power support – is the constitutionalization of international law, which is utilized by several legal expert groups. These lawyer groups mentally grasp the international law originally created by the contracts of the sovereign nation-states as the *global constitution,* and they try to use it to achieve the subordination of the nation-states and their national constitutions. [11] *Prima facie* it is only a theoretical development, but if we look at the development of the more comprehensive global world order in recent decades, it fits in very well with these. Namely, since the early 1970s and then from the 1980s onwards, the new monetary-capitalism began to be built in place of old nation state capitalism based on *Keynesianism* and stage by stage the boundaries of the nation-states of individual countries started to be removed in order to integrate them into the new global monetary-capitalism. [12] After the disintegration of the Soviet empire, the Central and Eastern European countries have entered this global monetary-capitalist organization from the 1990s onward. The increasing European integration – similar to the endeavor of other regions of the world - received the incentives and the background from these global monetary organizations in order to control the diverging nation-states. From 1995 onwards, the IMF, the World Bank and especially WTO were able to stabilize this new world and new forums about the nation-states were created by international treaties in order to penalize them if their obligations were hurt. Actually, it was only from 2008 onwards, when the great banking crisis erupted and the whole financial market system based on global banking families proved to be fundamentally inadequate to maintain world capitalism, that this whole global structure was shaken. Parallel with the effects of the demographic crisis of the central and eastern European countries enhanced by the migratory movements of their peoples to Western Europe, these phenomena made the political forces of the nation states stronger against the European Union and also confronted the global mechanisms over the nations. The new tendencies, however, are still at an initial stage of recent developments, and, in this way, on the intellectual level they could still not urge strong reversing trends against the global monetary-world and in the intellectual sectors the forces of globalization still remain dominant.

Against this structural background it is possible to explain the intellectual developments that created the theory of the constitutionalization of international law in the intertwining circles of international lawyers and constitutional lawyers in the mid-1990s. Austrian lawyer

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[10] "Some post-World War II national constitutions incorporate international law - or some parts of international law - as superior to statutes. So for example, in Germany, The Basic Law provides that *"the general rules of public international law ... take precedence over statutes and directly create rights and duties for individuals",* although in practice this provision is given somewhat restrictive meaning." Vicki C. Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement.* Federal Law Review (Vol. 35.), 2007 164.p.

[11] For a summary analysis of this effort, see Christine Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*. German Law Review. (Vol.13.) 2012, 2-22. p.

[12] For the summary analysis of this process, see: Kees van der Pilj, *Global Rivalries. From the Cold War to Iraq.* Pluto Press. 2006

Alexander Somek criticizes this effort as follows. Because in the years after the turn of the millennium, the plan of the European constitution and the United States of Europe completely failed in terms of politics, and, in addition to this, the increasing growth of euro-skepticism does not allow any return to this, the law professors consequently followed in the footsteps of politicians, and by redefining the legal concepts they try to create the desired social reality. Their motto is: if the new world order can no longer be created by political means, you can imagine that the desired change has already happened and make it look as if the changes had already become a reality. [13]

The constitutional courts equipped with this function will also become international law courts controlling domestic law, and this results in their trying to control the constitutional power of their own countries by relying on the international "constitutional" law. Because not enough comparative data is available to me, in order to reveal the reality in this respect, I try to show the different situations in the countries according to the text of their constitutions.

The constitutional courts in Romania and Croatia do not have the "international court"-character on the basis of their constitutions, and the constitutional judges in both countries control domestic law only on the basis of their national constitutions. Turning to those where there is this double character of the constitutional court, in the following the discussion will move from weak to strong in this respect. In this way, one must start with the Czech constitution, which includes the double-checking basis of the constitutional judges over the domestic law only in a limited form. By the Article 87 (1) i) provision of the Constitution, the Czech constitutional judges can control domestic law not on the basis of the abstract international treaties, but only such law can be annulled by which the implementation of certain international courts judgment is prevented. [14]

In contrast, the Slovak Constitution contains the possibility of controlling domestic law on the basis of international law and, beyond the provisions of the Slovak Constitution, the constitutional judges can always annul a domestic law on this basis, just like in Germany. Differently from the German solution, however, the Slovak Constitutional Court can control domestic law on the basis of such a part of the international law that has been created expressly with the international conventions and to which Slovakia joined and not on basis of the 'generally accepted rules of international law' that could be widened freely by the constitutional judges.[15] On the other hand, however, the control of domestic law on the basis of international law has got another possibility, because the constitutional complaint of the citizens will be judged by the constitutional judges under the human rights treaty and not on the basis of the Slovak Constitution. (Just like in the case of the Court in Strasbourg.) With this solution, the subordination of domestic law to the European Convention on Human Rights has been

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[13] "Since nobody appears to believe any longer in the change of the world order by political means, scholarship is increasingly taking comfort from the academic equivalent of practical change, namely the re-description of social realities of social. If the world cannot be changed, you imagine it changed and pretend the work of your imagination to amount to the real. (...) The most ludicrous form of the re-description is the application of constitutional vocabulary to international law." Alexander Somek, *Admistration without Sovereignty.* In Petra Dobner / Martin Loughlin (eds.): *The Twilight of Constitutionalism?* Oxford Univ. Press, 2010. 286 p.

[14] See "The Constitutional Court shall rule on ... (...) i) measures essential for the implementation of a ruling by an international court, which is binding for the Czech Republic, unless it be implemented in a manner."

[15] Article 185. 1. "The Constitutional Court shall decide on the conformity of the laws with the Constitution, constitutional laws and international treaties to which the National Council of the Slovak Republik expressed its assent and which were ratified and promulgated in the manner laid down by law; b) government regulations, generally binding legal regulations of Ministries and other central state administration bodies with the Constitution, with constitutional laws and with international treaties to which the National Council of the Slovak Republik has expressed its assent and which were ratified and promulgated in the manner laid down by laws. "(The Constitution of Slovak Rebublik.)

duplicated. In addition to this, not only can the constitutional judges annul the domestic legal provision, by which a human right under international conventions is violated, but they can also declare that something has been omitted and set a time period and prescribe a mandatory legislation for the elimination of the omission. [16]

As in Slovakia, the Polish constitution also contains the control of domestic law on the basis of the international law and it is important to emphasize that here also this control can be based only on international agreements which were signed by the Polish government agencies and were ratified and the 'general rules' of international law (so-called *jus cogens*) cannot be used by the constitutional judges to control domestic law.[17] But the subordination of domestic law under international law is intensified in such a way that the judges of the ordinary courts may ask during the judicial procedures for the examination of legal provisions that are currently being applied not only on the basis of the Slovak Constitution but also on the basis of international law.[18] Compared to the above, the control of domestic law by the Slovenian Constitution is more widely possible on the basis of international law, because here the German sample as a whole was adapted, and this control is allowed not only under international treaties signed by the Slovenian state bodies and ratified, but it can be based on the general rules of international law also. [19]

The Hungarian Constitution contains the possibility of the control of domestic law as widely as it was visible in the German and Slovenian samples. Sometimes, on this double control basis, such a majority of constitutional judges was formed in Hungary that it tried to control constitutional power also and on the basis of the general rules of international law (*ius cogens*) these constitutional judges also saw it as possible that they could annul constitutional amendments. The paragraph (3) of article Q) of the Hungarian Constitution contains the possibility of control of domestic law on basis of international law, according to which the Constitutional Court - in addition to the fundamental constitutional rights – can check the national legislation: „Hungary accepts the generally recognized principles of international law. Other sources of international law become parts of domestic law after promulgation." There is no problem with international law being promulgated and this cannotcreate a formal restriction of state sovereignty, because earlier this was explicitly accepted by the Hungarian State. However, some problems may be caused by the *ius cogens* over domestic law because with certain interpretations it makes it possible for the constitutional judges to extend their control

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[16] Article 127 "(1) The Constitutional Court shall decide on complaints of natural persons or legal persons if they are pleading the infringement of their fundamental rights or freedoms, or human rights or fundamental freedoms resulting from the international treaty which has been ratified by the Slovak Republik and promulgated in the manner laid down by law, save another court shall decide on the protection of these rights and freedoms. (2) (...) If the infringement of rights and freedoms according to the paragraph 1 emerges from inactivity, the Constitutional Courtmay order the one who has infringed these rights or freedoms to act in the matter. "(The Constitution of Slovak Rebublik.)

[17] Article 91 (...) "2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. 3. If an agreement ratified by the Republik of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws. (...) Article 188. "The Constitutional Tribunal shall adjudicate regarding the following matters: (...) 2. the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute." (The Constitution of the Republik of Poland of 2nd. April 1997)

[18] Article 193. "Any court may refer a question to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute, if the answer to such question will determine an issue currently before such court." (The Constitution of the Republik of Poland of 2nd April 1997)

[19] Article 160. "The Constitutional Court decides on the conformity of laws with the Constitution; on the conformity of laws and other regulations with ratified treaties and with the general principles of the international law."(The Constitution of the Republik of Slovenia)

to the Constituent power itself. In this way, a possible new constitution or amendments to the Constitution can be declared by the constitutional judges as contrary to the rules of the *ius cogens* and they can be destroyed. This position was occupied in 2010 by the then majority of Hungarian Constitutional Court majority, and they declared in the decision 61/2011 (VII.13) AB that they would grasp the ius cogens rules of international law not only over the entire legal system, but over the Constituent power also. With this interpretation they declared that the future amendments to the Constitution would be controlled by the constitutional judges. The exact text sounds like this: "The norms and the principles of the ius cogens of the international law can serve as benchmark for monitoring (…) the norms and principles of the ius cogens and their core values together constitute a standard to which all Constitution and their amendments in the future will have to comply. "(part V. 2.2. of the reason). This interpretation was usually rejected from 2011 onwards by the majority of the extended Constitutional Court - after fierce internal debates -, but in the decision 12/2013 (V. 24) AB it was confirmed again.[20] Against this expanded interpretation, in my opinion, the sovereignity-friendly interpretation of the article Q) of the Hungarian Constitution can only be that the rules of the ius cogens of international law are merely the framework for the international contracting authority of the Hungarian state and they are not aimed at subjecting the constitutional power to the constitutional judges.

3) The structural distortions of the functional activities

In the field of the control of domestic law based on international law we have already seen one possible distortion, but if we take a closer look at the functioning of the constitutional courts, we can discover more distortions. Most of these can be perceived in the multi-directional extension of their powers, but there are distortions caused by the fact that due to structural reasons, most of the decisions are not made by the constitutional judges themselves, but the determination of content of these decisions has been slipped to the various apparatuses of the constitutional court. Let u al s look more closely at these distortions.

Before analyzing the distortions arising from the arbitrary expansion of the powers by the constitutional judges, it is worth highlighting that a control over the constitutional courts could only be established with difficulty, given that this institution is directly related to the foundation document of the constitutional power, and, in this way, it is above all state organs. There is no state power body that could take charge of it. This structural situation then inevitably brings with it after a while that the irrefutable constitutional judges begin to interpret the

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[20] As a literature backing it can be summoned the analysis of the two studies wrote by John McGinnis and Ilya Somin. In this analysis, they see the international interweaving of strong political elites failed in the domestic political system but strong on a global scale as the driving forces behind the constitutionalization of international law. These forces are politically weak at home and that's the reason why instead of democracy they tend to trust the international judicial oligarchies: "A final explanation for the rise of raw international law may be its attractiveness to groups that are dissatisfied with the outcomes of the domestic political process. Political scientist Ran Hirschl has suggested that social and political elites have reacted to the rise of democracy in the modern world by constructing more powerful and wide-ranging roles for the judiciary over which they retain substantial influence." John O. McGinnis/Ilya Somin, S*hould International Law Be Part of Our Law?* Stanford Law Review (Vol. 59) in 2007 March 1185. p.; and their second study by which the expansive jurisdiction based on human rights is criticized: McGinnis/Somin, *International Human Rights and Democracy.* Notre Dame Law Review (Vol. 84.) 2009, No. 4 1739-1798. p.

comprehensive and normative empty constitutional rules more and more broadly. Or, making use of an alternative method, it can read out new fundamental rights from the comprehensive and normative empty declarations of the constitution, and, in this way, a new constitution will be created by the constitutional judges step by step. One way to do that - as could be found mainly in the Lithuanian Constitutional Court decisions of analysis – is that the decisions are based on the very comprehensive formula of the rule of state, even though they were also specific provisions in the constitution to decide the disputes. In this way, only the formula of the rule of state remains from the original constitution and the other parts of it will be pushed to the background. With this method, finally, a new constitution is built up step by step by expanding new and new aspects of the formula of the rule of state. [21] The first majority of the Hungarian Constitutional Court used this method in the 1990s also, but additionally they took over from the German constitutional judges the formula of the inviolability of human dignity. Then, building on both formulas, this majority declared quite openly the creation of the "invisible constitution", and it was stated that in the future more and more new constitutional provisions would be drawn from this.

To understand the consequences of the unquestionability of the decisions of the constitutional court, it is important to highlight that in the pluralistic democracies based on the continuous struggles of the political forces, the annulments of the parliamentary acts by the constitutional judges negatively affect the government party before any other. Thus, the positions of the opposition parties are always reinforced by these decisions,, even if these decisions happen to be contradictory to the provisions of the constitution. In this way, especially if the majority of the media and the dominant intellectual circles stand on the side of the opposition parties, the Constitutional Court should not be afraid of any criticism, even though the constitution has been ignored and its decision is made against it. Conversely, if these media and intellectual power resources are largely behind the opposition, the constitutional judges will refrain from making activist decisions when formal sanctions cannot reach them due to their unquestionability.

This unquestionability can be overridden in exceptional cases if there is such a great parliamentary majority in a legislative cycle that is able to create a constitutional amendment, and, in this way, the annulments of the constitutional judges can be overruled by the government parties. Or, if there is not enough majority to make a constitutional amendment, but the majority has enough power for at least the amendment of the Constitutional Court Act. [22] However, given the fragmentation among political forces in most European democracies, such a possibility of the resistance against the constitutional judges comes in existence very rarely.

The Constitutional Court thus forms a powerful body, but if we move closer to monitor their operations, it soon turns out that the constitutional judges did not actually design the decisions by themselves, but it has been made by the various apparatus of the Constitutional Court in most cases. Let us look at the causes and consequences.

1) The most important reason of this can be seen in the generalist nature of the constitutional adjudication, which runs counter to the European system of specialized courts that are being developed ever since the early 1800s. In the United States the generalist courts remained, and the upper and the supreme courts decide the cases taken from each branch of the entire legal system,

[21] As the critique of this development the concept of "total rule of law" was introduced by the Hungarian constitutional judge, Andrew Zs. Varga, see his book: *From Distortion of an Ideal was created an Idol? The Dogmatik of the rule of law.* (Eszményből bálvány: A joguralom dogmatikája) Századvég. Budapest, 2015, especially 25-32. pages.

[22] This was the situation in Poland in 2015 and after the use of this opportunity a power struggle broke out between the constitutional judges and the new parliamentary majority.

and the judges are not specialized in civil law, criminal and other cases. Or if there is such a specialized court (eg,. patent cases) in a sector, which is an exceptional case, the judges of the supreme court with generalist judging competence make the decisions in the case of the appeal, too. Constitutional adjudication was established for the first time in the United States in the early 1800s, and then it went to Europe in the first decades of the 1900s and now in most European countries there already is an existing institution. The European specialized court system with the specialized and differentiated judiciary – and, last but not least, also the legal community that is differentiated sector by sector - coupled with fundamentally different components to the constitutional adjudication, as it was on the original site. Of course, the constitutional judges also came with an only narrow competence and after becoming a member of the constitutional court, they should be able to decide concerning everything that can be found in the full spectrum of the law. Due to the specialization of a narrow area, the European constitutional judges are faced with bigger problems than their colleagues in the US. [23] The justices of the Federal Supreme court in the US, who are provided primarily with the function of the constitutional adjudication, have been for years performing the function of generalist judging at a lower level - typically parallel with law professor activities - and thus the subsequent role of the generalist constitutional judge is not a challenge for them. After all, they must continue to deal with criminal, civil, property law, administrative law, etc. issues, as they have always done.

2) In the case of the European constitutional judges, this competence problem is mounted by the fact that they remain in their position for only a relatively short time. In contrast to their American counterparts, who are appointed for life with no time limit, the European constitutional judges are usually chosen for a short time (9-12 years), and this is with an upper age limit, usually 65-70 years. In this way, the European judges often spend only six to eight years in the post, as opposed to the usual American counterparts of 30-40 years. One consequence of this is that the composition of the European constitutional courts changes frequently, and there are always two or three new judges, who are only just getting started with the decision-making work, while a part of the rest have already begun to prepare for the exit due to the age limit. Compared to their American counterparts, the European constitutional judges have decision-making activities with a much more transient nature, and this intensifies the competency problem arising from generalist judging and creates a discouraging effect in respect to the rethinking of the existing case law which does not appear in the case of justices of the US Supreme Court. In the first years after their election, the European constitutional judges may target the mastering of the many thousands of pages of the existing case law, but on the ground of the constitutional values there are only a few exceptions who undertake to reinterpret this law. Thus, the competence problem merging with the impact of the temporary position results in the following: the case law established by the ancestors appears as a pseudo-constitution impossible to throw away and not as simply changeable case law.

3) In addition to these two, the role of the law clerks of the European constitutional judges should be emphasized, which is fundamentally different from the role of their American counterparts. The possibility of the judges's own law clerks evolved since the early 1990s in the US Supreme Court in order to assist the decision-making work, and recently there are three law clerks in the case of the federal appeals judges and four in the case of the justices of the Supreme Court. These American judicial assistants are selected by the justices and judges from among the students of the best law

[23] There are some institutional problems arising from the coexistence of the generalist constitutional adjudication and the specialist European judicial system, and for the analysis of these problems please see my earlier study: Generalist judges in the specialized judicial system: A dilemma of the European constitutional judges. („Generális bírák a specializált bírósági rendszerben. Az európai alkotmánybírók egy dilemmája.) Review of Legal Theory, No. 2. 2014, p. 226-243

schools and they will receive a one-year mandate, even if in some cases this mandate will be repeated. Through these conditions, the law student-law clerks are clearly subordinated to their justices, who have many years of judicial experience. [24] The situation is radically different in the case of the relation between the European constitutional judges and their staff. Since the German model was copied by most European constitutional courts, we should start with the presentation of this. This model has broken with the American "freshman" scheme, and the staff of the judges are selected from among the young ordinary judges with some years of experience. The other change was that they not only work as law clerks for a year, but they remain fora long time at these posts.[25] With these changes, the relation of the constitutional judges and their law clerks is substantially transformed compared to the American one and the decision competence of the law clerks reaches the one of the constitutional judges. It is not possible to know exactly what is the proportion of those German constitutional judges who passed on to their staff the large part of the decision on merit as well, but by the empirical research on this topic this is presented as a serious problem. Uwe Kranenpohl wrote after interviewing the German constitutional judges: "Dabei signalisiert der leicht kritische Unterton dieses Gesprächspartner, dass einige Kollegen bei ihm durchaus im Verdacht stehen, ihren Mitarbeitern unangemessen umfangreiche autonome Gestaltungsbereiche einzuräumen. Noch deutlicher bringen dies zwei andere Interviewpartner durch Flucht in Sarkasmus zum Ausdruck: "Das hängt eben sehr vom einzelnen Richter ab. Ich glaube, ich kann für mein Dezernat sagen, dass da kein 'Entzug des gesetzlichen Richters' stattgefunden hat - aber ich kann das nicht allgemein behaupten. (Interview No. 6.) „So gibt in der Tat Verfassungsrichter, da muss man davon ausgehen, die unterschreiben jeden Mist, der Ihnen von den Wissenschaftlichen Mitarbeitern vorgelegt wird und kontrollieren das nicht!" (Interview No. 21)." [26]

As a further shift of this German model, it can be seen in the case of the other European constitutional courts that the law clerks will not be replaced on expiry of the term of their constitutional judge, but they stay and continue to work alongside the inexperienced newcomer-judge. In fact, of course, the newcomers facing elementary competence problems are under tutelage of the experienced law clerks the first time, and the new judges are guided and educated in the decision-making work by them. In this situation, it becomes the generality, which was ironically mentioned earlier in the interview by the German constitutional judge, and the cases will be distracted from „the lawful judge" by the law clerks. This image is only amended in exceptional cases, when the new constitutional judge has a particular sovereign personality and, in this way, he will be able to free himself from the guardianship after a while. In addition to the sovereign personality, of course, it can be mentioned that there must be enough time for the newcomer-judges to be able to become competent constitutional judges, and not to leave this post after five or six years due to reach the upper age limit. But this exceptional competence can be achieved by the newcomer-judge who could earlier see through wide fields of law based on previous praxis, and was not only specialized in a narrow area of legal expertise. But even if all this is available as well, such "deviant" constitutional judge must always be confronted with colleagues and their law clerks who deal with the cases on the ground of the pseudo-constitution as the bible of their work. [27]

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[24] The lesser decision-making competence of the law clerks does not prevent that they are included in the preparatory work of the drafts: „But what one expects (…) if most judicial opinions are written largely by law clerks (as they are), who are inveterate legalists because they lack the experience, confidence or „voice" to write a legislative opinion of the kind that judges like Holmes, Carodozo, Hand, Jackson, Traynor, or Friendly wrote. The delegation of judicial opinions writing to law clerks may explaine the decline in the number of judges whom anyone would be inclined to call „great". Richard A. Posner: Realism about Judges. Nothwestern University Law Review (Vol. 105.) 2011 No. 2.583.p.

[25] Earlier, five or six years time could be spent in the post of the staff of the German Constitutional Court, but lately it is usually only two or three years. (See Uwe Kranenpohl: Hinter dem Schleier des Beratungsgeheimnisses: Der Willenbildungsprozess des Bundesverfassungsgerichts. Verlag für Sozialwissenschaften, Köln. 2010,106-108.p.

[26] See Kranenpohl, at 88 p.

[27] What kind of charges will attract the newcomer constitutional judge, who tries to stick with the original

4) The fourth reason that causes the formation of the pseudo-Constitution rather than a simple case law is the huge workload of the European constitutional courts. As was already mentioned, there is a marked difference between the workload of the US Supreme Court and the European constitutional courts and while by the justices of the Supreme Court only one hundred cases must be decided per year, the European constitutional judges have to deal with thousands of cases every year. In this way, the busy European constitutional judges are not only unable to write a lot of concurring and dissenting opinions, but they are also unable to override the once established earlier case law in the light of the constitutional values and on the basis of the original text of the Constitution itself. This problem was already indicated by Richard Posner: "The heavier a court's caseload, the less likely it is to reexamine (...)." [28]

4. Summary and Outlook

The rule of state based on democracy is changed profoundly by the constitutional courts with their expanding competences and, in addition, the judicial activity of the ordinary courts removed from the statutory provisions and based rather on the abstract declarations of constitution makes the idea of democracy more and more empty. [29] In such circumstances, the reality of the functioning of state power can be expressed by the conceptual construction of the *juristocratic state*, in which the power dominance comes from the majority of the legislature and from the executive sphere to the supreme courts and the constitutional court placed above them. By the expanding competences of the constitutional courts - which is further expanded by the uncontrollable constitutional judges also - not only the determination of the laws will be transposed from the legislature to the constitutional judges, but also the constitutional power itself is transferred to them as a consequence of the creation of their pseudo-constitution. (Even though this is often practiced not by the constitutional judges themselves, but rather by their permanent apparatus, the law clerks, in their name.) By the interpretation tricks of the higher judiciary removed from texts of the statutory acts, this rise of the juristocratic state is only complemented and completed.

The emergence of the dominant position of the constitutional courts necessitates a conceptual framework in which the typology of the government forms itself is enlarged and beyond parliamentarism, presidentialism and semi-presidentialism, the juristrocratic form of government must be conceptualized. [30] In addition, by the shifting of power dominance towards

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constitution, and only secondarily follows the pseudo-constitution hardened case law, can be seen in the book of Kranenpohl: „Gerade das BverfG hat eine starke Neigung, im Sinne der Wahrung von Rechtssicherheit die bisherige Rechtsprechung weitgehend beizubehalten. (…) Schon durch den bloßen Umfang der bisherigen Rechtsprechung sind damit bereits weite verfassungsrechtlich relevante Bereiche vorstrukturiert, was dem Berichterstatter im Regelfall lediglich erlaubt, sich mit seinem Vorschlag innerhalb der bereits formulierten Prinzipien zu bewegen." (Kranenpohl, at 143.p.)

[28] Epstein/Landes/Posner, at 117. p.

[29] In this process, the dominant position of the objective-theological interpretation of law is a key aspect by which the judges will be removed from the binding to the law. For the analysis of the achievement of this dominant position, see Bernd Rüthers, *Die heimliche Revolution vom Rechtsstaat zum Richterstaat.* Mohr Siebeck. Tübingen. 2014, especially 89-94. p.

[30] For a more detailed analysis see my previous work: Béla Pokol, *The Juristocratic Form of Government and its Structural Issues.* In: Tamara Ehs/Heinrich Neisser (Hg.): *Verfassungsgerichtsbarkeit und Demokratie? Europäische Parameter in Zeiten politisher Umbruch.* Wien-Köln-Weimar. 2017, 61-79. p .; in Polish translation, *Juristokratyczna same rzadóv i jej strukturalne aspekty.* Prawo i Wiez, 2016 No.1. 95-113. p.

the higher courts and the constitutional court above them, new forms of political struggles were created as a consequence, and political struggle of the litigation in the courtroom has emerged. This has taken place most clearly in the United States since the early 1960s, and this has since been celebrated by hits adherents as the *rights revolution*. As the advocates of the „cause of lawyering," the movement lawyers try to fight the decisions of the courts based on the constitutional rights and freedoms, which cannot be achieved by the political struggles in Congress and in the Member State Legislature. As a consequence of this new political form, the selections of the new judges to the higher courts - especially to the federal Supreme Court – takes place in the wake of political struggles, which is similar to the presidential election. Furthermore, the judges and justices elected by the successive Democratic and Republican presidential administration face each other in the decision-making processes as internal „judiciary parties". In Europe and in other countries around the world, the same thing takes place with respect to the election of the constitutional judges, even though the role of the movement lawyers in litigation and politics has not reached the degree here, as could be seen in the United States in the 1960s and 1970s.

Likewise, in the theory it also begins to be transformed what gives the legitimacy of judicial decisions. While the legitimacy of a judicial decision in a democracy is given by the high degree of binding to the law - which was created by the parliamentary majority based on votes of the millions of citizens – until in the juristocratic state it starts to move to the judicial decision itself. The judicial decision is no longer legitimized by the election of the parliamentary majority by millions of citizens, but only if it is consistent with certain legal principles. These principles are developed by the moral philosophers of the critical intelligentsia, and then carried over to the judicial sphere by their friendly law professors. As a result, the idea of the democratic rule of law is less and less suitable for describing this kind of reality, and instead it is more appropriate to use the term „juristocratic state". There is, of course, another possibility in this situation and insisting on the idea of democratic rule of state, it can fight for the changing of the established reality andfor restoring the former state. But it would be the role of a political movement and a scholar can only describe the state of reality.

Chapter 2.
The Juristocratic Form of Government and its Structural Issues

Activism is the most widespread criticism over the activities of the constitutional courts. This means partly the exceeding of their authority given by the written provisions of the Constitution and, on the other hand, the downgrading of the democratic parliamentary majority and the will of millions of citizens who elect this majority. However, if we go beyond the widespread and recurring indignation, and we level-headedly look at the provisions of constitutions created in the recent decades, then it can be noted that these constitutions and the laws on the constitutional court themselves raise them to the level of the supreme organs of state power. In this way, the activism of the constitutional courts has partly become legalized and their power is wide ranging in order to limit the legislation and the will of the citizens expressed in the elections. It appears that this new, powerful actor in state power cannot be captured within the old forms of government (presidentialism or parliamentarism) because it bursts these old frameworks. Beyond these old forms, the study therefore proposes to introduce a new form of government based on the wide-ranging power of the constitutional court. As the most important structural issues of this new form of government, four aspects are analyzed: 1) the degree of the monopolized access of the constitutional court to the constitution; 2) *the breadth of the constitutional interpretative power given by the general formulas of the constitutional text; 3) the speed of activation of its power when it comes to the annulment of Parliamentary acts; 4) and finally the term of office of the constitutional judges which separates them from being re-elected by the political actors.*

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The takeover of the idea of constitutional adjudication from the USA to European countries caused the redesign of power relationships of the central state organs. Nevertheless, the new actor of state power has been theoretically placed in the framework of previously established forms of government, i.e. parliamentarism or presidentialism. The change caused by this takeover was conceptually grasped as an increase in the separation of powers. [31] In the original birthplace of constitutional adjudication in the United States, there was no need for reshaping the established forms of government because here this activity was achieved by the ordinary courts and these were seen as a branch of power next to the other two branches of power (legislation and presidential power). In Europe and on other continents, however, the constitutional courts were separated from the ordinary courts and they mostly are not a simple third branch of power anymore for two important reasons. Firstly, the new constitutional courts can control the legislation not only in the course of the litigation processes, but they can also

[31] For a more detailed analyzes of this questions see my previous study Béla Pokol: The Hungarian parliamentarism. Cserépfalvi Press, 1994, especially 11-45. p.

annul the new Parliamentary acts immediately after their enactment. Thus, while in the USA constitutional adjudication could affect the central political battles and laws created in these battles only after years, in the case of the new constitutional courts, their role in the power game is more evident. On the other hand, in the USA the control of constitutional adjudication over the legislation and the government is more limited than in the case of the new constitutional courts because here the laws are not annulled formally by the main courts (Federal Supreme Court in the last instance), but only prohibited for the lower courts to use them. In contrast, the new constitutional courts cannot only formally annul the Parliamentary acts but they can also give instructions, the content of which must be included into the future law by a parliamentary majority.

In Europe from the 1950s onwards and then on other continents in the 1980s and 90s a great transformation in the public power structure was set up by the new constitutional courts. This has already begun in the case of the German constitutional court set up in 1949, because here the control and the annulment of the new laws immediately after their enactment in Parliament has become possible without any preliminary judicial process. The constitutional court in Italy institutionalized in 1946 went in this direction also, although here the control of the new Parliamentary acts can take place only in the preliminary judicial processes, but here the judges can stop the judicial process and may directly ask the Constitutional Court to annul the statutory provisions. Thus, the direct involvement of the constitutional judges in the state power struggles became intensified compared to the original American model of constitutional adjudication. But the growing power role of the constitutional courts was really created in the 1980s when it spread to South American countries, and then in the 1990s, after the Soviet empire fell apart, and throughout the Eastern European countries new constitutional courts were created with increased power. This trend then established strong constitutional courts in several Asian countries too; there are Taiwan, South Korea and Thailand, for example.

Constitutional theory has not yet reacted to these recent developments and the role of the constitutional courts is only seen as a segment of the separation of powers. The activity of these courts is conceptually grasped in the previously established forms of government, i.e. parliamentarism or presidentialism. However, the real political processes have been bursting this inclusion, because in many countries the activity of the constitutional court fundamentally determines the rest of state power. In this way, it can be stated that we can understand real state power (beyond parliamentarism and presidentialism) if we create a new form of government for the central role of the constitutional court named the *juristocratic form of government.* Before we start analyzing the structural characteristics of the new form of government, however, it makes sense to analyze the structural links between the Constitutional Court and the political actors.

1. Two Types of Political Ties for the Constitutional Judges

The function of constitutional adjudication and the selection mechanisms of the constitutional judges by politicians entail that in the decision-making of the constitutional court there are ties to politics. However, it is different between the courts and within each court as well which level and grades of these ties became realized in respect to the individual judges. Empirical research all over the world analyzing lots of courts and the separate opinions of the constitutional judges arranged on a scale showed a high degree of dispersion of judges in respect to their political binding. It seems that this binding can be divided into two major types. The greater degree of political binding on one side is that within which the constitutional judges act as party-soldiers. Another group of judges

with a looser tie to politics is on the other side whose decisions are influenced only by the political values of a political camp, but the random interests and opinions of the parties are not taken into account. Which type of these in a country dominates is affected by a number of institutional mechanisms, constrains and rules, and the personality traits of the individual constitutional judges play a big role as well. However, before analyzing them, it seems useful to highlight a distinction between the continental European judicial role and function and the American judicial role and function. Namely, due the adoption of the idea of constitutional adjudication from America to Europe, the European constitutional judges are closer to the American judicial role-playing than to the ordinary judiciary in Europe.

1.1. Career Judges and Recognition Judges

The European judges are career judges, who entered the court immediately from the schoolroom of the law faculties and there they adapt to the leaders, the senior judges and they move up the ladder of the judicial career and during this career they are under constant control and evaluation mechanisms monitoring the percentage of successful appeals against their judgments and in case of a high level of this percentage they are sanctioned by career retention etc. In contrast, the American judges are as a rule recognition judges who come to the courts according to the performance of other legal spheres. In this way the recognition judges get this position when there have many years of experience behind them and as a rule they are appointed to specified posts and in principle there is no promotion here, especially at the federal level they are appointed for life. Both in America and Europe all institutional conditions are regulated by law, and thus both within the judiciary and from the outside the possibility of influence of the judges is minimized. However, while in Europe in respect to the career judges the entry at a young age makes it uninteresting for the politicians to influence the judges' selection, in America the appointment of the recognition judges - particularly in the higher judiciary levels and the federal judicial levels - the judge-selection has the most importance for political camps and this selection is carried out by the politicians, and the recognition of prior legal capacity of nominees becomes finally a recognition by the politicians. As a consequence, the European career judges are less politicized, but the judiciary from the inside rather shows the organizational characteristics of the bureaucracy, and that is the reason why here the judges are put in the center who are able to accept the submission, while the recognition judges in the US are more strongly politicized and the decision-making of the individual judges is more autonomous from the collective of the court than their European counterparts have it. [32]

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[32] The two types of judiciary are analyzed by Tom Ginsburg and Nuno Garoupa as follows: „The distinction between career and recognition judiciaries is useful to identify general approaches to the balance between independence and accountability. (…) Career systems emphasize collective reputation (in which internal audience prevail over external audiences); recognition systems emphasize individual reputation (thus targeting more openly external audiences). Collective reputation emphasizes collegial aspects of the judicial profession. Individual reputation depends in part on the primary social function of the judiciary, such as social control, dispute resolution or lawmaking. We believe that collective reputation dominates when the legal system emphasize social control (….). In constitutional law, where lawmaking is presumably the dominant function of judges engaging with the grand principles of democratic governance in high-stakes issues, most common and civil law jurisdiction use recognition judiciaries. On the other hand in many areas of the administrative law, where social control of lower officials is the more relevant consideration, both common and civil law jurisdictions have shown a strong preference for career judiciaries. (…) Career judiciaries resemble a bureaucracy, and so raise issues of shirking and sabotage of the agency's mission that are familiar to organizational theorists. Not surprisingly we observe a formal reliance on codes and significant procedural limitations to constrain the judges, limit their ability to sabotage the law, and decrease the costs of monitoring their performance. As a result, a career judiciary is methodologically conservative and systematically unadventurous, and unwilling to acknowledge its role in lawmaking. (…) Recognition judiciaries are different. They are dominated by lateral entry; and promotion is of little significance to the individual judge. Since ex ante quality is easier to observe, judges are less constrained and tend to apply more flexible standards as opposed to clear rules.

On the ground of their selection mechanisms, the European constitutional judges are as much the same recognition judges as the American judges, and so the characteristic of the "recognition judge" can be extended to them: "Constitutional judges belong to the recognition judiciary, appointed at senior stages in their careers, while ordinary judges are members of career judiciary, appointed at young ages and spending their whole lives in the job. In many cases, the appointment mechanisms of constitutional courts will be perceived as more political than those of the supreme court justices." [33] After the general presentation - where in the case of constitutional judges in relation to the ordinary judges the higher degree of politicization could be emphasized - we have to analyze in respect to politicization two types of constitutional judges.

1.2. Politically Value-Bounded vs. Party-Soldier Constitutional Judges

The stronger politicization of the constitutional court and judges compared to the ordinary courts is a well known thesis on the basis of empirical studies, and it is well known, too, that there are countries and periods within which a higher degree of politicization can be detected than elsewhere or at other times. The different emphasis of politicization could be seen above in the analysis of different schools, but with some modification of these schools these are able to capture the actually existing differences of politicization among a lot of constitutional judges. As we could see, the decisions of the constitutional courts were explained by the behavioralist (or attitudinalist) school entirely on the basis of the political preferences of the judges, while the school of strategic action attributes only a reduced strength to political preferences, and this recognizes other aspects in the determination of the judges' decision which reduce the impact of the political preferences. Presumably, considering all constitutional courts and judges, the latter is right, and the political preferences of judges do not have a strong role as the previous one claims, but in the case of more politicized judges this can still be true.

Thus, I think that these schools can not only be understood as the different explanations of the constitutional court’s decisions, but as the two real grades (or levels) of the politicization of the constitutional judges.

With this amendment of the explanations of these schools, which emerged as the explanation of the American ordinary courts anyway, each European constitutional court can be analyzed as one of the two types in respect to its level of politicization. Especially where the constitutional judges in their existential conditions remain strongly bound to the dominant political parties by the institutional and regulatory arrangements, there the dependence of the judges can create the dominance of the party-soldier type. In contrast, where by the institutional arrangements the existential conditions are optimally designed, there, as a rule, the strong party ties are removed and only reduced political ties still exist. In the last case, the attachment of the constitutional judges to their nominating parties exists only on the level of political values of a political camp and this loose binding makes it possible that the constitutional judges specifying the provisions of the constitution develop solid clues to the case law and to assist their colleagues in creating such. In the case of the loose binding, the constitutional judges always try to vote on the basis of the case law created by them and their decision-making is influenced only by the political values but not by the simple

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There are two possible behavioral consequences for the recognition model. First, the judiciary is more politicized (but not necessarily more democratic since it might not follow the legislator). Second, recognition judiciaries will be more creative in establishing and developing precedents (presumably inducing higher rates of reversal.)”
Ginsburg/Garoupa, *Hybrid Judicial Career Structures: Reputation v. Legal Tradition*, University of Chicago Law Scool, Coase-Sandor Working Paper Series in Law and Economics 6-7 (2011)

[33] Nuno Garoupa/Tom Ginsburg, *Building Reputation in Constitutional Courts: Political and Judicial Audiences*, 28 Arizona Journal of International and Comparative Law 547 (2011)

interests of a political party. In contrast, the constitutional judges with a strong degree of party-ties do not care about case law standards and they do not even follow the cases that are not politically important; they leave such drafts prepared by others and if one such judge becomes the judge-rapporteur in a case, the politically indifferent matters he gives his staff in order to create a draft and at the meeting he remains indifferent whether the aspects of his draft can fit into a coherent case law or not. This type of constitutional judge activates himself only in politically important cases when he has in mind only the interest of the political party that nominated him.

The types of party-bound versus politically value-bound judges really do exist, and each constitutional judge can be placed easily in one of the two types if the decision-making behavior of a judge is observed for a long time including his separate opinions and the coherence between them, as in the case of a judge with a close party binding, where probably the lack of coherence in his decision-making behavior is remarkable.

However, the two versions of the political constraints - and the question of the political affiliation at all – do not appear in such purity in all decisions of the constitutional courts. Namely, this affiliation is activated by certain affairs of the courts in a different degree. In respect to the three main groups of cases at the European constitutional courts, the least political constraint can be observed in cases of constitutional complaints against the ordinary judicial decisions. Although it is possible that a constitutional complaint against a judicial decision in a corruption case of a major party leader or a criminal case which affects the entire leadership of a political party exceptionally affects important political interests and political values, but as a rule these cases are largely apolitical and the opposing political ties within the constitutional court are not activated. Then the decision-making is more clearly legal in nature and this is intersected not with political considerations, but rather with particularistic antagonisms within the body, and during the decision-making process the antipathies /sympathies, prestige considerations, etc. are activated.

Political ties come more clearly into the center in cases of subsequent constitutional review, where the subject of the decision is the annulment of a statutory provision or of a whole legislative act. This may come if originally only a judicial decision was attacked, but in connection with this the annulment of statutory provision - which was the basis for this judicial decision - emerged. At that time, it may be that the political cleavage within the constitutional court comes into focus, and this activates beyond this cleavage the fault line between the more closely-knit party soldiers and the more relaxed political value-bounded judges, too. Eventually, the strongest political orientation comes into play in cases of the preliminary constitutional review. In these cases it may be that the constitutional judges take the place of the opposition MPs and the legislative acts - whose creation earlier these MPs in their minority position could not stop - could still be annulled by the majority of the constitutional judges. That is, while the constitutional complaint against the judicial decisions makes the decision-making processes more legal in nature, the subsequent constitutional review and particularly the preliminary one can, on the contrary, cause a higher degree of its politicization. [34]

Empirical studies are usually limited only to the detection of the political binding without differentiation, and I could not find information regarding the proportions of the two grades of this binding. This can be the consequence of the fact that in the comparative research of Nuno Garoupa and Tom Ginsburg, who are in the center of this research field, the main effort is to demonstrate the higher frequency of the limited political ties intersected with constraints of institutional conditions

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[34] That these effects can be considered valid in respect to constitutional adjudication in the whole world is confirmed by Nuno Garoupa and his co-authors also: „Whereas concrete review „judicializes" constitutional courts, preventive review has the opposite effect. Mere preventive review makes a constitutional court less judicial and more political in nature." Nuno Garoupa, *Empirical Legal Studies and Constitutional Courts*, 35 Indian Journal of Constitutional Law, 33 (2011). Another empirical research showed the high level of the party affiliation in the case of the preventive review: „There is a high correlation between party affiliation and voting, with respect to preventive review" Garcia/Garoupa/Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal*. Illinois Law and Economics Research Papers Series, Research Paper No. LE08-021 9.p. (2008)

against the explanation of the behaviorist school which asserts the total determination of the judicial decisions by political ties. Thus, they neglect the systematic analysis of possibility of the political binding on two different levels. However, some data can be found in the empirical studies to prove it. For example, in case of the Spanish constitutional judges, while in their voting behavior a high degree of party-binding is showed by the empirical research, a study demonstrates that this stronger party affiliation exists in cases when the political motivation of the judges is more directly affected, but if it is not the case, then the direct party affiliation becomes diminished and only the political binding as to political values comes to the fore. This is the case when the Spanish Constitutional Court decides disputes between the unified Spanish state and regional splits as Catalonia and the Basque territory, which aims to achieve a separate statehood. Then the ties of the judges to the political parties that nominated them become reduced and the cleavages at the level of political values come to the fore: "Our paper, looking at how judges vote, also indicates that Spanish constitutional judges are less likely to vote to party interests in the presence of strong regional or national interests." [35] Analyzing the Portuguese Constitutional Court, it comes out even more clearly that the political binding of the constitutional judges may be different and while in the case of one group of judges this binding can be very strong in form of direct party affiliation, the other group of judges has only a binding at the level of political values. Nuno Garoupa and his research team in a study in 2008 found that the Portuguese constitutional judges who were nominated to the constitutional court by the leftist (socialist or communist) parties have a voting behavior that shows a closer party binding than detectable in case of judges nominated by the right-wing (Christian Democrat and Conservative) parties: "We have shown that there is a strong association between being affiliated with the left-wing party (socialists and communists) and voting unconstitutionality, whereas the association between the right-wing parties (conservatives and Christian-democrats) and voting is weak. These results are confirmed when we look at voting according to party interests and legislation that have also been endorsed by the party with which the constitutional judge is suppose to be affiliated." [36]

2. Structural issues of the juristocratical form of government

The decisive point in the transformation from a simple actor in the system of checks and balances into the juristocratic form of government for the constitutional courts is the competence to annul the parliamentary acts immediately after their creation. This is the crucial point because, in this way, the constitutional judges become directly included into the political struggles of the democratically elected actors. In democracies based on political competition, parliamentary opposition and eventually the other public actors that oppose the parliamentary majority and its government - especially the local governmental bodies, or, in federal states the national / regional governments, local parliaments etc. – try to instrumentalize the constitutional court in order to block the parliamentary majority and the governmental activity. In this way, the opposing political forces behind the constitutional court can wholly or partly impose their will on the governmental majority. This is no longer parliamentarism, but the appearance of the juristoctratic form of governance which exists side by side with the parliamentary majority suppressed in the form of a semi-parliamentary system. This is similar to other mixed forms of government that can be seen in the semi-presidential systems. In fact, although it is not explicitly emphasized in its name, the semi-presidential system always has a counter-force in

[35] Nuno Garoupa/Fernando Gomez-Pomar/Veronica Grembi, *Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court*, 5 (2010) (online)

[36] Garcia/Garoupa/Grembi, *Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal,* Illinois Law and Economics Research Papers Series, Research Paper No. LE08-021 19 (2008)

semi-parliamentarism. In other words, these two forms of government operate in co-existence and the powerful head of state has to struggle permanently with the parliamentary majority and its prime minister. This co-governance causes no great tension if in a country there are more or less centralized political parties and both positions (i.e. the head of state and the prime minister) are filled by the same political party. In that case, the mixed form of government mostly operates in a smooth way. If the public opinion has shifted in the meantime, however, and at the two different elections these positions are filled by political leaders from opposing political camps, then ongoing public fights will start between the head of state and the parliamentary majority and its prime minister. Since this has first and most clearly evolved since the system in France was set up in 1958, called V. Republic, the co-governance of the political enemies is in general called *cohabitation.*

The juristocratic form of government can be involved in the same situation. This can emerge if such a majority of the constitutional judges exists for a longer period of time with stable political preferences (caused by the filling method of these positions of an earlier parliamentary majority) that stand in sharp contrast to the ones of a new parliamentary majority. In this way, the new parliamentary majority and its government will be continuously prevented from realizing its plans by the existing constitutional interpretation and the constitutional case-law produced on this basis. While in the case of the same political values there will be no greater tensions between the parliamentary majority and the majority of the constitutional court, and furthermore the control of the legislation will cause only smaller conflicts, in the case of a radical change in the political preferences of parliamentary majority, sharp struggles of cohabitation between the two mixed forms of government can be activated. Then, the elected new parliamentary majority and the millions of people behind him will be faced with a reality in which there will be no chance to realize the election promises. Namely, the majority of the constitutional court selected for these posts by the earlier dominant political forces can annul all the new laws and the parliamentary minorities can dominate through the constitutional court despite their electoral failures. In this situation of the mixed system of semi-presidentialism, as in France for instance, it is a natural consequence that the opposing positions start looking for a way out and after a while the head of state plans the dissolution of the parliament if he thinks that there was in the meantime a shift of the public opinion and in a new election his political camp will triumph. At the same time, the opposing prime minister and its parliamentary majority try to block the institutions next to the head of state in order to reduce the possibilities of the opposite side.

In the case of the constitutional court, this situation of cohabitation has only rarely emerged so strongly in the last decades - at least so far -, and over the past half-century, this stemmed from the fact that in Europe and the wider Western civilization (America, Australia) such an economic and demographic stability and prosperity existed, by which a rare tranquility in the history was brought about. In this way, through the densely consolidated constitutional framework and binding political preference value the political parties were forced to the center and the radical changes by the parliamentary elections were improbable. The alternation of political parties in government was thus more or less only the "left" and "right-wing" alternative of the same political center. In this way, there was not so much difference between the political preferences of the constitutional court’s majorities and the ones of the changing parliamentary government majorities always stemmed from the political center. However, this situation seems to have started to disappear in recent years for two reasons. First, in the Western countries the control of the social sub-systems has undergone a radical transformation in recent decades and the banking and financial sectors were able to acquire total control over the whole society (the mass media, the arts and cultural sub-systems, scientific research and commercialization in the

military sphere, etc.). [37] However, this caused such great distortions that since the outbreak of the 2008 financial and economic crisis, the entire Western civilization seems to have reached an evolutionary dead end. This crisis is intensified by a more profound demographic crisis. The latter was observed within a few decades, however, its consequences have increased dramatically in recent years. Because of the declining population and the work forces, millions of migrant workers were brought in to work - mainly imported from the Islamic countries. Through their higher birth rates and family unification, the number of Muslims in Europe has expanded to 23 million who live in Western Europe's major cities first of all and they have built up parallel societies in these cities. The Christian culture of Europe's population and the constant battles and tensions with the Muslim population has become the main political cleavage in recent years in most Western European countries. The recently launched big masses of new Islamic migrants combined with the inertia of the political parties that make up the center give rise to the radical parties that were marginalized in the past. And because of the tensions caused by migration and the demographic crisis, it seems plausible in a few years to replace the central parties by the radical new political forces. In this way, the difference between the new parliamentary majorities and the political preferences of the constitutional courts in European countries can be forecasted in the near future. This can bring forth the tensions between the two mixed forms of government that have hitherto existed only on paper as part of the constitution.

This situation was created because of a series of random reasons in recent months in Poland. In this country a political alternation had existed during several cycles, in which a left-wing and a center-right party dominated and then the radical national-Christian political force, the Truth and Order Party, got the majority in Parliament in 2015. In this situation, the sharp contrast between the political preferences of the constitutional judges and the ones of the new parliamentary majority came to the fore. In order to realize its program, the new Polish government majority tried to neutralize or at least reduce the resistance of the forces that the juristocratic form is made up of as much as possible. For example, taking advantage of a faulty step of the previous government's majority, which illegally filled the posts of the constitutional court, the new parliamentary majority elected five new members into this court and with the help of the head of state stemming from its political camp, these new members became appointed instead of the earlier elected members. Furthermore, to neutralize the still opposing majority of the constitutional judges, the new parliamentary majority has modified the law on the constitutional court and for the annulment of the parliamentary acts by the constitutional judges required two-thirds majority. As a next step in the defense of the constitutional judges, a six-month moratorium was introduced and the judges can start to control the new laws only after this six-month period. With the theoretical explanation which can view together the co-existence of the juristocratic form of government and the half-parliamentarism of the parliamentary majority government, these regulations can be analyzed as exciting developments - at least as long as both sides avoid the violation of the rules of co-governance. If, however, we cannot separate the two mixed forms of government, but view them only as parts of the parliamentary form of government and the separation of powers, then these regulations can be mistakenly grasped as the abuse of power.

The crucial point for the creation of the juristocratic form of government is the change when the constitutional court can annul the new laws of the parliamentary majority immediately

[37] See the analysis of this topic: Andreas Bieler/A. Morton D. (ed.): Social Forces in the Making of the New Europe. Palgrave. Hamshire 2001 47-69.p .; William C. Carroll/Colin Carson: Forging a New Hegemony? The Role of Transnational Policy Groups in the Network and Discourses of Global Corporate Governance. In: Journal of World-Systems Research. IX. 1, Winter 2003, 67-102. p .; and D. Joseph A. Smith/Böröcz (ed.): The New World Order? Global Transformation in the Late Twentieth Century. Greenwood.

after their creation. In this way, the constitutional judges come into the center of state power. However, the weight of power in both sides also depends on several factors.

1) In order to assess the power of the juristocratic actor against the parliamentary majority and its government, it is the degree of the monopolized access of the constitutional court to the constitution that is the most important aspect. The direct access to the constitution conceptually derives for the constitutional court's function, so it does not require an explanation. Conversely, one may ask whether the parliamentary majority has the competence to overrule the decisions of the constitutional judges or to change its organizational conditions; there are, in this respect, big differences among the countries. Ultimately, however, it depends on the extent to which the constitutional court has superior power over the parliamentary majority, and by these judges the majority will be utterly suppressed or only a moderate suppression takes place. The more difficult it is to amend the Constitution to the parliamentary majority, or to change the laws on the constitutional court, the greater the degree of the constitutional court's monopolized access to the constitution is. Conversely, the lighter the constitutional amendment, or at least the process of rewriting the law on the organizational conditions of the constitutional court by the parliamentary majority is, the more partial the weight of the juristocratic power against the parliamentary majority becomes. In this way, the suppression of parliamentarism into the form of half-parliamentarism takes place only in a moderate version. To furnish an example of the easy way of the constitutional amendment, there is the case of the Austrian Constitution, which only requires for its amendment the vote of a majority of all the members of the parliament, and it happened several times in the past that the decision of the Austrian Constitutional Court was neutralized by a corresponding amendment of the constitution itself. In Hungary, the constitutional amendment is bound to the two-thirds votes of all MPs, and when, in the period of 2010 – 2015, the government majority has this qualified majority, the neutralization of the decisions of the constitutional judges occasionally takes place by the amendment of the constitution too. In Poland, the constitutional amendment is similar to that of Hungary, but to change the law on the organizational conditions of the constitutional judges is easier and it is only connected to a simple parliamentary majority. So when in the 2015 parliamentary election a parliamentary majority with radically different political values from the previous constitutional interpretation of the constitutional judges was established, the polar opposing new parliamentary majority had enough legal means to modify the opposing majority of the constitutional court. However, in a number of countries more difficult preconditions exist in order to change the constitution, or at least to rewrite the laws on the constitutional court, and, therefore, the juristocratic form of government may have a stronger position against the parliamentary majority and the half-parliamentarism than it has in Poland.

2) By the constitutional court's high degree of monopolized access to the constitution its power is increased. This could, however, be further amplified if the wording of the text of the constitution was based on general declarations and vague principles and, in this way, instead of precise control such vague formulas provided the empowering of the constitutional review. To understand this, compare, for example, the fairly accurately worded rights and freedom within the United States Constitution to the German constitution, which contains such vague formulas as the right of the "all-round expansion of the personality" or the phrase according to which "human dignity is inviolable". In the latter case, the constitutional court can essentially decide without any normative determination and in the absence of normative content, the majority of the constitutional judges will decide quite freely what the constitution actually is. Conversely, if the rules in the constitution are worded precisely, then the interpretive power of the constitutional judges is more limited. If we look at the two together, and we see that in a country the constitutional court has a high degree of monopolized access to the constitution, and, in

addition to this, the text of the constitution inherently contains general-empty normative guidelines thereby giving the constitutional judges wide and uncontrollable interpretational power, then, essentially, this body can be regarded as the constituent power in the country. Conversely, if the parliamentary majority has an easy way to the amendment of the constitution or the laws on the constitutional court and empowerment of the constitutional judges is based on precise constitutional wording, then the power of the juristocratic form of government is suppressed, and the institutions of half-parliamentarism have the possibility to counteract the opposing constitutional court.

Another question within this context is whether the amendment of the constitution can be reviewed by the constitutional judges. This option emerged in Germany after the Second World War when for the first time a powerful constitutional court in Europe was created. This took place because here the occupying US military government had more faith in the constitutional court filled with trustworthy lawyers returned from the USA than in a mass democracy based on an election by millions of German people. In this atmosphere, the German Constitutional Court expanded its competence in the following manner: the whole chapter of fundamental rights was declared untouchable by the constitutional amendment. This pattern has then given impetus to some other countries so that - unlike the original American constitutional idea - the review of the constitutional amendments has consequently been brought under the authority of the constitutional court. This move already means the takeover of the constituent power openly, since, in this case, the constitutional court's monopolized access to the constitution becomes almost complete. However, this step was exceptionally made by only some constitutional courts. Although in 2011 there was an experiment in Hungary alone by the then constitutional judges to completely annul the new constitution. As the motion for the annulment had just been rejected by a slight majority of the constitutional court, the constituent power explicitly regulated this option in such a way that it essentially restricted this possibility in order to avoid such a new attempt. [38] Within this sub-question, a further question is whether or not a country's constitution - following the German model in this respect, too - contains a competence of the constitutional court to review the domestic law compared to the general rules of the international law. In this case, the domestic constitution and its amendments can be reviewed by the constitutional judges on the ground of the general principles and rules of the international law also. And because there is no codification of these general principles, the constitutional judges can decide whatever they want. In Hungary, the possibility of this annulment was already declared in 2011 by the earlier majority of the constitutional court.

3) The activation speed of the competence to annul Parliamentary acts is the third in order of importance of structural issues of the juristocratic form of government. Due to the monopolized access to the constitution and the broad interpretation power based on general-empty formulas of the constitution, the of the constitutional court's high level of dominance can already be achieved, but it can arrive at the top if the activation speed of its competence to annul Parliamentary acts is secured. This can be possible if all the opposing parliamentary parties or all single MPs have the right to challenge any law, and, in this way, the constitutional court can annul all the new laws immediately after their publication. A further sub-question in this respect is the constitutional court's scope of review determined by the motion for annulment. It is possible that this motion means only a necessary formal prerequisite and once it has taken place the constitutional court can include additional laws and their provisions under review by simply declaring the relationship between them. Even here wide possibilities can be further enhanced if the constitutional court has the right to start the review of the new law ex officio, through which the annulment process can be activated at will. In this way, the majority of the

[38] "The Constitutional Court can review the amendments to the Basic Law and the Basic Law itself only in respect of the procedures provided for in the Constitution." Basic Law, Art. 24 (5).

constitutional judges can annul laws and measures of the parliamentary majority if they have opposing political values. In all this respect, a wide variety of regulations exist, and there are countries where the weight of juristocratic insitutions is increased by this and, conversely, where the parliamentary majority can preserve some opportunity to resist. For example, by the regulation of the earlier Hungarian Constitution, the constitutional judges have enjoyed the greatest freedom in this respect and all single people have the right by way of what is called popular action to ask the constitutional court to review the new law. If the constitutional judges wanted to annul a new law, but nobody challenged this law, then the wife of a law clerk of the chief justice would quickly appear as petitioner and the annulment process would start. Conversely, the new Hungarian constitution entered into force in January 2012 - learning from the past problems – cut back the wide popular action to start the review of the law and there were many changes in this area. In sum, it is noted that these questions must be examined in detail in a comparative way, if we want to know in a country, whether the parliamentary majority of the half-parliamentarism still has dominance over the governance of this country or, conversely, the forces of the juristocratic form of government already have the upper hand in this area.

4) Finally, the length of mandate of the constitutional judges that separates them from the re-elections by the political actors is important for the analysis of the strength of the juristocratic form of government. Despite the high level of monopolized access to the Constitution and the widest interpretation power over the Constitution based on the general-empty formulas of it and, further, the sufficient activation speed of the competence to the annulment of the Parliamentary acts, the power of the constitutional court over the parliamentary majority is constrained, if the constitutional judges are appointed only for a short period of time. In this way, the determination of the juristocratic forces will always revert to the parliamentary majority and the head of state in form of the new judicial appointments. In particular, in addition to the short cycle, even if the re-election of the old judges is possible, the obedience of the constitutional judges to the parliamentary majority is - more or less - inevitable. By all of this, the weight of power of the juristocratic form of government against the parliamentary majority can be kept below a threshold. Conversely, if the cycle of the constitutional judges is long, eventually for a lifetime (especially if there is no upper age limit for compulsory retreat, as in the USA, for instance), then all this tendency will increase the power of juristocracy. The very long cycle of the judges alone is enough in order to enhance to weight of power over the other branches of power, as is shown in the US, where the supreme judicial body has in every aspect a tighter power than the new constitutional courts in Europe or Asia. However, the American supreme judges in office for 30 or 35 years represent power unchanged throughout generations, and conversely, the judges of the new constitutional court in the world mostly have only a limited period of mandate. There are big differences among the constitutional courts of the world; the most common is the nine or twelve-year cycle, but also the six-year cycle in some cases with the ban on re-election, and it is usually an upper age limit (for example, 70 years) that assures the obligatory exits.

So if a political scientist wants to establish the country-ranking of the power weight of the constitutional court against the parliamentary majority in the whole world, then it (s)he needs to get started on the basis of the above parameters. The constitutional court 's degree of monopolized access to the constitution must be analyzed; the breadth of the constitutional interpretative power given by the general formulas of the constitutional text; the activation speed of its power to annul the Parliamentary acts; and finally the length of mandate of the constitutional judges which separates them from the re-elections by the political actors.

3. Epilogue

By these structural characteristics only the relationships between the juristocratic form of government and the half-parliamentary form of government (or the semi-presidentialism) are given in an abstract fashion. However, on a more concrete level, these relationships can be understood if a lot of further aspects are included in the analysis. It may be important in this respect to see how the formal prerequisites for the post of the constitutional judge are regulated. For example, whether in a country all lawyers with a few years of experience can be candidates for this position, or is it just one of the supreme court judges and a university law professor who can occupy this position. In fact, the fewer the prerequisite for this, the more opportunities will be opened for the political parties to send a party-lawyer into the constitutional court. And if it is possible only with the parliamentary opposition together, then the party-lawyers of both sides will be sent into this body on a parity basis. In the latter case, the completely unknown lawyers have the chance to become constitutional judges, because, in this way, they have no aversion from the opposite side. However, it means that the totally inexperienced new judges will always be exposed to the experienced law clerks of their predecessors and the old case law will be mechanically taken over by them. Further, it is equally essential how the actual decision-making processes of the constitutional court are established in a country. For example, how great a power for the chairman of the constitutional court is given in the determination of the agenda or in the selecting of the rapporteur in the cases etc. [39] These details are important for the complete understanding of the functioning of a constitutional court in a political system, but, in my opinion, these just give color to the understanding of the power relationship between the juristocratic form of government and the semi-parliamentary form of government with the parliamentary majority. Thus, the crucial aspects can be explored by the analysis of the four main dimensions indicated above.

In connection with the closing of thoughts, it is worth mentioning that the juristocratic form of government is necessarily a mixed form of government in the political systems based on democracy - at least in the Western civilization circle. While no conscious break with the democratic legitimacy of state power takes place in a country, the power of the constitutional court cannot be institutionalized as the main state power. Only the direct election by the people can be the source of main state power and this is why the juristocracy can use its power only together with the elected state organs. In this way, the juristocratic form of government is always a mixed government. It is possible in the form of the suppression of the parliamentary majority to a half-parliamentarism and there will be a co-existence of two government forms. But it is possible in a country that parliamentary majority has already been suppressed there to a half-parliamentarism by the semi-presidentialism and this mixed form is changed further by the juristocratic system. The above analysis has always kept this in mind. Of course, not with non-formal constitutional structures but only with factual reality can such a situation emerge when it would be a case of a full reign of juristocracy, while the institutions elected by the people would still formally operate. (A situation which has been familiar in Eastern Europe from the time of the one-party Soviet systems.) If, for example, in a country the most monopolized access to the constitution by the constitutional judges already exists, the wide interpretative power is given by the general formulas of the constitutional text, the high activation speed of its power to the annulment of the Parliamentary acts can be seen and all these would be completed finally with the length of mandate of the constitutional judges for lifetime - which separates them completely from the re-elections by the political actors - then would the full power of juristocracy emerge. In this situation, the democratic institutions elected

[39] For a detailed analysis of all these issues, see Bela Pokol: The Sociology of the Constitutional Adjudication, Schenk Verlag, Passau, 2015.

by people would operate only as a disguise for the full power of the juristocracy. This situation is unlikely in Europe, but as indicated in Ran Hirschl's excellent book, by certain constellations of power such a move can be made that seems at first sight irrational and yet some dominant political groups do make it. [40]

[40] See Ran Hirschl: Towards Juristocracy. The Origins and Consequences of the New Constitutionalism. Harvard Universty Press. 2004.

Chapter 3.
The juristocratic state: the decomposition of its aspects

In recent decades, such changes have begun in the functioning of the democratic rule of law, by which their fundamental characteristics are also affected. For the description of these new characteristics, the name of the *juristocratic state* appears to be better than the rule of law. Some of these changes are caused by the increasing competencies of the constitutional courts, in addition to the powers of the parliamentary majority and the head of state at the center of the power of the state, and for these changes the *juristocratic form of government* can be established as a new form of government alongside parliamentarianism and the presidential system. In a broader sense, however, it can only be formulated as the replacement of the rule of law by the juristocratic state.

For the contrast of both forms, the following differences can be emphasized in ideal/typical purity. The functioning of the state as the rule of law is characterized by the sharp separation between political decisions and the decisions of state administration, or at least by the pursuit in this direction, and, secondly, the subjection of the latter to the former. In this configuration, political decisions always appear as the contents of parliamentary acts, or in the government regulations and ministerial decrees subject to these acts, and these exact rules determine the daily decisions of public administration. In this operating system, the current political majority of Parliament has broad power competences, but it is backed up by the voices of millions of citizens and in the next elections it can always be removed from the power of the state. In addition, public administration is expected to carry out its daily activities within the framework of strict rules, and the courts will, in most cases, decide in very limited discretion on the basis of precise legal requirements if the parties find that their legal rights have been infringed on by any authority or private individual.

The changes caused by the rise of the juristocratic state lead to a shift in this basic structure. The central change is that the precise rules of the laws have been replaced more and more by abstract legal principles, open normative valuations and the fundamental rights of the constitution, which provide broad possibilities for the interpretation of the judges, and finally, always with the free decision of the judges, will determinethe rights and obligations of the persons concerned in the situations. This decision-making freedom of the judges is increased by such an arrangement that the direct effect of the legal principles or the declarations of the Constitution are declared as obligatory for the judgments of the judges, and, in this way, the judges can still have more discretion in their decisions. The constitutional court is now only placed at the head of this structure, and, together with the higher courts, the decisions of the day-to-day work of the public administration can be directly determined by them. On the other hand, the legislative majority of political democracy will be determined more or less precisely by the Constitutional Court, and its constitutional decisions dictate what content is allowed for the parliamentary majority in the future parliamentary acts. Thus, the rearrangement is that the judiciary and the Constitutional Court, which is placed above them, will be pushed into the center of state power, and, on the other hand, their political priorities directly determine the daily activities of public administration. In this way, the triple structure of politics / state administration / justice is transformed into the double structure of the politicized judiciary (with the Constitutional Court as its head) and the public administration subjected directly under

them. The democratic elections and the legislative majority that they create are only a legitimizing veil on the actual exercise of power.

The analysis of Bernd Rüthers and Alec Sweet stone can be mentioned in the first place under the existing analyzes, of which these changes have already been outlined.[41] The analyzes of Rüthers emphasize the transformation of the rule of law into a judicial state, and these analyzes can be most directly used to understand the emergence of the juristocratic state. [42] Contrary to his resigned analysis of the genesis of the judicial state, the analysis of Sweet Stone in this area has a neutral tone, sometimes even a little enthusiastic. [43] My entire analysis can be seen here as the extension of Rüther's theoretical framework, for he merely limits his analyses to the ever-greater powers of the constitutional courts, and to the objective-teleological interpretation of the law of the courts by which the judiciary has been gradually torn by the laws (1). This limited formulation, if not sufficient, is useful for the wider identification of structural changes. On the other hand, it is worthwhile to isolate the emergence of a pseudo-constitution, which can be observed in some countries (2). The questions of the juristocratic form of government are still to be analyzed within the enhancing power of the constitutional courts (3). Then comes the analysis of the objective-teleological interpretation of the law, by which the judiciary was tendentiously torn from the laws (4). A further change in the law, by which the transformation from the rule of law to the juristocratic state is brought forward, is the increasing abstraction of the norms of the law, and instead of the precise legal rules the determination of the judicial decisions is taken over by the general principles of law, normatively open fundamental rights and constitutional evaluations 5). These changes will lay the foundations for the political struggles of society to pass from the parliamentary sessions to the courtrooms (6). Finally, it is worthwhile to analyze the change in the moral-philosophical arguments by which the shift in the exercise of power from the parliamentary elections of the millions to the juristocracy is confirmed in the theory of John Rawls and Jürgen Habermas (7). Before concluding, an analysis is still to be presented concerning the extent to which these changes have been realized in Hungary (8).

1) The dissemination of constitutional adjudication and its power growth

[41] It can also be mentioned in the footnote that the legalization of politics was already emphasized by Otto Kirchheimer in the 1920s due to the then new regulation of working conditions, and this thesis was once again highlighted in the 1980s. See Rüdiger Voigt: Legalization. In: ders (eds.): Legalization. Koenigstein. 1980. 15-16-p. The criticisms of the legalization of politics and of the politicization of constitutional adjudication were treated by Basil Bornemann in detail in a treatise published in 2007, and he has conceived of these tendencies only as an enhancement of the structural link between law and politics through constitutional adjudication but he did not attribute deeper significance to that. See B. Bornemann: Politisierung des Rechts und Verrechlichung der Politik durch das Bundesverfassungsgerichts? Systemtheoretische Betrachtungen zum Wandel des Verhältnisses von Recht und Politik und zur Rolle des Verfassungsgerichtsbarkeit. Zeitschrift für Rechtssoziologie 2007 (Vol. 28) Heft 1. 75-95. p.

[42] See Bernd Rüthers: Die heimliche Revolution vom Rechtsstaat zum Richterstaat. Mohr Siebeck, Tübingen. 2014; But the effect of this transition had already been the focus of his attention during the first years after the turn of the millennium, cf. B. Rüthers: Demokratischer Rechtsstaat oder oligarschischer Richterstaat? In: Picker / Rüthers (Hrsg.): Freiheit und Recht. München. 2003. 11-136. p. und Röthers: Geleugneter Richterstaat und vernebelte Richtermacht. NJW 2006, 2759-2761. p. From the Hungarian literature, András Zs. Varga made a similar criticism of the "total rule of law", see A. Zs. Varga: "Eszményből bálvány? A joguralom dogmatikája. (From idea to idol?) Századvég, Budapest 2015).

[43] Alec Sweet Stone: Governing with Judges. Constitutional Politics in Europe. Oxford University Press. Oxford. 2000. and the above-mentioned positive assessment of "governing with judges" can be read as follows: "I have tried to show that constitutional review has generated an expansive (rather than simply narrow) and relatively participatory (rather than elite-dominated) deliberative mode of governance, a governance that would not have emerged in the absence of constitutional review." 122. p. Footnote 4.

A change that had caused a cumulative effect with other changes and created the juristocratic state instead of the rule of law in many countries of the world was the dissemination of the constitutional courts and their gradual competence growth. The original idea of constitutional adjudication emerged in the United States in the early 1800s and originally meant only the decision-making process in matters of conflicts of competence between the member states and the federal government. The United States was, in fact, the first federal state in the world, and until then it had not been decided which institution would be able to resolve the conflicts of jurisdiction between the various levels of statehood. With the leadership of John Marshall, the federal Supreme Court established in 1803 that this court will have a final word in this debate in the future, and if a law is declared unconstitutional by the Supreme Court, it can no longer be used. This modest scale of constitutional adjudication expanded a great deal during the 1800s, but until the early 1900s it was only very rare that the highest judges, in addition to the ordinary competencies, also wanted to determine the content of the laws as a constitutional court. For lawyers of the European countries, constitutional adjudication was known in this modest role, and in 1920, after the disintegration of the Austro-Hungarian Empire, the time came to take over constitutional adjudication in Europe for the first time in the new Austrian constitution. [44] To some degree, constitutional adjudication in Austria changed, and this task was not entrusted to the higher courts - ultimately the highest Federal Court of Justice - but a separate constitutional court was created besides the hierarchical steps of the ordinary courts. Namely, the parliamentary majority of the then dominant Austrian social democrats had a strong aversion to the conservative judiciary and they thought a separate constitutional court filled with reliable social-democratic attorneys and legal professors as a politically better solution. Moreover, the jurisdiction of that court had changed, and this had not been placed at the end of the regular legal disputes, but directly over parliamentary legislation. In this way, the constitutional court controlled much more closely the legislation and the possible repeal of the law was directly connected with the political struggles within Parliament. This meant a considerable step on the way to the replacement of democracy by the juristocracy, but finally this change did not take place here due to some structural reasons and the otherwise modest competences of the Austrian Constitutional Court did not create the subordination of the parliamentary majority by the constitutional judges.

This step came only in the years after the Second World War, when the constitutional court was included in the newly created German and Italian constitutions under the control of the American occupation authorities. [45] From the original version of constitutional adjudication in the US, one would have expected that the highest ordinary court would be entrusted with constitutional adjudication by the Americans, but the creators of the new system in Germany had an even greater aversion to the judges - in the office under Hitler - than in former times in Austria, and, in this way, a separate constitutional court was created. In Italy, the Austrian model was little changed and here it also remained an organization with modest competencies. In Germany, however, the situation changed fundamentally. Here it was introduced to allow citizens to submit an immediate constitutional complaint immediately before the constitutional court if their rights were irreversibly damaged by the passing of time and, in general, all parties concerned in the legal disputes could and can stand before the constitutional court with a

[44] In 1885 Georg Jellinek, inspired by the experience of US constitutional courtship, made a proposal on the implementation of this activity in Austria, cf. Jellinek: Verfassungsgerichtshof für Österreich. Wien, Hölder, 1885.; But in fact the constitutional court, inspired by Hans Kelsen, was included in the Austrian constitution in 1920.

[45] Because the character of these constitutions, controlled by the occupying powers, is usually not emphasized, the work of N. Feldman is to be mentioned, of which this compulsory character has been exceptionally documented. See N Feldman: Imposed Constitutionalism. Connecticut Law Review (Vol. 37), 2005. page 851-865.

constitutional complaint, when the litigation by an ordinary court had come to a decision. In addition, the member state governments may file a complaint against the federal measures and vice versa before the federal constitutional court. These changes significantly increased the dominance of the constitutional court over the democratic parliamentary majority, but this dominance was further enhanced later. Namely, the constitutional court had been filled with lawyers and law professor friends, and these trusted constitutional judges could always be sure of the safe support of background power. [46] In this way, they began to interpret their competences most widely. In the early 1950s, there was indeed a conflict between the government of parliamentary majority and the constitutional court, because, in the secure awareness of its democratic legitimacy, the former did not want to admit the priority of constitutional judges. In the situation of the US occupation, however, it was clear which side had a better position, and, in this way, the German constitutional judges were unhindered to further expand their otherwise wide competencies. The main route was mainly that some empty formulas, which had little normative content (such as "the right to the all-round development of the personality" or the "inviolability of human dignity", etc.) were interpreted in such a way that they were called "mother rights," which could give birth to more and more new fundamental rights. In this way, for a few years, a new constitution was established instead of the original, and the constitutional court had also begun to interpret the original constitutional provisions in the light of this self-made constitution. In addition, they proclaimed their expanded competency to the control of the constitutional changes, and thus they achieved the priority not only over the legislative power, but also over the constitutional power, and this had nothing to do with the original idea of constitutional adjudication.

In the conditions of economic prosperity after the Second World War and in the Keynesian model of welfare capitalism, there was a good political climate in all of Western Europe, and the limited model of democracy by the strong constitutional judiciary caused no greater criticism in Germany and only some German theoretical jurists voiced some criticism. With the often keen and rather tasteless debates of parliamentary democracy for a background, the constitutional judges dressed in their solemn marshes with ceremonial robes met with great public sympathy for the announcement of the decisions. Encouraged by positive reception, in the late 1970s, the Western powers, among them the US government, were forced to propose this model of limited democracy by a strong constitutional adjudication for the countries after the collapse of the dictatorship as the new state structure. For this model, the naming of the rule of law was used, and this is appropriate to the extent that only the formal framework of cyclic governmental changes and the free path of democratic change are protected by constitutional adjudication. But here too much of the competencies is transferred to the constitutional court that goes far beyond the guarantees, and are partly the takeover of the state's main power.

This enhanced model of constitutional adjudication was adopted by Portugal and Spain in the late 1970s after the collapse of their dictatorships, and, in particular, the Spaniards realized the expanded model of the Germans. Not only was the separation from the written constitution in Spain increased by the fact that a new self-created constitution was conceived on the basis of the empty normative formulas of the Constitution, but the Spanish constitutional judges were also prepared to wipe out the concrete provisions of the Constitution in its decisions. [47] In the 1980s, the US political elite, which dominated the international scene, was able to use this

[46] See for the radical change of elites in Germany after the Second World War Stefan Scheil: Transatlantische Wechselwirkungen: Der Elitenwechsel in Deutschland nach 1945 Duncker und Humblot. Berlin. 2012; in relation to the constitutional judges especially pages 155-159.

[47] See the decision on the same sex marriage in 2012 when, despite the explicit prohibiton of the Spanish Constitution, the possibility of same sex marriage was declared constitutional in the Civil Code; In detail see B. Pokol: Alkotmánybírósági döntési stílusok Európában. (Constitutional decision-making styles in Europe.) Jogelméleti Szemle / Legal Theory 2015 No. 3.

German-Spanish model of constitutional adjudication in the South American countries, and constitutional courts with the broadest competences were set up in a number of the states of the continent. Then came the collapse of the Soviet Empire, and the German model of strong constitutional adjudication was also pushed for the torn-up Central European satellite states. The inner collapse of the Soviet Union in 1991 and the new independent states thus realized the strong German model of constitutional adjudication, and under the most direct American influence in Russia in the times of President Jelcin, a strong constitutional adjudication was established here, too. This process was then passed on to a number of Asian countries and in Africa in the 1990s, and today the strong constitutional courts are also equipped with the most extensive competences here. This power position, however, stands furthest from the original ideas of constitutional adjudication.

2) The pseudo constitution of the constitutional courts

Compared to simple laws, constitutions define norms, fundamental rights and constitutional values in a more abstract manner. In this way, the constitutional judges have to make much more concretization and interpretation, and these can be made with much greater freedom than in the case of the ordinary courts. For this reason, the constitutional judges are given a broad authority, and, therefore, responsibility and power, to interpret the constitution. In the course of this interpretation, they can make binding precedent decisions that sometimes work as additions to the constitution. The newcomer constitutional judges will always be chosen by representatives of the changed democratic public opinion in the form of a new parliamentary majority, and they are, of course, bound to the constitution, in accordance with their oath. In this way, they can reject the existing constitutional precedents can be rejected and they can establish new precedents. The new constitutional judges (and with them the majority of the constitutional court) are only bound by the old precedents to the extent that they have to give explicit grounds for the deviation. (Because without this explicit argumentation would arise only arbitrary decisions and chaotic constitutional design.) In reality, however, this partial attachment of the constitutional judges is only possible in principle, and a series of structural causes make it difficult to deviate from the existing precedents. Of this difficulty even the final break with the original constitution can be created, and a *pseudo constitution* is established from the indispensable precedents. This implicitly slips the constitutional power through the hands of the Constitutional Court.

Five structural factors can be highlighted by which the strong attachment of the constitutional judges to the old precedents can be explained and the gradual development of a pseudo constitution in some European countries can be considered.

1.The most important reason of this can be seen in the generalist nature of the constitutional adjudication, which runs counter to the European system of specialized courts that are being developed ever since the early 1800s. In the United States the generalist courts remained, and the upper and the supreme courts decide the cases taken from each branch of the entire legal system, and the judges are not specialized in civil law, criminal and other cases. Or if there is such a specialized court (eg,. patent cases) in a sector, which is an exceptional case, the judges of the supreme court with generalist judging competence make the decisions in the case of the appeal too. Constitutional adjudication was established for the first time in the United States in the early 1800s, and then it went to Europe in the first decades of the 1900s and now in most European countries there already is an existing institution. The European specialized court system with the specialized and differentiated judiciary – and, last but not least, also the legal community that is differentiated sector by sector - coupled with fundamentally different components to the constitutional

adjudication, as it was on the original site. Of course, the constitutional judges also came with an only narrow competence and after becoming a member of the constitutional court, they should be able to decide concerning everything that can be found in the full spectrum of the law. Due to the specialization of a narrow area, the European constitutional judges are faced with bigger problems than their colleagues in the US. [48] The justices of the Federal Supreme court in the US, who are provided primarily with the function of the constitutional adjudication, have been for years performing the function of generalist judging at a lower level - typically parallel with law professor activities - and thus the subsequent role of the generalist constitutional judge is not a challenge for them. After all, they must continue to deal with criminal, civil, property law, administrative law, etc. issues, as they have always done.

2) In the case of the European constitutional judges, this competence problem is mounted by the fact that they remain in their position for only a relatively short time. In contrast to their American counterparts, who are appointed for life with no time limit, the European constitutional judges are usually chosen for a short time (9-12 years), and this is with an upper age limit, usually 65-70 years. In this way, the European judges often spend only six to eight years in the post, as opposed to the usual American counterparts of 30-40 years. One consequence of this is that the composition of the European constitutional courts changes frequently, and there are always two or three new judges, who are only just getting started with the decision-making work, while a part of the rest have already begun to prepare for the exit due to the age limit. Compared to their American counterparts, the European constitutional judges have decision-making activities with a much more transient nature, and this intensifies the competency problem arising from generalist judging and creates a discouraging effect in respect to the rethinking of the existing case law which does not appear in the case of justices of the US Supreme Court. In the first years after their election, the European constitutional judges may target the mastering of the many thousands of pages of the existing case law, but on the ground of the constitutional values there are only a few exceptions who undertake to reinterpret this law. Thus, the competence problem merging with the impact of the temporary position results in the following: the case law established by the ancestors appears as a pseudo-constitution impossible to throw away and not as simply changeable case law.

3) In addition to these two, the role of the law clerks of the European constitutional judges should be emphasized, which is fundamentally different from the role of their American counterparts. The possibility of the judges's own law clerks evolved since the early 1990s in the US Supreme Court in order to assist the decision-making work, and recently there are three law clerks in the case of the federal appeals judges and four in the case of the justices of the Supreme Court. These American judicial assistants are selected by the justices and judges from among the students of the best law schools and they will receive a one-year mandate, even if in some cases this mandate will be repeated. Through these conditions, the law student-law clerks are clearly subordinated to their justices, who have many years of judicial experience. [49] The situation is radically different in the

[48] There are some institutional problems arising from the coexistence of the generalist constitutional adjudication and the specialist European judicial system, and for the analysis of these problems please see my earlier study: Generalist judges in the specialized judicial system: A dilemma of the European constitutional judges. („Generális bírák a specializált bírósági rendszerben. Az európai alkotmánybírók egy dilemmája.) Review of Legal Theory, No. 2. 2014, p. 226-243

[49] The lesser decision-making competence of the law clerks does not prevent that they are included in the preparatory work of the drafts: „But what one expects (…) if most judicial opinions are written largely by law clerks (as they are), who are inveterate legalists because they lack the experience, confidence or „voice" to write a legislative opinion of the kind that judges like Holmes, Carodozo, Hand, Jackson, Traynor, or Friendly wrote. The delegation of judicial opinions writing to law clerks may explaine the decline in the number of judges whom anyone would be inclined to call „great". Richard A. Posner: Realism about Judges. Nothwestern University Law Review (Vol. 105.) 2011 No.

case of the relation between the European constitutional judges and their staff. Since the German model was copied by most European constitutional courts, we should start with the presentation of this. This model has broken with the American "freshman" scheme, and the staff of the judges are selected from among the young ordinary judges with some years of experience. The other change was that they not only work as law clerks for a year, but they remain fora long time at these posts.[50] With these changes, the relation of the constitutional judges and their law clerks is substantially transformed compared to the American one and the decision competence of the law clerks reaches the one of the constitutional judges. It is not possible to know exactly what is the proportion of those German constitutional judges who passed on to their staff the large part of the decision on merit as well, but by the empirical research on this topic this is presented as a serious problem. Uwe Kranenpohl wrote after interviewing the German constitutional judges: "Dabei signalisiert der leicht kritische Unterton dieses Gesprächspartner, dass einige Kollegen bei ihm durchaus im Verdacht stehen, ihren Mitarbeitern unangemessen umfangreiche autonome Gestaltungsbereiche einzuräumen. Noch deutlicher bringen dies zwei andere Interviewpartner durch Flucht in Sarkasmus zum Ausdruck: "Das hängt eben sehr vom einzelnen Richter ab. Ich glaube, ich kann für mein Dezernat sagen, dass da kein 'Entzug des gesetzlichen Richters' stattgefunden hat - aber ich kann das nicht allgemein behaupten. (Interview No. 6.) „So gibt in der Tat Verfassungsrichter, da muss man davon ausgehen, die unterschreiben jeden Mist, der Ihnen von den Wissenschaftlichen Mitarbeitern vorgelegt wird und kontrollieren das nicht!" (Interview No. 21)." [51]

As a further shift of this German model, it can be seen in the case of the other European constitutional courts that the law clerks will not be replaced on expiry of the term of their constitutional judge, but they stay and continue to work alongside the inexperienced newcomer-judge. In fact, of course, the newcomers facing elementary competence problems are under tutelage of the experienced law clerks the first time, and the new judges are guided and educated in the decision-making work by them. In this situation, it becomes the generality, which was ironically mentioned earlier in the interview by the German constitutional judge, and the cases will be distracted from „the lawful judge" by the law clerks. This image is only amended in exceptional cases, when the new constitutional judge has a particular sovereign personality and, in this way, he will be able to free himself from the guardianship after a while. In addition to the sovereign personality, of course, it can be mentioned that there must be enough time for the newcomer-judges to be able to become competent constitutional judges, and not to leave this post after five or six years due to reach the upper age limit. But this exceptional competence can be achieved by the newcomer-judge who could earlier see through wide fields of law based on previous praxis, and was not only specialized in a narrow area of legal expertise. But even if all this is available as well, such "deviant" constitutional judge must always be confronted with colleagues and their law clerks who deal with the cases on the ground of the pseudo-constitution as the bible of their work. [52]

4) The fourth reason that causes the formation of the pseudo-Constitution rather than a simple case law is the huge workload of the European constitutional courts. As was already mentioned, there is a marked difference between the workload of the US Supreme Court and the European constitutional

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2.583.p.

[50] Earlier, five or six years time could be spent in the post of the staff of the German Constitutional Court, but lately it is usually only two or three years. (See Kranenpohl, at 106-108.p.)

[51] See Kranenpohl, at 88 p.

[52] What kind of charges will attract the newcomer constitutional judge, who tries to stick with the original constitution, and only secondarily follows the pseudo-constitution hardened case law, can be seen in the book of Kranenpohl: „Gerade das BverfG hat eine starke Neigung, im Sinne der Wahrung von Rechtssicherheit die bisherige Rechtsprechung weitgehend beizubehalten. (…) Schon durch den bloßen Umfang der bisherigen Rechtsprechung sind damit bereits weite verfassungsrechtlich relevante Bereiche vorstrukturiert, was dem Berichterstatter im Regelfall lediglich erlaubt, sich mit seinem Vorschlag innerhalb der bereits formulierten Prinzipien zu bewegen." (Kranenpohl, at 143.p.)

courts and while by the justices of the Supreme Court only one hundred cases must be decided per year, the European constitutional judges have to deal with thousands of cases every year. In this way, the busy European constitutional judges are not only unable to write a lot of concurring and dissenting opinions, but they are also unable to override the once established earlier case law in the light of the constitutional values and on the basis of the original text of the Constitution itself. This problem was already indicated by Richard Posner: "The heavier a court's caseload, the less likely it is to reexamine (...)." [53]

5) These effects have been increased by a mandatory uncritical attitude in the legal sciences regarding constitutional adjudication that has been established over the last sixty years by the fact that the constitutional courts were usually created in the wake of dictatorships that had just been overthrown and the new constitutional courts were seen as the symbols of freedom. During the dictatorship, the disciplines of constitutional law and legal theory were mostly repressed, since they would have to deal with the central state power structure and the alternative concepts of law other than the dictatorship's official one. Where for a long time there was a dictatorship, like in Germany, later in Spain, Portugal and then again in the countries of the Soviet Empire, there were two or three generations of lawyers who consequently also dropped out of the constitutional and legal theory of knowledge. Regarding the countries of Eastern Europe, then came immediately 1989 and the multi-party parliamentary democracy and constitutional adjudication emerged. The idea of constitutional adjudication was mainly imported from the United States - specifically for use in Europe reframing – and it was celebrated as the most important symbol of the rule of law. Furthermore, learning from the fact that Hitler was raised to power by the election of millions of German people and the dictators in Austria and Italy also enjoyed great popularity, the American lawyers in occupied countries after the Second World War tried to build the constitutional courts as restrictions on the massive parliamentary movements. This aspect of constitutional adjudication later gained importance also in Spain and Portugal, and after the fall of the Soviet Empire, the clear dominance of American intellectual influence in the new democracies of Eastern Europe encouraged withdrawal from all criticism regarding constitutional adjudication. Completely inexperienced in this area of law in Eastern Europe, the new constitutional legal theory and the legal circles celebrated the declarations and normative arguments contained by the decisions of the constitutional judges as irrevocable truths. These, of course, were largely imported from the German and Italian constitutional courts, but, for example in Hungary, these decisions went well beyond the original ones regarding the constraints over the majority of the legislation and the departure from the written constitution.

By my own experience in Hungary this has long been suggested because the writings of the young constitutional lawyers and legal theoreticians who have been socialized since the early 1990s clearly show the mandatory uncritical attitude regarding constitutional adjudication. Although I could not check this problem in the other Eastern European countries, fortunately in Germany some studies have already been published that analyzed this uncritical attitude. Bernard Schlink was the first exception in 1989 regarding his criticism against the mainstream of German jurisprudence, and he emphasized that, unlike the older state theory, constitutional science after the Second World War merely explains the constitutional court decisions without any basic research and theoretical critique. This "constitutional court-positivism" (Verfassungsgerichtspositivismus) presents only the relevant constitutional court precedents without alternatives, and these are depicted as final truths that only need acceptance, but this uncritical legal science does not look beyond the decisions in order to explore the deeper context.[54] Going beyond these, Matthias Jestaedt views this situation in Germany as the following: at the beginning of the 1950s the German legal sciences generally

[53] Epstein/Landes/Posner, at 117. p.

[54] See Bernard Schlink, *Die Enthronung der Straatrechstwissenschaft durch die Verfassungsgerichtsbarkeit,* in: Der Staat (Vol.28.) 1989, 161. p.

experienced a depreciation of the theoretical level in relation to the legal theory concepts—and here we cannot talk about legal positivism merely, which sees its job narrowly as only the systematization of enacted legislation – but it became more constrained and as a super legal positivism, *court-positivism* was created. [55] For this court-positivism, the law is what the courts in the courtroom are deciding thousand times, and jurisprudence and legal education are only responsible for the judicial case law. The situation highlighted by Bernard Schlink as constitutional court-positivism is only a part of this wider distortion.

Thus, unlike in the United States, there exist no different legal concepts spread in the legal circles behind the jurisprudence of the constitutional court, and, in this way, it is not possible for the individual German constitutional judges to represent different concepts of constitutional adjudication within this court. There is only a single widespread knowledge without alternatives and this makes it impossible for the individual constitutional judges to argue systematically against the established constitutional judicial case law. [56]

All in all, these five reasons and their cumulative implications have set a barely surmountable pseudo constitution before the original constitution in many European countries, and the newly elected constitutional judges with their old guard of the law clerks can base the decisions mostly on this pseudo constitution.

3) The juristocratic form of government

The crucial point for the creation of the juristocratic form of government is the change when the constitutional court can annul the new laws of the parliamentary majority immediately after their creation. In this way, the constitutional judges come into the center of state power. However, the weight of power in both sides also depends on several factors.

In order to assess the power of the juristocratic actor against the parliamentary majority and its government, it is the degree of the monopolized access of the constitutional court to the constitution that is the most important aspect. The direct access to the constitution conceptually derives for the constitutional court's function, so it does not require an explanation. Conversely, one may ask whether the parliamentary majority has the competence to overrule the decisions of the constitutional judges or to change its organizational conditions; there are, in this respect, big differences among the countries. Ultimately, however, it depends on the extent to which the constitutional court has superior power over the parliamentary majority, and by these judges the majority will be utterly suppressed or only a moderate suppression takes place. The more difficult it is to amend the Constitution to the parliamentary majority, or to change the laws on the constitutional court, the greater the degree of the constitutional court's monopolized access to the constitution is. Conversely, the lighter the constitutional amendment, or at least the

[55] See Matthias Jestaedt, *Verfassungsgerichtspositivismus. Die Ohnmacht des Verfassungsgesetzgebers in verfassungsgerichtlichen Jurisdiktionsstaat,* in: Otto Depenheuer (ed.): *Nomos und Ethos. Hommage an Josef Isensee zum 65. Geburtstag von seinen Schuler.* Duncker & Humblot, Berlin 2002, 183-228. p.

[56] Let me indicate my personal experience that I collected when the German constitutional court delegation visited Hungary and as a constitutional judge I could participate in the joint meeting. I prepared studies earlier about the opposing opinions of the justices of the US Supreme Court and I wanted to know whether there were similarities in this respect to the Americans, and I asked the German constitutional judges sitting around me during lunch if there were any representatives of the textualist conception of law as Antonin Scalia in the US. The answer was a cool „no" and a sharp criticism about Scalia was given. The same took place when, in a joint meeting, the German decision on the abortion case was analyzed and it was said that the German Constitutional Court created the greatest social divisions with this decision, and German society was sharply divided on this moral issue. Then I asked them whether there were dissenting opinions within the body and the answer was given that although the first time there had been a dissenting opinion in this question, then it came to an end and they could decide without dissent. It was revealing to me regarding the degree of obligatory unanimity within the German Constitutional Court, because in case of such a deep moral question nobody will change his opinion in a short time, only under very strong pressure.

process of rewriting the law on the organizational conditions of the constitutional court by the parliamentary majority is, the more partial the weight of the juristocratic power against the parliamentary majority becomes. In this way, the suppression of parliamentarism into the form of half-parliamentarism takes place only in a moderate version. To furnish an example of the easy way of the constitutional amendment, there is the case of the Austrian Constitution, which only requires for its amendment the vote of a majority of all the members of the parliament, and it happened several times in the past that the decision of the Austrian Constitutional Court was neutralized by a corresponding amendment of the constitution itself. In Hungary, the constitutional amendment is bound to the two-thirds votes of all MPs, and when, in the period of 2010 – 2015, the government majority has this qualified majority, the neutralization of the decisions of the constitutional judges occasionally takes place by the amendment of the constitution too. In Poland, the constitutional amendment is similar to that of Hungary, but to change the law on the organizational conditions of the constitutional judges is easier and it is only connected to a simple parliamentary majority. So when in the 2015 parliamentary election a parliamentary majority with radically different political values from the previous constitutional interpretation of the constitutional judges was established, the polar opposing new parliamentary majority had enough legal means to modify the opposing majority of the constitutional court. However, in a number of countries more difficult preconditions exist in order to change the constitution, or at least to rewrite the laws on the constitutional court, and, therefore, the juristocratic form of government may have a stronger position against the parliamentary majority and the half-parliamentarism than it has in Poland.

By the constitutional court's high degree of monopolized access to the constitution its power is increased. This could, however, be further amplified if the wording of the text of the constitution was based on general declarations and vague principles and, in this way, instead of precise control such vague formulas provided the empowering of the constitutional review. To understand this, compare, for example, the fairly accurately worded rights and freedom within the United States Constitution to the German constitution, which contains such vague formulas as the right of the "all-round expansion of the personality" or the phrase according to which "human dignity is inviolable". In the latter case, the constitutional court can essentially decide without any normative determination and in the absence of normative content, the majority of the constitutional judges will decide quite freely what the constitution actually is. Conversely, if the rules in the constitution are worded precisely, then the interpretive power of the constitutional judges is more limited. If we look at the two together, and we see that in a country the constitutional court has a high degree of monopolized access to the constitution, and, in addition to this, the text of the constitution inherently contains general-empty normative guidelines thereby giving the constitutional judges wide and uncontrollable interpretational power, then, essentially, this body can be regarded as the constituent power in the country. Conversely, if the parliamentary majority has an easy way to the amendment of the constitution or the laws on the constitutional court and empowerment of the constitutional judges is based on precise constitutional wording, then the power of the juristocratic form of government is suppressed, and the institutions of half-parliamentarism have the possibility to counteract the opposing constitutional court.

Another question within this context is whether the amendment of the constitution can be reviewed by the constitutional judges. This option emerged in Germany after the Second World War when for the first time a powerful constitutional court in Europe was created. This took place because here the occupying US military government had more faith in the constitutional court filled with trustworthy lawyers returned from the USA than in a mass democracy based on an election by millions of German people. In this atmosphere, the German Constitutional Court expanded its competence in the following manner: the whole chapter of fundamental rights was declared untouchable by the constitutional amendment. This pattern has then given

impetus to some other countries so that - unlike the original American constitutional idea - the review of the constitutional amendments has consequently been brought under the authority of the constitutional court. This move already means the takeover of the constituent power openly, since, in this case, the constitutional court's monopolized access to the constitution becomes almost complete. However, this step was exceptionally made by only some constitutional courts. Although in 2011 there was an experiment in Hungary alone by the then constitutional judges to completely annul the new constitution. As the motion for the annulment had just been rejected by a slight majority of the constitutional court, the constituent power explicitly regulated this option in such a way that it essentially restricted this possibility in order to avoid such a new attempt. [57] Within this sub-question, a further question is whether or not a country's constitution - following the German model in this respect, too – contains a competence of the constitutional court to review the domestic law compared to the general rules of the international law. In this case, the domestic constitution and its amendments can be reviewed by the constitutional judges on the ground of the general principles and rules of the international law also. And because there is no codification of these general principles, the constitutional judges can decide whatever they want. In Hungary, the possibility of this annulment was already declared in 2011 by the earlier majority of the constitutional court.

The activation speed of the competence to annul Parliamentary acts is the third in order of importance of structural issues of the juristocratic form of government. Due to the monopolized access to the constitution and the broad interpretation power based on general-empty formulas of the constitution, the of the constitutional court's high level of dominance can already be achieved, but it can arrive at the top if the activation speed of its competence to annul Parliamentary acts is secured. This can be possible if all the opposing parliamentary parties or all single MPs have the right to challenge any law, and, in this way, the constitutional court can annul all the new laws immediately after their publication. A further sub-question in this respect is the constitutional court's scope of review determined by the motion for annulment. It is possible that this motion means only a necessary formal prerequisite and once it has taken place the constitutional court can include additional laws and their provisions under review by simply declaring the relationship between them. Even here wide possibilities can be further enhanced if the constitutional court has the right to start the review of the new law ex officio, through which the annulment process can be activated at will. In this way, the majority of the constitutional judges can annul laws and measures of the parliamentary majority if they have opposing political values. In all this respect, a wide variety of regulations exist, and there are countries where the weight of juristocratic insitutions is increased by this and, conversely, where the parliamentary majority can preserve some opportunity to resist. For example, by the regulation of the earlier Hungarian Constitution, the constitutional judges have enjoyed the greatest freedom in this respect and all single people have the right by way of what is called popular action to ask the constitutional court to review the new law. If the constitutional judges wanted to annul a new law, but nobody challenged this law, then the wife of a law clerk of the chief justice would quickly appear as petitioner and the annulment process would start. Conversely, the new Hungarian constitution entered into force in January 2012 - learning from the past problems – cut back the wide popular action to start the review of the law and there were many changes in this area. In sum, it is noted that these questions must be examined in detail in a comparative way, if we want to know in a country, whether the parliamentary majority of the half-parliamentarism still has dominance over the governance of this country or, conversely, the forces of the juristocratic form of government already have the upper hand in this area.

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[57] "The Constitutional Court can review the amendments to the Basic Law and the Basic Law itself only in respect of the procedures provided for in the Constitution." Basic Law, Art. 24 (5).

Finally, the length of mandate of the constitutional judges that separates them from the re-elections by the political actors is important for the analysis of the strength of the juristocratic form of government. Despite the high level of monopolized access to the Constitution and the widest interpretation power over the Constitution based on the general-empty formulas of it and, further, the sufficient activation speed of the competence to the annulment of the Parliamentary acts, the power of the constitutional court over the parliamentary majority is constrained, if the constitutional judges are appointed only for a short period of time. In this way, the determination of the juristocratic forces will always revert to the parliamentary majority and the head of state in form of the new judicial appointments. In particular, in addition to the short cycle, even if the re-election of the old judges is possible, the obedience of the constitutional judges to the parliamentary majority is - more or less - inevitable. By all of this, the weight of power of the juristocratic form of government against the parliamentary majority can be kept below a threshold. Conversely, if the cycle of the constitutional judges is long, eventually for a lifetime (especially if there is no upper age limit for compulsory retreat, as in the USA, for instance), then all this tendency will increase the power of juristocracy. The very long cycle of the judges alone is enough in order to enhance to weight of power over the other branches of power, as is shown in the US, where the supreme judicial body has in every aspect a tighter power than the new constitutional courts in Europe or Asia. However, the American supreme judges in office for 30 or 35 years represent power unchanged throughout generations, and conversely, the judges of the new constitutional court in the world mostly have only a limited period of mandate. There are big differences among the constitutional courts of the world; the most common is the nine or twelve-year cycle, but also the six-year cycle in some cases with the ban on re-election, and it is usually an upper age limit (for example, 70 years) that assures the obligatory exits.

So if a political scientist wants to establish the country-ranking of the power weight of the constitutional court against the parliamentary majority in the whole world, then it (s)he needs to get started on the basis of the above parameters. The constitutional court‘s degree of monopolized access to the constitution must be analyzed; the breadth of the constitutional interpretative power given by the general formulas of the constitutional text; the activation speed of its power to annul the Parliamentary acts; and finally the length of mandate of the constitutional judges which separates them from the re-elections by the political actors. [58]

4) The objective-teleological interpretation of law: the detachment of the judges from the legal text

The prescriptions of the law only provide the framework for judicial decisions, and they do not fully determine these decisions. Since the early 1800s, however, a common legal technique - based primarily on Savigny’s rules of interpretation - had been developed in the German-Roman legal circle, and through this the judicial attachment to the laws was more or less secured. The attachment to the exact rules of the precedents could be observed in the Anglo-American customary law, too. This interpretive canon was then supplemented in the continental European countries by Rudolf von Jhering in the 1870s, and the teleological interpretation was the fifth after the previous quartet of cannons (grammatical, logical, systematic and historical interpretation). Jhering himself advocated the judges’ strong attachment to the law, and he regarded the realization of this as the most important basis of legal certainty, which became

[58] For a more detailed analysis of the construction of the juridocratic governance, see B. Pokol: The Juristocratic Form of Government and its Structural Issues. In. Tamara Ehs/Heinrich Neisser (Hg.): Verfassungsgerichtsbarkeit und Demokratie. Europäische Parameter in Zeiten politischer Umbrüche? Böhlau Verlag. Köln – Weimar, 2017. 61-78. p.

even more important in modern times. By the highlighting the targets behind the rules of law, however, and thus the possibility of competition between the text of the norm and its purpose, he unknowingly contributed to the detachment of the judges from the legal texts. For some anxious developments in criminal law came to an end even after the death of Jhering in 1892. Namely, the purpose behind the text was emphasized in 1887 in the study of Franz von Liszt, an earlier Jhering disciple, and Jhering's idea was transformed into a dual guideline for the judges in criminal law. [59] According to his thesis, the text of the Criminal Code is compulsory for the judges, but behind this text the purpose of the text is also compelling and this doubling gave the possibility for the judges to revise the legal text. In view of the purpose of the norm, it can always be argued that the legislators could not find the right text phrases for this purpose, and with regard to the purpose, the text can always be altered, rewritten, expanded or even narrowed by the judges. This change of interpretation in criminal law was in polar opposition to the criminal legal principle of *nullum crimen sine lege*, which had been most important since the Enlightenment in the modern era. In this way, Franz von Liszt himself became frightened of the consequences and he had the relevant parts from his newly issued textbook deleted in 1990. [60] In private law there was at first no such problem, because here Jhering's idea was developed further by Phlip Heck in his bantering writings of 1912 in such a way that the intentions of the legislators were placed at the center of interest of jurisprudence, and the fact that the judges were bound by law was always emphasized.

This being bound by the law in interest jurisprudence then began to change in the German legal sciences in the 1950s, and similar transformations in several continental countries occurred as an effect of this change. To do this, an aid meant such a declaration after the Second World War that the injustices in Nazi Germany were qualified as the consequences of legal positivism, and it began to sew these sins on the neck of the judiciary trained by legal positivism. Today, this explanation has already been rejected - as a result of the thorough analysis of Bernd Rüthers [61] - but the judge bound to the legal text is still a negative model for many legal scholars. In this climate, then, it began to spread that the judge and the other interpretation experts did not need to seek what legislators actually wanted to achieve by law, but instead what could reasonably be achieved. [62] The judge is always to decide on reasonableness individually, and his point of departure should always be that the law was smarter than the lawmaker himself. This objective-teleological method of interpretation has spread in recent years all over Europe, in my opinion, because the greatest political break-line in many European countries exists between the adherents of federal Europe and the supporters of the national-state structure. The strong international networks of foundations, with hundreds of scholarships behind the groups of lawyers for federative state, can have an effect of magnitude greater than the adherents of national legislation. In particular, this separation from the legal texts can be realized if these texts themselves are formulated less and less on the level of exact rules, but only as general principles or abstract normative declarations and constitutional rights. Let us now examine the

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[59] See Franz von Liszt: Der Zweckgedanke in Strafrecht. In: ders.: Strafrechtlieche Aufsätze und Vorträge. Band 1 (1875-1891). J. Guttentag Verlag. Berlin 1905, 126-179. p.

[60] See Ferenc Finkey: Unrechtmnäßigkeit als eine strafbare Handlung. Ungarische Akademie der Wissenschaften. Budapest 1909, 24-25. p.

[61] See B. Rüthers: Die unbegrenzte Auslegung. 7. Auflage. 2012. Tübingen.

[62] In one of the lectures by Bernd Rüthers, the President of the Federal Court of Justice is quoted, who wrote in an article: „ Es geht also nicht darum, was sich der Gesetzgeber - wer immer das sein mag - beim Erlaß des Gesetzes gedacht hat, sondern darum, was er vernünftigerweise gedacht haben sollte. (….) ernöffnet die objektive Theorie den Richtern die Möglichkeit, vom subjektiven Willen des historischen Gesetzgebers abzuweichen. Insoweit gilt dann eben das geflügelte Wort, daß das Geetz klüger ist als der Gesetzgeber." Bernd Rüthers: „Rechtsstaat oder Richterstaat? - Methodenfragen als Verfassungsfragen. 14.p. In: www.richterkontrolle.de (2007) derselbe noch ausführlicher in seinem schon oben zitierten Buch B. Rüthers: Die heimliche Revolution vom Rechtsstaat zum Richterstaat. Mohr Siebeck, 2014. S. 89-95.

changes from which the latter trend has been advanced.

5) The shift between rules and the abstract principles in the legal system

The legal system based on legal dogmatics, with a consistent conceptual apparatus, was spread throughout continental Europe in the nineteenth century, and the old juridical maxims, brocarda and other topical points of view were rejected as inconsistent. [63] But parallel to this development, another process has been in place since the early 1600s. On the one hand, the idea of secular natural law was introduced into the juridical process and, on the other hand, the idea of human rights was created, which was propagated primarily by the morality philosophers. The abstract human rights helped in the fight against the feudal powers, but proved as unsuitable for the settlement of disputes in the daily judicial processes after the Enlightenment. This is because, in each individual case, priority must be given to one of these rights, and this priority can be reversed in another case.

The events of the French Revolution of 1789 showed that the leaders of the revolution, with regard to human rights as absolute requirements, mutually abolished each other almost without exception. The French revolutionaries left their convictions in the Declaration of Human Rights of 1789 to posterity, and although these ideas did not have any direct consequences in Europe for a long time due to the terrible experiences of the revolution, they were incorporated into the constitution by the United States. These human rights were largely political (freedom of opinion, freedom of the press, freedom of assembly, etc.) and were later integrated into the revolutionary constitutional plans of 1848 in Continental Europe. But these were only targets for legislation and were not a binding right for the judges to make judgments. This nature was also maintained when constitutional adjudication was established in the United States in 1803 by the Chief Justice, John Marshall. Namely, constitutional adjudication meant here at first only the decision of the Supreme Court in the conflicts of the federal government with the individual federal states in questions of legislative competences. This nature of constitutional adjudication began to change in the second half of the nineteenth century, and its importance for the human rights gradually increased. This meant the substantive examination of the individual laws by the highest courts, and constitutional adjudication began to function as a corrective to the legislative majority.

From the sociological point of view, it can be said that this transformation opened up a possibility for the elite groups, which could not reach a majority in the elections in Congress, to achieve a certain degree of control over society by influencing constitutional adjudication. This strategy was developed by groups of large financial capital in the 1910s. In their struggle against the conservative groups of production capital, they supported the rights of the minorities - first of blacks, then of homosexuals, of women, etc. In this way, the massive conservative majority of the Congress was fragmented into many minorities, and as a consequence, the transformation of society was not determined by the majority of the Congress, but by the incorporation of human rights and by the constitutional adjudication of the Supreme Court. The dominance of financial capital over American society against the groups of production capital was brought about by constitutional adjudication and by the "minority weapon". In doing so, the financial capitalist groups established foundations that later took up the fight for human rights. „The American Fund for Public Service was created in 1922, and for a short time it supported key rights-advocacy efforts. Roger Baldwin, the Director of the ACLU, became the director of the new fund as well, and the original board of directors consisted largely of the

[63] See also Peter Stein: Regulae Iuris. Of Legal Rules Legal Maxims. Edinburgh: at the University Press. 1966, 87-91. p.

members of the ACLU's national committee (…) the Fund supported a wide array of left-wing causes in the twenties and thirties and the Fund was the primary source of financial support for court battles directed by the ACLU in the twenties (…) The stock market crash of 1929 devastated the Fund, however, and as a consequence its support for litigation dropped dramatically in the thirties."[64] In this way, Federal Supreme Court became the highest organ for the creation of the basic legal norms, and since the 1960s the constitutional adjudication has begun to subject not only the legislation but also the everyday decision-making activities of the courts. New techniques of political struggles were created by these processes, and the role of movement lawyers ("cause lawyers") was created which, based on the human rights of the constitution, began to fight for various minorities through the courts and not as politicians in the legislative process. [65]

These events encouraged new legal theories in the United States in the 1960s, which in turn attacked the legal-dogmatic system and, on the other, reintroduced once again the legal argumentation by means of moral maxims and legal principles. In these years, there was a rehabilitation of maxims and general legal principles over the exact rules of law. During the "rights revolution" described above, the earlier discredited maxims and legal principles once again became the focus of the legal life of the United States and legal systematic law began to be pushed aside as a mere formalistic part. In practical legal life, the courts were increasingly oriented towards the constitutional decisions of the Supreme Court and, in parallel, they increasingly based their judgments on the human rights of the constitution and on the abstract legal principles instead of the simple laws. This process was accompanied by the political struggles of the various groups of finance capital, and the conversion of the right of simple laws to the application of the fundamental rights of the constitution (and constitutional decisions) was stimulated, first of all, by the groups of financial capital. These groups were able to gain control over the mass media and the cultural enterprise as early as the beginning of the twentieth century, and - as Gramsci said - develop an "organic intelligence" for the defense of their interests, and they were able to achieve the positive assessment on the part of public opinion for this transformation of the law. The change was interpreted by the cultural industry with the help of the organic intelligence of financial capital, so that from now on *'the rights of the people instead of the laws of the politicians' became decisive* and the abstract rights of the constitution as well as the legal principles were again centered on American legal life.

In this spiritual climate, Ronald Dworkin came and stressed the priority of the legal principles before the rules of law. Dworkin formulated this thesis against the book "The Concept of Law" by H.L.A Hart, who had expressed the prevailing opinion on modern law as a system of rules. Dworkin stressed against this concept that the law was here abridged because, in addition to the rules of law, there are also the legal principles in law. If there were a conflict between the rules and the legal principles in a legal case, the legal principles would have priority. [66]

In German legal science there was already an attempt at rehabilitation in favor of the legal maxims and legal principles as early as 1953, when Theodor Viehweg wanted to recapture the medieval topical idea of the law instead of systematic legal dogmatics. After a long discussion, however, this attempt was rejected and accepted only as a partial correction of legal dogmatics. [67] A similar critique against too abstract normatives was expressed here in the 1970s, which

[64] *Charles R. Epp*, The Rights Revolution. Chicago and London, 1998, S. 58.

[65] See for the cause lawyering: *Stuart Scheingold*, The Struggle to Politicize Legal Practice: A Case Study of Left Activist Lawyering in Seattle, in: *Sarat, Austin/S. Scheingold* (ed.): Cause Lawyering. Political Commitments and Professional Responsibilities, New York, 1998, 118-150. p.

[66] See *Ronald Dworkin*, Is Law the System of Rules? In: *ders* (ed.) The Philosophy of Law, London, 1977, S. 65-89.

[67] See *Theodor Viehweg*, Topik und Jurisprudence. Fünfte, durchgesehene u. erweiterte Auflage, München, 1974;

qualified the *Generalklauseln* as only vague illusions of law in the judgment of the verdict and, in fact, passed on to the judges the right to determine the law. [68] In this way, the maxims and the abstract legal principles in continental European legal thought remained subordinate to the laws as partial help of systematic legal dogmatics, as was demanded even by Bartolus and Baldus seven hundred years ago.

It must, however, be seen that thinking in legal principles and maxims has been given great support in continental European countries because of the strong pressure of fundamental rights and constitutional adjudication in the latter decades. The shift in control of society and highest state power from legislation to the respective constitutional court according to the American model could be observed, especially in the new Eastern European democracies, so that thinking in abstract legal principles and maxims instead of systematic thinking plays a special role here. In addition to the influence of the USA as a victory power after the Second World War and as a leading world power, the shift from the laws of the national parliaments to the abstract legal principles is brought about also by the European Court of Human Rights in Strasbourg. As a result, the efforts to suppress systematic legal dogmatics can be observed, for example, in Hungary, and even within the sphere of private and criminal law, there are already shifts from systematic thinking towards loose topical thinking in legal principles and maxims.

6) Politics through judicial processes

In Western societies, since the beginning of the twentieth century, the democratic political struggles of the large groups of society have made it possible to determine the content of the laws, and to incorporate the interests and values of the these groups into the content of parliamentary acts. The most important way of doing this are the parliamentary elections and the election campaigns or political struggles during the electoral period, which serve to convince the millions of voters of the importance of these interests and values. With this arrangement, the final results of political struggles are borne by the law, and the losers are always waiting for the next election in order to be able to change the legal content. In this arrangement, the judges use the precise legal regulations in their case decisions, which regulations leave only a little room for interpretation, and – whether they want to or not - they can only act as politically neutral. In this situation there are not many possibilities for the judges to realize their own political preferences in case decisions.

It was possible to change this arrangement in the above-mentioned development, and these changes have actually been taking place in the United States since the early 1960s.[69] These changes have made it possible for the large groups of society to organize their political struggles not via the parliamentary way in order to influence the determination of the law, but directly via the judicial processes in the courtrooms. From the beginning of the 1900s, it became a matter of fact that such minorities, who had no chances in the elections against the majority, turned directly to the courts and, with arguing based on their constitutional rights, by the judicial decisions they tried to transform the legal position into something more appropriate for their interests. Following the initial successes of the blacks in this new political will formation, the other minorities of society were also encouraged to use this judicial path of politics and to

for the debate of this idea, see: Rhetorische Rechtstheorie. F. S. für T.Viehweg, herausgegegeben von *Ottmar Ballweg*, Freiburg/München 1982; *Josef Esser*, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts, Tübingen, 1956, and *Claus-Wilhelm Canaris*, Systemdenken und Systembegriff in der Jurisprudenz, Berlin, 1968.

[68] See *Günther Teubner*, Standards und Direktiven in Generalklauseln. Frankfurt am Main, 1971.

[69] See Charles R. Epp: The Rights Revolution. Chicago University Press. 1998.

achieve what could not be achieved by the legislative majority in Congress. In the early 1960s under the then presidents Kennedy and Johnson, respectively, these efforts were rated positive by the Congress majority of Democrats and the new way of politics through judicial processes was supported by special laws. The enthusiastic defenders of this new political path celebrated these changes and named it the rights revolution.[70] It must be mentioned, however, that, as a result of these changes, the US courts have become largely politicized, and the judicial processes in the courtrooms can sometimes only take place as a parliamentary struggle in the parliamentary session. From then on, before the selection and appointment of the federal judges, it became most important to know what political values the candidates had, and from their earlier statements and their lives, they were trying to figure out which political attitudes they would later take in judicial decisions. Sometimes the appointment process of the new judges in the mass media is one of the greatest political struggles, similarly to the battles of the presidential candidates. In this way, lasting political breaks between the judges of the courts in the United States come about and the judicial decision-making process is similar to the political debate, albeit with different arguments than in the case of legislative sessions.

This development can be summarized as the most direct change in the basic structures of the rule of law towards the juristocratic state. The consequences of this change are shown by the political struggles established in the judicial meetings, and during this development the path can be observed as in the place of the trio of separate politics / Administration / Justice, the duality of the politicized judiciary and the juridical policy stepped up, and the administrative activity of the administration became directly determined by this structure. Of course, this change has become widespread in Europe only to a small extent, but it is already present in many places. The efforts to transfer are usually carried out by the American foundations, which already have rich domestic experience, or other foundations supported by them (eg the Norwegian Foundation in Hungary). So far, however, they have only achieved success in this direction in the European countries whenever they were able to find some alliance in the judiciary of the country. I believe that in the last decades this development could be realized in Eastern Europe rather than Western Europe. Namely, West European legal culture has a stronger resistance to this influence than the legal culture of the East European countries with their forty years of Soviet dictatorship.

7) Moral discourse and deliberative democracy

In the course of research on the transformation of the rule of law towards the juristocratic state, such changes can also be observed in the field of moral theory over last decades, due to which the morale of the millions of mass society, and its parliamentary democracy based on it, will be replaced by a close elite morality and justice based on it. [71] The prehistory of this transformation can be traced back to the confrontation between Kant's individual moral philosophy and Hegel's philosophy of public morality, in which Kant only evaluated public morality as an inferior habit, and he tied true morality to the conscious decisions of the individual. In the last decades, Kant's moral theory has been radicalized by Jürgen Habemas' discourse morality - with great journalistic support from the media and public intellectuals - and finally, morality itself as a collection of rules of system of behavior has been thrown away and it is conceived as only

[70] As a theorist and an active fighter of movement lawyering, Stuart Scheingold can be mentioned, see S. Scheingold: The Struggle to Politicize Legal Practice. A Case Study of Left Activist Lawyering in Seattle. In: Austin Sarat/S. Scheingold (eds.): Cause Lawyering. Oxford University Press. 1998. 118-150. p.

[71] For the detailed analysis of this moraltheoretical development see my earlier work, B. Pokol: Theoretische Soziologie und Rechtstheorie. Kritik und Korrigierung der Theorie von Niklas Luhmann. Schenk Verlag. Passau, 2013. 185-209. p.

cultural knowledge. According to Habermas, the moral directives in modern complex societies can only be created as discourse morals by the discourse of the active citizens. Furthermore, in a deliberative democracy, these moral guidelines negotiated by the civilians must be used as a basis for the laws. Thus, morality and law are intertwined in this theory, and this gives an elevated status for the law saturated by morality. Ultimately, the laws of the legislation are not determined by morality as the public morality of the millions but by the moral guidelines of the intellectuals of the civil organizations. [72]

According to his subjective intentions, Habermas would like to convert democracy, which is confined to mere voting only once every four years, into a genuine debating and deliberative democracy. However, on the basis of a realistic assessment, this effort misses on the one hand the actual small potential of the millions of people for participation in civil society discourse, and on the other hand the possibility of understanding the difficult questions in the daily moral discourses by the average citizens. In fact, in the debates of NGOs, only the intellectuals - freed from the laborious daily mental or physical work - can participate regularly, and a deliberative democracy can only become reality in the first place as the debates of constitutional lawyers, political scientists, sociologists, economists etc., as can be observed every in the intellectual round table discussions on TV. In addition, this narrow circle can only be introduced into public discourse by means of the mass media, which is run by large sums of money, and the number of these media intellectuals, whose debates on TV and online portals etc. are realized, can not be more than a few hundred or a few thousand,. But these media are not politically neutral, and the debates or the participants are carefully sorted according to the corresponding points of view. Under these conditions, deliberative democracy would not bring about an improved quality of democracy, but the rule of small intellectual circles, in spite of Habermas's ideas. However, the proliferation and repetition of the arguments about the inferiority of parliamentary democracy further reduces the legitimacy of parliamentary legislation in the general public, and such methods of legal interpretation are thus helped, by which, instead of the coupling of the judges with the statutory rules, their free moral orientation is strengthened. [73]

Another version of the direct link between morality and law is realized through human rights ideology. From the beginning of the nineteenth century, the idea of natural law ceased to exist in Europe, but human rights ideology remained alive in the United States, and after the Second World War the former idea of natural law was revived by the domination of the United States. As a result, the international treaties of civil rights were clothed in the Human Rights Convention. This Convention, as any other international agreement, is both legalistically formulated, and its use is by means of the same legal interpretation as in the other parts of the law. The naming, however, is saturated by moral overtones and it gives an elevated accent to this regulation. The violation of this is not simply an "infringement" - especially in mass media presentations - but also a morally disgusting and shameful incident. It is often the case that the State condemned by the violation of the Convention on Human Rights rightly points out that the text of the Convention was the most widely interpreted by the Human Rights Tribunal in Strasbourg and went far beyond human rights. But the moral accent does not tolerate "casuist lawyering".

By way of a summary it can be stated that the dominance of the juristocratic state is taken

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[72] See Jürgen Habermas: Faktizität und Geltung. Beiträge des Recht und zur Diskurstheorie der Demokratischen Rechtsstaates. Frankfurt Suhrkamp. 1992. 146 p.

[73] In contrast to Habermas, another picture of the morally impregnated judge can be found in the writings of Gerard Postema, see G. Postema: Moral Responsibility in Professional Ethics New York University Law Review. (Vol. 55.) 1980. pp. 63-89.

out of criticism by these moral-theoretical supplements and language politics, and those who do so are disadvantaged from the outset.

8) The domestic situation: the juristocratic state in Hungary

The analysis has now come to explore the situation in Hungary in this regard, and it is to be emphasized that by the above-mentioned tendencies of transformation only an analytical framework on the structural characteristics of the juristocratic state in ideal/typical purity was sketched. How it was actually implemented in some states - that is, to what extent the transformation into the juristocratic state has already taken place - can only be shown by more detailed analyses. This analysis should first target the special regulation of the constitutional court by the constitution himself and the law on constitutional adjudication. Furthermore, the analysis should examine the political, organizational and procedural conditions in a country under which certain branches of state power, including the constitutional court, are performing their activities. Thus, the first task in Hungary is to analyze how strong competences were given to the Constitutional Court by the Constitution in force from 2012 and on its basis also given by the law on the constitutional court. On the other hand, however, on the basis of this analysis it can be clarified how much the juristocratic form of government has pushed the parliamentary majority to the semi-parliamentary form of government in Hungary, and also the extent to which the state as a whole has transformed itself into the form of a juristocratic state. The next task is to ask the question to what extent the institutional structure and the decision-making processes of the constitutional court have made it possible to gain the constitutive power itself and to place the precedents of its jurisprudence as the pseudo constitution in the place of the original. Then the analysis goes beyond constitutional adjudication, and with regard to the entire judiciary it is asked to what extent the dominance of the objective-teleological interpretation method in the place of the other methods in Hungary is realized. Another question of the analysis is the strength of the role of the *Generalklausen*, the empty constitutional declarations, evaluations and formulae instead of the rules at the level of exact meaning in judicial decision-making processes. The extent to which political struggles could be achieved by the judicial process in Hungary, as well as the moral and theoretical support of these legal and political struggles, can also be examined, because these processes can contribute to the realization of a juristocratic state. All these questions can only be solved by means of thorough research, but as a starting point a few answers can be presented here.

The Hungarian Constitutional Court can be qualified as one of the most powerful constitutional courts in the world due to the regulation of the Constitution and the Law on the Constitutional Court. The new Constitution in force from 2012 gave the constitutional court the right to control judicial decisions, as well as its power to directly control the laws of Parliament and the other legal regulations. In addition, we should also point out that during the process of constitutional complaint against judicial decisions, the constitutional court can always go beyond these decisions and it can begin the control of the underlying legal rules, too; even after the transition the closely related regulations or the whole law can be annulled. [74] But if the constitutional court does not want to annul the controlled legal provisions, they may amend or supplement the content of these provisions. Namely, it is capable of annulling the parliamentary act examined only in a mosaic-like manner, and from then on this act can only be used in this modified form. Furthermore, a constitutional requirement may be attached to the examined rule by the constitutional court, and the ordinary courts can only use this rule in the future together with this supplementary requirement. [75] In addition, the constitutional judges can usually choose

[74] See the section 28 (1) of the Law on the Constitutional Court

[75] See, in this connection, the 46 (3) of the Law on the Constitutional Court.

whether to annul the legal provisions examined or to declare a legislative omission, and the legislator is requested to fill in the identified gaps on the basis of the arguments stated by the constitutional judges. [76] In another direction, however, it can be judged as a barrier of the constitutional court in Hungary that the Constitution explicitly forbade him to examine the constitutional changes in substance. These changes can only be examined by the constitutional court on the basis of such procedural rules that are included in the Constitution itself. [77] This rule resulted from the experience that if in a country the issue of the control of constitutional change was not explicitly regulated in the Constitution, such efforts within the Constitutional Court would often be developed to include the entire constitutional change under control, as was actually the case in Hungary.

Regarding the weight of the constitutional court and the realization of the juristocratic form of government in Hungary, it can be clearly established that the position of this form of government is strong and the position of the parliamentary majority has been pushed back to a half-parliamentary form of government. In each of the four dimensions listed above, the constitutional court enjoys a high degree of primacy. 1) The constitutional court has a high degree of monopolized access to the constitution and the law on its organization and activity, and both can be changed only by the two third of the MPs. That is, until there is no such majority, the constitutional judges have a monopoly in this area. 2) The wording of the Constitution in Hungary was to a large extent based on general declarations and vague principles, and these vague formulas and declarations give the greatest empowerment to the constitutional judges to control the entire power of the state. 3) The rate of activation of the competence of the constitutional court is quite large for the annulment of the laws, although it has been reduced by the new Constitution since 2012 as a result of the removal of the possibility of popular action by everyone. 4) Finally, the length of the mandate of the constitutional judges in Hungary is 12 years without an age limit, and they are separated from political actors by this long period, and on the other hand, this time is suited to controlling the majorities of three parliamentary cycles.

The next question is the emergence of a pseudo constitution on the basis of the precedents of the constitutional court, instead of the original written constitution, and the observer is in a comfortable position. Namely, the first president of the Hungarian Constitutional Court, László Sólyom, declared immediately after the beginning that the task of the constitutional court would be to make an "invisible constitution" with its decisions as one which is valid forever and this constitution should have an advantage over the written constitution. [78] Perhaps this thesis had never been so openly declared in the world before, although in fact the Germans had already exercised this since the late 1950s, and a pseudo constitution was also brought about by the permanent jurisprudence of the Constitutional Court in Germany. In this procedure, the relevant provisions of the written Constitution are formally and politely mentioned, but the actual reasoning and decision are made on the basis of the pseudo constitution. The first president of the Constitutional Court in Hungary had immediately recognized this method at the beginning of constitutional adjudication here and he exposed it to the public, and then it was called the concept of the "invisible constitution". I have the presumption that this open statement - in addition to the fundamental lack of deeply rooted democratic tradition - was also made possible by the fact that there was never a constitutional court in Hungary and that there was no knowledge of it in the groups of lawyers. The decision-making practice based on the 'invisible constitution' is so strongly rooted that despite the new Constitution of 2012 - and despite its

[76] See, in this connection, the Act § 46 (1) - (2) on the Constitutional Court

[77] See the Constitution, article 24 (5) - (6).

[78] See the parallel justification of László Sólyom on the "invisible constitution" in Decision 23/1990 (X. 31.) by the Constitutional Court of Hungary.

pronounced ban! - decisions these days are still made by the majority of the constitutional judges based on old constitutional precedents (that is, the invisible constitution).

It is still to be noted that this decision-making practice developed by the Germans was realized not only in Hungary but also in Spain and Lithuania, while in the case of Croatia, Slovenia and the Czechs this alienation from the written Constitution cannot be observed. [79]

The spread of the objective-teleological method of interpretation - and thus the approach to a juristocratic state in this respect - cannot be established with regard to the judiciary in Hungary and the majority of the judges seem to have remained alongside the law-abiding methods. Although Article 28 of the Constitution has made it binding for the judges to interpret legal rules in accordance with the purpose of the legislation, there was no clear direction as to whether that purpose should be pursued on the basis of the subjective purpose of the legislators or the objective-teleological method. The widespread attitude within the Hungarian judiciary may favor the former method and not the objective-teleological method.

The spread of the use of general normative valuations and abstract principles instead of the exact relevant rules - or at least alongside them - can already be found in the course of the judicial activity in the last few years, and in some newly created statutes the introductory provisions stipulated that the individual provisions in these statutes should always be interpreted with the aid of the general legal principles. In the last few years, this direction was further strengthened by the fact that Article 28 of the new Constitution also stipulated that interpretation should always be carried out in accordance with the fundamental rights and the values of the Constitution. Whether or not these rules of interpretation in the future will cause the alienation of the judiciary from abiding the law, cannot be decided today.

As far as the political struggles through judicial processes are concerned in Hungary, it can be established that the resettlement of these struggles from parliamentary meetings to the courtrooms has only begun. This change was mainly driven by American foundations, in particular by the funding of the Soros Foundation Networks (Open Society, Helsinki Committee, etc.), and in the early 1990s some subsidiary organizations of the American movement lawyering were created in Hungary. However, the politics by judicial processes could only achieve a modest role. Although this motive is quite surely present behind some of the constitutional complaints submitted, and the specialized subsidiary organizations are actually engaged in the cause lawyering of American style.[80]

Finally, in order to cross over to the moral foundations of the juristocratic state, we can say that there have been strivings in this direction in the narrow intellectual circles in Hungary. These efforts, however, have had a remarkable influence only in tiny activist circles, and even the broader intellectual public has remained cool against their arguments. In contrast, the human rights ideology of the intertwined legal and moral arguments has resulted in a wider influence in intellectual circles. However, it is not so much from this success that the shift towards a juristocratic state in Hungary can be caused, but rather, in my opinion, that there has never been a massive belief in democracy here.

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[79] See also B. Pokol: Alkotmánybírósági döntési stílusok Európában. (Constitutional decision-making in Europe.) Jogelméleti Szemle / Legal Theory 2015 No. 3.

[80] For example, such organizations in Hungary may be named as the Association for Human Rights, or the organization of átlátszó.hu (internet portal)

Chapter 4
Possibilities for the amelioration of the juristocratic state

As has been analyzed in detail in the earlier pages of this work, the constitutional courts have spread more and more all over the world in the last decades and they have increasingly broad competences. In this way, they have become the center of the decisions of state power and not a mere constitutional guarantee of democracy anymore. The naming of "rule of law", which is applied to this changed state power structure, is less and less suited to rendering reality. The constitutional courts, in this extended form, are not only a means of protection over the constitutional activities of the state organs, but also a new place for the creation of basic state decisions, which has been wholly or partly removed from the democratic bodies elected by millions of people. Not only was a removal from the principles of democracy made by the constitutional courts, but also the entire upper judiciary was removed from the laws created by the democratic bodies, and on the basis of free legal interpretation methods or based on normatively empty constitutional values, the courts can in principle bring about free legal practice. The name of the *juristocratic state* is more suited to this state power system because it renders the reality of the state power better. In this way it can be made clear that this is not an "improved" democracy, but a limited form of democracy, which has, to a certain degree, already broken with the democratic foundation of the exercise of power to the millions of citizens.

The unbiased presentation of the juristocratic state as a limited democracy makes it possible to better understand its origins. Namely, the original idea of constitutional adjudication was not directed at the suppression of democracy, and the will of millions of citizens should not have been pushed aside. On the contrary, the constitutional court was originally only the guarantee of the cyclical renewal of democratic government and the division of powers. This was true for the constitutional judicial powers of the judiciary in the American beginnings between the federal level and the national level as well as the Austrian constitutional adjudication since 1920 due to the ideas of Hans Kelsen. Only the German Federal Constitutional Court, which was created under the control of the US occupation authority in 1949, began on the road that led to the creation of an increasingly stronger juristocratic state in recent decades in a number of countries around the world. The success of this model and the creation of the other constitutional courts on the basis of this model since the beginning of the 1980s in many countries - which had even given further competencies for the constitutional courts - created the new power system of the juristocratic state. Here the power struggles are always disguised with legal and constitutional arguments, and instead of open political struggles, the battles run on the basis of legal arguments. In addition to the German model, for the changing activity of the new constitutional courts in the world the change of the original idea of constitutional adjudication in the United States itself was also important, which took place here in the 1960s. [81] This was the beginning of the "rights revolution" which brought about new techniques for

[81] See Charles Epp: Rights Revolution. Chicago University Press. Chicago - London 1998, insbesondere auf den Seiten 7-21; für die Tätigkeiten der Bewegunsgjuristen und ihre politische Kämpfe siehe Stuart Scheingold: The Struggle to Politicize Legal Practice. A Case of Left Activist Lawyering In: Sarat, Austin/S. Scheingold (ed.): Cause Lawyering. Political Commitment and Professional Responsibilities. Oxford University Press. New York. 1998. 118- 150.p.

political struggles, and together with the model of expansive German constitutional adjudication, this mixture was the one by which the juristocratic state could be created in a number of countries around the world.

It is therefore to be seen free of bias that the expansive German model of constitutional adjudication, which was later adopted by an ever greater part of the world, was not created as a "noble" democracy enhanced with the constitutional court. Indeed, in contrast, it was created already due to the intentions of its creator as a limited democracy, which made possible the strong monitoring of the many millions of the Germans by the US and the other foreign powers. Talking about this has been a taboo in German scientific research for a long time, but in the last few years it has begun - if not in the circles of constitutional lawyers, but more in the ranks of historians –a research on the facts of the ways which were used to build up the controlled democracy in Germany by American occupation authorities.

At the conference organized by the Konrad Adenauer Foundation in May 2009, Rüdiger Löwe was quoted as saying that the actual extent of American influence on the emergence of the Basic Law and its content is still taboo for scientific research purposes: "Löwes Meinung nach sei der Einfluss der USA auf die Entstehung des Grundgesetzes heute immer noch ein Tabu-Thema. Die USA hätten mit sanfter Strenge auf den richtigen Weg geholfen. General Lucius D. Clay und die amerikanische Regierung gaben nach dem Zweiten Weltkrieg ein engen Korridor vor, in dem sich die deutschen Gründungsväter bewegen konnten". [82] On this question, Marcus M. Payk writes in his review as follows: "Über Brisanz der Frage, inwieweit das Grundgesetz für die Bundesrepublik Deutschland von 23. Mai 1949 als eine eigenständig deutsche Verfassung oder doch eher als ein "Diktat der Alliierten" zu werten sei, ist die Zeit hinweggegangen. Das Problem eines demokratischen Legitimationsdefizits durch die "Verfassungsschöpfung unter Besatzungsherrschaft" (R. M. Orsey) is zwar wiederholt aufgeworfen, größtenteils aber unter Hinweis auf den eigenständig deutsche Anteil an der Entstehung des Grundgesetzes sowie auf die akklamatorische Funktion der ersten und der nachfolgenden Bundestagswahlen verworfen worden." [83]

In his study, Hermann-Josef Rupieper emphasized three main American objectives during their occupation for the establishment of a special form of democracy, the center of which was the permanent control of the Germans: "1949 hatten sich drei Stategien herauskristalisiert, um zu verhindern, dass die Deutschen jemals wieder zu einer Gefahr für die "demokratischen Welt" werden konnten. Sie sollten "zum überzeugten Glauben an die Demokratie" gebracht werden, sie mussten durch "Kontrolle und Überwachung" in Schach gehalten werden, und sie waren durch Europäische Integration" in breitere Beziehungen einzubetten. Alle Elemente dieser Politik existierten weiterhin parallel zueinander." [84]

Barbara Fait made clear in her analysis of the documents on the events of the first years of the American occupation that the Americans did not want to free the Germans in 1945, but to hold as enemies under control and punish them. She cited from the documents in the original English language how strongly the control of all major developments in the early years - like the creation of the Federal Constitution - was practiced by the Americans: "Die (Straf-)Direktive JCS 1067, von April bis Juli 1947 offizieller Richtlininenkatalog der amerikanischen Militärregierung, bringt die restriktive Haltung der Sieger deutlich zum Ausdruck. "Germany

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[82] See die Veranstatunsgberichte von Adeauer Konrad Stiftung, Berlin, 26. Mai 2009.

[83] See Paykel's Rezension: www.hsozkult.de/publikationreview/id/rezbuecher-238, Payjkel rezensierte Edmund Spevack's voluminöses Buch: Allied Contoll an Geman Freedom: American Political and Ideological Influences on the Framing of the West German Basic Law. Münster LIT Verlag 571. p.

[84] See Hermann-Josef Rupieper: Peacemaking with Germany. Grundlinien amerikanischer Demokratisierungspolitik 1945-1954. In.: Arnd Bauerkämper (Hg.) Demokeratiewunder. Transatlantlische Mittler und die kulturelle Öffnung Westdeutschlands 1945-1970. Vandenhoeck und Ruprecht. Göttingen. 2005. S. 41-56.

will not be occupied for the purpose of liberation but as defeated enemy nation." [85] Another good quotation from Fait's analysis shows that behind the efforts of the US occupation authorities towards limited democracy stood the fear of the German masses: „Deutschland wird nicht zum Zweck der Befreiung, sondern als besiegter Feindstaat besetzt werden. Es war der Hauptziel der USA wie auch die anderen Siegermächte, eine neuerliche Bedrohung der Welt durch Deutschland endgültig auszuschließen." [86]

The OMGUS (Office of Military Government for Germany U.S. US - the name of the US military government agency) had already decided in 1945 that a new constitution for the country as a whole should be established, as well as for the federal states. The creation of a working group of OMGUS for the preparation of the constitution had already taken place in December 1946, and as members of this working group were an earlier judge from the American judiciary, and the professor of law, Carl Loewenstein, who had emigrated from Germany to the United States, and had now returned with the Americans. "Die Abteilung ließ sich dabei von einer im December 1945 eingesetzten Inter-Divisional Working Party on Land Constitutions beraten. Diesem Arbeitsausschuß, der sich bereits seit Dezember mit der Frage der Länderverfassungen beschäftigt hatte, gehörten hochrangige Persöhnlichkeiten an, so der OMGUS-Legal Advisor Joseph Warren Madden, Professor der Rechte und zeitweilig Richter am US-Court of Claims, und der von 1933 von München nach Amerika emigrierte Verfassungsrechtler Carl Loewenstein." [87] Behind the federal states' constitutions, the role of the real sovereign was played by the US military government and the German constitutional assemblies really only played an advisory role: "Bis zum 15. September 1946 erwartete die Militärregierung die Vorlage der fertigen Verfassungsentwürfe, die nach ihrer Genehmigung nicht später als am. 3. November 1946 dem Volk zur Abstimmung unterbreitet werden sollten. (…) Mit der Anweisung verzichtete de Militärregierung aber keineswegs auf ihre alleinige Souverenität. Auch die Verfassungsgebenden Versammlungen hatten de jure nur beratende Funktionen." [88] The working group of OMGUS also wanted to settle the final decisions on the constitutions by the constituent assemblies and not the millions of the German people, but the American general Lucius Clay insisted on holding a referendum instead. Namely, while the OMGUS could basically hold in its hands the creation of the constitutions, Clay worried about the fact that such a picture of the Constitution would come before the public, that the constitution was created by the occupation authorities: "This constitution must go to the German people as free creation of their elected representatives and with the least possible taint of Military Government dictation." [89] The author of the study, Barbara Fait, added: "Andererseits waren weder Clay noch sein Stab geneigt, den Besatzunsgzielen oder vitalen amerikanischen Interessen zuwiederlaufende Verfassungsinhalte zu akzeptieren."[90]

For me, these analyses gave a clear answer to the question of why the break with the original idea of constitutional adjudication took place, and the expansive power position of the German Constitutional Court was created instead. The ambitions were clearly directed at a restriction of democracy, which, on the basis of millions of Germans, would always have been a threat to the Americans and the other states. In case of the danger of an unacceptable massive political decision-making, further dangerous developments can be basically stopped by a

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[85] See Hermann-Josef Rupieper: Peacemaking with Germany. Grundlinien amerikanischer Demokratisierungspolitik 1945-1954. In.: Arnd Bauerkämper (Hg.) Demokeratiewunder. Transatlantlische Mittler und die kulturelle Öffnung Westdeutschlands 1945-1970. Vandenhoeck und Ruprecht. Göttingen. 2005. S. 41-56.

[86] See Fait, 420 p.

[87] See Fait, 426.p.

[88] See Fait, 429.p.

[89] 10 Clay's Anweisung wird von dem Autor zitiert, siehe Fait, 432.p.

[90] See Fait, 432.p.

powerful body, and in this way a continuous monitoring of the US-dominated western world over Germany can be guaranteed. This limited model of democracy is then given to the public with such a legitimation that this is the "real" democracy that has been improved with the rule of law. And since the everyday events of political democracy really show a series of dissonant experiences, and a strong dislike of the millions of people are caused by the hostile debates in parliament and in the mass media, the constitutional courts, with their secret decision-making mechanisms, and only with solemn announcements of their decisions before the public received massive support in most countries.

The German model of constitutional adjudication was then adopted in many countries around the world in the 1980s and 1990s. We must, however, see that this unhindered spread and the emergence of massive support was also made possible by the fact that this has always happened in countries where a certain form of dictatorship previously existed. The Great Powers organizing the overthrow of the dictatorships - as a rule, with the United States having the leading role among them - were able to present the German model of democracy as a real democracy of modern times. The argument is that nothing in the foundations of democracy has been changed here, but it has only been given another guarantee by the constitutional court. This is not the case, however, in the expanded power of the German Constitutional Court, and it would be true only in relation to the modest role of the original Austrian Constitutional Court of 1920. The fundamental change in the German model already implies a clear break with the political principles of democracy, which is based on the wills of the millions of people, and this model created a political decision-making system that is dressed in legal arguments. That is the reason why the name “juristocratic state” is more suitable for its characterization.

If the conversion of the state power from democracy to juristocracy was placed at the center of the analysis, it would become visible that there is a discrepancy between the existing legitimation arguments and the real state power. In this way, it could be asked in which direction could changes be planned, in order for the arguments of the political legitimation to be more in harmony with the actual functioning of the state. It is important to point out that no complete break with democracy has been made in the juristocratic state, only a superior power center has been laid upon it. Here, the basis of legitimation - in addition to the partial legitimacy of the bearers of the juristocratic state through the elections of the qualified majority of parliamentary members in most countries - is the decision-making process with precise legal arguments. Niklas Luhmann expressed this with the formula: "the legitimacy gained through the quality of the decision-making process itself". [91] Namely, the bearers of the juristocratic state are not directly elected by the people, but their decisions are derived from the abstract normative framework of the constitution, and *this derived argumentation gives the specific legitimacy for the decisions of the juristocratic state.* To a certain extent, this can be called as a dual legitimation. It should be pointed out that the constitution does not provide the legitimacy of constitutional adjudication and the constitutional court alone. It is provided only by the special nature of the decision-making process of the constitutional court by which its decisions are always derived from the constitution. In this way, this derived nature of the decisions of the constitutional court should be preserved on the one hand, and on the other hand, this preservation should always be controlled externally.

From this position, one can go in two opposite directions. It is a theoretical possibility to try to reduce the expansive constitutional adjudication to the simple constitutional guarantee, and, in addition, to bring back the legal interpretation of the upper judiciary to the texts of the law. In this way, the state power would now be placed on the basis of political democracy again.

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[91] See Niklas Luhmann: Legitimation durch Verfahren. Surhkamp. Frankurt am Main 1982.; für seine Kritik siehe Stefan Machura: Niklas Luhmanns „Legitimation durch Verfahren” im Spiegel der Kritik. Zeitschrift für Rechtssoziologie. (Vol. 14.) 1993. No. 1.

It is, however, also possible that, on the one hand, the appropriate legitimacy of the juristocratic state will be worked out, and on the other hand, to a certain extent, this legitimation could be bound up with the principle of democracy and thus improved by it. Without these changes, the bearers of the juristocratic state will work behind the backs of the public with the greatest distortions and, on the other hand, the principles of democracy will be even more marginalized.

The reduction of the juristocratic state to democracy does not require a specific analysis, it is enough to just remind us of this list: the Constitutional court here serves only the framework for the constitutional guarantees on the cyclically changing democratic government in order to keep the parliamentary majorities within limits and in order for the constitutional guarantees not to be eliminated by the current majority of the government. Here the constitutional court primarily functions in the interests of the preservation of the electoral system, and the constitutional decisions are intended to help maintain the freedom of political will formation in order to maintain the functioning of political rotation. However, the determination of the content of the laws - with reference to the abstract fundamental rights - already represents a shift towards the juristocratic state, and in order to be firmly fixed alongside Kelsen's ideas of constitutional adjudication, it must be rejected.

The other direction is the improvement and "ennobling" of the juristocratic state, which has already become a reality in many countries around the world in recent decades. The efforts in this direction should, on the one hand, be the removal of the existing structural distortions in the functioning of the constitutional courts, and, on the other hand, a greater rapprochement of the constitutional decision-making mechanisms to the requirements of democracy. At present, the functioning of the constitutional courts behind the public is characterized by the following distortions: 1) In its selection mechanism, the guarantee for the avoidance of the mere party soldiers, constitutional judges are not secured in many countries and this distortion can question beyond a certain degree - in addition to the poor quality of the juristocratic state - the frictionless political rotation. 2) The selected constitutional judges, who typically come from narrow specialized legal fields, cannot grow into the generalized decision-making process of constitutional adjudication. 3) A further problem is that, on the one hand, the permanent personnel law clerks of the constitutional judges reduce the likelihood of reaching the level of authentic constitutional adjudication in the case of the newly elected ones, and on the other hand, it can make it possible for the chairman or other senior officials of the constitutional court to replace the body of the constitutional judges by the centralized team of law clerks. (4) A further distortion means that, in the case of several constitutional courts, as in Hungary, the chairman of the constitutional court is not limited by any automatism with regard to the selection of the rapporteur for the individual cases, or he can even maintain the cases for himself. Thus, in the most important cases, the direction of the constitutional decision can be determined personally by the chairman. 5) As a next distortion, it can be formulated that no organization is superior to the constitutional judges, and in this way, necessarily such secessionist tendencies are created, by which the constitutional judges are removed from the provisions of the Constitution, and those who should protect it, become the greatest danger to it.

If the actual juristocratic nature of the state is assumed, but the structure of this state is still to be improved, the following deficiencies in the current situation will require a solution: 6) The decision-making of the constitutional court is completely behind the public, and while it is acceptable in the case of ordinary courts, it cannot be tolerated in the case of the constitutional courts, whose basic state decisions are made on the basis of their free discretion. 7) Finally, it must be emphasized that, in the case of juristocratic mechanisms of decision-making in the state, the legal NGO organizations have become the center of political will formation, but they are mostly disguised as human rights defenders and are qualified as a simple civil organization. In fact, they are the groupings of movement lawyers - precisely tailored to

the functioning of the juristocratic state - and they play the same role as by the political parties are played in democracy. In this way, these groups of movement lawyers should be distinguished from simple civilian organizations and a separate regulation should be created for them.

Finally, although the judges of the supreme courts in several countries are involved in the processes of the basic decisions of the juristocratic state, they do not have the minimum democratic legitimacy and are usually selected by their closed corporate selection to their positions. It is to be pointed out that, in the case of a stronger legitimacy, the chairmen of the supreme courts should at least be elected by the parliamentary majority.

1) The selection of the constitutional judges

Due to the normative openness of abstract constitutional provisions, the constitutional judges inevitably decide in the broadest discretion, and the great openness of their interpretation makes possible the determination of the interpretation by the individual values of the constitutional judges or their personal hierarchy of values. The selection of individual constitutional judges is usually made on the basis of the decisions of top politicians (party leaders, group leaders and/or former politicians in the person of the head of state) and - in addition to observing the formal requirements - their decision concerning the person of the constitutional judge is based on the political values which are revealed by the past activities of the candidates. In this way, the politicians always try to select the constitutional judges who will most likely decide in a certain direction. Consequently, it can be formulated as a general rule that the majority of the members of the constitutional courts, as regards their political values, belong to one of the political camps. Great differences can, however, exist among them concerning the degree of the intensity of the contacts and bonds they keep in their new positions with the party politicians. In the case of permanent and strong ties, even the judges' role of party soldiers can be developed, whereas in the case of the gradual disappearance of these ties, the individual constitutional judges can only be regarded as political value-bearers of a political camp but not as party soldiers. In the latter case, the judges' point of view cannot be determined by the mere political interests of a party.

The great power of the constitutional courts in the juristocratic state can bring about intolerable political conflicts on the long run if, in the case of the majority of the constitutional judges, the strength of their political ties reaches the level of the party soldier. In such cases, after the formation of a new majority of the government, which is systematically opposed to the majority of the constitutional court selected by earlier majorities of the government, even the country's ability to govern can be paralyzed. On the long run, the political struggles between the constitutional court and the government can lead to an explosion. Therefore, in the interest of the viability of the system, it is advisable to make such selection mechanisms of the constitutional judges, which can minimize the strength of the political ties of the majority of the judges.

If, because of the necessity of the minimum democratic legitimacy of the constitutional court, the role of the legal professional associations is pushed aside in the selection of the constitutional judges - because these associations are necessarily dominated by the interests of cliques behind the professional mask – then the selection by the parliamentary majority should be viewed as appropriate. It should be seen, however, that this can only be meaningful if the high professional requirements for this selection are defined fairly precisely by the act of the constitutional court. Experience shows that if they are not sufficiently defined, the parties in the parliament will - in the interests of the high qualified majority - decide to abandon even the fundamental requirements, in order to receive the support of other parties for their own

candidate. In this way, while the selection of the constitutional judges can be assessed as appropriate by the qualified parliamentary majority, the importance of the supervisory rights of the head of state as an end to this selection process is to be emphasized. It must remain on the level of the formal supervisory role of the neutral head of state, and the nomination to a constitutional judge can - even should - be denied by it only if there is a lack of formal prerequisites.

It must, however, be seen that in the selection of the constitutional judges, the filtering of the probable parties' soldiers is possible only if the peculiarities of the law professions eligible for the selection are analyzed. Namely, these professions are intertwined with daily political activities in various ways. Therefore, in the case of law professors, it is more likely to be isolated from daily politics and the same probability can be stated in cases of the judges of the courts. If the selection is restricted to these law professions, the simple party soldiers may be more likely to be filtered out of the constitutional courts. Of course, there may be exceptions in both directions, and law professors will act as real party soldiers in the constitutional court and, on the contrary, the former attorneys may decide to remain as politically neutral constitutional judges. But as the main rule, the mentioned restriction would be useful for selection.

2) The accessibility of the level of the authentic constitutional judge

No matter how long the novice's legal past is, when he begins to participate in the decision-making process of the Constitutional Court, he has to learn huge amounts of new information. For decades, the new constitutional judge has been a law professor or judge in one of the specialized legal areas but he remembers the other legal areas only as the subjects of the examinations from the age of the law school. But now he should be able to make decisions in all areas of law. Constitutional adjudication means a generalized jurisdiction - in accordance with the court system in the United States where the idea of constitutional jurisdiction emerged - and that is precisely in contrast with the specialized jurisdiction in Europe. [92] In this way, the law professors and the former judges are almost beginners when their activity as constitutional judge begins. In order to be able to really grow into the role of the authentic constitutional judge, the greatest efforts must be made in the first few months and in order to be able to handle the thousands of pages of case law already created by the constitutional court. All these may fall outside the domain of the newcomer's legal expertise and the only information (s)he has is to be found among his/her memories of exams from the age of law school. There is no doubt that a law professor whose research area was not just a narrow legal field has a greater chance of reaching the generalized view of constitutional adjudication. In contrast, maturing into an authentic constitutional judge for lawyers who have worked in the deepest specialization of law

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[92] See the most important literature for the comparison of generalist and specialist justice Richard A. Posner: Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function. Southern California Law Review (Vol. 56.) 1983 No. 2. 761-791.p.; Diane P. Wood: Generalist Judge in a Specialized World. SMU Law Review (Vol. 50.) 1997. No. 4. 1755-1768.p.; Sarang Vilay Damle: Specialize the Judge not the Court: A Lesson from the German Constitutional Court. Virginia Law Review. (Vol. 91.) 2005. No. 4. 1267-12311.p.; Lawrence Baum: Probing the Effects of Judicial Specialization. Duke Law Review. (Vol. 58.) No. 6. 1667-1684.p.; Herbert Kritzer: Where Are We Going? The Generalist vs. Specialist Challenge. Tulsa Law Review. (Vol. 47.) 2011. No.1. 51-64.p.; Edward K. Cheng: The Myth of the Generalist Judge. Stanford Law Review. (Vol. 61.) 2008. No. 2. 519-572.p.; Steve Vladeck: Judicial Specialization and the Functional Case for Non-Article III. Courts. JOTWELL. 2012. 2-5.p.; Anna Rüefli: Spezialisierung an Gerichten. Richterzeitung 2013/2. 2-18.p.

(lawyer, judge, legal scientist etc.) is, in many cases, almost an insoluble problem. [93]

However, this is only the starting position because the structures and the decision-making practice of the constitutional court can make the growing up to the role of the authentic constitutional judge more likely but, on the contrary, this practice could, to a great extent, be a hindrance. If the newly elected constitutional judge is already awaited by the permanent members of staff (law clerks) who have many years of experience and practice to teach him and introduce him, then the newcomer becomes, so to speak, under guardianship for the first time, and it can last until the end. As a matter of fact, the constitutional judge needs the law clerks only when he becomes the rapporteur of a case for preparing the draft. In this case he can hand over the technical details of the preparation of the draft to the law clerks and he should only deal with the important aspects of the case. In this way, when it is the draft of the other colleagues - and this is the main rule in a body of ten to fifteen members - then the individual constitutional judge can deal with the draft with his complete documentation alone. But the experienced staff left behind by the predecessor of the new constitutional judge also allows the inexperienced new constitutional judge to discard the hundreds of pages of the dossiers and only memorize the individual cases in a few pages made by one of the law clerks in order to attend the meetings. Of course, this is a convenient way, and when the new constitutional judge chooses this path, he will probably never become a real authentic constitutional judge, and he will forever be a mere delegate of his co-workers in the sessions and decisions-making of the constitutional court. Sociologically, it is no problem for the other colleagues and the constitutional judge remaining a beginner for ever can even be the favorite of the constitutional court. The others do not need to fear that (s)he will initiate a fierce debate, and the expensive time in the debate will not be taken up by him/her. At most, a problem can arise for the majority of judges if the law clerks of the dependent colleague can block through him/her the decision-making direction of the majority in individual cases. However, no matter what possibility, this is surely a distortion, and when several members of the constitutional court remain in such a dependent position, it begins gradually to emerge, behind the great parliamentary legitimacy of elected constitutional judges, as another will-forming entity to the center of the juristocratic state. It is therefore necessary to examine how these organizational distortions can be overcome, and how the growing up to the role of the authentic constitutional judge can be guaranteed.

What should be placed at the center of the changes is the emphasis on how important it is for the new constitutional judges to grow out from their former specialized areas of law and obtain the generalized decision-making capacity of a constitutional judge and not to remain under the constant guardianship of his/her permanent law clerk. The most important change would be if the new constitutional judge did not have any personal staff in the first year, and in the same way, (s)he would not be shared as a rapporteur in the first year because the personal law clerks are indispensable for this task. This structural change would urge the newly elected constitutional judges to make the analysis of the drafts made by other colleagues and the analysis of the supplements themselves (for example, the submissions of the complainants, the

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[93] The American Richard Posner calls our attention to the divergence between European and American court systems, and that this difference arises from a wider divergence between the structure of the two rights: „In Europe the judiciary is much more specialized than it is in this country; and I am not prepared to assert that is a bad thing, given the very different structure of he Continental system. I have serious reservations, however, about trying to graft on branch of that system, namely the specialized judiciary, onto an alien trunk" Richard A. Posner: Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function. Southern California Law Review (Vol. 56.) 1983 No. 2. 778. p. Posner's argument, however, can be reversed for the opposite, and it can be concluded that in continental Europe - especially after the 1989 regime change in the countries of Central and Eastern Europe - a piece of the generalized jurisdiction system was adopted by the United States in Europe The generalized Constitutional Court was placed over the specialized court system without seeing the problem of the subordinate of the specialized Supreme Courts to the generalized Constitutional Court.

court judgments in the first and second instance, etc.). This analysis initially involves a great workload, especially in the areas of law which are far from their former area of law, but after the thorough analysis of a few hundred of these draft decisions, it is becoming easier and in the coming years, the new constitutional judge will be a true generalist in the cases in criminal law, civil law, administrative law, labor law, etc.

However, these changes and the urge to analyze the draft decisions themselves can be effective only if the provisions of the act on the constitutional court oblige every constitutional judge to make a written statement in any decision draft. This is also important for the old and already authentic constitutional judges - they should not test the patience of their colleagues with improvising and formulating their positions on the spot, when already in the session! - but especially important for the new constitutional judge. As a consequence of this obligation, (s)he cannot sit peacefully during the debates and approve, with a friendly smile, the positions of the other colleagues, and (s)he should explicitly comment on the most important aspects of the case. Thus the lack of personal employees can only have the beneficial effect if the new constitutional judge is actually pressed to have to deal with the dossiers of the cases and the draft decisions themselves.

3) The reform possibilities of the team of permanent law clerks

With the adoption of the constitutional adjudication of America, the system for the assistance of the constitutional judges was taken over with regard to the technical work of decision-making. Thus, in most countries there is a team of law clerks (scientific staff, legal assistants etc.), which either work personally for each constitutional judge or are centralized under the chairman of the constitutional court. However, the adoption of this institution was very different from the original one. In the original form, the law clerks are selected from the law students for a year - strictly selected by the individual judges themselves. But after the takeover, the team of law clerks consists of trained judges or other well-experienced lawyers in Europe and in most countries of the world. In addition, this is no longer a temporary team of employees, but the auxiliary system means the constant co-workers of the constitutional court, which have been resident here for many years. Even in several countries (also in Hungary) it is possible that the employees are active here for a lifetime and they are waiting for the new and inexperienced constitutional judges, in order to teach these newcomers. These employees are selected in most countries by the chairman or a senior civil servant appointed by him, although some of them are formally the employees of the individual constitutional judges.

Through these changes, the relationship between the constitutional judge and their employees is fundamentally transformed, and the status of the constitutional judges in the structure of the constitutional court is thereby also touched. These changes have reached different degrees in the individual countries and in order to understand this, it is worth comparing the original system of law clerks in the USA with the most distant one. In this way, the effects of these changes can also be better understood in those countries that are within the two ends of the scale. In the original US system of law clerks, every Supreme Court judge occupies a sovereign decision-making position against his self-selected law clerks, who are exchanged annually, and only the technical details of the decision-making are done by them. In addition, the actual decision-making competence of these clerks is incomparably smaller than that of the judges. The system of the Turkish Constitutional Court is the furthest to this system. Here, the individual constitutional judges do not have a team of employees, but only the entire constitutional court and these employees are strictly subordinate to the president and they work under the direct supervision of a high official. In addition to this change, the draft decisions are not prepared by one of the constitutional judges as rapporteurs, but a permanent employee is

selected for this task in the individual cases by the chairman. The constitutional judges can get the drafts before the meeting and they discuss it with the employee who has made it. These employees are formally "deputy constitutional judges" and not simple employee, and they are at the center of the decision-making process of this constitutional court. It is, therefore, such a decision-making mechanism where the chairman of the constitutional court is at the center, and with the help of the deputy constitutional judges, he can dominate the whole decision-making process, and the real constitutional judges can only make efforts externally to understand the decision-making decisions of the drafts of the employees. Further studies would need to reveal the actual chances of the judges of the Turkish Constitutional Court in terms of influencing decision-making, but it can be stated at the level of an overall assessment that it should be low. [94] Here, the constitutional court's decision-making power is indeed in the hands of the chairman of the constitutional court, and if the Turkish President can determine it strictly, the whole constitutional system is here only a disguise and a fig-leaf before the actual power of the head of state.

If, on the scale of the two endpoints mentioned above, we approach the other end from the Turkish endpoint, the Romanian Constitutional Court will come next - as far as I know. The employees are also in the position of deputy constitutional judges, but the position of the rapporteur they do not have, and one of the real constitutional judges is in each case trusted by the chairman to create the decision draft. But here too the deputy constitutional judges are at the center of decision-making - in the hierarchical division on the basis of the internal positions - as in Turkey, and really the rapporteurs can formulate their own position in the draft only in such cases if the case has clear political aspects. A further step under the Romanian situation is the role of permanent staff of the Croatian Constitutional Court. Here the employees are officially not in the status of a deputy constitutional judge and they belong to the individual constitutional judges as his team. But their key role can be seen in the fact that the Act on the Croatian Constitutional Court explicitly expresses in its provisions that the employees can be present as participants in the meetings and the debates. In addition, this law explicitly allows the handing over of the task of presenting the draft at the meeting to the employee by the rapporteur constitutional judge. [95] In this way, the constitutional judges can completely escape from the hard work of the documentary analyses, and they can observe the drafts, which were done by the employees in their name, from the outside. In this decision-making system, the constitutional judges become simple outsiders, and they usually remain far from the role of authentic constitutional judges, such as the Romanians and the Turks, although the draft decisions were formally prepared in their name.

The next level of the scale in the direction of authentic functioning is perhaps taken by the Hungarian Constitutional Court. Here the employees of the individual constitutional judges also have an important role in the decision-making, but it depends on the personality of the constitutional judge and there are great differences among the teams of the individual constitutional judges regarding the transfer of the essential decision-making work or only the technical aspects. [96] On the other hand, the members of staff cannot participate in the meeting

[94] The dependence of the Turkish Constitutional Court on the permanent staff of whom the draft decisions are settled can also be seen in the analysis of the Venice Commission in 2011, see: Opinion on the law on the establishment and rules of procedure of the constitutional court of Turkey. Adopted by Venice Commission at its 88th plenary session 14-15 October 2011, 8-12.p.)

[95] See Article 47 (2) of the Croatian Law on the Constitutional Court in English translation: "Unless the Constitutional Court decides differently the secretary general and the legal advisors of the Constitutional Court and the head of the Office of Records and Documentation are present at the Sessions and may take part in deliberations." and Art. 48. (2): „The judge may authorize the legal advisor to present the case to the Sessions"

[96] The results of an empirical survey were published in the journal of Hungarian Constitutional Court, and a third of the number of constitutional jurists who define the substance of the draft itself are a third of those who also

and in this way, the constitutional judge as rapporteur must always be involved in the details of the draft in order to be able to enter into the debates. However, since, according to the constant practice, the constitutional employees in Hungary are entrusted with this task in the course of many years of work - under the chairman as employer, but indeed, in the teams of the individual constitutional judges - the new constitutional judges are regularly led by the team of experienced old employees to the decision-making process. This means a guardianship over the new constitutional judges during the first months (or years) and in this way, the complete decision-making work can remain in the hands of the employees.

It can be seen from the above analysis that the main obstacle to growing up to the role of the authentic constitutional judge is the system of (theoretically) helpful employees. In some countries, this obstacle to grow up to its authentic functioning is present when it comes to the constitutional court as a whole. In the case of the Turks it is so far that the whole institution of constitutional adjudication is just a disguise with some rule-of-law glaze, from which the legitimacy of the power of the head of state would be increased. But also in Romania and Croatia this institution is only one such center, which can be used against the other parts of the state power by those actors who can dominate the decision-making mechanisms of the constitutional court externally. In the interests of avoiding the distortion of constitutional adjudication into a mere power game - and thus the distortion of the whole juristocratic state – some changes in the system of constitutional employees must be planned.

In the earlier analysis, it was already pointed out that such structural conditions should be prescribed by the provisions of the law on the constitutional court from which the newly elected constitutional judges are forced out of their narrow earlier specialization towards the generalized manner of constitutional adjudication in order to reach the competence of the authentic constitutional judge. Thus, once again, the statutory provisions which mandatorily require the written opinion of the constitutional judges before the meetings should be mentioned, as well as, in the first year, the lack of their own employees in the case of the newly arrived constitutional judge in order not to avoid the personal decision-making work. That is the way to grow up to the role of an authentic constitutional judge. It must be recognized that if this is not required by the law, then, by the logic of the corporate decision-making mechanisms, the new constitutional judges will be rather encouraged to remain dependent for as long as possible. For the current majority of the old constitutional judges, it is the best state in which the meeting is composed by a dozen peacefully smiling members, and the inexperienced members are obedient to the drafts made by the old members.

However, these standards for the change are not yet sufficient, because if the system of teams of permanent employees remains unchanged, it is always possible that, in the case of the individual constitutional judges, the guardianship of the permanent employees over their constitutional judge will be developed. So it has to be taken into consideration as an elementary requirement that the system of permanent law clerks should be abolished and the guardianship of the new constitutional judges should be ended by the experienced old law clerks. In this way, the limitation of the employment of the law clerks to the cycle of constitutional judges is of fundamental importance, and then the recruitment of new law clerks (after a one-year break) is the minimum requirement for the new constitutional judges. But it would be best if the system of temporary law clerks were taken over from the United States and that would be common in all constitutional courts in the world. [97] The center of the juristocratic state is the constitutional

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share this task with their collaborators The last one third will be decided on the substance of the draft by the employees without the constitutional judge. See Orbán Endre / Zakariás Kinga: The role of the law clerks of the Constitutional Court in Hungary. 2016/2 Alkotmánybírósági Szemle (Constitutional Review) 114 p.

[97] Iin the footnote should mention the possibility of *robolawyer* used by the major law offices in New York and some of the dishes there. Through the future use of these algorithms in constitutional decision-making processes,

court and this is how they could reach an arrangement where it would actually be composed of authentic constitutional judges, and the decisions of the constitutional court would indeed made by the constitutional judges themselves.

4) The creation of automatism for the selection of the rapporteur

It is an important prerequisite for judicial independence and impartial judicial activity that the distribution of cases among the judges should be automatic and should not be decided by a court chairman at will. The constitutional courts regularly decide on the more important cases in a larger body - generally 10 to 15 people - and in this way it is important who will receive the role of the rapporteur. The direction of the debates in the meeting and finally the decision can be determined by the rapporteur's draft decision if the rapporteur can win the support of the majority with clever compromises. Thus, it is to say that the decision on the person of the rapporteur also means to some degree the decision on the substance of the judgment. In this way, if someone can decide it freely, he can determine who would certainly not get this task in one case, and his position at most should only appear as a dissent, and on the other hand, knowing the views of the judges he can determine the direction of the draft. It is therefore to be observed which regulations can be found in the constitutional courts and then, the situation in Hungary will be described in this respect.

It is worthwhile to begin with the United States, from where the idea of constitutional adjudication in Europe was transferred. Here the decision on the person of the rapporteur is made, to a certain extent, automatically. Namely, there is vote before the beginning of the debate at the plenary session and every judge gives his or her vote, whether or not he supported the complaint filed. After the vote, the judge who prepares the draft will be selected, but only such a judge can be the rapporteur who belongs to the majority. Among the members of the majority, the rapporteur is selected by the oldest member. In this case, the chairman does not have the power to select the rapporteur, and only then does he have this power if he becomes the member of the majority after the vote. But when that happens, he can make that decision or he will do the design himself, no matter what the seniority is. [98]

In the case of the German Federal Constitutional Court, the question of the selection of the rapporteur is made easier by the fact that in Germany the Constitutional Court itself has, to a certain extent, approached to the specialized jurisdiction. Its division into senates - elsewhere not existing - means an approximation towards the specialization and both are specialized in different parts of the German Basic Law. In this way, the complaints are automatically distributed between the senates, and the distribution takes place on the ground of which provisions of the Basic Law were determined by the constitutional complaint. This partial specialization is still further increased by the fact that the German constitutional judges receive still more restricted legal areas within the senates (labor law, financial law, criminal law, etc.) and the successor always inherits from his predecessor the narrow legal area. In this way, each constitutional judge automatically receives the complaints that belong to his legal area. In order to avoid the confusion, it is still important to note that in spite of specialization at the level of draft-making, the generalized constitutional adjudication remains in Germany, because the decisions of the Federal Constitutional Court are taken by all members of the Senate.

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the autonomy of constitutional judges could be fundamentally increased, and especially in routine matters (and it would account for 90% of the work load) it could be used.

[98] See Virág Kovács: The constitutional decision-making processes. Lessons from American empirical research. International Relations Quarterly, Vol. 4, No. 1 (Spring 2013) 13, S ..

Now comes the situation in Hungary and it should be indicated already at the starting point that this problem could not be detected in 1989, when the constitutional court was set up here, and in this way no regulation was obtained. The importance of the rapporteur's choice was not even considered, and it was only in practice that the chairman of the Constitutional Court could decide at his own discretion. The practice of twenty years was then incorporated into the new Constitutional Court Act of 2011, and it is now explicitly declared that the rapporteur is appointed by the chairman. It is worth mentioning that the problem of this rule could not be noticed by the ministerial staff, because no research on the constitutional court - its organization, procedures, decision-making process, etc. – existed, and not only in Hungary but, to a certain extent, in the whole of Europe. (In the research of constitutional adjudication, only the details of the case decisions or the questions of legal philosophy mostly receive attention.)

Based on the information, the chairman's unlimited power to select the rapporteur developed gradually at the beginning of the 90s in Hungary and firstly it was taken into account which legal area had been practiced earlier by the individual constitutional judges, but it did not become a customary law and now it is not mandatory for the chairman. He can decide on this matter freely and he can even keep dozens of cases, and as a rapporteur he can prepare the draft together with his staff (or with the addition of the employees of other constitutional judges). The chairman of the Italian Constitutional Court also has this unrestricted right for the selection of the rapporteur. Perhaps it can be said that while in the case of ordinary courts the greatest offense would be the distribution of the cases among the judges by the court chairman at his own discretion, the constitutional courts have a loose practice in this regard. In some countries - as in Hungary - this practice is unlimited, and if this unlimited power is combined with the retention of dozens of cases by the chairman and the decision-making takes place with the centralized team of the permanent employees, then we are close to the decision-making model of the Turkish Constitutional Court. And this is the deepest violation of the idea of constitutional adjudication. Thus, the creation of some kind of automation is most important for the selection of the rapporteur in the individual constitutional decision-making processes. The quality level of the juristocratic state can only be increased if such an automatism is brought about, be it the above-mentioned American, or the German or another.

5) The attachment of the constitutional court to the Constitution

The constitutional judges are active in the highest decision-making process of the state power and they protect and interpret the constitution. To do this independently, all influences on them are to be prevented. The constitutional judges are directly connected to the constituent power, and no other state organs can appear here. But this impossibility of control raises the question of "who is guarding the guards?". In fact, there are many structural incentives and other subjective motivations that can cause the distortion and the uncontrolled constitutional judges can become the biggest threat to the constitution. This is all the more because the main task of the constitutional court - the annulment of the laws on grounds of unconstitutionality - in political democracy is, by nature, usually triggering the enthusiasm of the opposition parties and their media and intellectual background. (And it is irrelevant that this annulment might take place with the explicit violation of the provisions of the constitution.) Thus, if the mainstream media are for a long time against the government, the decisions of the constitutional court can even create a new constitution instead of the original one, and in the meantime they will be celebrated by the media as the real trustee of the professional conviction.

Keeping this issue in mind, it cannot avoid establishing a control over the constitutional court in the future. Although this must be done with the utmost caution so that the particular political revenge against the constitutional judges cannot be realized this way. Thus, in the case

of the obvious violation of the provisions of the constitution by their decision, the sanctioning of the constitutional judges should be imposed only on the basis of a very high parliamentary majority. For example, the imposition of this sanctioning with a three-thirds majority in parliament might be high enough not to be able to use the sanction by the political forces and their coalitions for daily political interest. But in the event of exceptionally great consensus, this sanction could pounce and if necessary, the decision could be made to declare the termination of the mandate of such constitutional judges that supported the unconstitutional decision. Even if these sanctioning mechanisms were difficult to impose, they would always hover over the heads of the constitutional judges like a sword of Damocles, and this could have a beneficial effect on the constitutional judges, not to deviate from the provisions of the constitution. The incorporation of such sanctioning mechanisms into the constitution and the establishment of a parliamentary monitoring center on the decisions of the constitutional court based on the delegates from the governmental parties and the opposition parties might be of great importance to bind the constitutional judges to the constitution. This could also be the case if the sanction mechanism itself could be difficult to move because of the necessary three quarters.

6) The abolition of the secrecy of the constitutional court

While a court can formulate its judgment in the cases on precise legal provisions, and it makes interpretations in a narrow frame, the public declaration of sentence and the written justification is sufficient for the control of the public, and in the interest of the undisturbed session of the court, the secrecy of deliberations may be accepted. But by the decisions of the constitutional courts, the solutions of the basic problems of the state or society are targeted, and these decisions are not made with a simple interpretation of the law, but with a very broad and free consideration of the comprehensive constitutional declarations and rights. Even whole quantities of norms can be brought about by the constitutional court because of such an open basic right as the right to the integrity of human dignity or the right to general freedom of action. Constitutions usually contain open norms, declarations and constitutional values - and these parts of the modern constitutions have even been multiplied! – and, in this way, the constitutional provisions obtain the more exact content only in the constitutional decisions. In most cases, the unconstitutionality of the laws and the ordinary court judgments - or the contrary - is stated on the basis of earlier decisions of the constitutional court, and the relevant constitutional provision is only formally mentioned. Somewhat sharpening it, it can be said that in the decision-making processes of the constitutional court, a continuous constitutional work of a constitutional assembly is being done. The results of this work are the decisions of the constitutional court and they determine not only the individual cases but also the constitutional basis for the later decisions of the constitutional court. The concept of a juristocratic state makes this reality clear, and, in this way, the decision-making process of the constitutional court, which is a center of this state, can not be so freely concealed behind the public as in the case of ordinary courts. It is intended to be created in some form of public control over these processes, which, on the one hand, makes the motivations and considerations in the individual constitutional decision-making processes observable and, on the other hand, it would create the strongest motivations for the constitutional judges to prepare as fully as possible for the debates. As a consequence of this change, it will be necessary to formulate their positions in detail before the beginning of the session and not in some loose brainstorming groping fashion.

For the creation of public control, two ways can be found during the reflection. One way would be the complete opening up of the deliberations of the constitutional court and, as in the case of parliamentary committees, journalists and other public figures could be freely present

in these deliberations. The other way would not change the system of closed consultations of the constitutional court but it would be compulsory to publish the verbatim minutes of the meetings completely after the completion of the individual decision-making processes. For example, in this latter solution the literal protocols should be published on the website of the constitutional court together with the decision itself. The first solution would, in my opinion, be unnecessary and it would lead to the unnecessary disruption of the deliberations. But the second option would have no disadvantages, and it would create the benefits of public control. All the constitutional judges should then speak in the meetings knowing in advance that later on it will be read by the general public. How the individual arguments for and against the decision were raised as to how the relevant constitutional provisions were mentioned and constructed (or simply pushed aside), as to how the real motivations of the individual constitutional judges appeared in the debate etc. These important details of the decision-making could be seen in the proposed solution by the public. The creation of the technical background for this solution is not a difficult problem because the system of literal protocols already functions in the case of parliamentary meetings and the parliamentary committees, and the staff for this work can be involved. But now the language generation algorithms and automatic robots can be used for this work. With this new system of the publicity of the deliberations of the constitutional court, the possibility for the permanent analysis of the decision-making by the previously mentioned monitoring center would be brought about, and on the basis of the arguments or counter-arguments of the debates, the signs for the removal from the constitution could be detected early.

7) Separation of movement lawyers from civil organizations

In democracies, millions of citizens vote for parties and MP candidates, and so they try to determine the basic direction and decisions about society and state policy. In contrast, the determination of the basic state decisions is largely shifted in the juristocratic state from the parliamentary bodies to the constitutional court and the other supreme courts. In this way, it is no longer enough for the masses of citizens to vote in the elections and give the ballot there, but they must try to penetrate directly into the decision-making processes of the constitutional court and the other supreme courts. These efforts have led in recent decades within the circles of civil organizations to the sharp increase in the number of human right foundations, associations that have their effects on the level of daily political struggles. In the juristocratic state these movement lawyers' organizations are the same as parties are in a democracy.

Their activities are directed at the legal disputes before the courts and at the constitutional complaints before the constitutional court, but these activities are moved by political ends which want to defend the interest and values of the large social groups and the legal and constitutional complaints struggle for these political ends. On the other hand, these "human rights" foundations and organizations are also directly involved in the street actions, but here the fight for the group interests is not fueled by legal arguments, but it is based on the noble moral pathos: that is the struggle for justice! - as was sketched by Rudolf von Jhering 150 years ago. [99] Initially, only the first mentioned of the two combat directions was practiced by the movement lawyers in the American rights revolution in the 1960s. But in recent years, it has begun to export the techniques of street fighting in Europe and the other parts of the world, which have

[99] See Rudolf von Jhering: Der Kampf um das Recht. Verlag der Buchhandlung G. J. Manz'schen Wien. 1872. Although it is noted that the movement lawyering was quite sure far from the thinkihg of Jheirng, see Irrredel Jenkins: Rudolf von Jhering. Vanderbilt Law Review, 1960, No. 1, S. 160-190. For Jhering's legal and social theory see my earlier study, Béla Pokol: Jhering's legal, moral and social theory. Jogelméleti Szemle (Legal Theory) 2009 No. 1. 2-38. p.

been earlier developed in the US in the trainings of human right foundations and associations. These combative techniques were first developed by the environmentalists for the "good cause", and such violent demonstrations and other violent forms were found, by which are caused the destruction of the facilities directed against the protected rights (environmental technology). Thus, the sinking of the whaling ships in ports, etc. can be mentioned as an example. But in the meantime, the techniques developed here have been extended to the entire political arena, and in the last few years, the organizations of the movement lawyers have already used the techniques of street fighting against wide areas of state policy. In this way, the means of fighting the street battles, along with the old means of politically directed court proceedings, are arranged in the inventory of the movement lawyering. There are many such techniques and, for example, the name of such a one is "direct political action" that was developed due to the transformation of the old political form of demonstration. [100]

The open formulation of the state as a juristocratic state, and thus the abolition of its hidden existence behind the form of democracy, makes it necessary to bring the organizers of movement lawyering more into the public. As the publicity of the decision-making of the constitutional court must be required, so the disclosure of the real function of human rights foundations and other legal organizations is necessary, because they signify the other side of that state power. They are not only simple NGOs but also combat organizations, cut out for the constitutional battles.

It is indisputable that increased control of the public should be developed over the organization of movement lawyering, which should have gone beyond the control of simple NGOs, as is the case with political parties. This could be done by creating a parliamentary monitoring center that would continuously monitor the public activities of all civilian organizations. In the case of human rights activities or legal street fighting activities, such organizations would then be reclassified into another class, and from then on, they would be more in control of the public.

[100] For the detailed analysis, see my previous analysis, Béla Pokol: Political think tanks and direct action groups. Jogelméleti Szemle (Legal theory) 2004 (Vol. 5.) No. 4. 3-15. p.

Part Two
Double State and Doubling of the Legal System:
Constitutional Law and Duplication of the Branches of Law

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Foreword

In the chapters of this part, I analyse the impact of norms, fundamental constitutional rights and principles, as well as the impact that of constitutional values on the layers of the subconstitutional legal system. For a long period in Early Medieval Europe, these legal layers developed from the status of mere customary law, when the law was only anchored in judicial decisions. With the discovery of the Digesta around 1050, Italian legal training began in Italy, and with the spread of this training, the reception of Roman law in Western Europe and later in Eastern Europe gradually improved customary law in the sense of a more rational legal thinking. Emancipated from theology, philosophical and geometric-mathematical thinking gradually brought abstraction into legal thinking in the 16th and 17th centuries, thereby shifting centuries of Roman legal casuistry and legal education towards the legal codes, which were designed in a logical system. From the early 18th century, Leibniz and Christian Wolff based their work on such conceptually structured legal norms, and, in time, the legal aspirations of the centralised absolute monarchies took advantage of this legal system for their conscious purposes, replacing the earlier customary compilations with the legal codes. As a result, the law gradually became converted to conceptual legal dogmatics. From an evolutionary point of view, these changes have enabled the establishment of two new legal levels (Rechtsstufe) above customary judicial law. On the one hand, theoretical legal thinking emerged from the field of judicial law, and freed itself from the narrow judicial case law thinking, mainly intertwined in the activity of university law professors. This legal dogmatics has been an essential part of the legal system after centuries of development since the early 19th century. Parallel to that – or, to be more precise, in France much earlier, already from the middle of the 17th century, due to the success of the absolute monarchy –, the regular creation of law by the jurists of the monarch created a new legal level, which served the purposes of the king and was placed hierarchically above the case law decisions of the judiciary. Following the French example, the deliberate legislative aspirations of the absolute monarchies spread, and when this was finally replaced by the legislature of the people's representatives, this did not change the fact that the ongoing legislative sphere already existed as a new legal level above both the judiciary and the newly developed legal dogmatics. The two were increasingly intertwined, and the systematic codes of private, criminal and procedural law created by Napoleon in the early 19th century were already based on the threefold legal layers: the text layer, the dogmatic layer and the layer of judicial case law. To be more precise, the third layer, an addition to the judicial cases, did not emerge until decades after Napoleon, when the true third legal layer of the judicial precedent law could be recognised.

In Europe in the 19th century, these two evolutionary developments led to numerous criticisms in theoretical legal thinking pointing to the problems around these changes, requesting to prevent them and restore to their former state. By voicing the benefits of

customary law in his writing Vom Beruf… in 1815, Carl Friedrich von Savigny managed to slow down the process of codifying – which in France had already begun – for many decades in the German lands. Likewise, from the early 19th to the late 20th century, the abstract codes were subject to numerous criticisms, because they brought about the loss of the colourful case law provisions. There are a number of legitimate aspects in this criticism, of course, but their recognition can at best justify the search for corrections, and neither the systematic conceptual legal dogmatics nor the conscious legislation of democracy could be abandoned.

In view of these evolutionary legal changes and new legal levels, it is necessary to address the latest developments, which in recent decades have increasingly shown the construction of a new legal level built on the three existing layers of law. The various constitutions had long been solemn legal documents without any concrete legal effect. By the addition of constitutional adjudication, their status gradually changed, as the ongoing decisions of the constitutional court to substantiate the abstract and, from a normative aspect, empty constitutional declarations and constitutional rights enlivened the previously solemn but sluggish constitution. This shows the increasing emergence of a new legal level both above the previous legislative area and the legal dogmatics of the individual branches of law. What permanent function can this new level perform in the legal system? It does not help much to examine their actual historical origins, because the creation of constitutional adjudication in individual countries was mostly determined by narrow-minded, specific political constellations, regardless of whether the main cause of these was a number of internal political considerations or international motivation for power. Once established, however, they can only survive permanently if they are maintained by a more general function. This is very likely to happen because, although the deployment of the U.S.' constitutional adjudication to the occupied European countries during the first decades after the Second World War was not followed by other countries, constitutional adjudication has become more widespread in the past decades, and today there may be hundreds of constitutional courts in Europe and around the world. Is there a permanent function that explains this spread and permanent activity?

In my opinion, a possible permanent function is that it is only from an instrumental point of view that the rights and obligations of individuals can be taken into account by conscious legislative activity in the form of political legislation and by the subordinate ministerial regulations. In contrast, constitutional adjudication can correct the lower legal levels by referring to the new legal level of the rights of individuals, due to its focus on individual rights and obligations in the course of its case-specific work – at least in relation to the review of the constitutionality of court decisions and the legal provisions that they apply. In this way, the emerging new legal level can enrich the evolutionary additions of the previous legal levels, just like legal dogmatics had earlier enriched legislation by improving the legal system with the introduction of a strict logical order. Another case of enrichment was a kind of conscious law-making surpassing the level of the judiciary; this was the addition of draft laws drawn up by the ministry's expert apparatus.

If one analyses the widespread application of the new legal level of constitutional adjudication above legislation that has taken place around the world, one may also find a lasting function for this phenomenon in the fact that, in this way, democracy, which is based on millions of voters, ultimately becomes institutionally linked to society but, at the same time, subject to corrections by the elite.[101] In this way, what the French revolutionaries of the Enlightenment obtained by fight – following Rousseau's idea, popular representation –, can coexist with the power realities of the elites. From a pessimistic point of view, this is a limitation of democracy – as has often been written down against constitutional adjudication –, but from an optimistic

[101] See Robert H Bork, The Tempting of America. The Political Seduction of the Law (New York: Simon & Schuster, 1990), 17.

point of view this may be the only way to maintain mass democracy, at least in this form, despite the unstoppable dominance of the elite.

Chapter 5.
The doubling of the legal system

30 years ago, at the end of the 1980s, I examined the structural complexity of law based on Niklas Luhmann's study on legal dogmatics.[102] In addition to this research of mine, Karl Larenz's and Josef Esser's debate on the role of supreme court case law in the legal system further encouraged me to go beyond the established concept of law – which identifies law with the legal texts – and to try to develop a multi-layered concept of law instead.[103] According to this concept, the legal system consists of the text layer of the laws, the layer of legal dogmatics and the case law of supreme courts. The debate between Larenz and Esser in Germany took place in the late 1950s, and subsequently, the emergence of constitutional adjudication fundamentally changed and expanded the functioning of the legal system by the end of the late 1980s. Since then, an increasing number of constitutional courts have emerged worldwide, and so I have taken the constitutional basic rights and constitutional principles as a new layer of law – going beyond the inspiring precursors who formulated the multilayered legal system – and referred to it in my later studies as a layer of fundamental rights.[104]

In recent years, the juristocracy's reorganisation and completion of the democratic mechanisms of society's governance has been emphasised by several analyses.[105] This is particularly true in Western democracies, but it is also increasingly important in many parts of the world, and it makes it necessary for me to further develop my multi-layered legal concept. For, as I reflect on the consequences of constitutional adjudication, I find that the simple inclusion of the newly emerging constitutional law into the legal system as a fourth layer of law – alongside the text, dogmatics, and case law – can be estimated as too restrictive now; it did seem sufficient at the beginning of the 1990s, but it does need to be somewhat reworked by becoming more inclusive. Indeed, there is a much deeper reorganisation of the law and political will-building of the state, and so it is theoretically not sufficient to grasp constitutional adjudication and constitutional rights as a simple addition to the multiplicity of law. In the following parts of this study, I would like to begin this rethinking.

1. The traditional layers of law

[102] Niklas Luhmann, Rechtssystem und Rechtsdogmatik (Stuttgart: Kohlhammer, 1974).

[103] See the books of Esser and Larenz: Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgarantien der richterlichen Entscheidungspraxis (Frankfurt am Main: Athenäum, 1970); Karl Larenz, Methodenlehre der Rechtswissenschaft, 4. Auflage (Berlin – New York: Springer, 1979); and my studies: Béla Pokol, 'Law as a System of Professional Institutions'. Rechtstheorie no 3 (1990), 335–351; Béla Pokol, Theoretische Soziologie und Rechtstheorie. Kritik und Korrigierung der Theorie von Niklas Luhmann (Passau: Schenk, 2013).

[104] See Béla Pokol, The Concept of Law: The Multi-Layered Legal System (Budapest: Rejtjel, 2001).

[105] For the analysis of juristocracy, see Ran Hirschl, Towards Juristocracy. The Origins and Consequences of the New Constitutionalism (Boston: Harvard University Press, 2004); and my earlier study, Béla Pokol: The Juristocratic State. Its Victory and the Possibility of Taming (Budapest: Dialóg Campus, 2017).

The need for consistency in law grows with the complexity of society, and the complex functioning of modern societies is only possible with a high degree of consistency. This is ensured by the coherent intellectual system of legal norms. With ever denser social relationships and ever increasing contacts between millions of people and organisations, the systematic nature of legal norms is only made possible by increasingly complex legal systems, contrary to the demands of forever unchanged relations of small communities that live in enclosed villages at an earlier stage of development. Thus, in Early Medieval Europe, the law was exclusively the domain of judges, who for a long time were not qualified lawyers, and their decisions determined the law of the country for centuries in the form of customary law. Later, however – and acceleratingly from the late 15th century –, deliberate legislation began to break away from the judiciary, first through the creation of legal codes based on customary law, later through the increasingly conscious creation of new codes; and in parallel to the development of increasingly precise legal terms, the science of law was shaping more and more definitely. Since the Enlightenment, the legal system has consisted of a separate legislation, the application of law by the lower courts, and the legal dogmatic activity of law professors. The system of legal norms as a system of meaning can, therefore, increasingly function as the product of three layers of law in the modern societies of recent centuries: (1) the layer of texts produced in the legislative procedure, (2) legal dogmatics, which clarify the meaning of the concepts, categories and provisions in the legal texts, and finally, (3) the case law of supreme courts, which, in each case, equip the abstract legal provisions with concrete meaning.

The relationship between these three legal layers may vary from one legal system to another. For example, the English legal system, which developed on the basis of judicial case-decisions, as well as the parliamentary laws, which became more important in the late 19th century, used these casuistic regulatory techniques, thereby not recognising more abstract norms and concepts. Such abstract legal doctrines and terms as existed on the European continent could not be observed in England. [106] In the case of the latter, law is essentially a combination of case-specific precedents and the detailed legal provisions that are similarly tailored to specific situations – just like two halves of a single legal layer. Although it should be noted that there are still a number of legal concepts in the English legal system, this is not as significant as in Continental abstract code law.

In the legal systems of Continental Europe, however, the division into the three legal layers is easily observable, and it can be said that the stronger the role of legal dogmatics – and thus abstract code law – in a legal system, the more the abstract rules of law will be supplemented by case law. The clearest example of this is German law, however, the legal systems that developed under its influence, including the Hungarian one, are also good examples of the legal system being divided into three layers of law. In this solution, the true meaning of legal norms shifts from the legislator to the jurisprudential circles, and the Members of Parliament can only contribute very little definition to the abstract law books. On the other hand, the judges in the Continental legal systems receive open standards and thus have a great deal of freedom in the formulation of case law. In other words, this regulation shifts the center of gravity of the meaningful provision of law away from parliamentary policy, and the legal professors and the courts play a greater role. However, it is undisputed that the law in this way is dominated by professional lawyers (law professors and supreme judiciary), while with the above-mentioned English solution the parliamentary politicians have more influence on the determination of law.

If we compare English law with Continental law, we can also see that the detailed English legal norms are authoritative normative standards for those who act in certain situations, while

[106] See John P Dawson, The Oracles of the Law (Ann Arbor [US-MI]: University of Michigan Law School, 1968).

Continental legal systems based on abstract legal norms can offer often only a vague orientation in each situation. Only the complementary legal norms of the case law of the courts show what is considered to be law in a given situation and whose actions are legally supported even under state coercion. In other words, in contrast to the concrete rules of English law, the duality of abstract law books and supplementary judicial case law constitute the two alternatives that can be formulated as two responses to the regulatory requirements of modern societies.

Over the past half-century, in addition to these traditional legal strata, legal systems in several countries have increasingly developed a new legal framework that has, to some extent, restructured the traditional layers of law. These are the fundamental rights and principles of the constitution, and they play a major role only where, in addition to the written constitution, constitutional adjudication has also developed. Initially, in the early 19th century, this was only the case in the United States, but since the 1950s it has occurred in several Western European countries as well. More recently, constitutional adjudication has also been introduced in most new democracies of Central and Eastern Europe. In the same way, constitutional courts have been established on the other continents since then.[107]

The fundamental rights of the constitution originally emerged as basic human rights in the 18th century, during the ideological-political struggle against feudalism; they formulated various political and humanitarian needs. In the 19th and 20th centuries, they were included in the new state constitutions. When constitutional judges began deciding constitutional disputes on the basis of the fundamental rights and principles of the constitution, it became clear that fundamental rights can easily be considered an abstract requirement for governmental decisions, but for a given case-decision they can only give conflicting directions of judgment. In other words, these fundamental rights are often contradictory on a case-by-case basis and can only be applied with the restraint of one or the other's preference. However, if another judge is given the power of decision and prioritises another fundamental right, this judge may come to the opposite conclusion. Therefore, unpredictable constitutional adjudication is often observable, because the different hierarchies of values of the different judges determine which rights they consider superior to others. Moreover, this new kind of constitutional law can only really develop in countries based on democracy and pluralistic political struggles, since a constitution cannot function under dictatorial politics. Thus, in addition to the majority in legislature, large social groups engaged in a democratic political struggle also have the opportunity to gain supremacy in the supreme courts and the upper hand in the constitutional court. These developments started early, and in analyses they were singled out as the legalisation of politics and as the politicisation of law.

2. Democracy pushed into the background

In Germany, the debates about the juridification of politics and democracy already began during the Weimar period in the 1920s. This was when the Constitutional Court in neighbouring Austria began reviewing parliamentary decisions, and also in Germany the Federal Supreme Court started to expand the law to the labour disputes in trade union struggles.[108] From the

[107] There are now 46 states on the African continent with constitutional courts, of which 29 have separate constitutional courts. (The data comes from the Confederation of African Constitutional Court Communication of 2018 – CCJA.) Of course, for the most part, they only play a role in political power struggles and are less important for influencing the law. (For their analysis, see Béla Pokol, 'Az európai jurisztokrácia globális exportja', Jogelméleti Szemle no 1 [2019], 78–108.)

[108] In his study of 1928, the German law professor Otto Kirchheimer even considered the then legal regulation of employment as an unauthorised interference with politics, and this argument has been used in recent decades in several dimensions as a criticism of the law that restricted the field of politics. See Rüdiger Voigt,

early 1950s, constitutional adjudication began in Germany and Italy and, especially in Germany, it restricted democratic decision-making. At the same time, the United States, the birthplace of constitutional adjudication, also began a radical shift towards policy-making by the highest judge. As a result, the foundations of American political decision-making shifted in many respects from the democratically elected institutions to the courts, and in courtrooms it began to decide the polities' struggles as constitutional disputes. [109] This expanded kind of constitutional adjudication then spread in European countries at the end of the 1970s, first in Spain and Portugal, and somewhat later, in the 1980s, an enormously expanded constitutional adjudication was enacted also in Latin American countries where dictatorship was wiped out. After the collapse of the Soviet empire at the beginning of the 1990s, constitutional courts were formed in all Central and Eastern European countries of this former empire and in the newly independent former Soviet member states. This development was promoted and pushed by the American political elite that exerted a world-wide domination either as occupying power, like in Germany and Italy, or as hegemonic world power. Thus, after the fall of the dictatorships, these countries did not create a purely democratic political framework which left the masses of citizens the freedom to determine their own fate, but instead, a normative framework was set up, which was governed later by the global world power.

Even in countries where constitutional control over legislation did not exist at all – in other words, there was no juridification over democratic political decision-making – a shift of power began in that direction. The analysis of the Canadian political scientist, Ran Hirschl, focused on these processes.[110] He examined constitutional reforms in four countries that severely curtailed unrestricted parliamentary sovereignty through the introduction of constitutional adjudication, and where the power was given to the highest judges to review and potentially reverse fundamental political decisions of the parliament. This was the case with Israel, Canada, the Republic of South Africa, and New Zealand. Since they had previously been governed by British legal traditions, no separate constitutional court was established in these countries – with the exception of South Africa – and, following the model of the United States, this competence was given to the highest court.

Hirschl's main thesis was that in all four states, at the time of the transfer of a considerable part of the parliamentary power to the highest court, a power situation had been present in which a parliamentary shift in power from the long-standing dominant political forces had already begun and it was only a matter of time to lose the parliamentary elections. In this situation, since they could be confident that the majority of the elite of the Supreme Court and the university law professors surrounding them would reaffirm their cultural and social values, a constitutional reform was carried out so as to give most of the power to the highest judges before they would be defeated by the upcoming rival parliamentary forces. Such was the situation when, spurred on by solemn declarations and eloquent speeches on constitutional

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'Verrechtlichung', in Verrechtlichung. Analysen zu Funktion und Wirkung von Parlamentarisierung, Bürokratisierung und Justizialisierung sozialer, politischer und ökonomischer Prozesse, ed. by Rüdiger Voigt (Königstein: Athenäum, 1980), 15–16.

[109] The advocates of this process refer to it as 'cause lawyering', emphasising the morally right aspects, but in this way hiding the fact that this process bypasses democratic political decision-making. See Stuart Scheingold: 'The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle', in Cause Lawyering: Political Commitments and Professional Responsibilities, ed. by Austin Sarat and Stuart Scheingold (New York: Oxford University Press, 1998), 118–150.

[110] „The constitutionalization of rights and the corresponding establishment of judicial review are widely perceived as power-diffusing measures often associated with liberal and/or egalitarian values. As a result, studies of their political origins tend to portray their adoption as a reflection of progressive social and political change, or simply as a result of societies' or politicians' devotion to a "thick" notion of democracy and their uncritical celebration of human rights." Hirschl, Towards Juristocracy, 2.

changes, it was decided by vote to take away the priority of the Parliament, and amandments to the constitutions were made to subordinate the Parliament to the Supreme Judicial Forum.

A clear example of this was the establishment of the Israeli Supreme Judge's control over the decisions of the Israeli parliament, the Knesset, which took place in 1992. In Israel, a largely secular Ashkenazi cultural and political elite dominated every aspect from the start, and although there were, in the early years of the formation of Israeli public law, faint voices of opposition from the ranks of law professors, who propagated a division of power on the American model and constitutionalism, the MAPAI – the predecessor of today's Labour Party –, led by David Ben Gurion, silenced any such attempt at dissension. This attitude continued into the late 1980s, but the slow decline of their dominant position began when the Sephardic Jews of lower social status formed a party. Consequently, both the Eastern and the Sephardic Orthodox (mostly ultra-Orthodox – haredi) Jews entered the political arena and joined in the struggle for political power. Before a possibly definitive disturbance of the power of this dominant elite in the Israeli parliament, the constitutional reform in the Knesset was voted and the Supreme Judicial Forum was given the competence to decide on the constitutionality of the laws.[111] Since then, these supreme court rulings are regularly in line with the values of the former dominant elite, and in this way, the old elite has been able to retain its dominance despite losing its majority in the legislature due to the involvement of other religious parties.

Similar power shifts were behind the 1982 constitutional reforms in Canada, as a result of which Canada's earlier system of public law – firmly based on unrestricted parliamentary sovereignty – was replaced by the U.S. model of judicial control. The political power at the federal level had hitherto belonged to a political elite propagating English culture, which was, on the one hand, gradually compromised by the increasing number of multinational immigrants that began to undermine the numerical basis of this elite, and, on the other hand, the growing power of French separatists of Quebec also started to threaten this dominance. Against this backdrop, support for constitutional reform and constitutional adjudication, so much needed for decades, increased among the dominant parties in the Parliament, and a significant part of the Parliament's supremacy was consequently transferred to the Supreme Court of Canada. Since then, the strength of the judicial review of the legislative majority has even surpassed that of the Supreme Court of the United States; and in Canada the highest judges are given even the abstract control of legislative power, which had hitherto been the case only in the strong European constitutional courts.

The situation was similar behind the constitutional changes in New Zealand in the 1990s, when the parliamentary dominance of the British-born elite was undermined by the higher birth rate among the Maori population and by the influx of the masses of other Asian and Oceanic immigrants. This development brushed aside the objections to creating supreme judicial control over the legislation. While back in 1968 Geoffrey Palmer, as a young university lawyer freshly returned from his U.S. study tour, cautioned against a constitutional judicial review on the American model, from the 1980s he became, as a Prime Minister in the face of changing parliamentary balance of power, an arch-propagator of the very same constitutional amendments.[112] The continued dominance of the English elite in the judiciary, despite the

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[111] „The 1992 constitutional entrenchment of rights and the establishment of judicial review in Israel were initiated and supported by politicians representing Israel's secular Ashkenazi bourgeoisie, whose historic political hegemony in crucial majoritarian policy-making arenas (such as the Knesset) had become increasingly threatened. The political representatives of this group found the delegation of policy-making authority to the Court an efficient way to overcome the growing popular backlash against its ideological hegemony and, perhaps more important, an effective short-term means of avoiding the potentially negative political consequences of its steadily declining control over the majoritarian decision-making arena." Hirschl, Towards Juristocracy, 51.

[112] „In 1968, Geoffrey Palmer, then a young academic, had in his own words "recently returned from studying the mysteries of the United States Constitution". He warned against a Bill of Rights on the grounds that is was not needed, would catapult the judiciary into political controversy, and would be "contrary to the pragmatist

presence of more fragmentation in the case of political power, has since guaranteed the unchanged power relations in New Zealand. Leaving aside a detailed account of the change of power in South Africa until the mid-nineties, the same phenomenon characterises South Africa as was described about New Zealand just now; here the political elite of the European white minority gained control of the power of Parliament through the newly created constitutional court.[113]

It is, however, possible to go beyond the specific situations described by Hirschl and show that the transition from democracy to juristocracy was also brought about by the United States during the reconstruction of defeated Germany and Italy after the Second World War, especially in the case of Germany, which was considered dangerous by the American occupational authority. Here, a constitutional court has been created with unprecedented broad powers to control the parliamentary majority. At that time, at the end of the forties, native American constitutional jurisdiction was only a quiet control of the democratically elected Congress, and it was only occasionally that the highest judges intervened in the formulation of substantial content decisions. Similarly, the idea of a constitutional court, which was originally formulated by Hans Kelsen and tried out in Austria in the past, was but a thin procedural framework for liberal democratic institutions. In contrast, the new German constitution, set up by lawyers from the U.S. occupational forces, gave the constitutional judges the widest right to annul laws. This annulment was based on such broad and even further extensible decision-making formulas that had practically no normative content and, in this way, the whole democratic decision-making competence tended to be given to the constitutional judges.

The limited democracy of the Germans – which has since been regarded by official narratives as a true and elevated 'democracy of the rule of law' – served as a model for the global dominant world power, namely, the United States. Following the overthrow of dictatorships in the late 1970s, this model was supported in Spain and Portugal, and particularly among the Spaniards, the strong German model of constitutional adjudication was introduced to control democratic decision-making. Since then, an activist constitutional style is present in Spain, even more so than in Germany. An example of this is that Spanish constitutional judges are prepared to judge even against a literal provision of the constitution, which cannot be observed in the case of German constitutional judges.[114] The radicalisation of activist constitutional adjudication in Spain served as a good tool for the U.S. to build a similar constitutional model in Latin American Hispanic countries. The means for the U.S. to do so were their subsidies and aid, which were tied to creating this model. In this way, a large part of Latin America became the most important basis of juristocracy. The enormous power of the constitutional courts and the highest courts, which imitate their style of decision making, results in that in these countries that fundamental sociopolitical decisions are only possible through the involvement of these courts in most cases.

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traditions of our politics". Quoted by Hirschl, Towards Juristocracy, 87. 'But two decades later, when the white bourgeoisie's control over New Zealand's major policy-making arenas was challenged, that same speaker – now Sir Geoffrey Palmer – in his capacity as Minister of Justice in the term Lange Labour government (1984–89) and later Prime Minister (1989–1990) initiated and championed the empowerment of the New Zealand's judiciary through the enactment of the 1990 New Zealand Bill of Rights Act.' Hirschl, Towards Juristocracy, 87.

[113] In the Republic of South Africa, 129 of the 194 high court judges and six of the 11 constitutional judges were white, while the white minority in society can only be considered marginal in numbers. (See Hirschl, Towards Juristocracy, 239, note 86.)

[114] The Spanish Constitution states, for example, that marriage is a form of coexistence between women and men, and the Spanish Constitutional Court judges do not deny that the 1978 constitutional legislators actually meant a marriage between a woman and a man. But they argued that by now public opinion had already changed, and the modern world was already moving towards accepting same-sex marriage, and thus they qualified this marriage as constitutional, even though it is literally banned in the Constitution. For their analysis, see Béla Pokol, 'Alkotmánybírósági döntési stílusok Európában', Jogelméleti Szemle no 3 (2015), 107–129.

It is into this process of dissemination and radicalisation of constitutional adjudication in the 1980s and 1990s that the turns analysed by Hirschl can be integrated. To some extent, however, they admittedly differed from the spread of juristocracy on a global level, because in the countries analysed by him, the political powers struggling in the parliamentary arena to maintain their dwindling political dominance voluntarily introduced juristocracy in order to retain or regain it. This strategy was kept after the dissolution of the Soviet empire in the early 1990s, and was further put to use to provide democracy as well as a juristocracy in the newly created countries. by that time, the German–Spanish model of constitutional adjudication in South America had already been put to the test and the Americans, who controlled the transition and regime change fairly directly here, did not recommend the more modest model of the Austrian Constitutional Court for the newly independent Central European states and the successor states of the dissolved Soviet Union. Instead, they propagated the German–Spanish model with the broadest control over parliamentary democracy. If a constitutional court with limited powers, such as in Poland, had been set up after all, a few years later this model was changed to a model of the barely restricted constitutional court, which was described as a 'true democracy' in the global narrative. These constitutional courts, with their vast powers, are very unlike the picture Hans Kelsen had once thought of as a thin framework on democracy, and rather represent one of the highest powers in the state. For the uses of the globally dominant American power elites, this power of the strong constitutional courts finds its rationality in the possibility to gradually integrate the constitutions of each country into a unified global system of constitution interpretation. This integration and unification would be brought about by the assistance of American foundations, intellectual think tanks, and the local legal elite that is supported by them. As a result, since the late 1980s, a close-knit global constitutional oligarchy has been progressively organised over the parliaments of formally independent states. The emergence of a 'juristocracy instead of democracy', which was analysed by Hirschl, can be thus seen more comprehensively and then further cases of juristocracy can be uncovered.

3. The doubling of the legal system: Legislative law versus constitutional law

The developments described above have led to a doubling of the political system. The system of democracy, which is characterised by elections involving millions of citizens, a multiparty system and the legislation of the parliamentary majority, remains. However, the system of constitutional court decisions, which is based on a few dozen abstract rules and principles of the constitution, has brought about a second system of governance. In this second system, the decisions for social governance are not made as the results of open political competition and choice between alternatives, but are presented neutrally as mere results of judicial interpretation and as a simple derivation from the rules of the constitution. In fact, these decisions are vague and their interpretation rather open-ended. In the countries of comprehensive Western civilisation, therefore, several intertwined legal groups have been created with the aim to create a common line of interpretation for constitutional interpretation. This common line of interpretation favours certain possible interpretations and prohibits others. This includes setting up a network of constitutional law teachers, international lawyers and legal theorists from different countries, organised by the global foundation networks. The permanent participants in these networks regularly consult each other at conferences and then summarise the proposed constitutional interpretations and formulas of the 'profession' in English-language books. This includes setting up various international advisory bodies, which will then control in each country compliance of the 'professionally-recommended' interpretations of global

constitutional networks and, if they find a problem, may impose various economic sanctions, such as revoking subsidy funds or, in the case of EU countries, revoking Cohesion Fund resources. In terms of content, this common line of interpretation means influencing the interpretations of the constitutional judges of different countries in the service of the interests and future visions of the most important global ruling groups. In Europe, this role is primarily played by the Venice Commission, which, in principle, should only be an advisory body, but the EU authorities have transformed it into the strictest controller of the public law of the Member States (especially the Eastern Europeans).

This dual political system, then, creates a tension between the democratic rule of the social elites that dominate a given country and the power aspirations of the global ruling circles (mostly global financial groups). In terms of the legal system, this power struggle appears in the dual system of constitutional law with tens of thousands of constitutional court judgments and legislative law. In other words, the political system not only duplicates the power mechanisms of democracy and the juristocracy, but also leads to the duplication of the legal system. The constitutional law as a fourth layer, which I earlier created and introduced, could not properly emphasise this duplication, and this is why I aim here to rethink the structure of law. The constitutional text, which is at the center of the constitution-based law, has extensive constitutional case law, without which this very abstract text – sometimes solemn declarations and constitutional principles – could not prevail in everyday life or only with less certainty. In the same way, the constitutional case law of tens of thousands of pages per country could not be systematically constructed if their key terms and interpretative formulas were not systematised by a constitutional dogmatic layer. In other words, in addition to the three traditional layers of legislative law, constitutional law also requires the construction of a three-layered structure, if the constitution, proclaimed on a solemn occasion, not only remains a celebrated document, but as the basis of constitutional adjudication it becomes a living part of the legal system. Obviously, constitutional adjudication, therefore, doubles the political system and, in addition to democracy, builds up mechanisms of power for the judiciary, and then the legal system is also driven towards a doubling.

If the analyst scrutinises the introduction of constitutional adjudication in Hungary in 1990, and focuses on the fact that originally this introduction only allowed for a control of the legislation but not the judges, and that it was only with the new Constitution in 2012 that the possibility of constitutional review of the judgments of ordinary courts was added, then the analyst can proceed to an analysis of the duplicated nature of politics and law. Political power struggles could hardly be doubled by the introduction of constitutional adjudication – as the case of the Polish Constitutional Court showed at the beginning of the 90s –, when something deemed unconstitutional could be then reevaluated by the Polish Parliament, the Sejm, and the effect of the decision of the Constitutional Court could be annulled. Essentially, therefore, the Constitutional Court's activities were more like some non-binding legal advice, and it is clear that the Constitutional Court could not be established as a second political center in this way. On the other hand, a kind of constitutional adjudication was realised in Hungary between 1990 and 2011, which, while it did not as yet review ordinary judicial rulings, it did exercise the most extensive constitutional control over the legislation and the government. As a result, while there has been no tendency in Hungary for a duplication of the legal system, the power struggles of the political system have been doubled. In particular, during the first parliamentary term of the free elections, between 1990 and 1994, a sharply opposing position of the parliamentary majority and the socialist/left-liberal opposition bloc that had crystallised behind constitutional judges was characteristic. And, in spite of its minority position, the latter could triumph in determining the country's policy by annulling a great number of laws of the parliamentary majority with the help of constitutional judges. At that time, the powerful Hungarian constitutional judges exercised some influence over the law in the rationale of their decisions,

but this remained under the control of traditional legal doctrine and supreme juridical interpretations. Thus, in Hungary, constitutional adjudication could not affect the interior of the legal system, but only restrict and direct the political objectives of legislation. Understandably enough, at that time, the decisions of the Constitutional Court in Hungary were not read by judges and lawyers, but by the lawyer-politicians of each party and the legislative departments of the ministries. The changeover to a doubling of the legal system in Hungary was only created by the new Constitution, which came into force in 2012, and the new Constitutional Court Act that was based on it.

4. Differences between the three-layered structures of constitutional and legislative law

The question here is the following. What is the difference between the traditional three-layered legal structure, which is built up alongside the law produced by the parliament, and the new three-layered legal structure based on the constitution? To understand this, it seems reasonable to start from the Hungarian situation which I know best, but it should be noted that, although their main features correspond to the double legal system in other countries, there are great differences between them.

(1) The most important feature, in all countries in this area, is that the degree of dominance and the amount of normative content of the text layer is incomparably less significant in constitutional law than in the traditional law produced by legislation. While in the case of constitutional law there are hardly a dozen provisions, declarations, and principles that guide the decisions of constitutional adjudication, in traditional legislative law there are hundreds of measures, and even thousands of subordinate ordinances, which provide a very precise guidance to the judges' decisions. In this way, constitutional judges are much freer and more unrestricted in their decision-making than judges of the ordinary courts. This difference causes the emphasis in constitutional law to shift largely from the constitutional text to the jurisdictional level of the constitutional court, whereas in traditional law this emphasis is much more on the textual layer.

(2) The next difference is that legal dogmatics in the traditional three-layered structure of legislative law has dominance over the supreme court judgments, and only the centuries-old formation of this dogmatic layer allowed the creation of law books even in the 19th century; by contrast, in the case of constitutional law, legal dogmatics is only a modest conceptual one. In addition, this modest constitutional dogmatics was shaped under strong political points of view due to the high degree of normative openness in constitutional declarations and constitutional principles. As a result, in this area it is not possible to adopt a politically neutral conceptual apparatus, as is the case with traditional legal dogmatics. Therefore, constitutional dogmatics only exists in the practice of the individual countries, in the justification of the decisions of the constitutional judges and the local jurisprudential writings. As to a comprehensive European or even more comprehensive professional consensus, it does not exist. Instead, one can only mention a few commonly used formulas for constitutional disputes – in Europe these are mainly from the Germans – that are used by European constitutional courts. Volumes published in world languages that seek to consolidate this in larger areas are more likely the products of the aforementioned interpretive networks organised by global powers with the aim to limit the constituent power of sovereign states, rather than truly neutral professional products. The same applies to the impact of certain rulings of the European Court of Human Rights in Strasbourg on the constitutional courts in European countries, because they restrict the sovereignty of nation states and transmit global rule on legislation, and so they cannot be regarded as a neutral

normative order. It follows that within European countries, the legal and political elite that is more closely interwoven with the global powers welcomes this, while the sovereignty-defending elites are against it.

(3) It is also a deviation in the case of constitutional law from the traditional legislative law that there is no hierarchy of norms between the more specific constitutional provisions and the general constitutional principles and declarations. In traditional law, for 600 years, the lex specialis derogat legi generali principle of interpretation consistently ensured that special rules tailored to the situation prevailed over the more general rules, and this always meant a defence against such intentions of the legislature.[115] However, with the emergence of constitutional adjudication, it was constitutional law itself that has reversed this principle in recent decades, and the constitutional provisions with a lex generalis nature are always enforced before more specific rules of law. Then again, this reversal and the new priority of lex generalis does not stop at the border of subordinate legislative law, but continues in the field of constitutional law itself, and the more specific constitutional rules have no priority over the general declarations of the constitution, which have very little normative content. In this way, constitutional judges have an almost unlimited freedom of decision because they can reverse the more specific constitutional provisions due to the normatively empty constitutional declarations. Of course, there are big differences among the constitutional courts of the world in this regard, but my previous empirical investigation showed that, to furnish an example, the situation in Lithuania was similar to Hungary, and the judges of the constitutional court base their decisions on the general formulas of the Constitution, rather than on more specific constitutional rules.[116] In this way, the detailed will of the constitutional authority is not protected. There is no general formula for this dilemma in this area, this is more of an openness. In other words, in contrast to the priority given to general constitutional law over the detailed rules of subordinate law, constitutional law itself does not prioritise either the specific provisions or the general constitutional principles and formulas. Thus, within any constitutional court, the prevailing majority of judges can argue that special constitutional provisions precede the more general constitutional principles and formulas, but they may also argue that the decisions are based on some of the most common constitutional principles, such as the rule of law or human dignity. In short, there is no indicative formula for this dilemma within constitutional law, even within the legal elite of a country, and I do not think that this is independent of the fundamental politicisation of these legal circles, since the majority of constitutional law teachers are not neutral analysts, but mainly interested lawyers of NGOs or had been, at least, socialised by the NGOs and only later became university professors. Therefore, the majority of constitutional judges in a given country can always decide without being constrained by an underlying professional guidance, whether the detailed constitutional rules they interpret take precedence over purely declarative general constitutional principles, or vice versa, they let the latter overrule the more specific constitutional law provision tailored to the case.

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[115] The solution of the dilemma between lex generalis and lex specialis was elaborated by Baldus de Ubaldis, and the axiom of lex specialis derogat legi generali has also become valid in modern times. In the description of Peter Stein, the following happened: 'Bartolus' succesor, Baldus, emphasized that he was a party to an action in his favor, is prima facie in the right.' Peter Stein, Regulae Iuris. From Juristic Rules to Legal Maxims (Edinburgh: Edinburg University Press, 1966), 154.

[116] In analysing the decision-making style of the European Constitutional Courts, in addition to domestic practice in Hungary, I have also found a similar tendency in the case of the Lithuanian constitutional judges: they very often base the decisions on the general and solemn declaration of the rule of law, even though there is a detailed provision of the constitution which gives the precise regulation . (See Pokol, 'Alkotmánybírósági döntési stílusok'.)

(4) There is another significant difference between constitutional law and traditional law in relation to the creation of case law. The case law of constitutional adjudication is determined only by the majority of a single judicial body and not by a more comprehensive and multi-level judicial decision-hierarchy. This uncontrolled situation was expressed in a rather cynical way by Judge Brennan, a Supreme Court Justice of the U.S. in the 1980s, when he stated that the highest rule in the U.S. Constitution was the 'Five Rule'. This means that the stipulated provision of the constitution is always the one pronounced by the votes of the five judges of the nine-headed SCOTUS. Similarly to constitutional judges, the rulings and decisions of the judges of SCOTUS cannot be revised and therefore what they say is a final and irrefutable decision within the country. However, this also means that within the three-layered constitutional law, case law, in which the constitutional text is concretised, has a far greater weight than in the structure of traditional law. It follows that there are always big struggles when it comes to the selection of new constitutional judges.

(5) Another difference between the two parts of the double legal system is that while in the case of traditional legal law - and thus in its whole three-layered structure - the possibility of a formal change of the old law has long since been established, this problem is not yet resolved in constitutional law. First and foremost, an unsolved problem is the change of constitutional adjudication in case law, which, as we have seen, is the most important layer of law here. To elaborate, the normative arguments set out in earlier decisions remain applicable for future purposes, in explanatory statements in particular, even if, in the meantime, a later majority of the constitutional court put forward a normative argument in the polar direction. In the future, both conflicting arguments will be observed as applicable case law and there is no waiver of the previous arguments. Despite the obvious problem, this situation provides a comfortable position for the decisions to be taken, so the solution can only be achieved if the stimulus threshold of the comprehensive legal and political elites is already sufficiently disturbed to solve this problem by amending the constitutional court act in Parliament.

This question has not yet been resolved, because even in the case of a constitutional amendment or a completely new constitution, it continued to be disputed whether the case law of the constitutional court based on the earlier constitutional text remained applicable or not. Due to the indecision of this issue, after the constitutional amendment or the new constitution entered into force, there emerges a legal and political struggle within the constitutional court as well as in the political public for the use of the previous constitutional case law for the application of the new constitutional text. It is not only this question that has remained unsolved, but also the question of whether or not the constitutional court can review the constitutional amendments or even the creation of a new constitution on the basis of its existing case law.[117] It is undisputed, in my opinion, that this indecision is less due to the theoretical difficulty of the subject than to the most general socio-political struggles that normally take place around the subject. For example, some Hungarian researchers and scientists of constitutional law have again pointed out in their studies that constitutional courts can review the constitutionality of constitutional amendments and even declare them unconstitutional. This control is even more significant in the interpretation argued by some domestic researchers in Hungary, namely, that the new Constitution of 2012 is not a new constitution at all and it can be seen as a mere amendment to the old Constitution. In this way, the judges of the Hungarian Constitutional Court could abolish this whole new Constitution. (This thesis was represented in several studies by a former constitutional judge, András Bragyova.)

[117] After the new Constitution in Hungary, which came into force in 2012, these struggles led the constitutional legislator to declare, in the 4th Amendment to the Constitution, that the previous constitutional court decisions are overturned. But the majority of constitutional judges finally declared, in decision no. 13/2013 (VI. 17.), the applicability of these old precedents.

Because of this openness of constitutional decisions, any decision that has once been made can be used again in disputes, despite the fact that another constitutional majority had since then declared the opposite to be the ruling one. Thus, arguments that have shifted back and forth for many years all remain valid as the content of living case law and they can be used in turn by constitutional court decisions. Of course, this is an anomaly, but since the university lawyers of constitutional law are mostly politicised lawyers or former NGO lawyers, they only protest if a constitutional ruling does not follow their political line and values. And if it does, they go as far as to celebrate the Constitutional Court's ruling even if it is blatantly violating the constitutional text.

(6) The next difference between constitutional and traditional law is that in the area of new constitutional law, specialisation has not been resolved. This is especially problematic, since the material of normative arguments of the decisions of the constitutional court comprises tens of thousands of pages. It should also be noted that it is not self-evident that such a comprehensive constitutional law is created that would be able to encompass the whole law of the traditional legal areas. Human rights, which were transformed into constitutional rights at the end of the 18th century, were originally just guarantees for citizens. However, during the years of constitutional adjudication, a lot of decisions were made that went beyond these guarantee points and increasingly examined the entirety of traditional law. In this way, a large part of the entire legislative area gradually fell under the jurisdiction of the constitutional court. Thus, for example, the fundamental right to participate in the referendum and elections was not only understood so as to mean that the rule of law should grant all citizens the right to vote and the right to referendum, but the regulation of the entire electoral system and the referendum process was also gradually included in the constitutional review. Similarly, decisions on constitutional property rights guarantees began to control progressively the full ownership and, moreover, most parts of private law. Some private law theorists already speak of a separate constitutional private law, and in criminal law, the extension of the criminal guarantees in the text of the constitution led to design of constitutional criminal law. This process goes on concerning constitutional financial law, labour law, criminal and civil procedural law, family law and so on, and all these constitutional legal branches are accompanied by the thousands of pages of decision-making material of the domestic constitutional courts, and, in addition, by the decisions of the German constitutional judges or the Supreme Court of the United States as well.

On the one hand, these extensions are fuelled by the ambitions of some members of the constitutional courts for their original branch of law, and if such a member can receive the benevolent support of the majority of constitutional judges for his or her ambitions, it will be mutually extended to other branches of traditional law. These ambitions are gradually driving constitutional case law to duplicate the traditional areas of law. However, the force of legal opposition is at least as strong from certain ordinary courts and law professors, who oppose the current government policy of the parliamentary majority; these are then voiced in constitutional complaints and lawsuits, and they urge the constitutional judges to annul certain criminal, labour, private law provisions made by government policy, and to proclaim the constitutionality of the rules they champion.

As a result, constitutional law has doubled much of the material of traditional law after several decades of constitutional adjudication, however, there has been no division of jurisdictions and no specialisation of constitutional judges and their preparatory staff. To some extent, the solution of the German constitutional judges is a notable exception; they created a system in which the new constitutional judge is automatically included as judge for the preparation of future draft decisions in a certain legal branch, thereby inheriting the areas of his predecessor, which results in a certain specialisation in a certain field of law. Furthermore, the newly elected

constitutional judge initially also inherits the trained staff of his or her specialised predecessor, who are also already specialised in the field he becomes responsible for. In this way, specialisation can also be reproduced in the new constitutional law, to some extent at least. However, this is only partially the case, since all the members of the full constitutional court are equally involved in the decision of the institution and thus every constitutional judge is compelled to be knowledgeable in all partially specialised areas of law if he wants to remain authentic. This is one option. As an alternative, it is also in the judge's power to hand over most of the content-related decision-making to his/her experienced employees. To summarise, the difference in the division of jurisdictions in ordinary law and constitutional law give a different role for ordinary judges and constitutional judges. In the latter case, it is possible – at least in the case of the European constitutional courts – to hand over content-related decision-making to the staff of the judges, and the ever newly elected constitutional judge can save himself/herself the hard work of becoming a true constitutional judge.

5. Development dynamics of the double legal system: alternative scenarios

In recent decades, more and more countries around the world have created constitutional adjudication by either establishing a separate constitutional court or rebuilding the Supreme Court based on the American pattern.[118] Constitutional adjudication on the U.S. model leads, in the first place, to a doubling of the law, but it can only slowly become a political machinery that is able to compete with democracy. However, as the events of the 1960s in the United States have shown, the decade-long aspirations of social groups that at the level of the masses of democratic struggle have the weaker position but otherwise enormous resources, can also lead to this form of constitutional adjudication for the creation of a competitive political centre. However, if a separate constitutional court is created and most constitutional judges come from the ranks of law professors and lawyers, an immediate doubling of the political arena will be likely. This political role is somewhat limited if such a constitutional court, in addition to its wide-ranging powers in the field of annulment of the law, must also review the final court decisions. This latter workload usually means thousands of constitutional complaints per year, and thus the constitutional judges have less time to control the legislation. This was recognised in Russia by the dominant political forces during the restructuring of the Russian Constitutional Court in 1992; as the constitutional judges had previously been the most involved in power struggles, the restructuring shifted its activities to the review of final judgments of ordinary courts, and by this new workload, the political ambitions of the constitutional court judges was quickly erased.[119] In fact, this may also have played a role in Hungary in the reorganisation of the constitutional court of 2012; the court had previously exercised a very active political role, and since the reorganisation in 2012, its main task has been to review ordinary court decisions.

The next question to be clarified is that if constitutional adjudication has already been drawn into the internal processes of applying the law by reviewing ordinary court decisions, then what components decide the speed and the level of expansion of the doubling of traditional legal layers (textual layer, dogmatics, case law) that takes place in the new area of constitutional law.

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[118] While there were only three functioning constitutional courts in Europe at the end of the 1970s – in Germany, Italy and Austria –, the Spanish and Portuguese constitutional courts first emerged at that time, and then in 1989, with the collapse of the Soviet empire, in almost all independent states of that part of Europe the constitutional adjudication was set up.

[119] For a detailed description of this process and the new role of the Constitutional Court in Russia or the battles between the Constitutional Court and the Supreme Court, see William Burnham and Alexei Trochev, 'Russia's War between Courts: The Struggle over the Jurisdictional Boundaries between the Constitutional Court and Regular Courts', The American Comparative Law 55, no 3 (2007), 381–452.

In addition to the constitutional text layer, a constitutional case law is always created, since this is also produced by the decision-making of the constitutional judges when reviewing the judgments of ordinary courts. However, the extent to which this case law outweighs the importance of the constitutional greatly differs among individual constitutional courts. In analysing the decision-making style of the European constitutional courts in an earlier study, I found that the strong suppression of the constitutional text in favour of previous judgments of the constitutional court is not only present in Hungary, but this practice can also be observed in case of the Spanish and Lithuanian constitutional courts. On the other hand, this practice could not be observed in the case of the Slovenian, Croatian and Romanian constitutional courts where the constitutional judges base their arguments on the constitutional text. When it comes to Poland and the Czech Republic, they do resort more strongly to case-law, but not as much as in the case of Hungary, Spain or Lithuania.[120] In Hungary, this style was created by the constitutional judges of the first cycle of the constitutional court, which began in 1990, and, in my experience, once established, it is almost impossible to change it and put the emphasis back on the constitutional text. Probably similar coincidences – such as the charismatic role of the first president of the Hungarian Constitutional Court, the ambitions of the then majority of constitutional judges to seek greater control over politics and law, and so on – caused such a prominent role of constitutional adjudication in the two other countries besides Hungary, by which the constitutional text was pushed into the background.

In contrast to the coincidences in relation to the strong priority of their own constitutional arguments over the constitutional text, a constitutional dogmatics over the traditional dogmatics does not seem to have been created by chance. In this regard, it depends on whether the majority of constitutional judges come from the ranks of university professors and the highest ordinary judges or, on the contrary, former lawyers play a more important role here. It can be stated that in the latter case, constitutional dogmatics will have less weight in the legal system of the respective country and the doubling force of the entire constitutional law gains less weight than the three-layer structure of traditional law. Conversely, if the majority of the constitutional court in a country is controlled by the law professors and highest judges who possess a high degree of ambition and experience in the field of legal doctrinal thinking, then in addition to their constitutional case law, a constitutional dogmatics is quickly established and thereby a higher doubling of the legal system can be achieved.

6. Is it possible to consolidate a politically neutral constitutional dogmatics?

Niklas Luhmann analysed the specific function of the constitution and its evolutionary achievements, and found that the emergence of the constitution at the end of the 18th century brought to light certain issues that had hitherto been hidden from political debate; namely, certain fundamental questions regarding power, as well as certain social problems.[121] In this way, these elementary social and power issues could be the subject of political struggles. Indeed, although in some political and philosophical writings Aristotle's alternatives for forms of government were discussed in the earlier centuries (democracy, aristocracy, and so on), these discussions remained the internal affairs of a few dozen philosophers and intellectuals, and had no effect on the political life of the countries. What changed this was the spread of Rousseau's social contract idea among the intellectual groups during the Enlightenment. Based on this idea, intellectual circles began to demand that the foundations of society and the state should be

[120] Pokol, 'Alkotmánybírósági döntési stílusok', 127–129.

[121] See Niklas Luhmann,'Verfassung als evolutionäre Errungenschaft', Rechtshistorisches Journal 9 (1990), 176–220.

discussed and laid down in writing in the contract concluded by the citizens. First, the American settlers who fought for their independence formed the first constitution on this basis. Then, as of 1789, in the course of their internal struggles, the French revolutionaries discussed dozens of drafts of constitutional laws, thereby exemplifying that the decision regarding basic power issues could also be a part of political struggle. In the meantime, political democracies have emerged that are based on competing parties and their changing governmental powers, and they have managed to survive, even if a number of fundamental social questions are constantly under discussion among the political public and these discussions permanently divide society into different divisions. However, on the most fundamental constitutional issues, there is usually a very high threshold for constitutional change in each country, and this keeps such debates in small intellectual circles, far from the general public. Without a revolution, a constitutional change is sometimes practically impossible, but even in countries where constitutional changes are easier, it may occasionally take decades to achieve the majority required for constitutional changes. In principle, the creation of constitutions has opened up the possibility to discuss and shape the most fundamental questions of society, but it is largely made illusory by the high threshold for changes. This is, of course, advantageous in that the too frequent changes in the foundations of society and power can lead to chaos. On the other hand, the unattainable level of change can lead to the radicalisation of elites aspiring for this change.

It is against this background that the possibility opened by constitutional adjudication for changing the solutions for fundamental social problems can be understood. Namely, the abstract normative nature of constitutional provisions, declarations and constitutional principles, which are largely normatively empty, gives constitutional judges great freedom to determine the specific meaning of the constitution. It means that the majority of constitutional judges can also bring about a change in the actual content of the constitution. In this way, it really becomes possible to have political debates about the fundamental questions of society and the structure of power. To achieve this, it is no longer necessary to wait for the power to change the constitution – an option brought to unattainable heights –, it is enough to replace some constitutional judges to get a new majority of the constitutional court. This makes it a realistic goal for the intellectual background of each elite group to discuss constitutional solutions, and to consider alternatives that are beneficial to the social group they focus on.

The intellectual arena surrounding constitutional adjudication is, therefore, inevitably involved in the struggles of political debates, which are wrapped in constitutional clothing. This also applies to the development of constitutional dogmatics. Logical coherence is important here, just like in the case of the legal dogmatics of simple legal branches of law. Here, however, the dominance of logical coherence is suppressed by the great importance of dogmatic content for the fundamental questions of society, as well as by the normative openness of constitutional provisions. In the alternative solutions of constitutional dogmatics, logical coherence is actually only a secondary issue. It must be noted that this is only one of the differences between constitutional dogmatics and the legal dogmatics of various legal branches that exist alongside ordinary law. This is due to the fact that the debate on possible alternatives of legal dogmatics (in criminal law, private law, and so on) has developed a separate legal policy area; these with debates take place after the creation of dogmatical legal studies by the law professors and their publication in legal journals, and the alternatives of legal dogmatics are politically transformed before their use in legislation. Sections of judicial associations and bar associations also discuss the political implications of the various de lege ferenda proposals that were made by legal professors who are involved in the intellectual debate in public life at their annual meetings, and the lawyer-politicians of each major party also observe these discussions. So the parties have information about the liberal or conservative consequences of the dogmatic alternatives that are already in the pre-parliamentary area.

The legal dogmatics of conventional branches of law thus have a mediating sphere through the development of a legal-political arena; through this filter the parties of the prevailing parliamentary majority bring those alternatives that are close to them into the legislation, and the new legal regulations are build on them. However, due to the structural relationships of constitutional adjudication, the influence of the external group of legal professors on the formation of constitutional dogmatics is minimal. What is largely missing in constitutional adjudication is the difference between the competence of external law professors and members of parliament who vote in a question of law in traditional legislation. As a rule, the constitutional judge can develop him/herself the dogmatic formulas and their coherence for each case group. Or at least there are always one or two influential constitutional judges on the panel who do this. The dogmatic clarification of normatively open constitutional principles and declarations is therefore largely the responsibility of the constitutional court with only minimal external influence by the law professors. A change in applied constitutional dogmatics can only be achieved by changing the majority of the body of the constitutional judges, and this is brought about when the constitutional judges who are elected by the new parliamentary majority take decisions based on criteria that differ from those of their predecessors. Then the new majority can remove the earlier distinctions and formulas of constitutional dogmatics and it can begin to gradually create a new constitutional dogmatics by filling in open constitutional principles and declarations with differing standards.

With regards to the relationship between constitutional dogmatics and the traditional dogmatics of the legal branches, a distinction must be made between two types of constitutional adjudication; one is that of the separate constitutional courts while the other one is based on the American model, where it is carried out by the ordinary supreme courts. In the latter case, judges with decades of experience in traditional justice also perform the function of constitutional adjudication, so that constitutional provisions, principles and declarations that have been added to legal law, even if they are abstract, remain united with traditional law and, in this way, the traditional legal system does not become that much doubled. Likewise, constitutional dogmatics based on new, more abstract constitutional provisions remains more closely integrated within the framework of traditional legal thinking. Within this framework, traditional dogmatic concepts themselves are, of course, more politicised, because of a broader interpretation of open constitutional principles and declarations. This politicisation, makes clearer the proximity of individual dogmatic alternatives to one or the other world of political values. The price of a more uniform legal system is, therefore, that the entire legal system is more strongly politicised, while in the case of a separate constitutional court a politically neutral legal dogmatics of the traditional legislative branches of law remains largely unaffected alongside a thoroughly politicised constitutional dogmatics.

Indeed, it is the constitutional court, separate from the ordinary courts, that opens the way for a more complete duplication of the legal system. In particular, if the positions of constitutional judges are filled by legal professors, this is increased, and this is usually the case with separate constitutional courts. In these cases, the role of the political value accents of the individual constitutional judges and their direct effect on the interpretation of constitutional provisions, principles and declarations is more pronounced. In addition, constitutional judges often extend their power of changing the legislative standards, and, on the other hand, there are always legal professors in traditional branches of law who move away from their humble, dogmatic role in legislative law and turn to constitutional criminal law, constitutional private law, and so on. In this way, these university professors can formulate their dogmatic proposals no longer as modest de lege ferenda alternatives, but as hierarchically higher, mandatory constitutional demands. There are already examples of this in Hungary. However, this has been mostly observed among the Germans since the 1980s. In the field of criminal law, for example, Claus Roxin's initiatives have increasingly started to view the freedom of legislation in criminal law

regulation as limited by 'constitutional criminal law', and the focus shifted from traditional criminal law onto the constitutional barriers of state power. These restrictions are set by the professors of criminal law themselves, and so they are actually trying to scrutinise legislation instead of making the earlier, more humble proposals. For this to succeed, it is, of course, a prerequisite to have a majority within the constitutional court that is open to the demands of constitutional criminal law prepared according to the political premises dictated from outside. In addition, there is also at least one German professor of criminal law who states that if the majority of German constitutional judges do not want to follow them, it is possible that the ordinary judges themselves will push aside the limitations of traditional criminal dogmatics and practice interpretations derived from constitutional criminal law. [122]

The answer to the question in the title – is it possible to consolidate a politically neutral constitutional dogmatics? – is, therefore, that although in principle it cannot be ruled out that a more consolidated and politically neutral constitutional dogmatics with conceptual formulas and arguments will be created with regard to constitutional adjudication in individual countries and within certain legal areas, it does require a number of lucky coincidences that have been outlined in this chapter. In my opinion, however, the emergence of such a neutral constitutional dogmatics is not likely today, and it is not worth assuming such in these investigations.

[122] He is professor Bernd Schünemann and he wrote on the job of a judge: „Indem sie gegenüber dem bloßen Wortlaut des Gesetzes eine allgemeinere Dimonsion erschließt und damit die Grundprinzipien des Strafrechts für die Interpretation fruchtbar macht, bildet sie den "Fluchtpunkt" und bringt den liberalen Grundgedanken, der eine verfassungsrechtliche Dimension represäntiert, unmittelbar in die Gesetzesauslegung ein, ohne sogleich mit der Kalamität belastet zu sein, die Verfassungswidrigkeit einer Entscheidung des Gesetzgebers begründen zu müssen." Bernd Schünemann, 'Das Rechtsgüterschutzprinzip als Fluchtpunkt der verfassungsrechtlichen Grenzen der Straftatbestände und ihrer Interpretation', in Die Rechtsgutstheorie. Legitimationsbasis des Strafrechts oder dogmatische Glasperlenspiel? Ed. by Roland Hefendehl, Andrew Hirsch and Wolfgang Wohlers (Baden-Baden: Nomos, 2003), 255–260. p.

Chapter 6.
Some questions of constitutional law

Constitutional law was formerly known in Europe as a branch of law under the name of 'state law', and it was renamed 'constitutional law' only in recent decades when the constitution was expanded to include fundamental rights. With the introduction of constitutional adjudication, constitutional law has changed from a simple branch of law to a new layer of the whole legal system, and then, through expansive constitutional adjudication, the traditional legal system became gradually doubled by an extended constitutional law in many countries. The three-tier nature of traditional law (legal text, dogmatics and supreme judicial case law) and the various branches of law have also largely developed in this doubled legal area. Without a constitutional case law interpreting and concretising abstract constitutional formulas, the constitutional text with its solemn declarations and constitutional principles had no real legal effect in everyday life and in parliamentary debates. Furthermore, this escalating case law could not have existed without the gradual creation of a conceptual constitutional dogmatics. In addition to traditional law and its branches, it is therefore advisable to conceptualise this doubled legal part as constitutional law, and to separate it from the traditional law and its branches. In order to avoid confusion with the names, it is advisable to consider the use of the earlier continental European name for the latter, namely state law or law of state power.

In view of the doubling of traditional law by the expanded constitutional level of law, all questions and dilemmas have arisen in the new area that have been examined there in the past one and a half centuries. It is, therefore, worthwhile, at least sketchily, to consider which types of modification these questions went through in the expanded constitutional level of law. It seems technically sensible to first address the frequently occurring general problems and then to deal with the specific questions of constitutional adjudication and the constitutional level of law in Hungary.

1. General questions of constitutional law

In order to ensure systematicity, I will carry out the analysis of the emerging problems just indicated by taking into account the internal layers of constitutional law. First I will deal with the questions of the constitutional text, then with the level of constitutional case law and finally with the questions of constitutional dogmatics.

1.1. The layer of the constitutional text

One of the first questions about the constitutional text layer is who can dispose of it and to what extent this disposition is separate from that of simple legislation. The main rule in this area is that this constitutional power is subject to a higher level of consensus among citizens either within the legislature or through the establishment of a separate constitutional convention. As a result, legislation is usually tied to a simple majority of the MPs (with the criterion that half of all the MPs must be present, or even the third in some countries), while a qualified majority is required to amend the constitution or create a new one. This larger form of consensus can also be to tie the adoption of the constitution to a referendum or even to have the draft constitution discussed by a separate constitutional convention prior to the referendum, who would then compile the document submitted to the referendum. It is also possible that only the adoption of the new constitution as a whole requires approval of a direct referendum, but for the constitution to be amended, it is sufficient to have a qualified majority of the votes in parliament. However, it is often the case that the legislative parliament itself adopts a completely new constitution with a higher proportion of votes, which is enough to change it. One version of this is that in a bicameral parliament, the two chambers together must have a majority or a share of two thirds, as is the case with the Germans, where the Bundestag and Bundesrat sit together.

Another subquestion of the disposition over the constitutional text is the size of the majority required in parliament to amend the constitutional court act, since the meaning of the constitutional text is ultimately determined by the majority of constitutional judges. So if the number of constitutional judges is not set in the constitution itself – and this is the general rule –, they can be increased or decreased by amending the constitutional court act; furthermore, the framework for interpreting the constitution within the constitutional court without changing the constitutional text itself can also be changed by the modification of the rules of constitutional court procedure. The difference between the Polish and Hungarian regulations is an example of the above difference: while in Hungary a two-thirds majority of all MPs is required to change both the Constitution and the Constitutional Court Act, the two-thirds majority in Poland is only needed for constitutional amendment, but a simple legislative majority is sufficient to amend the Constitutional Court Act. Since the majority government also only needs this much, the incumbent new government, even if it does not have access to the constitution, it does have access to the constitutional court law, and it follows that in this way it can prevent the formation of an opposing political centre of the parliamentary opposition behind the majority of the constitutional court.

The role of the constitutional court and the interference of constitutional judges in politics (or, on the contrary, refraining from interfering in the political struggles) is largely determined by how the positions of constitutional judges are filled in a country. In any case, it is up to the leaders of the dominant political forces to decide, but there are different ways to do it in different countries. This is primarily decided by the parliamentary majority, but it is important whether it can be carried out with a simple majority in parliament or with a qualified majority with an increased share of the votes. As a rule, the majority of the parliament is not sufficient for this and at least one of the opposition parties must be involved, and, therefore, several political value accents play a role in the functioning of constitutional adjudication. Even if the majority of parliament is enough to appoint the constitutional judges, the appointment has yet to be confirmed by the head of state in some countries. This way, if the head of state comes from another political camp, a politically multi-coloured constitutional court will be likely. All of these versions are important primarily in view of the extent to which another centre of political power is being built in addition to the majority parliamentary government. This additional centre of political power is based on decisions of the constitutional court and is built by part of the opposition behind it. The short-term majority government and the long cycles of constitutional judges (for 9–12 years or even for lifetime in some countries) tend to bring about

the constitutional court's developing into an independent centre of power under certain circumstances.

The strength or fading of this political role is also determined by the direction in which the activities of a particular constitutional court unfold in a country. If the ordinary judicial decisions cannot be challenged before the constitutional court and the constitutional judges exercise most of their right to exercise control over the legislation, then the decisions of the constitutional court have a greater influence on politics, but only a relatively minor influence within the legal system. In this arrangement, this activity becomes more of a second arena for political struggle, and on the basis of abstract constitutional principles, a second form of organisation for political struggle against the parliamentary majority government can be established by constitutional adjudication. If, however, the final judgments of ordinary courts can be challenged before the constitutional judges by the constitutional complaints of the citizens, the hundreds or thousands of such constitutional complaints per year allow constitutional decisions only a minor influence in the area of political struggle. In this way, the impact of the decisions tends to shift to the doubling of the legal system. Sometimes this enormous workload gets constitutional judges to the point that while they have the power to control the legislation extensively, they do not have enough time to deal with this politically more important activity. This in turn leads to a greater influence of constitutional decisions within the legal system to the detriment of political role play.

In this context, it is important which legal profession the constitutional judges come from. If the majority of constitutional judges consist of law professors on a regular basis, this leads to a more complete doubling of the law and, in addition to the legal dogmatics of the traditional branches of law, an autonomous constitutional dogmatics is brought about to a greater extent. Conversely, this possibility is reduced if many of them formerly had a legal practice. The constitutional judges with a background of law professorship articulate their arguments rather conceptually and thus gradually create a constitutional conceptual dogmatics over traditional dogmatics. However, it is also possible that constitutional conceptual arguments will be elaborated not so much at the level of the constitutional judges, but at the universities where some professors will transform these arguments into constitutional dogmatics in order to combat established traditional dogmatics.

What has been said so far has only been a set of introductory questions concerning the constitutional text, and if one turns to the internal questions of content, the question arises to what extent the constitutional text consists of precise rules or mostly only solemn constitutional declarations and normatively open constitutional principles. In addition, there is the question whether each fundamental right only offers guarantees for a narrower sector – for example, freedom of the press, freedom of assembly, freedom of religion and so on – or there are completely open normative formulas in the field of fundamental rights that can apply to everything, and, in fact, only the constitutional judges give normative content to the normatively empty fundamental rights with their decisions. (For example, the command of 'inviolability of human dignity' or the 'rule of law' may be mentioned.) If the constitutional text is largely filled with precise rules, the constitutional judges have only a modest political weight due to their interpretation. However, when much of the constitutional text consists of solemn declarations, principles and generally open fundamental rights, the definition of the meaning of the constitution actually passes to the constitutional judges and they use their decisions to explain what the country's constitution is.

Another important question of the constitutional text layer is how much freedom this text allows the constitutional judge to interpret or, on the contrary, whether it contains interpretation rules that aim to force these judges in a certain direction. In this regard, it can be said that there are relatively few constitutions that bind constitutional judges closely to interpretation rules. This is probably only because constitutional adjudication itself has only become idespread in

the past few decades, and, therefore, its dangers were not recognised when it was introduced. However, in some constitutional texts that are easier to change or in newly created constitutions, there are such interpretative rules in some places, as in the new constitution of Hungary.

1.2. The layer of constitutional precedents

One of the preliminary questions of constitutional case law concerns the circumstances under which constitutional judges make these precedent decisions and how they relate to them in subsequent decisions. Among these, it is important to mention that, in contrast to the fragmented legal system and the specialised judicial system in Continental European countries since the 19th century, constitutional adjudication, which was transferred from the USA to Europe, means a non-specialised general jurisdiction. As in general, the courts in the United States are generalist in nature and do not specialise in specific areas of law. As a result, unlike in the United States, in Europe only specialised lawyers can become constitutional judges, and no matter how famous a professor may have been before his election, this only gives him decision-making authority in a narrow area of law. Thus, the incumbent European constitutional judge is inevitably only an inexperienced beginner, although he/she has to make decisions on an equal footing with the other judges within the college of judges the next day. In this way, he/she still has a task ahead of him to metamorphose from a specialised legal professor, or from a lawyer or ordinary judge, into a generalist constitutional judge in order to actually be able to take part in the decision-making process.

In addition, unlike the top U.S. judges who mainly deal with constitutional adjudication, the European constitutional courts have developed a system of permanent staff to prepare or analyse court drafts, and the members of this experienced staff always await the newly elected constitutional judges. [123] These employees have already accumulated many years of experience in the field of generalist constitutional adjudication. The aforementioned shortage of newly elected constitutional judges is thus supplemented by the fact that the receiving permanent staff can easily carry out the work of the constitutional judge. As a result, it is natural for the new constitutional judge to be patronised by his/her staff in the first few months and to only act as a postman of his/her staff's positions and opinions in plenary sessions, unless the cases fall within the narrower branch of law that he/she is familiar with and would otherwise be dealing with. However, this can only have a 10 to 15 per cent chance in relation to the full repertoire of constitutional court decisions, but even less in the case of a legal historian or a specialist in a peripheral branch of law.

Under these two circumstances, the new constitutional judges must themselves decide right upon filling the position how they should proceed and what kind of role they want to have as constitutional judges. The newly elected constitutional judge, depending on his/her age (a new constitutional judge is usually around the age of 50 to 60 years) and his/her personality, can decide that he/she will rely on his/her staff forever and that he/she will only represent their opinions in matters beyond his/her own narrow legal sphere in plenary meetings. Occasionally

[123] It has been common in the United States since the early 20th century that Supreme Court judges hired three or four law school students from renowned universities as law clerks with a one-year contract. This has changed in the European constitutional courts along the lines of the German model, by employing younger full-time judges or other lawyers instead of law students who, however, have extensive experience, not for a year but for a longer period. Then the new constitutional judges are received by these experienced academic staff and mostly trained for the constitutional tasks, and sometimes the new constitutional judges' decision-making work is also carried out by these employees for a longer period of time. For the German practice in this area, see Uwe Kranenpohl, Hinter dem Schleier des Beratungsgeheimnisses: Der Willensbildungs- und Entscheidungsprozess des Bundesverfassungsgerichts (Berlin: VS Verlag für Sozialwissenschaften, 2010), 106–108.

this attitude can change when there are cases in which he/she has not been given a firm position by his/her staff, or simply agrees with the views of other constitutional judges, and he/she agrees to side with them. Such connections can lead to the permanent formation of small voting groups with one opinion leader and two or three constitutional judges following him/her within the plenary session.

The exact opposite of this behaviour is when after his/her election as a constitutional judge, a formerly specialist lawyer works hard for a few months or even a year or two to become a generalist constitutional judge, depending on how narrow his/her area was before. This means that for the most part, he/she only involves his/her employees in drafting the draft decisions as rapporteurs, but he/she analyses drafts created by other colleagues him/herself, regardless of how far away these drafts are from the special legal area that he/she was originally familiar with. In my experience, this growth into the role of generalist constitutional judge can largely be achieved in one year and then improved in another year. It has to be added that after a number of years this work becomes gradually easier for the constitutional judge, and preparation is reduced from a week's hard work to a day or two, and the result will even be of a much higher quality.

Apart from these completely different role concepts (let us call them sovereign versus opinion transmitting roles of constitutional judges), a frequently adopted role concept that is somewhere in the middle of these opposites is that a new constitutional judge who specialises in a narrow legal area expands the scope of the narrow legal area with some other legal areas, where he/she wants to shape his/her positions him/herself, leaving only the rest to his/her employees. Since the above-mentioned circumstances exist in all European constitutional courts, albeit in different ways, this is a general tableau of role-taking in the decision-making body of constitutional courts, which consists of different constitutional judicial roles. Based on my own experience and information, I estimate that of the 40 Hungarian constitutional judges during the last decades so far, around 12 to 15 were sovereign, 16 to 18 were constitutional judges with partially expanded competence in other areas, and 8 to 10 were mainly opinion transmitters for their employees, and if the employees had no firm positions, they were merely opinion supporters of other constitutional judges. Providing a typology of the role of constitutional judges in the decision-making process, we can talk about the roles of opinion sovereignty, partial opinion sovereignty, and the opinion transmitter and opinion supporter roles in the respective constitutional courts.

It follows that the constitutional court in each country is composed of constitutional judges who play completely different roles, which has important implications for the creation of precedent decisions and their subsequent fate. Crucial to precedent decisions is the long-established thesis that employees are less autonomous than the elected judges, and therefore, when the actual weight of the decision is shifted to them, they tend to stick to pre-established precedents and rethinking them is largely excluded.[124] Experience in Hungary also shows that even after the constitutional text has changed significantly since the old precedents had been set, the majority of the judges and the staff (with its 45 members) behind it can only be made to yield and give up their opinion set out in the old precedents by a major argumentative struggle. Taking this and some other contextual factors into consideration, this can lead to a decision-making shifting from written constitutional provisions to permanently established precedents, the latter forming a kind of pseudo-constitution that suppresses the written

[124] See the observation by the American judge Richard Posner: „But that is what one expects … if most judicial opinions are written largely by law clerks (as they are), who are inveterate legalists because they lack the experience, confidence or "voice" to write a legislative opinion of the kind that judges like Holmes, Cardozo, Hand, Jackson, Traynor, or Friendly wrote. (The delegation of judicial opinion writing to law clerks may explain the decline in the number of judges whom anyone would be inclined to call "great." Richard A Posner, 'Realism about Judges', Northwestern University Law Review 105, no 2 (2011), 583.

constitution itself. [125] In this situation, the endeavours of a newly elected constitutional judge to restore the status of the written constitution are completely in vain, since he/she cannot influence his/her own staff, which he/she inherited from his/her predecessor, to side with him/her against the power of the above mentioned pseudo-constitution. And even if he/she succeeds in doing so, his/her own drafts will not receive majority support, just because they diverge from the precedents, and it is practically impossible to get a majority. If such a new and determined constitutional judge wants to change the argumentation formulas of established precedents in a plenary session in case of other people's drafts, it will feel like running head first into a wall, meeting with the reaction 'we do not use this formula!'. Another consequence of the different roles of the constitutional judges for the plenary debate is that because only a part of the judges have actual responsibility for their opinions and positions, and the judges with the opinion transmitter role are only formally involved in the debate, real discussions only rarely take place. [126] In this way, the precedents that have been established do remain unchanged.

These were, therefore, structural questions relating to the layer of precedents in the case of constitutional law. Next, the analysis focuses on internal, substantive questions. Such a substantive question is to what extent the decision-making styles developed by the individual constitutional courts have become textually true to the provisions of the constitutional text or whether they only consider the most general explanations of the constitution and use their openness to constantly develop new fundamental rights. In the latter case, essentially a new constitution is created instead of the original one. It is important to emphasise that it is not only the already established precedents that tend to become almost eternal and hardly changeable in the practice of the European constitutional courts, but this applies even more to the once established style of decision: for the simple reason that an overlying disposition of this style requires its conscious and critical understanding, and in the absence of this disposition, the decision style itself, as an invisible wall, stands in the way of change. The decision style itself cannot be summoned and criticised by a constitutional decision, because it behaves more like some invisible creeper that is simply there and represents a limit. In my experience, most new constitutional judges in Hungary – as is usually the case with European constitutional judges due to their legal knowledge of other areas – had not previously been systematically and critically concerned with constitutional decisions before they got their post, and so they could only adapt to the already established decision-making style without being able to see that there are alternative decision-making styles in comparison.

There are big differences in the decision-making styles of the European constitutional courts, and in an attempt to summarise them, it can be said that, on the one hand, there is a kind of decision-making style that deviates most freely from the constitutional text and that, in place of the constitution, draws up a new constitution from the general declarations and constitutional principles. This style of decision-making was developed by German constitutional judges from the late 1950s and was gradually adopted primarily by the Spanish, Lithuanian and Hungarian

[125] László Sólyom, the first President of the Hungarian Constitutional Court, proudly described this development as an 'invisible constitution', and in my experience, despite all statements to the contrary, it has remained uncontested within the Hungarian Constitutional Court.

[126] It should be noted that in Hungary and a number of European constitutional courts, the actual decision-making work of the constitutional judges is transferred to the permanent academic staff spontaneously, due to the above mentioned circumstances, and they act as quasi-substitute constitutional judges. However, in some countries this is done formally and some substitute constitutional judges have been officially appointed, most of whom make the actual decisions. This situation is characteristic primarily to the Turkish Constitutional Court, and to a lesser extent to Romanian constitutional judges, while in the case of the Croatians this is usually shown by the fact that the rapporteur constitutional judge's scientific staff can officially take part in the consultation of the constitutional court. This makes it possible for the new constitutional judges to remain inexperienced forever.

constitutional courts. In contrast, Croatian, Slovenian and Romanian constitutional judges are more bound by the constitutional text and its provisions.[127]

The next question is to what extent individual constitutional courts base their later decisions on their previous precedents, or rely primarily on written constitutional provisions. There is also a difference between individual constitutional courts when it comes to whether an increased focus on one's own case law goes hand in hand with constitutional provisions taking a back seat to reason or not. This would not be necessary, and, in addition to the numerous quotations from precedents, the parallel inclusion of constitutional provisions in the justification and in supplying a basis for decisions could, in principle, remain. In Hungarian practice, for example, it can be observed that the formal reference to the relevant constitutional provisions in the first part of the justification of a decision immediately removes those provisions and no longer actually includes them in the justification. In this way, the justification for the decision almost exclusively discusses the harmony or conflict of the audited legal provision with the case law and not with the actual constitutional provisions. In the justification, not more than a single sentence is generally mentioned stating whether a controversial legal provision is constitutional or unconstitutional, but a specific constitutional provision is almost never analysed to decide about a problem. The analysis of the decision-making style of the constitutional courts in countries around Hungary shows that if there is a decrease in the inclusion of the constitutional court's own jurisprudence, the references to the written constitutional provisions increase in parallel, and vice versa. In this way, the use of the provisions of the Constitution to justify the decisions of the Constitutional Court is stronger in Poland than in Hungary, but even stronger in the Czech Republic, and most spectacular in Slovenia. They analyse the wording of the most various provisions of their constitution if these become important with regard to the case. The Croatians, who are the least dependant on previous constitutional decisions, also distinguish themselves by primarily analysing the specific constitutional text to justify their decisions, but they do not achieve the same intensity in this regard as the Slovenians.

Regarding the inclusion of case law in the decision-making process in Central and Eastern Europe, a Hungarian–Polish–Czech–Slovenian–Croatian spectrum can be established in descending order, and the Romanian pattern can be placed before the Croatian in this spectrum. Precedent decisions are only cautiously mentioned by the Romanian constitutional judges and only those that were made relevant by the subject of the decision itself. Text quotations from case law are rare among them, and only a few important lines are included, but most of them contain only the essence of the old reasoning of the precedent. In my previous empirical decision analysis, I found very few chain-like quote in several repeating precedent decisions in the justifications of the decisions of the Romanian constitutional court, as is the general rule for the Lithuanian, Spanish and Hungarian constitutional decisions, for example.[128]

The alternative to overemphasising case law is generally the massive inclusion of specific constitutional provisions in the justification of decisions, and here, too, the Romanians are close to the Slovenians. Romanian constitutional judges almost always rely directly on the wording of constitutional provisions, and after being quoted verbatim, the text is interpreted and then compared directly with the meaning of the contested legal provisions. It can be said that the practice of the Romanian constitutional court does not differ formally from the legal justification of the ordinary courts in Hungary and it arises directly from the text of the relevant (constitutional) provision. In order to counter this immediately, the Hungarian constitutional court style, which follows the constitutional court style of the German constitutional judges,

[127] For more details, see Pokol, 'Alkotmánybírósági döntési stílusok', and András Téglási and Júlia T Kovács, 'Alkotmánybíráskodás visegrádi szomszédainknál: Áttekintés a cseh, a lengyel és a szlovák alkotmánybíróság kialakulásáról', Pro Bono Publico – Magyar Közigazgatás 3, no 1 (2015), 90–104.

[128] See Pokol, 'Alkotmánybírósági döntési stílusok', 122–124.

completely breaks through the limits of ordinary legal interpretation, and the actual argumentation no longer mentions the specific text of the constitution. In Hungary, precedent decisions and not actual constitutional provisions appear to be the basis for decisions.

1.3. The questions of constitutional dogmatics

Fundamental constitutional rights, which are hierarchically above simple laws and ordinances, originally protected citizens from the state and its legislation if their laws and ordinances were at times made in a way that violated the fundamental rights of citizens, just as human rights performed this function according to the ideas of the Enlightenment. The impact of fundamental rights on simple legal acts and their legal dogmatics began in the United States, back then the only place with constitutional adjudication. A particularly important event in this respect was the famous Lochner judgment of 1905, when the Federal Supreme Court annulled a new law in New York because the Court viewed it as a violation to the constitutional protection of property and the principle of freedom of contract. Here the state was one of the litigants against which private individuals should be protected. This indirect influence increased with the Germans in the 1950s when the chief labour court annulled an otherwise proper employment contract between two private individuals, based on the direct effect of the constitution and its status as a legal source above simple laws for the courts and citizens. Although the German constitutional judges weakened this in 1958 and a simple legal provision in private law relationships could no longer be overridden by a regular judge on the basis of a constitutional provision, an indirect influence of fundamental rights in private law was recognised. It has been determined that the openness of the provisions of the ordinary law applied should be interpreted in the light of constitutional principles and fundamental rights, and only if it complies with the relevant fundamental right will the judicial decision be constitutional. If there is no openness, and if the judge suspects that the legal rule applied is unconstitutional, the judge can stay his/her proceedings and ask the constitutional court to carry out a constitutional review, but he/she cannot push this aside him/herself.

With this turn, the indirect impact of fundamental rights and constitutional provisions on private law in Germany began, and this indirect application of fundamental rights between individuals was gradually adopted by the constitutional courts of several countries after their establishment. This indirect horizontal effect in relation to constitutional fundamental rights between private parties was accepted by the then existing Italian constitutional court, and this was later adopted by both the Spanish and Portuguese constitutional courts. In contrast, the Irish, where constitutional adjudication is exercised by ordinary chief judges, have accepted the direct effect. However, where the indirect effect of fundamental rights was formally adopted, it was later extended to such an extent that it actually coincided with the direct effect. As Mattias Kumm wrote in an article in 2006, a constitutional change in Germany that would from now on require direct application of fundamental constitutional rights would actually have no effect, since it actually exists today.[129]

The German constitutional judges used various formulas for the influence of constitutional law in private law, and these enabled the penetration of constitutional law into the individual legal branches of the legal system to different degrees. One of the formulas emphasises the impact of fundamental rights, which can penetrate here due to the open norms and principles of every legal regulation. Typically, such an extremely open right in private law is the principle of good faith, but there are principles in all areas of law that are open in nature and the fundamental rights can have an impact through them. Another formula has opened up the

[129] See Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', German Law Journal 7, no 4 (2006), 341–369.

possibility of intrusion even more, because it saw fundamental rights as an objective order of values that cannot be restricted, and therefore has a greater chance of being drawn anywhere. The broad concept of objective value can then generalise, beyond fundamental rights, every constitutional principle mentioned in the constitution and every institution protected under constitutional law and make them referrable as constitutional values against the provisions of simple laws, be it criminal or procedural law.

Another question to focus on is the following: what spurs on the constitutionalisation of the traditional branches of law? Comparative law analysis shows that this is not done in the same way in every country and in every legal area. For example, there was a great constitutionalisation in Germany in relation to criminal law and private law, while in Hungary it was more pronounced only for criminal law. In the area of labour law, in Germany there was a shift in this direction, and there was a great deal of debate in the United States about the constitutionalisation of labour law among law professors.

The constitutionalisation of a branch of law means a change in three directions. If, on the one hand, this happens at the level of the constitutional court of a particular country and the normative arguments of constitutional adjudication are the most important norms for a particular branch of law, this removes the free formability of the rules of this branch of law at the discretion of ordinary legislature. On the other hand, the decisions of the constitutional court regarding the generally defined legal norms of a particular branch of law can direct the judge's discretion, too, in certain directions. This second option is also possible in a way that not the constitutional judges themselves give this incentive to the ordinary courts, but some university professors in the individual branches of law themselves turn to constitutionalised argumentations, because they believe that this will serve their legal policy purpose better. This, in turn, represents the third strand of constitutionalisation in addition to constitutional adjudication's influence on the legislation and on judicial application. This aims at the legal dogmatics of a certain branch of law and instead of traditional dogmatics, this supplies legislature and judicial interpretation with such normative concepts, tests and standards that are derived from constitutional values. However, this voluntary constitutionalisation brought about by university professors (that is, the type without the force of constitutional judgments) depends on whether the composition of the judiciary in a particular country is likely to follow the directions of legislative amendment based on constitutional argumentation advocated by university professors. Without the support of the decision-making majority of the constitutional judges, it is not worthwhile for a university law professor to condemn the 'constitutionally blind', 'disobedient' judges with prophetic curses if they do not follow the constitutionalised interpretation suggestions of the professors. In that case it is worth finding another way and trying to rely on the political legislative process in order to be able to implement the desired changes in legal policy in a branch of law. As Ian Holloway writes about U.S. labour law, after its – according to him – failed path of constitutionalisation, since American society is structured in a way that it is more worth to devise the political legislative path to achieve the desired goals, it is necessary to move away from the unsuccessfully experimented path of constitutionalisation: „Rather, it will focus on whether the experience of other nations supports the argument that the constitutionalisation of labor law in the United States would be desirable – or whether there is something in the nature of American society which suggests that caution is advisable in viewing the Constitution as the preferred vehicle for normative change in labor law." [130] Such sincere self-disclosure is rarely found in the endeavours for constitutionalisation of traditional branches of law in different countries, but it is obviously one of the main driving forces. In addition, there are the internal ambitions of some constitutional judges who, if they could not influence their original legal branch as simple law professors, are trying at least now

[130] Ian Holloway, 'The Constitutionalization of Employment Rights: A Comparative View'. Berkeley Journal of Employment and Labor Law 14, no 1 (1993), 115.

to triumph with their views as constitutional judges. What does not go through the traditional path of political legislation, or is not achievable in a certain branch of law due to opposition from dominant professors of traditional dogmatics, can be achieved in the alternative way of constitutionalising this branch of law, at least if the majority of judges in the constitutional court can be trusted. In other words, what Ran Hirschl has already analysed in relation to the political tactics of the legislative majority – the strategy to hand over power to friendly chief judges as a final escape before the collapse of the parliamentary majority – can be used in other specific ways as a support for the analysis of constitutionalisation of certain branches of law.

2. Some questions concerning the layers of Hungarian constitutional law

Regarding the analysis of Hungarian constitutional law, I reverse the order of the former analysis, and after the layer of constitutional text I first outline the issues of constitutional dogmatics and then those of constitutional case law.

2.1. The characteristics of the text level of Hungarian constitutional law

Looking at the different parts of the text level of the Hungarian Constitution, which came into force in 2012, we need to differentiate, first of all, between the preamble entitled National Avowal [131] and the actual constitutional text and, on the other hand, between the first part of the actual text with sections entitled Foundation and Freedom and Responsibility – with the Foundation containing mostly a series of solemn declarations that are normally in the preamble, and the Freedom and Responsibility laying down the fundamental rights – and the more exact final part entitled State, which regulates the framework of the state and the main organs with more detailed standards. The preamble entitled National Avowal is hierarchically placed very high by the constitution itself, since Article R of the Foundation prescribes the interpretation of the entire constitution in accordance with the National Avowal. Thus, the normatively open declarations of the National Avowal increase the openness of the entire constitutional regulation and thereby expand the freedom of interpretation of the constitutional court. This freedom of interpretation is further increased by the fact that Article R also requires interpretation according to the achievements of the historical constitution, and because these achievements are nowhere defined, their determination is the future task of the constitutional judges themselves.

By limiting the present analysis to the structural features of the text level, it is sufficient to point out that the 26 declarations of the National Avowal focus largely on preserving national and Christian cultural heritage, concluding that: ‘We … are ready to found the order of our country upon the common endeavours of the nation’. This declaration, which puts limitations to individualism, is then supplemented by Article O of the Foundation with regard to the interpretation of fundamental rights, among other things. It states that: ‘Everyone shall be responsible for him- or herself, and shall be obliged to contribute to the performance of state and community tasks according to his or her abilities and possibilities.’

The constitutional text tries to defend itself and its amendments against the review of the Constitutional Court by expressly stipulating in Article 24 Paragraph (5) that such a review is only possible ‘in relation to the procedural requirements laid down in the Fundamental Law for

[131] Regarding the translation of the Hungarian Constitution of 2012, the official translation was used. Available at: https://bit.ly/39mOiul

its making and promulgation'. This provision was incorporated into the text of the constitution by the fourth amendment to the constitution, when the majority of constitutional judges expressed their willingness to comply with the demands of the little circle of domestic constitutional professors and to subject the constitutional amendments to their review. However, due to the loose connection to the constitutional text that has so far been developed in the decision-making style of the Hungarian constitutional court, it should be noted that previous experience does not guarantee complete protection for the constitution against interpretations in the direction of total control of amendments of the constitution in certain domestic and foreign policy constellations, since there is no overarching authority over the majority in the constitutional court and, in this way, the review by this court cannot be prevented. Even this restrictive provision may justify the review, insomuch as the constitution itself has explicitly approved the review in one respect. ('The Constitution itself has expressly empowered the Constitutional Court to review its amendments!') That a deviation from the express provisions of the constitution is not merely an imaginary proposition is also shown by the fact that although the fourth amendment of the constitution had ordered the repealing of the constitutional court's case law – created on the basis of the previous constitution –, the majority of the constitutional court did not follow this prohibition, and this case law is still used in the constitutional court decisions these days. Despite the express provision, the majority of the Constitutional Court made it possible – in decisions 22/2012 (V. 11.) and 13/20013 (VI. 17.) – to base itself on the previous decisions of the Constitutional Court, which were overturned by the Constitution.

The Hungarian constitutional text is one of the rare exceptions that dictate rules for their own interpretation, and this is due to the fact that the first majority of the Constitutional Court, which began its work in 1990, had deviated from the written constitution to the extent that it actually did not base its decisions on the constitutional text at all, but on their own previous decisions. Although this decision-making method had previously been adopted from the German constitutional judges, it was then further developed by their Hungarian colleagues to such an extent that it was sometimes portrayed in the relevant international literature as the most activist constitutional court in the world. [132]

The Hungarian constitution contains two interrelated articles referring to interpretation, Article R Paragraph (3) and Article 28. The former has already been mentioned, while the latter puts the teleological interpretation of the law at the first place of judicial interpretation and it also adds that the interpretation should be in accordance with the Constitution. It does not stop there, however, and further adds that: 'When interpreting the Fundamental Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good.' (Art. 28.) While the constitutional author intended to limit the judges to certain directions of interpretation (legislative purpose, constitution, common sense, moral and economic purpose), it is clear that in the final effect, the actual practice of interpreting the constitution and the simple laws by supreme courts and constitutional judges remains free. Obviously, less here would have been more.

The seventh amendment to the Hungarian constitution then put the arguments and points of view in the justification of the respective law in the first place with regard to the interpretation tied to the legal purpose. However, this provision was immediately relativised in the Reasoning for this seventh amendment by adding that in the interpretation 'the arguments stated in connection with the adoption of the legal regulation, the achievements of the historical constitution and the results of the theory of law may be further used' (Reasoning of Article 7).

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[132] See Stephen Gardbaum: „If Hungary's Constitutional Court was frequently viewed as the most activist in the world in the 1990s, that mantle passed to the South African court during the 2000s". Stephen Gardbaum, 'Are Strong Constitutional Courts Always a Good Thing for New Democracies?', Columbia Journal of Transnational Law 53 (2015), 297.

It, therefore, left it up to the courts and ultimately to the Constitutional Court to determine the hierarchy among the main types of interpretation of the law. As such, this openness of the constitution – due to the corresponding reasoning – does not require a mandatory departure from the previous practice of interpretation. However, if the Constitutional Court focuses on the amended constitutional text instead of its reasoning, it can put the points of view and arguments of the respective legal justification at the top of the hierarchy of legal interpretation.

It is certainly possible to say that Article 28 also indirectly applies to the interpretation of the law by authorities other than the courts, but the question is how the Constitutional Court itself is affected by Article 28. Is it affected just like ordinary courts? Or is it only compulsory for the constitutional judges when reviewing the constitutionality of a court decision and it is no longer the case with the other types of constitutional judicial proceedings (for example in the abstract norm control)? Or can they themselves revise judicial decisions based on the justification of the law to the effect that the justification of the law should be repealed due to a fundamental right? And if we first analyse this in detail, does the above mentioned analytical question arise how the rule in Article R Paragraph (3) of the Constitution applies to ordinary courts? While Article 28 requires that the law applied by the courts be interpreted in accordance with the Constitution, Article R Paragraph (3) states that this constitutional conformity will only exist if the entire Constitution is interpreted in conjunction with the National Avowal of the Preamble.

Another question is whether the complainants themselves can request a review of the judicial interpretation under Article 28, or this is only possible ex officio by the constitutional judges. The majority position in the Hungarian Constitutional Court has so far been that since Article 28 is included in the part of the Constitution on courts, it is natural that they are primarily the addressees of this article. In my opinion, however, this is not a correct legal-theoretical argument, because this provision imposes an obligation on the courts and, where there is an obligation, there must also be rights holders, and the scope of the beneficiaries is therefore wider than that of the group of persons liable for the obligation. Where there is a legal obligation, there are always opposing rights holders. Thus, if Article 28 of the Constitution prescribes a certain method of interpreting the law by the courts, all natural and legal persons are entitled in their own right to lodge an appeal against the court decision based on this provision of the Constitutional Court. In other words, I find it inappropriate that the majority of the Hungarian constitutional court reduces the scope of the addressees to the scope of the obliged, and, in this way, it prohibits the complainant from challenging the judicial interpretation of the law in this regard.

2.2. The beginnings of the dogmatics of constitutional law in Hungary

The duplication of each traditional branch of law as a constitutional branch of law requires a separate detailed analysis, so I will go into that in the next section. This discussion is only intended to provide a brief introductory overview.

2.2.1. Constitutional criminal law

The extension of traditional branches of law to constitutional guarantees first took place in Hungary in the case of criminal law, since criminologist András Szabó was one of the first constitutional judges to contend for the notion of constitutional criminal law, using a broad interpretation of the constitutional provisions with the criminal law guarantees. These

beginnings were then continued by some of the younger professors of criminal law and gradually a small circle of criminal law teachers formed around constitutional criminal law. The organisation of this circle was also made easier by the fact that among German criminal law professors, who had a major influence on Hungarian criminal lawyers, the focus was also on the idea of constitutional criminal law (one can mention the name of Claus Roxin, a well-known and often quoted figure in Hungary). The advocates of constitutional criminal law did not remain unrepresented among constitutional judges after the turn of the millennium, because the criminologist Miklós Lévay, as a constitutional judge, promoted further the theses both as rapporteur in his draft decisions and also in his dissenting opinions until the 2010s. In recent years, the shift of majority of the constitutional court in Hungary has led to the fact that the concept of constitutional criminal law was removed in the constitutional judicial decisions and is only used as a simple ensemble of criminal constitutional guarantees. It still has popularity, however, among professors of criminal law and analyses referring to constitutional criminal law have not decreased.

The extension of the criminal-law constitutional guarantees to the idea of constitutional criminal law was made by transforming the ultima ratio nature of criminal law in a constitutional requirement. In this way it is proclaimed as a constitutional order that an unlawful circumstance can only be punished under criminal law if the milder sanctioning system of the other branches of law is not sufficient and, if so, such a criminal law regulation is unconstitutional. This criminal law thesis as a constitutional order then appears as a restriction of the penal state power (in the USA 'police power'), and, on this basis, the constitutional court can in principle review and cancel all criminal law regulations that were not found to be compatible with the ultima ratio principle. However, since this principle is not present in the constitution of Hungary – and in general, in any constitution of the world, one can only elevate it to constitutional level by deriving it from a general constitutional principle, and this task is mostly solved by using the rule of law principle. Furthermore, since some principles of criminal law are listed in the constitutions as constitutional guarantees – such as, for example, the principles of nullum crimen sine lege and nulla poena sine lege, as well as the presumption of innocence –, by extending these and developing further aspects from these, they are not regarded as constitutional guarantees of criminal law anymore, but are treated as part of the entire constitutional criminal law.

There were opponents of this expansion within the field of criminal law in Hungary, such as Imre Wiener A, who feared that the autonomy of the dogmatics of criminal law would be compromised by constitutional criminal law. There were, furthermore, opponents from outside, who criticised this expansion as a reduction of the controlling power of the democratic parliamentary majority over criminal law.[133] If, through the interpretation of the constitutional court, the review of criminal law goes beyond the safeguarding of guarantees and all penal provisions are included that are not provided for in the constitution itself, then all criminal law will be removed from the control of the parliamentary majority government.

2.2.2. Constitutional private law

Private law was the other branch of law whose constitutionalisation began in Hungary around the millennium, together with the making of a constitutional private law. The first, rather striking sign of this was the volume entitled Alkotmányosság a magánjogban [Constitutionalism in private law] edited by András Sajó in 2006 with studies on certain parts

[133] See Imre Wiener A, Büntetendőség, büntethetőség. Büntetőjogi tanulmányok (Budapest: KJK, 2000), and Béla Pokol, 'A törvényhozás alkotmányossága', Világosság 34, no 1 (1993), 41–48.

of private law.[134] Another one was a monograph written by Fruzsina Gárdos-Orosz in 2011, which examined the decisions of the Hungarian Constitutional Court and the positions of Hungarian authors from a comparative legal point of view.[135] However, the new 2012 constitution, which came into force after the publication of these volumes, created a new situation with regard to the constitutionalisation of traditional branches of law because it introduced a procedure for challenging final court decisions with constitutional complaints. Since then, the Constitutional Court has revised hundreds of such court rulings and the constitutionalisation of the branches has continued on a larger scale, but its analysis has so far been lagging behind.[136] Likewise, András Téglási's doctoral dissertation completed in 2011, which deals with the constitutional fundamental right of property, is based on the previous situation, but in 2015 he expanded his analysis in view of the years that have passed since.[137]

In the period before 2012, Hungarian constitutional judges could only turn a normative requirement, derived from relevant constitutional fundamental rights and values, into a constitutional requirement for the individual branches of law during the control of a legislative process. With a view to preserving the autonomy of the ordinary courts vis-?-vis the constitutional judges, the Supreme Court insisted that these constitutional requirements only bind the legislation and that the judges are only subordinate to ordinary law. With this limited influence of the Constitutional Court, however, there have been shifts in Hungarian private law that have created tensions regarding the principles of traditional private law dogmatics. The principle of freedom of contract was thus opposed to the comprehensive concept of non-discrimination, which was also a prerequisite for Hungary's accession to the EU in 2004. In addition, the conflict of right to freedom of expression with property rights has created tension between tenants and landlords. In the same way, increased legal uncertainty was supposed to have been brought about by the discrepancy between fundamental rights and abstract norms of human rights disputes in Strasbourg on the one hand and more specific and precise rules of private law on the other. In the aforementioned volume from 2006, Barna Lenkovics writes about the growing international skepticism about human rights and the emergence of the criticism of 'human rightsism'.[138] It has to be highlighted that the British Brexit, which has now ended, was originally directed against human rights activism in Strasbourg, and this shows what tensions between human rights, fundamental rights jurisdiction and national legal systems – including the traditional dogmatics of private law –, can develop, and to what explosions these can lead.

Among the authors of the above mentioned studies there are both defenders of the constitutionalisation of private law and opponents, and also those whose position cannot be determined in this regard. László Székely criticises the followers of constitutionalisation as people who suffer from the disease of 'constitutional narrow-mindedness', and the lines quoted

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[134] See András Sajó, 'Előszó', in Alkotmányosság a magánjogban, ed. by András Sajó (Budapest: CompLex – Wolters Kluwer, 2006), 7–16.

[135] Fruzsina Gárdos-Orosz, Alkotmányos polgári jog? Az alapvető jogok alkalmazása a magánjogi jogvitákban (Budapest: Dialóg Campus, 2011).

[136] It may suffice here to point out my assumption in just a footnote that the lack of analysis may be due to the fact that the attitude of the political opposition to the new constitution aroused the expectation among Hungarian analysts that the entire new constitution would be cancelled after a change of government, so there is no reason to analyse it. This was further facilitated by the attitude of the majority of constitutional judges, whose constitutional decisions are largely based on the case law, which was based on the old constitution.

[137] András Téglási, A tulajdonhoz való jog alkotmányos védelme (PhD dissertation) (Szeged: SZTE ÁJK, 2011); András Téglási, 'Az alapjogok hatása a magánjogi viszonyokban az Alkotmánybíróság gyakorlatában az Alaptörvény hatálybalépését követő három évben – különös tekintettel a tulajdonhoz való jog alkotmányos védelmére', Jogtudományi Közlöny 70, no 3 (2015), 148–157.

[138] Barnabás Lenkovics, 'Polgári alanyi jogok – alkotmányos alapjogok', in Alkotmányosság a magánjogban, ed. by András Sajó (Budapest, CompLex – Wolters Kluwer, 2006), 107–130.

by Barna Lenkovics and Attila Menyhárd can also be put in this more critical camp.[139] In contrast, András Sajó's analysis and Fruzsina Gárdos-Orosz's monograph can be qualified as a defence of constitutionalisation.[140]

2.2.3. Constitutional labour law

Although there is a high number of Google search results for 'constitutional criminal law' or 'constitutional private law', this does little help for those who are looking for information concerning constitutionalisation in Hungary's labour law. One of the few search results in this area also indicates that this is not due to the poor effectiveness of the search engine, but that this topic does not appear in Hungarian labour law research beyond one serious analysis.[141] This one in-depth analysis, however, is worthwhile to look at, because this monograph very thoroughly examines the possibility of constitutional labour law and illustrates developments in this area in a comparative way. This monograph was written by György Kiss in 2010 and is entitled Alapjogok kollíziója a munkajogban [The conflict of fundamental rights in labour law]. Although his monograph was written before the new Constitution, this does not pose a problem, because the new constitution only legalised the practice of the Constitutional Court in this regard, and that could already be discussed in Kiss's analysis.

It can be seen that the constitutionalisation of labour law differs from that of private or criminal law. The interpretation of fundamental rights throughout the Western world is that they convey the combination of two liberal attitudes, individualism and the protection of minorities, in the direction of the traditional legal branches that are to be constitutionalised. Whether they were affected by the consequences of constitutionalisation depended on the direction these attitudes opposed with the individual traditional branches of law and their rules. In the traditional dogmatics of criminal law, the state's action against crime was conceptually recorded by this dogmatics, and this community criminal law was then confronted with a constitutionalised criminal law that focuses on the fundamental rights of individual offenders. In addition, in most Western countries, the majority of offences are committed by members of ethnic or religious minorities, and thus traditional criminal law is almost polarly opposed to constitutionalised criminal law, which emphasises minority protection. In private law, the confrontation between the traditional dogmatics of private law and constitutionalised private law is less sharp, since private law has been a bastion of individualistic view of law since the Roman legal traditions and, under the influence of German constitutional judges in continental Europe, the constitutional principles have largely been shaped by the principles of private law. Here only the minority-protecting aspects of fundamental rights are confronted with traditional private law, which, however, severely limits freedom of contract and property rights. Finally, if we look at traditional labour law, we can see that this was the result of the collective action of workers who were dependent on private power in permanent employment contracts in the early 20th century, and labour law was created against it. As a result, this new area of law was torn out of individualistic private law, and its peculiarity lies in the collectivity of employment contracts compared to the individualistic character of private law contracts. It is common for all workers to be dependent on the other contracting party, the employer, and therefore when

[139] Attila Menyhárd, 'Diszkrimináció és polgári jog', in Alkotmányosság a magánjogban, ed. by András Sajó (Budapest, CompLex – Wolters Kluwer, 2006), 131–146.

[140] Sajó, 'Előszó'.

[141] See Tünde Jónás, 'Véleménynyilvánítási szabadság a munkaviszonyban', Pécsi Munkajogi Közlemények 3, no 2 (2010), 23: „Unfortunately, the enforcement of fundamental rights in labour law has received little attention in Hungarian legal literature, and judicial practice cannot be described as rich either."

the collective organisational power of the unions disappears behind it, the subordinating power relations of the individualistic level will gradually prevail and the private legal basis, from which this branch of law once emerged, will be restored.

In contrast, the monograph by György Kiss deals with the entire question of fundamental rights and labour law on the basis of human dignity, which is the dominant paradigm of German private law, and Kiss thus renders private law individualism, the 'arch-enemy' of labour law, unproblematic from the perspective of fundamental rights. András Bragyova, who was the official opponent of this monograph when discussing it as a dissertation, argued that the author seems to reject the class-based concept of labour law. I would confirm that on the historical level, namely, that labour law was created and has been maintained until now in the midst of collective labour struggles, and when this collective organisation is replaced by the human dignity of the individual worker, it sounds nice, but labour law loses its foundation, which secured its separation from private law. In any case – at least in Hungary –, the constitutionalisation of labour law and thus its approach to individualism did not cause major confrontations to traditional labour law, but this topic can only be concluded after a broader and international comparative study.

2.2.4. Constitutional finance law

Compared to the previous Constitution, the new Constitution expanded the scope of regulated financial matters and, in addition to the large number of financial provisions, also prescribed the codification of detailed rules regarding the financial sector. In terms of the depth of its regulation, this area of law became equivalent to the traditional constitutional areas that have been raised to the highest constitutional level (government, courts, electoral system and so on). Thus, the traditional branch of finance law has been constitutionalised by the new Constitution itself, and therefore its situation differs from all the three branches of law previously discussed. For example, criminal law guarantees introduced at the level of constitutional law would not have required independent constitutional criminal law. It is created by some criminal law professors extending these guarantees based on the ultima ratio principle and the thesis of mandatory legal interest as general constitutional barriers to state criminal liability. But it is only claimed by a few criminal lawyers who want to stand up against traditional criminal law with their self-constructed constitutional criminal law. Likewise, in the case of private law, constitutional private law can only be presumed to appear above traditional private law if the role of fundamental rights is seen as valid not only in the vertical relationship between private individuals and the state – which is the original idea –, but also between private individuals. The introduction of property right – and the mandatory compensation for expropriation – as a constitutional guarantee would not yet result in constitutional private law, just as the order of equality before the law does not make it necessary. The constitutional prohibition of discrimination was only applicable in a narrow framework – with regard to fundamental rights, and certain permanent personal characteristics (gender, race, origin and so on) –, and it was only extended by the majority of Hungarian constitutional judges to all discriminations by the legislation, as a general prohibition of discrimination; furthermore, it came to be understood not only in the relationship between private individuals and the state, but also in the relationships between private individuals. In this way, constitutionalisation really penetrates the area of traditional private law regulation and it doubles the legal system, but it is more a result of legal policy efforts by the professors of private law rather than a result of constitutional regulation. In the case of labour law, the few constitutional provisions in Hungary that touch its foundations would also be only guarantees As I mentioned earlier, the constitutionalisation of

labour law was urged by a comprehensive monograph in this area which supported its privatisation with the help of giving horizontal effect to fundamental rights between private persons.

Contrary to these branches of law, the entirety of the foundations of financial law has been incorporated into the Constitution. However, at least with regard to the review conducted by the Constitutional Court, a temporary restrictions have also been imposed, namely, budget law and its constituent taxes and levies were excluded from the constitutional review over a certain state of government debt. Two Hungarian financial law professors can be highlighted who have regularly dealt with constitutional issues in the past: István Simon, who summarised the most important issues in this area in an analysis from 2019 [142] after several studies on this topic, and Dániel Deák, who, also after several studies, dealt with constitution and tax law in a comprehensive monograph. [143] Some introductory remarks suffice here, as they will be dealt with systematically in the next chapter when the questions of constitutional branches of law will be more fully at the centre of the analysis.

The approach of the two finance law professors appears to be fundamentally different, and while István Simon analyses specific constitutional provisions in the macroeconomic context required by the subject, Dániel Deák prefers the legal-philosophical aspects in the analysis, and as in the case of followers of constitutional criminal law, Deák deals primarily with the constitutional limits and imperatives of the state's tax power. Therefore, these two approaches must be carefully examined in the next chapter.

2.3. The layer of precedents of Hungarian constitutional law

As mentioned in the previous paragraphs concerning the issue of precedents in European countries, setting aside the practices of the Spanish and the Lithuanian constitutional judges, it is the judges of the Hungarian Constitutional Court that show the strongest tendency to take previous decisions to justify later decisions. This would require that the normative argumentation and decision formulas in individual decisions – which can often be qualified as supplements to the Constitution due to the style of decision-making, and which are anyway concretisations of the Constitution in effect for many years – should be emphasised in some way. In the decisions of the Czech Constitutional Court, for example, it can be observed that the chief normative argument in a given decision – which was reached by concretising the relevant constitutional provision in a given case (ratio decidendi) – is highlighted in bold and well separated after the operative part of the decision. Unfortunately, this is not the case in the decision-making practice in Hungary, although the first Hungarian constitutional judges tried to do so in the first year of their work. This stopped, and the reason for this is unknown, but its consequence is that the normative arguments in the constitutional decisions, which could not be justified on the basis of the constitutional provisions, remained more unnoticed. Due to this technique, the weight of such normative arguments that actually supplemented or even modified the constitution became clear only gradually. In this way, the decisions of the first constitutional majority, which were aimed at a 'self-made invisible constitution', rendered – seen from the present – this 'hiding' style of constitutional interpretation rational. However, this disguise has no function today, because the new majorities of the Constitutional Court have already refrained from further developing the invisible constitution. So it would be advisable to follow the practice of the Czech constitutional judges in this respect.

There is another reason that hinders the clear presentation of established normative arguments in the decision-making practice of the Constitutional Court in Hungary, and even pushes the

[142] István Simon, 'A magyar pénzügyi alkotmányjog átalakulása', MTA Law Working Papers no. 2 (2019).
[143] Dániel Deák, Alkotmány és adójog (Budapest: HVG-ORAC, 2016).

reasoning away from the purely normative decision-making formulas towards a deliberate vagueness of style. This is simply because individual constitutional judges (and sometimes the staff behind them) are against a given reasoning of a decision, but if that reasoning is not expressed, they are willing to vote on the draft decision in question. The judge-rapporteur therefore, who contends for the majority of votes, makes his/her draft with a vague decision justification by taking the edge off the controversial argument or decision formula, and only vaguely referring to the original argument. This search for compromise and thus the decrease in the comprehensibility of decisions can go so far that in the event of a declaration of unconstitutionality and the repeal of a law or a court decision, the actual constitutional provision that was basis for the unconstitutionality itself is missing from the operative main part of the decision, and is only included – and hidden at that, for the above mentioned reason – in the reasoning part. There has been a break with the latter in recent years, and it has been proclaimed that when the unconstitutionality is declared, it must always be stated which constitutional provision conflicts with the unconstitutional regulation, but ultimately, due to the inclinations to search for compromise, the vagueness still remains to this day.

All this undermines the transparency and effectiveness of Hungarian constitutional case law, although the extent to which decision-making is based on this is one of the greatest among the European constitutional courts. However, it is a positive development that the Constitutional Court recently welcomed the stronger emphasis on ratio decidendi after the panel debates, and this should lead to positive changes in the future.

Chapter 7
An alternative issue of doubling: constitutional law versus simple law

The longstanding constitutional adjudication in Germany has gradually created an opposition between constitutional law and the rest of the legal system as simple law. When the 1949 Basic Law of the Federal Republic of Germany was initially extended through fundamental rights to the entire legal system, but the Constitutional Court did not yet provide sufficient material for the interpretation of the Basic Law, jurisprudential studies first wrote about jeopardising the primacy of Basic Law by simple law. At that time, the focus of the discussion was on the mere formality of the primacy of Basic Law, insomuch as, instead of the upper level controlling the content of simple law, the content of simple law is brought up to the level of constitutional law. In the early 1960s, Walter Leisner was still concerned with the re lationship between constitutional law and simple law from this point of view, [144] but from after a time, since the increasingly expansive German constitutional judges have penetrated simple law through their decisions, more and more law professors have started to fear for German legal system of excessive constitutionalisation. [145]

As early as 1960, a constitutional court ruling used the expression 'special constitutional law', stating that judges in ordinary courts must not only take into account the norms of traditional law in their decisions, but also the norms of Basic Law as special constitutional law that apply to them. [146] However, since the individual fundamental rights ultimately extend to all areas of the legal system, 'special constitutional laws' mean that traditional legal areas are completely doubled. Instead of taking this phenomenon as a doubling of the law, the term 'simple right' has spread. This notion emphasises that the other branches of law are simple legislative laws, in contrast to constitutional law, which is based on a higher social consensus of qualified

[144] Walter Leisner, Von der Verfassungsmäßigkeit der Gesetze zur Gesetzmäßigkeit der Verfassung. Betrachtungen zur möglichen selbständigen Begrifflichkeit im Verfassungsrecht (Tübingen: J. C. B. Mohr, 1964).

[145] Walter Leisner, Von der Verfassungsmäßigkeit der Gesetze zur Gesetzmäßigkeit der Verfassung. Betrachtungen zur möglichen selbständigen Begrifflichkeit im Verfassungsrecht (Tübingen: J. C. B. Mohr, 1964).

[146] In the analysis by Hans-Jürgen Papier, the role of special constitutional law is as follows: "Spezifisches Verfassungsrecht ist demnach nicht schon dann verletzt, wenn eine Entscheidung, am einfachen Recht gemessen, objektív fehlerhaft ist; der Fehler muß gerade in der Nichtbeachtung von Grundrechten liegen." Hans-Jürgen Papier, 'Das Bundesverfassungsgericht als "Hüter der Grundrechte"', in Der Staat des Grundgesetzes – Kontinuität und Wandel, Festschrift für Peter Badura zum siebzigsten Geburtstag, ed. by Michael Brenner, Peter M Huber and Markus Möstl (Tübingen: Mohr Siebeck, 2004), 423. To be sure, the paper points out that the German constitutional judges, based on the Schumann formula, only consider the disregard of a fundamental right as a reason for accepting a constitutional complaint based on this if the court decision, as a result of this disregard, also violates the relevant fundamental right. Otherwise this judicial interpretation error is considered irrelevant. This should also be emphasized because in the practice of the Hungarian Constitutional Court a stricter standard was adopted and if a relevant fundamental right is not taken into account in a judicial decision, it alone justifies the annulment of this decision.

majority voting. This duality of legal system was therefore thematised as constitutional law versus simple law. The status of constitutional law, which was elevated from the level of a branch of law to the level of an entire legal system, was then systematically discussed at a conference on constitutional law in 2001 with the participation of renowned German legal theorists, and the conference contributions were published in a volume in 2002. This thematisation differs from mine in that I use other focal points and I compare and contrast the layers of traditional law and those of constitutional law. It therefore seems worth considering which aspects of the German thematisation could be used to expand my theory of the doubling of the law and its layers. In the following, I will first analyse the studies of two speakers at the German conference and then examine a volume by Matthias Ruffert from 2001 on this topic. In my further analysis, I am going to draw the lessons from these German writings with regard to my analysis on the doubling of law, and see what new aspects can the concept of multi-layered law contribute to the understanding of the doubling of the legal system.

1. The German concept of constitutional law versus simple law

Among the conference speakers, Robert Alexy and Philip Kunig spoke rather broadly about constitutional law versus ordinary law, so I will highlight them for analysis.

1.1. The position of Robert Alexy

Alexy begins his analysis with a warning from Hans Kelsen, who brought constitutional adjudication to Europe, from a lecture of his at a state law conference in 1928: a constitution must contain precise rules if a constitutional court is to be attached to it. According to Kelsen, care must be taken not to include abstract legal principles and values as well as open concepts in the constitution, since they pose a threat to democracy if they are coupled with a constitutional court.[147] Kelsen emphasised that by using vague and open concepts, constitutional judges can become a superpower that would be intolerable to society and democracy. Alexy then regrets that this early warning from Kelsen could not prevent the expansion of constitutional material in Germany.[148]

For the first time, this expansion happened through the Lüth decision of the German constitutional judges, when they, expressedly for the penetration of basic rights into private law and using Rudolf Smend's earlier theory, reinterpreted the basic rights as 'objective values' and 'cultural assets' of the entire cultural system. In this form, fundamental rights demanded an impact on the entire legal system, and the German constitutional judges made this public with the formula 'radiation of fundamental rights to all legal areas'. This reinterpretation then granted the extended fundamental rights, despite Kelsen's intention, increased constitutional

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[147] Robert Alexy, „Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit', in Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. Primär- und Sekundärrechtsschutz im Öffentlichen Recht (Berichte und Diskussionen auf der Tagung der Deutschen Staatsrechtslehrer in Würzburg vom 3. bis 6. Oktober 2001), ed. by Robert Alexy et al. (Berlin – New York: Walter de Gruyter, 2002), 8.: „So hat Hans Kelsen auf der Wiener Tagung unserer Vereinigung im Jahre 1928 sein Plädoyer für eine Verfassungsgericht nicht nur mit der Forderung verbunden, dass die Verfassung die vom Verfassungsgericht zu kontrollierenden materiellen "Grundsätze, Richtlinien, Schranken … so präzise wie möglich bestimmen" muss, sondern auch mit der Warnung vor einer "höchst gefährliche(n) Rolle", die "Werte" oder "Prinzipien" wie etwa "Freiheit" und "Gleichheit" "mangels einer näherer Bestimmung" "(g)erade im Bereich der Verfassungsgerichtsbarkeit" spielen können."

[148] Ibid. 9: „Warnungen wie diese haben nicht verhindern können, dass es unter dem Grundgesetz zu einer Expansion materieller Verfassungsgehalte kam."

power ('The Smendian idea is used in this way with Kelsen's teeth'), and thus gave the constitutional judges the possibility of arbitrary intervention in all legal fields. After the intervention, the constitutional judges were always given a free hand, as values in certain situations can only be weighed against other values – one suppresses the other –, and through this discretionary power, the constitutional judges became masters of the constitution, as Kelsen had foreseen. Alexy also points out that the formula of the Lüth decision on the radiation of fundamental rights was later supplemented, and the repertoire of constitutional adjudication was expanded with the protective function of fundamental rights, which, in addition to private law, made it possible to penetrate into all areas of law. Likewise, the arbitrary ability of the constitutional court to thus penetrate was exacerbated by the generalisation of 'equality before the law' to a general equality law combined with the requirement of proportionality, with the decision on proportionality always remaining in the hands of the constitutional judges. [149] In this way, going beyond the purely protective nature of fundamental rights, the laws of legislation could be examined as well as the decisions of the ordinary courts, and whether or not there is sufficient protection or proportionality to require positive action by the state; it is always the constitutional judges who can evaluate these, almost without restriction.

Alexy also notes that these extensions enable constitutional control of every state action and application of law – and that means the direct constitutionalisation of the system of law –, but beyond that, an indirect constitutionalisation has also taken place in Germany in the direction of the judiciary. The German constitutional judges interpreted the obligation of the judges to be bound by law and parliamentary acts, formulated in Article 20 Paragraph (3) of the Basic Law, in the sense that a judicial decision that contradicts a simple law or regulation also indirectly violates Basic Law and this also implies an unconstitutionality. In this way, the parties concerned can submit a constitutional complaint to the constitutional court because of an unconstitutionality. With this interpretation, the entire legal system was subjected to a constitutional review, either directly (radiation of fundamental rights, protective function of fundamental rights, opposition to disproportionality) or indirectly, in all areas of law.

Alexy then willingly lists the criticisms that has so far been expressed about this 'superconstitutionalisation', beginning with the 'tyranny of values', the criticism by Carl Schmitt and Ernst Forsthoff, which was renewed by Wolfgang Böckenförde in the past decades, then the criticism by Uwe Diederichsen on the 'super supreme court' of constitutional judges to the criticism on the suppression of parliamentary democracy and the emergence of a juristocracy, and asks whether it can be accepted as an over-constitutionalisation (Überkonstitutionalisierung). His answer to this question is no. After reading the criticisms above, this seems surprising, so we have to see how Alexy reached to this acquittal.

He begins by stating that all of these criticisms argue for an over-constitutionalisation, but following them would result in sub-constitutionalisation that would be as problematic as the former. Thus, there is objectively a playing field in front of the constitutional court for the proper fulfilment of its task, and there can be neither an over-constitutionalisation nor a sub-constitutionalisation within this playing field. And that can only be ensured by a playing field dogmatics. [150] The pre-question of this playing field dogmatics is whether German Basic Law can be understood as the framework of the legal system, as Böckenförde stated in his criticism

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[149] Ibid. 10: „Die Trias von Wert oder Prinzip, Ausstrahlung und Abwägung war eingeführt worden, um den Grundrechten im Zivilrecht zur Geltung zu verhelfen. Heute wird dies mit Hilfe der in allen Rechtsgebieten einsetzbaren Figur des Rechtes auf Schutz präziser gefasst. Rechte auf Organisation und Verfahren und faktishe positive Leistungen traten hinzu, und die Verstärkung des allgemeinen Gleichheitssatzes zum Maßstab einer an "Verhältnismäßigkeitserfordernisse(n)" orientierten "strenge(n) Prüfung" tat ein übriges."

[150] Ibid. 13: „Die Steuerungskraft der angebotenen Kriterien ist entweder zu diffus, so dass zu viel offen bleibt, oder sie geht zu sehr in Richtung auf eine Unterkonstitutionalisierung, die ebenso zu vermeiden ist wie eine Überkonstitutionalisierung. Eine adäquete Konstitutionalisierung ist nur über den steinigen und tückenreichen Weg einer Spielraumdogmatik zu haben."

of constitutional jurisdiction, or, on the contrary, as the basis of the legal system. Alexy believes Böckenförde's position is too rigid and says that on closer inspection, both are the same and the constitution is basically the basis and not just the framework of the legal system.[151] With this decision, Alexy has already implicitly approved the leadership of society and the control of the entire legal system by the constitutional judges, and therefore his playing field dogmatics can only be a tool for constitutional judges. It must be seen, however, that unlike the United States Constitution – the world's first constitution – and the 19th-century constitutions, the constitutions of the past few decades in the world have actually gone, beyond providing merely a framework, toward deciding about basic legal and state issues. Of course, this also means that the constitutional courts can actually call into question the entire legislative program and the cyclically changing democratic government majorities and thus the idea of democracy, as Kelsen, Carl Schmitt, Ernst Forsthoff and later Böckenförde stated. If we take this seriously, we should somehow interpret constitutional primacy over the law more narrowly in order to allow enough freedom for the legislation of the cyclically changing parliamentary majority, which is based on millions of citizens. But Alexy's theoretical decision, replacing democracy with playing field dogmatics, confirms the supreme role of constitutional judges, who concretise the entire constitutional order.

Alexy endeavors to limit this control and ensure the role of the legislature under constitutional adjudication by trying to divide the playing field for the legislation and the constitutional court. He claims that the playing field is only where the constitution does not issue a command in one direction and states a prohibition in other directions. There is a playing field for democratic legislation in these free areas, and constitutional judges can only check whether the frameworks of the playing field were observed. But when he moves onto discussing the playing field, Alexy inconspicuously turns determinateness by the constitution to determinateness by the constitutional judges, and begins to discuss how the playing field is determined by constitutional judges. However, this avoids the difficulty of clearly delimiting general and normative, extremely open fundamental rights as orders, such as the 'right to free development of personality' guaranteed by the German Constitution, or the understanding of equality before the law as general equality, or the 'inviolability of human dignity', which can all be examined in all human relations and state regulations by the German and a number of other European Constitutional Courts. However, if we put this into our perspective, it turns out that Alexy's assumption that constitutional provisions provide a free space for state activity through clear commands and prohibitions is wrong. This would only be the case if, for example, the constitutional court had clarified the right to free development of personality in a restrictive interpretation or had more precisely determined the inviolability of human dignity as a ban on humiliation. Instead, the German constitutional judges have broadly defined their meaning and thus subject all state regulations and judicial judgments to the discretion of the constitutional court. Therefore, Alexy wrongly claims that within constitutional orders and bans there is a free playing field for state legislation and the law enforcement of the ordinary courts without the control of the constitutional court. It is questionable whether Kelsen's fear of a boundless constitutional adjudication that Alexy willingly describes and the criticism by Forsthoff and Böckenförde in the light of real German Constitutional Court practice can be rejected as unfounded.

The German constitutional judges themselves have already laid down many formulas in relation to the playing field (formation field, judgment field, action field, decision field, adjustment field, evaluation field, discretion field and so on), and when reviewing these, Alexy sees two different types of constitutional playing fields. One is the structural playing field, which can be defined by whether there is an explicit order of action in relation to an area or a

[151] Ibid. 14: „Bei näherem Hinsehen zeigt sich jedoch, dass die Rahmenordnungsidee ohne weiteres mit der Grundordnungsidee komptatibel ist."

prohibition of a certain direction in the Basic Law. The other is the epistemic playing field, the limits of which are not contained in Basic Law, but in the ability to recognise where the further, from the constitution derivable limits within the structural playing field are. Finding the latter limits is made possible by functional considerations, of which Alexy highlights three types: playing field for purpose, playing field with a scope for tool selection and playing field for discretion. [152] The focus is on the discretion, in which – from the practice of German constitutional jurisprudence, which, incidentally, has been adopted by most European constitutional courts – it should always be checked whether the relevant regulation was necessary and suitable for the achievement of objectives, and if so, then whether it was proportionate to the otherwise necessary restriction. Suitability, necessity and proportionality – these are the three elements of the playing field of discretion, and the key to Alexy's playing field dogmatics. Although, as we have seen, due to the most widely interpreted fundamental rights and the general equality law, there is practically no free and uncheckable playing field for legislation, still, if this threefold discretion test could work properly, in a standardised way, democracy would be damaged anyway, but at least the juristocracy that would take its place would offer a predictable framework. The fact is, however, that these considerations could only approach the level of information processing of law-making ministerial apparatus with processing a huge amount of information, and the constitutional judges have no means for this. On the other hand, even if it were possible in one case, they could only decide on the necessity and proportionality based on their subjective value judgments. In contrast, Bernard Schlink is right when he argues that the outcome of the consideration only shows the direction of the bias of the person who does it, and it is largely subjective. [153]

All in all, Alexy's analysis is by no means convincing, and one cannot evaluate, despite the critical warnings from Kelsen and others, the extremely strong control of the expanded German constitutional adjudication over democracy and the judiciary as problem-free. In addition, this expanded German model has been adopted in a number of countries around the world, and even precautions that are still implicitly present in Germany have been discarded. In Germany, for example, attempts have been made to solve the problem of the tension between the generalist constitutional adjudication and the specialised European legal professions by always placing each new constitutional judge in a narrower legal area and thus achieving a certain specialisation within the constitutional court. However, this is not the case in other European constitutional courts, and, in this way, initially the actual decision-making power is inevitably taken over from the newly elected constitutional judge to his/her academic staff who absolutely lack democratic legitimacy and independence. So what has already been distorted in the case of German constitutional adjudication is further exacerbated in other places, so the problems of Alexy's analysis are even greater elsewhere.

1.2. The position of Philip Kunig

Kunig's analysis begins with the analysis of fears in Germany that emerged in 1949 regarding the intrusion of constitutional fundamental rights and principles into the ordinary courts, and he points out that this review was then interpreted by most as a 'rightful enforcement of the

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[152] Ibid. 16–17.: „Wenn man die Dinge zuspitzen will, kann man sagen, dass der epistemische Spielraum aus den Grenzen der Fähigkeit entsteht, die Grenzen der Verfassung zu erkennen. Beim strukturellen Spielraum spielen funktionellrechtliche Erwägungen oder formelle Prinzipien keine Rolle. Die Probleme epistemischer Spielräume können demgegenüber ohne sie nicht gelöst werden."

[153] Ibid., 20.: „Diese elementare Struktur zeigt, was radikale Abwägungsskeptiker wie etwa Schlink bestreiten müssen, wenn sie sagen, dass in "den Prüfungen der Verhältnismäßigkeit im engeren Sinn … letzlich nur die Subjektivität der Prüfenden zur Geltung" kommt und dass die "Wertungs- und Abwägungsoperationen der Verhältnismäßigkeitsprüfung im engeren Sinn … letztlich nur dezisionistisch zu leisten" sind."

ordinary judges to get down from their ivory towers. [154] Later, however, as a result of the expansive German constitutional judges, both judges and jurists rebelled against the suppression of ordinary courts, and they argued that the constitutional court encroaching on traditional dogmatics cannot really understand the context of this, and on the other hand, the private law dogmatics has a nobler tradition than the new doctrines of constitutional adjudication. [155] All this indicated that this is not just about the clash of generalist constitutional adjudication and the specialised jurisdiction of ordinary courts, but that all traditional branches of law have been attacked with the expansive expansion of constitutional judicial control: „Jedenfalls gibt es einen Kompetenzkonflikt, der im Gewand des Streits um das rechte Verhältnis von Gerichtsbarkeiten auch Züge eines Streits von Teildisziplinen der Rechtswissenschaft aufweist." [156]

Kunig also deals with the question of the relationship between legal disputes in ordinary judicial proceedings and the later constitutional complaint proceedings before the constitutional judges, and how it is possible to distinguish between the contents of simple law and the constitutional principles and constitutional provisions in these two proceedings. It is generally understood that the procedure for deciding on a constitutional complaint is, compared to ordinary judicial proceedings, only a narrow investigation and no longer affects the content of traditional legal branches, but only the aspects relevant in the context of constitutional provisions are taken into account. He remembers, however, that there were some who only qualified and disputed this distinction as a 'lie of life' (Lebenslüge). However, Kunig reverses the accusation and says that the exact opposite is the case: „Im Verfahren der Verfassungsbeschwerde ist der Verfassungsstreit die Fortsetzung des fachgerichtlichen Verfahrens im auf das Verfassungsrecht verengten Blickwinkel. Angesichts dessen müsste einer Rechtstheorie, welcher der Nachweis der Unmöglichkeit dieser Unterscheidung gelänge, die von der Verfassung vorausgesetzte Unterscheidbarkeit zwischen Verfassungsrecht und anderem Recht als Lebenslüge erscheinen. Die Verfassung zwänge gleichwohl zur Aufrechterhaltung dieser Lüge, allerdings erzwingt sie nicht das Bild von Stufenbau der Rechtsordnung. Es ist missverständlich, weil Stufen hartkantig aneinander stoßen und wir es hier eher mit gleitenden Skalen zu tun haben." [157]

In this debate, a monograph written by the staff of the German Constitutional Court based on many years of practice in German constitutional complaints also assumes that the contents of traditional private law, criminal law, and so on, cannot really be distinguished from the aspects of constitutional provisions when discussing and deciding on individual constitutional court cases. [158] This way, even if the 'lie of life' rating may be too hard, it still tells the truth. It is of course also possible that this indivisibility can only be created by the Germans and the Constitutional Courts following them, since the scope of the questions of constitutional adjudication has already been expanded contrary to the original idea of this adjudication. For example, by the time the German constitutional judges accepted the horizontal effect of

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[154] See the article by Herbert Krüger from 1949: „Es erweist sich … als notwendig, den tieferen Hemmnissen seelischer und sachlicher Art nachzuspüren, die (die Zivilrichter) zurückhalten, … Verfassungsbestimmungen in (ihre) Erwägungen einzubeziehen … (Hemmend wirkt) die alte Befürchtung des Ziviljuristen, den festen Boden unter den Füssen zu verlieren … Gerichte, die sich einmal aus dem zivilistischen Turm herauswagten, (haben) von strengen Zensoren bittere Rüffel einstecken müssen.' Quoted by Philip Kunig, 'Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit." In: Verfassungsrecht und einfaches Recht – Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit. Primär- und Sekundärrechtsschutz im Öffentlichen Recht (Berichte und Diskussionen auf der Tagung der Deutschen Staatsrechtslehrer in Würzburg vom 3. bis 6. Oktober 2001), ed. by Robert Alexy et al. (Berlin – New York: Walter de Gruyter, 2002), 35.

[155] Ibid. 37: „Wie in anderen Konstellationen der Abschirmung des Eigenbereichs wird der fachliche Unverstand des Intervenienten behauptet…"

[156] Ibid.

[157] Ibid. 40.

[158] See Matthias Jahn et al., Die Verfassungsbeschwerde in Strafsachen (Heidelberg: C. F. Müller, 2011).

fundamental rights in private law in their Lüth judgment of 1958, they had naturally interfered with the provisions and dogmatic solutions of private law. As a practising constitutional judge in Hungary for the past nine years by now, let me point out that I have seen this expansionist tendency several times in the discussions and the inseparability comes about when an entire constitutional branch of law is created instead of mere constitutional guarantees. This is also due to the fact that due to the fundamental structural circumstances of constitutional adjudication, there is no longer any control over this activity, which could act against its further expansion. The constitutional judges, therefore, do not rely on a closed set of aspects of fundamental rights and a derived and defined set of constitutional principles when dealing with the proposals submitted to them, but on an attitude that the expansion can be continuous. The end result is the doubling of the entire legal system, and, in this way, the individual constitutional branches of law emerge over the traditional branches of law.

1.3. Matthias Ruffert's analysis

Ruffert emphasises that the constitutionalisation of law through constitutional adjudication means a different change in the private law part of traditional law than in the public law part, such as criminal law and financial law. This is because in the former case it limits private autonomy, while in the latter case private autonomy is not in focus.[159] If one adds the democratic component of the state to this finding, it is striking that this change reorganised the state's power to dispose of the law by passing it from the democratic legislation to the supreme judges and the law professors behind them. Another consequence for private law is that this modified state power not only removes the democratic component in favour of juristocracy, but also limits the autonomy of private law.

In Ruffert's analysis the explanation of the supremacy of the constitutional courts which is often expressed in German legal literature can also be found: this says that the supremacy is a result of the excessive positivism of law of the early 1900s. According to this argument, this positivism between the two World Wars enabled the emergence of German National Socialism, which could only be defeated in the Second World War at the cost of great suffering. In this way, it was the result of the spirit of the time Zeitgeist) that the German Basic Law during the post-war American occupation ordered, and the positivist legislation was suppressed by a strong constitutional adjudication. However, this 'darkening' and negative portrayal of positivism should not only be questioned in order to clarify the democratic component of the state, but also because historical research now shows that the reason for this distribution of power in Basic Law lay elsewhere. The German Constitution of 1949, centrally controlled by the American occupation authorities and their jurists, was primarily determined by the fear of the democracy of the millions of Germans, and so this democracy was controlled by such a powerful constitutional court that was wholly unprecedented in the world at the time.[160] This fear of the

[159] Matthias Ruffert, Vorrang der Verfassung und Eigenständigkeit des Privatrechts. Eine verfassungsrechtliche Untersuchung zur Privatrechtswirkung des Grundgesetzes (Tübingen: Mohr Siebeck, 2001).

[160] In addition, historians documented that, under the command of the U.S. occupation authority, headed by General Lucius Clay, closely monitored the preparation of the German Basic Law by his lawyers – including Professor Karl Loewenstein, who previously emigrated to the United States and then returned with the occupiers –, and the essential content of the Basic Law comes from them. From the materials of historians Barbara Fait and Hermann-Josef Rupieper it turns out that General Clay had the closest control over this constitutional process, and according to his instructions, the reason for this control was to prevent the millions of Germans to elect a leader like Hitler. He also emphasised in his instructions that the extent of American participation in the drafting of the Basic Law should not be made public. See my previous analysis for details: Béla Pokol, The juristocratic State, (Budapest: Dialóg Campus, 2017), 86–87.

democracy of the German masses and the resulting limited democracy was then veiled in public accounts, and it was portrayed on the one hand as a consequence of the 'sin' of legal positivism, on the other hand as an 'improved' democracy. Theoretically, the thesis that positivism is the logical consequence of political democracy in the area of legislation is tenable, although in addition to the legal text, the legal dogmatic formulas and precedents of the Supreme Court are required to get the full picture of law. The American occupation authority after the Second World War had no problem with positivism, but with the dangers of democracy posed by the German masses. It is important to clarify this fact also because this German constitutional court model has been promoted and adopted in many countries in Europe and on other continents in recent decades.[161] For this reason, the narrow portrayal of the role of fundamental rights and constitutional adjudication and the idea that these would overcome 'evil legal positivism' should be criticised: „Sie ist das Ergebnis der Auffassung, daß für den Zusammenbruch des Rechtsstaates im Dritten Reich in erster Linie der überzogene (Gesetzes-) Positivismus verantwortlich war." [162]

In his analysis of the role of fundamental rights in the legal system, Ruffert refers to Jürgen Schwabe's 1971 book Die sogenannte Drittwirkung der Grundrechte ('The so-called third-party effect of fundamental rights'). In his book, Schwabe understood fundamental rights as binding programs for state legislators and law enforcement bodies: they should create and apply these right in a way that they help citizens in the aspects guaranteed by their fundamental rights to protection. From this point of view, Schwabe saw no difference between public and private law. In his opinion, it is not the private litigants who are obliged to enforce the fundamental rights in private disputes, but the judge. What came to the foreground was not that aspect of the fundamental rights which obliged the individual, but the enforcement obligation of state organs and thus the emphasis from the former was implicitly removed, which was emphasised in the subject of fundamental rights: „Gesetzgeber und Richter als Staatorgane griffen in die Grundechte des betroffenenen Grundrechtsträgers ein, wenn sie diese bei der Rechtsetzung und Rechtsprechung nicht hinreichend beachteten."[163] This was later criticised by some theoretical opponents as a return to the statist state-friendly legal concept, but it was also followed and modified by a number of followers. Overall, however, the majority of legal literature rejected this.

Another and more accepted concept for the role of fundamental rights in private law was provided by a study by Wilhelm Canaris from 1983, which emphasised the state's obligation to protect fundamental rights. Canaris stressed that this should also be done by the state organs in private legal disputes: „Der Grundgedanke besteht darin, daß der Staat durch Privatrechtsgesetzgebung, aber auch durch Zivilrechtsprechung die Grundrechte einzelner vor Übergriffen anderer Privater zu schützen habe. Da die grundrechtlichen Schutzpflichten im Gegensatz zu den Abwehrrechten kein bestimmtes staatlichen Handeln vorschreiben, bieten sie

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[161] Given the material cited above, Michaela Hailbronner's assertion that the drafters of the Constitution paid no attention to the Constitutional Court's restrictive power on the parliamentary majority and its suppressive effect in 1949 can be evaluated as erroneous: „Second, the framers paid little attention to the new Constitutional Court or indeed to rights review, the basis for the broad expansion of the Court's powers until today … To imagine that the German framers would have conceptualized a constitutional court with even roughly the authority and power of the current German Court hence misunderstands the spirit of time." Michaela Hailbronner, Traditon and Transformation: The Rise of German Constitutionalism (New York: Oxford University Press, 2015). If we take into account the newly defeated Germany and the constitution drawn up for it by the occupiers, the 'spirit of time' (Zeitgeist) does make plausible the intended strong control of the parliament created by the election of millions, and we can only come to a conclusion like Hailbronner's if we ignore this spirit of time. Against this background, one can see a sad irony in the fact that instead of identifying with the German nation in a 'Nazi' way, an alternative identification was suggested by some otherwise famous German thinkers (like Habermas) in the 1980s: 'constitutional patriotism' (Verfassungsgpatriotismus), identifying with the Constitution.

[162] Ruffert, Vorrang der Verfassung, 11.

[163] Ibid. 17.

sich als flexible Begründung für die Grundrechtswirkung im Privatrecht an." [164] This concept regarding the obligation to protect fundamental rights in private law was then generally recognised in the German legal literature. Of course, it is not clear, says Ruffert, why this concept should only imply the indirect effect of fundamental rights, since they would have to have a direct effect. In any case, the initial defence function of fundamental rights has now been converted into multi-dimensional functions, among which the defence function is present, but also a protective function. In fact, the defence function began to intensify in the early 1990s. However, the presence of both in the justification of the German constitutional judges shows that the German constitutional judges wrote in the famous commercial agent decision (Handelsvetreterbeschuß) about their obligation to interpret private law within the framework of the duty to protect the constitution. Likewise, the obligation to protect the weaker and to compensate the weaker in unequal situations was defined as the mandatory direction of interpretation of the constitutional court in private law disputes before them. Ruffert also points out that for a long time, the debate focused only on the intrusion of fundamental rights into private law, but later this intrusion began to generalise in relation to the whole of Basic Law, and the altered thematisation was about constitutional law versus simple law. [165]

Then Ruffert goes on to the idea of 'concretised constitution' in his analysis. The constitution takes precedence over ordinary law, but it is abstract and normatively very open and therefore it has to be concretised in order to regulate individual cases. The question is, therefore, who is entitled to this concretisation and who creates the specific constitutional law. One answer was the concept of 'partial constitutions' at the end of the 1970s, and, according to this concept, the partial constitutions between the constitution and the law could be made in such a way that the relevant provisions of the constitution were linked to some essential parts of the law: „Eine Teilverfassung bündelt verfassungsrechtliche Vorgaben und verfassungsgeprägtes Gesetzesrecht in einem "gesellschaftsverfassungsrechtlichen" Subsystem. Auf diese Weise entstehen Wirtschafts-, Sozial- und Arbeitsverfassung, daneben Ämter- bzw. Dienstverfassung." [166] The German constitutional judges, who had examined it in the light of the economic constitution, rejected it, as did the legal literature. Ruffert nevertheless considers it theoretically supportable and instructive.

Another concept for the relationship between constitution and law was the constitution as the framework of the legal system. This concept would have given ordinary law more freedom of choice than the concept of concretisation and, on the other hand, the constitution would have been devalued into just a mere framework. If the constitution were seen as a mere framework, it could only be something limiting the freedom of legislation. If, however, fundamental rights are considered within the framework of the duty to protect, constitutional judges can and must also decide when deciding on individual cases whether the legislator has fulfilled his/her duty to protect in a certain relation or not, and so his/her omissions can also be monitored and not only his/her having exceeded possible limits or not.

Ruffert's emphasis on the effects of constitutional adjudication so far can be summarized as follows; due to the attitude of the German constitutional judges, he does not regard the constitution as a framework for the legal system, but rather as the basis of the legal system that has already made the most important substantive decisions, and on the basis of these decisions, constitutional judges can already examine in detail the content of the laws and their judicial

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[164] Ibid. 21.

[165] Although this was not problematised by Ruffert, it should be pointed out that this extension was by no means a matter of course, since Article 20 Paragraph (3) of the German Basic Law only states that the legislator is directly bound by the constitutional order, but the state administration and judiciary only by 'law and right', and Article 1 Paragraph (3) only highlights the fundamental rights within the Basic Law. The direct binding effect of judges with all norms of the Basic Law is problematic because this interpretation places constitutional judges in the center of the state instead of the parliament.

[166] Ruffert, Vorrang der Verfassung, 39.

interpretations. As Ernst Forsthoff once wrote, according to this view, the constitution already contains the entire legal system in a nutshell, and constitutional judges are authorised to extract the entire legal system from it with their decisions.[167] According to this view, the constitutional guarantees for the traditional branches of law do not remain in the role of mere barriers, but can be expanded as desired, and can, therefore, develop into a whole constitutional branch of law.

Another thing could be added to the above debate on the distinction between the constitution as the framework or the basis of the legal system; namely, that it was only possible to deduct in the light of the actual German constitutional adjudication that the constitutional judge's unrestricted intrusion into the legal system would be the consequence. This can be counteracted by the fact that if the constitutional judges interpret the constitution as a part of a democratic constitutional state, then they can, without worry, interpret the constitution, which was declared as the basis of the law, as the framework of law. It is important to emphasise this as the Hungarian Constitution explicitly states its status as the 'basis of the Hungarian legal system' [Article R Paragraph (1)]. According to the above criticism, there should be no obstacle to interpret this only as a framework, which must be concretised primarily by the democratically elected parliamentary majority, through the multitude of acts.

Ruffert's analysis contains a cautious criticism of the constitutional court, that does not respect the established dogmatics of private law, but this criticism itself shows the peculiar emphases in German legal literature. It shows that the inclusion of the concepts originally developed in private law into the text of the Basic Law (often in the form of a mention, as in Article 74 on competing federal and national competences) doubles these concepts and, in a next step, the constitutional judges are able to brush aside original limitations posed by the framework of private law and use these concepts in a way that is incompatible with private law dogmatics. This was the case when tenants' right were perceived as property right in 1993, when a tenant's 'property right' was protected against the owner based on the constitutional protection of property. [168] Ruffert tries to combat this intrusion and the erosion of traditional private law by trying to prevent constitutional judges from modifying the concepts of private law dogmatics which have been developed over centuries are not just the result of one-off legislative decisions. He also emphasises their real-life nature compared to decisions of the constitutional court. [169] This intrusion is mitigated – according to Ruffert – by the fact that even if this constitutional interference with private law already exists, one can be comforted because the spirit of the constitutional concepts itself essentially comes from private law. Ruffert quotes two famous professors of public law from the end of the 19th century, Carl Friedrich von Gerber and Paul Laband, who demanded a systematic cleansing of public law from private law concepts. [170] In a broader sense, this consolation naturally does little to help a law scholar in

[167] See Ernst Forsthoff, Der Staat der Industriegesellschaft (München: Beck, 1971), 144.

[168] Ruffert, Vorrang der Verfassung, 46: „Am 26 Mai 1993 entschied das Bundesverfassungsgericht: "Das Besitzrecht des Mieters an der gemieteten Wohnung ist Eigentum im Sinne von Art. 14. Abs. 1. Satz 1 GG." Der Unterschied zwischen Besitz und Eigentum gehört zu den grundsetzlichen Differenzierungen innerhalb des Zivilrechtssystems des BGB. Die Einsicht, daß die Wohnung nicht dem Mieter gehört, ist nicht nur jedem Juristen geläufig, sondern prägt auch das Rechtsbewußtsein der Bevölkerung. … Die Kernfrage, die sich diesem Kontext stellt, geht darin, ob die Verfassungsbindung des Privatrechtsgesetzgebers sich auch auf der Ebene der fachgerichtlichen Interpretation fortsetzt, ob also das Verfassungsrecht insoweit die Auslegung einfachgesetzlichen Rechts determiniert."

[169] Ibid. 47.: „Rechsbegriffe und -institute des Zivirechts sind zumeist nicht Ergebnis einer einzigen gesetzgeberischen Entscheidung, sondern lassen sich in ihrer Entstehung bis in das Römische Recht, dessen Rezeption und andere Phasen oder Quellen der Zivilrechtsbildung zurückverfolgen. Diese Tradition vermag in vielen Fällen eine dem jeweiligen Institut eigene Rationalität vermitteln, denn traditionelle Intitutionenbildung führt dazu, daß über die zeitliche Evolution unsachgemäße Lösungen ausgeschieden und vorteilhafte Konzepte aufrechterhalten werden. … Hinzu kommt, daß die Entwicklung des Zivilrechts durch Privatrechtgesetzgebung und vor allem Zivilrechtsprechung eine besondere Nähe zu den Sachproblemen aufweist."

[170] Ibid. 50.

criminal law and other traditional legal disciplines. Finally, it should be pointed out that German Basic Law is based on the component of democracy within the rule of law of a democratic state, but this is not emphasised in this analysis. In addition, when Ruffert discusses violations of legislation and private jurisprudence, he expressly emphasises only the latter as something to be protected.

2. Lessons from the alternative thematisation of the doubling of the law

It has to be seen that although the juxtaposition of constitutional law and simple law in German literature essentially discloses the doubling of the legal system, this remains only an implicit conclusion, and consequently does not present any further lines of research that would be self-evident in the case of deliberate thematisation. Namely, how the problems look like in this new constitutional law, the same problems that have been explored for centuries in the case of traditional simple law? After all, most of the questions of legal theory that have already been examined in relation to traditional branches of law can be raised here. The deliberate raising of the question of doubling the law itself therefore enables us to compare a number of aspects of new constitutional fields of law with traditional branches of law. For example, what is the difference between adjudication in terms of simple law and constitutional justice? And what can result from the confrontation between specialised adjudication of simple law and the generalist constitutional adjudication in Europe, where, for centuries, only specialised adjudication existed? The deliberate raising of the duplication of law can in itself bring something new, not only in comparison with the much discussed alternative thematisation in Germany, but also in relation to the concept of multi-layered law. This leads to a series of comparisons about the different relevance of text, dogmatics and case law between the new constitutional areas of law and the traditional branches of law, and not only a diffuse comparison of both laws – constitutional law versus simple law – emerges. Thus, the new concept of doubling discussed here and the novelty of the questions arising from it with regard to the alternative issue of doubling encountered in German literature can reasonably be stated. But which aspects can be taken from the alternative thematisation that could also enrich my theory of the doubling of the law? From one point of view, the analyses above have certainly inspired me, and these concern the delimitation and clarification of constitutional law, the new constitutional branches of law and traditional simple law.

The first lesson came from examining the relationships indicated by the terms 'specific constitutional law' and its more common alternative, 'substantiated constitutional law'. The first implies that a specific constitutional law comprises the fundamental rights or bundles of fundamental rights that have been incorporated into German Basic Law as constitutional guarantees with regard to a traditional branch of law. The term 'specific constitutional law' thus breaks down the constitution and, by cutting off, separates the fundamental rights relating to the various branches of law as special constitutional rights from the part of the constitution traditionally known as 'constitutional law' (in the sense of Staatsrecht), which largely comprises internal and reciprocal relationships between organs of state power, and citizens' relation to these by their right to vote. Of course, these few fundamental rights sentences in the constitution have to be understood with the norms laid down in the hundreds of constitutional court decisions and it follows that they contain the content of the specific constitutional law together. The relationships captured with this concept can thus be followed in two directions. On the one hand, it separates from the inside constitutional law in the broad sense, which applies to the entire legal system and, although it only expressly describes fundamental rights as specific constitutional law, implicitly also includes core constitutional law as a counter-concept.

It distinguishes the regulatory material traditionally referred to as Staatsrecht and its conceptual, dogmatic context from specific constitutional rights, that is, from the section on fundamental rights. On the other hand, the specific constitutional rights that go beyond core constitutional right also have external implications, and, in the context of the various branches of law, they can be seen as the constitutionalised versions of these traditional branches. For example, the special constitutional law of criminal law is commonly referred to as 'constitutional criminal law', and the others as 'constitutional private law', 'constitutional labour law', 'constitutional financial law' and so on. If one restricted this content to the mere constitutional guarantees of the traditional branches of law, one could not really speak of a doubling of the legal system, but only of adding new parts to the traditional branches of law. They will only become comprehensive new constitutionalised branches of law – competing with the dogmatics of traditional branches of law – if they go beyond the original constitutional guarantees by means of a radical further expansion. This happened in private law in 1958, when the German constitutional judges decided on the horizontal effect of fundamental rights between private parties and thus brought all private law under their control; or, in criminal law, when some criminal law professors tried to use the concept Ultima Ratio-pinciple to set a constitutional limit before the penal power of the state. In this way, instead of making recommendations de lege ferenda, criminal jurists began to act as inspectors of the state's criminal justice system.

In summary, the problem of the constitutional regulation of the entire legal system, which is continuously fleshed out by the constitutional judiciary, and the relationships of the branches of law can be described sketchily in the following way. (1) First of all, it seems appropriate to refer to a constitutional level of the entire legal system and not to constitutional law as a branch of law, so as not to confuse it with the other simple branches of law. (2) Historically, the higher constitutional regulation was directed at the basis of the organisation of state power since the late 18th century. It was called Staatsrecht in Germany and later also in Hungary ('államjog'), and it has been called constitutional law proper ('alkotmányjog') in Hungary in the last decades. (3) However, to ensure a clear distinction between names, it appears necessary to call this central part of constitutional law (core constitutional law) state power law, rather than simply renaming it state law (Staatsrecht), since the new expression better emphasises its distinction from administrative law. (4) On the other hand, the branch state power law of as a whole cannot be included in the constitutional law – although these relationships normally receive the foundations of their regulation more fully in the constitution –, since laws that specify their constitutional rules (electoral system, judicial system, and so on) lie outside the constitution. (5) It is possible to include the specific and substantiated constitutional laws in this system, which contain the constitutional rules of each traditional legal branch, the relevant fundamental rights and the constitutional decisions specifying them, and can be regarded as supplements to the traditional legal branches. In this narrower sense, they supplement and limit the dogmatics of the traditional branches of law in some aspects, but do not compete with them. (6) In this way, it is possible to designate them as constitutional criminal law, constitutional private law, and so on, but it should always be kept in mind that they only join traditional legal fields in a complementary sense and cannot be built up as competing constitutional dogmatics against them.

Chapter 8
Specified constitutional laws (constitutional branches of law)

I will now go into more detail about the relationship between constitutional guarantees, which are made above the level of the individual branches of law, and the internal material of the branches of law, some of which have already been dealt with in the previous chapters. For each branch of law, I always look first at foreign analyses and solutions and then at the relevant Hungarian studies. At the end of the chapter, I try to summarise the degree of constitutionalisation of each branch of law in a theoretical synthesis.

1. Constitutional Private Law

As has already been shown in the relevant analyses of the previous chapters, the autonomy of the dogmatic order of private law can be terminated to different degrees by the penetration of fundamental rights, and thus private law can only function together with an overarching system of constitutional considerations. Constitutional adjudication in some countries has retained that fundamental rights, according to their historical origin, can only function for the protection of private parties against the state and that relations between private parties should be left to traditional dogmatics and the regulation of private law. In many countries, however, they have gone beyond this, and fundamental rights have also penetrated the norms of private law which govern relationships between private parties. The German constitutional judges were pioneers in this area and they influenced the constitutional judges of other countries. They developed a distinction between direct and indirect influence of fundamental rights and rejected direct influence, which would affect private law too much, and consequently decided in favour of indirect influence. This means that the priority of the norms of private law remains, and the relevant fundamental rights must be included in their interpretation. However, the reasonings that were used went further. In one case, they declared that fundamental rights are cultural values that must be passed on throughout the legal system. In another case, they declared the state's duty to protect them was justified in order to help the intrusion of fundamental rights. In this way, ordinary courts should always correctly assess whether the protection area of relevant fundamental rights is not damaged by the regulations of simple law and whether the conflict between them can be judged as proportionate for the protection of fundamental rights. Due to these shifts, the only indirect influence of basic rights became increasingly illusory, and, in fact, a direct effect was brought about.

In a 2017 article, Wolfgang Lüke describes this shift towards a direct effect by stating that the original indirect effect declared by the Lüth judgment was only asserted in relation to private delictual liability norms, the prohibitions of which are similar in many respects to the administrative norms. The Lüth judgment itself emphasised this when the affect on private

law.[171] Although this was later expanded in the 1970s by the obligation of the legislature and the judiciary to protect fundamental rights, what really meant a penetration by fundamental rights was, in Lüke's analysis, putting the freedom of contract under the control of fundamental rights in the early 1990s. This shift was brought about by the German constitutional judges in the so-called guarantee decision (Bürgschaftenentscheidung) in 1993, in which the practice of bank lending with family guarantee was reviewed. The reason for this practice was that borrowers often bestowed their assets to their family members and left the creditor banks unsecured if the debtors refused to repay their claims in court. In some cases, however, the family members were essentially without any income and would have had to pay back hundreds of thousands. After appeals to higher courts, a diverging decision-making practice arose at the Federal Court of Justice. One of its chambers focused on the behaviour of a bank that did not investigate the guarantor's apparent bankruptcy, and therefore decided against the bank. The other chamber decided in favour of the bank and declared the bank guarantee by the family member valid and binding based on the free discretion and the contractual freedom of the guarantor. In this way, the issue was referred to the constitutional judges in 1993.

There were two cases, and in one of them the borrower was a small-scale businessman whose 21-year-old daughter with a minimum wage job acted as his guarantor, and had to pay 100,000 German marks for her father's debts. In another case, a woman who raised small children at home and had no income of her own was the guarantor for her husband's loan. The novelty of the constitutional judges' decision was that they interpreted the case as the violation of the right to universal personal development in Article 2 Paragraph (1) of the German Basic Law. The circumstances under which these people were made guarantors were qualified as external coercion (Fremdbestimmung): if a party is in a very subordinate position and therefore has made a disproportionately burdensome undertaking, this situation already means loss of autonomy. In addition to the decision about the violation of the fundamental right, the German constitutional judges also included Articles 20 (1) and 28 (1) of the German Basic Law, which declare not only the rule of law but also the welfare state.[172] For this legal impact of fundamental rights on the innermost part of private law and the revision of the primacy of private autonomy, the guarantee decision emphasised Article 138 of the BGB (German Civil Code), which declares the nullity of the contract in the event of immorality. It is important to emphasise, however, that this decision was essentially based on the right of self-determination – which was derived from the fundamental right to universal personal development –, and in the statement of Fremdbestimmung other constitutional articles, too, were included for confirmation; Article 138 of the BGB was only used so as to harmonise this argument with the norms of private law, but cannot be seen as a basis for decision-making.

This penetration of fundamental rights into private law in Germany already points to the direct effect of fundamental rights, although this is not expressly stated, and in the entire legal system it is only the interpretation of the norms of traditional law with the help of fundamental rights

[171] Wolfgang Lüke, 'Die Einwirkung der Grundrechte auf das Vertragsrecht des BGB', Ritsumeikan Law Review no 35 (2017), 157–158: „Beide Entscheidungen befassten sich also mit Fragen der Grundrechtsgeltung im deliktischen Bereich. Dies ist insofern von Bedeutung, als er privatrechtlich kaum gestaltet wird. Hier erfüllt ein bestimmtes Geschehen die Voraussetzungen eines gesetzlichen Haftungstatbestandes unabhängig von einem rechtsgeschäftlichen Willen. … Die hierin liegende Verhaltenssteuerung ist staatlichen Regeln im öffentlich-rechtlichen Verhältnis, die Gebote oder Verbote enthalten, ähnlich. Das Gericht stellt bereits in der Lüth-Entscheidung eine nahe Verwandtschaft mit der öffentlichen Recht fest und stützt auch hierauf seine Auffassung von der mittelbaren Drittwirung."

[172] Ibid. 161: „Grundlage für eine solche Korrektur sei die grundrechtliche Gewährleistung der Privatautonomie (Art. 2 Abs. 1 GG) und das Sozialstaatsprinzip (Art. 20 Abs. 1, Art. 28 Abs.1 GG). … Das Bundesverfassungsgericht hat in diesem Beschluss eine wesentliche Begrenzung der Privatautonomie festgestellt. Bei aller Vertragsfreiheit dürften Verträge nicht Mittel zur Fremdbestimmung sein. Eine solche liegt nach seiner Auffassung vor, wenn eine Partei ein so starkes Übergewicht hat, dass sie den Vertragsinhalt einseitig bestimmen kann."

– that is, the indirect effect – that is formally recognised. Such direct intrusion of fundamental rights can also be found in Italy, although based on other reasoning. Here too, only the indirect effect of fundamental rights was recognised for a long time, and the shift to direct effect only began in 1994 and was carried out by the Corte di Cassazione, the highest ordinary court in Italy. The basis for this was the link between the exercise of fundamental rights and the duty of solidarity under Article 2 of the Italian Constitution, and here, too, the subordination of the weaker party at the time the contract was concluded and the disproportionate advantage of the other party were assessed as a violation of fundamental rights. Here too, the declaration of unconstitutionality was introduced into the system of private law norms by an intermediary, by declaring it with the help of the general clause of the Italian Civil Code on the requirement of good faith.[173]

Let us take a look at a study of an Oxford professor, Hugh Collins, that needs to be taken into account when discussing the effect of fundamental rights between private parties because, in addition to the comparative analysis, an attempt is also made to provide a comprehensive legal theoretical justification.[174] Collins commented on the German debate concerning the horizontal effect of fundamental rights, including the differences between indirect and direct effects, and pointed out that, due to the signing of the Strasbourg Convention on Human Rights, in some cases the effect of fundamental human rights between private parties were recognised as domestic law in Great Britain as well. He cites the case 'McDonald v McDonald' in 2017 as an example, when a young woman with reduced mobility and intellectual disabilities lived in an apartment bought by her parents and paid the agreed rent from her state grant. However, due to the mortgage on the apartment, a bank became the new owner after the 2008 financial crisis and the bank ended the lease. Then the new owner asked the young woman to move out. However, according to Article 8 of the ECHR, her lawyer argued that the right of the tenant to the home is protected by their 'right to home' against the right of the owner: 'Everyone has the right to protect their privacy, family, home and correspondence.' [Article 8 Paragraph (1)]. Since it was a relationship between private parties, the bank's property right was also protected under the Human Rights Convention, but the Supreme Court of England accepted that in the dispute between the private parties two fundamental rights were opposed, and they have an effect not only vertically, in the relationship between the state and private parties. As a result, the Court accepted that such disputes should be resolved by taking into account the conflicting fundamental rights of the two parties: „The Supreme Court of the United Kingdom agreed that her eviction by the bank interfered with her right to a home and that the law of landlord and tenant should be aligned with that requirement in Article 8. (…) provided the bank followed the procedures set out in legislation for the eviction and conformed to any requirement in the lease, a proper balance would be struck between the right to a home and the right to property". [175] Following this consideration, the top judges decided in favour of the bank, but the effect of

[173] Maria Vittoria Onufrio, 'The Constitutionalization of Contract Law in the Irish, the German and the Italian Systems: Is Horizontal Indirect Effect Like Direct Effect?' InDret (Revista para el Analisis del Derecho) 4 (2007), 6–7: „In fact, as established by the Italian Corte di Cassazione, the contracting parties infringe the duty of good faith when they infringe the duty of solidarity provided by art. 2 of the Constitution, which, when applied in the field of contract law, requires that every contracting party, if possible and not contrary to his/her own interest, has to preserve the interest of counterparty. … As a result in this case, as well as in the German case illustrated above, the constitutional values played a leading role, in fact the court determined the outcome of the dispute by balancing the clashing fundamental principles and values, which were the contractual autonomy and the solidarity, whereas the role of clause of good faith seemed to be limited to transpose the outcome of this balance into the realm of contract law."

[174] See Hugh Collins, 'Private Law, Fundamental Rights, and the Rule of Law', West Virginia Law Review 121, no 1 (2018), 1–25.

[175] Ibid. 7.

fundamental rights between private parties and the obligation of the British judges to apply private law in conjunction with fundamental rights are clearly visible in this case.

Collins points out that since 1948, a more limited recognition of the effects of constitutional rights under private law has been found in the United States. This happened in the 'Shelley v Kramer' case, when African-American Shelley bought a house in St. Louis for her family, the original owners of which, together with other neighbours, had previously signed a mutual agreement to limit their property by committing themselves not to sell to African-Americans. On this basis, one of his neighbours, Kramer, challenged the purchase agreement in court to prevent the new African-American owner from moving in, and requested that his property be declared null and void on the basis of the neighbourhood agreement. The local court did this, but the case reached the highest federal judges, and the Supreme Court judges ruled that state courts should always examine the disputes before them in the light of relevant fundamental constitutional rights, and when a transaction that is otherwise sound under private law contradicts a fundamental right, then it cannot be confirmed by the courts. This solution introduced a minor version of the horizontal effects of fundamental rights into the U.S. legal system, which became an aspect of state action doctrine that previously tried to exclude the horizontal effects. [176] In the same way, the formula created in 1964 in the 'New York Times v. Sullivan' case concerning libel between private parties was a recognition of this influence. In the case it was declared that private liability would take a back seat in favour of fundamental right to freedom of opinion and expression if the slanderer was not aware of the falsity of his allegation and was not negligent in this regard. Since this fundamental right even protects false claims by private party within these limits, the court cannot decide that, because of the state action doctrine, the private party must grant compensation otherwise owed under private law. [177]

Collins describes the criticism and fears concerning these developments in the Anglo-American legal literature, starting with the concept that the effects of fundamental rights undermine private law doctrines that have emerged from many generations of legal knowledge and jurisprudence, in contrast to new fundamental rights doctrines created in individual cases. It has also been criticised that the effect of fundamental rights, which are very open and hardly normative, in contrast to the case-specific and more precise rules of private law, leads to a sharp deterioration in legal security. However, after presenting these criticisms and accepting their truth, Collins states that if the order of traditional law is only corrected but not removed by fundamental rights, this whole change can be seen as an improvement: „I shall argue that the constitutionalization of private law forms part of a broader intellectual movement to reconceive the foundation of the legal system not in terms of a closed system of rules but rather as a coherent body of individual rights." [178]

Collins's legal-theoretical basis for this assessment is a modified concept of the legal system that does not see it as a system of rules, but as a system of individual rights, which Collins inherits from Dworkin's legal theory established in the 1980s. From the beginning of the 1960s, Dworkin's entire theoretical activity was against the concept of law as a system of rules, and he first spoke out against Hart's legal theory and for the correction of rules in the light of general

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[176] See Jud Mathews's article for analysis of this doctrine: 'State Action Doctrine and the Logic of Constitutional Containment', University of Illinois Law Review no 2 (2017), 655–679. The state action doctrine appeared in a decision in 1883 on the Civil Rights Act which has been declared unconstitutional because the U.S. Supreme Court had not accepted the enforcement by state intervention of the fundamental right of equality between private parties: „The state action rule inaugurated a policy of constitutional containment, erecting a cordon sanitaire that kept constitutional rights out of the private law." (p. 664). This changed to some extent with the 'Shelley v Kramer' decision in 1948, although the general horizontal effect of fundamental rights, accepted in the 1958 Lüth decision, was not accepted in this decision.

[177] Collins, 'Private Law', 6.

[178] Ibid. 3.

legal principles, then from the mid-1970s for the same correction in the light of constitutional fundamental rights. As a summary of this last version of his legal theory in the 1980s, Dworkin formulated two opposing versions of the rule of law, one of which regarded law as a system of rules contained in the codes and the other as a system of individual rights. According to the first, while public policies are generally not allowed to target a person, the state can do so according to its own rules if the previously laid down, generally valid rules allow it. In contrast, another concept advocated by Dworkin is based on the idea that citizens have political and moral rights before state regulation and that the positive state rules created by the state and applied by its judges must already respect them. While the judges have to apply in their judgments certain codes of law that contain positive legal rules, they always have to interpret them in such a way that the fundamental rights of the individual are not violated. If the rules do not allow such an interpretation in individual cases (these are the hard cases), the judge must push aside the rule and thus make a decision in accordance with fundamental rights. [179] Collins finds that the penetration of fundamental rights into the rules of private law is in line with Dworkin's concept of law, and that despite all the disadvantages that this change may bring about, it generally improves the legal system. To conclude the presentation of Collins's position, however, it must be examined to what extent this analysis can be accepted and which aspects may have been hidden in order to be able to evaluate it positively.

In my view, two important concealments can be uncovered as we step closer to the previous analysis. On the one hand, he assumes without discussion that citizens have rights that, if violated, can cause the judge to push the state rules aside. However, he does not take into account that constitutional fundamental rights are normatively empty and therefore open, and in order to determine violations, the judges have to create the normative content themselves with multiple specifications and interpretations. And with multiple steps of specification, this process can ramify in a number of directions at any point, and it can lead to a number of norms with conflicting fundamental rights behind them, including one that complies with applicable law. While Dworkin and Collins present the fundamental rights of the individual as commanding force, in reality they are almost empty declarations before a judicial interpretation, and the conflict between state rules and fundamental rights largely arises from moving towards certain directions in the gradual development of judicial concretisation. In other words, the controversial provisions of state legislation do not interfere with fundamental rights themselves, but rather with the actual, concrete content of fundamental rights, chosen by the judge. By eliminating this ambiguity, it can be said that it is not the fundamental right and the legal provision of the state that is in conflict, but rather only the interpretation of fundamental rights created by the judge is affected by these legal provisions. At this point, one might ask why the specification of the fundamental rights by the judiciary would be more noble than a legislative regulation?!

At this stage, the possibility opens up to point at another aspect that remained so far hidden. After all, Dworkin and Collins only refer to the rule book of law in contrast to the concept of law based on of individual rights, but do not emphasise that in the last 200 years in Western countries, in state systems based on political democracy, legislative power has been exercised by majority parliamentary legislation based on elections by millions of citizens, and legislative changes can cyclically occur as millions of people change their views. With this hidden aspect uncovered, it can be seen that rejecting the rule book and preferring judicial decisions based on

[179] Ibid. 24: „The rights conception of the Rule of Law requires judges to enforce the law according to its plain meaning because those transparent rules usually express an accurate public conception of individual rights. But there will be cases, known as hard cases, where it will be necessary to depart from existing rules of law, even though those rules contain prima facie evidence of what rights people have, in order to uphold the true rights of citizens properly and accurately."

self-created contents of fundamental rights also means renouncing democracy-based state building.

After these concealments have been removed and the connections have been better understood, the question remains to what extent the state's political and legal decision-making mechanisms will be changed by an additional new legal formation over the legislative process, essentially by constitutional adjudication and other supreme courts. While this causes a number of changes in each country, I believe that a common change can be highlighted. This means that above the will of legislation, which is at the level of millions of citizens, a new level of law emerges, which is determined by the highest judges and constitutional judges and by the intellectual elite, the business elite and the pressure of the media behind them. While the democratic legislative processes in the elaboration of rules are based on the political preferences of the majority and on ministry-specific bureaucracies – with the interest groups incorporated into this bureaucratic law preparation –, the new level of law of the constitutional court and the supreme courts provides a further correction and addition to the law. In this way, the law and the state function differently than in the case when they are only determined by democracy-based ministerial law making. The new legal level above the legislation, the level of fundamental rights and constitutional adjudication, can be assessed that in this way the democratic legal structure remains as an evolutionary achievement, but it is completed by the law correction of the supreme judiciary influenced by the intellectual and economic elite. The legitimation of this legal correction is then provided by the rights based version of the rule of law in Dworkin's theory.

Regarding the Hungarian positions on the constittionalisation of private law, I only remind of the reservations that were already seen in earlier analyses in the positions of László Székely, Barna Lenkovics and partly Attila Menyhárd in the 2006 volume, and in a summary supporting these, by Fruzsina Gárdos-Orosz in 2011. The latter cannot be praised enough for its thorough and prudent processing, but I believe that the affirmative viewpoint regarding constitutionalisation can already be criticised in the starting point of her analysis, because it makes the author's analysis one-sided despite its thoroughness.

Therefore, in the analysis of Gárdos-Orosz's private law, the first criticism can be expressed as early as her analysis about 'transforming private law into public law'. From the beginning of the 20th century, this process meant a state intervention in the previously unrestricted freedom of contract, both as burdening property with obligations and as a restriction of certain aspects of freedom of contract and in particular long-term employment contracts, which led to the separation of labour law from private law. This was the result of long-standing political struggles and parliamentary legislative struggles and, in the end, a separate labour law was brought about. Later, with the advent of constitutional adjudication, private law started of course to be transformed into public law in some places, including Germany, not only by way of the parliamentary legislative process, but also by way of constitutional adjudication and the interpretation of fundamental rights; but this was only an alternative to a shift by legislative means. In contrast, in the monograph now criticised, this general tendency of transformation of private law into public law is implicitly equivalent to the constitutionalisation of private law. [180] This way, however, it is hidden that this transformation did not need at all to be done through constitutionalisation, as discussed in the previous chapter dealing with the analysis by American author Ian Holloway.

In Gárdos-Orosz's analysis, I consider the recognition of the horizontal effect to be one-sidedly highlighted in the case of the American state action doctrine, too. As I mentioned earlier, quoting from Jud Mathews's study, this doctrine was originally intended to rule out the effects of constitutional rights between private parties and it only played a role in this direction in the

[180] See Gárdos-Orosz, Alkotmányos polgári jog? 33–34.

‘Shelley v. Kramer’ decision of 1948. However, it considered it entirely legitimate to deviate from the requirements of fundamental rights in relations between private parties and only prohibited their enforcement in court. So it is by no means a version of the German indirect horizontal effect, let alone a direct effect. However, this ‘minus’ is not visible in the volume’s analyses, and in contrast to Germany, the minimal recognition of its influence on private law is not emphasised here, so that it only appears as an example of a worldwide trend towards the constitutionalisation of private law. [181]

The volume can also be criticised for portraying the position of Uwe Diederichsen, one of the greatest critics of the constitutionalisation of private law by the German constitutional judges. Diederichsen’s position is portrayed in such a way as if he simply claimed the strengthening of the direct effect instead of the indirect effect of fundamental rights.[182] Diederichsen’s criticism of this development is therefore eliminated, and in the entire volume, a regular discussion of the criticisms of this development in the literature of all countries concerned is absent. [183] However, the position of the author in this area is more reserved than, for example, that of Tamás Lábady, Hungarian professor and former constitutional judge, who supported the direct effect of fundamental rights; Gárdos-Orosz only advocates recognition of the indirect effect.

My position in this regard lies in my parallel and dissenting opinions which I, as a constitutional judge, have attached to the decisions of the Hungarian constitutional court. I can say that although I do not even recognise the indirect impact of fundamental rights in private law, if a public matter arises in private litigation, I believe it justifies including the relevant fundamental right in the decision of the case, so that later a constitutional complaint can be based on this. From this view of mine it also follows that I interpret the requirement under Article 28 of the Hungarian Constitution – that judges must interpret the applicable legal provisions according to the Constitution – in such a way that the inclusion of fundamental rights in the interpretation is only mandatory in state versus private individual cases, except if a public law aspect appears in private litigation, as indicated above. The inclusion of relevant constitutional declarations from the section Foundation of the constitution (‘Alapvetés’) is, however, in my opinion, also possible – under Article 28 – regarding the relation between private parties. However, this requires special considerations in all cases, and questions of this process could only be answered after regular debates in the decision-making body of the Constitutional Court, which unfortunately have so far only happened to a very limited extent.

2. Constitutional labour law

A 2015 study by English professor Judy Fudge clearly shows the motivations that inspire labour lawyers and employees’ organisations, that is, trade unions, in the choice of the right way to further develop employment regulation, or – in case of employees – in the choice of the field

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[181] See ibid. 41–45.

[182] ‘Diederichsen also claims that the indirect horizontal effect has been removed by the introduction of the new approach by the Federal Constitutional Court, since the new cases show that the content of the contracts must be assessed on the basis of the provisions of the Basic Law.’ Gárdos-Orosz, Alkotmányos polgári jog? 60.

[183] Against the criticised author, the study by András Téglási should be cited, which most clearly emphasises Diederichsen’s critical stance on the constitutionalisation of private law: „Diederichsen points out that this change in the function of the Constitutional Court leads to the provisions of the German Civil Code and those for it to have to put aside judicial interpretations.” (Téglási, ‘Az alapjogok hatása’, 149.) For a detailed analysis of Diederichsen’s criticism see András Molnár, András Téglási and Zoltán Tóth J, ‘A magánjogi és az alapjogi érvelések együttélése’, Jogelméleti Szemle no 2 (2012), 88–117.

of legal struggles. [184] Based on her analysis, the first phase of the changes in labour law took place in the 1970s. Then, after the golden age of peaceful cooperation between employers and employees, the privatisation and withdrawal of the state from the economy began in parallel with the completion of the organisational role of market economy; the foundations of the existing labour law began to be destroyed. In parallel with its reintegration into private law, labour contract began to appear as one of the many kinds of contract. This removed the special problem of the worker's dependence from a private power. At that time, freedom of contract and business, which could best be addressed through the dogmatic framework of private law, became the main issue, but thus the aspect of dependency and unequal position of the worker on the other side of the contract was eliminated. Labour law custodians, the trade unions in Europe, began to pursue a new course in the mid-1990s – in Canada since the late 1980s – based on their fundamental constitutional rights. In this way, labour law has doubled over the past 30 years and, parallel to traditional legislative labour law, constitutionalised labour law has been brought about.

In Canada, the 1982 Charter of Fundamental Rights revolutionised the entire legal system and allowed the Supreme Court to exercise strong control over both parliamentary legislation and traditional law. In the early years after this change, however, the unions could not rely on the support of the supreme judges in their struggles against the unfavourable changes in labour law. This was observed when in the mid-1980s labour law prohibited public service strikes to support claims – the most powerful weapon workers use – and, in parallel with the mandatory arbitration of such agreements, the possibility of the strike was eliminated. The unions tried to make the supreme court declare this unconstitutional because of freedom of association, but the supreme judges were not partners in their 1987 lawsuit.[185] At the heart of the union lawyers' argumentation strategy was the need to interpret the Canadian Charter of Fundamental Rights in the light of relevant international legal norms, which, as we shall see, was one of the main strategies for the constitutionalisation of traditional law. Most of the panel's judges opposed this, and only one dissenting judge, Chief Justice Dickson, used international law to support his opposition. Although he did not claim to be bound by international law when interpreting the Charter of Fundamental Rights, he interpreted the Charter as giving fundamental rights the level of protection that the International Convention on Human Rights offers. In his dissenting opinion, he referred to the decisions of the International Labour Organisation (ILO), which recognised both the right to collective bargaining and the right to strike as part of the right of association. After the judges were replaced, the efforts of the Canadian trade unions matured in 2001, and the new majority of judges, respectful of Dickson's previous dissenting opinion, based their decision on this opinion. Since then, in Canada the constitutionalised version of labour law results in that employment contracts have been protected separately from private law contracts.[186] Both the right of workers to free foundation of unions, the right to strike and the status of collective agreements under the protection of fundamental rights were gradually adopted by Canadian judges in the years after the turn of the millennium, and they include the position of the ILO bodies in their interpretation of fundamental rights.

[184] Judy Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes', Current Legal Problems 68, no 1 (2015), 267–305.

[185] Of the six Supreme Court judges in Canada who ruled on these questions, three considered that collective agreements were not protected under the fundamental right to freedom of association, four considered that strike action was not protected by this right, and only two have taken the union's position on these issues, thus remaining in minority. Fudge, 'Constitutionalizing', 11.

[186] Ibid. 17.: „Although he failed to "attract sufficient support to lift his views out of their dissenting status", Dickson C.J.'s approach to Canada's commitments under international law has, "more recently proven to be a magnetic guide". Its pull was first felt in 2001 when the Supreme Court of Canada invoked Dickson C.J.'s dissent as the inspiration for relying on international labor law and human rights for the interpretation of freedom of association in the labour context."

In Europe, the monetarist turn was brought about by the early 1980s, as in North America, and here the earlier golden age of labour law and the peaceful relationship between capital and labour were replaced by a shift in private contract freedom in favour of the employers. According to Fudge's analysis, what has been seen in Canada has taken place here at the level of the Supreme Courts of the European integration, but on the other hand there has been a polar opposition in this respect between the two supreme courts, the European Court of Human Rights in Strasbourg and the European Court of Justice in Luxembourg.

Against the background of a turn to monetarism, the European trade union federations and the social groups behind them tried to counteract the changes in their national legal systems that were detrimental to them, and tried at the European level to standardise workers' rights alongside the ECHR. They have convinced the Council of Europe to adopt a declaratory 'Charter of Fundamental Social Rights of Workers'. While this was only a recommendation, it served as the basis for the legitimacy of the struggle for the charter to be included in a later, broader Charter of Fundamental Rights, and it was in the end included in Article 28 as a right to collective bargaining and action. (In a broader sense, Articles 27 to 32 contain the fundamental rights for the details of the employment relationship in this Charter.) However, in the present cases, the judges in Luxembourg have come to the conclusion that the freedoms within the EU (the free movement of goods, capital, work and services across the EU) take precedence over the fundamental right to collective bargaining of workers in each Member State (see Viking and Laval decisions), and this position has not been abandoned. In contrast, the ECHR in Strasbourg made the same change that the supreme judges in Canada had previously made, and gave up their previous negative views in their 2008 decision in the 'Demir and Baykara v. Turkey' case: the meaning of this decision was polarly opposed to that of the Viking and Laval decisions that were made at the same time. The European Court of Human Rights in Strasbourg, referring in its decision to the Human Rights Convention, the ILO Convention and the right to collective bargaining of the EU Charter of Fundamental Rights, decided that these have priority over the economic freedom of contract. The European Commission for Social Rights (ECSR), which was set up together with the Social Charter in the mid-1990s, also supports this direction, but can only make its decisions as recommendations. The union-friendly stance of this Commission and the ECHR is therefore in vain, as the European trade union federations are weakened by the opposition of the Luxembourg Court. The ECSR decisions in favour of the unions can be repelled by the EU Member States concerned by way of referring to the Luxembourg Viking and Laval decisions. It was on this basis that, following an ECSR decision in favour of the Swedish trade unions, the Swedish government refused to restructure its internal labour law.[187]

Efforts for right protection based on fundamental rights following unfavourable labour law regulations in the United States, the United Kingdom and Germany are presented in Ian Holloway's study.[188] In the United States, from the beginning of the 1900s constitutionalisation meant preventing the separation of labour law from private contractual freedom; the Lochner judgment of 1905 declared an act that regulated the hard labour circumstances of the bakers in favour of the employees as unconstitutional. For over 30 years,

[187] Ibid. 25: „The discrepancy between the robust normative stance of the ECSR and its weak enforcement powers is captured in the Swedish government's response to the ECSR's finding that it had violated the labour rights guaranteed by the European Charter of Social Rights. Swedish unions brought a claim under the collective complaint procedure that the recent amendments to Swedish law in response to the Laval decision violated the right to strike protected in the ESC. Not only did the ECSR decision contain an extensive review of ILO standards, it went further than the ILO's CEARC in its willingness to be explicit in subjecting a Member State's legislative response to a judgment of the CJEU to scrutiny for compliance with the ESC. … The Swedish government responded by complaining that the ESCR's decision "creates an unnecessary tension between the obligation of EU Member Sates to respond to EU law and the obligations to respect the Charter."

[188] Holloway, 'The Constitutionalization'.

a series of judgments followed, declaring a similar unconstitutionality, such as a legal requirement in the member states to set the minimum wage for women or a federal law prohibiting employment contracts that sanction union membership. There was only a change in connection with the public law 'civil war' events of the New Deal legislation. The federal judges, who were under political pressure, declared the laws that created worker protection constitutional and made it possible to cut labour law from private law.[189] In the United States, subsequent changes in labour law to protect workers continued to be determined by the political arena and legislative laws, and they were not driven by the constitutionalisation of this sector. Even if supreme judges intervene in employment relationships by making decisions based on fundamental constitutional rights, they protect the individual fundamental rights of individual workers and not their collective right to organise. As an example, Holloway cites the 1987 Supreme Court decision ('Rankin v. McPherson', 483 U.S. 378 (1987)] in which the Federal Court ruled that the dismissal of an employee at the Sheriff's Office was unconstitutional because of his freedom of expression. The dismissal was based on a remark made by the worker in his workplace after President Reagan's unsuccessful murder, in which he expressed his hope that the next one would be successful.[190] The sheriff's office found this inconsistent with the work there, but the supreme judges said that this expression of opinion was still under the protection of the fundamental right to freedom of expression. Contrary to this American decision, the Federal Labour Court in Germany, which is otherwise recognised as having a leading role in the constitutionalisation of labour law by activists, ruled that the dismissal of a worker who distributed political brochures at his workplace is constitutional. The argument was that the peaceful atmosphere in the workplace takes precedence over the expression of opinion. Holloway sees in it the differences between American and German – and generally, continental European – societies. While continental Europeans have been accepting the formation of interpersonal relationships and conflicts by state for generations, the English and American cultural atmosphere leaves the formation of rules of group democracy to the struggle within small communities. American labour law, therefore, lays down less substantive rules for employment relationships, rather an attempt is made to establish special procedures for carrying out fair negotiations in collective decisions: „Thus, to the extent that people advocate the constitutionalization of American labor law as the first step in the democratization of the workplace, they should not expect a German-style result. Indeed, one could argue that the typical American workplace already represents a model of American-style democracy, with its emphasis on individual employment contracts and the prevailing notion of "every person for herself." [191] Instead of the substantive labour law rules of the continental European states, Anglo-American labour law is mainly a labour law of individual determination and means procedures for collective decision making, and if it continues in the direction of constitutionalisation, it follows the same logic here.

Daniel J. Galvin's 2019 study on U.S. employment relationships presents more recent conditions, so let us take a look at it. [192] In his description, the Federal Employment Relations Act of 1935, which made the collective bargaining system the centrepiece of American labour law, could remain in force because President Roosevelt had successfully broken the position of

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[189] President Roosevelt's attack against the Supreme Court judges in the case of the six 70-year-old judges, by whom New Deal laws have consistently been declared unconstitutional, meant increasing the total number of judges with additional judges appointed to the Supreme Court's decision-making majority to turn in his favour. This was the essence of the plan, known as 'court packing', and although it eventually came to a halt due to the death of the senator who organised the plan in the Senate, the Supreme Court judges have gradually changed their previous positions. Ibid. 18–120.

[190] „It they go for him again, I hope they get him." Cited by Holloway, 'The Constitutionalization', 137.

[191] Ibid. 137.

[192] Daniel J Galvin, 'From Labor Law to Employment Law: The Changing Politics of Workers' Rights', Studies in American Political Development 33, no 1 (2019), 50–86.

supreme judges. This system was underpinned by a strike law, and because of the success of the Act, the membership of the unions in the early 1950s represented over 50 percent of all workers. The level of wages, hours, overtime, and other working conditions they negotiated in collective bargaining had a profound effect on the mass of American workers thanks to the high union rate. This began to change in the 1970s, when the export of capital to low-wage countries and the organisation of production in global production chains began and the suppression of union organisation in these countries guaranteed low wages and favourable working hours, overtime, and so on, for employers. Against this backdrop, union-based collective bargaining agreements in the United States have gradually declined in recent decades and have been increasingly replaced by individual labour agreements, the regulation of which required mandatory arbitration to resolve problems and disputes at work, and both the judiciary option and the right to strike has been excluded. After this system was set up, the share of union members among all workers decreased to ten per cent by 2018 and five per cent in the private sector. [193] The foundations of labour law from 1935 disappeared because the labour law of union-centred collective agreements became weightless. The creation of a broader basis of industrial relations regulations under the name of 'employment law' alongside the old 'labour law' by occupational safety and health activists and labour lawyers has been a new tactic in recent years, including organising the struggle for fundamental rights in court.[194] In this description by Galvin, traditional American collective labour law, which was once obtained in a legislative way, is being doubled by a new regulatory layer that also includes constitutionalisation. As we have seen, constitutionalisation in its early years (from 1905) in America aimed precisely at preventing the separation of labour law from private law. Roosevelt pushed back this constitutionalisation to enable the development of legislative labour law. Now the situation is reversed, and constitutionalisation is trying to move away again from privatised employment. We have seen that Ian Holloway was a pessimist in this area in the early 1990s and he hoped more for a success by way of legislation, and a study cited by Galvin about a 2018 SCOTUS decision shows once again that believers in the legislative way are chasing illusions in the area of labour law. The majority of the highest federal judges found in this decision that the practice of inserting a mandatory arbitration clause into individual employment contracts was not unconstitutional, and the system of 'forced arbitration' – as its critics call it – was confirmed. [195]

However, if we take into account the changes in U.S. politics that have taken place in recent years since Donald Trump was elected president, we can look at the issue of reintegrating labour law into private law from a new angle. The biggest problem in the world of U.S. workers has been the rise in mass unemployment, especially among the ranks of industrial workers, as capital gradually migrated to low-wage Asian countries from the late 1970s. In this way, the question of wages, working hours or overtime became secondary to enormous unemployment. Trump recognised this in his presidential campaign and identified the forced return of productive capital as one of his program items, which he largely achieved after winning the

[193] Ibid. 50–53.

[194] Ibid. 53: "Although the terms "labor law" and "employment law" are sometimes used interchangeably, legal scholars draw an important distinction between the two: whereas labor law focuses on collective bargaining, unionization, and other issues, that may arise between groups of workers and their employer, employment law covers all other laws, regulations, and policies regarding individual workers' rights and the relationship between the employer and the individual employee. By establishing minimum workplace standards (like the minimum wage, enforced through regulation) and individual rights and protection (like workers' privacy rights, which may be vindicated in court) employment law uses the alternative delivery mechanisms of regulation and litigation to achieve many of the same objectives labor law seeks through collective bargaining: namely boosting wages and regulating the terms and conditions of employment."

[195] See Ceilidh Gao, 'What's Next for Forced Arbitration? Where We Go after SCOTUS Decision in Epic Systems?' NELP: National Employment Law Project, June 5, 2018 (cited by Galvin, 'From Labor Law', 52)

presidency, and he was able to significantly reduce unemployment. While it is not expected that a cutback in private law in the area of employment relations would be targeted in Congress, and Trump's two appointments to the position of Chief Justice did not create a union-friendly majority of SCOTUS, millions of workers (and employees) did manage to bring about the advantageous change in labour circumstances in America by way of the pressure from political democracy.

This finding can be applied in Europe, and the regulation of Hungarian employment after 2010 can be demonstrated to be a modified version of the Trump example. Throughout labour regulation, Orbán's government policy has always contributed to making productive capital and multinational companies more flexible, and has always focused on creating conditions conducive to capital unemployment. While the opposition in Parliament fought to prevent these changes in labour law using the 'slave law' label, the vast majority of workers reportedly did not feel the changes so disadvantageous. Likewise, it is not characteristic of the Constitutional Court in Hungary to intensify the constitutionalisation of labour law issues with the help of the norms of international agreements. In contrast, for instance, in 2018 the Italian constitutional judges repeatedly repealed decisions of national legislation using the ad hoc decisions of the ECSR (European Committee of Social Rights) – which organisation is based on ILO traditions –, relying on the provision of the Italian constitution to respect international legal obligations. It is true that they always emphasised in the explanatory statement that this convention was definitely not signed by the Italian State and was therefore only an inspiration for them and is not binding: 'Even though the Committee decisions are considered authoritative rather than binding… Although ILO convention no. 158 is inapplicable in Italy because the State has not signed it, the Court refers to it by emphasising that Article 24 ESC is inspired by that convention. (Summary, Constitutional Court of Italy, Judgment No.194 / 2018, Sept. 2018.) [196]

With regard to the scholarly analyses of the constitutionalisation of labour law in Hungary, György Kiss's monograph on this topic should be considered first. Just as with regard to the constitutionalisation of private law, the thoroughness but also the bias of the book by Gárdos-Orosz could be emphasised, these characteristics can also be emphasised here. As to his concept of labour law and constitutionalisation, Kiss supports the integration of labour law into private law and its principles, and together with the constitutionalisation of private law and due to fundamental rights under private law, the constitutionalisation of labour law is presented as desirable. [197] One aspect of this concept is that Kiss has an aversion to union-centred collective labour law and prefers individual labour law, viewed as a custodian of private autonomy. [198] While recognising the inequality of the dependent worker against the employer, he does not support in tackling this problem through trade union bargaining as he believes that after a time such organisations tend to act in their own interests rather than the interests of the workers.

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[196] See International Labor Rights Case Law, available at: www.brill.com/ilarc.

[197] Among the various formulations that point in this direction, the following can be quoted: „From the point of view of the enforcement of fundamental rights in labour law, I believe that the starting point is that labour law is part of private law and its content is shaped by the principles of private law." György Kiss, Alapjogok kollíziója a munkajogban (Pécs: Justis, 2010), 41.

[198] Among the many formulations that apply to this, see the following: "Today's labor law is inconceivable without the connection between individual and collective labour law. This correlation means that both must be based on the same principle – the principle of private autonomy – and consequently, collective labour law must not go beyond the possibilities of self-determination in determining individual relationships and cannot become independent of them. However, there is a constant danger, and a situation can arise in which the power of a community under private law influences the self-determination of the people who make it up, and this already carries the peculiarities of public law.' (Ibid. 35.) Or, in the same way, he criticises the union interests that conflict with employee interests: 'It can be shown that in some cases these collective interests exactly violate individual interests. These interests are in other relationships on the same page as long as they have all employee interests." Ibid. 10, note 52.

These accents make it understandable that György Kiss prefers the improvement of subordinate employee positions with the help of fundamental rights and courts. Due to the weak trade union sector of the East Central European countries, which integrated into the western world system after the collapse of the Soviet empire and have since struggled to raise capital, this concept of supporting employees seems rational. Instead of union struggles and parliamentary struggles, this strategy relies on adjudication and the legal professors behind it to balance and correct the subordination of workers. So if there is a greater chance of success in this area, it can be seen as rational for activists from the workers' organisations. It is true, however, that from a broader perspective it shifts the focus from state democracy to the juristocratic power structures, and because of the demands of a consistent mindset, it must be required in other branches of law and this path leads to juristocracy instead of democracy. Not to mention that this path also undermines the dogmatic order of the traditional branches of law and constitutional adjudication and the new dogmatic solutions to the constitutionalised legal fields no longer allow them to assert themselves. (As we saw earlier in Uwe Diederichsen's criticism.)

Also from a narrower perspective, it is only worth supporting this strategy if the legal and constitutional environment makes it hopeful, and it can also be seen from Kiss's monograph that this situation does not exist in Hungary. As early as the early 1990s, there was no such environment in constitutional adjudication in Hungary, and constitutional judges were hostile to workers' rights. This situation has not changed since then, the institutional background of constitutional complaints in Hungary is still underdeveloped, not independently from the above mentioned weakness of the trade union sector. Therefore, this monograph can only be seen as a supportive treatment of fundamental rights issues and constitutionalisation, and less as an analysis of the current problems of capital and workers. This broader framework, however, brings with it the prospect of promoting juristocracy instead of democracy and the dissolution of traditional legal dogmatics, which the monograph does not recognise at all.

After the general criticism, one can also criticise the starting point of the understanding of fundamental rights in Kiss's monograph, since he regards them as historically derived from human dignity.[199] This is not true at all, since human rights were first converted into fundamental constitutional rights by the U.S. Constitution and then they were only applied as narrow sectoral freedoms. It is true that Kant's legal philosophy focused on the generalised formula of human dignity, but it had no effect on American constitutional adjudication. Kantian abstract universalism was completely foreign to American legal thought, which continued English pragmatic legal thought. Here, case-by-case decisions and narrow, casuistic formulations have made progress in defining individual fundamental rights, and there was no attempt to make progress with comprehensive philosophical conclusions. It was only 150 years later that German Basic Law included barely definable and empty normative formulas such as the inviolability of human dignity and 'the right to free development of personality', and this was not independent of the U.S. lawyers who, after the Second World War, set up a constitutional court in occupied Germany which could use arbitrarily easily expandable formulas of fundamental rights to control the formation of democratic will of millions of Germans. It is also important to point out the historically incorrect analysis of the foundations of fundamental rights, which was criticised here, since later, with the spread of the constitutional adjudication, the German model became the dominant model in a number of countries. So its actual development and honest understanding of the motivations behind the German model are crucial regarding the whole modern constitutional adjudication.

While we cannot agree with György Kiss's position on the horizontal effect in the constitutionalisation of traditional branches of law because he fully supports it, his account of

[199] See, for example: „It is undisputed that the birth of the idea of fundamental rights was linked to the recognition of human dignity." Ibid. 41.

the American state action doctrine can be considered appropriate from the perspective of this position. As we saw in the analysis of Fruzsina Gárdos-Orosz's book, she slightly 'bent' the state action doctrine to support her positive stance on horizontal impacts, while György Kiss clearly demonstrates that this doctrine is not even on the level of indirect horizontal impacts of fundamental rights – because it somehow requires state participation in fundamental rights – and therefore cannot serve as a model for the desired stronger horizontal effect: „It follows that the state action doctrine was the result of a compromise for the survival of the United States, so it was a preliminary, but in my opinion by no means a model for the development of European law."[200]

3. Constitutional criminal law

When it comes to the constitutionalisation of criminal law, a distinction must be made between the mere constitutional promotion of criminal law guarantees and the constitutionalisation of full criminal law. The latter can be supported by promoting a number of positions in criminal law theory and classifying different regulations of criminal offences as unconstitutional. If this endeavour can then get a majority in the constitutional court of a given country, it will be possible to bypass the legislative majority and shape criminal law in a particular direction. In this regard, the Supreme Court of Canada in particular has proven to be a partner in the expanded constitutionalisation of criminal law. Therefore, after analysing constitutionalisation on a more modest scale, which is more general, the particular analyses should begin with Canada. Then the analyses should be continued with the Germans, who were also exemplary in this area, although it must be pointed out in advance that an increased constitutionalisation is less to be found in the decisions of the German constitutional judges than in the intellectual products of activist professors of criminal law. However, since they are influential in criminal legal science in a number of European countries, including Hungary, it is worth taking a closer look. Finally, I conclude this section by examining constitutionalisation efforts that have emerged in Hungarian criminal law.

In most countries where constitutional adjudication exists, the constitutionalisation of criminal law means that the guarantees traditionally developed in criminal law theory have been raised to the level of constitutional guarantees. The observation of these guarantees is checked by the constitutional judges both at the level of legislation and the judicial application of the law. The most important of these are the principles of nullum crimen sine lege and nulla poena sine lege; they ensure that only acts that are deemed to be criminal offences by law at the time when they are committed can be punished and would only be punished with the penalty prescribed at that time. In a broader sense, these safeguards prohibit retroactive effect across the legal system, but the severity of criminal sanctions in this area has also resulted in a stricter guarantee system. In this way, the prohibition of analogy in criminal law derives from these principles, since in the context of a modern world that strives for predictability, it would be intolerable if, using an analogy, the judge came to the conclusion that an earlier act committed by someone was a crime. This leads to the prohibition of judicial customary law in this area, if it is used to expand criminal liability in a way that it contradicts the purely grammatical meaning of the relevant legal provision.[201] While both analogy and judicial case law are used in most branches of law today, these are legal techniques which are not possible due to the severity of criminal sanctions. These principles, which have been transformed into constitutional

[200] Ibid. 138.

[201] See Ferenc Nagy, 'A büntetőjogi legalitás elvéről és alkotmányossági megítéléséről', Acta Universitatis Szegediensis: Acta Juridica et Politica 79 (2016), 486.

guarantees, also require the laws to be the precisely defined, the lack of which is not unconstitutional in other areas of law. [202] Another such principle of criminal law raised to the status of constitutional guarantee is the presumption of innocence, according to which only persons who were found guilty by a final court decision can be considered guilty and be punished. The same principle applies to the right to defence, which guarantees the right to defend the suspect as a constitutional guarantee.

The question is the following: if these constitutional guarantees are only repetitions of existing criminal guarantees, what enrichment does this repetition add to the previous legal situation? The answer may be that these safeguards not only protect against law enforcement and an interpretation of the law that infringes on these principles, but also against legal provisions created based on various short-term political considerations. In this way, these protective measures are effective not only in the judicial application of the law, but also at the level of the entire legal system.

These guarantees, therefore, form the framework for the constitutionalisation of criminal law for most countries, and constitutional complaints and constitutional judgments in this area constitute an essential part of the cases. In addition, however, as I have already indicated, there has been a more extensive constitutionalisation of this area of law in some countries, either at the level of constitutional adjudication itself or only at the level of criminal legal science. Let us look at these below.

The constitutionalisation of Canadian criminal law went far beyond the jurisdiction of the United States Supreme Court, which was originally viewed as a model for the Canadian Charter of Fundamental Rights. In the U.S., even the most activist Warren Court himself declared as a goal only the constitutionalisation of certain points of criminal proceedings in the 1960s, the majority of which was later withdrawn, but the constitutionalisation with regard to substantive criminal law did not even came into question. [203] Proponents of this expanded constitutionalisation in the U.S. began to hope only in 2003 when a Texas State law on sexual aberration was declared unconstitutional by the majority of the U.S. Federal Supreme Court in the case of 'Lawrence v. Texas' because the law violated the individual's right to self-determination in private life. In a broader sense, however, this decision did not establish a doctrine about the possible restrictions on the state's penal power.

This was done by Canada's supreme judges, however, and for this purpose the judges combined John Stuart Mill's liberal principle of harm and principle of proportionality. Accordingly, only the act that causes harm to another person can be punished. In this way, self-

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[202] Claus Roxin's view seems to be accepted in German criminal law: „wenn und soweit sich ihr ein klarer gesetzgeberischer Schutzzweck entnehmen lässt und der Wortlaut einer beliebigen Ausdehnung der Interpretation immerhin noch Grenzen setzt." Cited by Luís Greco, 'Das Bestimmtheitsgebot als Verbot gesetzgeberisch in Kauf genommener teleologischer Reduktionen. Zugleich: Zur Verfassungsmäßigkeit vom §§ 217 und 89a 2 Nr. 1 StGB', Zeitschrift für Internationale Strafrechtsdogmatik (2018), 475.

[203] Markus D Dubber, 'Criminal Justice in America: Constitutionalization without Foundation', in The Constitution and the Future of Criminal Justice in America, ed. by John T Parry and L Song Richardson (Cambridge: Cambridge University Press, 2013), 36.: "It is true that American constitutional law (federal and state) has shown little interest in this question of what "can be made a crime in the first place", and instead has concerned itself with procedural matters, especially during the Warren Court years (1953–1969), though that concern has dissipated greatly since then, as subsequent Courts have been engaged in a concerted effort to cut back on what came to be seen as the Warren Court's expansive view of constitutional criminal procedure, to the point where protective constitutional norms are so limited in scope and, even if applicable, are so riddled with exceptions as to raise the question whether the Court still "insist[s] on procedural safeguards in criminal prosecutions." Contrary to Dubber's efforts that focus on the expansion of the constitutionalisation of criminal law, and therefore his negative assessment of the Supreme Court, the editors of the volume point out in the introduction that the majority of the Supreme Court did not allow the Congress law to abolish in an act the 'Miranda v. Arizona' doctrine: "For instance, to the surprise of many, the Court struck down Congress's attempt to overrule Miranda v. Arizona, the landmark doctrine requiring police to inform suspects of their rights to counsel and to remain silent before a custodial interrogation." (Introduction, 12.)

harm that a person inflicts on himself cannot be punished because of the freedom of self-determination. Let us put it aside now that Mill's entire theoretical foundation considers human community only as the coexistence of individuals, and therefore harm to the community, possibly the gradual destruction of the foundations of the community through individual activities, is not addressed by this theory. In any case, this liberal justification is suitable for the constitutionalisation of all substantive criminal law if the majority of decision-making in a constitutional court tends to include it in a constitutional principle. For this purpose, Article 7 of the 1982 Charter of Fundamental Rights was used in Canada, which declares the protection of freedom and the security of life of people, and the deprivation of liberty should only be ordered in accordance with the principles of justice.[204] This principle of harm has been associated with the principle of proportionality by the Canadian Supreme Court, and as a principle of fundamental justice, it has sometimes been applied to the constitutional review of certain criminal matters. Although in its 2003 decision reviewing a legal provision to punish drug possession even of small quantity, the inclusion of this principle in Article 7 was refused; however, in their decision of 2012, they were inclined to give it constitutional status.[205]

The principle of harm is also used together with other standards in the constitutional review of criminal cases and their state of affairs in Canada. One example of common use is the assessment together with the principle of proportionality, another example is the decision on the constitutionality of the offence concerned on the basis of equality. On this basis, the constitutionality of the criminality of polygamy was supported, since polygamy does harm to women and undermine their right equality with men.[206] The same argument was used in declaring the unconstitutionality of qualifying medical euthanasia for severely disabled people as homicide, because it was considered by Canadian judges to violate the equality of severely disabled people compared to those who are free to choose self-denial.[207]

As the leading nation in jurisprudence in the West, Germans had already reached a high level in the field of criminal law theory and in the analysis of the possible limitations of the state's penal power in the second half of the 1800s. Among these, Rudolf von Jhering's conceptual innovations have had major consequences. It is worth starting with it. His point of departure is that the means of punishment should be avoided, as the law itself should only be applied where no purpose can be achieved without it. Indeed, criminal law instruments also reduce the vitality of society because of the cost of punishment and because the perpetrator is excluded from being productive in society. But if the damage caused by the act in the living conditions in society exceeds a certain level, there can be nothing to stop the state, as a representative of the collectivity of society in a wide sense, from declaring such an act a crime. Jhering sharply protested against legal categorisations which wanted to exclude criminal penalisation from certain areas by arguing that they were, for example, economy related areas of private law and that only private law sanctions were possible there. What needs to be protected under criminal law is a purely political question, and so if a living condition is considered important in a society

[204] „Everyone had the right to life, liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"' (Article 7.)

[205] Benjamin L Berger, 'Constitutional Principles in Substantive Criminal Law', Osgoode Legal Studies Research Paper Series 54. 2014, 23: 'In R. v. Ipeele, [2012] 1 SCR 433, at para. 36, the Supreme Court stated that "proportionality in sentencing should be aptly be described as a principle of fundamental justice under s. 7 of the Charter".'

[206] Ibid. 15.: „Similarly, a decision upholding the constitutionality of the crime of poligamy leaned heavily on the practices's potentially harmful effects on women. Equality, arguably the basal norm of modern rights constitutionalism, conditions the analysis of harm."

[207] Ibid. 16: „The principal rationale for the invalidation of the criminal bar on assisted suicide in Canada was the discriminatory effect that such a crime had on the severely disabled. Thus, in a variety of ways, the transfer of philosophical debates about the limits of criminal law into a constitutional idiom has seen a greater role for equality in giving substantive shape to the criminal law."

and private law cannot adequately protect it, criminal law must act.[208] One effect of Jhering's analysis is, therefore, the removal of obstacles to state punitive measures and the subordination of criminal law to the free legislation of the state. Instead of applying established criminal act theories, Jhering conceptually tries to create such legal differentiations, from which the overall purpose of law (the provision of social living conditions) can be substantiated from a criminal law perspective. Ultimately, Jhering always analyses how to secure the functioning of society in the broadest sense. Even when it comes to the innermost aspect of individuals, such as the prohibition of the abortion of the fetus, Jhering does not explain with the 'right to life' based on individualism, but by saying that the life of the offspring means providing an essential living condition for society as a whole. The unborn child is not just a part of the mother's body that still needs to be separated, but a guarantee of the living conditions of society.[209] There is a social system of goals behind legal provisions, from which the scope of individual rights are determined. These goals always mean the living conditions of a society, and therefore, in theory, individual rights and legal institutions can only be assessed ultimately in the light of the living conditions of society. In order to understand some of the aftermath of Jhering's legal theory, it should be highlighted that while he always emphasised in his work Zweck im Recht that the judges must be bound to the text of the law, he implicitly created the dual theoretical dimension, namely, by setting up the purpose of the rule behind its text, he set up a rule for judging crimes. Then, in the footsteps of Jhering, Franz von Liszt began a tendency to downplay the strict factual requirements required by the nullum crimen sine lege principle as purely formal illegality, and, gradually, substantive illegality came to the fore. Although Liszt also emphasised the former, it could later be put aside by those who carried on this idea. On this basis, the German Imperial Court of Justice accepted in 1927 that it was possible to go beyond the text of the law with the help of examining legal interest.

Through several mediations in the wake of Jhering, but contrary to his intentions, Claus Roxin has in the past few decades continued the idea of the material legality that is behind the purely formal criminal act and has to assess it. Roxin does not add the category of legal interest (Rechtsgut) to the material expansion of illegality, but rather places material criminal offence alongside mere formal criminal offence.[210] The function of material criminal offence is to describe what the state can classify as a crime. The concept of legal interest is assigned to it in such a way that legislature can only justify a criminal offence through protection of a legal interest and, in the absence of this, it is not permitted to create a criminal offence. There is such an opinion, he says, according to which the concept of legal interest in the 19th century served to exclude purely moral sins from criminal law, but Roxin denies this and only admits that the concept of legal interest has really served such a function in recent decades. For example, in the case of punishing homosexuality or sodomy, which was a crime in Germany until 1969, those who wanted to do away with it argued that these, as violations of mere moral ideas, had no legal interest and were merely 'general concepts': „Es fehlt bei ihnen an einer "realen Verletzungskausalität", sie können daher nach dieser Lehre nur als Verstöße gegen "Allgemeingegriffe" wie die Moral nicht aber als Rechtsgüterverletzungen verstanden werden." [211]

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[208] Rudoph von Jhering, Der Zweck im Recht, Erster Band (Dritte, durchgesehene Auflage) (Leipzig: Breitkopf und Härtel, 1893), 487.

[209] Ibid. 517: 'Schon bevor das Kind geboren, streckt die Gesellschaft ihre Hand darnach aus, es schützend und begehrend. „Das Kind, das Du im Leibe trägst", ruft das Gesetz der Mutter zu, "gehört nicht Dir allein, sondern auch der Gesellschaft, wehe Dir, wenn Du in ihre Rechte eingreifst".'

[210] Claus Roxin, Strafrecht. Allgemeniner Teil. Band I: Grundlagen. Der Aufbau der Verbrechenslehre (München: C. H. Beck, 1994), 11: „Der materielle Verbrechensbegriff ist also dem Strafgesetzbuch vorgelagert und liefert dem Gesetzgeber einen kriminalpolitischen Maßstab dafür, was er bestrafen darf und was er straflos lassen soll."

[211] Ibid. 10.

In the early 1900s, some users of the category of legal interest tried to create another legislative restriction by considering legal interest as pre-state, regardless of government regulations. In this way, they declared the prohibitions and regulations that were created solely by the state to exist without criminal legal character, and they wanted to exclude the criminal protection by these regulations, and only found them suitable for punishment as contravention (Ordnungswidrigkeit): „weil der Gegenstand des Verbotes oder Gebotes durch den Staat überhaupt erst geschaffen worden also nicht vorgegeben und insofern kein Rechtsgut ist." [212] Roxin points out that this is problematic since many criminal bans protect general concepts such as 'state', 'law enforcement', 'monetary value' and so on, and no one objects to their criminal defence. In other words, this concept is just an excuse and a search for justification of changing the criminal regulation of some issues and excluding them from criminal law. However, Roxin also disagrees with the opposite attitude, which reduces the concept of legal interest and only considers their role as regulation register for classifying the groups of criminal law rules. [213] The solution, he argues, could be to view legal interest as a constitutional barrier to the state's penal power: „Der richtige Ansatz liegt in der Erkenntnis, daß die einzige dem Strafgesetzgeber vorgegebene Beschränkung in den Prinzipien der Verfassung liegt." [214] Roxin thus raised the importance of the category of legal interest, since legal interest would thus appear not only as an intellectual creation of jurisprudence, but also as a constitutional obligation for the authors of criminal law.

In the footsteps of Roxin, the concept of legal interest has become a tool for the constitutionalisation of the whole criminal law for some German authors in recent years, and among them Winfried Hassemer is a moderate and Bernd Schünemann a radical representative. Hassemer describes the dual nature of legal interest, the legal dogmatical and the legal political (criminal political); the first is a function inherent in the system, while the second is the system-belonging to criminal policy is certainly to be welcomed, since one of the greatest confusions when analysing legal interests in Germany as well as in Hungary is that it is mostly presented without differentiation concerning whether or not it belongs to the realm of legal dogmatics. In Hassemer's analysis, however, it is rightly pointed out that only the systematic classification aspect of the categories of legal interest belongs to legal dogmatics. For the legislator, however, the critical analyses from which the political values in criminal law are formed, belong to the field of legal policy struggles. Although it may be one of the means for success in the field of legal policy to disguise this character and present it as a neutral and irrefutable legal dogmatical argument, it cannot deceive the neutral legal analyst. Well, Hassemer does not do that and declares his analysis of legal interest to be a criminal policy approximation. It perceives the nature of legal interest as analogous to the fundamental rights of the constitution, and according to this, it restricts the state in the sanctioning of criminal offences in the same way as fundamental rights. In order to support this, he highlights the 'right to free development of personality' as described in Article 2 of German Basic Law, and places it at the centre of the entire legal system as a right to general freedom of action, relying on theses expressed by the majority of constitutional judges in certain periods.[215] As a result, Hassemer endeavours to

[212] Ibid. 12.

[213] Ibid. 13: „Solche Überlegungen könnten auf den Standpunkt des sog. "methodischen" Rechtsgutsbegriffe führen, der unter einem Rechtsgut nur eine "zusammenfassende Denkform für den Sinn und Zweck der einzelnen Strafrechtssätze" (Grünhut, 1930), eine "Abbreviatur der Zweckgedankens", damit "die ratio legis" der einzelnen Tatbestände versteht. Damit wäre aber die Bedeutung des Rechtsgutsbegriffs für den materiellen Verbrechenslehre gänzlich preisgegeben; denn da der Gesetzgeber natürlich mit jeder Vorschrift irgendeinen Zweck verfolgt, wäre eo ipso ein Rechtsgut immer gegeben.'

[214] Ibid. 14.

[215] Winfried Hassemer, „Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?', in Die Rechtsgutstheorie. Legitimationsbasis des Strafrechts oder dogmatische Glasperlenspiel? Ed. by Roland Hefendehl, Andrew Hirsch and Wolfgang Wohlers (Baden-Baden: Nomos, 2003), 60: 'Jedes

build the entire criminal law on the basis of the instrumentarium of fundamental rights and, if a recognisable legal interest can be derived from fundamental rights, even then he warns of the requirement of proportionality in criminal law regulation.[216] Although in the classic liberal notion of legal interest and classic liberal concepts of criminal law only the critique of excessive criminal regulation (Übermaß) can be included, Hassemer points out that, more recently, the requirement of a lower threshold – that is, the constitutionally mandatory criminalisation of an act – has appeared in German constitutional court decisions. In this way, in addition to their role as a barrier, the constitutionalised concept of legal interest can also function as a requirement for the criminalisation of an act: Hassemer himself, too, criticises this, and the example he gives shows the reason for this. In one period of the German constitutional court in which it was dominated by a non-liberal majority, the German constitutional court imposed a strict ban on abortion and even called on the legislator to punish abortion in order to protect the unborn child: 'Es ist vom Bundesverfassungsgerichtshof gegenüber den Strafgesetzgeber insbesondere in Entscheidungen zum Abtreibungsverbot aktiviert worden; vgl. zur "Schutzpflicht" für das ungeborene menschliche Leben BVerfGE 88, 203.' Hassemer points out that the shift of the constitutional majority between the political worlds later led to a new decision, which insisted on prohibiting punishment for abortion, and instead, he called on legislation to make counselling prior to an abortion compulsory.

These complications illustrate the problems caused by linking the dogmatics of criminal law with fundamental constitutional rights and also illustrate the necessary changes to the resulting criminal policy requirements. A majority of constitutional judges who adhere to Christian and Catholic values can move towards a more liberal majority even after one judge has been replaced, and in this situation the entire constitutionalised criminal law can be changed. What was previously prescribed as a constitutional requirement can now be declared unconstitutional, and it starts all over again with another change of majority of constitutional judges. Attempting to construct a 'substantive' criminal law over a formal concept of criminal act and formal criminal law is a hopeless undertaking at the level of dogmatic criminal law, since what depends on the choice between political values cannot be justified as a logical and neutral decision.

This is made clear by Bernd Schünemann's analysis of legal interest, who, linking legal interest with constitutional principles, thinks it possible to set aside some principles of criminal law that were previously considered sacred.[217] Namely, Schünemann's constitutionalised criminal law is not tied to and does not depend on constitutional judicial decisions, but it can also be independently used by any criminal judge even if it goes against the text level of the law ('gegenüber dem bloßen Wortlaut des Gesetzes'!). The reason for this theoretical position can be better understood if it is emphasised that Schünemann criticised the decision of the German constitutional judges because it did not declare the penalisation of cannabis use unconstitutional due to a lack of legal interest, but rather handed it over to the legislature to

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strafrechtliche Gebot oder Verbot ist ein Eingriff in die allgemeine Handlungsfreiheit. … Das Rechtsgut trägt den Kern einer Rechtsfertigung eines Handlungsverbots. Ein strafrechtliches Handlungsverbot –in Form einer Strafdrohung gegenüber einem bestimmten Verhalten – lässt sich nicht rechtfertigen, wenn es sich nicht darauf berufen kann, einen anerkannten Zweck angemessen zu verfolgen."

[216] Ibid. 59: „Wenn man den strafrechtlicen Begriff und die Konzeption des Rechtsgut in die verfassungsrechtliche Diskussion über das Strafrecht und seine Grenze einpassen will, so müssen zwei Konzepte aus dem Verfassungsrecht und der Wissenschaft vom Verfassungsrecht im Vordergrund stehen: das Übermaß- und Untermaßverbot. Beide sind imstande, die Traditionen des Strafrects, in deren Mitte das Rechtsgut steht, verfassungsrechtlich zu rekonstruiren."

[217] Schünemann, 'Das Rechtsgüterschutzprinzip', 134: „Indem sie gegenüber dem bloßen Wortlaut des Gesetzes eine allgemeinere Dimension erschließt und damit die Grundprinzipien des Strafrechts für die Interpretation fruchtbar macht, bildet sie deren "Fluchtpunkt" und bringt den liberalen Grundgedanken, der eine verfassungsrechtliche Dimension repräsentiert, unmittelbar in die Gesetzesauslegung ein, ohne sogleich mit der Kalamität belastet zu sein, die Vefassungswidrigkeit einer Entscheidung des Gesetzgebers begründen zu müssen."

decide what to do about it.[218] If the constitutional judges cannot be trusted, the criminal judge will decide the matter himself based on the 'constitutional' legal interests, that stand above the legislator and the text of the law – so we can deduce Schünemann's thesis; in contrast, Hassemer has not gone this far.

However, these views belong only to a particular group of German criminal law professors. Although because of their success in the community of criminal law scholars abroad – including Hungary – they deserved to be considered here, it is important to emphasise that the German Constitutional Court itself has not included these views in its doctrines. When deciding on the constitutional complaint in relation to the criminal act of incest in 2008, the German constitutional judges made it clear that they remain within the narrow framework of constitutional guarantees of criminal law and do not accept the concept of an extended criminal constitutionalisation. Although criminal law has an ultima ratio nature in the system of legal sanctions, the assessment of such questions in individual cases and in relation to the relevant state of affairs was left to the de-lege-ferenda proposals of jurisprudence, and a constitutional review of the legislator based on these was rejected. Likewise, the legal regulation of criminal matters based on legal interests was classified as a good instrumentarium of criminal policy and criminal law dogmatics, but it was not considered suitable to be used as a constitutional standard and thus to bring about a complete constitutionalisation of criminal law. [219] Bettina Noltenius, by whom the decision is critically discussed, indicates with satisfaction that it is not by chance that the only dissenting constitutional judge, Winfried Hassemer, is the only one who comes from the profession of criminal law.

If we turn to Hungarian authors, we have to start with the analysis by Zsolt Szomora, because he is the scholar most openly committed to following this line of expanded constitutionalisation, seen in German criminal law theory. Then a detailed overview of this trend in Hungary, especially the relevant constitutional court decisions, can be obtained from the newly published doctoral thesis by Erzsébet Amberg. With regard to the latter study, it can be said that the Hungarian Constitutional Court, unlike the German decision of 2008, by 2011 ruled 18 times based on the principle of ultima ratio in the issue of constitutionality of a criminal law regulation, and in eight cases the unconstitutionality of criminal law was declared.[220]

In his dissertation, Szomora analyses the facts of sex crime based on the individualistic view of society, which has already been seen in the case of the German authors. In this view, society is seen as a group of freely united individuals, in which legal regulations and restrictions for individuals cannot be based on community traditions and moral norms. In this way, he emphasises that penalising the morally most reprehensible act, incest, cannot be considered constitutional. Because the genetic damage to the descendants derived from it is only based on uncertain expert opinions, Szomora proposes that this penalisation be declared a violation of

[218] Ibid. 145: „Bedauerlicherweise hat das BVerfG das Gegenteil getan: Es hat bereits auf der analytischen Ebene die kritische Potenz des Rechtsgüterschutzprinzip verschmäht, es hat die spezifische Schwelle für den Einsatz des Strafrechts eingeebnet, und es hat damit im Ergebnis die Strafrechtstheorie auf ein voraufklärerische Niveu zurückgeschraubt."

[219] Cited by Bettina Noltenius, 'Grenzenloser Spielraum des Gesetzesgebers im Strafrecht? Kritische Bemerkungen zur Inzestentscheidung des Bundesverfassungsgerichts von 26. Februar 2008', Zeitschrift für das Juristische Studium 1 (2009), 17: „Das Bundesverfassungsgericht hat lediglich darüber zu wachen, dass die Strafvorschrift materiell in Einklang mit den Bestimmungen der Verfassung steht und den ungeschriebenen Verfassungsgrundsätzen sowie Grundentscheidungen des Grundgesetzes entspricht. Strafnormen unterliegen von Verfassungs wegen keinen darüber hinausgehenden, strengeren Anforderungen hinsichtlich der mit ihnen [vom Gesetzgeber, Anm. der Verf.] vefolgten Zwecke. Insbesondere lassen sich solche nicht aus der strafrechtlichen Rechtsgutslehre ableiten." (Rn. 38f.).'

[220] Erzsébet Amberg, A büntetőjogi felelősség helye és ultima ratio szerepe a felelősségi alakzatok rendszerében (PhD dissertation) (Pécs: PTE ÁJK, 2019), 92–98.

sexual self-determination and thus excluded from criminal law. [221] Also in general, he is of the opinion that the application of criminal law is only legitimate and permissible if they comply with the ultima ratio principle and are supported by a legal interest.[222] The lack of this justification means that criminal law provisions of the state are unconstitutional because they violate a fundamental right, sexual self-determination being such a right: „The the process of decriminalisation, experienced in the historical development; namely, homosexuality, extramarital sex or simple prostitution are not punishable by law."[223] right to sexuality is far more important in limiting the other side, that is, the intervention of the state through criminal law. The recognition of this fundamental right necessarily brings along In summary, Zsolt Szomora seems to follow the expanded constitutionalised criminal law approach of the German literature and he uses all those arguments to delineate the framework of criminal law. However, at least in his writings analysed here, he refrains from demanding that constitutional judges declare these Hungarian criminal law regulations unconstitutional, although in Germany a whole movement was organised to achieve this.

From the above mentioned collection by Erzsébet Amberg it can be seen that the majority of the Hungarian constitutional judges has not only followed the German constitutional judges as a model in the field of criminal law until 2011, but while their German colleagues refused to follow the proposal of a group of criminal law professors, the Hungarian Constitutional Court has gone far beyond their mandate based on constitutional guarantees of criminal law and has resorted to the review of criminal facts several times by converting the ultima ratio principle into a constitutional standard. For example, decisions 11/1992 (III.5.) and 42/1993 (VI. 30.) carried out a constitutional review with regard to lapse, and one of the reasons was the ultima ratio nature of criminal law regulations. Decision 58/1997 (XI. 5.) abolished a provision for the criminal sanctioning of abuse of the right to organise based on the principle of ultima ratio. Decision 13/2000 (V. 2.) abolished the rule sanctioning violations of the national emblem due to the lack of legal interest. Decision 18/2000 (VI. 6.) declared the facts regarding the spread of rumours to be unconstitutional and repealed based on the principle of ultima ratio; this principle also played a role in decision 18/2004 (v. 25), which repeatedly abolished the facts regarding sedition. Decision 41/2007 (VI 20.) declared the constitutional limits on the state's penal power based on the principle of ultima ratio, and based on an application that attacked the lack of criminal sanctions for serious discrimination. Finally, decision 13/2014 (IV. 18) also based the argument on the principle of ultima ratio in a defamation case and overturned a judicial decision.

From the above mentioned constitutional court decisions it emerges that, in contrast to the German constitutional court, the expanded constitutional control of criminal law in Hungary was not only left to the activity of criminal law professors, but was also carried out by the majority of constitutional judges. This tendency stopped with the gradual change in the majority of the constitutional court in Hungary from around 2015, although the effects of the former majority's old case law in this regard occasionally spark great debates at the Constitutional Court meetings over returning to the old line or rejecting it. However, the main line is

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[221] Zsolt Szomora, A nemi bűncselekmények egyes dogmatikai alapkérdéseiről (PhD dissertation) (Szeged: SZTE ÁJK, 2008), 258: „It must be emphasised that the abolition of criminal responsibility for adult blood relatives is justified because it restricts the right to sexual self-determination without any reasonable cause, neither a genetic justification can be given nor the aspect of family protection justifies it."

[222] Ibid.: „The lifting of the criminal law prohibition means that criminal interference in the given social situation is not legitimate, inappropriate, unnecessary or disproportionate or inconsistent with the principle of the ultima ratio and is not justified by legal protection of a legal interest."

[223] Ibid. 126. It should be noted that the part of the author's dissertation on sexual self-determination was also published in 2017 in the edition of the magazine Fundamentum (issues 3–4), in which he conceives the criminal law protection of the negative side of the right to sexual self-determination and the legal punishability of the positive side in a somewhat narrower way.

increasingly to restrict the constitutionalisation of criminal law to the enforcement of the criminal guarantees contained in the Constitution and not to bring about a constitutionalised criminal law as a duplication of traditional criminal law.

Finally, I would like to point out that despite the previous enhanced role of constitutional criminal law in Hungary, the relationship between the two different criminal law approaches was not addressed theoretically, only some critiques emerged on this enhanced role, such as by Imre A Wiener. (For example, the Germans at least addressed somehow the problem of duality as the duality of simple law and constitutional law, with regard to private law.) However, as an exception, a recent article by Imre Németh reveals such an analysis.[224] The rather vague description of Németh basically claims the duplication of criminal law, which I would like to present more comprehensively, at the level of the entire legal system.

4. Constitutional finance law

If you look around the world in search of attitudes to the constitutionalisation of financial law, it is worth considering at least one example in the United States and Germany and then to examine domestic reflections. Both foreign examples will represent aspects that may also occur in Hungary in the future, although constitutional court decisions have not yet been made in such cases, and these have not received scholarly attention.

The constitutionalisation of a U.S. financial law issue has been called for in recent years by several U.S. authors who have attempted to have the competition between member states and cities for raising capital through tax incentives, property insurance, and capital replacement (McCluskey 2016) declared unconstitutional by the Supreme Court. Their argument was that, in this way, almost a third of the budgets of cities and member states are put in the pockets of large multinationals and capital owners, which means that there is not enough left of the budget for small local businesses, for less wealthy layers of society and for other purposes (education, environment, and so on). In addition, through credit borrowing, the big cities and the member states become excessively indebted. In order to counteract this and have this declared unconstitutional, the authors endeavour to change the interpretation of the commerce clause in the U.S. constitution: „First, the dormant commerce clause doctrine should be interpreted to restrict state and local government subsidies that allow nationally (or globally) organized business to extract unequal government support from more dispersed and localized economic interests … Though government offer these subsidies to attract vital local economic development, these subsidies largely operate as a race to the bottom that tends to undermine meaningful and sustainable growth while increasing inequality and austerity for small businesses and middle or lower income residents." (McCluskey 2016: 279). This clause has been included in the American federal constitution so that the self-serving economic interests of the member states and metropolitan areas do not distort the large economic area united in the federal state and it can function as a single economic area despite competition. But what has really happened is that the huge companies in many Member States can use their capital and paid lobbyists to influence a large part of the political and media elite in the Member States and in metropolitan areas, thereby earning budget money to the detriment of local companies: „The interstate "subsidy wars" instead tend to operate like taxes or import duties extracted from individual farmers, workers, and entrepreneurs to support businesses able to use nationalized market power to exclude or exploit localized suppliers and workers."(McCluskey 2016: 280-281).

[224] Imre Németh, 'A büntetőjog paradigmaváltása a 21. század hajnalán', in Új Nemzeti Kiválóság Program 2017/2018 tanulmánykötet, ed. by László Kóczy T (Győr: SZE, 2018), 334.

Local political groups with local interests took constitutional arguments in the years after the turn of the millennium to address their systemic disadvantages in the city and state budget, and a group of them turned to court on behalf of taxpayers, with a constitutional argument previously made by a law professor. The city of Toledo, Ohio, provided the Daimler Chrysler automobile company with 280 million dollars in subsidies, and this was questioned by these local entrepreneurs because there was not enough money for education in the city budget.[225] However, in a 2006 Supreme Court ruling, the case was declared inadmissible because it was a too general argument to question constitutionality. In addition, the federal judges stated that they did not want to interfere in public finance policy and that this would be left to the discretion of policymakers: „The Court justified this narrow standing interpretation in part with structural reasoning that courts should refrain for interfering with state policymakers' discretion over fiscal matters, and that this judicial respect for political discretion should preclude any assumption about the effect on fiscal policy of hundreds of millions in tax incentives." [226] So far, the constitutionalisation of this issue and the attempt for a turn in the fiscal struggles of the member states and metropolitan areas in the USA have failed.

To conclude the issue, it should be pointed out that within the framework of the autonomous budgetary power of the large municipalities in Hungary, the right to borrow [Article 34 Paragraph (5) of the Constitution)] can lead to constitutional struggles in the future in the case of local leadership with a politically opposite majority in relation to the government. The recent amendment to the Constitution has allowed administrative and government agencies to lodge a constitutional complaint with the constitutional court. In addition to the appearance of university lawyers for the constitutionalisation of administrative law, this new possibility may also put the constitutionalisation of financial law in focus.

As an example of the expanded constitutionalisation of financial law in Germany, the case of the EU banking supervisory authority set up for the countries of the Eurozone is to be examined; this is a banking supervisory authority that has been reviewed by the German constitutional judges. (It should be mentioned that the narrower approach, that is the review along the financial constitutional guarantees, is regulated in Articles 105–115 of the German Basic Law.) In this case, the constitutional complaint requested the constitutional examination of the basic question of German fiscal policy on the basis of a violation of the general right to vote. This can also show that the constitutional judiciary can carry out the review of a regulation in a traditional branch of law based on the most distant constitutional provisions and the normatively empty fundamental rights, and as a result a case law is brought about, from which this branch of law will be increasingly constitutionalised in the future. In this case, the 114 largest banks in the euro-zone countries were placed under the direct supervision of the European Central Bank (including the 19 largest German banks) and the internal banking supervisory authorities of the Member States can only function subordinately. According to an EU regulation and a directive issued to operate this system, deprived banks can automatically lose their primary powers and control over their assets in the event of problems identified during their ongoing banking supervision. This was contested by a constitutional complaint lodged by the finance law professor Markus Kerber on the grounds that this unduly undermines German sovereignty and constitutional identity and that the EU treaties do not contain any authorisation provisions and this supervision could not have been introduced without amendment the EU treaties. So that is a case of ultra vires. In the absence of an amendment procedure, the democratically legitimised parliaments of the Member States could not take part in the decision, which is unconstitutional

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[225] McCluskey, 2016, 282: 'Drawing on Professor Enrich's doctrinal analysis, a group of taxpayer plaintiffs used the dormant commerce clause to challenge 280 million dollars in tax incentives for an auto manufacturer to relocate to Toledo, Ohio.'

[226] Martha McCluskey, 'Constitutional Economic Justice: Structural Power for „We the Peopole"' Yale Law and Policy Review. 2016 Vol 35. No. 1.pp. 282

and contrary to the principle of democracy laid down in Article 38 Paragraph 1 of German Basic Law. The professor's constitutional complaint, who was aware of the earlier constitutional normative arguments already put forward by German constitutional judges to protect universal suffrage from emptying content within the framework of the EU delegation, had a solid foundation. In this way, the constitutional review was followed with concern across Europe, as the entire system was largely based on Germany's money regarding bankrupt banks. In their decision in the summer of 2019, however, German constitutional judges found everything in order and the banking supervisory authority was declared constitutional, although the banking supervisory authority deprived the rest of the financial autonomy of the member states of the euro zone.

If we turn to the Hungarian considerations on the constitutionalisation of financial law, we should start with a question from Ernő Várnay, who says that an important question is whether the constitution defines social and economic rights as state goals or explicitly as fundamental rights. This distinction is of utmost importance because a budget from which fundamental social rights cannot be guaranteed could be permanently adjusted by decisions of the Constitutional Court, making stable governance impossible. In this way, a constitutional financial law would gradually develop above the legislative financial law, from norms resulting from constitutional decisions, and economic and political governance through democracy would be replaced by juristocratic governance. It should be emphasised that the right to work and the right to social security have been replaced in the new constitution of Hungary in 2012 by the right to freely choose work and social security as a state goal, and in this way, the possible constitutionalisation of financial law was restricted. The same applies, however, to the fact that the new Constitution has eliminated the constitutional review of budget law for the duration of the reduction in public debt to a certain lower level, and has thus stopped the constitutionalisation of the central part of financial law for many years. Thus, one can agree with Ernő Várnay's position, which was stated during the process of the constitutional planning of 1996, and which for this reason suggested the wording of the constitutional text as a mere state goal: 'From the perspective of the constitutional process of these days, this means that the further development of the constitution must not go in the direction of any concrete basic social rights, and it must remain open regarding the state's obligations. [227]

The decisions related to the so-called „Bokros-csomag" which was meant to bring about economic stabilisation in 1995 in Hungary can be rated as the most powerful constitutionalisation of financial law. These decisions took 40 billion forints from this stabilisation package (from the 170 billion forints meant to be saved), and the main argument for the repeal was the principle of legal certainty derived from the rule of law by constitutional judges, and then the category of "acquired rights" created by further derivation. It prohibited retrospective cuts in long-term benefits, particularly maternity benefits and the child benefit system, without giving reasons in principle, so that the constitutional judges could make decisions case-by-case. As a result of this uncertainty, legislature could not know when it would come into conflict with the bans set out in this way. Decision 43/1995 (VI. 30.) of the constitutional judges did not allow any reduction in the rights acquired for children who were already born or were to be born within 300 days of the decision, but declared decreasing in the long-term maternity and maintenance system to be constitutional, 'especially if it has no insurance element'. In the explanatory memorandum, the constitutional role of 'acquired rights' for the entire legal system was explained even more comprehensively, but it was even more

[227] Ernő Várnay, 'Adalékok alkotmányos pénzügyi jogi kérdésekhez', Acta Universitatis Szegediensis: Acta Juridica et Politica 47 (1996), 189. Várnay distinguishes two types of constitutional obligations as follows: „State tasks can be defined in two ways. In one case it will be open if the obligation does not have a specific right for citizens or their organizations. … In the other case, the obligation also creates property rights (social security, social benefits as subjective rights, subsidies for producers and costumers)." (Ibid.)

uncertain when the future legislation would be repealed if the acquired right was restricted or withdrawn. Because this repeal was made possible: ‘The protection of the rights acquired are the imperatives of the rule of law, but not without exception. However, exceptions can only be assessed on a case-by-case basis. It is for the Constitutional Court to decide whether the conditions for an exceptional intervention are met.’ (Explanation, Part II.)

The rest of the reasoning shows the complex system of criteria based on which the constitutional court intended to examine budget and social security laws: ‘However, the constitutionality of individual withdrawals also depends on compliance with other constitutional principles and rights, that is, whether they are against the principle of legal certainty or the prohibition of discrimination, and whether, in the case of a service that includes an insurance element, they contradict the protection of property.’ (Explanation, Part II). Since by then the Hungarian constitutional judges have enormously expanded the scope of certain fundamental rights, the legislators could not be sure in the least whether their laws would eventually be declared unconstitutional and what should be done to avoid this. I am not exaggerating when I say that the requirements for certain constitutional principles have been so greatly expanded in the past and such a high and insecure standard they have established for constitutional intervention, that the only reason why it did not explode in later years is that the Sólyom Court’s term of office was over and the subsequent majority of the constitutional judges led by János Németh had already resigned from this profound intervention. This withdrawal affected the legal system as a whole, but particularly financial law. A reminder of this, however, may have been one of the reasons for the constitutional amendment that the Orbán-government put before the constitutional judges in 2010 concerning a restriction of the review of the budget law, and this restriction also remained in the new Constitution. It is not possible to conduct ongoing state affairs with the possibility of activist interference by the constitutional court based on the uncertain normative basis described above.

The analysis is to be continued with István Simon’s two studies, which present the current situation of the constitutionalisation of financial law in Hungary.[228] His studies raise the constitutional questions of several financial regulations which may lead to disputes before the constitutional court and may be abolished. One of these studies raises that while Article 32 Paragraph (1) h) of the Constitution requires local tax administrations to determine the types and rates of local taxes, Article 29 Paragraph (1) of Act CXCIV of 2011 (Stability Act) already changed this so that local taxes can only be set in the frameworks of the law.[229] It is undisputed that the term ‘the frameworks of the law’ is left to interpretation, but the way and the result of the interpretation touch the most important questions of power between the two parties involved. This is the case, for example, in the event of a dispute between the opposition-led capital government and the parliamentary majority in such an issue, combined with the fact that any of the parties can file a constitutional complaint with the Constitutional Court due to the latest constitutional amendment. It should still be noted that there is no limit to the control of budgetary law by constitutional judges in local taxes, only to the control of the central budget.

Simon’s study also indicates a problem between Article 36 Paragraph (6) of the Constitution and Article 7 of the Stability Act. In fact, this paragraph of the Constitution exceptionally allows the mandatory reduction rate of government debt compared to the GDP to be ignored and relocated to the budget for the following year ‘in case of an enduring and significant national economic recession’. In contrast, Article 7 of the Stability Act changes this so that it can also be ignored and relocated if only the real value of the annual gross product falls. That is, for instance, if the gross production of the economy is not in decline at in volume, only in real

[228] István Simon, ‘Az Alaptörvény hatása az adójogra, különös tekintettel a magánszemélyek adózásában bekövetkezett változásokra’, MTA Law Working Papers no. 14, 2018; Simon, ‘A magyar pénzügyi alkotmányjog’.

[229] Simon, ‘Az Alaptörvény hatása’, 7.

value, this can already trigger the consequence of the 'enduring and significant national economic recession' written down in the Constitution, which can theoretically raise the question for the Constitutional Court how the situation relates the text of the Constitution.[230] (For the sake of clarity, it should be noted that a constitutional complaint for this purpose is unlikely to result in a constitutional decision due to the above mentioned budgetary law audit constraint imposed on constitutional judges.)

A remark by István Simon refers to the doubling of financial law – which is the central theme of my analysis –, and in my opinion wrongly: „Hungarian constitutional finance law has two stages and, in addition to the Constitution, it also includes financial laws adopted by a qualified majority of MPs." [231] On the contrary, it can be argued that 'constitutional finance law' cannot have two stages and that only the norms of the constitution can be included. All other legislative laws that substantiate it belong to the traditional legal branches, in this case to financial law. In Hungary, the constitutional guarantees of financial law primarily include Articles 36–44 and Articles N) and O) of the Constitution. Because of this mistake, it is important to clarify the problem of the branch of law originally called 'state law' (államjog) in Hungary and renamed 'constitutional law' (alkotmányjog). The original regulation of the 19th-century constitutions, by which the organs of state power were regulated, was expanded by fundamental rights and other new regulations in recent decades, and together with thousands of constitutional judicial decisions, constitutional law is expanded across the entire legal system. In this way, constitutional regulation no longer remained a branch of law, but rather duplicated the entire legal system. The problem is that the mere renaming of 'state law' to 'constitutional law' could not capture this change in the type of constitutional regulation. One of my goals in the current analysis is to rethink this and analyse the doubling of the entire legal system. As a result, some traditional branches of law are duplicated, and, in this case, a new constitutional finance law is contrasted with the content of traditional financial law and the boundary must be drawn between them, as in the cases of private law, criminal law and labour law.

Among the domestic professors of finance law, Dániel Deák also analysed the questions of the possible constitutionalisation of tax and finance law, and while much of his 2016 book on this topic deals with distant subjects (philosophy of law, social theory, private law and so on), the rest also touches on questions that are the subject of our current discussion. [232] The central position of his analysis on this topic is related to my dissenting opinion as a constitutional judge. In retrospect, I find it worthwhile to have written this because his mental confrontation with me now helps him read through his otherwise branched analyses.[233] He draws from my dissenting opinion that I deny the role of private law as the ultimate source of property relations, including tax law, and he criticises this position. It was important for him to emphasise this, as he not only separates the whole tax law from administrative law and sees private law as the background of tax law, but also considers the exercise of state power, including tax power, to be acceptable only on the basis of legal authorisation by the rules. If in a particular case there is no such authorisation at the level of rules – 'the law is silent' –, then the state is outside its borders and its role is taken over by the rules of private law tailored for individual parties: „If the law is

[230] Ibid. 10: „In connection with the abolition of tax guarantees, however, I do not think this solution is correct.' The same idea is expressed in a later study: 'According to this, an extremely small and short-term relapse can release the brake." Simon, 'A magyar pénzügyi alkotmányjog', 15.

[231] Simon, 'A magyar pénzügyi alkotmányjog', 11.

[232] Deák, Alkotmány és adójog.

[233] In my dissenting opinion, I argued against the majority that the inclusion of fundamental rights and constitutional values in the interpretation of the law according to Article 28 of the Basic Law is possible not only in the case of general clauses, but also in the case of any open legal norm that requires interpretation. I just want to add that I have not indicated here that I consider the inclusion of fundamental rights to be possible only in the horizontal relationship between the state and private parties, and when it is a judicial decision in a dispute between two private parties, the inclusion of fundamental rights is not possible even through the general clauses.

silent, this means for the citizens freedom, but not for government agencies. Neither national nor international law can accept the state's freedom to act in the light of the principles of democracy and the rule of law, at most in the sense that where there is no public authorisation, private law takes control."[234] Therefore, the focus of Deák's position is that tax law is private law rather than administrative law, and that public administration can act on the basis of an extraordinary, detailed authorisation. This goes hand in hand with that the inclusion of a constitutionally open fundamental rights can only serve to protect citizens from the state. The possibility that the state organs, in particular the judge in this regard, involve and expand the constitutional fundamental rights or values declared in constitution when assessing the functions of the public body and thus resolve the dispute between the state and the private party in tax law matters, seems to be excluded from the angle of Deák's position. On the one hand, fundamental rights can only be claimed against the state by the citizens, while on the other hand, the state can only act on the basis of authorisation by precise rules.

From the perspective of Dániel Deák, the constitutionalisation of financial law, including tax law, can only use the defence function of fundamental rights and can only be a means of protecting citizens against a broader invasion of an already restricted state. With this approach, however, an audience cannot be found everywhere, for example, the judges in Strasbourg dismissed the tax complaint in their 2001 decision in the Ferrazzini case and considered tax law to be part of public law. The attached dissent is cited by Deák who supports it, but I think his position can be considered unacceptable.[235] In fact, tax matters and the power of the tax state are in the same relationship to the citizen as the state's penal power, and tax procedure are at the very core of state administration. There is no need to be an adherent of the ECHR apparatus, that actually shapes the decisions in Strasbourg, to agree with their position now.

It is not known to what extent Deák's position contributes to his failure to recognise the functioning of the administrative judiciary in today's Hungary. He only declares: 'There is no administrative justice in Hungary, but there is a separate administrative law.' He seems to believe this because the actual judicial decisions about the contested administrative decisions are not made on the basis of private law: „In Hungary there are administrative actions (although there is no administrative jurisdiction) and there is an independent procedural and substantive administrative law – and also tax law – but the closing of gaps of legal authorisations with private law is uncertain." [236] One can say with certainty that this position is a minority position in administrative law in Hungary – which of course could still be correct as such – but the support of this position with the German example ultimately makes it vulnerable: „In Germany there is administrative justice … its starting point is whether the public authority has not violated the fundamental rights of citizens protected by the constitution." [237] This position assumes the full constitutionalisation of German administrative jurisdiction, which is inconceivable in the judicial review of dozens of administrative files (filled with dozens of details). If we take Deák's above view that the activities of the public authorities in relation to fundamental freedoms are only negatively influenced, we are at a loss about his view of the functioning of German administration and the judiciary that results from this position.

Finally, it should be noted that Deák's analysis of the Constitution regarding taxation and public burdens can be assessed as incorrect. In contrast to István Simon's new analysis, which shows a fundamental change from the rule of the old Constitution and, in particular, the

[234] Deák, Alkotmány és adójog, 434.
[235] See ibid. 447.
[236] Ibid. 144.
[237] Ernő Várnay, 'Adalékok alkotmányos pénzügyi jogi kérdésekhez', Acta Universitatis Szegediensis: Acta Juridica et Politica 47 (1996), 189. Várnay distinguishes two types of constitutional obligations as follows: „State tasks can be defined in two ways. In one case it will be open if the obligation does not have a specific right for citizens or their organizations. … In the other case, the obligation also creates property rights (social security, social benefits as subjective rights, subsidies for producers and costumers)." (Ibid.)

inclusion of family relationships in the determination of the tax rate in addition to the capabilities regarding common burdens in the new Constitution [Article XXX Paragraphs (1) and (2)], Deák does not even mention this change.[238] Therefore, he only emphasises the waiver of progressive taxation as the author of injustice, because those who are in a more difficult position are in fact made unequal by this formal equality. From this he concludes that: „In Hungary the rational state is in a crisis." [239] In comparison, those who are blessed with many children, but are in a financially difficult situation, are very privileged by the above-mentioned provision of the Constitution when determining the amount of tax: 'For persons raising children, the extent of contribution to covering common needs shall be determined by taking into consideration the costs of raising children.' [Article XXX Paragraph (2) of the Constitution.] There is no need to agree, but the thesis of the irrationality of the state can only be biased.

5. Theoretical summary

The above analyses showed that the constitutional rules and constitutional adjudication of individual countries, and also their groups of university law professors, have implemented the constitutionalisation of traditional branches of law to varying degrees. The choice between the development paths, whether constitutionalisation in a country has stopped at the mere constitutional guarantees or continued in the direction of the full constitutionalisation of the traditional legal branches, depended on the content of the actual constitutional rules in the country, on what attitude the majority of the constitutional judges had in this regard, and, last but not least, what strategy was chosen within the traditional legal areas by a group of university law professors in the country. In other words, it is worth analytically separating these two levels of constitutionalisation, and while constitutionalisation that is limited to mere constitutional guarantees is can be classified as the lower level, efforts to fully constitutionalise the traditional branch of law should be analysed separately. The actors in this regard are firstly the constitution-making power when drafting the constitutional text, secondly the majority of constitutional judges and finally the academic jurist groups in each traditional legal branch, but in a broader perspective a role is also played by legal theorists and philosophers in this field.

With this analytical division, the situations of constitutionalisation described above can be viewed as a single picture. It can be established that in the case of the two main areas of the legal system, private and criminal law, there have been countries where constitutionalisation has remained with constitutional guarantees, while there have been cases where full constitutionalisation for one or more branches of law could be seen. In these two branches of law, one could well highlight the dividing line the crossing of which decided whether a lower or a higher degree was intended. In the case of private law, this was the consideration of the horizontal effect, when not only the vertical effects of fundamental rights between the state and private parties were recognised, but also the possibility of integrating fundamental constitutional rights into private relations. This recognition was even reinforced by accepting not only the indirect horizontal effect, which was limited to the judicial interpretation of private law alone, but also the direct one, when private law was pushed aside, and the result of disputes between private parties was decided solely on the basis of fundamental rights. In the case of criminal law, the crossing of the dividing line and the full constitutionalisation of criminal law

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[238] Simon, 'A magyar pénzügyi alkotmányjog', 11: „The new Constitution contains three principles for burden sharing instead of the one principle of the previous constitution: capability to sustain oneself, participation in the economy, taking into account the costs of raising children." In this regard, Article 70 of the previous Constitution only established income and property relationships.
[239] Deák, Alkotmány és adójog, 446.

beyond mere constitutional guarantees will be realised if the ultima ratio principle, the principle to be supported by a legal interest or any other similar principle elaborated in legal literature are made standards of the rule of law, and all facts of criminal law can be reviewed according to these standards.

Proceeding from the mildest level of constitutionalisation to the strongest, the United States should be mentioned first. As previously seen, in case of private law the horizontal impact was only little recognised with the state action doctrine in the United States, and it has had an impact only on the enforceability of a private contract that violates a fundamental right. The constitutionalisation of criminal law in the United States remained at the level that was limited to mere constitutional guarantees and no full constitutionalisation was intended here, as could be seen from the criticism of some U.S. criminal law professors. In the same way, a reluctance in the areas of labour law and financial law as well as a declaration by the supreme judges about the freedom of democratic legislation in these areas of law could be seen. Moving further towards strengthening constitutionalisation, the overview can continue with the British Supreme Court, which recently recognised the indirect horizontal impact in private law. Although it is not possible to know how the situation will develop after Brexit, since the horizontal effect of fundamental rights is contrary to traditional English law and Brexit itself was provoked by such influences of the EU. The effects of fundamental rights on private law are stronger in Germany, where they have recently had a direct impact, but in the field of criminal law the constitutionalisation has stopped at the level of mere criminal-law constitutional guarantees. The most radical efforts in German criminal law for the expansion of constitutionalisation to the entire criminal law were expressed by some groups of criminal law professors. However, this mainly affected the criminal legal science of other countries, and these efforts could not influence constitutional adjudication in Germany. In Canada, constitutionalisation in the area of private law has not reached the level seen in the case of Germany, but it has exceeded Germany in the area of criminal law and they tend, through a conjunction of the principle of harm and the principle of proportionality, towards a complete constitutionalisation of criminal law.

When we finally turn to the situation in Hungary, we can see a wave of constitutionalisation in recent decades. In the 1990s, the majority of constitutional judges realised in the field of criminal law such a degree of constitutionalisation – declaring the principle of ultima ratio as a constitutional standard –, that it reached the level of the ‘world championship’, surpassing even the Canadians. However, this has gradually decreased, and since 2012 the level of constitutionalisation has only been maintained alongside the tighter criminal constitutional guarantees. This is also the case with private law, and although there were no major theoretical arguments and debates on the subject within the Constitutional Court in the 1990s, the majority at that time tended to accept the indirect horizontal effect of fundamental rights. In addition, constitutional judge Tamás Lábady argued for the direct effect, but then and also later, his debates on this subject with private law professors like Lajos Vékás took place outside the circles of the constitutional judges, and the constitutional court was not affected by this debate. In financial law, the Bokros stabilisation package triggered a radical constitutionalisation, which came to a standstill in later years and was hampered by new constitutional provisions. However, these questions are most directly relevant to power interests, and since there are no obstacles to the constitutional court at local financial level, constitutionalisation in this area may increase in the future. This is probably also because the recent constitutional amendment has made it possible for the state organs to lodge a constitutional complaint.

Finally, I would like to point out once again that today’s constitutions have mostly already covered the entire legal system by (1) the abolishment the limitation of the previous constitutions to the mere regulation of state organs, (2) by influencing all legal areas through the inclusion of fundamental rights and (3) due to constitutional adjudication. So it is a flawed

theoretical construction if the constitutional level of law is taken as a mere synonym for the legal branch of constitutional law. It would therefore make sense to rename the branch of law that examines the regulatory material and the dogmatic constructions of state organs as 'state law' or more precisely 'state power law', separating it from the constitution that extends to the entire legal system. In this way, 'constitutional law' could be conceptually understood as the doubling of the entire legal system. Differing from all other branches of law, it should be conceived on another level of law, 'lying over' all the branches of law. In this way, constitutional criminal law, constitutional private law, constitutional finance law and so on could be resolved from the traditional branches of law and could be comprised in this special branch of law. However, their practitioners would only go as far into the respective traditional areas of law and their dogmatic order as required and justified by constitutional guarantees. With this conceptual change, we would create a generalist branch of law in addition to the traditional branches – among which a process of increasing horizontal divisions has been going on in continental Europe's legal systems for almost 200 years – due to the needs of a generalist constitutional adjudication. As I have indicated in a number of studies in recent years, generalist constitutional adjudication that has been adopted from the United States only works with the greatest distortions in the specialised legal system in Europe.[240] The creation of the proposed generalist constitutional branch, its integration in the classification system of law, and its urgent introduction to law studies could also help in this regard.

[240] See Béla Pokol, A Sociology of Constitutional Adjudication (Passau: Schenk, 2015); Pokol, The Juristocratic State.

Chapter 9
Juristocracy and the constitutional level of law

To what extent can the worldwide spread of constitutional adjudication be seen as the emergence of a new level of law above the legislative area? Or is it only a short-term consequence of internal political power struggles or external pressure on individual countries that will disappear when this cause ceases? As was seen in the previous chapters, I believe that its emergence as a new evolutionary step in legal development – and thus its permanence – can only be assumed if, through the functioning of constitutional adjudication, special functional additions to the existing legal institutions can be recognised, by which the functioning of the legal system is improved, or at least this new function makes the legal integration of societies more harmonious. So this is an evolutionary functionalist starting point, since, in my opinion, this is the only way to predict the likelihood of a new institution stabilising in social development. In the following, I would like to examine this comprehensive thesis by empirically reviewing the constitutional adjudication of individual countries and highlighting the generalisable elements from which more general conclusions can be drawn.

The judicialisation of politics has spread worldwide in recent decades, both in democracies and in authoritarian political systems that suppress pluralism. The particular reason for this in relation to democracies was seen in Ran Hirschl's analysis, according to which the long-standing ruling party surrenders its supreme power to the Supreme Court – provided the party's political values are dominant there, too – in the event of its permanent decline, in order to reduce the power of its successor. In the case of authoritarian regimes, Tamir Moustafa's and Tom Ginsburg's study showed that a rational reason can also be found for the transfer of part of the power. [241] According to the latter study, the dictatorial leader group that focuses on economic modernisation is forced, despite the suppression of political pluralism, to endure the stabilisation and operation of more or less independent courts in the interest of foreign capital inflows and investors. Then, however, these courts begin to function as a quasi-opposition to a centred political power, and even if no democracy can develop, these courts appear as an 'oppositional' juristocracy against authoritarian political power.[242] In addition to Hirsch's model of juristocracy contrasted with democracy, there is also a model of juristocracy contrasted with autocracy in this way. In his analysis, Chien-Chih Lin also mentions the emergence of juristocracy from grassroots legal aid movements: „Others are due to bottom-up grassroots forces, such as legal mobilization and cause lawyering." [243] In Central and Eastern Europe, however, the basic character of these grassroots forces needs to be corrected, since in

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[241] See Tamir Mustafa and Tom Ginsburg: The Functions of Courts in Authoritarian Regimes, in. Tamir Mustafa and Tom Gnsbiurg (eds): Rule by Law. Cambridge Edition 2008, pp. 1-22.

[242] Chien-Chih Lin, 'Autocracy, Democracy, and Juristocracy: The Wax and Wane of Judicial Power in the Four Asian Tigers', Georgetown Journal of International Law 48, no 4 (2017), 1063–1145. In the summary of this concept by Chien-Chih Lin it reads (p. 1065–1066): "In summary, at the risk of oversimplification, this model suggests that economic prosperity is predicated on, and therefore simultaneously contributes to, judicial independence, because the latter is required to convince foreign investors and boost investment. The model explains why judicial expansion sometimes takes place in authoritarian regimes seeking to improve their economies; an independent and capable judiciary can stimulate foreign investments by securing investors' freedom of contract and protecting their property from takings without compensation."

[243] Ibid. 1069.

recent decades they have been organised through American NGO networks, some of which are active worldwide, and in particular the Soros Foundation, which operates a global power organisation under the guise of protecting fundamental rights, supporting juristocracy instead of democracy.[244] So it is not a matter of 'cause lawyering', but the organisation of a way of political competition outside of democracy and party pluralism. In this case, the system of democratical means works, but one of the political elites develops a second subsystem for influencing state power by organising NGOs and having them involved in the judiciary, and educating part of the jurists as legal protection activists. This has been the case in a number of political systems in Central and Eastern Europe since the 1990s, mainly due to the long-standing development of NGOs by the Soros Open Society, and this cannot, therefore, be regarded as a bottom-up grassroots juristocracy. [245]

Let us take a look at some of the world's constitutional courts or supreme courts that also carry out constitutional adjudication. It is worth taking a look at the constitutional courts in the East Asian countries and then at those in Latin America. At the end of this chapter, I summarise the analyses to date, so that in the next, last chapter I can only deal with the structural problems of constitutional adjudication in Hungary and their possibilities for reform.

1. East Asian constitutional adjudication

The Indian constitutional jurisdiction should be considered first, where this function was delegated to the Supreme Court and not a separate constitutional court, since the British colonial Anglo-American Common Law system continued here in India. We then examine the constitutional jurisdiction in Taiwan, South Korea, Thailand and Indonesia, where separate constitutional courts have been established.

1.1.The constitutional adjudication of India

There were also common causes of the creation of constitutional adjudication in the world, and one of them was its effective spread in the occupied European countries by the United States at the end of the 1940s, in order to have certain effects on these states in later times, and the support of this tendency by the United States became more general in the coming decades. This was later accompanied by the tendency to establish constitutional adjudication as an indispensable part of democracy in the course of building pluralistic democracy. In this way, constitutional adjudication was created in earlier dictatorships such as Spain and Portugal at the end of the 1970s, and later in Latin America in the late 1980s and in the 1990s in Central and Eastern Europe, when these countries were liberated from the Soviet empire. In the case of the creation of East Asian constitutional courts in Thailand, South Korea and Indonesia, the incentive by the Western great powers also played a role, as did imitation. By comparison, constitutional adjudication in India – although imitating the U.S. Federal Court and its activism

[244] See, for example, a study by researchers from the University of Strasbourg on Eastern European NGO networks set up by U.S. global foundations to organise, among others, litigation before human rights courts: Gaëtan Cliquennois and Brice Champetier, 'The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War?'. European Law Journal 22, no 1 (2016), 92–126.

[245] See Pokol, The Juristocratic State.

was important here, too – was not created out of external encouragement, but as a result of domestic socio-political power struggles.

To understand this, one has to know that the codification of the British common law system was continued in India after the 19th century, unlike in Britain and the United States, where unsuccessful attempts were made until the end of the 19th century. From 1860 to 1910, the British colonial lawyers summarised the entire private law of common law into 15 laws, with the exception of tort law, which was then further divided to certain compensation acts (for example Railways Compensation Act, Automobile Compensation Act, and so on). In accordance with the spirit of the times, this codification reduced judicial interpretation of the law to the smallest circle and put down clear rules that had already been laid down in common law. This legal system also remained unaffected by India's independence and has largely survived to this day, but the very far-reaching powers conferred by the Indian constitution on the higher courts, and in particular the Supreme Court, have opened for these courts a special option in the area of private law. What the private law courts were unable to do due to India's codified private law with its strict regulations, was made possible for the supreme judges by the lessons learned from the activist constitutional adjudication in the United States from the 1960s. In particular, Article 32 of the Indian Constitution, which did not simply grant the right of access to the courts – as customary in today's constitutions –, but the right of access to the Supreme Court, made it possible for this Supreme Court to realise activist constitutional adjudication.[246] This is complemented by Article 142, which enables the top judges to take a wide range of direct measures to support their rights, so they do not need the support of the lower courts towards the authorities to enforce their decisions, but these decisions can be enforced by the highest judges themselves.[247] When the Supreme Court began to exercise this power more and more broadly, the higher courts below the Supreme Court followed the new decision-making style and began to use their similar powers, which were granted to them in Article 226 of the Constitution, to implement the constitutionalisation of traditional private law.[248] Thus, a fundamental rights jurisprudence has gradually emerged in addition to the strict rules of private law jurisprudence of common law for the same areas.

Shyamkrishna Balganesh, an Indian law professor living in the United States, wrote in his study that the constitutionalisation of private law in the field of compensation law began in India in the early 1980s, when the Supreme Court involved, under Article 32, more and more in its jurisdiction private claims for damages against the state. Initially, there were complaints from prisoners against the prison staff, and in order to expand the possibilities of these processes, the right of action was also granted to third parties and organisations not directly affected. After all, violation of a fundamental right was possible not only because of the damage that was actively caused, but also through omission.[249] Since this fundamental rights lawsuit

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[246] Based on the German-language constitutional collection, Article 32 of the Indian Constitution reads as follows: „Das Oberste Gericht ist befugt, Direktiven oder Weisungen oder Verfügungen, einschließlich Verfügungen in der Art von habeas corpus, mandamus, prohibition, quo warranto und certiori je nach ihrer Eignung zur Durchsetzung der in diesem Teil gewährten Rechte zu erlassen." [Art. 32. (2).]

[247] „Bei der Ausübung seiner Gerichtsbarkeit kann das Oberste Gericht Beschlüsse fassen oder Verfügungen erlassen, soweit sie notwendig sind, um in einem Verfahren volle Gerechtigkeit zu erreichen. Jeder gefaßte Beschluß oder jede erlassene Verfügung ist im gesamten Gebiet Indiens in der Weise vollstreckbar, wie es durch oder auf Grund eines Gesetz des Parlaments vorgeschrieben wird. Bis eine Regelung zu diesem Zweck ergeht, kann der Präsident sie durch Verordnung vorgeschrieben." [Art. 142 (1).]

[248] „Unbeachtet der Bestimmungen in Artikel 32 ist jedes Obergericht befugt, auf allem Gebieten, in denen es die Gerichtsbarkeit ausübt, gegen jede Person oder jede Behörde, in geeigneten Fällen auch jede Regierung, Direktiven, Weisungen oder Verfügungen, einschließlich Verfügungen in der Art von habeas corpus, mandamus, prohibition quo warranto und certiorari zur Durchsetzung der im Teil III gewährten Rechte und für jeden anderen Zwecke zu erlassen." [Art. 226 (1).]

[249] Shyamkrishna Balganesh, „The Constitutionalisation of Indian Private Law', Faculty Scholarship at Penn Law 1557 (2016), 6–7: 'In exercising its plenary jurisdiction under Article 32 to protect and enforce the

required much less burden of proof, traditional private lawsuits in this area gradually ceased. For a fundamental rights complaint, it was sufficient to make a statement to the notary about the damage suffered and there was no need to bear the heavy burden of proof that was normally required in a private damages claim. In the 1980s, damages due to medical malpractice, for example in the case of state-financed hospitals, could not only be sued through traditional private law trials against the hospital and the doctors involved, but also through a lawsuit against the Indian state due to the constitution, in which high compensation had a greater chance.[250]

These developments doubled the system of private litigation and in many ways emptied the original private law regime in favour of fundamental rights litigation. To some extent, however, these changes seem to only have made the hitherto stagnating common law system of India more flexible, which was something that the original European private law doctrines could achieve without the detour of constitutionalisation. For example, the Delhi High Court allowed in a case of a fire in an urban movie theatre in 2003 to bring the lawsuit – due to the indirect involvement of the local government – under the more liberal rules of constitutional fundamental rights suits, instead of private law litigation with the strict burden of proof of the violation. It was declared by the judges of Delhi that if anyone operates such a dangerous facility, they are fully responsible for any damage there. This means that objective liability for damage caused by functioning of a dangerous facility was incorporated into Indian compensation law through the detour of constitutionalisation. [251] However, a broader analysis also reveals some problematic developments in Indian constitutional adjudication.

Initially, the Indian Supreme Judges interpreted their jurisdiction abiding by the constitutional text and respecting the priority of parliamentary legislation, but this began to change after a few years. Colonial precedents of the second half of the 19th century also helped to set aside certain laws: such precedents overturned some of the Governor General's decisions for violating the Indian Councils Act of 1861. This judicial control was further expanded by the English Parliament in the Colonial Laws Validity Act in 1865, and this right was expressly delegated to the Indian high courts. [252] Following such precedents, the first Indian prime minister, Jawaharlal Nehru, was cautious despite the Supreme Court's initially modest stance and considered it necessary to defend his extensive land reform, begun in 1951, against constitutional control. This reform obviously violated the property right of the landowners because, among other things, it also wanted to distribute among the masses of the poor that land that was taken from the rich landowners. Therefore, after Article 13 – which contained the constitutional control –, the parliamentary majority of Nehru's government added a new article

constitution's fundamental rights, the Supreme Court's first move was to relax the requirement of locus standi to allow third parties to petition the Court in any way or form for relief. In later cases, the Court interpreted its powers to allow it to consider a matter on its own motion (suo moto), effectively eliminating both the standing requirement and the need for an actual case or controversy to arise as preconditions for the exercise of its jurisdiction. … Whereas the early cases had involved deliberate or intentional governmental action (e.g. unlawful detention, torture of prisoners, etc.), in later cases the Court became far more willing to extend liability to situations where the state actor had omitted to take any action. In so collapsing the act/omission distinction, public interest litigation thus came to be extended to situations where governmental inaction had been a factor in harm suffered by a victim."

[250] Ibid. 7: „A government hospital's failure to provide treatment or in negligently providing treatment could now be the subject of a writ petition against the government, rather than the subject of a simple negligence action against the doctors or hospital staff, and a court could award the petitioner compensation under either approach. The petitioner had "rights" against both sets of parties: a fundamental right against the government, and a private law right against the private party. From a petitioner's (i.e., victim's) perspective, bringing the action as a writ petition however held innumerable advantages. Most important among these were the expendited nature of the process, and the reality that a court's decision in its writ jurisdiciton did not require an elaborate factual record but could instead be disposed off on affidavit evidence without further testimony."

[251] Ibid. 9.

[252] Rabindra K Pathak, Constitutional Adjudication in India: A Study with Special Reference to Basic Structure Doctrine (PhD dissertation) (Bardhaman (IN-WB): University of Burdwan, 2013), 71.

to the constitution, which excluded these new laws from the possibility of abolition based on fundamental rights. Initially, the Indian Supreme Judges were not against it, but in a 1964 decision they declared that constitutional fundamental rights shall not be restricted by Parliament through any of its powers. During these years, Nehru's daughter Indira Gandhi was the prime minister, and after this court decision it was assumed that the supreme judges would extend the possibility of declaring unconstitutionality to amendments of the Constitution. To prevent this, Indira Gandhi's party, which received an increased parliamentary majority in the new elections, had nine new judges elected to the Supreme Court in 1971, and the extended court ruled on the issue. Then a council of 13 members of the Supreme judicial forum finally decided 7:6 that the Constitution can only be changed by the parliament in such a way that its basic structure is not affected. What was included in the basic structure was clarified to varying degrees in later judgments, but in principle the Supreme Judges declared with their decision their right to control amendments of the Constitution. This was interpreted as a declaration of war by the parliamentary majority, and Indira Gandhi appointed a new Chief Justice to replace the previous one and removed three judges from the panel. However, the remaining majority of the court was still against the government and, as an act of revenge, accepted the opposition's request, which challenged Indira Gandhi's election as a Member of Parliament. In June 1975, Gandhi exercised constitutional authority to declare a state of emergency and the powers of the Supreme Court were immediately restricted. However, the struggle did not end, Indira Gandhi failed in 1977, and the reinforced supreme judges took revenge with a number of decisions to cut back Gandhi's political course.

The next step on the way to the supreme power of supreme judges was a broad interpretation of the separation of powers and, based on this interpretation, the right to appoint judges was removed from Parliament and a separate system for appointing judges by the judges themselves was introduced. Although the separation of powers is not contained in the Indian Constitution – contrary to the American Constitution, which is considered exemplary in India –, the judges have found as a substitute that certain state functions are regulated separately in the Constitution, and it can be concluded from this that the branches of state power are thus separate.[253] After many battles, the deletion of judges' appointments by Parliament and the inclusion of these appointments in the judges' own authority realised in 1993, through a lawsuit brought against the Indian state by a bar association. The Supreme Judges accepted their arguments, and from then on five senior Supreme Court judges, led by its president, have been deciding on appointment of new judges. In order to change this and to abolish the right of the Supreme Court to co-opt, in 2003 the majority government at the time presented a proposal to amend the Constitution to establish a National Judicial Council, which failed without a sufficient majority. In 2014, it was resubmitted by the Modri government's parliamentary majority and it was passed, but in 2015 the law was annulled by the Supreme Court as unconstitutional. In response, President of the Supreme Court Dipak Misra was indicted at the request of 71 MPs, but the success of this process requires a majority of the two chambers with the presence of at least two thirds of all members, and this number is unlikely to be reached. Recently, the position of Supreme Court judges has deteriorated due to the fact that out of 25 members of the Supreme Court – which, as is also known to the public, fell into two (liberal or conservative) camps – four senior judges attacked at a press conference the Court President, complaining about abuses inside the court.

[253] One of the court's decisions in 1975 reads: „It is true that no express mention is made in our Constitution of vesting in the judiciary the judicial power as is to be found in American Constitution. But a division of the three main functions of Government is recognized in our Constitution. Judicial power in the sense of judicial power of the State is vested in the Judiciary." See 'Indira Gandhi v. Raj Narain', 1975 Supp SCC 1, cited by Pathak, Constitutional Adjudication, 79.

Many decisions could be mentioned to characterise the super-activist interpretation of the constitution by the Supreme Judges of India. For example, here is one of the latest that says that in all Indian cinemas, the national anthem must be played before the screening, which must be heard with due respect from the audience who is to listen to it standing. But not less 'brave' was the decision that deduced from the right to life that people actually have the right to a living as a fundamental right.[254] This was further specified in a later decision in the sense that this fundamental right guarantees the basic living conditions necessary for dignity.[255] All of these decisions prompted the Indian Supreme Judges in the 1980s to commission extensive research into social issues so that they could take such decisions. As a result, a whole system of socio-legal commissions has been gradually established, which are often tasked with overseeing the implementation of the decisions made by the Supreme Court judges. In this way, a quasi-parallel administrative system was gradually established by the Supreme Court of India, and these auxiliary agencies of the court, also known as surveillance agencies, make recommendations to the public administration for the performance of the tasks resulting from court decisions.[256]

This full-fledged super-juristocracy only lags behind the power of the exemplary American activism in constitutional adjudication in that the senior judges of India, due to their mandatory retirement at the age of 65, are often less than four years in active service. This leads to a frequent change of direction due to a varying majority. An example of this is that in a decision in 2013 on Article 377 of the Indian Penal Code, which has existed for 150 years and has remained in force from the colonial era until today, they did not declare the punishment of same-sex sexual behaviour unconstitutional. This was done by first separating the right to privacy from the right to life and freedom in 2017, and after the majority of judges of the Court of Justice further changed, Article 377 was finally declared unconstitutional in 2018. [257]

Due to Indian constitutional adjudication, an interesting answer can be given to the question of what function this institution can perform in addition to a parliamentary democracy based on millions of citizens. Robert Bork's analyses have supported the assumption that this is a juristocratic correction of the law based on the value preferences of the elite that stands above the masses, although it is presented in public as the protection of the interests of the lower masses, which they cannot overview. Anuj Bhuwania discusses this question in a relatively new study that analysed the years 1950 to 1975. In this study it is demonstrated how the Indian supreme judges, supporting essentially liberal upper-class views, opposed the measures taken by the parliamentary government to support the lower masses, like the Indian land distribution and other mass aid measures. Following the state of emergency initiated by Prime Minister Indira Gandhi and breaking judicial resistance, the newly appointed majority of judges followed the poor people's support program and started activism to help this. In this process, the supreme judges deliberately relaxed the framework of constitutional adjudication in order to help public interest litigation.[258] In addition, they themselves started to set up legal aid organisations and

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[254] „The sweep of the right to life conferred in article 21 [of the Constitution] is wide and far reaching" and includes the right to a livelihood.' 'Tellis v. Bombay Municipal Corp.', cited by Charles Manga Fombad, 'Constitutional Reform and Constitutionalism in Africa: Reflections on Some Current Challenges and Future Prospects', Buffalo Law Review 59, no 4 (2011), 1072.

[255] Ibid. 1073: „In 'Mullin v. Union Territory of Delhi', the court stated that "the right to life includes the right to live with human dignity and all that goes along with it … must in any view of the matter include the right to the basic necessities of life."

[256] Ibid. 1075.

[257] In their decision they stated that it was up to Parliament to change this old provision and they did not want to act in this respect. The following year, an individual MP motion tried this in legislation, but received no support.

[258] To describe this, the author shows that the supreme judges often organise the procedures themselves to make in the end the decision they want: "Arun Shourie, then editor of the Indian Express, gave an interview in 1983 where he observed: "A judge of the Supreme Court asked a lawyer to ask me to ask the reporter to go to these areas, get affidavits from some of the victims who are still alive and some of them who were dead, from their

use them as a tool to support the intended decisions. This shift finally brought them into a stage when they began to replace the original litigants with the amicus curiae organisations they created so as not to interfere with their decision-making. With this change, Indian constitutional adjudication began to shift, and instead of making decisions on narrow individual cases, the decisions of the supreme judges shifted in the direction where they aimed to achieve more comprehensive policy changes and where the litigants of the cases only bothered the judges.[259] In this way, the activism that was originally supposed to help the lower masses turned back into a constitutional adjudication supporting the value preferences of the elite.[260]

1.2. The Taiwanese Constitutional Court

In the case of Taiwan, the use of constitutional adjudication began during the transition from dictatorship to democracy, and here it played a peculiar role, since it was not created after a failed dictatorship to restrict democracy, but the hitherto existing but paralysed council of supreme judges (Council of the Grand Justices of the Judicial Yuan), which had constitutional adjudication among its functions, became operational due to the changing political environment. Here, the Taiwanese Constitution of 1947 created a body of 17 members as a separate judicial council to interpret the constitution at the request of the litigants or the government. The Grand Justices, appointed by the President, tried to do so in the early 1950s by restricting the power of government agencies, but were retaliated and they stopped doing so. After that, they could basically only vegetate, but when the Kuomintang leaders, who were evacuated from China to the island of Taiwan in the second half of the 1940s, gradually grew older with President Chiang Kai-shek and eventually handed over control in the early 1980s, the new leaders allowed the appearance of opposition parties, and the time of supreme judges finally came. The Council of Great Judges began to deal with filed applications and to exercise its existing powers more courageously. Ultimately, this allowed for a complete break with the remaining supporters of the dictatorship, and in one of its 1990 decisions, the Council declared it unconstitutional that MPs who had represented mainland China since 1948 were allowed to continue to be MPs for decades without interruption, since it was impossible to elect new MPs in their place. [261]

For the entire Taiwanese political system, this decision enabled the constitutional judges to openly break with the old Kuomintang regime, given that President Lee Teng-hui, who came

families. The affidavits were got [sic] compiled, sent and he entertained a writ. Eight months later someone came to me saying that the same judge had sent him … to ask me to ask the respondent to file such and such information in a letter through so and so. … A third time a civil rights activist asked that the same thing be done. He said the judge had ask him. … The point that the opponents of the case were making was that the litigants were choosing a judge. As it turns out, some judges were choosing their litigants." Anuj Bhuwania, 'Courting the People: The Rise of Public Interest Litigation in Post-Emergency India', Comparative Studies of South Asia, Africa and Middle East 34, no 2 (2014), 327.

[259] Ibid. 330: „However, in more recent years Indian public interest litigation has come to include cases involving matters of general public policy in which the petitioner stands for the entire citizenry of India rather than individual victims of injustice. … She could be superfluous once her minimal role was performed."

[260] Ibid. 331: „The petitioners are then entirely at the mercy of the amicus curiae who as the delegatee of the court's screening power can decide who can or cannot petition the court and what can and cannot be said by them."

[261] Basically, Chiang Kai-shek and his co-workers drafted Taiwan's Constitution based on the idea that it could function as the constitution of all of China. That is why even those members of the Taiwanese parliament were elected in 1948, by whom the whole of China was symbolically represented, and who remained members in the later decades. See Tom Ginsburg, 'Constitutional Courts in East Asia: Understanding Variation', Journal of Comparative Law 80, no 1 (2008), 80–99.

to power in the 1987 presidential election, was anxious to break with the past one-party system with caution. Then, with the help of new power groups, the constitutional judges began to exercise their powers without scruple and successively destroyed the remains of the Chiang Kai-shek system. Unrestricted pluralistic democracy was established, but Taiwan's constitutional judges have also played an important role in the structure of state power since then, and they are somewhat saturating the democratic political system with a dose of juristocracy.

Like most of these institutions in the world, constitutional adjudication in Taiwan was initially aimed at correcting the political system, but after the stabilisation of pluralistic political mechanisms, its effects on the legal system became more visible. This could also be observed more clearly in Taiwan, as the model was the German constitutional court. According to a description, German universities are at the top of the renowned foreign law faculties for doctoral studies, and here it became almost mandatory for anyone wanting to be appointed a constitutional judge.[262] To what extent this led to the duplication of traditional branches of law, as in Germany, cannot be precisely assessed from the data, but one can find some references in this direction, concerning the extension formulas of fundamental rights and their expanded 'scope'.[263]

1.3. The South Korean Constitutional Court

There is not such a long history of constitutional adjudication to narrate here as in the case of Taiwan in our previous section, but with the disappearance of military dictatorships in South Korea that had existed for decades, it was almost at the same time that the South Korean Constitutional Court went into operation, in 1987. Here, the longstanding situation was characterised by new military coups and the constant rebellion of already existing, half suppressed opposition parties, and the last protests against the last state leadership of 1979 were defeated amongst bloodshed, after which the military government could no longer be stabilised. The successor of the resigned president, General Roh Tae-woo, promised the opposition to work out a new constitution with them, with a direct election of a president to rule the state. The 1987 Constitution subsequently created a strong constitutional court based on the German model, and the new constitutional judges followed the exemplary Germans by extracting new fundamental rights and principles from the Constitution in order to be able to abolish unconstitutional laws to a greater extent. In addition, the Constitutional Court itself took part in the toughest power struggles, and in 2003 the constitutional judges sided with President Roh Moo-hyun, who was supported by lower social classes against the ruling power groups, and did not deprive the President of arranged power.[264] Korean constitutional judges continue to play

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[262] Yun-Ju Wang, Die Entwicklung der Grundrechte und Grundrechtstheorie in Taiwan (Wiesbaden: VS Verlag für Sozialwissenschaften, 2008), 123: „In der 7. Amtsperiode der Hohen Richter (2003–) hatten 6 in Deutschland, 1 in Österreich und 2 in den USA promoviert. Daraus lässt sich ein deutlicher Einfluss der deutschen Rechtswissenscaft abletien."

[263] Ibid., 125: „Als Beispiel gilt der Hohe Richter Gen Wu in der 5. und 6. Amtsperiode, der z.B. die deutsche Grundrechtsbegriffe des Schutzbereichs des Grundrechts und die institutionelle Garantie im Sondervotum der Auslegung Nr. 368 eingeführt und angewendet hat."

[264] In the campaign of the election meant to renew half of the parliament, the new president elected in 2003 spoke out in public for the success of his party, which was prohibited by law, and therefore the two-thirds majority of the parliament – which was to dissolve soon – declared the indiction and the suspension of the president. In the elections that took place during his suspension, the president's party won a brilliant victory and his party became a majority in the new parliament, too. It was in this situation that the Korean constitutional judges were lenient with the president's violation and decided that the withdrawal would be disproportionate to this minor violation. (See Ginsburg, 'Constitutional Courts', 87.) In fact, the opposite could have been said just

a central role in both monitoring parliamentary laws and resolving public law disputes between power groups.

Of the constitutional courts in East Asia, the Koreans have the greatest authority both domestically and worldwide.[265] Regarding their decision-making statistics, the constitutional judges have made a total of around 10,000 decisions here, around a 1,000 annually, and most of these were due to constitutional complaints from citizens and private organisations. In this way, the work of this constitutional court can be characterised less by control over the political system than by control over the law. This is limited by the fact that final judgments of ordinary courts in Korea cannot be challenged by a constitutional complaint.[266] Instead, by suspending the proceedings before them, the ordinary judges can apply to the Constitutional Court for a review of the constitutionality of the legal provisions that they have to apply in the case. It also determines the competence of constitutional judges to control the laws because there is no abstract norm control – for example that on the proposal of a limited number of opposition members, an investigation into the unconstitutionality of a new law is carried out –, only concrete norm control.[267] The consequence of this concrete norm control is that constitutional judges move more from politics to law in this way, and that their entire activity has more of a legal character. Thus the possibility of doubling the traditional branches of law through the constitutional branches of law increases.

It is peculiar in its decision-making structure that, in addition to nine relatively short-term constitutional judges, elected for a six-year term, some rapporteur judges are appointed for a long period, even ten years. Some of these rapporteur judges join the new constitutional judges, while some of them use their specialisation in certain legal areas in centralised groups and prepare drafts for constitutional decisions.[268] This decision-making structure, partly slipped away from the constitutional judges, increases the likelihood of the emergence of an 'invisible constitution', that is, the functioning of previous constitutional court decisions as a basis for decisions. This possibility is further reinforced by that deviations from old decisions in new decisions are possible with only two thirds of the votes.[269]

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as correctly as it did happen in Thailand ten years later, and this is a good example of how democratic political struggles can be determined by the constitutional judges' decisions.

[265] Tom Ginsburg, „The Constitutional Court and the Judicialization of Korean Politics', in New Courts in Asia, ed. by Andrew Harding and Penelope Nicholson (London: Routledge, 2010), 1: 'The Constitutional Court of Korea has just celebrated its twentieth anniversary, a significant milestone. Of the five designated constitutional courts in East and Southeast Asia (the others being found in Indonesia, Thailand and Mongolia), it is arguably the most important and influential, and therefore deserves close scrutiny as a case study in judicialization of constitutional politics in Asia."

[266] Except if a court decision was based on a legislative act that constitutional judges had already declared unconstitutional – as decided by Korean constitutional judges in a 2018 decision. See Lee Kyung-min, 'Constitutional Court Cannot Review Supreme Court Rulings'. The Korea Times, August 30, 2018.

[267] See the 2011 analysis of the Venice Commission about Korean constitutional jurisdiction: Venice Commission, Past and Present of Korean Constitutional Justice. Independence of the Constitutional Court from Korea (2011), 2.

[268] In the Korean Constitutional Court Act, Articles 19 to 20 provide for the use of rapporteur judges, who are appointed by the court president from a list of individuals approved by the board, and controlled later by the president. This solution was only adopted by the Romanians in Europe, so there, in addition to the constitutional judges, in fact these substitute constitutional judges play the main role. The same was realised in Turkey, where, in this way, the actual decision is determined by the president of the constitutional court or even more by the state president, instead of the theoretically independent constitutional judges.

[269] Ginsburg, 'The Constitutional Court'. Of course, besides rapporteur judges, who are subordinate constitutional judges and subject to the president of the court, Korean constitutional judges can also take an independent stance on outstanding social issues, and this was demonstrated by their recent decision against a law that banned abortion. While the same part of the law was considered five against four of them as constitutional in 2012, their majority declared it 'conditionally unconstitutional' in summer 2019 after an interim exchange of constitutional judges with seven votes against two. To support more radical measures, three constitutional judges, in their dissenting opinions, insisted that women could exercise their right to abortion unconditionally in

Political fragmentation here has contributed to transforming South Korean constitutional adjudication into a strong juristocracy since the collapse of the military dictatorship in 1987. At the beginning of the changes, the military elite reconciled with the opposition; the three groups of the opposition had around the same quantity of votes, so they lost the presidential election and the military elite candidate won. Therefore, all three opposition groups were interested in a strong constitutional court that restricted the president's power. Therefore, the election of the nine members of the constitutional court was tied to different political forces, so that a mixed decision-making body would always force internal compromises.[270] In this political situation, in addition to the political conflict, which often leads to a stalemate, the establishment of an institutional system to influence constitutional adjudication began. In this way, a juristocratic will was formed alongside the party-political parliamentary arena, in which the legal NGOs, the lawyers of the opposition parties and also other non-party political groups were involved. In this way, not only politicians but also personalities known by NGOs were brought up in the political public. Roh Moo-hyun, the would-be president, was known as such an NGO activist before his election and he flooded the ministries with NGO lawyers, his former colleagues, when he took power. In this way, not only the judicial proceedings, but also the whole executive power were penetrated by juristocracy.[271] As a result, in the case of South Korea, it can be said that above the system of democratic institutions, state power is actually organised around the judges of the Constitutional Court – with their jurist apparatus – and the ordinary Supreme Court.

1.4. The Thai Constitutional Court

In Thailand, too, the state power was dominated by permanent military coups since 1932 after the overthrow of the absolute monarchy, and here, too, the mass uprising against the last military coup at the end of the 1980s marked the beginning of attempts at multiparty democracy. The new constitution was then drawn up within a few years, and after its adoption in 1997, a strong constitutional court began its work. Here, the review of ordinary court decisions as well as the possibility of constitutional complaints from citizens were excluded from the jurisdiction of constitutional judges, but like in South Korea, ordinary judges can request a review of the applicable legal provisions, and heads of state organisations can do the same. However, the Thai Constitutional Court has been given a greater role in resolving disputes between central authorities, and thus its real role became that of a public arbitrator in political power disputes, which in Europe only exists in exceptional cases, although it does formally exist here, too. This delicate role did not allow constitutional adjudication to function permanently here. After the struggles between the prime minister and the parliamentary opposition forces in 2001, the constitutional judges stood by the prime minister and prevented his being deprived of power. The Prime Minister's party won again in 2006, but the constitutional court declared the results of the general election unconstitutional after a Senate motion which questioned these results. In

the first 14 weeks of pregnancy, and they considered this feasible by the immediate abolition of the relevant part of the law. See Jeong-In Yun, 'Recent Abortion Decision of Korean Constitutional Court'. IACL-AIDC Blog, July 31, 2019.

[270] Lin, 'Autocracy', 1116: „Of the nine justices on the Constitutional Court, three are nominated by the president, another three by the national assembly, and the last three by the chief justice of the Supreme Court."

[271] Ibid. 1117: „Former President Roh Moo-hyun himself was an activist lawyer who affiliated with the Lawyers for Democratic Society (Minbyun). After his election, he also appointed some Minbyun members to important governmental positions. This stimulated more judicialization of politics because these legally trained politicians had rich experience taking advantage of litigation to pursue their agendas when they were public interest lawyers."

the subsequent crisis, the military seized control, the constitutional court was dissolved and a new constitution was adopted.[272] In 2007, however, a new constitution was adopted by the opposing powers and a new constitutional court was established. However, this did not change the basic situation, because in the struggle of the opposing large social forces the party of Prime Minister Thaksin Shinawatra, who had been sacked in 2006, won again, and now his sister became prime minister and started to fight the enemy political forces in the Senate. The constitutional judges then once again became the final arbitrators of this political struggle after another request from the Senate. But they already had enough experience that the military leaders were not on the side of the Shinawatra party, and they declared the prime minister's deprivation of power in 2014.[273] The situation in Thailand is therefore a strange mixture of democracy, an increasingly explosive military dictatorship and juristocracy, but despite all the volatility of their situation, the constitutional judges play a central role.[274]

This fragile duality of democracy and the juristocratic power of the constitutional court based on the dominant elite is presented by Eugénie Mérieau in her recent study as a coexistence of democracy with the 'deep state' in Thailand.[275] It is worth taking a closer look, since this can be conceived as a typical example of Asian juristocracy and the internal constellation of power. This Asian juristocracy can, therefore, be well confronted with the juristocratic power structures created in Europe, especially in the Eastern European countries from the 1990s. This is because in Eastern Europe juristocratic power structures do not have their origin in internal power constellations, and their visible organisations and agencies do not rely on internal resources either, but they have appeared here in recent decades as an import of the juristocratic institutions originating in power constellations in the U.S. While the European juristocracy is essentially a globally exported juristocracy, in Asian countries it is predominantly the organisation of its own internal power resources in a parallel deep state. In the latter case, the political forces behind the juristocracy can exist unaffectedly outside the electoral and democratic political framework. Both are trying to correct democracy, but while Europe is transforming the influence of global powers into an internal power by the juristocratic power structures, the Asian juristocracy is using the internal sources of power, which are not affected by the democratic struggle. Thailand seems to be the best example of this pattern. Let us take a closer look at that.

The category of 'parallel state' or 'deep state' outside democracy-controlled state structures first appeared in the 1950s, when Morgenthau described the structures of the military-industrial lobby organised by the CIA elite. For the conceptual expression of power structures beyond democracy in different countries around the world, the concept of deep state has become commonplace in recent years.[276] Juristocracy as an alternative system of power to democracy

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[272] Ginsburg, 'Constitutional Courts', 89.

[273] The justification for the withdrawal was almost dictated, as the constitutional judges, at the senators' request, found that the Prime Minister's transfer of a national security officer to another position and the filling of that position with her own followers was an abuse of power. Of course, hundreds of such exchanges are possible and common in democratic countries, so this was obviously only intended for the removal.

[274] In his 2008 study cited above, Tom Ginsburg describes – and also blunts – the contrast between the politicians of a democracy based on the masses of people and the chief judges who are influenced by a narrow elite, as follows: „More broadly, however, the emergence of a middle class, seen to be so important in the broader process of democratization, may be a necessary condition for constitutional review to thrive. All four countries can be said to have vigorous middle class that played an important role in demanding democratic reforms. The presence of this broader middle class allows the court to have an alternative means of legitimation – the court can protect itself from attack by political institutions through building up a wellspring of popular support." Ginsburg, 'Constitutional Courts'.

[275] Eugénie Mérieau, 'Thailand's Deep State, Royal Power and the Constitutional Court (1997–2015)', Journal of Contemporary Asia 46, no 3 (2016), 445–466.

[276] Ibid. 446. Mérieau describes the structure of the deep state as follows: „Like the regular state, the Deep State is not monolithic; various actors and networks engage in power struggles within its framework. However, the fundamental difference between the regular state and the Deep State is that the former is visible to the people it

is a combination of several elements, and the constitutional court and in some cases other supreme courts are only at its top. Without an established NGO system to organise mass and politically targeted applications to these courts, this cannot have a profound impact.[277] This happens either through the organisation of internal social groups with resources, as is typical for East Asian juristocracies, or as subsidiaries of global NGO networks that are built up from outside in the different countries, as is customary in Eastern European countries. Therefore, in addition to the supreme judges, their 'customer' NGO organisations are just as important for the power system of juristocracy as the political parties for democracy. In addition, the continuous production of juristocratic intellectual products and the legal training in a juristocratic spirit are indispensable elements of this power system. Creating the right concepts and methods of interpretation so that the legal system can continue to function in accordance with the goals of juristocracy is only possible by spreading these ideas through legal studies and monographs; it is important to inculcate these concepts, arguments and methods of interpretation for students in law academies, and to sensitise judges and lawyers for these ideas so that they accept the goals of the juristocracy and operate the system in accordance with them. While this was accomplished in Europe, and particularly in Eastern European countries, through the organisation of U.S. foundations representing the deep state from the early 1990s, [278] these shifts in the legal system in East Asian countries were accomplished by power groups with internal resources, who did not feel certain that through democracy their existing power resources would be converted into state power.

In Thailand, this deep state and its weight of power was built up by the elites around the broken royal power from the end of the 1990s, when ongoing military coups with bloody retaliation against the masses could no longer help.[279] The power resources of these elites were provided by the urban entrepreneurial and intellectual elites, and these faced the millions of rural agricultural masses and their elites. Since the parliamentary elections and thus the position of prime minister could more or less only be won with the support of the rural masses, the authors of the 1997 constitution, who had already had information about the practical experience of the Eastern European juristocracy, decided to set up a constitutional court with very strong jurisdiction. The constitutional judges elected here and the judges at the supreme courts were a guarantee that the economic and intellectual elites of the cities, also supported by the military officers, will determine the life of Thailand despite their weakness in the elections.

In Thailand, the judicialisation of politics and thus the establishment of a juristocratic system of the ruling elites against a constantly developing democracy was accomplished in three steps. The first phase was the establishment of a powerful German-style constitutional court in the 1997 constitution, created by royalist lawyers from the old royal elite.[280] The second phase began in 2005 when the king, in response to increasing opposition to his elite, asked the judges

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claims to serve, whereas the latter is hidden and unaccountable. The Deep State is the invisible framework under which institutional interests of unaccountable bodies and co-opted non-state networks are aggregated." Ibid. 446.

[277] Charles Epp, who investigated Indian juristocracy in the early 1990s, found that the Indian model had little effect at the time, despite the activism of the judges, due to its then underdeveloped NGO system. See Charles R Epp, The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (Chicago – London: University of Chicago Press, 1998), 112.

[278] On Eastern European NGO networks related to human rights jurisdiction developed by United States foundations see the above mentioned 2016 study by the Strasbourg authors Cliquennois and Champetier, 'The Economic'.

[279] Mérieau, 'Thailand's Deep State', 449: „The objective was to enable the Deep State to face two sets of challenges: democratisation and the rise of majoritarian politics on the one hand and the aging of the king on the other. The practice of the judicialization of politics that unfolded from 2006 onwards is part of such self-interested hegemonic preservation strategy."

[280] Ibid.: „They envisioned a Constitutional Court that was a kind of "insurance" against the political uncertainty of democratisation (see Ginsburg 2003)."

to intervene to overcome the ‘political impasse’ and the judges enthusiastically followed the king’s call.[281] The constitutional judges destroyed the results of the 2006 elections and dissolved the Thaksin Party, which had won three elections with the support of the millions of rural masses. In the new constitution, which, in turn, was created by the victorious old elite, the new constitutional judges they appointed were given even more unlimitable power. Although the Thaksin Party regained governmental power and parliamentary majority in 2010, the constitutional judges declared the unchangeability of the constitution, and only they were allowed to establish its contents and meanings. Thus the juristocracy against democracy – and behind it the deep state of Thailand, the successor of the old elite of the royal power – became the bearer of the highest state power in a formal way, too.[282]

1.5.Indonesian constitutional jurisdiction

In Indonesia, a country with 273 million inhabitants of Islam, a community of 20 million [OÁ24]Christians, and 2-3 million Buddhist or Hindu inhabitants, a constitutional amendment around the turn of the millennium created a constitutional court.[283] While larger Islamic communities cause bloody conflicts wherever they live together with others, the largest Islamic population in the world (99 per cent Sunnis) is an exception here and religious extremism has only sporadically appeared so far.[284] Of the 23 constitutional judges so far, 20 were Muslims – 13 of them were strongly religious – but none tried to disrupt the peaceful coexistence of Islam with the state.[285] In the course of their work, 524 important decisions were made between 2003 and 2013, some of which significantly influenced the fate of the country. The weight of their decisions is also increased by the fact that the court decisions are not reviewed by the Constitutional Court, and the municipal normative rules are not assessed by them either, but rather by a lower level of the administrative courts. In this way, constitutional judges only review decisions on the national level. [286] As a result, it is rather the distribution of power that can be somewhat corrected by the decisions of constitutional court and there is less room for influencing the internal order of law, as is the case in Europe and North America. In addition to reviewing legislation, constitutional judges also play a role in resolving public disputes between central government agencies. So far, however, this has not had the dramatic impact that we have seen in Thailand and there is no information about decisions significant in this regard. The nine constitutional judges are appointed and elected equally by the state president, the Parliament and the Supreme Court for five years. The president and vice-president of the Constitutional Court are elected for two and a half years among themselves.

[281] Ibid.: „The judiciary responded with considerable enthusiasm. Subsequent decisions resulted in the annulment of the elections, the sacking and jailing of election commissioners and, in 2007, the dissolution of Thaksin's Thai Rak Thai Party (TRT) which had won elections in 2001, 2005, and claimed a disputed victory in 2006.”

[282] Ibid.: „Starting with the 2008 dissolution of the ruling party and subsequent change of government, which some have referred to as a ‘judicial coup’, its landmark decision was the July 2012 Constitutional Court decision (Order 29/2555, July 4, 2012) to forbid constitutional revision.”

[283] See Simon Butt, Melissa Crouch and Rosalind Dixon, ‘The First Decade of Indonesia’s Constitutional Court’, Australian Journal of Asian Law 16, no 2 (2016), 1–7.

[284] According to the information, the majority of Indonesian Muslim communities belong to the Sufi Line, which has a stronger focus on the inner spiritual life compared to several Islamic lines, in contrast to the Wahhabis, for example, not to mention the bloody aggressiveness of the Salafi tendencies. This will also make the peace here between Muslims and Christians understandable.

[285] Ibid. 2.

[286] See Dominic J Jardi, ‘Demand-Side Constitutionalism: How Indonesian NGOs Set the Constitutional Court’s Agenda and Inform the Justices’, Centre for Indonesian Law, Islam and Society. University of Melbourne Policy Paper 15 (2018).

It is possible for individuals and organisational bodies to petition the Court, and this has generated much NGO activity in recent years, but the extensive study I drew on did not indicate that subsidiaries of American-based global NGOs active in Europe and Africa would be active in this area, too. In any case, according to statistics, constitutional judges give priority to applications submitted by NGOs, and their arguments more often appear in the constitutional reasonings, too.[287] As an indication of the specific gravity of their respective decisions, one may mention their decision that the privatisation of Indonesian electric works is unconstitutional. Another decision declared that the ban of the existence of the Communist Party is unconstitutional. Democratic political struggles were deeply affected by the Constitutional Court decision which declared that a closed character of party lists is unconstitutional, and thereby they forced open party lists. Since the filing of only few cases in the first years, the number of cases and substantive decisions has increased, which shows the stabilisation of Indonesian constitutional adjudication.

2. Constitutional adjudication in Latin America

First I analyse the general aspects of constitutional adjudication in Latin America in the light of comprehensive-comparative studies, since there is a lot of summary material in this regard. Then I will go into the specifics of individual countries.

As a general characteristic, it can be said that Latin American countries have long and detailed constitutions, which are often easy to change or completely replace, so that in the 30 years from 1978 to 2008 alone, 350 constitutional changes were made across the region.[288] Especially in the Andean countries – Ecuador, Peru, Bolivia, Venezuela – it is typical to create a completely new constitution instead of making a change in the existing one. And this is not just the internal affair of the legal elite about the masses, as is the case in most parts of the world and in Europe, but it is supported by referenda with a large majority of the masses, and it promises extensive social change in most cases.[289] On this basis, it can be said that the constituent power in this region is not separated from ordinary legislation by the democratic forces. The political struggles of democracy is, therefore, only duplicated by constitutional adjudication in such a way that both are governed by the same political forces, and there is usually no separate

[287] Ibid. 8.

[288] María Gracia Naranjo Ponce, 'Constitutional Changes in the Andes', Univ. Estud. Bogotá (Colombia) no. 13 (2016), 141. Constitutional changes have been particularly widespread in Mexico and Brazil since 1990, and between 1990 and 2009 such changes were implemented an average of four times a year in Mexico and three times in Brazil. But this number is also two in Colombia and Costa Rica, and an annual constitutional change can be seen in Chile, Honduras, Guatemala and El Salvador. See Detlef Nolte and Almut Schilling-Vacaflor, 'Introduction: The Times They are a Changin'. Constitutional Transformations in Latin America since the 1990s', in New Constitutionalism in Latin America: Promises and Practices, ed. by Detlef Nolte and Almut Schilling-Vacaflor (London – New York: Ashgate, 2012), 7.

[289] In Ecuador, for example, Rafael Correa won his presidential campaign by 82 per cent in the years after the turn of the millennium by promising a new constitution, and the new constitution was confirmed by 63.93 per cent of the population in a referendum. In Bolivia, the share of votes for the new constitution drawn up in recent years was 61.43 per cent (see Naranjo Ponce, 'Constitutional Changes', 149). It is true that caution should be exercised when evaluating a high level of referendum support, since a monopolistic state control over the entire process and the participation rate in relation to the total population are usually uncertain, which raises doubts about the entire process and the legitimacy of the resulting Constitution. As judged by Joel Colón-Ríos, this is 'validation of constitutions of dubious legal origins through the theory of constituent power'. Joel I Colón-Ríos, 'Constitutionalism and Democracy in Latin America', Victoria University of Wellington Legal Research Paper 118 (2017), 155.

juristocracy over democracy. However, due to the enormous tensions and inequalities in these societies (for example, indigenous ethnic groups are largely excluded from society), these easily changeable constitutions contribute to the instability of their daily functioning, which hinders the development of effective structures. However, these characterise the various Latin American countries to different degrees.[290]

Roberto Gargarella, in his general description of Latin American constitutionalism, points out that traditional left-wing intellectual groups beyond left-wing liberals are generally skeptical about that constitutionalism and constitutional adjudication can solve the most serious social problems, while the other side is too optimistic.[291] Gargarella sees the real addition of constitutionalism in this region in that, in contrast to the other regions of the world, it focuses more on economic and social rights and, through the use of constitutional rights, the reduction of social exclusion of indigenous peoples. Constitutionalisation happened here in four phases, and it is a feature of the last phase, which began in 1980, that constitutional rights, which previously only existed formally, were placed at the centre of constitutionalism and were expanded by additional basic rights for indigenous peoples.[292] The desirable state structure and the hierarchy of fundamental rights are viewed, however, fundamentally differently by the liberal (already left-wing liberal) elite and the right-wing conservative elite. In recent years, the only consensus among them has been to reduce the influence of the millions of masses within the state and thus to limit political freedom. While conservatives sought to do this by strengthening centralised executive power, the left-liberals preferred the courts. With regard to fundamental rights, while the former have strengthened the role of religious organisations, including the Catholic Church, the left-liberal forces have preferred property and freedom of enterprise.

Joel Colón-Ríos highlighted an interesting new phenomenon in the use of constitutionalism in groups of countries in the northern part of South America (Ecuador, Venezuela, Bolivia and Peru) in a new 2017 study. The combination of two otherwise separate theories added an interesting twist in the connection between democracy and constitutionalism to distort political struggles. One was taken from the Indian constitutional adjudication, which in addition to the control of simple laws, also included the control of constitutional changes This actually implies that a constitutional change is implicitly limited by the constitutional judges, even if a qualified majority in Parliament were achieved. However, this was linked to another theoretical contribution to the constituent power, which emphasises the role of a constitutional assembly separate from parliament, which was first developed by abbé Sieyes in the French Revolution and later adopted by Carl Schmitt in constitutional theory. Taken together, this combined theory also offers a new opportunity for government forces with a simple parliamentary majority. The essential thing is that while the current constitution stipulates that only a qualified majority of the parliament can make constitutional changes and new constitutions, this thesis declares, based on the theory of the 'original constituent power' of a separate constitutional assembly, the possibility of overriding the entire constitutional system. In this way, a new government, which has gained control of state power through a simple parliamentary majority, sets up a constitutional assembly consisting mainly of lawyers and confidants, and confirms its constitution through a referendum that is conducted according to its own rules. The control of

[290] In his 2015 study, Roberto Gargarella analysed the creation of Latin American constitutions, which began on the model of the United States from 1820, and differentiated four phases of the development. The first is called the period of experimental constitutionality, while the main goal of striving for independence; the second phase between 1850 and 1917 is the period of constitutionality in which the basic structure of already independent states is established, and the third phase is the social phase between 1917 and 1980. The current final phase is named by Gargarella as the period applying a human rights strategy. Roberto Gargarella, 'Too "Old" in the "New" Latin American Constitutionalism', Yale University Research Papers (2015), 2–10.

[291] Ibid. 2.

[292] Ibid. 8.

the referendum process and the control of the turnout as well as the distribution of the votes are in the hands of government forces, so that they are guaranteed a favourable result. According to this procedure, all previous holders of public law positions can be removed under the new constitution despite the fact that they were appointed by qualified majority under the old constitution and could only be replaced in this way. All in all, such a constitutionalism, which was originally designed to limit simple parliamentary majority and legislation, thus becomes the instrument of this very majority and gives it the power to transform the whole of society and the political system.[293] Of course, violations, conscious lack of control of legitimacy, and manipulation make the whole thing doubtful, but if the public law system of the state to be replaced has little regional or international support (that is, you can hardly wait for it to be replaced), these legal anomalies will be forgiven. The latter developed for these Latin American countries in such a way that, when confronted with the same U.S.-centred world power, this instrumentalised constitutionalism could be preserved by supporting one another and receiving the support of the superpowers opposed to the United States. In the meantime, they were faced with the United States based Latin American human rights juristocracy, and Venezuela had already resigned from this human rights law because of constant clashes.

But this 'special' solution to constitutionalism, which is originally against global juristocracy, can also be used for the opposite purposes, as has been seen in Hungary in recent years.[294] It is not known what mediation brought the similar endeavours to Hungary (see the footnotes), but it is a fact that in the debate between democracy and juristocracy, in contrast to Latin America, this theory would not be used to assist democracy but to assist global juristocracy, as the latter has been suppressed by the Hungarian parliamentary majority for years.

The peculiarities of Latin American juristocracy and constitutionalism compared to those in the rest of the world can be well summarised after a study by Jorge Esquirol from 2018, as it discusses the issue in relation to the United States and the demands of the global constitutional oligarchy.[295] He stresses that global constitutionalists are indeed right in that constitutional changes in Latin American countries are too easy, and that constitutional adjudication is, therefore, still intertwined with the political struggles of democracy. Unlike critics of a contrary opinion, he emphasises the democratic advantages that this offers.[296] He also accepts that this

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[293] Colón-Riós also points to the reversal of the focus change between democracy and constitutionalism in favour of the latter: „Nevertheless, the theory has been playing a central role in the rebalancing constitutionalism and democracy that has taken place during the last decades in several countries in the region.' Colón-Ríos, 'Constitutonalism and Democracy," 155.

[294] The opposition to the Hungarian government majority, which majority has gradually become a feud with global NGO networks and the EU juristocracy since 2010, made public before the 2014 parliamentary elections that if the left-wing liberal parties came to power with a simple majority the entire public law foundation of the existing new constitution would be pushed aside because they could undo it through a referendum based on the theory of the 'original constitutional power' of citizens. According to this idea, the entire system of public law established from 2010 could be abolished, although it is not made possible by the constitution, but the 'original constitutional power' of the citizens stands above it. In the possession of ordinary government power, a constitutional assembly would be summoned the members of which would be appointed by them, and the new constitution they drafted could then be confirmed in a controlled referendum according to the rules it created. The previous system of counterweights consisting of prosecutors, constitutional courts and so on would be replaced immediately. Mátyás Eörsi, the former state secretary of the left-liberal party SZDSZ and today's opposition politician, outlined this in an evening TV program and in a weekly newspaper (Magyar Narancs, no 17, 2011).

[295] Jorge L Esquirol, 'The Geopolitics of Constitutionalism in Latin America', in Constitutionalism in the Americas, ed. by Colin Crawford and Daniel Bonilla Maldonado (New York: Edward Elgar, 2018), 79–108.

[296] Esquirol argues against an author who criticises the constitutional conditions in Latin America as follows: „In fact, the observed malleability of Latin American constitutions, and their commonplace role within ordinary politics, seems to suggest the opposite of a lack of social mooring … greater social mooring in contexts of deep political conflict may lead to greater politicisation of the constitution and to more routine constitutional volatility." Ibid. 98.

is why the intensification of Latin American constitutionalism has not led to a shift in power, as the United States has done since the 1960s, but argues that it is precisely for this reason that the kind of politicisation of the judiciary that was hidden from the public in the United States could not be seen here. And Esquirol justifies the move away from global constitutionalism with the fact that this global version has actually developed according to the preferences of the global dominance, supervised by the United States and other major powers, which can be good for solving problems there, but are not transferable to specific social concerns in Latin America.[297]

However, these characteristics do not dominate in the entire Latin American region, but mainly the Andean countries – Ecuador, Bolivia, Venezuela –, and in the most important countries of Latin America, Brazil and Mexico, the Western model of juristocracy was rather implemented.[298] However, this is only the Latin American adoption of the juristocratic model known in the Euro-Atlantic area, which only colours it, but has not created a new type.

Overall, our investigations so far have shown that it is worthwhile to differentiate two different types when it comes to the model of juristocracy, which has spread throughout the world in recent decades. At home in the United States, where it gained ground in the early 1960s, it was used in struggles between rival political forces and the powerful social groups behind them. Here it was the strategy of bank capitalist groups against industrial-productive capitalist groups to create strong constitutional adjudication and to build a broad network of NGOs for fundamental rights processes before the courts. This second political system was further developed through deeper involvement in the judiciary, and supported by its already existing media power, the creation of a 'deep state-like' formation was accomplished, involving the most diverse governments agencies (intelligence agencies and so on). As a result, the cyclic changes in presidential power had no impact on its weight, although its main base was and continues to be given by left-liberal groups from the Democratic Party. These left-liberal American groups began to spread the juristocratic model through their foundations after the political changes in Eastern Europe in the 1990s. First, their NGO networks were established in every Eastern European country as subsidiaries of their U.S. NGO networks, and a continuous coordination and central control over them was established. In the case of the Eastern European countries that have joined the EU, this system is linked to the other system run by left-liberal NGOs. On the one hand, these operate on the Brussels level, and on the other hand, they are organised around the Human Rights Court in Strasbourg. So this Eastern European model is another model of juristocracy, based on externally imposed NGO networks, and it is in competition with democratic forces based on internal sources of power. This exported model of juristocracy is present in all of Eastern Europe and it receives strong support from the European and American left-liberal mainstream media. In addition, these global NGO networks, mostly based in America, have been able to infiltrate the central management bodies at EU level in recent years. There is also an externally exported juristocracy in Latin America

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[297] Ibid. 104–105: „The discussion above brings us back to the basic question of the desirability of global constitutional law in the first place. To the extent that this means a worldwide epistemic community engaged in common questions of constitutional reasoning, accepted doctrines, theoretical references, and general world view, the answer is not clear. Certainly, basic humanist propositions of intellectual sharing, dialogic intercourse across borders, the benefits of advances developed elsewhere, and other such points are of general value. However, in the arena of national legal systems, not all are equal in the global sphere. There is a recognizable geopolitics of state law."

[298] Alberto Coddou McManus, 'Addressing Poverty through a Transformative Approach to Anti-Discrimination Law in Latin America', in Law and Policy in Latin America. Transforming Courts, Institutions, and Rights, ed. by Pedro Fortes et al. (London: Palgrave Macmillan, 2017), 231: „In Latin-America, the Colombian Constitutional Court has been seen as the model agent for social change. For its part, the Supreme Court of Brazil, the Supreme Court of Nation in Mexico, the Constitutional Chamber of Costa Rica, or the Argentinian Supreme Court are sometimes seen as the main followers of this new practice of progressive neo-constitutional adjudication."

that uses the original model of the U.S. 'deep state' juristocracy, but this is also used here in some countries by internal power groups to build an alternative power over the power of the opposing groups successful in the election. In this way, the results of democratic election can sometimes be modified by this juristocracic system. Thus, Latin American juristocracy is an instrument of power that is partly exported and maintained externally, but also partly used internally against opposing election victories.[299]

In contrast, the juristocracy of East Asian countries from the 1990s – in India from the early 1970s – has no resemblance to the juristocracy of Eastern Europe, but rather to the pattern of the deep state in the USA. This means that, opposed to the institutional system of established democracy, this power strategy was adopted by powerful power groups with large internal resources in some East Asian countries, who, however, lacked a mass electoral base. This has been the most clearly shown in Thai developments in recent years, but is also present in other East Asian juristocracies, albeit not so visibly. In other words, while Eastern European juristocracy can be described as a model that is built and maintained through the export of global left-liberal American juristocracy, the political system of some East Asian countries can be portrayed as an internally duplicated system in which, in addition to democracy, a juristocracy is organised on its own internal power base. Ultimately, the Latin American Andean model of juristocracy differs from both and can be seen as a doubling of democratic will in addition to democratic legislation, which, in a way, might also be described as 'democratic juristocracy'. Of course, the term 'democratic' cannot only be interpreted as positive here, because in this system the democratic struggles and forces of deep social tensions, which are constantly creating new constitutions, also unsettle the foundations of societies. In any case, based on the examination of the local constitutional systems, it can be determined that the constitutional state could not be transformed here into a dual state structure in which a higher state power of juristocracy would have formed over democratic decision-making. In contrast, other Latin American countries – particularly Colombia and Brazil – belong to this dual-structured state model.

Before I turn to the analysis of the legal mechanisms of individual Latin American countries, it makes sense to consider the organisation of human rights jurisdiction across the continent, which is considered the equivalent of the ECHR in Strasbourg. Only 25 of the 35 signatory states have submitted to the Human Rights Court established by the 1969 American Convention on Human Rights, and the two largest, the United States and Canada, have signed but not ratified the convention. Apart from them, the small Caribbean island states with an English colonial history classified this convention as a catholic Latin American affair and they remained outsiders. The convention entered into force in 1978 with the eleventh ratifying state, and the seven judges at the Inter-American Court of Human Rights (IACHR) in San José, Costa Rica, made their first decisions in the early 1980s. In contrast to the European model, one has to turn to the Inter-American Commission on Human Rights before the IACHR procedure and this Commission can be described as a preliminary dispute settlement forum, which initiates the procedure. Only if the Commission is unable to agree with the state accused of human rights violations to make amends and reorganise its legal system will this body initiate legal proceedings. The Commission is headquartered in Washington and its entire operation is influenced by the United States. [300] Beyond the Commission, only states can make a complaint

[299] According to this typology, Ran Hirschl's originally highlighted juristocratic shift of the four states (Canada, Israel, South Africa and New Zealand) represents a special case of internally rooted juristocracy, in which the highest state power is delegated to the Constitutional Court / Supreme Court by the previous ruling party when (1) their long stable parliamentary rule was shaken by the emerging new electoral groups, and on the other hand (2) it has strong positions in the judiciary and is thus able to determine the main directions of state politics despite their election defeat.

[300] Although the United States has not ratified the Convention itself, and is therefore not under the jurisdiction of the IACHR, the text of the Convention has been modified so that any citizen of a country in the Organization of

before the IACHR against each other, and not private parties – as before the ECHR –, but indirectly, individuals can also initiate human rights proceedings before the IACHR through the Commission. For NGOs, who are actually the driving force behind such procedures everywhere, this is only a small detour.

Another difference from the ECHR is that, in addition to making decisions on applications for human rights violations, the judges also have an advisory role, which in practice means that laws or even constitutional changes in the Member States are reviewed based on the American Convention and the case law of the IACHR. The latter thus represents a comprehensive Latin American constitutional court and doubles the otherwise broad constitutional adjudication, which exists almost everywhere here. And the IACHR judges, who exercise an admittedly activist and most broad interpretation of this advisory power, have tried in recent years to control the entire internal legal system of the states. In the case of the ECHR, the model provider, attempts have been made to do this, but only with the help of the Venice Commission, and they have not tried to determine the constitutional order of the European states. By early 2010, the IACHR judges had made a total of 120 judgments and 20 advisory decisions, but the number of judgments has been increasing in recent years.

Several Member States have objected to the IACHR – which was in fact converted from an international human rights court to a constitutional court – since the turn of the millennium, and have rejected this type of decision-making as an unauthorised interference with their sovereignty. In essence, it is seen as an instrument of the United States, which, despite failing to comply with the Convention, is trying to shape the internal politics and legal system of the Latin American states through its global concept of power. Venezuela withdrew from the agreement in 2013 and several countries have initiated the withdrawal procedure in recent years.

In the following, I will first deal with the case of Colombia and Brazil, which is at the forefront of the juristocratic turn, and then the situation in Chile and Argentina, which is more or less against it. Between the two I will examine Mexican constitutional adjudication which represents a middle position, because the Mexican constitution shows a strong juristocracy on paper, but the actual practice of the Mexican Supreme Court has not driven this towards an activist juristocracy. I would also like to point out that Venezuela, Ecuador and Peru were originally included in this juristocratic group, but as seen above, they left this system after President Hugo Chávez's political turn in 1998. However, in the absence of suitable materials, I cannot analyse them in detail, and in case of the most dominant Venezuela, it does not even make sense to examine it now at a constitutional level, due to the chaotic conditions there approaching a civil war,

To conclude the general presentation, the general characterisation by a researcher of the region, Francisca Pou Giménez, should be highlighted, which focuses on Latin American neo-constitutionalism versus a democratic legislative state. It is worth our while since it shows what an intellectual climate surrounds any opposition against juristocracy. Giménez is almost horrified to describe the characteristics of a 'legislative state' where judges who are subject to the law are forced to make a limited decision and are governed not by principles but by rules, while in the finally established neo-constitutionalist state the judges are directly under the constitution, and they can make decisions based on the constitution: „For long, variably (dis)empowered Latin American judges would carry out their job as described under the "legislative state" paradigm … they would put rules – not principles – at the center of law, they would assume disputes were to be resolved by applying statutes – not the constitution – and they would assume a relatively detached relationship between the constitution and the wider legal system. Years later, both legal theorists and sociologists signal Latin America as a

American States can be a judge, even if that state has not signed the Convention. In this way, from the beginning in 1979 to 1991, the United States was able to bring in one of the leading judges, Buergenthal, who was even president of the IACHR for four years.

champion of legal "interpretivism", or of "neoconstitutionalism", understood a version of the "constitutional state" paradigm. Under this paradigm, law is made of principles, values and rules, the constitution directly applicable and paramount in judicial adjudication, and basic constitutional rights and principles invade and daily orient the wider legal system." [301]

Such a sharp contrast between a democratic legislative and a juristocratic state would likely be favoured by many European theorists and NGO supporters, but would tactically reject its public announcement.

2.1. The constitutional adjudication of the superjuristocracy

2.1.1. Colombian Constitutional Court

Considering the developments in the above discussed regions of three continents – Eastern Europe, East Asia and Latin America –, the strongest role of juristocracy over democracy in the past decades can be observed in the case of three countries in Latin America, namely Colombia, Mexico and Brazil. The constant juridical control of everyday political life that has been implemented here cannot be seen in Europe. Even in East Asia, although the government can be overthrown by the power groups behind it through juristocracy, the juristocratic mechanisms cannot play such a role in everyday politics, possibly with the exception of the Indian constitutional adjudication. Among the three, the Colombian Constitutional Court has achieved the greatest role in power. In a 2017 study by Daniel M. Brinks and Abby Blass, the authors report that the outstanding juristocratic model of Latin America was created through external help of billions and ongoing efforts, and that Colombia was at the forefront.[302] In this case, it is also suspected that – similarly to Mexico – the country's leading elites were susceptible to pan-American human rights justice and its reinforcement with internal constitutional adjudication because of the intensified fighting of drug gangs in the 1980s brought the country to the brink of civil war and the state organs were helpless against the greatest atrocities. On the one hand, hope of the judicial remedies spontaneously led people in this direction. On the other hand, leading politicians voluntarily accepted the control by constitutional adjudication and human rights justice in order to regain the rest of their reputation abroad. [303] While this was often formal in Mexico and, under the surface, the judiciary acted actually more within the boundaries of law, this constitutionalisation of state power along with the marginalisation of democracy in Colombia was actually carried out and Colombia became one of the model states for global constitutionalism or neo-constitutionalism (these are the typical terms for juristocracy in the narratives).

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[301] Francisca Pou Giménez, 'Supreme and Constitutional Courts: Directions in Constitutional Justice', in Routledge Handbook of Law and Society in Latin America, ed. by Rachel Sieder et al. (London: Taylor & Francis, 2017), 12.[0]

[302] „Over the last century, scholars have documented the expansion of judicial power and the consequent judicialization of politics. (…) No more region has been more active in this respect than Latin America, and billions of dollars in international aid flowed into the region in support of reforms to insulate and strengthen judges. " Daniel M. Brinks and Abby Blass, 'The DNA of the Constitutional Justice in Latin America' Cambridge University Press. 2018, (296-297. p..)

[303] For the almost forced signing of the human rights convention under President Uribe see Alexandra Huneeus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority', Law and Contemporary Problems 79 (2016), 189: „During the Uribe administration, the "almost compulsive ratification" of human rights treaties formed part of an executive strategy to project the image of a government that takes human rights seriously despite the presence of terrorists within the territory. It behooved the executive, and it was part of Colombia's foreign policy, to demonstrate a strong adhesion to human rights."

In Colombia, this superjuristocracy began with the constitution passed in 1991, when the struggle of the government of the former elite – which was alternately liberal and conservative – against the drug gangs emerging in the 1980s became hopeless. With the help of the United States, the previous non-parliamentary opposition tried to create a new state structure through a constitutional assembly to replace the former state. A powerful constitutional court was created, but when César Gaviria, one of the leaders of the constituent power, later became head of state, he and his government were surprised at what the constitutional judges were capable of. The Colombian constitutional judges, who had socialised themselves in the largely left-liberal doctrines of the intellectual circles of the United States, declared the prohibition of hard drugs unconstitutional in the mid-1990s. Since drug use is only a problem for drug users, they argued, it would be state guardianship if the state wanted to protect them from themselves, and the right to free personality development must include free drug use: „If each individual is the owner of his or her own life, then that person is also free to care or not care for his or her health. If one wishes to do so, he or she may deteriorate to death. The free development of personality is the recognition of the person as an autonomous individual. The first consequence that derives from autonomy consists in that it is the person (and not a self-appointed surrogate) who should give a sense to his or her existence and harmony with his or her course." [304] The nine-member Constitutional Court made this decision five to four, which shows that this almost unprecedented level of ultra-liberalism in the world has not penetrated the entire Constitutional Court, but looking back over the past almost 30 years, it can be said that this ultra-liberalism and the strong control of over the respective head of state and his government, including the destruction of a multitude of laws, has continued in Colombia since then.

This is also made possible by the fact that the 1991 Constitution most fully opened the right to appeal to constitutional judges in order to mobilise their tremendous powers, creating two ways to do so. On the one hand, everyone can apply to the ordinary court with an Acción Tutela application if they consider that their fundamental right has been violated by one of the state authority's measures or that they have been harmed by a state omission in defence of their right. This has priority over any other judicial decision, and in the event of unsatisfactory handling, the petitioner can immediately refer the matter to the constitutional judges, who will make the final decision. The other form is the Acción Popular – which was also known in Hungary as 'populáris akció' until 2012 – and anyone can submit it without personal interest if they believe that a new law or regulation contradicts the constitution. And with these two forms of application, the Constitutional Court is given a superpower, because thousands of applications per year have enabled control over the entire legal system and every state measure.

In addition, Colombian constitutional judges have also been allowed to oversee all state powers very widely through using the IACHR's constitutional bloc doctrine, according to which the constitution of each country must always be interpreted together with the rights of the human rights conventions and the interpretation of those rights by the human rights courts, and these together constitute the constitution of each country in Latin America. This doctrine has been the most widely accepted by Colombian constitutional judges, and in their decisions they usually refer not only to their own constitution, but also to the American Convention on Human Rights and IACHR decisions. These decisions not only destroy simple laws, they also control constitutional changes and thus the entire state.

2.1.2. Brazilian constitutional adjudication

[304] Summary of some arguments of the Constitutional Court decision (May 5, 1994) by Luz Estella Nagle, 'Evolution of the Colombian Judiciary and the Constitutional Court', Indiana International and Comparative Law Review 6, no 1 (1995), 85–86.

In Brazil, a new constitution was created in 1988 with the consensus of the elites, although the direct cause of the new constitution was that the previously opposing forces came to power in 1985. The new parliamentary majority wanted to put governance on a new footing and secure a strong role of human rights and constitutionalism, the protection of which was entrusted to the Supreme Court, following the example of the United States. [305] This inter-party consensus on constitutional issues has existed since then, and this explains why, although an amendment of the constitution requires a three-fifths majority in parliament, it has been carried out 99 times in the past thirty-some years. This happened despite that a constitutional amendment requires even the approval of the Supreme Court judges, who declared this right to control based on the arguments of Indian Supreme Judges; this control is similar to that of the Colombian constitutional judges. [306] The frequent constitutional amendments, which have taken place on average four times a year, have thus become part of everyday political struggles in Brazil, in which supreme judges functioning as constitutional judges act on an equal footing – and even as supervisors – with parliamentary groups. As a researcher of the issue, Francisca Giménez emphasises, the judges were politically rather neutral for a while after the 1988 constitution was passed, but they and their successors gradually became politically more active judges with the above mentioned decision-making style.[307] The eleven members of the body are elected by the parliamentary forces for life, but must retire at the age of 65. This long term tenure is particularly beneficial for their role as the highest controller.

The Brazilian Supreme Court's constitutional adjudication goes well beyond the U.S. model, and based on European models, there is also the possibility of abstract control over these laws, which can be filed directly against a law. In addition, an application can be submitted not only in relation to an expressed violation of the constitution, but also because of an unconstitutional omission of protection of a fundamental right or a constitutional value.[308] Due to the easy way of applying, an average of 70,000 applications reach the supreme judges each year, most of which have to be dealt with in a shortened procedure, but also the substantive decisions can only be tackled with by a division into two chambers.[309] Finding all the relevant issues in the mass of applications, they can easily mobilise their enormous power to decide all fundamental questions of government and politics. An example of their 'free' decision-making style, which literally deviates from constitutional provisions, is their permission of same-sex marriage, although the Brazilian Constitution explicitly only allowed marriage between woman and man. [310]

Thus the 1988 Brazilian Constitution increased the role of fundamental rights in governing society to the detriment of traditional legislation, while enhancing the political role of judges

[305] Francisca Pou Giménez, 'Constitutionalism and Rights Protection in Mexico and Brazil: Comparative Remarks', Revista de Investigaç?es Constitucionais 5, no 3 (2018), 233–255.

[306] Ibid. 237: „The Supremo Tribunal has asserted its power to review the constitutionality of constitutional amendments (even ex ante, before their formal passing), thus slowing down change and further securing institutional control of higher-level legal change."

[307] Ibid. 246: „Right after the enactment of the Constitution, the Supremo Tribunal Federal exhibited a sort of professionalized, politically temperate outlook, but over time it has asserted a strong degree of independence and has incredibly enlarged its powers and public presence. As scholars have repeatedly noted, it is difficult to think of a court having changed so radically in one or two decades."

[308] Ibid. 238.

[309] Ibid. 239.

[310] Fábio Condeixa, 'Parallels between Judicial Activism in Brazil and Australia: A Critical Appraisal', The Western Australian Jurist 3 (2012), 114–115: „But the most controversial instance of judicial activism has occurred during a recent decision by the Supremo Tribunal Federal involving a case related to family law. The court legalised same-sex civil unions explicitly violating the Brazilian Constitution. In art 226, paragraph 3, the Brazilian Constitution states: "For the purpose of governmental protection, it is recognised the civil union (only) between a man and a woman as a family entity, thus having the legislation to facilitate its conversion into legal marriage."

and, more generally, jurists. A 2016 study by Bryant Garth thoroughly investigated the extent to which this role of Brazilian jurisprudence was taken over from left-wing liberal law professors from the United States, based on models of the U.S. fundamental rights revolution of the 1960s, with massive grants from major liberal U.S. foundations. [311] While this left-wing liberal human rights activism was pushed back in the United States, it survived more in Brazil and became the centre of politics through the 1988 constitution. Another difference between the two university elites was demonstrated, according to which Brazilian law professors focus less on scientific research than on activities of a legal reformist nature.[312]

2.1.3. Mexican constitutional adjudication

Mexico followed the U.S. pattern in its 1824 constitution and established a three-tier federal judicial system (district court, circuit court and Supreme Court), but at its head, the Supreme Court centralised the whole system and the lower courts were closely subordinated to the highest level. This system was maintained in the 1917 Constitution which is valid to date, and while the judiciary's external independence from other branches of power is now guaranteed, the inner independence, that of individual decisions by judges, remains problematic to this day. [313] In 1994, however, under the pressure of international markets, a far-reaching constitutional reform in the judiciary was carried out to better attract capital investment, and the Supreme Court's abstract constitutional review of laws was introduced along European lines. The former 25-member court was reduced to 11 members, the decision-making process was standardised, making the Supreme Court function as a constitutional court. A profile cleanup was carried out in parallel, but despite the cleanup, the number of applications could not drop below 7,000 a year. [314] Most decisions are made in two chambers, but when it comes to abstract constitutional review, the plenary session decides and the chambers decide on the enormous mass of amparo (constitutional complaint). However, this heavy workload is made bearable by the fact that the top Mexican judges have perhaps the largest staff in the world, each top judge is supported by at least ten employees and may even employ additional assistants. [315] It is important to note that while legal interpretation throughout the Mexican judiciary towards the Supreme Court has

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[311] Garth cites Javier Couso: „The inspiration came from the scores of Latin American legal academics who started to pursue graduate training in law in the United States in the late 1970s, where they were socialized by their liberal North American law professors in the virtues of the legendary Warren Court … a final indicator of the rising influence of neo-constitutionalism in Latin America can be seen in the enormous interest law has sparked in some of the most prestigious law schools of the region … financial support from U.S.-based foundations … built a powerful network."' Bryant G Garth, 'Brazil and the Field of Socio-Legal Studies: Globalization, the Hegemony of the US, the Place of Law, and Elite Reproduction'. Revista des Estudos Empíricos em Direito 3, no 1 (2016), 19. Garth points out that while in the past the Ford Foundation was the chief exporter of left-liberal legal ideas in Latin America, more recently, the Soros Foundation has been doing the same in partnership with the MacArthur Foundation.

[312] Ibid. 15: „One difference from the U.S., according to the authors [Lopes and Freitas Filho], is that the researchers in legal sociology in Brazil mostly "do not rely on firsthand social inquiry … the studies concentrate on the efficiency of institutions and possible reforms to their regulatory framework".

[313] Francisca Pou Giménez, 'Changing the Channel: Broadcasting Deliberations in the Mexican Supreme Court', in Justices and Journalists. The Global Perspective, ed. by Richard Davis and David Taras (New York: Cambridge University Press, 2017), 209–234: „The strong hierarchical fingerprint of the Mexican judiciary – which has remained to this day – assured the smooth top-down transmission of the style of judging extremely deferential to the political gestures of the day. The situation remained like this for almost seven decades." (13. p.)

[314] According to Giménez's calculations, 8,000 cases were received by the Supreme Judges in 2008, and 7,000 in 2014. Ibid. 14.

[315] „Each of them is aided by a staff of at least ten clerks (plus assistants), who serve at the pleasure of the Justices." Ibid. 15. The author states that she herself was a clerk of a judge between 2004 and 2011.

remained centralised to date, the Supreme Court itself is more decentralised than the European constitutional courts. Here, the president of the court is elected by the judges for a short time and he/she only deals with administrative matters. The appointment of the rapporteur, for example, is decided randomly and is not the responsibility of the court president.

After the constitutional reform of 1994, the Mexican supreme judges did not change their style of decision in the first decade, but they began to exercise this power more. It can be said that they essentially acted as arbitrators of disputes and struggles among the branches of power. Miguel Schor's analysis shows that the Mexican Supreme Court primarily plays the role of the Marshall Court of the United States of the 1800s and not the activist style of the Warren Court of the 1960s. This latter style, crossed with the model of the activist German constitutional adjudication, created a system of powers that largely suppressed democratic legislation. Unlike the Mexican judges, the Colombian Constitutional Court adopted this style, and Schor compared the two courts as follows:

The Mexican Supreme Court facilitates democracy by effectuating vertical and horizontal separation of powers whereas the Colombian Constitutional Court primarily deepens the social bases of democracy by effectuating rights. Why the Mexican Supreme Court plays a role akin to the one played by the Marshall Court in the early American republic and why the work of the Colombian Constitutional Court bears a familial relationship to the Warren Court is a puzzle. „The Mexican Supreme Court is primarily an umpire that handles disputes between the different branches of government while playing only a limited role in effectuating rights." [316]

The lower extent of constitutional adjudication related to fundamental rights in Mexico is also confirmed by another, already cited researcher, Francisca Giménez, who argues that the role of 'support structure' is less developed here than in Colombia: she mentions 'the impeding role of the amparo in Mexico, coupled with the absence of supporting structures.[317] Expressed in a less veiled manner, this means that the NGO basis which actually execute fundamental rights litigation in the juristocratic countries, and as its means, track down those who were violated in their rights – or who can be persuaded to have been violated (sensitivisation) –, is absent in Mexico. But the other requirement of juristocracy, the network of university jurists ('epistemic community'), is very much present in Mexico. It was created within the law department of UNAM, an autonomous university in Mexico, where it is the centre for the dissemination of left-liberal neo-constitutionalism, and in the past few decades, several activist judges and presidents of the Inter-American Court of Human Rights, the IACHR, came from here. So it seems that while neo-constitutionalism in Latin America gets most of its ideas from Mexico, these theorists cannot be 'prophets' in their own country.

However, the deeper meaning of this difference is that Mexican constitutional adjudication remained more a defender of the original constitutional state, in which the guardian of the constitution only protects the frameworks amid the struggles of democratic forces, and does not attempt to derive the whole normative system of law itself from the constitution, using the fundamental rights as a means. So there is no dual state here – a democratic one at the bottom, a juristocratic one at the top –, and no doubling of the legal system with a hierarchically higher constitutional law and the constitutional branches of law. Mexican constitutional adjudication is thus a middle ground between Chilean and Argentinean constitutional jurisdiction and the superjuristocratic Colombian one, the latter closely approached by the Brazilian.

2.2. Minimising juristocracy

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[316] Miguel Schor, 'An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia' [Abstract and outline], Revista de Economia Institucional 16, no 1 (2008), 41–42.

[317] Giménez, 'Constitutionalism', 235.

In the following discussion, I will only briefly point out the differences from the superjuristocratic pattern, and provide a contrast for the constitutional court's complete exercise of power, which can be seen especially in Colombia. I am concerned with the constitutional adjudication of the Argentinian and Chilean Supreme Judges, who mostly only guard the constitutional framework and do not replace it by creating its own 'invisible constitution'

2.2.1. Argentine constitutional adjudication

After frequent military dictatorships, it was only in 2003 that democratic governance in Argentina enabled a stable judiciary, that still exists today. Constitutional adjudication is carried out here by the Supreme Court, and although any lower court, on the model of the United States, can review, the constitutionality of the applied law – and put it aside, if necessary –, it is for the supreme judges to make a final decision. Five judges are the members of the Supreme Court, and the choice of judges is in the hands of the head of state. However, only with the approval of the Senate with a two-thirds majority will the position be won for a lifetime, but only up to the age of 75.

The difference between the Argentinian supreme judges and those of the Latin American countries inclined to superjuristocracy is also reflected in their distance from IACHR decisions, which they supported with the argument that the Argentine constitution's public law principles should be reserved for the country's sovereignty and, in this way, they stand above international conventions.[318] In contrast to the Colombian and Brazilian constitutional courts, which want to play a broad role in governance of the whole society, Argentine judges deliberately advocate a minimalist regulatory role in norm control and intend to limit the impact of their decisions to individual cases instead of forcing structural changes. [319] This may be a major crime for supporters of activist neo-constitutionalism, but it can only be positive for a democracy-friendly stance, especially in Latin America, where in most countries the dominance of juristocracy can be demonstrated.

The activity of Argentine supreme judges also differs from the superjuristocratic model in terms of the control of constitutional amendments, although the constant resistance of other branches of power has played a role in this. Because here, in Argentina, there is stable public administration, this leads to the conclusion that the Latin American superjuristocracy is generally shaped by the chaotic state and social conditions, while its supporters tend to create a favourable picture and highlight super constitutionality and human rights (as seen before in Francisca Giménez). At one point, the Argentinian Supreme Court controlled and annulled a controversial constitutional amendment in the midst of a political struggle in 1998, but this

[318] „The Court ruled that the Constitution's public law principles define a "sovereign reserve sphere", to which international treaties – and the construction of derived legal obligations – must adjust.' SCA' s decison in 'Ministerio para. 16." cited by GIDES, Argentina's Supreme Court and the Covenant (CESCR – International Covenant on Economic, Social and Cultural Rights 61 Pre-Sessional Working Group [09 Oct 2017 – 13 Oct 2017]). Thus, before that, the Argentin chief judges also strated from the human rights convention incorporated into their constitution, and accepted the thesis of constitutional bloc. María Gracia Andía, Disadvantaged Groups, the Use of Courts and Their Impact: A Case Study of Legal Mobilization in Argentina (PhD dissertation) (Boston: Northeastern University, 2011), 90

[319] Martin Oyhanarte, 'Public Law Litigation in the U.S. and in Argentina: Lessons from a Comparative Study', Georgia Journal of International and Comparative Law 43 (2015), 470: „Using this minimalist approach, the Argentine Supreme Court has issued favorable decisions and satisfied the specific claims asserted by individuals or groups who brought the complaint but without demanding any structural change in public policies or the existing administrative dynamics. Within the framework of this second scheme, the Supreme Court is often very careful to underscore the singularity of the facts and circumstances of the case in order to prevent the decision from being only too readily relied upon and applied by other courts."

surge of power over the other branches of power did not become a standard. It would also be difficult here because, as in the case of the United States, the Argentine president can increase the number of Supreme Court judges by a simple parliamentary majority, and thus turn the majority of the court in his favour, as President Menem did it in 1990. He then increased the number of Supreme Court judges from five to nine, and it was not until 2006 that the original five were reinstated.[320]

2.2.2. Chilean constitutional adjudication

Since the outbreak of mass demonstrations in Chile in 2019, it has been decided that a new draft constitution should be submitted to a referendum in 2021. Since these mass demonstrations were organised by left-wing radical groups against right-wing President Sebastián Pi?era and his government, the constitution and constitutional adjudication are likely to move in the direction of left-liberal neo-constitutionalism that is already prevalent in Latin America, as we have already seen in Colombia and Brazil. [321] In a few years perhaps, today's Chilean minimalist juristocracy will only be seen as part of history and it will already be a thing of the past.

The process of democratisation in Chile that started in 1990 laid the foundations for the still functioning version of constitutional adjudication with a thorough constitutional reform in 2005. This was determined by the fact that the main role was played mainly by moderate constitutionalists, who have heavily criticised superjuristocracy by U.S. human rights judges and its export to Latin America. For example, Francisco Zúniga called the concept that sees all norms of the entire legal system as readable from the constitution 'constitutional fetishism': „There is an enchantment with the Constitution and its "material of values" ("perennial philosophy"), and an epistemic disposition that we call constitutional fetishism, which transform the Constitution (sacred text, interpreted, reinterpreted to infinity) in the source of all the answers, which supports a misunderstanding restrained judicial activism (and with it a marked epistemological elitism), a kind of inexhaustible material law and that also constitutionalizes all law." [322] With this idea, Zúniga was able to express the nature of the distortion of the constitutional state into a dual state (democratic below but juristocratic above), because the constitution in a constitutional democratic state only provides the framework for the formation of democratic political will. Within this framework, the norms of the legal system are determined by the laws made by the majority in parliament, while in the case of neo-constitutionalist juristocracy, the entire legal system is viewed as derivable from the constitution. This minimises the democratic component and gives the juristocratic state a dominant role. Zúniga does not spare the role of human rights IACHR and sees this as the culmination of a superjuristocracy within the countries that have a democratic deficit in their

[320] Diego Werneck Arguelhes and Evandro Proença Süssekind, 'Building Judicial Power in Latin America: Opposition Strategies and the Lessons of the Brazilian Case', Revista Uruguaya de Cienca Politíca 1, no 27 (2018), 13.

[321] This is all the more possible since the outbreak of the mass demonstrations itself was largely due to decisions by American human rights organisations, including the IACHR, which criticised the failure to repair the human rights violations during the time of the former Chilean dictator Pinochet, and also criticised government action against rioters at the mass demonstrations: „The decline in the legitimacy of the Pinera government in the eyes of the population has been intensified by the serious criticisms of the Inter-American Commission on Human Rights, the Human Rights Commission of Chile and the OAS General Secretary for violation of human rights by the government to suppress protests." Ariela Ruiz Caro, 'The Dramatic Fall of Chile as Latin America's Neoliberal Role Model', Counterpunch, February 5, 2020.

[322] Francisco Zúniga Urbina, 'Nueva Constitución y constitucionalismo en Chile', Anuario de Derecho Constitucional Latinoamericano 173 (2012), 175.

way of working: „This neo-constitutionalism has a correlate in the inter-American system and in culture of continental law in that true paroxism of judicial arbitration that is the "control of conventionality" exercised by an Inter-American Court in an interstate environment which is by no means a supranational political space, a system with defendant democratic deficit." [323] And Zúniga has become one of the protagonists of this constitutional reform and has shaped Chile's democratic constitutionality in recent years. [324]

3. The dual state and the duplication of law. Summary

First, I summarise the previous investigations from the perspective of state theory and then I summarise the analyses of the doubling of the legal system, which could be seen in detail in the first chapters of the volume.

3.1. Dual state: democratic below, juristocratic above

The conclusion of my research can be summarised as follows. State power, which has existed since ancient times, became a constitutional state by the early 19th century in the United States, but the model of this constitutional state, which later became widespread, had gradually changed from the second half of the 20th century, and this change led to a state model that can be described as a dual state. This model originated in the United States when the constitutional adjudication of the Supreme Federal Court was rebuilt in the 1950s as a second centre of power alongside the congress and the president. In parallel, it was transferred to defeated Germany by the Americans after World War II, and from there it spread to a number of countries around the world until the turn of the millennium. The different versions of this dual-state model have evolved according to the requirements of a number of different functions, and the main versions have been crystallised through global interactions. In terms of law, the main impact of the dual state has been that traditional legislative law and its branches of law (private law, criminal law, and so on have doubled with the constitutional court's constitutionalised legal material, and gradually new, 'constitutionalised' branches of law appeared, such as constitutional criminal law, constitutional finance law, constitutional labour law and so on. Let us look at this process in detail.

In the intellectual and political struggles of the Enlightenment, the idea of the constitution gradually developed from the theory of the social contract as a framework and foundations of state power. This was realised for the first time in history by the constitutions of the North American colonial states. After getting rid of English colonial status, their own state structures were formed and in 1787 the United States was founded as a federal state with its federal constitution. This constitution contained only the framework of state power, but after the French revolutionaries proclaimed the human rights in 1789, they were incorporated into the U.S.

[323] Ibid.

[324] Alexandra Huneeus writes about the role of Zúniga and another conservative constitutional lawyer in the 2005 Chilean constitutional reform as follows: „Francisco Zúniga, who played the most influential role in the process, deems neoconstitutionalism to be a type of "constitutional fetishism" and describes the IACtHR's doctrine of conventionality review as a "paroxysm" of judicial discretion lacking in democratic grounding. Fermandois, a political conservative close to the Right, has argued that the IACtHR's rulings are not binding within Chile. Significantly, the reform did not alter or further specify the status of international human rights law domestically.' Huneeus, 'Constitutional Lawyers." 193.

constitution as fundamental rights. These fundamental rights served only as a guideline for the purposes of state power at the time and that did not change when the United States' Supreme Court ruled in 1803 that it had the competence and jurisdiction to declare federal or member state laws unconstitutional and to prohibit their use. This was when the idea of constitutional adjudication was born, and at that time it was only a question of compliance with the two-tier division of competence between the federal government and the member states, which was enshrined in the federal constitution.

This began to change gradually from the middle of the 19th century when the political struggle over the abolition of slavery broke out between the northern and southern states because the northern states wanted to abolish the institution of slavery due to the constitutional fundamental right to human equality, but the federal judges opposed it through their decisions in accordance with the will of the southern states. When the civil war that broke out between the northern and southern states ended, the abolition of slavery was incorporated in the Constitution, and then constitutional adjudication began to extend judicial review of the law and to use the constitutional rights to review the content of the law too. At the turn of the 20th century, it gradually emerged that what some political forces in the Federal Congress or in the member states with a majority could enact as law, could then be annulled by the opposing political forces with the help of the federal judges. According to political camps, the general picture until the end of the 1930s was that conservative supreme judges declared the laws of the liberal democratic political camp unconstitutional, and the liberal democratic intellectual camps were outraged about the constitutional adjudication of some old judges that restricted democracy. However, with the support of foundations from large banking families in their vicinity, certain groups in the liberal political camp who suffered from constitutional adjudication have started to organise fundamental rights movements in support of the African-American minority – and later other minorities and feminist efforts – in order to achieve their political goals through litigation policy. Ultimately, this led to success at the U.S. Supreme Court for the first time in the 1950s, after pressure from President Roosevelt and the appointment of supreme judges had turned the majority of the judiciary to the liberal side. Then, in the 1960s, there was almost a fundamental rights revolution in the United States, and what the liberal democrats were unable to make law because of the conservative majority in Congress and state legislatures, that could now be achieved by means of fundamental rights through their litigation policy before Supreme Court judges. With this change, the former constitutional state has been transformed into a dual-structure state in which the lower level of political decision-making is determined by millions of citizens through democratic elections, but above this level, there is a higher level of state power which is exercised on the basis of constitutional adjudication and fundamental rights..

However, this model of a double state has been fundamentally strengthened by the fact that after the Second World War, in defeated Germany the lawyers of the U.S. occupation authority created a constitutional structure which fundamentally increased the power of constitutional adjudication over legislation and the government. The aim of this was to prevent millions of Germans from being able to re-elect a new Hitler, and therefore an unprecedentedly powerful constitutional court was established over the parliamentary system. This was largely filled with their own confidants, and in later years, when the German chancellor and his government tried to oppose extensive scrutiny by the constitutional judges in the name of democracy, the constitutional judges were joined by the American lawyers and foreign policy leaders and defended the argument that this arrangement of state power is one of the necessary features of the rule of law. Due to this, the German constitutional judges developed formulas to expand competences and developed ways of interpreting the constitution, moving away from the constitutional text, and their otherwise far-reaching powers could be made almost unlimited. This shift of the centre of power from democracy to a higher constitutional adjudication in this dual-state structure and the transfer of power from democracy to juristocracy posed no problem

for millions of otherwise wealthy Germans, and thus this power structure became a model valid for the elites of the United States and great powers in general, and exportable to anywhere in the world.

Later, in the 1960s, the pattern of the American fundamental rights revolution was heavily mixed with the elements of the German model of constitutional adjudication, which achieved a far greater freedom of interpretation and power than that of the American judges, and it is this mixture that European, East Asian and Latin American countries began to take over. In addition, the American global power elites consciously tried to transfer this dual-structure state model that mixes the German and the U.S. models to the countries that were under their influence. From below, this model shows the democracy of society, but from above, a second constituent of the state is added, that tries to extract the entire legal system and the content of governance of the whole society directly from the constitution, especially its fundamental rights. The German model was adopted in Spain and Portugal when they were liberated from dictatorship at the end of the 1970s, and particularly in Spain, the separation of constitutional adjudication from the constitutional text was even more realised than in the case of the German model. This model of constitutional adjudication, radicalised by Spain, was adopted in the Spanish-speaking countries of Latin America from the end of the 1980s with the support of the foundations of the U.S. left-liberal elites, and after the collapse of the Soviet empire, this model was also introduced in the liberated Eastern European countries.

At the same time, there have been shifts towards a dual-state structure in some East Asian countries, with some U.S. foundations promoting this, but some of the local elites themselves have also tried to import it, for other reasons. As early as the early 1970s, some elite groups in India enhanced the use of supreme court juristocracy against the majority parliamentary government by adopting the constitutional interpretation method of the 1960s American left-wing liberal supreme judges. They also went on to radicalise it even more and drew up further interpretations. The previously organised but lame Taiwan Constitutional Court began its real work in 1987, and from then on the constitutional judges regarded the German activist constitutional adjudication as a model, as did the South Korean constitutional judges, who also started their work in 1987. The Thai constitutional court came into force only a little later, and its judges also saw the style of the German constitutional adjudication as a model. Because of this loose connection to the constitutional text, the constitutional judges in Thailand were able to rise completely above the other branches of power, and the leader of the party that won the elections has twice been removed from office of prime minister.

In Eastern Europe the model of the dual state structure, which is democratic in the lower part and juristocratic above, shows the structural elements of this dual state structure to a certain extent. Let us look at this and point out just the bigger differences when summarising the similar issues in other parts of the world. It is important to emphasise that the juristocratic state structure was built here after the regime change around 1990 and was exported to the Eastern European states by the left-liberal elite in the United States. The NGO networks of their global foundations have been organised here as subsidiaries in every single country, and here their trusted individuals created strong central coordination and control over them. In addition to central coordination among the Eastern European countries, this juristocratic state structure was supported by a previously established coordination mechanism, which from the late 1940s aimed to bring about the plan of certain Western European elites for the creation of the United States of Europe. This was ultimately reduced to the creation of a European Convention on Human Rights and has been preserved to this day in the human rights jurisdiction associated with this convention in Strasbourg and in the loose cooperation between the member states in this jurisdiction. With the collapse of the Soviet empire and the integration of the Eastern European states, this formerly humble human rights court came to life and in 1999, with a supplement in the protocol, the signatory states were given the opportunity to accept subjection

to proceedings brought against them by their own citizens in the event of a human rights violation. This accession was strongly recommended and was not just a discretionary option for Eastern European countries waiting to join the EU. But international pressure has also made this accession obligatory outside the circle of these countries, for example Russia, too, signed the protocol after a while. In this way, the global U.S. NGO networks, which had already been deployed in Eastern European countries, were able to influence political decision-making not only through the constitutional adjudication of the domestic dual state structure, but also through litigation in the Strasbourg human rights judiciary, with the Eastern European subsidiaries of the global NGO-s suing the Eastern European states. In the meantime, research into this litigation activity has shown that the vast majority of applications in Strasbourg are submitted by subsidiaries of American NGOs, and it has also become public that 22 of the 100 Eastern European judges who have been deployed to Strasbourg in the past 20 years have been recruited from Soros Open Society NGOs. Other studies have shown that it is not really the judges who make the decision there, but this is done by a carefully selected permanent human rights apparatus (registry lawyers), and that the role of the judges is simply to proclaim the decisions. Unfortunately, no study into the personal connection between these registry lawyers and the specified global NGOs has been carried out yet, but it is very realistic to assume that if in the case of the publicly more visible judges the proportion of NGO people involved is so high, then it can be even bigger in the more hidden apparatus. This supranational European infiltration in the center also exists alongside the EU bodies in Brussels, as recent information on the enormous influence of the networks of the Georg Soros Open Society Foundation on the decision-making process has shown here.

With regard to the juristocracy of the European states, its double character has to be highlighted: on the one hand, the central part in Strasbourg, and on the other hand, the juristocratic organisation of the top domestic judiciary, in particular the constitutional judges. As we have seen, both parts were created through the export of American left-wing global NGO networks and their European subsidiaries. It is important to emphasise, however, that although this also applies to the judiciary of Western European countries, it has only been fully achieved with regard to the Eastern European countries, since the more consolidated Western European legal systems and their legal experts did not open up so easily to them.

This European juristocratic system, which is based on judges and networks of NGOs, has yet another element, and this is the network of university jurists that provides the intellectual background.[325] It also exists in U.S. law faculties, and the worldwide dissemination of studies on constitutional law, legal theory, and international law has given the opportunity to export the juristocratic state structure around the world. These studies use and propagate the activist interpretative formulas that have gone far beyond the previous American activist constitutional interpretation in the field of constitutional adjudication in Germany and other countries in recent decades. The EUI (European University Institute) in Florence is one of the best-known centres that coordinate intellectual activities of the European juristocracy. The EUI has an abundance of doctoral scholarships for young jurists, who have already been selected and examined by shop stewards in the law faculties, and they have the opportunity to join NGO networks and participate in their legal work through shorter or longer study trips. Regular conferences with common English-language volumes are organised by the Soros Open Society networks, and

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[325] This is commonly referred to as the 'epistemic communities' of the academic and scientific world, but it hides the fact that, under the disguise of science, it is often just an actual political organisation of intellectual people. This is important mostly in the legal and social sciences, since this knowledge can be converted directly for political purposes. For a summary see: Mai'a K Davis Cross: 'Rethinking Epistemic Communities', Review of International Studies 39, no 1 (2013), 131–145. And in particular for the role of legal professors in the dissemination of the global juristocracy, see Margaret E Keck and Kathryn Sikkink, Activists beyond Borders: Advocacy Networks in International Politics. Ithaca (US-NY) – London: Cornell University Press, 1998.

this has gradually established permanent groups of university jurists who are closely associated with this pan-European juristocratic organisation. Czech, Hungarian, Polish, Romanian, Slovenian, Slovak, and Romanian scholars of constitutional law proper, international law and legal philosophy, as well as Western Europeans such as Germans, Dutch, English and Americans are regularly involved. Just as the organisers of the NGO networks of the various countries are publicly known, so are the members of the circles of university jurists in each country's academic life, and also the central leaders in Europe. For example, the former EUI director Joseph Weiler has to be mentioned, who has been one of the leading figures in the organisation of the academic elite of European juristocracy for decades. There is also Armin von Bogdandy and George Daly, who can almost always be found when such European juristocratic university activity appears, and Daly also appears as an organiser of such activity on other continents.

There are intertwinings, overlaps and exchanges between these three elements (top judges/constitutional judges, network of NGOs and university jurists) not only at the level of human rights jurisdiction in Strasbourg, but also within individual countries. In Hungary, for example, there were a dozen advisors of the Constitutional Court who later joined the Soros NGO networks, and one of them even became the president of the Hungarian Soros Foundation; most of them have held senior teaching positions in the teaching of legal theory and constitutional law in various law faculties.[326] It can only be assumed that this could also happen in other Eastern European countries, and that in addition to the offices of constitutional judge or chief judge held by them, the juristocratic part of the dual state structure could function with the background of the NGOs and the group of university jurists behind them. As in the case of Strasbourg, much of the petitions submitted to the Constitutional Court are submitted in a very coordinated manner by NGO networks or by law firms associated with them, possibly in a common text form. This juristocratic conglomerate is also supported by a common media background both within each country and on a general European level, mediating important news about the actions of their organisations from all countries. Nowadays, these media activities concentrate on high-traffic Internet portals and they increase the effectiveness of an NGO campaign or disseminate a new study by a university jurist in a coordinated way. Conversely, they are able to organise attacks aimed at discrediting the professional reputation of a constitutional judge or chief judge or legal professors whom they judge to be opponents.

It is important to note that while constitutional courts and other supreme courts are at the centre of this juristocratic state structure, which is in many respects against democratic organisation, if a sufficient parliamentary majority is reached for a constitutional change, then this majority in parliament can gradually fill the ranks of juristocratic institutions with followers of their own democratic values. This can lead to a unique situation in the internal relations of European juristocracy, which is essentially regulated and operated by American left-liberal forces. If a right-wing conservative party receives a majority that is sufficient to change the constitution, the majority of the constitutional court can ultimately be converted with new appointments and the election of new constitutional judges, and the previous juristocracy will be changed from the left-liberal direction toward a conservative trend. This turn will largely affect the effectiveness of their left-liberal NGO network and the group of university jurists. This has been happening gradually in Hungary since 2011 and in Poland since 2015. As a result,

[326] This also applies to the Inter-American Court of Human Rights (IACHR), as shown by a study by Alexandra Huneeus which portrays the role of the neo-constitutionalists as the main disseminators of global juristocracy and their infiltration in the organisation as follows: "But part of the power of epistemic communities is that their members can work across national borders and play a role in shaping international as well as domestic institutions… This part shows that neoconstitutionalists have increasingly taken leadership roles on the IACtHR as judges and clerks, and that neoconstitutionalist ideas and practices have permeated the Court." Huneeus, 'Constitutional Lawyers', 202.

the frequently heard attacks by NGO lawyers and university jurists against the new constitutional judges and other supreme judges can be understood, and their attacks are disseminated in the journals of these countries (at home and abroad) and in the left-liberal online media. However, this can only be a provisional situation, because if the majority government that caused the overthrow is changed for a new government majority that has a friendly relationship with juristocratic organisations, then even if it has no constitutional power, it can try to reverse the power relations even with a political coup, because the supporting dominant western left and left-liberal political forces will angrily demand this both at home and abroad. It must be seen that the case of Hungary and Poland is a case of juristocracy 'cut in two'.

If we turn to the constitutional courts of East Asian countries, we have to look at how the patterns we know in Eastern Europe work there or how they differ. One difference is that there is no comprehensive human rights jurisdiction in all of East Asia, unlike in Latin America and Africa, where this juristocratic organisation could be imported. There is, therefore, no uniform global juristocracy over the individual states in the East Asian region. There is also no indication that subsidiaries of global American NGO networks would have been set up here, which would move the constitutional adjudication of individual states here. The main difference is that it is a juristocratic organisation based on social groups with internal sources of power alongside a democratic organisation and not an exported, externally built juristocratic power system. While some NGO networks appear to have external roots, these seem to be the exceptions here in East Asia.

However, this does not mean that these juristocratic organisations do not have external connections, since in the case of the Indian Supreme Court, its constitutional interpretation pattern imitated the activist interpretation of the U.S. Supreme Court from the 1960s and later the acceptance of litigation of public interest or the recognition of the importance of working with the self-created pro bono law firms arose from the experience about the United States. However, these were merely ideological takeovers dictated by internal incentives and not the consequences of the infiltration by external global powers, as was seen in Eastern Europe. Similarly, in the case of the constitutional judges in Thailand, Taiwan and South Korea, the very close connection to the constitutional models and argumentation formulas of German activist constitutional adjudication can be regarded as a result of internal political power differences, and this connection cannot be understood as an acceptance of submission to a world power.

All in all, the system of constitutional adjudication in East Asia and the juristocratic system based on it represent a parallel power organisation in addition to the democratic organisation in several states and the political power struggle is thereby doubled. As a result, the wills of the state and the legal system in these countries are doubled, and in addition to the laws created by parliamentary legislators, there is a constitutional legal material, too. With regard to the constitutional adjudication of the Latin American countries, one can see an intermediate position here. This position is between the externally exported and maintained Eastern European juristocracy and the East Asian model of using juristocracy for the internal doubling of power. Most of the states here have gone toward superjuristocracy, led by Colombia, Brazil, Costa Rica, and partly Mexico, but the continued ideology and settlement of U.S. NGO networks have ultimately been linked to internal pluralism as an alternative form of power and have been used for groups who are weaker in democratic elections but otherwise have power resources. So it is not just a juristocracy maintained by the external organisation of the left-wing liberal forces of the United States, as observed in Eastern Europe, but the expression of a permanent internal duality of power, as we have seen it in East Asia.

3.2. The double state and the doubling of the legal system

The fact that I have spent most of my days in the decision-making process of the Constitutional Court over the past eight years as a constitutional judge has probably also contributed to the fact that in the past few months I have seriously considered the proposal to correct my original concept of the legal system with four layers of law. A criticism of my concept has claimed that the legal system has five layers instead of four – contrary to what I established at the end of the 1980s. As a starting point at that time, I used the concepts of law of formerly prominent German authors, a context where law was mainly understood as a combination of the text layer, legal dogmatics and supreme judicial case law. I supplemented this combination with the fundamental rights layer, which obviously already existed at the end of the 1980s and had great importance. My critic, Csaba Cservák started to correct this and wrote in 2015 that there is a fifth layer of law and this is the dogmatics of fundamental rights.[327] When I thought about it, I noticed that he was right, and the deeper I dug into research with this in mind, I immediately noticed that there is yet another, sixth, legal layer with which I have actually spent most of my days for years, namely the case law of constitutional courts. Because I had adopted and expanded Ran Hirschl's thesis on juristocracy, in 2015 I have come to the conclusion that constitutional adjudication, under certain conditions, duplicates the state's democratic system by building up a juristocratic structure on democracy. And this means that there are not simply six layers in the legal system, but this system has doubled, and just as the traditional legal system of text layer, legal dogmatics and case law was built up, the duplicated part of law also has these three layers. In this arrangement, the new constitutional level of law takes precedence over traditional law, and my experience has shown that this has led to a constant struggle with the bearers of traditional legal layers, as is the case of legislative text layer with MPs from the ruling parties, as well as the case of legal dogmatics with professors of traditional branches of law, and with the judges of the Supreme Court, although the degree of this struggle varies from country to country.

After I got to that point, I looked at foreign literary sources to see if I had a brand new idea with this insight, or just repeated other claims that were already made by others. It immediately occurred to me that what I now do concerning the expansion of the concept of law was discussed by the Germans under a different name from the 1980s, especially around 2000, and the phenomenon of an expanded constitutional law was contrasted with the traditional branches of law as simple law. Although this was not explicitly called a doubling of the legal system, it has been discussed like this from some aspects. Then I rethought this treatment of the topic as an alternative formulation of my doubling thesis, which is contained in Chapter III of the volume. At the same time, it was good to see that since I did not only looked at law as a whole, but also as divided it into layers I was able to better confront and compare the traditional layers of law with the layers of the new constitutional law. This made it easier to see how the role of individual legal layers of traditional law had changed on the level of the new constitutional law. This raises a number of questions that could not be raised by the German focus on constitutional law proper versus simple law. (I am only referring to the six important differences between the layers of traditional law and the layers of constitutional law that I presented in the first chapter.)

However, a lot can be learned from this comparison, since the Germans have already started to study the tendency of doubling due to the expanded version of constitutional law, but also because the rest of the world is based on the Germans in this regard, either as an example to emulate or to criticise. In the case of constitutional private law, the degree of British and Italian constitutionalisation based on the German model has shifted to the recognition of direct effect

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[327] Csaba Cservák, 'A jurisztokrácia aggálya és az ellentmondások feloldása', Jogelméleti Szemle no 4 (2015), 55–61.

after the indirect effect had been recognised earlier, while in this regard the USA has remained at a lower level of constitutionalisation. Similarly, in the case of constitutional criminal law, the solutions developed here by the German criminal law professors, which aimed at the constitutionalisation of all traditional criminal law, were a good basis for classifying the degree of actual constitutionalisation of criminal law on a scale in various countries. It was, therefore, clear in this comparison that the German constitutional court went as far as to completely reject the constitutionalisation of criminal law in a decision in 2008 in this regard and that the criminal law provisions of Basic Law were only interpreted as constitutional guarantees. This has also been done in the United States, in contrast to the Supreme Court in Canada, which enthusiastically began to constitutionalise criminal law. After that, it was instructive to compare the constitutionalisation of criminal law based on foreign examples by the Hungarian constitutional judges in the 1990s, since it turned out that the Hungarians could even have won a world championship in the 1990s. Because what the constitutional judges in countries all around the world did not do – and even the Supreme Judges of Canada have only approached since 2000 – the newly created constitutional court in Hungary did without scruple in the early 1990s. What the German criminal law professors could not achieve at home – they only dreamed of having their proposals applied in German constitutional adjudication – was done without hesitation by the majority of Hungarian constitutional judges in the 1990s, and they annihilated a number of criminal law provisions as violations of the ultima ratio principle.

On this basis, I have summarised my comparative analysis as follows: two degrees can be distinguished in the constitutionalisation of the various branches of law. This can happen to a lesser extent if it is only a question of constitutional guarantees, but it is also possible to a greater extent, if the constitutionalisation can potentially fundamentally rewrite the entire scope of the legal norms of a traditional legal branch together with their legal dogmatics. This happens in the area of criminal law if, in addition to the constitutional guarantees of criminal law, a general formula is established as the standard for the constitutional examination, based on which all criminal facts and rules can be checked and destroyed. As such general formulae were the categories of legal interest (Rechtsgut) and ultima ratio developed by a group of criminal law jurists in Germany, as well as combinations of other categories in Canada. In the area of private law, the recognition or refusal of the horizontal influence of fundamental rights between private parties is the turning point that determines the degree of constitutionalisation in a particular country and thus the degree of doubling of the legal system.

As I continued my research in the issue, I became aware that because of the proliferation of constitutional adjudication over the past few decades, the number of existing constitutional courts or supreme courts with constitutional jurisdiction has increased from three (in the late 1970s) to more than 100. Here the memory of Savigny came to my mind, who fought against the French-based written legislation at the beginning of the 19th century, and although he pointed out real problems, in retrospect it can be said that he unsuccessfully sought to prevent the rise of a new evolutionary legal level. Given the unstoppable spread of constitutionalisation over the past 40 years – well beyond Kelsen's modest notion, constitutional adjudication as a guardian of the frameworks – I have now come to the conclusion that this duplication may be still another level of law, and I have been fighting against this in vain, using the formula of activist constitutional adjudication against it. This undoubtedly destroys democracy to a certain extent, and also destroys the dogmatic conceptual order of traditional branches of law, but it may be a 'productive destruction' in the name of a new and higher function or more functions of law that was not previously considered. So far, I have focused on the specific reasons why the supremacy of democratic legislation in some countries has been replaced by constitutional courts and other supreme judges, and these have been rather prosaic political and power reasons, as Ran Hirschl wrote in his 2004 book Toward Juristocracy. Indeed, it is completely independent of the concrete causes of a newly created institution whether it will survive or

disappear afterwards. According to the evolutionist functionalist theory of history, what is crucial in this respect is whether or not a permanent function or functions can be performed by such a new institution. So the question is whether such a permanent function could be demonstrated in relation to constitutional adjudication that is becoming more widespread in the world.

Since I am only at the beginning of my analysis in this area, I have only included two functions in the preface to my volume here that could mean this. I repeat: 'In my opinion, a possible permanent function is that conscious legislative activity in the form of political legislation and the subordinate ministerial regulations can only take into account the rights and obligations of individuals from an instrumental point of view. In contrast, due to its focus on individual rights and obligations in the course of its case-specific work – at least in relation to the review of the constitutionality of court decisions and the legal provisions they apply – constitutional adjudication can correct the lower legal levels by referring to the new legal level of the rights of individuals. In this way, the emerging new legal level can enrich the evolutionary additions of the previous legal levels, just as conscious legislation enriched earlier, and legal dogmatics could improve the legal system too with the introduction of a strict logical order. Or like the deliberate legislation above the judiciary has gone further by enriching the legal system with draft laws drawn up by the ministry's expert apparatus."

So that would be a function, but another function also appeared for me, I quote: „The analysis of the widespread application of the new legal level of constitutional adjudication above the legislation around the world can also find its lasting function in the fact that in this way democracy based on millions of voters ultimately becomes institutionally linked to the law corrections of the elite and they coexist. In this way, according to Rousseau's idea, what the French revolutionaries of the Enlightenment have fought for in the form of popular representation, can coexist with the power realities of the elites. From a pessimistic point of view, this is a limitation of democracy – as has often been described against constitutional adjudication – but from an optimistic point of view this may be the only way to maintain mass democracy, at least in this form, despite the unbridled dominance of the elite."

It is up to everyone to decide whether the functions highlighted here are worthy enough for the consequences of constitutionalisation, the undermining of democracy and traditional dogmatics, to be viewed as 'productive destruction' and to support them. Or you can search for other legitimate functions. In any case, after almost half a century, I see little chance of a reversal of the trend and a constitutional adjudication that simply keeps the traditional legal system within the frameworks of guarantees, as Kelsen dreamed of.

The specification of these functions is still largely hypothetical and must be proven by analyses and studies of others. For the second, I have already found a full analysis by Robert Bork that almost did this justification of the hypothesis. I quote from him: „A judge inserting new principles into the Constitution tells us their origin only in a rhetorical, never an analytical, style. There is, however, strong reason to suspect that the judge absorbs those values he writes into law from the social class or elite which he identifies. It is a commonplace that moral views vary both regionally within the United States and between socio-economic classes. It is similarly a commonplace that the morality of certain elites may count for more in the operation of government than that morality which might command the allegiance of a majority of the people. In no part of government is this more true than in the courts. An elite moral or political view may never be able to win an election or command the votes of a majority of legislature, but it may nonetheless influence judges and gain the force of law in that way. That is the reason judicial activism is extremely popular with certain elites and why they encourage judges to

think it the highest aspect of their calling. Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment." [328]

At the end of my summary, I would like to briefly address the anomaly that arose in the horizontal division of traditional law, which came about due to constitutional law and the doubled legal system. In the continental European legal systems, the division of law has existed for more than 150 years and it also divided the legal profession in narrower legal branches as private law, criminal law, procedural law and so on. A further division is the separation of the judiciary, the prosecution, the bar, the public administrative jurists and the university jurists. This second separation does not affect the fact that after graduation from university, every continental European jurist is forced to specialise in a branch of law in order to advance his career. The judges of the Supreme Courts, the law professors, the members of the prosecutors' elite and the lawyers' elite are all specialised jurists who have only nostalgic memories of other branches of the legal system that they once learned as a law student, but have not used it for decades. In contrast, the judiciary in the United States has retained a generalist legal competence, and because they are largely university jurists, they train the next generations of jurists with a comprehensive view of law. This comprehensive legal perspective has gradually disappeared on the European continent, which makes it difficult for specialised jurists here to take on the task of generalist constitutional adjudication originating from America.

In my opinion, constitutional law, which is promoted by generalist constitutional adjudication and which causes the doubling of the legal system, requires the institutionalisation of a generalised branch of law 'lying above' the horizontal division of traditional branches of law and at least one major subject in law studies should be devoted to it, under the name 'constitutional law'. It follows that the designation 'constitutional law' proper (Verfassungsrecht), which has been identified with the old branch of state law (Staatsrecht) in recent decades, must be rejected as an inappropriate name. This misidentification led to the formation of constitutional law departments dealing with constitutional private law, constitutional criminal law and international constitutional law, but the material of the former branch of state law (Staatsrecht) was handed over to political scientists. However, they have little legal knowledge to gain a deeper understanding of the relations. In other words, my suggestion in terms of branches of law and legal education is that state law should regain its material and name, and a 'constitutional law' as a new generalist branch of law should include today's various constitutional fields, such as constitutional criminal law and so on. It is true that the consolidation of different constitutional fields of law at a higher level could simultaneously lead to new rivalries. But since they also exist today, hidden and unmanageable, this open institutionalisation over the traditional branches of law might be more appropriate from this point of view.

[328] Bork, The Tempting of America, 17.

Chapter 10.
Structural Problems of the Constitutional Level of Law and Possible Reforms

On the basis of the analyses carried out in the previous chapters, it is likely that the doubling of the legal system and the emergence of a new legal level above the legislative level, due to the widespread use of constitutional adjudication, will bring about a new structure of modern law despite the tensions with democracy. This new level of law takes precedence over all three layers of traditional legislative law, such as the text layer, legal dogmatics and supreme judicial case law, but it is currently struggling with a number of structural problems in order to adequately fulfil its prominent role. In the following, I will concentrate on the analysis of the structural problems of Hungarian constitutional adjudication, but it should be noted that these problems more or less affect all constitutional courts in Europe and other continents.

In comparison to the ideal of constitutional adjudication, I want to analyse five important contradictions in the law regarding the Hungarian constitutional court. In this analysis, it is worth starting from the structural solutions of the United States Supreme Court, which first implemented constitutional adjudication, and the Turkish Constitutional Court as a pattern that most deviates from this ideal. The ideal in this case is for the decision-making body of constitutional judges to make their decisions based on the equality of all members, with the chairman only having the authority to chair the session, but not having a major impact on the direction of individual decisions. Conversely, this means that the chairman of the constitutional court has no significant influence on the appointment of the rapporteur in individual cases, since this can largely determine the decision of the case, and therefore this appointment should be determined by a kind of automation (1). Ideally, the chairperson is not an employer of the scientific staff of individual constitutional judges and this staff is selected by each constitutional judge himself and the maximum period of employment of the employees is limited to his term of office (2). It is not for the chairman alone to decide when the individual cases may come for discussion before the panel of judges, as this can lead to arbitrary decisions. For example, some cases can be deliberately withheld or, on the contrary, accelerated for political reasons (3). In addition to these three, the fourth problem is that constitutional adjudication has been adopted as the generalist (non-specialised) U.S. judicial model in Europe, but can only perform this task with distortions due to the specialised European legal system and judiciary (4). Finally, the fifth problem when comparing the ideal of constitutional adjudication is that no superior instance controls the possible deviation of constitutional judges from constitutional provisions. In this way, the constitutional judges themselves can pose the greatest threat to the constitution, who should be the ones protecting constitutional provisions (5). When analysing the five problems, I will always discuss how the current regulation in Hungary could be brought closer to the ideal.

1. The power of designation in relation to the rapporteur

Before 1989, there was no constitutional adjudication in Hungary, and most lawyers had not really heard of it. When this system was introduced, only the main lines were taken from foreign

models. In addition to the basic structural features, the first Constitutional Court Act left the rapporteur's appointment from among judges unregulated; the rapporteur deals with draft decisions, which is essential for decision-making. This question was decided step by step based on the customary law of the college of judges and, after initial hesitation, developed slowly so that this designation power became the competence of the president of the court without restriction. This came about the following way: the president of the Constitutional Court in Hungary could freely assign the decision drafting of individual cases to any of the constitutional judges, and he could even keep any such case to himself and appoint himself as rapporteur. (I joined the panel as a constitutional judge in the summer of 2011, and according to public data, 184 cases were retained by the president as rapporteur at the end of the term in the following years, simply because he did not pass it on to anyone.) The new Constitutional Court Act of 2011, from which the twenty-year customary law was maintained in this regard, incorporated this solution and now the full designating power of the president of the Constitutional Court is recognised by law.[329]

If one looks at the practice of foreign constitutional courts, it can be seen that such unrestricted designation power exist only in exceptional cases - as far as I know, in European mocracies only in Italy - but in most places there is a kind of automatism which excludes arbitrary decision in this matter. To name just two of them: In the United States, in the case of the Supreme Court, a preliminary decision on the submission of a case divides the judges into two groups, supporters and opponents, and the rapporteur (*opinion-writing)* can only be appointed from among the supporters and the chairman of the Supreme Court is only privileged if (s)he becomes a supporter. In the case of Germany, an automatism avoids any decision about the person of the rapporteur, because each constitutional judge is already responsible for a certain legal area - the new constitutional judge inherits it from the predecessor - and thus the incoming application is automatically sent to the judge responsible for the legal area of the application.

In my opinion, automatism in this respect is the only solution that complies with the rule of law and, therefore, the full right to appoint the rapporteur in Hungary can be seen as a violation of the ideal of constitutional adjudication. [330] In view of the tension between the role of the generalist constitutional judge - which will be discussed in more detail later - and the European lawyers who specialise in a narrow area, the German solution seems to me to be the most desirable in order to remove the designating power of the court president. Although all constitutional judges are equally involved in the decision-making process and the rapporteur's privilege on this matter is terminated after the draft decision has been drawn up, if the rapporteurs specialise in narrower legal areas, this solution can be seen as a qualitative benefit for the whole panel. If I look at the regulatory areas of the constitution, I can see that the distribution of the fifteen areas among the members of the fifteen-member constitutional court can be resolved without any problems. Once the division of the regulatory areas is determined until the end of the term, each new constitutional judge would have the area that was previously overseen by the departing constitutional judge.

As a related consequence of this solution, it should also be mentioned that the automatic appointment of the rapporteur would always create the competence of a particular constitutional judge, which would inevitably deprive the rapporteur of the right to return this position if the

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[329] “The President (…) e) appoints the Judge Rapporteur”, Section 17 (1) (e) of the CLI Law 2011 on the Constitutional Court (Dept.).

[330] Let me mention my personal experience of the President 's appointment of the rapporteur a few years ago when I was having lunch with a delegation of German constitutional judges who had visited the Hungarian Constitutional Court and I asked the German colleague next to me whether the President of the German Constitutional Court ussually appoints the rapporteur for the draft decisions. The German constitutional judge vehemently protested this assumption and looked at me with astonishing at how I could imagine it, so that I no longer tactfully mentioned the domestic situation in this area…..

majority did not support the draft. It follows that rapporteurs should, therefore, not only be allowed to provide a parallel argument for the decision as it is in Hungary today, but should also be allowed a dissent as well.

In accordance with this proposed solution, the statutory regulation of the appointment of the rapporteur in the Constitutional Court Act in Hungary could be as follows: *"The individual requests for the drafting of the draft decision are submitted to the constitutional judge responsible for their respective subject. The breakdown of the competences of the constitution according to the number of members of the constitutional court is contained in the final part of this law. If a new constitutional judge is not elected after a member has left, the constitutional court temporarily distributes the subject matter of the constitutional judge among the existing constitutional judges by majority vote. "*

2. The constitutional judges and their staff

Each judge has one vote in the Constitutional Court, but it is necessary to involve the judge's staff in the preparation of the decision to go through the details of the case or, in the case of the rapporteur, to prepare the technical details of the draft decision. This law clerks system has been in place at the United States Supreme Court since the early 20th century, and has been the case since the creation of the European Constitutional Courts in the 1950s. However, the difference between the two patterns shifted the role and weight of constitutional judges' staff in different ways. [331] The key difference is that in the United States, the nine Supreme Court judges are elected for life and typically hold this position for between 30 and 35 years. Therefore, there are rarely new and inexperienced judges in the college of judges. In addition, U.S. Supreme Judges have had a strong right to choose cases since 1925. Since then, only 100 to 120 cases per year have been discussed and decided, which means that the decision-making burden is relatively low. In contrast, European constitutional judges are elected for 9 to 12 years, with compulsory resignation in most places after the age of 70, and, in this way, one or more new and inexperienced judges join the constitutional court every few years. In addition, in most countries, European constitutional judges have only limited powers to select from submitted constitutional complaints and to select only a few of them. As a rule, they have to review five to eight thousand cases a year, and even if most of them are rejected, they have to review their content and state the reasons for this in the rejection decision. In Europe, the existence of inexperienced constitutional judges within the body, which contributes to a much greater decision-making burden than in the United States, shifted the role of constitutional judges to the direction that these decision-making personnel have been structurally significant. While in the case of US Supreme Court judges who remain in position for a lifetime, their law clerks only have a one-year mandate, the staff of constitutional judges in Europe are generally appointed indefinitely. In addition, these employees are not law students, but rather experienced lawyers, university lawyers and the situation here is such that the decision-making processes of the constitutional court are occupied by those who are largely experienced in these processes and the newly elected constitutional judges can only adapt to them and this employee staff will

[331] The differences between the American and the European pattern become clear when you read the relevant studies together. For the German see: Joachim Wieland: The Role of Legal Assitants at the German Federal Constitutional Court (In: Rogowski / Gawran (eds.): Constitutional Courts in Comparison. 2002, 197-2010) for the American see Tod Peppers / Christopher Zorn: Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment. De Paul Law Review (Vol. 58.) 2009, 51-77.p. illetve Saul Brenner: The memos of Supreme Court law clerk William Rehnquist: conservative tracts, or mirrors of his justice mind? Judicature 1993, 77-81.p.

teach them from the start how to decide here.

In this European arrangement, the decision-making function of the constitutional court staff far exceeds that of the American law clerks. In the first few months in particular, the new constitutional judge is almost exclusively a "delegate" of his/her experienced staff, and his/her efforts are mostly limited to somehow understanding the material presented by his/her staff and at panel discussions to reproduce exactly these positions that (s)he takes from the them. This initial subordination can be stabilised if a softer constitutional judge with his dominant staff is in a situation where the loss of judicial sovereignty becomes permanent and the judge only participates in the panel discussion as a delegate of his/her staff.

A further shift in the focus of decision-making from constitutional judges to employees will be achieved if a permanent consultation has developed between the employees of the individual constitutional judges. Then not only do individual constitutional judges lose control of their own staff, but most constitutional judges or even the constitutional court as a whole can be vulnerable to a uniform group of employees. The German constitutional judges have four employees per constitutional judge - a total of almost 70 - and from among them they elect a spokesman as well and, alongside the two senates of the court, they function as a so-called "third senate". For the Germans, the term of office of the constitutional judges' scientific staff lasts only a few years, and then they return to the ordinary courts to work as judges. In contrast, this tenure in Hungary is lifelong, and most employees have been preparing decisions for decades.

On the other hand, the independence of the staff from the constitutional judges is further strengthened by the fact that although every constitutional judge has influence over the selection of his/her staff, his/her employer is not the constitutional judge him/herself, but the president of the constitutional court. So, if there is a permanent conflict between a given judge and his/her staff, (s)he cannot dismiss and replace them as quickly as (s)he sees fit. And this structural arrangement gives employees the possibility of permanent resistance to their judge and, on the other hand, the constitutional judge can be forced to compromise. In addition to his/her heavy decision-making burden, (s)he is forced to tolerate the resistance of his/her decision-making staff.

In some constitutional courts, this independence of academic staff and their decision-making function is further reinforced by the fact that it is not used for individual constitutional judges, but for the entire body under the president, and the draft decisions are drafted by them for the constitutional judges in advance and the latter can make and reject changes in a panel debate at most, but the main lines of the decisions are already formed in advance. This is the case with the Turkish Constitutional Court, and in this model the weight of the decision is shifted entirely to the scientific staff, and the judges can almost only veto the draft decisions of the staff. [332]

To illustrate this problem, it is worth using American descriptions, because contrary to the very brief empirical description of the European constitutional courts with regard to the highest courts of the United States, considerable literature can already be found. *Lester J. Mazor* describes the situation of United States Supreme Court clerks when *Earl Warren*, the chairman of the Supreme Court, initially received his clerk from Harvard, the most elite American university, but after a while he stopped and he began to look for employees at other universities because, due to the influence of his judge colleague *Felix Frankfurter* in Harvard, he no longer trusted the employees here. [333] From the 1920s onwards, as a professor at Harvard, Frankfurter

[332] The dependence of Turkish constitutional judges on the staff of the Constitutional Court when drafting decisions is also clear from the analysis by the Venice Commission in 2011, see: Opinion on the law on the establishment and rules of procedure of the constitutional court of Turkey. Adopted by Venice Commission at its 88th plenary session 14-15 October 2011, 8-12.p.)

[333] Lester J. Mazor: The Law Clerks at the Supreme Court of the United States. In: Rogowski / Gawron (ed.):

had built up an entire personnel policy and hired clerks for Holmes, Brandeis and sometimes even other judges at the Supreme Court. And when he became a judge in 1939, he worked with the clerks, flooding the Supreme Court as a pillar of war to put pressure on the other clerks or even on the judges themselves: "Once Frankfurter himself on the Court, it is said that "He used his clerks as flying squadrons against the law clerks of the other jusctices and even against justices themselves." [334] According to another analysis, Earl Warren was so concerned about Frankfurt's weight due to his army of law clerks that he initially prohibited his own clerks from disclosing information to Frankfurter clerks. [335] The US Supreme Court clerks are only active for a few years but cannot reach nearly as much decision-making weight as the experienced staff of the European constitutional courts, not to mention the much more permanent decision-making staff in Hungary. [336]

With regard to the Hungarian situation, it should be noted that a system of employees was created in this area, essentially based on the German model, and the employees were deployed alongside the individual constitutional judge and not, as in some countries, in a central decision-making apparatus. However, this remained controversial in that their employer is the president of the Constitutional Court and they are indefinitely hired, and so they always wait for new constitutional judges to enter and then train them as “guardians”. In most cases, this leads to the new constitutional judge becoming vulnerable to his employees.

Against this background, the ideal situation in this area would be if the constitutional judge him/herself could select his/her employees and act as an employer, which means that the American solution is the best.

3. Agenda Setting

After constitutional adjudication began in Hungary in the 1990s, constitutional judges had no time limit to decide cases, and they could bring a case without time limit or reverse it for years. This complete freedom created great decision-making power and allowed it to rapidly advance norm control over the laws that were to be abolished, but if there was some motivation to delay the decision, it could be postponed indefinitely. However, this great decision-making power did not extend to the entire constitutional court, but only to the chairman. In this way, as I have just analysed, he was able to decide in a case himself who to designate as rapporteur or to keep the case to himself, and when to take the drafts on the agenda or postpone them for years. This was changed by the new constitution, which came into force in 2012, and by the new constitutional court law enacted on this basis, which, however, only slightly reduced the arbitrary nature of the settlement of cases. The current deadlines for all constitutional proceedings are as follows. The constitution itself provides for a period of 30 days for normative ex-ante control (Article 6 paragraph 6 for ordinary laws and Article 24 paragraph 5 for the adoption or amendment of the constitution). Likewise, the Constitution itself provides a ninety-day time limit for reviewing

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Constitutional Courts in Comparison. 2002. Berghahn, New York / Oxford, 2002 192. p.

[334] See Mazor 2002, 191 p.

[335] Artemus Ward and David L. Weiden: Sorcerers ’Apprentices. 100 Years of Law Clerks at the United States Supreme Court. New York University Press. 2006: 164

[336] The results of an empirical survey on the current decision-making mechanism of the Hungarian constitutional court were published in a study published in the journal of the Hungarian constitutional court. According to the survey, a third of the number of constitutional judges who determine the drafts themselves is a third of those who do this together with the academic staff, and in the case of the remaining third, the academic staff also decide on the baseline of the draft decisions. See Endre Orbán / Kinga Zakariás: Az alkotmánybírósági érdemi munkatársak szerepe Magyarországon. (The role of the clerk of the Constitutional Court in Hungary.) Alkotmánybírósági Szemle 2016/2. sz. 114.

applications submitted by the ordinary courts. (Article 24 paragraph 2 letter b). With the other two important constitutional court proceedings, however, the possibility of an indefinite duration remained. Therefore, there is no legal deadline for deciding on the subsequent control of laws under Article 24 paragraph 2 letter b of the Constitution, and this also applies to constitutional complaints. The constitutional court's rules of procedure do not contain additional deadlines for the obviously more important procedure of legal control from a national perspective, but there are certain deadlines for constitutional complaints. Rule 53 (1) of the Rules of Procedure provides that a decision on approval should be taken within one hundred and twenty days, while paragraph 2 also gives the rapporteur one hundred and eighty days to present the first draft of the case to the panel. Paragraph 3, however, makes this easier immediately, since the chairperson can extend these deadlines several times. However, if the first draft is submitted to the panel within 300 days of no extension, there is no deadline for preparing and submitting the second and subsequent draft constitutional complaints, and there may be delays in deciding the matter over years. (Recently, the new draft was submitted to the panel debate again after four and a half years in the event of a constitutional complaint.) Constitutional complaints account for more than 90% of the decision-making work of the Constitutional Court in Hungary, and this causes a great deal of legal uncertainty in Hungary concerning the decision-making process of the Constitutional Court, which takes no time limit. The legal requirement of a one-year decision-making period in every constitutional court procedure would thus make a significant contribution to bringing constitutional adjudication in Hungary closer to the ideal situation and at the same time eliminating arbitrariness.

This was the problem of deadlines, more precisely the lack of it in the most important decision-making processes of the Hungarian Constitutional Court, and these problems are exacerbated by the anomalies in setting the agenda. The extent of the decision-making power is first determined by the freedom the Constitutional Court which it has with regard to legal deadlines for its decision-making processes, and the vaguer the legal regulation of these processes, the greater the decision-making power. However, whoever has this decision-making power of different sizes is also determined by who has the decision-making power to determine the agenda of the Constitutional Court. For example, if it is distributed among all constitutional judges and it is mandatory to put a draft decision on a particular case on the agenda by requesting a certain number of constitutional judges alongside the chairperson, this means a decrease in the decision-making power of the chairperson. However, if the agenda is determined by the exclusive jurisdiction of the chair, the monopoly over agenda setting will increase the dominance of the chairman over the board. This latter situation exists in Hungary and the chairman has a monopoly on setting the agenda: “The chairman (…) c) sets the meetings and the agenda of the entire meeting; the planning of the agenda items to be examined, including the date for the negotiation of the cases. "(§ 17 paragr. 1 c) and d) of the Constitutional Court Act). Together with the unrestricted right to appoint the rapporteur, including any number of cases kept for himself, and the right of the employer over the scientific staff and their placement next to the new constitutional judges (or occasionally the central grouping of several employees), the monopoly on the agenda setting gives the chairman of the constitutional court a position from which (s)he is far above the decision-making authority of the body of constitutional judges.

This status is incompatible with the ideal of constitutional adjudication, which is based on the primacy of body decision and ideally exercised by the same decision-making powers of all constitutional judges. The exact opposite of this ideal is the Turkish Constitutional Court, which is based on the decision-making power of the chairman and where the preparatory decision-making process is carried out in full by the deputy constitutional judges elected and monitored

by him. [337] The situation in Hungary is of course better than this, but the accumulation of decision-making powers, which are also set out in the hands of the president of the Constitutional Court in Hungary, radically differentiates the situation from the ideal situation. Eliminating the distortion would require some form of automation in setting the agenda, but even in today's situation the distortion could be reduced if, for example, the chairman's agenda setting could be supplemented by at least three constitutional judges.

4. The dilemma concerning the role of generalist constitutional judge

In contrast to the specialisation of European courts in certain areas of law from the 19th century onwards, legal specialisation within law firms has developed in the United States, and the role of judges as generalists without specialisation is still alive today. [338] The U.S. judge decides on the full range of legal issues before him, and for each branch of law and other subsectors, the specialised lawyers who, as specialists, capture the facts of the litigation, identify the precise sections of the relevant substantive law. The judge only monitors compliance with the procedural law provisions by the lawyers of the counterparties and makes the decision based on the facts available to him.

Constitutional adjudication arose within the framework of the generalist jurisdiction of the United States and, in this generalised form, it was then spread from here in Europe and all over the world. In this way, the professor or famous lawyer and full-time ordinary judge elected as constitutional judge in Europe is an inexperienced beginner in most areas of constitutional adjudication because (s)he has only dealt with a narrow branch of law for decades. In the other areas of law, (s)he only has previous law student experience, but as a constitutional judge, (s)he now has to make decisions in all areas of law. In other words, constitutional adjudication is a generalist jurisdiction and is in contrast with a fragmented kind of European jurisprudence and highly specialised judicial system. [339] In order to become a truly authentic constitutional judge,

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[337] I am referring again to the 2011 Venice Commission analysis, which shows that Turkish constitutional judges depend on the staff of the constitutional court on which the draft decisions are prepared, see: Opinion on the law on the establishment and rules of procedure of the constitutional court of Turkey. Adopted by Venice Commission at its 88th plenary session 14-15 October 2011, 8-12.p.)

[338] For only the most important relevant literature on the question of generalist versus specialist in the area of jurisdiction, see: Richard A. Posner: Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function. Southern California Law Review (Vol. 56.) 1983 No. 2. 761-791.p.; Diane P. Wood: Generalist Judge in a Specialized World. SMU Law Review (Vol. 50.) 1997. No. 4. 1755- 1768.p.; Sarang Vilay Damle: Specialize the Judge not the Court: A Lesson from the German Constitutional Court. Virginia Law Review. (Vol. 91.) 2005. No. 4. 1267-12311.p.; Lawrence Baum: Probing the Effects of Judicial Specialization. Duke Law Review. (Vol. 58.) No. 6. 1667-1684.p.; Herbert Kritzer: Where Are We Going? The Generalist vs. Specialist Challenge. Tulsa Law Review. (Vol. 47.) 2011. No.1. 51-64.p.; Edward K. Cheng: The Myth of the Generalist Judge. Stanford Law Review. (Vol. 61.) 2008. No. 2. 519-572.p.; Steve Vladeck: Judicial Specialization and the Functional Case for Non-Article III. Courts. JOTWELL. 2012. 2-5.p.; Anna Rüefli: Spezialisierung an Gerichten. Richterzeitung 2013/2. 2-18.p.

[339] Richard Posner draws attention to the discrepancy between the role of the European judiciary and that of the USA, as follows: In Europe the judiciary is much more specialized than it is in this country; and I am not prepared to assert that is a bad thing, given the very different structure of he Continental system. I have serious reservations, however, about trying to graft on branch of that system, namely the specialized judiciary, onto an alien trunk" Richard A. Posner: Will the Federal Courts of Appeals Survive until 1984? An Essay on Delegation and Specialization of the Judicial Function. Southern California Law Review (Vol. 56.) 1983 No. 2. 778.p. Conversely to Posner's argument, however, it can be concluded that in continental Europe, especially in the countries of Central and Eastern Europe, an aspect of the American legal system was taken over after the regime change in 1989, without discussing the differences in relation to the generalist nature of the constitutional jurisdiction with the to know European specialized judicial system.

the newly elected constitutional judges must make the greatest efforts in the first few months to process, understand and criticise the many thousands of pages of case law collected by the constitutional court on a case-by-case basis. Most of it also applies to branches of law that are far from the world of their own specialised legal field and only live in their memory as material of their exams as law students. It is undisputed that a lawyer who is less restricted to a narrow branch of law as a jurist may have a greater chance of covering the very broad areas of constitutional adjudication in a shorter period of time and, in contrast, for a lawyer (ordinary judge, university lawyer etc.) with the deepest specialisation in many cases it causes an almost insolvable task.

However, this is only a starting point, since the organisation of the constitutional court and its decision-making practice can in many ways support or rather hinder growth into the role of generalist constitutional judge. If a new constitutional judge who has already been chosen and is freed from decision-making by members of his/her staff with many years of experience, this staff becomes his/her "guardian" in the first place, and if (s)he does nothing about it, this situation can last forever. Theoretically, an authentic and well-prepared constitutional judge only needs decision-making personnel so that when (s)he becomes a rapporteur in one case, (s)he is free from the technical problems of decision-making and can concentrate on the fundamental issues. If it is a draft that was drafted by another - and this is the main workload of a ten to fifteen-member panel - the constitutional judge can review and process the whole matter together with the draft without any assistants. However, the staff inherited from his/her predecessor makes it possible for the newly elected constitutional judge to put aside the detailed work on hundreds of pages with files, with only a few pages containing information on the college meetings. This is, of course, a more convenient way, and if the new constitutional judge does so, (s)he will most likely never become an authentic constitutional judge and will only attend court panel sessions as a delegate of his/her staff.

For the rest of the constitutional court, the mere formal involvement of a constitutional judge in the decision-making process is usually only a relief, since the existence of many independent sovereign judges is a headache for the dominant chairperson or other key decision-maker on the panel. A dependent judge who is only supported by his/her staff is therefore only a great relief in the panel discussions and (s)he does not have to fear a negative evaluation. (S)he can even be a favourite of the sessions. Unless, of course, such a dependent constitutional judge blocks the desired direction of decision of the majority under pressure from his/her staff. In either case, however, this does not change the fact that it is a distortion, and if there are several such dependent constitutional judges, the constitutional court will undergo a transformation under the guise of a high level of parliamentary legitimacy, and actual decision-making will be determined by the non-elected staff. It is, therefore, necessary to examine how these organisational distortions can be remedied and somehow to ensure that the role of an authentic constitutional judge is strengthened.

The focus of the changes should be on professors and other lawyers specialising in a narrow area of law to be able to grow up as generalist constitutional judges as quickly as possible without being under the patronage of permanent constitutional court personnel. In this regard, it would also be helpful if the new constitutional judge could not inherit his/her predecessor's staff, as this tends to put him/her under guardianship immediately, but (s)he could always hire new staff for him/herself. This structural change can force the new constitutional judge to examine the draft decisions drafted by other colleagues and their documents (motions, first and second instance judgments, etc.). At first, this is a heavy workload, especially for matters outside of the former specialised legal area, but after carefully examining several hundreds of such draft decisions, it becomes easier and (s)he will become a real generalist constitutional judge who can authentically participate in the decision-making process next year. However, this change and the need for constitutional judges to take a closer look at the draft decisions can

only be effective if the provisions of the act on the constitutional court would require all constitutional judges to give their prior opinion on a draft decision. This is important for old, practiced and already authentic constitutional judges - that they should not improvise with the formulation of their views during the session itself! - but especially important for new constitutional judges. They should not sit smiling peacefully and approve of the designs with their silence, but should be able to take clear positions on the main aspects of the case.

5. Who should guard the guards?

"The Constitutional Court is the supreme body protecting the constitution." (Article 24 paragraph 1 of the Hungarian Constitution) In terms of content and taking into account its competences, this statement can be expanded to the extent that the constitutional court, which is directly linked to the constitutional power, is the organ for the concretisation of the constitution. After the start of constitutional adjudication in Hungary in 1990, it was initially only above the legislature and by repealing its laws or making various provisions binding for the content of future laws by declaring constitutional omissions. Since the new constitution, which came into force in 2012, the powers of the Constitutional Court have been extended to reviewing and possibly overturning ordinary court decisions. Thus, like the constituent power, the constitutional court stands above the principle of the separation of powers, and there is no separation of powers at the level of constitutional adjudication in most European countries.[340] This extraordinarily great power poses the problem: "Who should guard the guards?"

The constitutional judges protect and interpret the highest decision-making level of the state, the constitution, and in order to do so independently, they have to evade any control of the state organs. The constitutional judges are directly tied to the highest decision-making level of the state and are directly below it, and this is the constituent power. But it is this uncontrollability that raises the question: "Who is guarding the guards?" In fact, there are many structural incentives and other subjective motivations for the constitutional judges who act completely out of control to become the greatest threat to the constitution. This is all the more likely since their main task - to monitor the law and to destroy it as unconstitutional - naturally causes the immense celebration of the opposition parties and their media and their intellectual background in political democracy, even if their decision is the most obvious violation of the constitution. And if the mass media are strongly opposed to the parliamentary majority in a government cycle, constitutional judges can even create a new constitution through their own jurisdiction - which destroys the actual constitution - and this is celebrated by the mass media as a product of genuine professional conscience.

Given this problem, it is impossible to avoid attempting to gain some control over the constitutional judges, although extreme care must be taken to prevent the revenge of certain

[340] In my opinion, the repeated debate about whether the Constitutional Court is a “court” in Hungary is misleading. Since 2012, it has also been the highest part of the judicial hierarchy in Hungary due to the new constitution, because for the constitutional judges, it was made possible to overrule court decisions. However, the Constitutional Court is also a legislator because it can not only repeal laws, but also give the new law, which is to be created in connection with its repeal, its binding normative content; but even without repeal, more specifically from the provisions of the constitution, he can extend a legal provision by formulating a constitutional requirement for judges, and thus further expand the legal content. In addition, in accordance with Section 61 (2) of the Constitutional Court Act, the executive power of the government can even be committed with a temporary measure by the Constitutional Court. In this way, the Constitutional Court is both a judge and a legislator and an executive, and it only misleads us if we only address its nature in one respect. Instead, its nature can be better understood if it is kept in mind as a *constitutional contretizing body* that can adequately describe all three aspects of its work.

political interests from being achieved. Therefore, only a very large parliamentary majority may be required to sanction the obvious separation of the constitutional court majority from the constitutional provisions. For example, the sanction order is already tied to the parliamentary majority enough to prevent everyday political forces and their coalitions from triggering them, and only the highly qualified majority of the entire parliament can impose the sanction. However, if the consensus were exceptionally large, this majority would still be able to end the mandate of constitutional judges who voted against such an obvious provision of the constitution if necessary. In order to enable this idea to be put into practice, it can be proposed to set up a continuously functioning monitoring centre via the Constitutional Court.

A possible solution would be to fill this control centre with professors from all faculties of law, with the proposal of two or three professors from all parliamentary groups and the selection among them by the head of state. This centre would have two main tasks. One of his/her tasks would be to monitor the deadlines of constitutional proceedings at any time and to report violations monthly. In its other role, it would review whether the Constitutional Court's decision-making process is based on constitutional provisions or the Constitutional Court Act is not violated in their grammatical meaning. Although the constitutional judges can often interpret the provisions of the constitution in a broad framework, the violation of an obvious grammatical meaning in the case of a provision of the constitution or the act on the constitutional court is such an exceptional situation if the constitutional judges could be sanctioned. Within this narrow circle, the proposed Centre could be allowed to review constitutional court decisions and publish the results of such violations in its monthly reports. The power of public relations could possibly be enhanced by discussing the experiences of the Centre's reports once or twice a year in the Constitutional Committee of the Hungarian Parliament.

Part Three
European juristocracy:
Questions Concerning the Juristocratic Power Structure of the European Union

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Foreword

I had been criticising activist constitutional adjudication for decades when I happened to come across Ran Hirschl's book on juristocracy. To explain, activist constitutional adjudication had primarily been implemented in Germany and then spread to a number of countries around the world, and in 2004, Hirschl formulated this process as a replacement of democracy by juristocracy, and he demonstrated rational reasons why this had been taking place in a number of countries (Hirschl 2004).

Following in his footsteps, I expanded my previous criticisms of activism and reformulated it as a replacement of democracy by juristocracy. In addition to juristocratic tendencies within individual countries, I also began to analyse the juridification of politics on an international level. These analyses show the processes of the constitutionalisation of international law, which transformed international political power struggles under the guise of law, and they furthermore show the expansion of human rights jurisdiction on a continental level, which brought the democratic will formation of the states and a larger part of the internal legal systems under control. In this way, juristocracy within countries can also be doubled on a larger scale.

In order to analyse this, I came across empirical analyses of the functioning of the Strasbourg Court of Human Rights (ECHR) in recent years, which, based on anonymous interviews with human rights judges and registry lawyers of the centralised ECHR legal staff, honestly explained the actual birth of Strasbourg judgments. It demonstrates that, in fact, these judgments are not drawn up by the judges sent by the Member States, but by a central permanent team of registry lawyers, and the judges are mere dressed up representatives who are only allowed to announce the decisions. This is articulated most sharply by *Matilde Cohen* in a study that published her analysis with the title "*Judges or Hostages?*" (Cohen 2017). In the same way, *David Thór Björgvinsson,* former ECHR judge and professor in Copenhagen, after leaving his job in 2015, in the course of an interview, criticised academic researchers for not detecting the

ECHR judge's full vulnerability to the registry lawyers' team who had been employed in Strasbourg for decades. On this basis, I found Matilde Cohen's analyses fully substantiated, which described this situation. This has prompted me to investigate to what extent the situation of the judges in Strasbourg differs from that of the judges in Luxembourg who make the most important decisions of the European Union. The analyses of this have also highlighted the role of the European Court of Justice (CJEU) in the power structure of the whole EU, and in the end it could be clarified that the structure of the EU can basically be seen as a bureaucratic juristocracy.

Because of this progress, I then consciously tried to examine the power structure of EU juristocracy. If one looks at the power structure of the European Union not on the formal but on the sociological level, the ECtHR in Strasbourg is as much a part of it as the Luxembourg judicial elite or the legal elite of the EU institutions in Brussels. If the parts of it are examined together, the role of NGOs in the EU's juristocratic power structures clearly appears, and my further research aimed to investigate this. I found very detailed empirical analyses, in particular on the ECHR, but also on the Commission, the Council (plus COREPER) and the European Parliament, as well as the European Court of Justice on the influence of NGOs and lobby organisations.

I have looked at the organisation of power within the EU several times in the past few decades, and in this context I have often found that European studies and European law writings dealing with them are simple apparatus propaganda and not real scientific analyses. In my most recent research, I came across new historical, political and sociological analyses that, based on the materials of the EU's institutional archives, thoroughly examined the science of European law and the development of European studies and law academies. So my feelings were not deceived, and the nature of the apparatus propaganda was not accidental. After this chapter, I tried to analyse the justifications and legitimacy arguments of the EU power building that has existed over the Member States for more than half a century. I wanted to know whether there are arguments to their functioning, whether the EU can claim that they are worthy of recognition. Finally, in the final chapter, I examined how and to what extent EU legal institutions and solutions, which are considered to be successful worldwide, have been adopted by other continents in recent decades.

Chapter 11
The ECHR as a Self-Organising Team of Registry Lawyers

In recent years, based on empirical studies and internal interviews, a number of studies have appeared that show the details of the internal functioning of the European Court of Human Rights (ECHR). For a long time, this way of working was only known to internal actors, but now these recent studies have made it possible to understand how the Court works in general sociological contexts. This chapter deals with the characteristics that can be derived from investigations and interviews with regard to the independence of the ECHR judges. First, details are described (1); Then the general characteristics of the independence of the judges and the dilemmas around the judges' commitment to the case law of the ECHR are looked at in more detail (2). Finally, against the background of the general picture of judges' independence, the problematic independence of the ECHR judges is assessed by highlighting which side of the functioning of the court most violates this independence (3).

1) Organisational framework

Each of the signatory states to the Convention may send a judge to the ECtHR, and the 47 judges are divided into five sections. In the plenary meeting of the ECHR, the president and a deputy president are elected from the judges for each section. In addition, there are seven or eight judges in each section. According to their website, the decision making of the 47 ECHR judges is currently supported by 667 registry lawyers, including eleven Hungarians, of whom 270 lawyers help to decide individual cases. The ECHR judges do not have their own staff, and if one of them is appointed rapporteur by his/her department head in one case, (s)he also receives employees from the centralised legal team and forms a team with them. This centralised decision-making apparatus is divided into 33 groups, which are installed alongside the five departments and are headed by the department head. [341] Since the applications are submitted in the national language and there is a separate team of employees for each language area that leads each case through the decision-making process, most of the 33 groups bring lawyers together from one language area. There is a strict hierarchy within the decision-making groups of permanent legal staff, and in the bottom rows are the temporary employees with a one-year term that can be extended by up to four years. However, if one of them is found to be co-optable by the permanent head of the legal team, (s)he can belong to the permanent registry

[341] More specifically, the judge-rapporteur does not receive a specific legal assistant, but a whole group of lawyers from the relevant department, below junior registy lawyer, who is constantly checked by senior lawyers and the written draft is corrected, and ultimately everyone can be from the head of department be taught in relation to the designs. In an interview, one of the department heads described this as follows: „I Manage the entire thing, it's a well-oiled machine… Clearly the most experienced lawyers who have an indefinitive contract … handle the hardest case… and supervise younger lawyers who begin with the simplest cases and handle correspondence. It's a system of hierarchy and supervison, especially for newcommers. In our jagon we call the permanent lawyers „A lawyers" and „B lawyers" those who are on a fixed-term contract." (idézi: Mathilde Cohen: Judges or Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights. In: Fernanda Nicola/Bill Davis (eds.): EU Law Stories. Contextual and Critical Histories of European Jurisprudence. Cambridge University Press 2017. 63. p.

lawyers, where (s)he can then spend up to 30-35 years.

In addition to the judge who has been appointed rapporteur for a case, the responsible department head appoints a member of the legal team. They review the progress of the case and each phase of the editorial process, and the hierarchy reviews the draft created by the junior staff before the rapporteur, changes it, and then forwards it to the rapporteur. Before it is completed, it must go through the above-mentioned supervisor of the junior assistant lawyer and the amendments of the rapporteur may only be included in the draft by the consent of the registry lawyers. So when it comes to a more determined rapporteur sticking to his/her ideas, there is an ongoing struggle between the judge and the registry lawyer hierarchy. The resulting draft decision will then be forwarded to one of the ECHR's decision-making bodies and, if it includes a rejection, it will be distributed to a three-member council. [342] However, if the decision is substantive and positive, it will be forwarded to the section's seven-member chamber.

There is, however, another review by another permanent legal staff before a case is brought before a judicial decision-making chamber, and this is the opportunity for the *jurisconsult* and his/her legal team to intervene. This position of *jurisconsult* was established in 2005 to protect the relevant ECtHR case law and to ensure that individual drafts are always made in the light of this case law. As a former *jurisconsult*, *Vincent Berger*, who held this office between 2006 and 2013, writes that the appointment of *jurisconsult* is decided by the central ECHR management team, which is composed of the President of the ECHR and the five heads of department, and (s)he then examines the draft of every single case. In the event of a discrepancy, his/her legal team requests the judge rapporteur and the decision-making staff to end the discrepancy. If the deviation from the case law is significant, his/her weekly briefing contains, as a kind of public reprimand, the name of the "perpetrator" and the case for all judges and registry lawyers to warn everyone of such a deviation. [343] Based on interviews with judges and legal staff of the ECHR, ECHR researcher *Mathilde Cohen* has already found that if the rapporteur insists on a solution to his/her draft despite repeated warnings in one case and expects a positive decision in his/her chamber on the contested draft, at the suggestion of the *jurisconsultus* staff, the case is ultimately taken away from the judge-rapporteur and the chamber and assigned to another judge-rapporteur or another chamber. [344] However, this is only conceivable for the most persistent judges, since the *jurisconsult* stands far above the individual judges and their decision-making bodies and is one of the most important decision-makers in the more important decision-making forum of the ECHR, the *Grand Chamber*. Here (s)he represents the entire permanent EGMR -team of registry lawyers. (S)e is also the joint manager

[342] It should be noted that the first decision on applications received by the ECHR is the admission or rejection, which is entirely decided by the legal staff of the permanent staff and then the rejection is formally signed by a judge as a sole judge, and this has become even more common in published in the past under the names of committees of three section judges. The number of these has been tens of thousands since the turn of the millennium, e.g. 33,067 applications were rejected in 2009, and 983 went to the boards to make a factual decision. See Andrew Tickell: Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a „Bureaucratic Rational" Construction of the Admissibility Decison-Making of the European Court of Human Rights. German Law Review (Vol 12.) 2011. 1799. p.

[343] "A regular, always confidential, task: he writes a weekly flash jurisprudence intended only judges and Registry lawyers and devoted to developments in sections during the past week. With particular emphasis on the "value added" case law, it intends not only inform, but above all contribute to the treatment of chamber business by alerting those who are responsible for their preparation (lawyers, registrars and judges rapporteurs) and their outcome (members of judgment formation of the Court)" Vincent Berger: Jurisconsult of the Court (2006-2013). online www. berger-avocat.eu/echr/jurisconsult.html

[344] "The jurisconsult has the authority to intervene at any time in the opinions-drafting process if a departure is spotted. Several options are available. The jurisconsult can initiate a discussion with the lawyer and the reporting judge responsible for the case, alerting them to the discrepancy. They can include a note on the problematic case in their weekly e-mail to judges and registry members banking on the naming-shaming effect. Should these actions fail to elicit the desired response, more drastic means can be employed, such as withdrawing the case from the panel and reassigning it to a different one." Mathilde Cohen: Judges or Hostages? … 68. p.

of several independent departments (e.g. the research and library department, the jurisprudence department, etc.). [345] However, his/her greatest strength is that (s)he protects the ECHR's case law from individual judges and their decision-making bodies under the umbrella of the "*Case Conflict Prevention Group"* of the President of the ECHR and the section presidents, and thus confrontation with the legal team of *jurisconsult* by each judge and his/her decision-making body would be a confrontation with the central supervision of the ECHR as a whole. Although a warning from *jurisconsultus* to a draft case in principle only promotes an open account of the reasons for the deviation, and a justification for this deviation can be given that in principle only promotes an open debate. [346] The above-mentioned sanctional powers of the *jurisconsult* and the possibility to take the case away - or possibly suggest a referral to the Grand Chamber - encourage the potentially opposing judge not to raise any objections if the warning of *jurisconsult* reaches a level. In the summary by Mathilde Cohen, the *jurisconsult* can be seen as the "Grand Inquisitor" of the ECtHR: "I like to think of the jurisconsult as the ECHR's 'Grand Inquisitor'. The jurisconsult and his delegates receive and review all draft opinions. They can intervene at any time in the writing of any opinion. During their weekly meetings, one of the lawyers may declare, 'Hey, I'm reading something that fails to support 'the party line', as we used to say during the Soviet time, that is, contrary to orthodoxy." [347]

However, there is another level of control over the judges of the ECHR, namely the linguistic control of draft decisions and final decisions, but also of individual dissent. This also means an additional review of the content, since the linguistic corrections by the mother-tongue inspectors, in accordance with the established case law language and the concepts, also cause significant changes to the finished drafts and the published text of the final decisions. This is all the more so since the senior layer of the staff of the language department not only has a mother tongue background, but also a law degree. In this way, they can control judges and their decision-making bodies and chambers, both linguistically and from the point of view of human rights law. [348] Language tests on the decisions are taken twice, first after the draft decisions have been drawn up and then again by the linguist lawyers, including the text of the dissenting opinion, to the text of the decisions made. Such a linguist lawyer, attached to the ECtHR, stated in his interview that there are explicit linguistic precedents in Strasbourg that include binding terminology, and regular terminology meetings are held by linguist lawyers to maintain them. This terminology is compulsory and applies to all judges and legal staff. If one of the judges violates this - perhaps because he deliberately wanted to add another normative meaning to the decision - this will be relentlessly remedied during the linguistic correction phase. [349]

Regarding the linguistic vulnerability of judges, it should be noted that the two official languages of the ECHR, English and French, do not only mean the official and widely used language versions, but one that has become a simplified but special Strasbourger language system that has been developing over many years. These so-called language versions

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[345] "Besides that tasks, the jurisconsult is the head of a direction that brings together several sectors: The Registry of the Grand Chamber, (..) the Research and Library Division (…) The Cae Law Information and Publicatoion Division (…)The Just Satisfation Division". (Vincent Berger, siehe oben)

[346] In an interview, a jurisconsultus lawyer described his review of the draft decisions as follows: „Thus a member of the jurisconsult's team pointed out that „my role… too is to say, with my team, 'Beware, if you depart from precedent, you must explain why.' One may very well have good reasons, but it must be transparently, and really good reasons must be given." Az interjút idézi Mathilde Cohen: Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort. The American Journal of Comparative Law (Vol. 62.) 2014, 970-971.p.

[347] Mathilde Cohen, Ex Ante Versus Ex post… 970. p.

[348] Mathilde Cohen: On the linguistic design of multinational courts: The French capture. I-CON. 2016, 1-20 p.

[349] "ECtHR translator Martin Weston thus writes that there are „linguistic precedents" at the Strasbourg court. There, tanslators hold periodic „terminology meetings" to discuss and settle upon standardized translations for given words and expressions. These translation constrains are very much present in the mind of those, judges and non-judicial personnel, drafting opinions." Mathilde Cohen: On the linguistic design… 15. p

("Conventional English" and "Conventional French"), which have been expanded with special terminology, represent the two working languages that are used in everyday decision-making processes. [350] And this can only be learned through a two-year intensive language course, even for lawyers who work continuously in Strasbourg. Regardless of how well a judge from the Member State who has been seconded to the ECHR for nine years speaks either or both languages, for several years (s)he is unable to carry out decision-making processes without support and is, therefore, vulnerable to the senior legal staff. However, the real situation in Strasbourg is worse, and since one of the two official languages is sufficient to appoint ECHR judges, the seven judges in a section's decision-making chambers can often only communicate at meetings with the help of an interpreter, because half of them knows one and the other half only knows the other language. These linguistic restrictions, along with the others, mean that in many cases judges are, in fact, just a disguise to cover up the decision making of the permanent legal staff (registry lawyers); on the one hand, due to the restrictions of extremely strong precedents, and on the other hand, due to language weaknesses.

The almost complete vulnerability of ECHR judges to the ECHR's permanent legal staff (registrar, deputy registrar, department registrar and deputy department registrar) and to the centralised registry lawyers they oversee and are under permanent hierarchical subordination can be demonstrated even more clearly in their situation in comparison to the European Court of Justice in Luxembourg. As we will see, judges are also vulnerable to permanent staff, but this results in a higher level of judicial independence for judges involved in decisions. (See the analyses in the next chapter.)

2) The independence of the judges, their loyalty to the Convention on Human Rights and their case law

Since the Enlightenment, the basic principle of the judiciary - the formula for the independence of judges - has been that the judge is independent and is only subject to the law. As a result, there must be no other instance between the judge and the law applied by him/her that affects the decision. The linguistic meaning of the law determines the norm of the decision, and if this does not happen immediately due to its openness, the judge can authentically decide based on the methods of interpretation used in the legal system and the legal dogmatic concepts of each branch of law. If there is any objection to the judgment of the court, the appeal process can be repeated before a higher instance. This can eliminate the prejudices or misinterpretations that still occur in the first instance and, at the same time, ensure the independence of the judges. This initial situation began to change in the early 20th century, and, by then, decades of experience since the Enlightenment made it clear that something else under the law's general provisions should still be binding judges in their considerations and interpretation of the law. It has gradually become common in European countries for judges to be bound by interpretations developed and determined by Supreme Courts, and if this is ignored in their judgment, their judgments in appellate cases will become annulled by the higher courts. Henceforth, the legal text and the case law of the Supreme Court have jointly defined what is the law in a country, and the judges take the legal text into account in their decisions based on legal dogmatic concepts and together with the case law of the Supreme Court. [351] Since then, legal compliance

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[350] „A senior registry lawyer explains that the new recruits must be trained in those idioms: „we have our style… for two years, we are taught that style, so there is a Convention English and a Convention French, a registry lawyer way of drafitng." Mathilde Cohen: On the linguistc design… 19.p.

[351] See the description of the combined effect of legislative acts and the case law of Supreme Court on the decision making of the courts and on their judgments: McCormick, D. Neil/Robert Summers (eds.): Interpreting

and the relevant legal dogmatics have also been considered as a legal restriction to the independence of the judiciary in addition to compliance with the law. However, this did not change the fact that the judge's decision could not be influenced by a binding body, and the judgment of a judge can only be corrected by appeal. The appeal has, of course, been supplemented by various additional review procedures over the past hundred years, and not the entire trial is repeated, only a few legal issues are re-examined, or the Constitutional Court can decide on the basis of a constitutional complaint if a court decision violates a fundamental right. However, they do not affect the judge's decision in his/her own proceedings and (s)he can make his/her judgment without the instructions of an outside person.

Violation of the independence described above is the most fundamental violation of the rule of law. So let us look at how the ECHR decision-making mechanisms described in the introduction relate to this and whether or not they affect the independence of individual judges.

3) Exclusivity of ECHR case law for judges: loss of independence

The general picture of judges' independence outlined above is supplemented in the case of stable legal codes that may remain in place for centuries, such as the French Civil Code of 1804 or the German Civil Code of 1900. Despite the unchangeability of the legal text, this can be supplemented by the fact that the changes in times are followed by a gradual reinterpretation of the existing case law brought about by the judges and the introduction of a new case law standard in addition to the legal text. There is a hierarchy between the listed intellectual layers of law (legal text, case law, legal dogmatics) and in addition to the priority of the current legal text, judges' case law can be changed more easily, which can be supported by new legal dogmatic constructions created by legal scholars over time. Therefore, the binding nature of groups of Supreme Court case law norms is only relative, and when new generations of judges come or new judges are appointed with a change in the democratic political majority, the existing case law is gradually changed and the old case laws are replaced by new ones added to the codes. However, this presupposes that the newly appointed or elected judges within the judiciary are independent and that the binding nature of the case law remains only relative and the possible rapid exchange of the existing case law cannot be prevented. Judicial independence, therefore, means not only protection from outside, against political power, but also against the internal hierarchy of the judiciary and protection against older groups of judges who want to preserve the old case law forever. If a closed judiciary and its self-cooptation order are created, then the rule of the established case law against a change of law and dogmatics can be realised, which can only react to the change of times with arrogant rejection and with the argument of the supremacy of law over democratic politics. The closed judiciary actually identifies the supremacy of law with its own power and this is declared as the "rule of law". In the event of an extreme escalation of tensions, society and its political order can only respond to such a situation with a revolutionary swing to restore the primacy of law and legislation and the subordinate jurisdiction of the judiciary. In this way, the individual judges are freed from the rule of the closed and hierarchical judiciary and the independence of the individual judges is realised again.

The general picture of the relationship between the independence of judges and existing case law also provides a good background for understanding the situation of the ECHR judges. The investigations show that case law has been absolute and individual judges and their decision-making chambers have been extremely bound to this case law, and the ECHR judges

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Statutes. A Comparative Study. Dartmouth. Aldershot. 1991

have lost their independence in an extreme way, especially since the turn of the millennium. The starting point for this is the fact that the decision-making staff were separated from the judges and organised in a hierarchical central system. In this way, the rapporteur can only act from a subordinate position in order to prepare a draft decision based on an independent judicial judgment. "His/her" helpers are embedded in a hierarchical order that is independent of him/her, and even if new ECHR judges grow up over time to understand the existing case law and to examine possible intellectual alternatives to a provision of the Convention on Human Rights, (s)he will still be opposed to the closed hierarchical EGMR legal team that dominates decision making. The "Grand Inquisitor" (jurisconsult) has joined this already existing position of subordination since 2005. With his/her own legal team, (s)he has extensive powers to intervene in every phase of each case and ultimately force individual judges and decision-making chambers of the ECHR to change. All of this not only abolishes judges' independence, but gives full control over the ECHR's decision-making mechanism for established case law, and the Convention only becomes a distant reference because judges can only consider it in the light of case law.

In fact, the ECHR's decision-making mechanism is increasingly characterised by the rule of the closed group of the permanent registry lawyers, who could also ensure their permanent self-reproduction by training new lawyers, monitoring their loyalty and then including the selected ones. Therefore, for the most part, the ECHR judges selected and seconded by the Member States can only hide this decision structure, but have only a minimal influence on decisions. In fact, they only obscure the hierarchy of the permanent legal team, including the dominance of registrar, deputy registrars, and departmental registrars and deputy departmental registrars. If an ECHR judge identifies with the leaders of the dominant legal team over the years, (s)he may even be section president, but the remaining years of his/her nine-year term leave him/her with little opportunity to influence the ECHR's juristocratic oligarchy and jurisprudence.

The signatory states to the ECtHR can, therefore, only state that their powers due to the closed ECHR juristocracy are being annulled and despite their right to choose the ECHR judges based on the democratic public opinion of each member state to influence human rights jurisdiction in the face of changing European circumstances, this is not put into practice. Research has also shown that, over the years, this closed juristocratic oligarchy in Strasbourg has not only interpreted the Convention in its jurisdiction, but expanded it in many ways to bring the entire legal system of the signatory states under its control. In analysing the case law of the Court of Human Rights, *Julian Arato* has previously shown two methods of how judges' competences, which were originally very wide, were further separated from the Convention. In doing so, they have been expanded so that they are the most distant from what the signatory states originally intended with the commitment.

In view of this expansion, it is not the ECHR judges that actually rule on the cases before them, but a closed juristocratic oligarchy, and this fact in particular violates the sovereignty of the signatory states to the Convention. Over the next few years, Europe's self-defence against migration pressures, which are already reaching millions, will be at the heart of the Strasbourg Court's rulings. If the ECHR does not interpret human rights standards by focusing on the rights of European citizens and protecting European civilisation from other civilisations, but interprets immigration as the rights of all people, then its pre-existing distortions - like we have seen: violation of the foundations of judicial independence - will continue to increase, and its operation can be questioned in the most fundamental way. One step towards creating a new pan-European court of justice should perhaps be to modify the human rights protection that was set up after the end of the Second World War and, instead of human rights, to put the protection of the rights of European citizens at the centre. In the meantime, however, the most important tasks of the improvement are already visible for today's ECHR. First, the decision-making

autonomy of the ECHR judges must be at least as high as that of the Luxembourg judges, and, for this purpose, the centralised decision-making apparatus in Strasbourg must be abolished and each judge must be able to do the preparatory work instead. In addition, the powers of *jurisconsult*, in whom the extreme ties to the Strasbourg case law are realised, and the influence of his/her apparatus should be radically abolished in every decision-making process.

These are the most direct violations of judicial independence and the abolishing of these are the requirements for the rule of law minimum. [352] On the long run, however, a number of additional negative experiences in building today's protection of human rights from the rights of European citizens could be a warning sign in the direction of the right structure to avoid today's distortions.

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[352] In an interview with David Thór Björgvinsson, an earlier judge of ECtHR, he had critics on researchers not to adresss the problems of independece of judges from a theoretical point of view: "You enter into an institution filled with hundreds of people who at least some of them, have been working there for decades. These are the people in the Registry. They have all the institutional knowledge, so you are very much dependent on them, when it comes to the way in which the European Court of Human Rights operates on a daily basis This is not just with regard to practical matters, but also on technical expertise, and even judicial decision-making. (…) Some judges have very strong views on their judicial independence, while others are less concerned about the role of the Registry and its influence of the judicial decision-making. This has caused some tensions within the Court and is an issue which academics have failed to address from a theoretical point of view." Graham Butler: Interview with David Thór Björgvinsson: A Political Decision Disguised as Legal Argument? Opinion 2/13 and the European Union Accession to the European Convention on Human Rights. Utrecht Journal of International and European Law. (Vol. 81.) 2015, No. 31.

Chapter 12
The Decision-Making Mechanism of the Court of Justice of the European Union

In the previous chapter, I analysed the functioning of the Strasbourg Court of Human Rights (ECHR). One of the aims of this chapter is to compare judges in Luxembourg with the situation of ECHR judges. I would like to examine to what extent the Court of Justice of the European Union differs from the situation diagnosed in Strasbourg and whether the Luxembourg decisions are real court decisions and whether the judges are mere puppets of a permanent legal staff or not. When I analyse the situation of the EU Supreme Court in more detail, I also look at its power functions, which were actually achieved during its work and make some suggestions at the end of the chapter to remove distortions in its functions.

1) Organisational and operational data

The Court of Justice of the European Union (CJEU) has had two internal courts since 1989 to deal with the decision-making burden more quickly and, in addition, a second internal court (known as the General Court) has been set up to deal with competitive law cases. I will refer to these two courts as the European Court of Justice (ECJ) and the General Court.

The ECJ and the General Court are composed of one judge from each signatory state, and the term of each of these can be extended by six years. In addition to the 27 judges, nine advocates-general (avocat générale) from the French legal tradition take part in the decision-making of cases. (There are no Advocates General at the General Court.) Although the latter have no right to vote in the judges' chambers, the Advocate General's independent opinion essentially determines the content of the decision in all important cases. [353] Here in Luxembourg, each judge and advocate general has his/her own staff (cabinet) with three (the last four) legal staff (*référendaires*) selected by the individual judge and advocate general and employed as an employer. So if a judge is appointed rapporteur by the President of the Court of Justice, (s)he will have more control over the draft decision through his/her subordinate staff and will not be as vulnerable to the permanent legal staff as we have seen in the case of the ECHR judges. (The Advocates General are appointed by the First Advocate General to provide an opinion on each case.) Again, there is the registrar who oversees and directs the permanent legal team, but for the most part controls only the economic management and information tools of the entire Court and no control about the cabinets involved in the decision of individual cases. Here the vulnerability of individual judges is more due to language restrictions. In Luxembourg

[353] In contrast to the judge positions available to each Member State, in the case of Advocates General, only six large states (UK, Germany, France, Italy, Spain and Poland) have such positions and the other three have switched from the other Member States. However, the Lisbon Treaty provided for an increase to 11, and Poland was then given a permanent sixth post as Advocate General. See László Blutman: European Union law in practice. HVG-ORAC. Budapest. 2014, p. 74.p.; However, with regard to the total number of Advocates General, only nine employees were hired until 2017, see Karen McAuliffe: Behind the Scene at the Court of Justice. Drafting EU Law Stories. In: In: Fernanda Nicola / Bill Davis (eds.): EU Law Stories. Contextual and Critical Histories of European Jurisprudence. Cambridge University Press 2017. 44.

alone, French is the internal working language of both courts, and individual judges draw up their draft decisions and statements in French. Since French has largely been relegated to the English language in general for the past seventy years, the judges appointed by each Member State travel to Luxembourg with much less language experience and it is more difficult to get truly French trained cabinet personnel from the Member States. (*Mathilde Cohen* calls this "*the French capture*"). [354] Since a specific legal jargon and a closed terminology for the uniform linguistic expression of draft decisions and judicial statements have also developed here in Luxembourg, only a judge and the cabinet staff who have long used this legal jargon can effectively enter the decision-making process. As a result, this language barrier mostly does not allow individual judges to choose their own cabinet staff and maintain their independence, and for this reason there is a tendency to adopt those who are familiar with the functioning of Luxembourg judges, and that means also a forced takeover of already practiced employees. [355] Although such transferred employees cannot be controlled by an external legal team independent of the judge, in contrast to ECHR judges, a judge with a stronger personality in Luxembourg can retain a certain degree of decision-making sovereignty in this way. It should also be noted that the constant corrections of the legal-linguistic departments in the draft decisions and then in the adopted decisions also mean strong control here, and this goes beyond mere linguistic control and often means a rewriting of content before the adopted decisions are published. [356]

An additional decision-making control over individual judges and their decision-making chambers in Luxembourg is the involvement of the advocate general in the decision-making process. Although the advocate general has not been appointed for simpler cases since 2004, this is the case in most important cases and, together with the President of the Court's decision on the person of the rapporteur, the First Advocate General also appoints the advocate general to the specific case. After his/her appointment, both the rapporteur and the advocate-general each report to their own cabinet on the drafting of the draft decision and the opinion in the case of the advocate-general. However, the rapporteur can only begin drafting his/her decision after the advocate general has done his/her job and has submitted his/her opinion, which has been published in the internal system of the court. *Mathilde Cohen* describes the role of the advocate general in a way that the intervention of *jurisconsult*, which has already been outlined in the case of the ECHR, and in her opinion the role of the advocate general in influencing the decision is somewhat similar. [357] However, it should be noted that although the opinion of the advocate general plays an important role in the decision in Luxembourg, the majority of the Chamber can take a different position. Thus, the independence of judges here in Luxembourg is not affected as much as it was created in Strasbourg due to the apparatus of the *jurisconsultus* and registry lawyers.

According to the European Parliament and Council rules 2015/2422, which amended the Statute of the Court of Justice of the European Union, the number of judges of the court was doubled by 2019. [358] At the CJE, the judges are appointed for a three-year term in five chambers,

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[354] Mathilde Cohen: On the linguistic design of multinational courts: The French capture. I-CON. 2016, 1-20 p.

[355] „When new judges or advocates general come to the Court, they generally bring their own staff with them, although they sometimes keep at least one référendaire from the institution itself as 'it is useful to have at least one member of cabinet who knows and understands how the intsitution works". McAuliffe: Behind the Scene… 46.

[356] See Karen McAuliffe: Behind the Scene at the Court of Justice… 35-57. p.

[357] See Mathilde Cohen: Ex Ante versus Ex Post… 971. p.

[358] With regard to the case burden, 739 cases were registered in 2017, which also exceeded the peak of 2015 (713). This increase was also increased due to preliminary design requests, which totaled 533 requests, 13% more than in 2016. However, the number of infringement procedures against Member States has also increased. In 2017, 41 such cases were initiated, compared to only 31 in 2016. The court's number of appeals to the ECJ in 2017 was only 141, compared to a higher number in 2015, 206. The total number of cases closed by the ECJ in

chaired by a president, who is elected by the General Assembly from among the judges of the CJE on the proposal of the President of the Court. In these chambers, the General Assembly elects three-member councils and one chairperson for an annual rotation, and if it is a routine matter and no new legal issue arises, this is not discussed by the five-member council, but only by the three-member council. In the ECJ, however, most cases are decided in five-member councils.

2. The question of judge independence and objectivity at decision making

The independence of judges and impartiality of decisions are strengthened when cases are passed on to the chambers and to one of the judges as rapporteurs through a certain degree of automation. In this regard, there is a big difference between the CJE and the General Court, and while the President of the CJE can freely decide who will be the rapporteur and should deal with the draft ruling in the case, the General Court has had automation in this area in recent years. By restricting the discretion of the President of the General Court, the cases are here automatically forwarded to each chamber. It is true that the decision of the President of the Chamber on the person of the rapporteur is more or less formally approved by the President of the General Court. However, since the case was referenced to a particular chamber through the mechanism of random case assignment, the possible distortion of this personal choice only disturbs the objectivity of the decision, but does not remove it. In contrast, within the CJE, the appointment of a judge through an arbitrary decision by the president can be the greatest problem both in terms of a higher degree of judicial independence and in terms of the objectivity of decisions. Because the President of the Court of Justice (CJE) is free to rule in this area, the President's rejection of a former rapporteur's decision in the future may adversely affect that judge in later cases, and it can be assumed that the President will avoid this judge with the arbitrary choice of rapporteur. This distorted situation is all the more problematic, since between the two courts of the Court of Justice of the European Union - the CJE and the General Court - the CJE has a higher hierarchical level and important cases come from here and the decisions of the General Court can be appealed to the CJE. Two further problems exacerbate this distortion, particularly within the ECJ.

One of them is described by the "revolving door" analogy, and the important thing is that while the ECJ should be the neutral arbitrator in the dispute between the EU Commission and the governments of the Member States, it has a close exchange of staff between the permanent apparatus of the ECJ and individual judges / advocates-general and the Commission's Legal Department in Brussels. Dozens of Commission lawyers will regularly switch from the Commission to the staff of the CJE, but also to the legal staff of the General Court, and they will return to the Commission's legal department in a few years. [359] For the ECJ, more than ten percent of legal staff came here from the Commission's legal department in the 1990s, but that

2017 was 699 versus 704 in 2016. The preliminary ruling before the ECJ averaged 15.7 months in 2017 compared to 16 months in 2016, the appeal process averaged 17.1 months, compared to only 12.9 months in 2016. This increase was due to the large number of very complex competitive processes. See the report by the President of the ECJ, Koen Lenaerts: The Court of Justice in 2017: Changes and Activity. In: Annual Report Judicial Activity. Court of Justice of the European Union. Luxembourg. 2018. 8-19.p.

[359] „Abundant literature in law, economics and political science has voiced concern that revolving doors can lead to regulatory capture. As the Commission frequently apperars before the Court, those référendaires who were seconded from the Commission or those who wish to join the Comision may have the tendency to side with the Commission." Angeal Huyue Zhang: The Faceless Court. University of Pennsylvania Journal of International Law. (Vol. 38.) 2016. No. 1. 101. p.

number is still over 30 percent at the General Court. In addition, some of the *référendaires* return to the Commission's Legal Department after their years at the ECJ and General Court, and many only work in either of these courts when their work at the Commission is suspended. Thus, the Commission can always count on built-in "friendly" lawyers in the judicial system of the ECJ or the General Court, and in more important cases, judges with an employee on their staff who is a member of this "friendly lawyers network" from Brussels and when they are appointed as rapporteurs this situation could cause serious distortions. The most common way for the Commission to get inside information from built-in former Commission staff is to find out which decision-making preferences prevail in cyclically changing judicial chambers and new judges and which judge or rapporteur would be favourable to the Commission. [360] The most common party to litigation before these courts is the Commission, which is either suing a Member State or is sued for a measure. Therefore, the independence of the judiciary in Luxembourg and the objectivity of decision-making are often questioned by a “revolving door” -like association.

The ground tilts towards EU institutions, including the Commission in the Luxembourg decision-making process, while judges and judicial councils should, in principle, be isolated from them as neutral arbitrators in disputes between the EU and the Member States. The ongoing internal insider information and the close relationship between the Commission and the Luxembourg judiciary make the equality of arms between the Member States, which are suing for EU measures, largely illusory. Their disadvantage is exacerbated by the fact that the Luxembourgish courts, which originate from the French tradition, completely hide internal dilemmas and decision alternatives from the public and do not allow judges to add dissenting opinions and parallel arguments to decisions. Contrary to the vast amount of inside information provided by the Commission's Legal Department, Member States' lawyers who have litigation with the Commission are unsure about arguments that judges can adequately influence. In addition, there is the French "language trap" of the Luxembourg judges due to their internal working language, and although applications from the Member States can be submitted in all the 23 official EU languages, the internal decision-making processes use only the French one. In addition to the few western Member States (France, Belgium and Luxembourg), the knowledge and use of the French language in legal circles is minimal, as English has replaced all previous world languages in recent decades. For most EU Member States, this language disadvantage is, therefore, limited to the narrowest possible group of lawyers from which to choose a cyclically dispatched judge and send him/her to Luxembourg, and the judges have difficulty finding a lawyer in their own country who, in addition to EU law, also knows the French language. The French court jargon used in the terms and formulas of Luxembourg jurisprudence have developed over decades and can only be mastered after a long language course even for those who speak French well. [361] This then forces almost all judges from the Member States to select their legal staff from EU legal departments. The Luxembourg judiciary is thus isolated from the Member States, but works almost in symbiosis with the EU bodies, with the Commission in particular.

A further distortion can also exacerbate the above distortions within the CJE, which violates the independence of judges and questions the objectivity of the Luxembourg judiciary. This

[360] See Angela Huyue Zhang: „Another consequence o the revolving door is that it allows the Commission to conduct intelliegence surveillance on the Court. As Court membership is fluid and the preference of individual judges varies, the revolving door makes it possible for the Commisison to keep pace with its changing landscape. Commissions secondees can sharpen their litigation tactics, for instance, by learning how to present arguments that can best persuade particular judges and référendaires at the Court. (…) The Legal Service of the Commission, which employs more than 200 lawyers, is a powerhuse that specializes in litigation before the Court.” id. mű102. p.

[361] See Mathilde Cohen: On the linguistic design of multinational courts: The French cature. I-CON 2016, 1-20 p.

was described by *Hjalte Rasmussen* in 2007, stating that the judges from the old Member States marginalise the judges sent by the new Member States that have joined since 2004 and the latter are mostly excluded from deciding on more important cases. After the President has appointed the rapporteur, the weekly general assembly of judges, on the rapporteur's suggestion, decides which formation to form in a case: whether the three-member chamber, the five-member chamber or, in more important cases, the 15-member grand chamber. In addition to the President and Vice-President of the Court of Justice, the Grand Chamber is dominated by the group of judges from the old Member States, while the ECJ's rules of procedure in principle provide for rotation, at least more recently. [362] In his 2013 study, *Tomas Dumbrovsky* confirmed this statement by saying that if a judge from the new member states adapts to the preferences of the old judges, one of them could exceptionally join the inner circle after a while. In his description, the dominant group of judges developed in such a way that the then President of the Court set up an informal decision-making body after 2005, consisting of the old judges at the head of the five chambers, to ensure that the decisions of the chambers were based on his preferences. On the other hand, those who belong to the dominant inner circle have a permanent information advantage over other judges who miss these weekly sessions. [363]

Another consequence of the consolidation of the dominant group of internal judges is that the presidents of the five chambers sit next to the president and the vice-president of the Court in the 15-member Grand Chamber, which decides on really important cases and thus on the most basic jurisprudence. If you take all the old judges with you, the safe majority of them are usually able to make decisions beyond doubt. As of 2005, the new Member State judges were scattered and separated in the various chambers at the suggestion of the President of the Court, so that they could not be organised against the old judges in larger cases. [364] Dumbrovsky even showed that some judges in Central and Eastern Europe brought some nuances to the arguments of the elderly by emphasising national defence against the previously unshakable pro-European dominance of federal EU. Internal interviews said it was the first Polish judge and the Czech judge and it applied to the Estonian judge, but in principle this did not mean a renewal of the decision-making practice of the EU courts.

Overall, therefore, although the situation in Luxembourg is better than that of the Strasbourg judges, there is some degree of objectivity of judicial decisions in the judiciary of the ECJ. However, the situation in Luxembourg is not reassuring due to the major decisions of the Grand Chamber, the so-called "revolving door problem," and the role of this internal judge clique in the old Member States.

3. The European Court of Justice in the power dynamics of the Union

Of the two EU courts in Luxembourg, the CJE is important not only because of its ordinary judiciary, but also because to a certain extent, it plays the role of the constitutional court through its interpretation of the treaties and its case law is indirectly at the centre of EU law. Let us take

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[362] Hjalte Rasmussen: Present and Future European Judicial Problems after Enlargement and the Post-2005 ideological Revolt. Common Modern Law Reiew (Vol. 44.) 1661-1687. p.

[363] Tomas Dumbrovsky: The European Court of Justice after the Enlargement: An Emerging Inner Circle of Judges. EUSA Twelfth Biennial Conference, Boston. 2013. 2.p. According to Dumbrovsy's data analyzes, there were no new national judges among them, despite the five rotating presidencies of the Council after 2004, after two three-year terms.

[364] Dumbrovsky also showed in absolute numbers that between 2004 and 2012 the most influential old judges in the inner circle received at least twice as many rapporteur positions as judges in the new Member States, and this was clearly more unequal in really important cases. See Dumbrovsky, 28. p.

a closer look at them.

Although after the failure of its 2003 constitutional draft, despite the encouragement of some political circles, the European Union failed to unite the member states in one federal state, even the most Eurosceptic member states benefit from the economic concentration and thus they are encouraged to accept the expansive interpretations of the ECJ on the Treaties. In this way, the ECJ's interpretations of the Treaties are the de facto highest normative level of the EU and this activity can be regarded as the constitutional adjudication of the Union, even if the Union has not become a federal state due to the afore-mentioned failure and the treaties do not mean a constitution. This de facto situation has existed for decades, and since the amendments to the treaties to repeal the CJE's interpretations are often almost impossible due to the requirement of unanimity, the CJE has so far unconditionally limited the laws of the Member States through constant expansive interpretations of EU-competences. This enlargement can, in principle, be stopped by the constitutional courts of each member state on the basis of constitutional identity or by *ultra vires*, in particular because of the reservations by the decisions of member states' constitutional courts on the Lisbon Treaty, which declared that the binding force of EU law to the member states was limited. [365] It is rarely realised, but in 2012 the Czech Constitutional Court rejected a CJE decision regarding the Czech Republic because of its constitutional identity, and implementation of that decision in the Czech Republic was prohibited. Then there were similar cases again in 2016 in Denmark and again in 2020 in Germany. However, these occurrences are rare, and despite the basic possibility, no other similar invalidation has yet occurred in other cases.

However, it should be seen that the scale of mass migration in recent years and the militant denominations of Muslim communities already numbering millions - e.g. the Salafi fanatics - create such civil war situations in the metropolises that can help those in a number of Western European countries to power the government who want to radically break this current. This changed political situation in Europe and the change of mood can, in the future, also alter the attitude of the constitutional courts of the member states in order to take advantage of this possibility of resistance to EU law. It is only worth mentioning that the ECJ did not address this problem, and, following the increase in the influx of millions of migrants in 2015, at the request of an Eritrean youth migrant girl, in April 2018 the Luxembourg judges decided that the girl who had a family at home (her parents and three brothers) has a right under EU law to bring their family to the Netherlands for family reunification purposes, and the Dutch authorities' decision to refuse to do so was considered against EU law. It should be noted that the ECJ's migration-friendly decisions in recent decades have largely required the admission of hundreds of thousands of migrants from non-EU countries to EU countries for the purpose of family reunification. However, several countries have attempted to interpret this in such a way that if a minor is recognised as a refugee wanting to stay in the country, (s)he can only ask for family reunification before (s)he reaches adulthood. After adulthood, however, this need for family reunification no longer exists, namely, (s)he is no longer in need of family help. However, in April 2018, the ECJ ruled that the possibility of family reunification should be expanded, and despite reaching adulthood, a migrant could apply for the admission of his/her parents and siblings to the Netherlands under EU law. [366] Due to a similar situation in Germany, the local press pointed out that the German authorities also examined this decision of the ECJ and presented figures from last year that 90,000 migrants, mainly Muslim minors, came without parents in 2017. Based on the family of five from this Eritrean girl, the ECJ ordered the admission of another fifty thousand migrants only for Germany and only for 2017. However,

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[365] See the analyse of constitutional judge, Zs. András Varga: The Role of Constitutional Courts in the safeguard of consitutional identity. (Az alkotmánybíróságok szerepe a nemzeti/alkotmányos önazonosság védelmében.) Iustus Aequum Salutare 2018/2. sz.

[366] See the decision C-550/16 of Chamber of ECJ unter: https://eur-lex.europa.eu/legal-inhalt/en

this will be reinforced by the years 2015 and 2016 with more than one and a half million Islamic people. This means tens of thousands of similar minors among them and together with their families the number exceeds hundreds of thousands who stayed at home. [367] Therefore, as a case law, this decision could increase millions of new migrant groups across the Union in the coming years, even if the EU border agency, Frontex and the Member States manage to stop further influxes of migrants.

This raises the problem that, despite the fact that political change has been taking place at the level of millions of European citizens and they are becoming a political force that wants to curb migration in more and more European countries, the European Court of Justice above them can block government actions for European self-defence. In such situations, it is very likely that, at least in some EU countries, the limited possibility to invalidate EU acts within a Member State on the basis of constitutional identity or ultra vires will be brought to life in the coming years. In this way, the "constitutional adjudication" of the ECJ can be reduced to whatever would have resulted from the international law-character of the Union: a mere international interpretation activity under the control of the constitutional courts of the signatory states.

The fact that this possibility is not just theoretical speculation has been shown by the consequences of several ECJ decisions around 2007, which more than usually exceeded the EU's responsibilities to the disadvantage of the Member States, provoking explicit proposals from the member states to reject the implementation of these decisions. One of them was the the ECJ’s so-called *Laval decision*, which was based on the four fundamental freedoms of the Union (free movement of people (labor), capital, goods and services), and it intervened in the area of labor law and trade union issues, that are after the EU treaties expressly a matter for the member states. [368] With this, the CJE, relying on market freedom, brought the supervision of the fundamentally different areas of labor law and advocacy in each member state under its control and started to lay down the foundation of a single EU regulation. This put aside the trade union powers that have been fought for in individual Member States for centuries, which clearly violated the division of powers in the EU treaties, and suggested the rejection of such CJE decisions, which, without political consultation, imposed a serious political dilemma onto the member states. *Fritz Scharpf*, a renowned expert on EU political mechanisms and a German political scientist, suggested that after the rejection of this ECJ decision, the member states must have the power of regulation concerning these issues in EU legislation. That is, the negotiating mechanisms of EU regulations and directives should be decided and such EU law can only be created with a majority will. [369] Flooding European societies with millions of Muslim migrants, also through the decisions of Luxembourg judges, while leading to landslide electoral shifts in the Member States to prevent this, threatens the foundations of European civilisation far beyond the otherwise important labor struggles. It is, therefore, likely that the resistance recommended by *Fritz Scharpf* will become reality after a good decade, and the declaration of principle already made by most EU constitutional courts on the basis of constitutional identity and ultra

[367] See the information from the weekly „Zeit”: „Insgesamt haban nach Abgaben der Bundesregierung im vergangenen Jahr 89.207 Minderjährige einen Asylantrag in Deutschland gestrellt, darunter 9084, die ohne Begleitung ihrer Eltern oder anderer Erwachsener eingereist sind.” Die Zeit 2018, 12 April.

[368] C-341/05 Laval un Partneri Ltd v. Svenska Byggnadsarbetarförbundet and Others.

[369] “Die Regierung könnte erklären: Wir halten diese EuGH-Urteil für nicht gedeckt durch die politische Willensbildung in Europa. Dieses Urteil ist reines Richterrecht, das nie politisch akzeptiert wurde. Wir akzeptieren jedoch ein Votum des Ministerrats falls dieser das Urteil bestätigt. Das heißt, man müsste nicht nur der nationalen Wiederstand deklarieren, sondern auch die europäische Politik anrufen und fragen: “Habt ihr das wirklich gewollt, was die Richter hier machen? Wenn eine qualifizierte Mehrheit der Länder Ja sagt, dann warden wir weiterhin das Europarecht vollziehen”. Das wäre aus meiner Sicht die einzige Strategie, mit der man nicht die generelle Unterstützung für die europäsiche Integration aufkündigen müsste und trotzdem Wiederstand leisten können gegen diese zu weit gehende richtelrliche Interpretation von Verträgen, die vor mehr als 50 Jahren geschhlossen wurden.” Cornelia Girnd: Der einzige Weg ist, dem EuGH nicht zu folgen. Interview mit Fritz Scharpf. Mitbestimmung, 7-8/2008. 23. p.

vires can lead to concrete decisions in the coming years.

In connection with this anticipation, there is a fundamental structural problem of the European Union that makes it even more urgent to take this step. The basic problem can be understood if one takes as a starting point the nature of a semi-federal state of the EU. Originally an international treaty, the Common Market of 1957 was brought to quasi-federation by the decisions of the ECJ from 1962-64 (*Van Geld en Loos* and *Costa v Ennel*), which declared the supremacy of Community law over the legal systems of the member states, and thus the Treaty of Rome was made a quasi-constitution. In particular, however, later on the EU treaties were radically modified and expanded by the case law of the CJE, and this community thus moved towards a half-realised European United States. However, the failure of the EU constitution in 2005 and the profound global banking and financial crisis of 2008 led to the deepest pessimism among hundreds of millions of European citizens about all transnational formations, and in a number of European countries the parliamentary majority became more Eurosceptic. This has only been exacerbated by the influx of several million Islamic migrant masses since 2015, an influx that was received amicably by the EU elite or at least rated as neutral. Therefore, no effective measures have been taken to stop migration according to the will of the electorate. Eurosceptic political forces have thus increased across the Member States and in some places have gained the majority. However, this cannot be reflected at EU level due to the structural peculiarities of the EU institutions. This is because the CJE has been pushing for European integration towards the Federation from the start. In cooperation with the CJE, the other EU institution, the Commission first of all, which is independent of the Member States and in most cases against them, is the main bastion of federal efforts within the EU. Although the intergovernmental institutions that safeguard the sovereignty of the Member States (the Council of Heads of State and Government and the Council of Ministers) were encouraged by the more Eurosceptic Member States, they could not act effectively against the tandem between the ECJ and the Commission in defining the Union.

Due to the unanimity of the EU treaties, which constitute the quasi-constitution of the quasi-federation of the EU, this standstill has been resolved for decades, so that the European Parliament has no possibility of changing the foundations of the Union, and also the Council of State and heads of government or the Council of Ministers have only minimal scope in this area. In contrast, the ECJ, which interprets the quasi-constitution of the Union with an exclusive monopoly, realises a constant constitutional specification of all EU policies through its case law. Constitutional historian *Dieter Grimm* called this situation the over-constitutionalisation of EU politics in his 2016 book; Grimm is a former German constitutional judge and a great critic of this phenomenon. [370] In addition to this deadlock, this is also made possible by the nature of the EU treaties, which not only provide an operational framework for EU institutions (which could then be filled in by specific political processes), but also a number of abstract political goals for important EU responsibilities. But even the basis for it - the four EU freedoms as basic goals of the entire Union - is so extensive that by an activist ECJ interpretation they can almost completely define all living conditions in the member states. In fact, the free movement of people (labor), goods, capital and services across the Union indirectly affects all regulations in all Member States, and in recent decades, the CJE has not hesitated to interpret the full EU law of the Treaty and thus the internal political will formation of the EU is redesigned to the specifications of the Treaty by the CJE. It always receives great help against the intergovernmental institutions from the Commission, which is pushing the Union towards federalism, and from the permanent Eurocratic bureaucracy of tens of thousands in Brussels. On the one hand, the Commission enforces the case law of the CJE in dozens of infringement proceedings against Member States before the ECJ - and forces the Member States to do so. On

[370] See Dieter Grimm: Europa ja – aber welches? Zur Verfassung der europäischen Demokratie. C. H. Beck Verlag. 2016.

the other hand, the drafts of EU legal regulations and directives, most of which were created by its own apparatus, will merely codify the relevant case law that was adopted by the CJE and from then on the case law becomes effective not only as case law of the CJE, but as complete, directly applicable EU law. [371] As a result, it can be concluded from the analyses that the ECJ, which is actually behind the public, is the dominant force in the European Union as a whole and that the Council of Heads of State and Government, which is in principle at the head of the EU, is not able to control the ECJ. In most cases, when drafting regulations and guidelines, the Council of Ministers only codifies the case law of the ECJ, which the Commission and its apparatus have included in their draft regulations and guidelines.

However, this stalemate between the federative forces of the EU and the sometimes strong intergovernmental institutions of the Member States has a high price for the Union. This is because the Union has come under the control of a leader that, due to the nature of judicial decisions, can only look back. Any change that occurs worldwide or concerning the EU - about which a government of a real state is able to process operational information and react to it at lightning speed and even declare a state of emergency - the ECJ, as the highest guide of EU, can only resort to an action plan that has developed in the Union over the years. In analogy, this situation could, perhaps, be portrayed if we look into the captain's cabin of a giant ocean liner and see that the captain and his first officer are discussing what to do in an windowless room, poring over an old map. Meanwhile the iceberg is approaching. In other words, the current governance structure of the Union makes it difficult for any Member State to withdraw and take action against certain EU measures, while the ECJ's case law extends the powers of the EU to bring it closer to a federation, whether it is what EU citizens like or not. However, this only creates a back and forth for the entire Union. As long as the more or less orderly relationships of the world allow for this uncontrollability, these operating conditions need not be changed significantly by the EU in order to survive. In the meantime, this situation can remain latent. But if conditions are disrupted, as demonstrated by the migration of millions of migrants to Europe in 2015, this shows the Union's non-viability.

4. Encouragement Towards a More Ideal Situation

Proposals to end the EU stalemate due to the dominance of the European Court of Justice cannot be taken up here, and since there is no uniform European consciousness beyond the national communities and there is no European public sphere or genuine European party system, it would be another dead end to go in the direction of a single European state. However, the consequent descent of today's Union into the initial integration of a single market would only be a politically realistic alternative if there were massively more dramatic problems than there are today. However, from the analysis above, there are some obvious reform proposals to reduce the distortions of the European Union - which is focused on the CJE and therefore led by top level judges - and I would like to outline this in the last part of this chapter.

Six changes could improve the current situation of the stagnating EU governance at the EU headquarters, but especially in the case of the hierarchically higher ECJ. From a democratic perspective, these changes could help in terms of publicising the decision-making mechanism of the EU judiciary and also concerning the problems of the EU institutions - in particular the Commission - in their legal disputes with the Member States. One of the main distortions is that

[371] For details see Fabio Wasserfallen: The Judiciary as Legislator? How the European Court of Justice shapes Policy-Makng in the European Union. Paper presented at the Annual Meeting of the Swiss Political Science. St. Gallen, January 8-9, 2009.; illetve: Michael Blauberg/Susanne K. Schmidt: The European Court of Justice and its political impact. West European Politics, (Vol 40.) 2017, No. 4. 907-918 p.

both the President of the CJE and the President of the General Court can have a strong influence on the decisions of the judicial chambers not only as a neutral administrator of judicial administration, but also through a number of powers. This applies, in particular, to the President of the CJE, who can be regarded as the actual head of the entire EU Juristocracy due to the hierarchical relationship between the two courts and due to the fact that important decisions fall within the jurisdiction of the CJE. We would, therefore, be closer to driving the Union's leadership towards democracy if we could reduce the President's influence on court decisions. The aim is to abolish the powers of the Presidents of the CJE and the General Court in order to no longer appoint judges to the chambers of the CJE and the General Court and instead to introduce random mechanisms for the distribution of judges.

Another suggestion to increase the openness of decision-making processes in the judiciary instead of today's secrecy can be requested because case law, which goes beyond ad hoc effects during the process, represents a "constitutional specification" of the Treaties. In addition, political disputes and struggles between the Union's institutions - the Commission in particular - and the Member States are resolved through these judicial decisions (through rule-of-law rather than democratic struggles). Publicity would thus be a minimum here, so that at least the alternatives that exist and are discussed in court decision-making processes could be published and thus, in addition to majority decisions, divergent opinions and parallel arguments of divergent judges should be publicly published at the end of the decision-making processes. This would bring equality of arms closer to the most common parties in the EU judiciary, the Commission vis-à-vis the Member States, and would enable any party to better anticipate legal dilemmas and prevailing argumentation patterns and alternatives for the future. However, this equality of arms can only be achieved if the "revolving door" mentioned above could also be closed between the legal department of the Commission and the legal staff of the two main courts of the Union. To this end, it would be necessary to include a conflict of interest rule into the procedural rules of the courts.

In the end, it seems to be a technical problem, but perhaps the most radical change would be to replace the courts' French internal working language with English. This would allow the selection of judges from a much broader base of Member States, but also the convening of legal staff from home lawyers. Above all, however, it seems sensible to adopt a proposal that was published several years ago in order to prevent the EU Court of Justice from extending its powers beyond the Treaties, and it would, therefore, be important to set up a court of competence over both Union courts.

Establishing a Court of Competence

In 2002, *Ulrich Gollt* and his co-author *Markus Wissenner* were prompted by the increasing criticism of ECJU judgments that go beyond the treaties to prepare a proposal for a court of competence to control the CJEU. [372] With some changes, this proposal can be accepted here and it should be assumed that the European Union is not a federal state, but only a certain international legal entity. It follows that the ECJ, which does the application of the Treaties on which this formation is based, is a court of international law. Therefore, this body can only act as an international court that is closely linked to the text of the treaty and cannot act with the freedom of interpretation of a constitutional court in order to break away from it. The creation of new standards or a new principle with a radiant effect on a new area by interpreting more abstract provisions and principles of the Treaties thus goes beyond the function of this court

[372] See Ulrich Goll/Markus Kenntner: Brauchen eir ein europäischer Komptenzgericht? Vorschläge zur Sicherung der mitgliedstaatlichen Zuständigkeiten. In: Europäische Zeitschrift für Wirtschaftsrecht. 2002. No-3. 101-106. p.

and represents an unauthorised usurpation of the contract-changing function of the member states and an infringement of jurisdiction would, therefore, be the annulment of such decisions. [373] The review done by this court would obviously affect the decisions of the higher European Court of Justice in the case of the two-tier European Court of Justice and would only secondarily challenge the decisions of the General Court (which can be challenged at the European Court of Justice anyway), but, in principle, the review could also be done in the subordinate General Court if the question of exceeding the division of jurisdiction happened to arise in the EU Treaty.

The first question in the case of a Court of Competence is how to determine the sufficient number of member states that should form a coalition that would be large enough to challenge an ECJU judicial decision. In order to initiate this procedure, it is not appropriate to prescribe a threshold that is too high, since a higher threshold within the court of competence would obviously be required only for an actual annulment decision. For example, based on seats in the European Parliament, at least 15% of the common seats of the contesting Member States in the European Parliament could be required to introduce such a procedure, and at least three Member States should be involved. The decision to annul the judgment under appeal would only be possible with a majority decision of 27 judges, whereby all judges in the Member States would have the same voting right. Such a structure and a low threshold to initiate proceedings would make it likely that such infringement proceedings would be initiated more than once a year. The judges of the Court of Competence could be elected by the majority of each Member State's parliament under the constitutional judge or the judge of the Supreme Court where there is no such court, and the judge could hold this office in parallel until the end of their term at home. It would be foreseeable that in the event of the establishment of such a Court of Competence, the weight of power in relation to the Union vis-à-vis the Member States would be fundamentally shifted towards the Member States, as determined at the beginning of the European integration in the Treaty of Rome in 1957.

The Distribution of the Judges of the CJE and the General Court in Chambers, and the Appointment of Chamber Presidents

The independence of the judges and the expected neutrality of the decisions of the judicial chambers can only be guaranteed in the judiciary if the court presidents cannot have any significant influence on the content of the court decisions through administrative functions. This is a principle of the rule of law, but it does not exist in the two EU courts, from which the EU rule of law should otherwise be protected. The Presidents of the CJE and the General Court have the power to propose that the judges be distributed to the chambers, which is only a formal decision by the General Assembly. This is regulated in Article 16 of the Statute for the CJEU, in Article 50 for the General Court, in Article 11 of the Rules of Procedure of the CJEU and in Article 13 for the General Court. Likewise, the presidents of the established chambers are elected by the general assembly on the proposal of the ECJ President and the President of the General Court, proposals that sociologically mean the actual decisions. In this way, the two Presidents' position of power and their actual influence on court decisions are further increased. In view of the rule of law, it is, therefore, proposed to abolish it and instead assign judges to

[373] Martin Höpner has set a six-point scale in order to separate such excesses from legitimate interpretations of the contract (clarification of provisions and possible gaps) see Martin Höpner: Von der Lückenfüllung zur Vertagsumsdeutung. Ein Vorschlag zur Unterscheidung von Stufen der Rechtsfortbildung durch den Europäischen Gerichtshof (EuGH). Zeitschrift für Public Policy, Recht und Management. 2010. Heft 1. 165-185. p.

each chamber by random mechanisms and to use the same method of selecting presiding judges by changing the two articles of the statute as follows: “The judges of the CJE will be drawn by lot distributed into the chambers, and the presidents of the chambers are selected by lot from the judges in each chamber. The distribution into chambers, including the term of office of the chairman of the chambers, takes three years. Then a new distribution follows.” The same applies to the General Court by amending Article 50 of the Articles of Association.

The Appointment of the Rapporteur

The two Presidents of the ECJ and the General Court also determine the selection of the rapporteur for the examination of each application, which in many respects determines the direction of the judicial council's decision. One difference, however, is that the President of the General Court is somewhat more restricted and can only select a judicial council based on the selection criteria laid down in the General Court's preliminary ruling and then appoint a rapporteur from among its members. [374] However, the President of the CJE has no limits and is free to choose a rapporteur at any time. Then again, it is the ECJ that is hierarchically superior to the General Court and that decides on all important questions for the Union. [375] In both cases, it is suggested that a more random selection mechanism be established in accordance with the rule of law and that the rapporteur, instead of being selected by the President, should be chosen by lot as soon as possible after the request has been submitted to the President.

Enabling Dissents and Parallel Arguments

The judgments of the courts of the European Union, in particular the hierarchically higher ECJ, have the consequence that the EU treaties with a predominant effect on legal disputes are concretised and later become an interpretation of the Treaties at the highest level. Furthermore, as seen, their normative content mostly becomes the content of the Commission's proposals for the regulations and directives that are secondary EU laws. Therefore, these decisions are not in the least simple judicial decisions; on the contrary, they can be considered as the "constitutional specifications" of the quasi-constitution of the Union and also as the essential determinants of EU law. Since among the double basic contracts, the TEU and the TFEU, the former mostly only defines broadly formulated principles - the broadest is the mere declaration of the four fundamental freedoms - the CJE, which interprets this, essentially enjoys complete freedom in concretising this quasi-Constitution. This specification can actually not be changed by any other EU institution because of the unanimity. Therefore, the formation of the EU's political will has been juristocratised to the utmost. Political issues are decided here in the form of court decisions rather than in the form of democratic struggles, and to ensure that at least the minimum of democracy is achieved, it should be possible to dissent and furnish parallel arguments in order to make decision alternatives that arise during these court decisions and it should be possible

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[374] "The court shall determine the criteria by which the boards are assigned to the cases. (Article 25)" After receipt of the procedural document, the president of the court will refer the case to a council as soon as possible. The President of the Chamber proposes the Judge Rapporteur to the President of the Court for each case assigned to the Chamber. The appointment is decided by the president of the court. "(Rules of Procedure of the General Court, Art. 26 Para. 1 and 2)

[375] "The President of the Court of Justice appoints the judge-rapporteur responsible for the case as soon as possible after submitting the procedural document." (ECJ Rules of Procedure, Art. 15 (1))

for judges to disclose these in public. In a system of rule of law, the publicity of dissent and parallel arguments is a minimum of democracy, and this is why this should be suggested here. [376]

This possibility is not declaratively prohibited by the provisions on the EU's highest courts in the TEU, the TFEU, the statutes and the rules of procedure, in which they are listed, but there is simply no information about them. Therefore, this should not be changed, but supplemented. The most appropriate way to do this is to add a new paragraph to Articles 36 to 37 of the Statute of the Court of Justice of the European Union on the reasoning and delivery of judgments as follows: “A judge who has voted against the judgment can have one dissent and express the reasons for this in a separate opinion. A judge who voted for a judgment but had reasons other than the majority can declare them in parallel. “(Article 36 paragraph 2) "The dissenting opinion and the parallel reasoning attached to the judgment must be signed by the judge and read to the public at the time the judgment is pronounced after the majority decision has been issued." (Article 37 paragraph 2).

The Declaration of a Conflict of Interest vis-à-vis the Legal Departments of EU Institutions

The "revolving door problem" mentioned above, the merger between Luxembourgish legal staff and the legal departments of the EU institutions, systematically disadvantages the objective judgments of the courts of the Union, so it is one of the important tasks in this area to remedy this and to declare the conflict of interests between the jobs in EU-institutions and the ECJU legal staff. In the case of the CJE, the addition of Rule 20 of its Rules of Procedure appears appropriate, and in the case of the General Court Rule 39 of its Rules of Procedure, which mentions officials and other servants. In both cases it must be stipulated that a person who has been employed by an EU institution for three years cannot be a member of the legal staff of the Union courts. This addition will likely close the "revolving door" and give equality of arms a greater chance of litigation between the Union and the Member States.

Changeover from French to English

We have seen the counter-selective impact of the internal French working language of the Luxembourg judges as a result of the fact that French, which is used only in this way, is only slightly used in most EU countries and is undoubtedly overshadowed by English. For the Member States, the number of available judges can, therefore, only be selected on a very narrow basis, but they also find it difficult to recruit their legal staff from their own Member States, and they have to get it spontaneously from the legal department of the EU Commission. However, this is the typical EU institution that turns out to be the most frequent complainant in legal disputes against the Member States and this situation gives the Union an advantage and disadvantages the Member States. *Mathilde Cohen* calls this "*the french capture*" and suggests using the much more common English as the internal working language instead of French, and

[376] With other considerations, Marcus Höreth is also trying to improve the most important courts in the European Union by allowing dissents and parallel applications. He would therefore like to make the future deviation of these courts more flexible compared to established case law, since not only would the (undeniable) rationalism of established case law be preserved, but also the various alternatives would serve as models for the future. See Höreth, Marcus: Richter contra Richter: Sondervoten beim EuGH als Alternative zum “Court Curbing”. Der Staat (Vol. 50.) 2011. Heft 2. 191-226. p.

I would like to repeat this in complete agreement.

Based on the consideration of the four-level system of the rules for the Luxembourg judiciary - Article 19 TEU, Article 251-281 TFEU, or the statute specifying it and the rules of procedure adopted on this basis, it can be stated for both the ECJ and the General Court that (in particular in the rules of procedure) there is a lot of talk about the use of the court language, but these rules only apply to external judicial contacts and it is not about the internal working language. This was originally provided for in secondary EU law, in Article 6 of Regulation (EEC) No. 1/58, and entrusted to the rules of procedure of every EU institution, but ultimately no such institution has formally laid it down, only in practice, and the use of the French working language was fixed. It can,, therefore, be proposed to change this by replacing and incorporating what the ECJ and the General Court did not do in this area in its rules of procedure (in the case of the ECJ rules of procedure 38 / b. And Article 46 / b in Case of the General Court) that the internal working language in the court decision-making processes is exclusively English.

Chapter 13.
The Power Structure of the EU Juristocracy

The European Council, composed of the heads of state or government of the Member States, appears to be the Union's most powerful body, and the Commission, led by its President, is the permanent decision-maker. The European Parliament, which is not a real legislator, appears only in public due to the low turnout in its election as a mere noisy politicising forum. In contrast, the European Court of Justice, which acts behind the public, reaches only a fraction of the political publicity in the EU member states with its decisions and is only occasionally observed by political journalists, publicists and social scientists.

However, some studies and books have shown for years that the European Union - and its predecessor, the European Community - has built an internal power structure that, even at the level of formal institutionalisation, has concentrated unlimited power on the Union's Supreme Court (ECJ). There is no appeal and no possibility to change the decisions of the Court of Justice, and since these decisions also lead to a binding interpretation of the EU Treaties in the event of conflict, until the Member States can change them through intergovernmental bodies, the ECJ will remain a supreme power over the entire Union without any counterbalance whatsoever. Then again, changing the EU's founding treaties requires unanimity, and this is almost out of the question in everyday political processes and can only be achieved with a series of clever compromises after decades of preparation. As a result, this structure of power has spontaneously placed the European Court of Justice in a power role that goes beyond its already broad remit and which has made the democratic organisation in the Union even more juristocratic than it is possible in the member states by the most powerful constitutional court. The pinnacle of this unrestricted role is that, pursuant to Article 281 of the Treaty on the Functioning of the European Union (TFEU), the rules on the Court of Justice of the European Union can only be changed at the request of the Court itself or with its consent. So while in the case of the state constitution, which has a strong juristocratic power structure, rules can usually be changed against the will of the Constitutional Court, this is impossible in the case of the Union. This justifies describing the power structure of the Union and thus the role of the EU Supreme Court as a *superjuristocracy,* which has completed the transition to juristocracy that has already taken place in many countries. [377] Following a brief overview of the Union's formal institutional structure, this role of the CJE and some aspects of the processes that create it are analysed. The final section of the chapter attempts to outline the future effects of a possible breakthrough of the Eurosceptic political forces that may be caused by this power structure in the coming 2024 European Parliament elections.

1. The Institutional System of the European Union

[377] See the analyse of Alec Sweet Stones on the juristocratic natur of EU : "The European Court of Justice and the Judicialization of EU Governance". Yale Law School, Faculty Scholarship Series. 2010. Paper 70. 53 p.

1.1.A General Description

In order to understand the EU's decision-making mechanisms, it must be borne in mind that it originally functioned as an international organisation of sovereign member states and has developed in the fierce struggles between supporters of a federal Europe and defenders of national sovereignty. The EU decision-making mechanism is based on five organisations: the European Commission, the European Parliament, the Council of the European Union (Council), the European Court of Justice and the European Central Bank. Of these, the Commission and the European Parliament (EP) are forums for the EU's independent political will-building over all Member States, while the Council, as a body of national ministers, sets up a forum for compromising the positions of the Member States. Although the European Court of Justice is, in principle, just a law enforcement body and it could not be seen as a forum for political decisions, but because of its role in the past sixty years it can be described as a supporter and expander of the EU's competencies against the Member States. The European Central Bank is the guardian of the single currency of the Union, the manager of the euro, and although it plays an important role in EU bodies, it is not involved in the EU's decision-making mechanisms in political struggles, which is why we are now ignoring it in our analyses.

As they evolve, the Commission, the Council and the EP need to be viewed in relation to each other to understand how they work and what drivers are responsible for their change. After the Rome Treaty of 1957, the decision-making mechanism was initially determined by a double mechanism in the European Economic Community, the Council, which mediates the will of the Member States and the Community as a whole, and the Commission. The EP became complete in the decisions as a mere advisory body locked out. His name - the Parliamentary Assembly - was changed to MEPs by the MPs themselves in the early 1960s, although for a long time it was not officially included in Community documents (see Horváth 2000: 54). The actual decision-making bodies were the Commission and the Council in the division of tasks, whereby the Commission had the exclusive right - and still has - to present proposals for regulations and guidelines, while the decisions are made by the Council itself. In this list, the actual weight of power between the two bodies was determined by the fact that in the first decades, decisions in the Council were made unanimously, which meant a veto for each Member State. According to the treaty, this need for unanimity should have been abolished in 1966 and should have switched to a majority decision, but France protested and its representatives temporarily withdrew from the Community organs ("politics of the empty chair"), thereby making these organs unable to make valid decisions. Finally, in what came to be called the “Luxembourg Compromise,” the decision-making based on unanimity was effectively extended until the 1980s. As a result, the Commission's monopoly on proposals has long been devalued and powers have shifted to the Council as a Member State's veto made the decision on the Commission proposal impossible. This changed gradually shifted to the principle of majority decision-making in the Council, which increased the Commission's monopoly on proposals and the resulting power in the Community's decision-making processes.

The European Parliament (EP), which has been directly elected by its citizens since 1979, has only gradually developed from an advisory role to a real decision-making body (for details see Judge / Earnshaw 2003: 26-68). The first major step in this area has been taken by the Single Act since 1987, when the EP became a co-decision body in some areas alongside the Council. With this solution, the Council and the EP have become two parts of a two-chamber parliamentary system in these areas, similar to the German Bundestag and the Bundesrat, for example, which are made up of delegates from the German federal states (member states). This co-decision has since been extended to more and more issues and the EP has also been given more powers to bring its status closer to that of a real parliament. So today the person of the

President of the Commission, the "Prime Minister" of the Union, is ultimately decided by the EP and can overthrow the entire Commission with a vote of confidence. Although the fragmentation of will formation within the EP in the party factions and different national interests make this only possible to a small extent. In addition, its status increases the fact that it has a key say in the adoption of the Union budget.

1.2. The Council

However, the Council (the "Council of the European Union") remains the Union's actual decision-making body, and the two main sources of European law are its regulations and directives. The Council consists of the ministers of the governments of the Member States and, depending on the subject of the decision, consists of several formations. There were twenty such council formations in the late 1990s, but efforts are being made to reduce this number. The main formation of the Council of Ministers is the General Affairs Council, which brings together the foreign ministers of the Member States and decides on fundamental Union affairs or more politically sensitive issues. It should be noted that since the Lisbon Treaty, the Council of Heads of State or Government of the Member States, the European Council, which meets twice a year since 1974, has been renamed and the fundamental strategic issues, enlargements and treaty changes in particular, are decided by this body. Although EU documents have recognised the existence of a privileged body under this name since the late 1980s, it has only existed at the treaty level since the Lisbon Treaty. In other words, if the Council is now the "legislative" body of the Union, the European Council, which brings together the heads of state or government of the Member States, can be regarded as the "constituent" body of the Union. However, this competence, which is almost blocked by the requirement of unanimity, can only be effective in exceptional cases and affects the current power structure more as a political advisory body on important issues.

……With the expansion of EU powers and the dismantling of internal borders in an increasingly unified EU area, the Council would not be able to fulfil its regulatory and directive-making tasks without preparatory workers. Therefore, a preliminary decision organisation was set up in addition to a huge apparatus. From the late 1950s, the Permanent Representatives of the Member States became the "Council of Permanent Representatives", abbreviated to the French name COREPER, to prepare the Council's decisions. Most compromises have to be reached here before the Member States can take a final decision on a matter before the Council. On the other hand, if all disputes can be agreed by the Permanent Representatives of the Member States on a decision at COREPER level, it will no longer be brought to the Council but will be published immediately as a regulation or directive. But before the decision of this COREPER, a subordinate system of working groups carries out the preparation of decisions and the exploration of alternatives in them as well as the creation of compromises about them. In this system, the decision areas are further subdivided with further specialisation, and around 250 such working groups have been set up here. According to literature reports, these working groups already make the most compromises in decision-making, and even COREPER only has to decide a few remaining differences and reach an agreement. Only with this solution can the Council make final decisions with the ministers who always travel to Brussels for a flash visit. It should be noted that the working groups are also mainly composed of national officials from the Member States, so that the interests and disagreements of the Member States can already be taken into account here. On the other hand, it should be emphasised that the substantive creation of decision alternatives and their selection mainly takes place in the working groups. Therefore, this decision level is the main area of the huge lobbying system at European level.

In the Council, the Member States have different votes depending on their population, and

since the 2004 enlargement, the largest (Germany, France, Great Britain and Italy) have 29-29 votes, the medium-sized ones (Spain and Poland) 27- 27, the middle ones 12-14 votes, the smaller ones have 7-7 or even fewer votes. (Hungary has 12 votes in the council). While unanimity was required to make all decisions in the first few decades, over time the range of issues that can be resolved by majority or qualified majority has expanded, and since the 2004 enlargement, such a decision has been sufficient in roughly 90% of the subject areas. However, unanimity is still required for contract changes and other strategic decisions.

1.3.The Commission

The Commission is the custodian of unitary decision-making in the Union across the Member States, although there are fluctuations depending on the role of its President. For example, in 1985, after two decades of paralysis and the EU crisis, Frenchman *Jacques Delors* became President of the Commission, shifting much of the decision-making power from national governments to Brussels headquarters and, on the other hand, trying to close the Union from outside, especially from the USA. Overall, however, this body has always been the main bastion of federal Europe in the past half century. As of today, the Commission has a huge apparatus of 32,000 people and is increasingly structured as a real government, the chair of which is nominated by the European Council of Heads of State and Government and confirmed by a majority decision of the EP. The designated Commissioners are appointed by the Member States and appointed after consultation with the President of the Commission, who are then fundamentally independent of the nominating Member States. The freedom of the President of the Commission to distribute powers among the Commissioners is increasingly recognised, as is the fact that he can propose the dismissal of a Commissioner. The EP can make a motion of no confidence against the Commission, which must resign collectively if successful. (The term of office of the President and the members of the Commission is five years.) As already mentioned, effective control over the Commission cannot be achieved due to the fragmentation of the internal groups of the EP and the lack of uniform decision-making.

It is important to note that despite the expansion of EU competences, Member States have opposed the development of a decentralised system of EU organisations, and two methods have been developed to enable EU decisions to be implemented. These decisions are made by the Member States or by the so-called comitology system, in which the officials of the Brussels apparatus and the Member States meet. For example, the necessary implementing provisions are issued by the comitology system for implementing an EU decision. If the Member States are responsible for implementation, the Commission will review this and in the event of non-compliance, the European Court of Justice will ultimately impose a penalty or fine on the reluctant Member State.

1.4.The European Parliament

The EP has already emerged from various perspectives in previous analyses. Its main feature is that after a gradual increase in its role, the EP has been able to achieve a real parliamentary role and that its decision-making powers as part of a bicameral system can determine how the Union works. In addition, the appointment of the President of the Commission requires confirmation by the EP and a motion of no confidence against the Commission with a total of two thirds of the votes cast and the majority of all MPs. Similarly, the EP has a key say in the adoption of the Union's annual budget, which increases the weight of the requests from individual political groups when it comes to drawing up the budget. It can also play an important monitoring role by setting up EP investigative committees to uncover individual abuses.

An anomaly that has brought about the specific development of the Union over the past

few decades in relation to the role of the EP still needs to be mentioned here. As we have already indicated, this development has been determined by the struggles of the defenders of the sovereignty of the Member States and supporters of a federal Europe against them over the past half century. In this way, the political forces of the federalists have succeeded in transferring more and more powers to the level of the organisation of the EU by deliberately using spill-over effects. It means that if certain powers have been adopted at the EU level, then it becomes inevitable in the future that new powers will also be brought to the EU level from the Member State level. The forces working for the Member States could not resist this enlargement of the EU, but they could at least keep the EU's growing powers in the decision-making process of the intergovernmental negotiation mechanisms. Thus, the Council remained the main decision-making body with the ministers of the Member States in it. However, this body can only accomplish this task through decision making, alternative explorations and compromises of the permanent Brussels apparatus. In reality, however, the intertwined Brussels apparatus and the surrounding European lobbying system were largely independent of the ministers of the Member States and the permanent representatives of the Member States. The latter are usually selected on the basis of the influence of the Brussels authorities and over the years they have made decisions with “Brussels glasses” rather than representing the pronounced differences of opinion between the member states. It follows that while the EU's powers over the Member States have grown, the independent Brussels apparatus and lobbying system can function without serious responsibility and control. Nor can the solution unfold because the defenders of the sovereignty of the Member States do not allow the European Parliament to become a full Parliament and to exercise greater parliamentary control over the President and the members of the Commission. However, they can no longer achieve the restoration of responsibilities that have “slipped” away to Brussel from the Member States. In the meantime, the chief officials of the Brussels apparatus, which is practically uncontrolled, and the members of the lobbying system around them can act as leaders of European politics. (For the operation of the Brussels lobbying system see Mazey / Richardson 1993 and Navracsics 1998).

2. The Tandem of Power between the Commission and the Court of Justice

We have seen above the formal institutional structure of the Union and the formal links between the various governing bodies. However, the spontaneous dynamism given in the introduction, which placed the ECJ above the other Union governing bodies due to its factual unrestricted nature, was associated with the division of the various camps along the Union's internal political divide. Indeed, the Court's consistently distinctive integration support has promoted a stable alliance with the Commission and its many thousands of apparatuses, since it has had a federal bias from the start. To understand the growing merger between the Commission and the Court of Justice, it is worth considering the shift in the focus of the power structure of European integration as a whole in recent decades.

In contrast to the first decades after its foundation in 1957, the weight of the Commission vis-à-vis the Council of Ministers, which brings the Member States together, has increased since the 1980s. The first chairman of the commission, *Walter Hallstein* (1958-1967), was confronted with the French President *Charles de Gaulle* from the beginning, who spoke out against integration as a whole and refused to subject nation states to bureaucracy in Brussels. The unanimity requirement of the decision-making mechanism then reduced the power of the Commission to a minimum, and this weak role continued until 1985 when the dominant European powers behind *Jacques Delors* from France agreed with the Member States to tolerate the greater power role of the Commission and this compromise was fixed in the Single European

Act in 1986. The golden age of the Commission was during the Delors period (1985-1995), but then the 1993 Amsterdam Treaty increased the weight of majority decisions in the decision-making procedures between Member States and the increasingly regular meetings of Heads of State and Government reduced the Commission's powers regarding the setting of strategic targets. In addition, the Commission resigned in 1995 due to internal corruption and the resignation of its president *Jacques Santer*. Since then, the Commission Presidents have been able to act only under the dominance of large member states, both on the level of daily political decisions and in connection with the now almost monthly meetings of heads of state and government where strategic decisions concerning all relevant Topics are made. (Oztas / Kreppel 2017: 5-6). This loss of power over intergovernmental forums has, over the past few decades, caused the Commission to promote the federalisation of the EU using the ECJ's procedures. In fact, in most cases the Commission does not have to turn to the Court of Justice as an independent arbitrator, but as a loyal ally without any risk. A number of studies have shown, based on empirical analysis, how the power tandem between the Commission and the Court of Justice works, acting in a coordinated manner towards the Member States and, through their combined powers, making them mutually stronger. [378] This coordination then developed specific political-legal strategies of tandem power to break the more resilient member states and some of their policies (Schmidt 2000; Dederek, 2014; Höpner 2014; Schreienmacher 2014).

The cooperation and then an almost tandem-like merger between the two actors in the Union resulted from the interdependence of their positions of power, which despite all their strengths characterise their powers. Despite its irrefutable interpretations of the treaties and arbitrary interpretations of secondary law, the CJE can constantly be faced with the fact that if a decision happens to go against national interests, the parliaments, governments and courts of the Member States simply ignore such a decision by leaving it only on paper but not acting accordingly. However, the Commission is empowered to initiate proceedings to compel reluctant Member States to comply with the judgments of the Court of Justice. By initiating infringement proceedings, the Commission can bring a Member State that has infringed the Court back to the Court. If it finds that a Member State has violated the infringement procedure decision, the ECJ can impose billions in fines on the Member State. The decisions of the CJE regarding the interpretation of the Treaties or the interpretation of certain provisions of secondary EU law are made primarily on the initiative of the Commission or in a preliminary ruling procedure through applications from the national courts, [379] almost always by a small step to expand the relevant competence of the EU and to limit national jurisdiction.

On the other hand, the Commission's need for the Court is less clear, but it has been shown over the years that it will be an easier task for the Commission to break the resistance of the Council, the intergovernmental body representing the Member States by the support of CJE, and in most cases it would not be possible without it. As can be seen, the powers of the Commission have risen to the level of the Council since the reduction of unanimity and the transition to majority voting in the 1980s, but it has often been insurmountable to push the

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[378] See Buket, Oztas/Kreppel, Amie (2017): Power or Luck? Understanding the Chraracter of European Commission Agenda Setting Influence. Paper presented for the Midwest Political Science Association Annual Conference. Chicago. 2017, 04 6-9, 5-6. p.

[379] According to Björn Schreienmacher, the tandem cooperation between the Commission and the Court of Justice in many cases is as follows: „Diesem Gedankengang folgt auch die Beobachtung, dass die Kommission Gesetzesvorschläge mit Vertragsverletzungsverfahren gegen Mitgliedstaaten vorbereitet, die für die Annahme dieser Gesetze im Rat als Schlüsselstaaten gelten können. Diese Länder werden gerichtlich zu Integration bzw. Liberalisierung gezwungen. Ein anschließender Komissionsvorschlag zur Kodifizierung dieser Urteile bietet den betroffenen Regierungen dann die Aussicht auf eine gleichmäßige und gesetzlich präzisierte Anwendung des neuen Rechts in allen Mitgiedstaaten." Björn Schreienmacher: Vom EuGH zur Richtlinie - wie die Eu-Mitgliedstaaten über die Kodifizierung europäischer Rechtsprechung entscheiden. Transtate Working papers 2014. No. 183. Bremen. 22 p.

blocking minority aside in the Council. The EU Court of Justice can help here, and in recent decades, the Commission has consistently advocated the ever increasing integration of the Union against the Member States. In many cases it is sufficient for the Commission to show the possibility of opening infringement proceedings against a reluctant Member State. Member States can have no doubts about the decision of the Court of Justice in a CJE procedure, because the empirical studies show that the Commission has a 93% chance of winning before the CJE. [380] That this "absolute success" of the Commission has been before the Court for decades is also evident from a study by *Harm Schepel* and *Erhard Blankenburg* in 2001, which analysed the decisions of the 1990s by examining the relationship between the Commissioners and the CJE and they compared this relationship to a kangaroo boy sitting on his mother's lap: "Its success rate is so high as to make the ECJ look like a kangaroo court - being the baby in the pouch of the mother, it has to follow wherever the Commission goes. " (Schepel / Blankenburg 2001: 18.) Thus, in most cases, a blocking minority of the Member States can be cleared out of the way with the help of the Court of Justice and the Commission can achieve the adoption of its proposal in the Council, despite the initial resistance of the majority of the Member States. In recent years, a variety of regulations and guidelines have been created in this way.

However, the mere tactical initiation of an infringement procedure in order to carry out an internal legal transformation required by the Commission is often sufficient to ensure that a Member State (and even several other Member States!) comply with the Commission's request so that the ECJ does not do so at the request of the Commission. A more comprehensive decision by the ECJ would probably require an even more extensive change. This effect is described by *Michael Blauberger* as follows: "Um schwer vorhersehbarer und politisch kaum korrigierbarer Rechtsprechung vorzubeugen, kann es aus dieser Perspektive politisch ratsam sein, sich auf Kompromisse mit möglichen Klägerinen einzulassen und nationale Politik *vorauseilend und umfassend* zu reformieren. Dies kann auch politische Reformen in Mitgliedstaaten einschließen, die noch gar nicht in einen konkreten Streitfall vor dem EuGH verwickelt waren, sich aber indirekt betroffen sehen." (Blauberger, 2013:184).

However, if, despite this pressure, the Commission is unable to implement its proposal for a regulation or directive because of opposition from the Member States in the Council, it can achieve its goal again by relying on another jurisdiction of the Court. There is then the possibility that what the Council could not achieve in the form of the creation of a secondary right, could be achieved by the ECJ in a court decision that results directly from the interpretation of the Treaties. [381] This only requires intended applications by the Commission to the CJE related to a judicial phase of an infringement procedure, many of which are still ongoing or the Commission can permanently enter the preliminary ruling process by the courts of the Member States with proposed decisions, and, in this way, it can finally be determined of legal norms that could not be implemented as a regulation or directive due to the resistance of the Council. [382]

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[380] See Schmidt K Susane (2000):Only an Agenda Setter? The European Commission's Power over the Council of Ministers. *European Union Politics*. Vol.1. No. 1. 37-61. p.; Dederke, Julian (2014): Bahnliberalisierung in der Europäischer Union. Die Rolle der EuGH als politischer und politisch restringierter Akteur bei der Transformation staatsnaher Sektoren. Papers on International Political Economy, No. 20. 28. p.; Höpner, Martin (2014): Wie der Europäischer Gerichtshof und die Kommission Liberalisierung durchsetzen. Befunde aus MPifG-Forschungsgruppe zur Politische Ökonomie der europäischer Integration. Max Planck Insitut für Gesellschaftsforschung. MPIfG Discussin Paper. Vol. 14. No.8. Schreienmacher 2014, 22.

[381] „The preliminary reference procedure in Article 267 Treaty on the functioning of the Europen Union (TFEU) is, in this regard, the epicentre of EU judicial politics. It and the enforcement procedure accounted in 2009 for 87.8 % of the judgements delivered by the Court with it accounting for 49.9% (Europena Court of Justice 2010:87)." Damian Chalmers/Mariana Chaves: The Reference Points of EU Judicial Politics. 2011. LEQS Paper, No. 43/2011. 31p.

[382] In wording of the authors: „Enforcement procedures against Member States are preceded by lengthy Commission-Member State negotiations with only a small proportion (in 20009 about 4%) reaching judgment .

It has to be added that a tandem-like collaboration between the two bodies has also developed beyond what was said above. With hundreds of judgments a year, the Court of Justice sets standards in each of its proceedings for innumerable aspects of the economic and social life of the Member States, which result from certain principles and declarations of the Treaties. Although these decisions and the standards set out therein are only formally established between the parties involved in a particular procedure, under the pressure of the Commission and other EU bodies, these case decisions are considered a general norm for the whole Union and should be followed by everyone. Although this conversion of individual decisions into general norms contradicts the formal power structure of the Union, since the Court of Justice is only a law enforcement agency and it is not compatible with the principle of democracy, which is a fundamental principle of the Union, the transformation under the pressure of integration-promoting forces has become commonplace. The Commission also enforces these decisions as generally binding by initiating infringement proceedings in the event of opposition. More importantly, however, it uses the Court's numerous case laws to codify the content of regulations and directives in its proposals to the Council. [383] In this way, the case decisions formally become the "laws" of the Union, and thus the Court not only plays the role of a constitutional court that interprets the Treaty, but also becomes an effective player in EU legislation.

3. Is there a possibility of resistance in case of a Eurosceptic EP election result?

After the EP elections in 2024, the federal forces in the Union's power structure are likely to weaken, although the extent of this weakening is at best questionable. In preparation for this, considerations are already being made about a possible reform of the Union and the possible liberation of the Member States, which have so far been put under pressure by federal forces. In view of the realisation of these possibilities, it is worth considering first the existing forms of resistance (1) and then the existing mechanisms for building the internal political will of the Commission (2).

3.1. A Historical Background of the Resistance of the Member States

For an overview of the resistance of the nation-states defending their sovereignty, it is worth reviewing existing forms of resistance and their success against the pressure of the Union's federal agents before realising the possible scope of the growth of resistance in the case of a more souvereignity-friendly majority of EP 2024. Andreas Hofmann gives a good summary in a recently published study (Hofmann 2018).

So far, open resistance to EU acts that go beyond the EU treaties, including the decisions

It is thus an arena of dispute settlement of last resort with the Commission winning 92.7% of the cases in 2005-2009." Damian Chalmers/Mariana Chaves: The Reference Points of EU Judicial Politics. 2011. LEQS Paper, No. 43/2011. 4p. De hasonló arány volt már a '90-es években is Andreas Hofmann szerint: "Only about 10% of infringement proceedings reach the Court, with a judgement rendered in less than 4%." Andreas Hofmann: Influencing Policy Production in the European Union: The European Comission Before the Court of Justice. Paper presented at the EUSA Eleventh Biennial International Conference. Los Angeles. 22-25 April 2009. 5. p.

[383] In a broader sense, this also means that democratic-political decisions within the Union are replaced by processes disguised as legal decisions, so that there is a shift towards democracy rather than democracy. László Blutman has already pointed this out in the Hungarian-language European legal literature, see László Blutman: The law of the European Union in practice. HVG-ORAC book publisher. Budapest. 2014. 85. p.

of the European Court of Justice on which they are based, has rarely occurred, and in addition to the decision of the Czech Constitutional Court in 2012, which has repeatedly been used as an example in debates, the Danish top judges made this resistance in 2016. [384] At the time, the Danish judges not only stood up openly against a norm of EU law, but also explained that in future it will in each case decide in front of them whether Danish law or contradictory EU law have priority under the Danish constitutional order. In addition to the rarity of such an open confrontation, the undeclared opposition was far more common, but mostly did not appear in the ECJ's regular annual reports or in the media about the EU. This type of resistance has been known since the 1980s, but has increased in particular in recent years. *Andreas Hofmann* has examined this in his empirical analysis and, for a better understanding, he has taken the distinction between *Michael Madsen, Pola Cebulak* and *Mich Wiebusch,* a trio of authors who examine the resistance to decisions of international courts in a broader dimension, to separate the degree of contradiction. Accordingly, in the event of a confrontation, he differentiated between resistance, which only pushes back and limits the scope of the decision (*pushback*), and resistance, which rejects the entire controversial norm (*backlash*). The latter, more radical confrontation after an outrageous EU court ruling mostly appears only in academic circles as a scientific opinion, [385] but in the case of a government or the courts of a member state in question, the more covert forms of pushback confrontation appear.

On the part of the governments of the member states, this more hidden resistance appears in their neglect of the legal changes ordered by the Court of Justice in infringement proceedings, and it also appears in the obstruction of the national courts with regard to the preliminary decision of the ECJ concerning the member states. [386] In the event of non-compliance with the obligation laid down in repeated infringement proceedings, the Maastricht Treaty in 1992 introduced the possibility of a fine, which the Court of Justice has been able to impose at the request of the Commission and which has been applicable since 1997. If a Member State has already reached this stage against the Court's decision, it is already approaching the level of open resistance and, according to EU statistics, the Commission has imposed 86 such fines between 1997 and 2016, which represents 9% of all infringement procedures carried out during that period (962). The extent of the final opposition is also evident from the fact that in 33 cases the reluctant Member State had to do so and could not be persuaded to comply with the mandatory legislative change previously ordered by the Court, even under the threat of a heavy fine. The Court subsequently imposed a final fine on 31 cases. [387]

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[384] There were 2,900 such infringement proceedings pending in 2009 alone, but in most cases the Commission can agree to the Member State concerned under different pressures and compromises before being brought before the Court of Justice, and only a hundred of them have given a judgment in this case. Year. See Damian Chalmers/Mariana Chaves: The Reference Points of EU Judicial Politics. 2011. LEQS Paper, No. 43/2011. 6. p.

[385] Björn Schreienmacher distinguishes between the following versions, of which the case law of the Court of Justice is included in a Commission proposal to be codified by the Council: „Für die im Vorfeld von Gesetzgebung ergangenen relevanten EuGH-Entscheidungen steht zur Disposition, ob sie für die Anwendung europäischer Recht in Gesetzesform gebracht, sprich: kodifiziert, werden sollen, und wenn ja, in welcher Weise. Die Möglichkeiten reichen von der wortgetreuen Übernahme bis zur abstrahierenden Umformulierung. Unterschiedlich kann etwa mit dem Sachbezug des Urteils belassen, oder diese – und damit auch die Integration und Liberalisierung – auf neue Zusammenhänge ausweiten. Letzlich kann eine Kodifizierung auch umgangen werden, indem speziell die Sachverhalte des relevanten Richterrechts aus dem Anwendungsbereich des Gesetzes ausgenommen werden." Björn Schreienmacher: Vom EuGH zur Richtlinie - wie die Eu-Mitgliedstaaten über die Kodifizierung europäischer Rechtsprechung entscheiden. Transtate Working papers 2014. No. 183. Bremen. 2. p.

[386] This was the so-called *Ajos case*, in which the Danish supreme judges overturned the norm prohibiting age discrimination based on a ruling by the Court in 2005, on the grounds that this norm did not exist even when the Danish Accession Act was adopted existed. For an analysis, see Ran Hirschl: Opting Out of Global Constitutionalism. Law & Ethics of Human Rights. (Vol 12.) 218 No.1. 30. p.

[387]In his study, Hofmann describes this type of reference for a preliminary decision as a "national informant": „The Commission has limited capacity to follow up on implementation and often relies on national „whistle-

However, the breadth of this lesser resistance is reflected in the fact that, between 2003 and 2016, in 461 cases between 2003 and 2016, the Commission had to send a formal notification letter to the Member States convicted by the Court of Justice to warn that the infringement procedure would resume if they postponed enforcement. The final solution to the confrontation is that the ultimately resilient Member States will implement the standards established by the Court of Justice as EU law into national law in addition to paying the fine, but in some cases resistance will continue. The Member State concerned pays part of the fine by declaring that it will implement the necessary change in the law, but essentially retains its previous right. The Commission, on the other hand, sees the obligation as 'fulfilled': "Closer analysis of the aftermath of the cases in which CJE issued a penalty for non-compliance with previous judgments indicate that even financial penalties do not guarantee that the underlying implementation problem is remedied. Ian Kilbey shows that the Commission has developed creative means of 'face-saving' in order to close cases after some penalties have been paid and some efforts towards compliance undertaken, even though the problem persists. " (Hofmann 2018: 12.)

Another tool in the hands of national governments to avoid the ever-increasing powers of the EU is to design their laws that a Member State keeps the preliminary rulings available to its courts to a minimum. It is clear that if global foundations that promote federalism and the staff of their NGOs can run "awareness courses" in law schools and training centres in one Member State to regard the ECJ's condemnation of the Member States as a "shame", then, the number of such preliminary rulings will increase in this Member State. In the case of such practice by Italian judges, who sent a relatively large number of such preliminary requests to the CJEU, the empirical investigation shows that in the extensive judicial area, the judge's poor reputation is caused by his participation in repeated preliminary ruling procedures and the reputation of the National Supreme Judicial Forum is repeatedly destroyed and that has a deterrent effect: "When a few iconoclastic judges did challenge these practices for motives with judicial empowerment, they often incurred reputational costs and remained marginalized." (Pavone 2018:8). In addition, judicial officials and, under their influence, central judicial administration have the ability to contain such "sensitising" influences in this area, and there is scope for litigation rules to influence the environment for preliminary rulings. Research into the practice of Danish government officials has shown that they have made efforts to reduce the preliminary ruling process. They wanted to achieve this in order to maintain the integrity of the national legal system: "It could be hostility towards judicial review of legislation more generally, which has been attested to judges in majoritarian democracies, such as the UK and the Scandinavia. Marlene Wind has moreover reported that Danish government officials discourage Danish judges from sending references to the CJEU." (Hofmann 2018: 15.). But Member State governments also go in this direction when they implement a restructuring measure following an infringement procedure or follow a reference to a preliminary ruling by a court, which is, however, only tailored to the circumstances of the case and leaves the general restructuring.

In addition to the national governments, there is also resistance at the level of the national courts against the expansive case law of the ECJ. Although the open confrontation of the Danish Supreme Court in 2016 cannot be seen as a general pattern, there are also more concealed confrontations in other courts. This covert opposition usually manifests itself in the fact that the courts of a particular member state may follow the interpretation of EU law given in individual cases, but they do not accept such as requests for a comprehensive doctrinal change. Already in 2002, Lisa Conant showed that if there is no institutional structure in the ideological and media environment of judges in a certain member state that constantly alarms the public about the decision of the CJEU in order to promote comprehensive implementation, then measures will

blowers". (Hofnamm 2018:10).

probably only be taken in a specific case, but the broader scope is not taken into account: "*Conant* like *Rosenberg,* argued that in the absence of supportive political pressure following the development of innovative legal doctrines, national authorities will respond by isolating the effects of single judgments, applying them only to the case at hand while ignoring their wider ramification - that is, denying the intermediate authority and 'erga omnes' effect (Hofmann 2018: 18.). In particular, if there already exists a legal doctrine that has for many years been developed in a particular Member State that is against a doctrine in the decision of the Court of Justice, it is expected that this technique of resistance will be used by the judiciary and the contrary doctrine of the Court will not adopted besides its application in some individual cases. Of course, there are major differences in the implementation of EU law by the courts of the Member States in this area, while EU law should always take precedence in the everyday life of the Member States. In Denmark, for example, domestic law completely excludes the application of relevant EU health standards in judicial practice, while in Spain the judicial application of law in this area is thoroughly based on it (Hofmann, 2018: 23).

3.2. Internal Decision-making in the Commission

It is worth dividing this topic in two and consider the times before 2014 and the time since President Juncker separately, since President Juncker also passed a reform in this area when he took office. (The time of *von der Leyen* Commission is too short to enable a research in 2020.)

For decades, the commissioning and preparation of Commission proposals began in a decentralised way, from bottom to top, from the Directorate-General apparatus and with the coordination of the apparatus between the Directorates-General. If issues remained open, the decision lay with the chiefs of staff of the Commissioners concerned, possibly the Commissioners themselves, and the compromise proposal went to a meeting of the College of Commissioners and appeared as a proposal of the Commission and was then presented to the Council and Parliament in the EU legislative framework. [388] In this system, decision-making was essentially organised by the Commission apparatus, led by senior officials from the major Directorates-General, and by the Commissioners and their cabinets. In addition, the compromises of apparatus between the Directorates-General was generally so seamless that 87% of the Commission's final decisions as a Commission proposal between 2004 and 2008 did not go to the College for discussion, but were already taken at this administrative level. [389] In practice, this system meant that the Commission's apparatus, which had grown to many thousands and was organised in Directorates-General under the direction of the Directors-General and the General Secretariat, was largely independent in guiding this important part of EU decision-making. The commissioners, who often traveled from home to Brussels for only a few days, could at most reject some suggestions from the apparatus, but could not make their own proposal. So they were not really able to initiate positive decisions and get involved in making decisions. This autonomous apparatus decision-making system, which violates the rule of law and democratic principles, has also tried to demonstrate a kind of democracy in recent years. In fact, the research has shown that the heads of this decision-making system have been

[388] „Until the end of 2016, the Commission had sent 86 such cases to the Court, which correspond to about 9 percent of infringement cases ruled on by the CJEU from 1997 to 2016 (962). The CJEU ruled on 33 of these (the rest were withdrawn before a judgment) issuing financial penalties in 31." (Hofmann 2018:11).

[389] For details see Miriam Hartlapp: Internal Dynamics: Position Formation in the EU Commission. WZB Paper. 2008. 2-6. p. illetve Buket Oztas/Amie Kreppel: Power or Luck? Understanding the Character of European Commisson Agenda Setting Influence. Paper presented for the Midwest Political Science Association Annual Conference. Chicago, Apil 6-9. 2017.

using the Eurobarometer more and more recently to demonstrate the popularity of their proposals. For example, while in the early 1980s no specific opinion polls existed to assess the popularity of a proposed measure, the number of such polls exceeded 20 each year after the turn of the millennium and the number of directorates-general increased, one of which commissioned such a survey prior to the major drafts. [390] These surveys not only increased legitimacy but also served as weapons to protect the position of the Directorate General of the draft from those who had contested its draft, and so this democratic addition also initiated will-fighting struggles between directorates-general as party-like struggles.

This is what the era with President Juncker has changed since 2014 and has continued since. The reform consisted of several elements, the final effect of which was to centralise the Commission with 27 Commissioners under the President of the Commission and to freeze the decision-making process in the Directorates-General, which would ultimately involve the Commissioners and their personal cabinets more closely. The *Joint Teams*, headed by the heads of the General Secretariat and the Vice-Presidents of the Commission, dominate in this new situation, and they discuss and approve proposals from the outset.

The increasing role of vice-presidents vis-à-vis the ordinary commissioners and their subordination to the presidents put an end to the Presidency of the commission "primus inter pares" and created a more central system around the President. Although there had been Vice-Presidents in the past, they had only a symbolic title with no real functions and, like the other Commissioners, they only had contact with the Directorates General in their respective departments. However, the Vice Presidents no longer have their own resorts, and the Commissioners' resorts that are under their leadership in the "Joint Team" belong to him/her, as do the Commissioners in his/her Joint Team. The aim of the reform was not only to create a more central unity among the college of commissioners, but also to break the closure of the previously closed directorates-general and to subject them to a uniform decision-making process by the Commission. Or, according to Brussels terminology, the reform aimed at "de-siloisation", i.e. the freeing of the apparatus from separate "silos" (tanks). [391] This meant that the Juncker reform even created the post of First Vice President over the four Vice Presidents, and that, as an extension of the President, it gained control and administration over the entire Commission, of course under the President. With the help of the First Vice President, the President almost doubled in overseeing the activities of the 32,000-strong apparatus, which was organised into 40 directorates-general.

In addition to the system of commissioners in the centralised Joint Teams headed by the First Vice-President and the four Vice-Presidents, the Commission has unified around the President as the reform has given the Secretary-General and his/her extensive staff even more powers over each Directorate-General and cabinet Commissioners have been transferred. The extended powers of the Secretary General actually meant that the power of the President of the Commission could almost triple beyond that of the First Vice President. The Secretary General, Juncker's most confidential person, was given the right to obtain an authorisation or consultation concerning all relevant activities of the Directorates-General. The weight of the Secretary-General and the Secretariat-General was also increased by the fact that the Vice-Presidents, from whom the committees were headed, did not have their own apparatus and Directorate-

[390] „Emprical evidence on coordination at the poitical level suggests that only 13,2% of all Commission proposals between 2004 an 2008 were actually negotiated in the College. In other words, a rather large share of legislative proposals was already agreed among the services prior to the political level." Miriam Hartlapp/Julia Metz/Chrisitan Rauh: The agenda setting by the European Commission: the result of balanced or biased aggregation of positions? LSE. LEQOS Paper No. 21/2010. London. 20. p.

[391] „This gives rise to the expectation that looser coupling will lead to reduced siloization and more intensive intedepartmental cooperation." Kristina Ophey: Post-Lisbon Policy Making in the European Commission. Juncker's Politics of (Re-)Structuring Infra-Commission Policy Formulation Processes. ARENA Working Paper 6/2018. 5. p.

General, and, in this way, they could only control the Directorates-General of the Commissioners through the Secretariat-General. At Commissioner level, subordination to the Joint Committee indirectly led to extensive subordination to the Secretaries General and the Secretariat General. Perhaps this change can be represented by analogy as a replacement of a decentralised government structure based on ministers and their ministries with a centralised government of the chancellor type, in which everything serves to subdue ministries and their ministers and give direct control and direction to the prime minister (Russack 2017).

As far as the DG apparatus is concerned, the reform was aimed to end its former full autonomy and the bipartisan struggles of the Commission and, instead, limit it to processing mere information without independent political role play. As a result, its previous role as initiator in developing individual design proposals and reaching compromises with other Directorates-General has been removed without the involvement of Commissioners. Since 2014, a draft proposal has only been possible in the Joint Teams, and only after its approval can the draft begin in the Directorate-General's apparatus, which is appointed by the responsible Vice-President through the General Secretariat. This has made it possible for the drafts not only to contain the preferences of the apparatus of the approving DG, for which the other directorates-general are late to compromise, but also from the outset at the political level of the commissioners (or at least the chiefs of staff) and draft proposals are drawn up in front of the permanent presence of the directorates.

Overall, the impact of the Juncker reform, inherited from the post-2019 EP elections, has broken the multi-decade-long power of tens of thousands of Brussels bureaucrats and is a good prerequisite for a nation-state-friendly commission in the future to try to revamp federalist priorities. However, this can only be limited in terms of ultimate success if we see that the Union's power structure does not really focus on the Commission or the European Council of Heads of State or Government, but on the European Court of Justice, which is the highest juristocratic authority of the EU. It would be worth considering how this supreme power would be affected if the Court's tandem counterpart in the future focused on protecting the powers of the Member States, rather than pursuing federalist priorities. There is still time until 2024 when the next EP elections come.

Chapter 14.
The NGO Base of the EU Juristocracy

According to the analysis above, the EU's power structure is largely based on judicial decisions and although the democratic component of the European Parliament can influence this structure, it has little real control over the development of the Union. In addition, the democratic majority of the member states in the intergovernmental bodies of the Union (Council of Ministers and European Council) have only a limited influence on the political decision-making process of the EU. The question arises concerning this machinery, which has been freed from democratic control, to what extent it moves on its own - driven by the internal interests of the apparatus and the world views of its leading groups - and to what extent the dominant groups of society can influence it beyond the existing meagre path of democratic control. Regarding the latter, it is important to emphasise that a self-moving machine of power cannot survive alone for long if it does not build continuous channels of mediation with the dominant groups of society that have money, an influence on the media, and other sources of power. In a power system based on purely military power, this can happen for a short time even under the conditions of today's social development, but the spiritual atmosphere of societies in Western civilisation no longer allows this.

From this point of view, there are number of empirical studies that have shown the connections that exists between the legal system of the Union and these dominant groups in recent years. Let us first consider such links to the European Human Rights Justice (ECHR), which is formally outside the Union, but is actually an essential part of the EU legal system. We will then move closer to the Union's internal institutions and, after a general overview, look at the forms of NGOs and other lobbying that affect the work of the Commission, and then look at the influential organisations around the European Parliament, the Council of Ministers and COREPER. The European Court of Justice's influence through NGOs and lobby organisations will then be briefly examined.

1. Juristocratic Power Groups for the Decision-making of ECHR

As soon as we see that the ECHR's decision-making mechanism is essentially based on the self-organising legal staff of the registry lawyers, which is largely obscured by the chambers of judges who have been sent by the signatories to the convention for a term of nine years -as the second chapter’s analysis has demonstrated - next, it is important to look at how the members of this staff intertwine with the underlying power groups that want to influence the decisions of the ECHR and also with the employees of their NGO networks. Unfortunately, no such information can be found, and only in the case of some ECHR judges can evidence of such links with global NGO networks be shown, demonstrating that a systematic merger is also likely here. For example, Bulgarian ECHR judge *Jonko Grozev* was a senior member of the Soros Open Society organisation before his election. More recently, *Darian Pavli*, an ECHR judge dispatched from Albania, was the local chair of the Albanian Open Society preceding his

entry into Strasbourg. Yet another example is a former Hungarian ECHR judge, *András Sajó,* who had a senior position in an organisation of the Soros Foundation before receiving his Strasbourg position from the CEU. However, these are only sporadic data that do not mainly relate to the high-ranking members of the underlying human rights apparatus (registrar, deputy registrar, etc.) who actually influence the decisions of the ECHR. In contrast, the interrelation of certain points in the internal power machinery of the European Union with foundation leaders and NGO officials who want to influence them can be seen in documents published by *Wikileaks*. E.g. a list of 226 MEPs connected to the Soros network, with addresses, cell phone numbers, etc. In addition, the President, the Vice-Presidents of the Commission, and individual Commissioners can also maintain intensive and regular contact with the leading representatives of the NGO foundations as it is documented by media coverage. For example, when George Soros visited Brussels in the first half of 2018, he not only met President Juncker, but the first Vice-President Timmermans announced to journalists that he had had years of contact with the Soros network management and he had always spoken to Soros himself about the fate of Europe in the past and will continue to do so. (It is only little known that during this trip to Brussels, Soros met with other Vice-Presidents of the Commission and several commissioners for a working lunch, according to news and photos in the media.)

On the basis of this information, it is certain that similar links must also exist with regard to the ECHR legal staff. This is made possible by the enormous size of the NGO base, which is built on the submission phase of the applications, and by the NGO activities, which almost force the condemned state to implement the decisions of the ECHR through media lashing. There are already empirical studies for this activity by NGO networks, so let us take a look at them first.

Two researchers from the University of Strasbourg, *Gaetan Cliquennois* and *Brice Champetier*, conducted a thorough study in 2016 on how EGMR decisions are initiated by NGO networks in an organised manner, and hundreds, sometimes thousands, of cases are submitted by the same NGO lawyer on behalf of various petitioners, and an organised media campaign strengthens the effects of such actions (Cliquennois / Champetier 2016). For the sake of accuracy, the researchers focused only on NGO activities organised by Russian subsidiaries of foreign, mainly American, foundations. In recent years, these foundations, including the most active ones in the Soros network, have been present in a number of Central and Eastern European countries, so the description of the Russian situation also provides general information in this area.

The influencing of Russian politics and its prompting it in certain directions through decisions of the ECHR was made possible by the direct complaint of the citizens against their own state on the basis of Protocol No. 11 in 1998 and, with the help of subsidiaries of American foundations, it has started to exercise this influence. These subsidiaries settled here at the beginning of the 1990s, but in the past few years this has been a particular focus since Russia's relations with the United States have become increasingly tense. As a result, these US-Russian NGO networks are sending more and more applications to Strasbourg, and, in the meantime, general convictions have become possible beyond individual cases. Due to the *pilot judgment process* and their huge media presentation on Russia, this country constantly appears in the world press as a "state of terror" and as a real "Lator state". The two researchers point out that for the most part, the Russian problems that have been condemned by ECHR decisions (e.g. in the Russian prison sphere or in the area of press freedom) are not problems specific to Russia; on the contrary, similar problems are most often present in western countries as well, albeit to a lesser extent, and yet they will not be leaked and sent to Strasbourg and, above all, will not result in the same global condemnation as in the case of Russia. Taken together, the dumping of US-Russian NGO networks against Russia over the years has not primarily helped to protect the rights of the people and organisations involved, but to combat overarching political goals through human rights disputes as a new Cold War: "To put it differently, the point is to show

that the new cold war dynamics revolves around an instrumentalization of the European system of human rights, which work far from new, is extremely problematic. " (Cliquennois / Champetier 2016: 94).

With regard to the size of the US-Russian NGO base, we can see that behind every large NGO centre here, without exception, the central organisation of the Soros network, the *Open Society,* but often also other Soros network organisations such as a *Helsinki Committee* organisation is established in each country. In addition, the *MacArthur Foundation* is usually one of the founders and donors, but there is also an organisation of the *Norwegian Foundation* that has been closely associated with them for years. For example, the *Memorial Human Rights Center*, founded in Moscow in 1991 (founded and financed by the Open Society, the MacArthur Foundation and the Norwegian Helsinki Committee, among others) has been doing dozens of filings with the ECHR. Between 2000 and 2014, 101 applications were submitted together with this NGO centre, of which 87 received a positive decision. The *European Human Rights Advocacy Center* (EHRAC) was also founded by the Open Society, the MacArthur Foundation and other affiliates they had previously founded, and 93% of EHRAC is being funded by them ever since. In 2015, EHRAC was interested in 310 currently pending submissions to the ECHR. The *International Protection Center* (IPC), which is largely established and financed by the above-mentioned foundations, has been in operation since 1994 and has been under the Russian office of *the International Commission of Jurists* (ICJ) in several European countries since 1999. Its profile and potential have been increased by the fact that it has received advisory status from the United Nations and the Council of Europe. On average, it sends 30 applications to the ECHR every year, but it also disseminates human rights ideology in educational centers and teaches the details and tricks of human rights disputes to lawyers from various legal organisations. The *Stitching Russian Justice Initiative* (SRJI) was founded in Moscow in 2001 by the above-mentioned foundations and their organisations, and has submitted 300 requests to the ECHR for the North Caucasus region in recent years. It also submitted thousands of complaints to the ECtHR in Chechen cases, in controversial Russian-administered cases in South Ossetia, but also in cases of joint attacks in Georgia and Russia. This NGO network also includes the *Association of Russian Human Rights Lawyers, the Moscov Helsinki Group, the Open Russia NGO* and the Dutch-based *Russian Justice Initiative* (the latter, despite its name, is mainly funded by the Soros Network). Finally, within the framework of the Open Society Foundation (OSJI) judicial initiative in Russia, the Soros network has been active under its own name in the area of ECHR applications for many years and includes a number of important cases.

Taken together, these overseas-funded American-Russian NGOs are the originators of a significant portion of the thousands of ECHR filings against Russia each year, although some of them are disguised in the form of individual law firms. Another empirical study in this area shows that Russia has the highest rate of NGO submissions to the ECHR. If we look at this number together, it is even higher, and together with the submissions from individual human rights lawyers trained by NGOs, it could mean the majority. [392] In addition, of the tens of thousands of ECHR petitions per year, only two to four percent are accepted for a substantive decision and the rest are rejected, and the vast majority of this small accepted part are mostly

[392] "Lloyd Mayer, in a study of ECtHR cases involving NGO representation between 2000 and 2009 from all Coe member states found that, by far, Russian cases were most likely to involve NGOs as representatives, applicants, or interveners: during those years approximately 19 percent of decisions concerning Russia involved NGOs, while on average across the Coe only 4 percent of all ECtHR decisions involved NGOs. In reality, this undercounts the number of instance (such as those assisted be the International Protection Centre), NGOs will delegate their clients'cases to individual lawyers, and thus an NGO name never appears in the records. It also does not reflect the additoonal influence that NGOs exert on cases by traning individual independent lawyers on how to submit succesful cases to the ECtHR." Lisa McIntosh Sundstrom: Russian NGOs and the European Court of Human Rights. Human Rights Quarterly. (Vol. 36.) 2014. 849. p.

submitted as applications by NGOs. According to Straßburg practice, however, if the application has been accepted, then it will definitely be judged positively. [393] The coexistence of the admission with a largely positive decision, therefore, makes the work of the ECHR legal staff particularly important, even if it is formally covered by the decision of an individual judge. [394]

Taken together, the picture shows that the self-organising human rights apparatus in Strasbourg and the NGO network, which are largely supported and maintained by some American foundation networks, make the decisions of the ECHR together. Even if not so polarised, this depiction can, perhaps, be applied to other Central and Eastern European countries as well.

The importance of the merging of the ECHR base and the NGO networks and the creation of fundamentally comprehensive political efforts against individual states due to the ECHR's condemnation was particularly emphasised by the so-called pilot judgment procedure. The introduction of pilot judgment procedures radically expanded the scope of the ECHR to force individual states' legal systems to change, and, since then, human rights theorists have written about the "constitutionalisation" of the human rights system (which is one of the main pieces of evidence for constitutionalisation in international law). The procedure should be adopted in Protocol 14 with the signatories to the Convention on Human Rights, referring to the large number of cases that have of course been realised in "*repeat player strategies*" through the tactic of thousands of applications from NGO networks by US Eastern European foundations. However, in the end, the pilot judgement procedure was left out of the editorial board's opposition. Through the decision of the Committee of Ministers of the European Council (Res (2004) 3) to interpret Article 46 of the Convention, the ECHR was able to do this itself without additional provisions. In a subsequent recommendation (Rec (20004) 6), the Member States were informed that although the Member States were only bound by the ECHR's decision against them, if a Member State had already been convicted by the ECHR in a similar case, other Member States can voluntarily decide in such cases that, based on the decision of the ECHR, they will also change their problematic domestic law. As this is the core of the pilot judgment process, the ECHR made its decision in the first pilot judgment process in 2004 with reference to these decisions. The bottom line is that if there are a large number of cases before the ECHR, it is enough to highlight one of them as a lead case and suspend the others to identify the legal issue at stake, and (what in this process is really important!) in addition to solving the case, the respective state is obliged to remedy this legal problem in the specified directions by changing the legal provisions. When this is done, the other suspended cases will be closed with the declaration of acceptance of the change by the ECHR. It is also important that the ECHR continuously informs the competent bodies of the Council of Europe throughout the pilot decision-making process and provides information about compliance with the requirements by the member state (Szemesi 2013: 56). The Strasbourg judges were enthusiastically celebrated with this self-made expansion of power in the institutions and in the circles of human rights lawyers, but among the critical voices is the position of *Judge Zagrabelsky,* who was involved in the decision and did not agree with it. He described the specificity of the pilot judgment procedures and the general normative requirements as a transition to a political area and he believed that this procedure was rejected in the debate over the text of Protocol 14 and that the

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[393] „The large proportion of NGO involved decisions and the fact that most initial applications are underrepresented by NGOs or lawyers, suggests that, at least of on the face of things, NGO involvement in case applications leads to increased succes for applicants in having their cases admissible (…) an winning them (much less ardous, since nearly all cases admitted to the Court are ruled in favor of the applicant)." Lisa McIntosh Sundstrom: Russian NGOs and the European Court of Human Rights. Human Rights Quarterly. (Vol. 36.) 2014. 849. p.

[394] See Van den Eynde: An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights. Netherlands Quarterly of Human Rights. 2013. No. 2. 292. p.

ECtHR nevertheless set it up arbitrarily. [395] Despite this criticism, human rights foundations that pursue overarching political goals and the NGOs they pursue have increasingly taken the path of "process politicisation" by the ECHR. This has led to a political instrumentalisation of individual human rights violations and a purely power-based selection at the ECHR.

The mass filings of NGOs - mostly by searching for and acting on behalf of interested parties or by entering into the procedure with an *amicus curiae statement* as a third party - postpone existing procedures before the ECHR and promote the decision-making mechanism of the ECHR in certain directions. In addition, NGOs are actively involved in implementing the decisions of the ECHR for which they have already fought in the process. Cliquennois and Champetier provide data on this in relation to Russia, and if one reads about it, one gets similar experiences regarding the situation in Hungary, which shows the more general validity of their analysis. After the ECHR has condemned and ordered the attacked state to redesign its legal system and organisation in certain directions, the Council of Ministers of the Council of Europe monitors the implementation. Since the pilot judgments, this has meant not only fixing individual violations, but also implementing extensive internal reforms, so that US-Russian NGOs have taken control of them as a new activity in order to achieve broad media coverage. They monitor the progress of the required legal and organisational changes on the spot and are constantly bombarded with entries to Strasbourg, in which the inadequacy, slowness, etc. of the changes are explained. [396] This control and condemnation by NGOs is then always on the front pages of the friendly world press and as an attacked state, as a "Lator State", as a "Mafia State" and so on. Their image is weighted in the international public, which weakens the ability of the respective state to act. This is the real goal, since it can create international isolation for the attacked state. According to the Strasbourg authors, such an instrumental use of the human rights mechanism for comprehensive political purposes would mostly not help to protect individual rights, but would only worsen their situation by creating a new type of Cold War: “What we find is that NGOs/private donors (largely echoing and influencing EU/US foreign policy) make strategic use of the ECHR system and litigation before the ECtHR, and that such instrumentalisation of human rights, far from being conducive to a better protection of rights, actually tends to foster the opposite ” . (Cliquennois / Champetier 2016: 94).

2. The Influence of NGOs on EU institutions

The two main axes of the Union's decision-making mechanism are the decisions of the European Court of Justice and the expenditure of the regulation and directive resulting from the co-decision of the EP and the Council (or less often the Council alone) and the expenditure can only start on the basis of the Commission proposal. (The European Council of Heads of State and Government, which decides on strategic issues, is above the current decision-making machinery and is not directly accessible to NGOs and lobbies anyway, so it is now ignored.)

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[395] „Judge Zagrebelsky in a partly dissenting opinion in *Hutten-Czapska*, argued against the use of ordering general mesures in the operative part of the Court’s judgement. He took the position that the Court went „outside its own sphere of competence” and entered „the realm of politics”. He pointed to the fact that the pilot precedure was not included in Protocel 14.” Antoine Buyse: The Pilot Judgement Procedure at the Court of Human Rights: Possibilities and Challenges. Nomiko Vima (Greek Law Journal) 2009. November 12.p.

[396] „Lastly, NGOs have been associated since 2006 to the execution of judgements delivered by the ECtHR. During the supervisison process in which national states indicate to the Committee of Ministers the measures planned and or taken in an ’action plan’ to comply with the final judgement, NGOs and natinal institutions prompting and protecting human rights can submit communications to the Committee of Ministers denouncing the failure of a state to execute a judgement.” Clinquennois, Gaetan/Brice Champetier (2016): The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War? European Journal (Vol. 22.) No.1. 98. p.

The role of the Commission is the same in both decision-making directions. It initiates infringement proceedings against Member States before the CJE and, with additional requests for decisions, intervenes in the preliminary ruling procedures initiated by the courts of the Member States before the CJE. In this way, the activities of lobbies and NGOs at EU level mainly aim to influence the Commission's decision-making. With the expansion of the co-decision powers of the EP, however, NGOs and lobby organisations have also emerged in this direction. For NGOs that use public and media reporting as a resource, EP public hearings and friendly MP presentations are also important. It is, therefore, a priority to put as many MEPs on your contact list as possible and to organise safe support (see the 226 MEPs mentioned above that were found on the Soros list by *Wikileaks*). Because of EP's codecision rights, MEPs are also important for non-public lobbying and NGO activities, and they are trying to win individual MEPs as lobbyists, as some scandalous public announcements have shown. [397] A total of five thousand organised interest groups or NGOs are represented in Brussels - of which 3,500 are capitalist interest groups and one and a half thousand NGOs, but many of them are one-person lobbyists who are, therefore, less efficient than larger-scale NGOs. [398] An example of the latter is the Open Society European Policy Institute (OSEPI) in Brussels, which nominates 19 people on its website. Therefore, the total number of Lobbyists in Brussels is increased to 20 to 30,000. [399]

In addition to this path of influence in Brussels, it is important for NGOs and capital-intensive lobby organisations to develop a degree of influence at the level of the member states in order to promote decisions in Brussels or Luxembourg. [400] In addition, it is important for NGOs at Member State level to set up a machinery for influencing, as national courts can send requests for preliminary rulings to the Court of Justice (ECJ) in addition to the Commission, which can extend EU law in certain directions. It is, therefore, important for NGO networks to be able to change the reluctance of courts in this area in the Member States and to feel that judges are "heroes of progress" if they can be at the centre of the preliminary rulings activities. As the example of Hungary has shown in recent years, judges who have been trained by the largest NGO networks in law schools, can "sensitise" in order to intensify such activities. But in the same way, the education of future generations of lawyers in universities by the staff of NGO networks can change, so that lawyers can undertake such activities with greater determination in the future. Since the Soros Open Society network works in all Central and Eastern European countries - grouped together under common umbrella organisations - without exception, it probably exists in other countries as well, although unfortunately no empirical studies can be found for this.

2.1. The Commission’s base of NGOs and Lobbies

Initially (1957-87) in the age of unanimity, the Commission had little autonomy in decision-making, so lobbying in Brussels was minimal and associations or interest groups tried to do that

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[397] Ernst Strasser, MEP, former Austrian Home Secretary (and also a Romanian and a Slovenian MEP) spoke in a video published by British journalists about five lobbying tasks for a salary of half a million euros.

[398] See Henry Hauser: European Lobbying Post-Lisbon: An Economic Analysis. Berkeley Journal of Internatioal Law. (Vol. 29.) 2011. No. 2. 686. p.

[399] For a detailed description of the lobbying work with current data and representations, see Cerstin Gammelin/Raimund Löw: Europas Strippenzieher: Wer in Brüssel wirklich regiert. ECON. Berlin. 2014

[400] For the possibility of making a change of direction between the multilevel decision-making influences (“venue shopping”), see Christian Kaunert/Sarah Lénard/Ulrike Hoffmann: Venue Shopping and the Role of Non-governmental Organisations in the Development of the European Union Asylium Policy. Comparative Migration Studies (CMS) Vol. 1. 2013. No. 1. 179-200.p.

in the capitals of the then six founding states and then in some of the acceding countries in order to influence decision-making processes. Only the majority decision mechanisms of the *Single European Act* in 1987 increased the importance of the Commission and a larger proportion of the lobbyist subsidiaries started to settle in Brussels. The Maastricht Treaty of 1993, then the Amsterdam Treaty of 1999, and finally the Lisbon Treaty of 2009 further increased the decision-making powers of the majority in the EU, including codecision with the EP, and in parallel, the number of lobby groups has increased by several hundred and grew to 7,700 in 2016, which were registered in the Transparency Register in Brussels.[401]

NGOs and lobbyists are trying to direct their decisions to the Directorates-General of the Commission, as Commission decisions and the Directorates-General below are responsible for drawing up the Commission's decisions. Each NGO or corporate lobby organisation thus builds permanent links to the DG, which is responsible for the topic of their work. However, since more than one DG is involved in most of the Commission's decisions, the NGO networks and lobby organisations with a really large Brussels apparatus and resources have mostly developed stable contacts with several DGs. One form of this is that their people participate in the advisory councils set up by the Commission. But even before the really outstanding decisions are made, even the leading politicians or top managers of an NGO network are directly involved in influencing the Commission, as Georg Soros' trip to Brussels in spring 2018 showed when supporting Article 7 - Procedure of the EP against Hungary was on the agenda, initiated by the Commission.

However, the ongoing influencing of decisions is organised at a lower level, as a 2013 study on the success of NGOs to support migrants shows (Kaunert / Lénard /Hoffmann 2013). The date is also useful because the numbers in this study apply to periods prior to mass migration in 2015, when these issues were not as controversial and, therefore, NGO activities in this area have not yet been disguised. The authors are following the development of two guidelines on asylum and migration (from 2004 to 2011) to assess the degree of influence of NGOs that support migrants. In these matters, the EU was only empowered by the 1999 Treaty, and this was only expanded by the Lisbon Treaty of 2009, or EP was included as a co-decision maker. The transfer of competences to the EU in 1999 even placed the settlement of the migration question in the third pillar and at the centre of the Council of Ministers of the Member States. By 2004, the Commission's monopoly on proposals had not even entered into force. The Member States did not have to fear the excessive influence of the migrant-friendly EP and the Commission, and the focus was on the intergovernmental Council of Member States. [402] Nevertheless, NGOs in Brussels have already been able to include some of their proposals in the final directive (Council Directive 2004 / 83 / EC). The increased activity of NGOs at both EU and Member State levels has resulted in these organisations being able to increase grants and increase the benefits and rights of migrants (e.g. the number of additional family members who are allowed to join the refugee in the name of family reunification). Based on their

[401] For changes in this sphere see: „Watson charts moderate growth from 400 EU interest groups in 1970 to 800 in 1991, but doubling to over 1600 in 1994". Henry Hauser: European Lobbying Post-Lisbon: An Economic Analysis. Berkelely Journal of International Law. (Vol. 29.) 2011. No. 2. 690. p. For the last years see as follows: „Overall, beginning of 2016, the Transparency Register contained a total of around 7700 regsitered entities. Chart 1 shows that the largest sub-set contains the private sector-lobbying activities ('direct lobbying') with a total of around 4000 firms and another ca. 1000 consultancies or law firms lobbying on behalf of other firms ('indirect lobbying'). Another 2000 NGOs are as well registered in the database. The remaining part of the Register is small and contains think tank, academic institutions and small number of oganiastions representing local, regional and municipal or religious authorities." Konstantinos Dellis/David Sondermann: Lobbying in Europe: ner firm-élevel evidence. European Central Bank Working Paper Series. No.2071/2017. 7. p.

[402] „In addition, veue-shopping to the EU-level enabled Interior ministries to largely exclude 'migrant friendly' actors such as the European Commission and the European Parlianment from the decision-making process." (Kaunert/ Lénard/Hoffmann 2013, 182. p.)

suggestions, an amended guideline was then drawn up in 2011. [403]

In the first case, the opportunities for NGOs were even more limited in 2004 and only the Council could be influenced, as the home affairs ministers of the Member States were fairly closely linked from home. However, they were able to submit some of their proposals through the Brussels Office of the Council and the Directorates General of the Commission concerning the first settlement of the migrant issue at that time. In particular, the *European Council for Refugees and Exiles* (ECRE), an umbrella organisation for asylum, founded in 1974, has been a successful lobby organisation on this matter, and its proposals have been reflected in the formal proposal for a directive that was finally put forward by the Commission: "With regard to goal achievement, at the drafting stage, ECRE was fairly successful. Its recommendations and the Commission's proposal for the Qualification Directive especially concur on the general provisions and the chapter that defines the qualification criteria for international protection, such as the provisions concerning non-states actor persecution." (Kaunert / Lénard / Hoffmann 2013, 190. p.). But only about a third of the NGO proposal was included in the final Council directive, these authors mourned in their study, and, therefore, NGO pressure aimed to change the directive that omitted their proposals. This was the case in 2011 when they were given a greater chance after the changes to the new 2009 basic contract, which were favourable for NGOs. At this point in time, eight migrant support NGO networks were already engaged, five of which were involved in the Commission's draft decision, and were later in the co-decision phase of the EP and then before the Council. [404] In the case of the Commission, they have been most successful - in essence, their proposals made up most of the Commission proposal - but only half of their proposals were included in the directive which was finally adopted by the Council and EP.

If this picture has a general validity - which is also demonstrated by the other analyses, even if not with so much detail - then, in addition to codifying the case law of the ECJ through the Commission's proposals, the NGO networks and lobby organisations are the key factors for the creation of the EU-law in Brussels.

2.2 The Organisation of NGO Influence around the EP

When approaching lobbying and NGO organisations around the EP, it is important to emphasise that, unlike the other EU institutions, it is not only important to influence decision-making here, but also to maintain close contact with MPs and group leaderships of the EP, as this can reach the European public and a public hearing of an EP committee can ensure a friendlier attitude of

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[403] This directive further raised asylum standard in the EU by introducing several changes, including the clarification of various concepts through the incorporation of recent case-law of the Court of Justice and of the European Court of Human Rights, measures to better take into account gender-related issues and children's interests in asylum assessment processes, the approximation of the rights granted to refugees and beneficiaires of subsidiary protection relating to health care and employment, as well as the extension of the period of validity of residence permits issued to beneficiaries of subsidiary protection in some circumstances." (Kaunert/ Lénard/Hoffmann 2013, 188. p.)

[404] „In the case of recast Qualification Directive, total eight pro-migrant groups were involved in the lobbying of the EU institutions. Five groups tried to influence the drafting of the proposal by the European Commisison - AI Europe, the CCOEMA network, ECRE, the Women's Lobby (EWL), and the Red Cross. At the decison-making stage, the European Parliament and the Council were lobbied by the CCOEMA network, ECRE, Terre des Hommes, EWL, Asylum Aid, and the European Region of the INternational Lesbian, Gay, Bisexual, Trans and Intersex Association, as well as Red Cross" (Kaunert/ Lénard/Hoffmann 2013, 191. p.)

the MPs through stable contact or at least reduce hostile feelings. The actual decision on certain topics is mostly made later and not in the EP phase, but lobbyists and NGOs with large resources and organisations try not only to influence the decision-makers, but also the actors who have a lasting influence on the EP public. This underscores the importance of the Soros network's list of 226 MPs, published by Wikileaks, and even if it does not have such a large and strong EP presence, the other NGO networks also have groups of friends and their lists. Due to the nature of the matter, this is more important of the two competitors - lobbies and NGOs - for the NGO networks, because the extensive EP publicity for NGOs clearly brings about a reinforcement. On the other hand, lobbying is inherently a way of secret background influence, but it is also possible to build a separate NGO wing of the disguised lobby organisation here and, this way, such lobbies can also appear in the public relations of EP.

The participation of NGOs in specific EU decisions is continuously reflected in the process of establishing regulations and directives, which were decided by the Council and EP in codecision procedures. This means a "legislative process" in the EU, in which the Commission has the monopoly to submit proposals and to submit their proposals to the Council and the EP simultaneously in the form of drafts. (The EP can only influence it by way of presenting an initiative to the current work plan of the Commission for the next year with the majority of its members and proposes to the Commission a draft regulation or a draft directive on a subject that is not covered by the original work plan of the Commission.) If the EP receives the Commission's draft, the responsible EP committee appoints a rapporteur for the draft resolution, and each EP fraction nominates its shadow rapporteur. Influence begins at this level, and it is up to NGOs and lobby organisations in the sector affected by the project to determine who should or should not be the rapporteur for the project. In addition to the search for public influence, the position of the EP on a draft is most often determined by the internal dominant positions of the relevant EP committee, in which, in addition to the president, the shadow rapporteurs of the large groups and the narrow circle of the group coordinators responsible for the committee play an important role.

The political groups appoint a political group coordinator for all EP committees from among their members, from whom the position of the group's leadership in ongoing decision-making is conveyed to the committee concerned, so that the group coordinators monitor the work of the committee in addition to the individual shadow rapporteur. In addition, according to the descriptions, the drafts received by the committee are first discussed in some committees by the group's coordinators and are included in the selection of the rapporteur, although this is the prerogative of the committee chairman. However, the shadow rapporteur is chosen by each political group coordinator on behalf of the political group from among the political group members of the committee (Neuhold 2001).

The rapporteur usually proposes amendments and additions to certain points in the draft, and then when discussing it with the committee, the final position of the committee as a whole will be achieved in the light of the solution proposed by the shadow rapporteurs or additional changes by means of a communique. Relevant NGOs and lobby organisations are present at all points in this decision-making process, and they mostly try to smuggle their suggestions into the decision, in particular by contacting the rapporteur and shadow rapporteurs, as well as trying to provide information on the (adverse) impact of certain points in the draft and propose alternative solutions that they believe are more supported by "professional" information.

If the EP adopts its position on the draft, it will be forwarded to the Council, which has already contested the draft received from the Commission. At this point, the Council will comment on the changes to the EP. If there is a contradiction, the Council's position on the draft will be sent back to the EP, where there will be a second reading as before and then repeated again before the Council. If the differences between the EP and the Council persist, a joint conciliation committee will be set up before third reading, in which the representatives of the

Council and the EP, with an equal number of participants, will form the common position. In order to give an indication of the frequency of the three readings, the year 2006 was mentioned when in 103 such codecision procedures between the EP and the Council, in 58 cases a codecision at first reading, in 35 cases at second reading and only in 10 cases a codecision took place at third reading, for which a joint arbitration board would have to be set up (Lehmann 2009: 60).

This decision-making mechanism involves people from NGOs and lobby organisations at all points in the process. Statistics recorded 70,000 officially recorded contacts between MPs and NGOs and lobby organisations in 2006, and this means one hundred contacts per year for each MP on average. Of course, this means that there may be many hundreds of contacts between rapporteurs, shadow rapporteurs on key drafts, committee chairs and committee group coordinators, while there are few contacts for ordinary MEPs.

The EP, like the entire EU decision-making apparatus, is trying to replace and demonstrate its lower legitimacy base and closer proximity to society than national parliaments by allowing a large number of NGOs and lobby organisations to get involved in the decision-making process. In addition, the technical knowledge and information required by the EP, which decides in a wide range of areas, can be gathered by the lobby organisations that would otherwise like to provide it. It is true that the information processing of the materials they provide gives an image that is chosen according to their interests and is, therefore, biased. However, if the MPs examine this together with information from the competing lobbies, these distortions can in principle be mutually corrected. This justifies the trend not only to strengthen the organisation of NGOs and lobbies in the EU, including the EP, but also to build new NGOs in part from the Union itself through a range of funding channels. EU donations in 1994, for example, promoted the creation of a *Platform of European Social* NGOs, an umbrella organisation that has since been used to mediate the mutual influence between the social NGOs it brings together and the EU institutions in Brussels (Cullen 2017). This has, of course, led to criticism from less generous EU-funded NGOs that these NGOs set up by the Commission themselves have no real social basis and that they can only take a critical stance on the legitimacy of the Commission and the EP and them. [405] Without ending this debate, it should be noted that the EP parliamentary groups' debate on NGO funding shows that although NGOs do exist in all policy areas and that their political objectives are pursued jointly with the EU institutions, EU-backed NGOs tend to be in the left hemisphere rather than in the conservative political camp. This may also be strengthened by the fact that in 2015, for example, a quarter of the EU's donations of EUR 610 million went to the 28 most important NGO networks at three migration organisations.[406] This impression was further reinforced by the attitude of the Greens and the Left to hide EU NGO funding data in a corresponding debate in the EP in 2017: "In a vote today the EPP group rejected attempts to keep NGO financing a secret. Hiding behind calls for transparency in this House, the Greens and the Left in the European Parliament wanted to prevent shedding light on the use of EU taxpayers' money in funding NGOs, in a report by

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[405] „However, EU social NGOs have been characterized as elite focused with weak link to grass root constituents and have on this basis discounted as significant agents in closing gap between European citizens and EU policy makers. Scholars also point to the EU funding and project support these NGOs receive as evidence of their co-optation and inability to maintain independence from EU policy imperatives. EU NGOs have also been categorized as lacking the critical distance required to mobilize for a radical shift in EU policy and of participation in consensus-oritented processes dovoid of substanitve opportunities for deliberation." Pauline Cullen: The Platform of European Social NGOs: ideology, division and coalition. Journal of Political Ideologies. (Vol. 15.) 2017 No. 3. 318. p.

[406] „The three largest beneficiaries of these commitments are the Danish Refugee Council, which accounted for 8.4%, Red Barnet Forening (7.5%) and the Norwegian Refugee Council (7,3%)." Roderick Ackerman/Elsa Perreau/Malin Carlberg: Democratic accountability an budgetary control of non-governmental organisations funded by the EU budget. Directorate–General for Internal Policies. 2016. 18. p.

Sven Giegold on transparency accountability and integrity in the EU. The Greens and the Left in the European Parliament are hypocritical when they call for all-encompassing transparency from MEPs and interest groups, but deny transparency in the financing of non-governmental organisations. (Press-Release 2017). The debate between the EP's left and right groups on EU funding for NGOs also shows that some of the NGOs that have been specifically set up and funded by some Commission DGs do not actually use this money to operate out of the field, but to use it in the EP and to influence the Council and COREPER. And this means, according to the debate, that left-wing NGOs are financed by the Liberals and the Greens, and on the other hand, that right-wing and conservative groups are calling for such funding to be banned. [407]

2.3. Opportunities to Influence the Council and COREPER

Alongside the Commission and the EP, the Council, which is made up of various ministerial formations, there is a third main institution in the ongoing decision-making process of the EU. There were about twenty such formations per cycle in the 1990s, but that number has been decreasing since the turn of the millennium and there are now nine such formations in the Council's framework. Formally, the responsible ministers of the Member States to Brussels decide in the Council, but in most cases a compromise is reached on the proposal submitted by the Commission in the preparatory process, and also in the case of the codecision procedure with the EP, and, in this case, the Council of Ministers signs the decision only without separate discussion and it is announced as a regulation or guideline. The decision-making forums before the Council consist of a three-tier hierarchy that culminates in COREPER, the permanent representative of each Member State in Brussels, under which there is a mediation forum for lower-level representatives and at the lowest level there are work committees of employees (attaché), of which the Commission's proposals are processed at first level, and the first instance tries to reach compromises between the Member States. (Saurugger 2009: 105-110; Hayes-Renshaw 2009: 84-86). The number of working committees is 250, which further divides the main themes of the ten Council formations. This concerns the attachés, who are either specialised experts who are permanently seconded to Brussels or only officials from the ministries of the Member States who attend the meetings in Brussels. However, this Council machinery in Brussels is not a single operating system since the governments of each Member State have different EU decision-making models at home, and this also applies to their departments in Brussels within this three-tier hierarchy.

In principle, the home organisation of the political will formation of the member states with regard to EU policy can be divided into three main models. Some countries (France, Denmark, Greece, Sweden and formerly Great Britain) have developed the centralised model, in which a separate general secretariat or supreme body has been set up, and this body organises meetings of the internal EU departments of the various ministries involved in the project to Discuss EU drafts and develop a common national position. Due to ongoing drafts and multiple discussions about individual drafts, the French SGAE (*Secreteriat general des affaires européennes*), for example, occasionally holds ten such sessions in parallel in this model, and this happens almost

[407] "The budgetary control committee is dicussing German MEP Markus Pieper's draft report on EU financing of NGOs, in which he calls for funding restrictions on organizations which „disseminate untruth" or use EU funds to lobby Parliament or the Council of the EU. At a recent closed-door meeting in Strasbourg of the MEPs working on the draft resolution, he faced pushback from Green and Socialist MEPs. „We will as Greens try to 'kill' this report as soon as possible" Belgium's Bart Saes told *Brussels Influence* describing it as „direct attack" on NGOs without any proofs of the lack of their transparency." Harry Cooper/Quentin Aries: Commission sides with Greens on NGO funding - How to lobby (and how not to). Politico 4/21/217.

continuously throughout the year (Saurugger 2009:109). In contrast, this system is decentralised in most Member States, with a department specialising in EU affairs in each ministry largely developing its own position. Finally, there is the mixed system, in which there is a certain degree of centralisation and fragmented will formation in relation to EU policies. [408]

These three models give different roles to the Brussels departments of the respective member states and thus to different lobbies and NGOs. In the centralised model, the position of the Member State is already established at home, and this only has to be represented in the working committees in Brussels, in COREPER and in the Council itself, and it follows that there is no longer any autonomous education of the Member States' bureaucrats in Brussels.[409] This also means the closure of these bureaucrats in Brussels for lobby organisations and NGOs, because lobbying for EU positions in the case of a Member State with such a model can only be successful in its capital. Large trade unions, chambers of employers and industry associations, but NGOs interested in cultural affairs, etc., lobby in Paris, London, Copenhagen, etc. for draft regulations and guidelines that are important to them. Due to the partially centralised feature, which is also available in the mixed model, the neocorporatist mediation system set up here in Germany and Austria is most heavily involved in lobby and NGO networks in EU capitals.

The largest participation of lobbyists and NGOs based in Brussels in council decisions is in the member states in which the decentralised model only defines the position of the member states in the relevant EU ministries, since this is only done at the official level without a uniform national political consultation. There is, therefore, still room to influence this and to change the original secret position, and it is important to know that there is a decentralised model in most Member States. However, the common position of the analyses in this regard is that it is much more difficult for the Council than for the Commission and the EP to successfully lobby and influence NGOs (see Saurugger 2009; Hayes-Renshaw 2009). One of the reasons for this is that the attachés here, the permanent representatives and their deputies for all the drafts received have access to the apparatus of the responsible ministry at home, from which they can receive all the information and therefore do not constantly receive information such as the Commission or the EP MPs are absent and so they do not depend so much on the specific information from lobby organisations. [410] The other reason is the constant replacement of attachés and the appointed permanent representative and their deputy by changing government, which means that the existing personal relationships, which are more important for lobbying and the influence of NGOs, are always interrupted at short intervals and they have to always be built from the

[408] The Central and Eastern European countries that joined in 2004 largely developed a variant of the mixed model and are generally more centralized in this area than most of the old Member States. But Slovenia, for example, turned more to a decentralized model, while Poland turned to a more central model: "In Central and Eastern European states there has been a pronounced tendency towards the emergence of distinct 'EU core executicves' who are separated from the rest of the administration. This is particularly due to the fact that negotiating accesion and ensuring legal transportation of the entire *acquis* needed t be cooorditated efficiently. (….) However, differences emerged even before accession. Thus while Slovenien EU affairs structures turned increasingly polycentric, the Polish government experienced a major shift towards a much more centralized approach in 2000 which included reinforced central and hierarchical coordination mechanisms. " Sabine Saurugge: COREPER and the National Governments. In.: Davis Cohen/Jeremy Richardson (eds.): Lobbying the European Union: Institutions, Actors and Issues. Oxford University Press. Oxford. 2009. 110. p.

[409] It was one of the consequences of the fact that in such a centralized model the position of the member state was agreed at home at the political level, which was only communicated to the permanent representations of that state in Brussels and one had to act accordingly. The minister traveling to Brussels has only a mere formal signature role, which is why some British ministers, for example, often did not travel to complete this formality.

[410] "Compared with the Commission and Parliament, the Council requires less information from private actors because it has greater opportunities to obtain information from national and local governments." Henry Hauser: European Lobbying Post-Lisbon: An EconoHauser, mic Analysis. Berkelely Journal of International Law. (Vol. 29.) 2011. No. 2. 698. p.

beginning.

Despite these difficulties, in addition to the capitals of the Member States, the organisation of constant pressure from NGOs and lobbying also exists in Brussels towards the Council's preparation for decisions, in particular towards the 250 working committees. Most of the Council's decisions are already taken in the decision-making forums, and, in many cases, the final agreement is reached in the working committees, which the Council ministers no longer vote on, but only sign the decisions.

2.4. Ways to Influence the European Court of Justice

It is important to see that strategic legal disputes between lobbyists and NGOs as well as their interference in the legal disputes of others through *amicus curiae brief* in the proceedings before the ECJ are made very difficult due to the fact that the pilot judgment process is not allowed as it is in the case of the ECtHR in Strasbourg. Influence on decision-making and the enforcement of legal changes in the member states through ECJ procedures and circumvention of the member states' laws are, therefore, only possible in an indirect way. Such detours do exist, however.

The main method of influencing NGOs and lobbyists is to initiate preliminary rulings before the courts of the Member States, which are encouraged in the directions set out in their proposals. This means that it is not the NGOs and lobby departments based in Brussels that are affected by the ECJ, but their subsidiaries in the Member States. [411] The tactic is to use certain parts of EU law as the legal basis in an action before a court in a Member State and to ask the court to send a preliminary ruling to Luxembourg to interpret the aspect that is important to them. Courts have discretion, but if influential NGO networks in a particular country have "sensitised" some of the judiciary to law schools, training centres, or already during legal education, it is likely that more judges will tend to comply with preliminary rulings. However, this can only be effective if an NGO network is able to build up specialised legal staff (lawyers and university lawyers), since only a large number of carefully planned legal disputes are really sufficient to bring about the desired legal changes through legal disputes. And a "*repeat player*" can only work effectively with large resources and specialised legal knowledge. Although there is no possibility of an American class action or the Strasbourg pilot judgment here in Luxembourg, the NGO lawyers can split the case into aspects so that every NGO lawyer bombards the same topic from different sides in their legal proceedings with their submissions and so ultimately the desired answer can be obtained through a preliminary ruling procedure in Luxembourg.[412]

The other way to combat the EU's judicial decision in favour of NGOs and lobby organisations is to use the Commission's machinery by working to open infringement proceedings against a Member State to force the Member State to change its legal policy. However, it is also possible that they will provide the Commission with information on their

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[411] Within the European Court of Justice, the Court of Justice (ECJ) has monopolized the right to a preliminary ruling as the main instrument for the judicial development of EU law, and this cannot be decided by the General Court, although the EU treaties do not provide for it.

[412] „Litigants also bring multiple suits simultaneously, with slightly different strategic effects. The ECJ has long had the habit of joining' cases, where multiple referrals come before it with the same fact pattern concerning the same EU law or action. The trends towards jining cases has increased significantly over time. (…) Sending multiple references signals to the ECJ the saliency of the issue to private litigants and also maximizes the immediate applicability of a legal change." Margaret McCown: Interest Groups and the European Court of Justice. In.: Davis Cohen/JeremyRichardson (eds.): Lobbying the European Union: Institutions, Actors and Issues. Oxford University Press. Oxford. 2009.97. p.

opinion on the ongoing proceedings before the ECJ, and this will direct this process in a certain direction. While in the previous way the branches of NGOs in the Member States will take the lead, the influence of the Commission in Brussels is exercised by the local branches in Brussels. However, for a particularly important decision by the Commission, the main personalities of NGO networks can go to Brussels to force the decision. In the event of the decision to introduce the famous Article 7 against Hungary, Georg Soros personally visited the most important people of the EU leadership in Brussels in early 2018. In simpler cases, however, it is enough to mobilise stable links in the desired direction between the lower leaders of NGOs and the Directorates-General, the EP Secretariats and the General Secretariat of the Council.

In summary, the influence of NGOs and lobbyists on the Court of Justice in Luxembourg shows that there are only indirect options here. In contrast to the possible direct involvement of other Union institutions, the CJE in Luxembourg can only be influenced by the courts of the Member States or the Commission. If we compare this indirect possibility of influence with the direct NGO influence on the functioning of the ECHR in Strasbourg outside the narrow Union, which largely supplements the EU power machinery, and we recall the common decision-making machinery of the almost symbiotic-like, intertwined ECHR and its NGO base, then the ECJ judgment a few years ago, which despite the provisions of the Treaty refused to bring the Union as a whole and its decision-making mechanisms under the ECHR, becomes particularly important. This would have placed the remaining areas of democratic political influence under the hierarchical human rights apparatus of Strasbourg and the NGO base, and we would now see the completion of the EU's legal policy, but not with Luxembourg but with the centre in Strasbourg and as we have seen the situation here is worse.[413]

[413] Of course, it should be noted that this positive assessment is only a legal assessment by an external observer and does not release the Luxembourg judges from criticism of an open violation of their judicial obligations. This apparent departure from the Treaty has generally been a feature of the Luxembourg judges, as our analysis to date has shown, and deserves general criticism. It should only be emphasized here that in this case, exceptionally, this generally negative type of assessment also had an advantageous legal policy effect.

Chapter 15.
EU-studies: A Criticism

In the years around the turn of the millennium, I discussed the structure and models of European integration in two studies, [414] and while studying the relevant literature, I always felt that these were mostly descriptions for the EU staff in Brussels or for the people who want to be the members of this comprehensive organisation in the future, and from these descriptions the various positions of the huge organisation into which they will enter and where they have their place and their function in it are represented. In short, I could not regard them as scientific literature, but rather like uncritical propaganda writings. Based on my previous extensive research, I was aware of the motivations for planning European integration that some European power groups started at the beginning of the 20th century, and the resistance that this effort created in the elites of each country and I studied the background practices and strategies against these plans. [415] In contrast, writings on the history of the European Union and textbooks in the universities largely detail all phases of the history of integration, as well as successive contracts and expansions, of how the long-awaited state of peaceful development and the prosperity of European states was realised after a long period of being constantly at war with each other, and consequently how the United States of Europe is gradually being realised due to the will of all European citizens. Likewise, integration as a fundamentally coherent legal system across the Member States only unfolds as a story that has been advanced by courageous court decisions in Luxembourg. The court decisions with almost coup effect between 1962 and 1964 on the direct effect and the primacy of Community law over domestic law were mostly mentioned only as a side event and as self-evident. Only enthusiastic descriptions but no critical analysis has been found in the official textbooks on the EU concerning other similar decisions of the European Court of Justice, from which European integration has been transformed from an international organisation into a semi-federal state. Despite all opposition from the founding states and their peoples (see the rejection of the European constitution in referendums after the turn of the millennium) they are only described in the writings of European studies as the content of EU standards, but the deeper legal and sociological aspects have already been carefully removed.

Fortunately, however, in the course of my current analyses, I have found writings in recent years that illuminate this lack of problematic "science" for European studies with specialist literature. This new research may have taken place in recent years because secret material about the treaties and negotiations that have led to European integration has been published over the past few decades, and with the death of key players in the history of integration, theirs private archives have become largely accessible in recent times. Some of the participants who were still alive could already speak and give researchers interviews about the "intimate" details. At the same time, the descriptions of the history of European integration as a“salvation story” have lost credibility due to the global economic crisis in 2008 and the catastrophic

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[414] See Béla Pokol: EU accession and Hungarian parliamentarism. (Az uniós csatlakozás és a magyar parlamentarizmus.) Pol tud Szemle 1998/12. 21-37.p.

[415] See in particular the relevant monographs by the international historian of political economy Kees van der Pijl „The Making an Atlantic Ruling Class. London. Verso 1984, and „Global Rivalries from the Cold War to Iraq,. Pluto Press 2006.

mismanagement of Islamic mass migration in 2015. The 2008 financial crisis that shook the world and the inability to defend itself against the influx of millions of Islamic migrants to Europe have shocked a significant number of elites in the EU Member States with the dangers of the disappearance of all European civilisation. In this change, the "courageous" judges, cosmopolitan heads of state and leading legal politicians, who were formerly viewed as "heroes" in the era of optimistic ideas of Europe, now appear to many as gravediggers of Europe, whose actions destroyed the sovereignty of the nation states and their internal cohesion were undermined by secret practices and covert machinations. In this way, while in the past more serious criticisms of EU court decisions and treaty changes that promoted federalism could successfully be presented to the public as the "stupid nationalism of the mentally limited" or "backward adherence to the ideas of old sovereignty", these criticisms can find greater support in the face of these dramatic new experiences.

The new critical scientific research on European integration that has developed in recent years has been particularly important to me from three academic circles. The most fundamental redesign of European studies ratings comes from a Danish group of historians whose members have followed this path since the turn of the millennium, but their research has been particularly accelerated by the opening of relevant archives after 2010. The central figures and organisers of the research here are *Morten Rasmussen, Anne Boerger, Rebekka Byberg, Vera Fritz* and *Jonas Petersen,* but their research continues in close unity with the research of the American *Bill Davies,* the Dutch *Karin van Leeuwen* and *Karen Alter.* [416] After the turn of the millennium, another group formed among French political scientists and sociologists, which, in contrast to their Danish colleagues, did not concentrate on the entire history of integration, but specifically on the organisation of academic circles for European law and European studies based on the theory of *Pierre Bourdieu*. Bourdieu describes the development of individual academic disciplines and their access to teaching as university subjects and thus to university departments and professorships as an ongoing struggle that can always be led to success by charismatic university organisers, clever tacticians and legitimising ideologies. In recent decades, the new academic and university organisation of European studies and European law has created a good area for the application of this theory. In this way, political scientists *Antoine Vauchez, Julie Bailleux, Michael Madsen* and others have been researching since the turn of the millennium to find out how the discipline for European law and European studies did this. From this it can be deduced to what extent the new organisation of the EU studies as an academic discipline was due to the internal work of professors in the relevant branches of science or rather can be seen as an external creation by the power groups of the European Community, which actually created their " own" academic discipline.

The third grouping in this area is a German political science research department within the Max Planck Research Network. The group's great old man, *Fritz Scharpf*, has been analysing and critically demonstrating the monetarist neoliberalism of European integration since the late 1980s and the fragmentation of the social network and state aid system that has arisen in many Western Member States over decades in the name of market equality. However, his pioneering work has been continued since the turn of the millennium by an entire team of researchers from the Max Planck Research Network. In recent years, dozens of studies and monographs have been published as a critical strand of European integration research, with the studies by *Martin Höpner, Sussanne Schmidt* and *Björn Schreienmacher* being the most productive and usable. Also well connected externally with this group is the renowned

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[416] The research team's research into the development and change in EU science up to the mid-1990s was well summarized in *Rebekka Byberg*'s dissertation, which was written under control of Rasmussen, see Rebeka Birkebo Byberg: Academic Allies. The Key Transnational Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993. Kobenhavns University, Det Humanist Faculty. PhD thesis. 2017. 142 p.

constitutional historian and former German constitutional judge *Dieter Grimm*, who has analysed and criticised the doctrines and plans for a unified federal Europe in several monographs since the 1990s. The following analysis of this chapter on ECJ case law and the EU's juristocratic power structure has largely been derived from the results of this critical research. In this chapter, I will primarily use the analyses that exposed the structures of the instrumental framework for academic discipline of European studies and European law. Based on their analyses, these academic disciplines, controlled by the Brussels and Luxembourg juristocracy, serve to legitimise and support the steps towards federalism and the constitutional basis, rather than to analyse them with a really neutral attitude.

1. The Initial State of Opposition between Federalists and Sovereignists

The resumption of the post-war period and the controlled integration of Germany - which was occupied and divided by the Americans - into European integration, as well as the creation of a larger market framework that was necessary for economic prosperity in a comprehensive European area led to the following dilemma: whether the United States of Europe should be created based on the US federal model, or rather a loose confederation of states would suffice. The strong national identities and the lack of a uniform supranational identity took the federation quickly off the agenda, and the 1950 Paris negotiations on the coal and steel community rejected the ideas created of some smaller, cosmopolitan intellectual groups to build certain federal-style community institutions. Proponents of these minority opinions did not disappear from the Community institutions, however, and persuaded some leaders of the High Authority - the highest governing body of the Community for Coal and Steel - to accept an interpretation, although this form of European integration was established under international law due to its structure, and it no longer corresponds to international law, but represents a specific legal system that reflects the characteristics of a real federal state rather than a mere international organisation. Consequently, the provisions of the treaties establishing the Community must not be interpreted strictly according to the methods of interpreting international law, but as the domestic law of a real state, emphasising the overriding principles and normative objectives and perceiving the treaty as a constitution.

In particular, *Michel Gaudet*, head of the legal department of the leading community institution, continuously advocated this turnaround, and the leadership of the High Authority convened a comprehensive conference in Stresa in mid-1957 to discuss this by meeting the most renowned professors of international law (Byberg 2017:15). The conference was a complete failure for those who advocated the stronger federal integration model, as senior international law professors considered it impossible for the European Community, an international legal organisation, to act as a state. This ended the federalisation debate within the Coal and Steel Community, but the same circles raised the issue again in the 1957 Rome Treaty negotiations, even though they were unable to advance the treaty towards the Federation.

The man of continuity was *Michel Gaudet* in the new and wider European integration community, who from the beginning of 1958 until his retirement in 1969 was the head of the Commission's Legal Department, which succeeded the former High Authority. The possibility for the Commission to force individual Member States through the Luxembourg court to implement certain measures made it clear to Gaudet that the urgent constitutional law of the Treaty would be a great opportunity for the Commission to carry out its tasks more effectively, and that would give the community federal characteristics. In order to bring the Member States more strictly under Community law, a constitutionalised interpretation of the founding treaties would be far more effective than treating them merely as international treaties. The main task

of the Commission's Legal Service was to continuously consult the European Court of Justice, make applications and guide its decisions in a specific direction with the official opinion of the Commission, and so Gaudet was at the centre of the struggle regarding federalisation and constitutionalisation of the basic treaties. He was already in a better position in this fight than under the previous leadership of the Coal and Steel Community, as the first President of the Commission, *Walter Hallstein*, now fully supported Gaudet's plans and gave him a free hand in shaping the content of the requests and gave Commission opinions before the Court.

The breakthrough in the reinterpretation of the Community's international treaties and their interpretation as a quasi-constitution was made possible by the Dutch constitutional changes in the 1950s (1953 and 1956). These have greatly expanded the longstanding monistic conception of international law and domestic law in Dutch international legal circles and not only monistically expressed the direct internal effect of an international contract signed by the Dutch state, but also the possibility of taking a monistic view of international law to apply to later rules. Contributing to this was the strong acceptance of the idea of federal Europe by the Dutch political elite in the post-war years, but also the fact that in Dutch parliamentarianism, the independence of the government from the parliament - with an interesting interpretation of the separation of powers - enabled the government's international treaties without recognising and enforcing parliamentary ratification. [417] This has created an extremely monistic position in the field of international law, which has also been involved in everyday political debates. This extremely monistic position of the Dutch constitution helped the legal department of the Commission in Brussels push the Luxembourg court towards the constitutional law of the Community treaty. Due to the monopoly of the Member States in the implementation of Community law, the Commission, in accordance with international law, was only able to force the Member States to implement Community law through infringement proceedings, which the Brussels officials have found to be inadequate over the years. [418]

It should be noted that in addition to the constitutionalisation of the basic treaties that Gaudet advocated in the Commission's Legal Service, the other alternative was to incorporate Community law into the regulations of the Member States through harmonisation of laws, by bringing Member State laws and regulations closer to Community law. This was the dominant trend among the majority of comparative university lawyers in the emerging associations of European Studies in 1958. However, Gaudet and the leadership of the Commission found that this was too slow, since they did not see the solution as slowly bringing the Member States closer together, but instead created a centralised European area by completely destroying the autonomy of the Member States. The excessive trust of the professors of European studies in the legislation of the Member States was seen as flawed by them, and was also attributed to the fact that the national courts at that point only sporadically initiated preliminary rulings to the European Court of Justice. Gaudet, therefore, also tried to put the self-assertive character and

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[417] For internal Dutch political debates on the possibility of international law entering into force in the early 1950s without ratification, see Carla Hoetink / Karin van Leeuwen: Dilemmas of Democracy. Early Postwar Debates on European Integration in the Netherlands. In Joris Gijsenbergh (ed.): Creative Crises in Democracy. Peter Lang. Brussels 2012. 183-213. According to the authors' analysis, because of the protocols of the early parliamentary debates, the desire for a federal European state in the dominant Dutch parties was so strong that the Council of Europe, its parliamentary assembly and its committee of ministers already wanted to reinterpret it as a newly founded federal European state.

[418] See Morten Rasmussen: Revolutionizing European Law: A history of the Van Gend en Loos judgment. International Journal of Constitutional Law (Vol. 12.) 2014. Issue 1. (136-163) 142. p. In einem späteren Teil seiner Analyse argumentiert Rasmussen, dass die Verhandlungsprotokolle zur Festlegung des Vertrags von Rom zeigen, dass die Verhandlungsführer des Vertrags zusätzlich zum Vertragsverletzungsverfahren die Möglichkeit des Zwangs durch Vorabentscheidungen abgelehnt haben: „Likeweise, the analysis f the EEC Treaty negotiations suggests that the elements in the *Van Gend en Loos* judgment, most imortantly the use of the preliminary reference system as an alternative enforcement mechanism, contradictetd the original design of the EEC Treaty.” (id. mű 146. p.)

the direct effect of the Community Treaty under the Dutch constitution at the centre of the European legal conference of 1963, which was already planned in The Hague, since it puts the emphasis on national courts instead of national legislation. In this way, the European Court of Justice could also be placed at the centre of EC decision-making (Rasmussen 2014: 144). In the case of Bosch (Case 13/61) from 1961, a preliminary ruling by a Dutch court in The Hague gave Gaudet and the Commission the opportunity to press the constitutionalisation of the Community Treaty. However, its current version at that time was rejected by the Court.[419]

The turning point in this area was then created by a double exchange within the seven-member European Court of Justice in 1962, and this exchange shifted the balance towards accepting what was urged by Gaudet. As can be seen today after the publication of the ECJ's internal decision-making process, the decision by *Van Gend en Loos*, which constituted a "judge coup" (or from another point of view: a joyful revolution), was given by the judges of the Court with 4: 3 hit. And there were the new judges among the four supporting judges, namely the French *Robert Lecourt* and the Italian *Alberto Trabucchi*. Before his appointment, Lecourt was a notorious federalist and a member of the Jean Monnet socialist circle. It was, therefore, a surprise that he was appointed judge by the Eurosceptic and conservative President *de Gaulle* and Prime Minister *Michel Debré.* He replaced *Jacques Rueff* in the Luxembourg Court of Justice, who was an economist with narrow economic prospects, and so he was not convinced to accept the concept of constitutionalisation of the basic treaties based on the Gaudet proposal. Although *Nicola Catalano*, who was replaced by Trabucchi, was also a determined federalist and, therefore, suited Gaudet's aspirations, his deepest opposition to the other Italian judge, *Rino Rossi*, made his participation in every decision a permanent personal duel and they could not be on one platform. In contrast, Trabucchi saw eye to eye with his Italian colleague immediately after he entered, and followed Trabucchi's position in the *Van Gend en Loos case*, as can be seen in Trabucchi's note on the case. (Personal circumstances and their contradictions were revealed in an interview by Trabucchi's employee, who was also a Catalano employee before the exchange.)

Of the seven judges, *Charles-Léon Hammes* from Luxembourg was the rapporteur for the revolutionary Van Gend case, who in his draft decision rejected the constitutional concept of the Commission and Gaudet with *Otto Riese* from Germany and *André Donner* from the Netherlands. The two new judges Lecourt and Trabucchi accepted this and were supported by two old judges, *Louis Delvaux* from Belgium and *Rino Rossi*, whereby the four judges formed a majority and the constitutionalisation of the basic treaties and the direct effect of EC law were declared. (Rasmussen 2014: 155). [420] It is true that, as a precaution, this decision did not use the phrase “constitutional law of the basic treaties” in the reasoning of the decision - this was only done in a 1986 decision - but they made it clear that they have decided against the concept of international law and its limitations and Community law has been declared autonomous. It has the nature of the *sui generis* legal system, which made it possible, in addition to certain specific provisions in the text of the basic treaties, to derive other norms from the general objectives and values of the community. Three of the six Member States at the time - Germany, Belgium and

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[419] „The legal service also made clear its general position on the direct effect - or self-executing nature – of treaty norms. It argued that the EEC Treaty was not a traditional international treaty, but had features of constitutional law, and independent institutions the decisions of which create obligations directly for citizens. As a consequence, the treaty had a presumption in favor of being self-executing. *This point was not taken up by the ECJ*”. (kiemelés tőlem - PB) Morten Rasmussen: Revolutionizing European Law: A history of the Van Gend en Loos judgment. International Journal of Constitutional Law (Vol. 12.) 2014. Issue 1.145. p.

[420] In addition to the four federalists among the seven judges, one of the two advocates-general at the time was undoubtedly a federalist and a constitutional beehive. She was Maurice Lagrange, who stood out in her academic writing before taking office for the following reason: “In academic writings and before the ECJ, advocate-general Maurice Lagrange likeweise endorsed European law as partly constitutional and closer to federal than to international law.” (Byberg, 23. p.)

the Netherlands - commented on the preliminary ruling by Van Gend en Loos and on the opinion of the Commission and Gaudet and rejected its coming into immediate effect. [421]

Although the French did not comment on the decision in this proceeding, a year ago they did comment on the limited jurisdiction of the European Court of Justice for the application of Community law by the European Court of Justice in the *Bosch case* on this issue. It is worth remembering this opinion as it shows well what the situation was up till then and what role the Court would have played in European integration if the 4: 3 ratio in Van Gend's decision had had the opposite sign : "The French position in the Bosch case was remarkably clear. The French administration believed the system of preliminary reference should not be used for circumventing the political process at the European level nor interfere in the application of European law in the member states. The ECJ should merely interpret European law at the general and theoretical level, whereas national courts which held the 'pleines compétences sur les faits et les moyens', should apply European law in the concrete cases. " (Rasmussen 2014: 155). If the opinions of the Belgians in the Netherlands are also analysed, further problems can be identified in this decision. They even complained that the application and the Commission's opinion submitted to them referred to the direct effect of the Dutch constitution, but the European Court of Justice is not empowered to interpret the constitution of the Member States, but to derive their decisions from the Community Treaty. (Rasmussen 2014: 155). This definitely shows that the world is changing, and the position of the Dutch government in 1962 was already in conflict with its federalist-friendly predecessors, who had enforced previous Dutch constitutional changes, which first led to the Van Gend en Loos decision and then to the semi-federal, Luxembourg case law that has been constructed since.

2. The Organisation of Transnational Academic Circles for European Studies

The groundbreaking Van Gend decision was followed by enthusiastic celebrations from some French, Dutch, Belgian and Italian lawyers and politicians who had long wanted this in their plans for federalism, but also started the ongoing debate and criticism from member states and national sovereign defenders. Those in power around the Commission's legal department, especially Michel Gaudet, who had been pushing for a breakthrough for many years, were aware that the vast majority of Member States' legal elites were against the new ECJ doctrine and that the Court of Justice and the Commission supported constitutionalisation and gradual federalisation of the community would have to win at least some of the legal elites. However, Gaudet very much remembered the fiasco in Stresa in the mid-1950s experienced by the leaders of the Coal and Steel Community, and he knew that international law professors were at risk of the ECJ's reinterpretation of the EC from an international entity to a federal state. Only the creation of supranational academic circles for European law and in European studies can create the legal basis for the semi-federalist EK and, through it, the gradual influx of legal circles within nations could be created, from which the missing legal basis can be made up, because without it, a reversal can take place at any time.

Gaudet, with his abundant financial resources, started this mission in two directions. On

[421] In the Van Gend case and earlier in the Bosch case, it was clear that four of the six Member States were against the trend reversal at that time - the Netherlands, Germany and Belgium in the Van Gend case and France in the Bosch case - and in the subsequent case Costa The Italians submitted a dismissive statement to ENEL. Thus, only Luxembourg, the small country, was the only member state that did not object to the turnaround at the national level, and this puzzles why the member states tolerated this "judge coup", which was not supported by their own legal elites. In Rasmusen's words: "In existing research on European law, it has been a key puzzle why national governments accepted this fundamental transformation of the European legal order." (Rasmussen, 157.p.)

the one hand, he wanted to bring the federation-friendly legal associations to the supranational level with an umbrella organisation that had already been established in their country by the more cosmopolitan circles of the French (1954) and then the Italians (1958), and he wanted this umbrella organisation to work closely with the commission's lawyers in Brussels and the judges in Luxembourg. According to him, on the way to a federal Europe, these cosmopolitan sections of the legal elite should be feared the least. On the other hand, he started funding a new supranational journal for European law from Commission funds and saw the dissemination of this journal in the legal and academic community in the Member States to solve the problem of the lack of an academic basis and a supportive background to the plan to federalise Europe. In addition to Gaudet's efforts, the plan for a third supranational academic background for European studies emerged in 1948 with the establishment of the Coal and Steel Community, and that was the plan for the European University. Finally, the European University Institute was founded 24 years later and after many attempts in 1972 in Florence. Although not a real university, but only a university institute, this could include many doctoral thesis programs, and it later took on much of the supranational federalist ideas developed by Gaudet and his allies in 1958. Let us now take a look at the path of these three institutions.

2.1. FIDE as a Background for European Integration

Association des juristes européens (AJE), founded in 1958, followed the example of the Italian *Association Italiana dei Giuristi Europei* (AIGE), which deliberately tried to unite the more cosmopolitan lawyers with a university background who rejected the nation-state organisation. The judges of the European Court of Justice who had federalist ideas were already active in them, and alongside them, *Michel Gaudet* from the Commission - or earlier from the High Authority - was always there, and when the Italian organisation was founded, he already recognised the possibility to organise them as the background of federalist plans against the legal groups that favoured the nation-states. He then encouraged the creation of a similar body in the other Member States using the Commission's legal services. Immediately after the Italian, the Belgian organisation (*Association Belge pour le Droit Européen)* was founded, and similar associations were founded in Luxembourg in 1959 and in the Netherlands in 1960, in which the then Dutch court president, *Andreas Donner*, took part together with the former Dutch judge, *Jos Serrarens*. Only the German section was missing, which was no coincidence, since it seemed difficult to integrate the German professors that propagated the international character of Community law with other organisations in the Member States that sought the opposite direction; indeed, a common umbrella organisation of all Member States with such setup did not seem feasible. Finally, under pressure from German Commission President *Walter Hallstein*, the German Foreign Minister persuaded the Minister of Justice to speed up the establishment of the organisation, and in the spring of 1961, the missing *Scientific Society for European Law* - WGE - was founded. This enabled the establishment of an umbrella organisation for all Member States, which was organised by the Belgian organisation at the opening congress in Brussels in autumn 1961. The FIDE (*Féderation Internationale pour le Droit Européen)* and its member organisations have already been able to provide an academic background and background information on constitutional law and the federalisation of the European Community against the majority of international law conceptions of Community law by the legal community of the Member States.

The beginning was marked by a harmonious cooperation with federalist European FIDE lawyers who were looking for future-oriented test cases for the judges in Luxembourg, positively disseminating the decisions of the Luxembourg judges and encouraging the national

judges to initiate preliminary rulings in Luxembourg. For example, the groundbreaking *Van Gend en Loose* case came from the Netherlands, and the Dutch affiliate FIDE also contributed to the preparation of the application. In the same way, hundreds of participants, including almost all of the Luxembourg judges, declared in a joint statement after Van Gend en Loos' decision at the 1963 FIDE Congress that Community law, in addition to having direct effect, also took precedence over the legal systems of the Member States should have in the event of a conflict. The Court was still cautious in the Van Gend judgment, but declared it in the 1964 *Costa v ENEL* judgment with the support of this FIDE statement. However, with the recent breakthrough of the Court towards federal structures, some affiliates disagreed, and this eventually led to a rift.

The first major divide was caused by the debate about extending direct effects beyond regulations to directives. This was one of the topics of discussion at the FIDE conference in Paris in 1965, and it was already overshadowed by the fact that the French, with the announcement of the "*empty chair policy*", were withdrawing from the intergovernmental institutions of the Community and were only represented at a lower official level (in the case of Council and COREPER). This has led to a stalemate among believers who have called for the constitutional law of the treaty and a move towards federalisation, and possibly also due to the fact that the declaration of direct effect on the directives met with resistance at the FIDE Congress in Paris. The majority rejected this, while a minority accepted it in a milder version. Accordingly, although a directive cannot be directly invoked in a dispute between citizens (horizontal effect), in the event of a dispute against the state, the direct effect of the directive and its direct application by the courts must be recognised. The conference participants were unable to make a joint statement on the issue due to disagreement, and the compromise solution was to send a committee to deal with the issue, including the former President of the Court and current judge *Andreas Donner*. This committee then drew up a general principle of law based on the spirit of Community law - the principle of *effet util* - and, in a position otherwise completely rejected by the FIDE Congress, found that this principle is the direct application of directives by the judges in the Member States Disputes justified in front of them. [422]

One of the implications of this coup-like resolution for the entire FIDE Congress was that the contradictions within FIDE became definitive, and, for example, the previously estimated plan to establish a permanent secretariat and thus a supranational FIDE centre was rejected. In the years that followed, between 1970 and 1974, the Court interpreted this resolution as support for at least some academic circles and explained the direct effect of the guidelines with a series of decisions, starting with the degree decision. This abolished the sharp distinction between the regulation and the directives created by the treaty and made the entire law of the member states directly subordinate to Community law. Contrary to previous leniency by Member States at the time of the Van Gend judgment, the Court of Justice now met with more resistance and the French State Council decided in 1978, on the basis of Article 189 of the Treaty, in the case of Cohn Bendit, that directives had no direct effect, and rejected the Court's case law. The French legislature went even further by negotiating a law - the Aurillac amendment - and it was passed by the National Assembly. This change would have prevented judges from pushing aside national law based on the directives and was required to disregard this directive. The amendment ultimately failed in political debates before the Senate, so it did not enter into force. However, the submission of the amendment to the Court has already made it clear that its unhindered progress could lead to a revolt in the parliaments over the years. Therefore, on the eve of the French legislative debate, shocked by the decision of the State Council, he withdrew from the degree decision in 1979 and retained the direct effect of the directives only against the

[422] „However, a special FIDE commission, for instance with Ophül and ECJ judge Andreas Donner was established, and it found that directives could in fact have direct effect based on the principle of effectiveness (effet util) of European law." (Byberg id. mű 80. p.)

Member States, but withdrew them from individuals.

The internal disintegration of FIDE and the lack of unified support from the Commission and the Court of Justice have cooled hopes of using FIDE as a supranational legal elite against the legal elites of the Member States. With regard to FIDE, the plan for a cosmopolitan lawyer organisation, which the federalist circles of Europe had been hoping for since the early 1960s, was abandoned, and with Gaudet's resignation in 1969, the new head of the Commission's legal department had discontinued the use of FIDE as a legal background elite. (Byberg 2017:92-93). However, Luxembourg judges still continued to participate in FIDE congresses for many years after this, both at home and at joint congresses of the umbrella organisation. Even so, this no longer meant the close connection between FIDE and the Brussels lawyers and the Commission that it had had in the years around its foundation.

2.2. The Creation of a Transnational Journal for European Studies

In order to overcome hostility to the constitutionalisation of Community law and to federalisation, FIDE and its affiliates seemed to give little support in their annual congresses and declarations for the federalist elites of the member states. Given the nature of the academic community, this appeared to be possible only through the continuous writing of journal articles, the distribution of these within the legal elites of the Member States, and thus the positive presentation of the progress of federalisation and constitutionalisation by Luxembourgish judges. Existing and established journals for international law and comparative law were in the hands of the "enemy", so that the writing and publication of studies and case law analyses to the taste of the elite of civil servants and lawyers from Brussels-Luxembourg only seemed possible through the addition of new European study journals. Some of them have emerged since the early 1960s, but they were French, German, or Italian, and only English, which became a common world language, provided the opportunity to play a truly supranational, cosmopolitan academic role in European studies. After their founding, Gaudet and some Luxembourgish judges also worked in the editorial offices of the journals for European studies for narrower language areas. [423] The main plan, however, was to create an English-language magazine. In addition to the world language primacy of the English language, this was also an anticipation of future English accession, but it even contributed to the fact that American law professors could be involved via the English language. This, in turn, spontaneously transfers the analysis of European integration into the field of American federal experience, according to the idea to which relocation was one of the main goals of the magazine.

Gaudet's plans ultimately failed due to the English-language magazine because the Commission considered it too expensive to finance a magazine. His old colleague, *Ivo Samkalden* from the Netherlands, an international lawyer and a leading fighter for European federalism, as a professor at the European Institute at the University of Leiden (and at the time of the parliamentary majority of the Dutch Labor Party as the current Minister of Justice between 1956-58 and 1965), was able to found the desired journal, the *Common Market Law Review* (CML Rev), in 1963. Van Gend en Loos' decision, which represented a breakthrough

[423] After the founding of the *Italian Rivista di diritto europeo* in 1961, *Donner*, the then president of the Luxembourg court, and *Pierre Pescatore,* who later became a Luxembourg judge for twenty years, were members of the editorial team. After the founding of the French-speaking *Cahier de droit européen* in 1965, Pescatore and Gaudet were members of the editorial team, and the *Revue trimestrielle de droit européen* began in 1966 with Gaudet and Donner, and only the *German European law* of 1966 lacked the lawyers of Brussels and Luxembourg and the editorial membership here was restricted exclusively to the Germans (Byberg 2017: 102).

in Community law towards federalism and caused enormous resistance, had been published a few months before the magazine was launched and later in the new journal, a study was published by the enthusiastic publishers Samkalden and his partner *Dennis Thompson*. They even preceded the radical justification for the *Costa v ENEL* decision, which was issued just a year later, and found that the Community legal order and the European Economic Community itself are special legal orders and that judicial interpretation in this area must use special methods of interpretation to achieve the political goals of the treaty. [424] The enthusiastic celebration of the breakthrough of the Luxembourg judges, and even sometimes the anticipation of the breakthrough, was then regularly featured in the CML Rev.. Furthermore, authors of critical studies of Luxembourg jurisprudence could always count on the hardest attack by authors and editors here.

The nature of the mere academic veil in the case of the magazine can also be measured by the fact that in the first ten years after it had been founded (1963-74), a quarter of all articles were written by Commission lawyers, which was actually the power word of Brussels bureaucracy, but were cited as an academic opinion. In addition, such plans were boldly and honestly discussed in the articles here, which the majority of the Luxembourg judges have avoided in their decisions. For example, while Luxembourg jurisprudence had ceased to describe Community law, which is separate from international law, as a "special legal system", the articles of the CML Rev wrote without hesitation that this European Community law constitutes a constitutional law over the laws of the member states. But *Pierre Pescatore*, a Luxembourg judge (also in the sense that he became a candidate from the Grand Duchy of Luxembourg from 1967 to 1985) who most firmly believed in federal development, wrote this in his 1970 article, and he declared in his article here that the European Community can be seen as a kind of federalism (Byberg 2017:105).

Since Michel Gaudet's resignation in 1969, CML Rev has been away from the Commission lawyer in Brussels for a while and was provisionally mainly organised around Luxembourgish judges. However, the connections were also restored in Brussels from 1974, when *Claus-Dieter Ehlermann* succeeded Gaudet. Ehlermann, a younger man who had previously pursued a university career, was even more agile than Gaudet in using the magazine as an academic background for the Brussels plans. He had even taken positions in other European study journals that were more in the languages of some Member States and he tried to include them in supporting the federalist efforts of the Commission and the case law of the Court of Justice. This was all the easier, as it became common in the early 1970s that the publishers of friendly journals for European studies and European law met regularly in the Commission's Legal Department in Brussels, as the Brussels equivalent of the Central Editors' Meetings from the Soviet era in Eastern Europe. (Byberg, 2017:107). At these meetings, Ehlermann also distributed the Commission's opinions on the current preliminary ruling procedures, which dealt with important questions, and asked the editors-in-chief to write kindly about them in the next issue of their journal.

The intensified contact with the lawyers in Brussels alongside the judges of the Court of Justice in Luxembourg was now important to them, since the resistance within the member states to the expansionism of the Luxembourg judges had increased since the early 1970s. But in response, the lawyers-bureaucrats in the guise of CML Rev and other magazines struck hard

[424] "The editors Samkalden and Thompson provided an enthusiastic support of the ruling in the first editorial, where they stated that the European Economic Community had a 'special character' and that 'unique' methods had to be employed in order to meet the political objective of the Treaty. Thus, the editorial anticipated the definition of European law as 'special and original', as proclaimed in the ECJ's ruling in *Costa v ENEL*, where the primacy doctrine was established, affirmimg that in contrast with ordinary international treaties, the EEC treaty had created its own legal system, which was an integral part of the legal system of the Member States". (Byberg 2017:104).

at the „insurgents" in their articles. A campaign was launched within the Italian courts at this point to avoid preliminary rulings and avoid the Court, but a study by CML Rev, *Cesare Maestripieri*, member of the Commission's Legal Department, called this heresy. However, the really tough fight against the pressure of the expansive Luxembourg jurisprudence on a federal Europe was started by German constitutional judges in the late 1960s. After the Luxembourg decisions, which led to an increasing subordination of the member states, and this case law was codified by the Community regulations and directives, a discussion in Germany began at the conferences with the participation of the judges and law professors that fundamental constitutional rights take precedence over Community law and are not subject to subordination. In response to and to suppress this, Luxembourg judges, in a preliminary ruling initiated by a German court, ruled that there are no exceptions and that even the most general principles of the Member States' constitutions cannot be an excuse to ignore the case law of the Court of Justice (Case 11/70, *Internationale Gesellschaft*). Added to this was Grad's decision to declare the direct effect of directives and to strengthen this doctrine through case law between 1970-1974, which, in some countries, provoked the most elementary opposition from judges and constitutional judges towards Luxembourg judges. In retrospect, this hard pressure was traced back to the time when the court under President *Pierre Lecourt* (1967-76) was superactivist, since neither before nor after such aggressive violations did the text of the treaties go beyond the norm and the Luxembourg judges used a more cautious, disguised wording.

The setback did not lag behind, and in 1974, the German constitutional judges stated in their so-called *Solange ruling* that as long as the Community Treaty does not contain a catalog of fundamental rights that is similar to the German constitution, German courts have the right to refuse to comply with Community acts. The CML Rev studies then predicted the collapse of the community for years and described the position of German constitutional judges as unacceptable. However, the German constitutional judges did not give in and in 1986, in their decision on the Greens - in the so-called *Solange II decision* - they reiterated the control of the German constitutional courts over Community acts, including Luxembourg court decisions. The change in their reasoning meant that they now recognised the constitutional nature of the community treaties, but insisted that the German Basic Law still had priority due to the lack of a catalog of fundamental rights and, in future, Community law will be controlled by the constitutional judges and will be used in the event of a conflict to declare a ban on its use in Germany. The Luxembourgish judge *Pierre Pescatore* - the most determined supporter of European federalism and constitutionalisation in the Luxembourg court - criticised this and was probably right when he wrote that the German constitutional judges actually defended their state's independence from the Community, and they argued with the lack of fundamental rights only as a disguise of the real reason. Since then, the possibility of a confrontation with EU law and Luxembourg judges has been claimed by almost all European constitutional courts, and the possibility of a confrontation was explained beyond the emphasis on fundamental rights with regard to constitutional identity and *ultra vires*. That said, Pescatore really raised this point because the real aim here was to defend the sovereignty of the Member States. However, just as the Luxembourg judges had previously given pseudo-arguments about their "coup" on the status quo in 1962-64, the contradiction of German constitutional judges with pseudo-arguments was raised. [425] The German constitutional judges later rejected the adoption of the constitutional character of the EU treaties and, in their decision on the Lisbon treaties of 2009,

[425] The honesty and frank reasoning with which Pescatore defended his federal position, which often goes far beyond the other judges, also gave him the adjective *„stormtrooper"*, but his strong criticism on the German constitutional judges showed the causes of this. See Bill Davies: Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ's Human Rights Jurisprudence. In: Bill Davies/Fernanda Nicola eds.: EU Law Stories: Contextual and Critical Histories of European Jurisprudence. Cambridge University Press. 2017, 157- 178. p.

declared them to be international treaties, and the European Union was again qualified as an international organisation.

CML Rev has always fought hard against these confrontations, and the position of the CJE and the Commission has been supported with academic writings by the editorial team publishing counter-studies and relentless critical reviews of lawyers in Brussels and Luxembourg. In addition, an editor from Luxembourg judges was brought in to ensure the effectiveness of this method. *David O'Keeffe*, an employee of the Luxembourg judge O'Higgins, became one of the editors of CML Rev. from 1985 onwards. From then on, he was not only responsible for the content of studies and analyses on Luxembourg jurisprudence, but he also acted as a moderator. When one of the Luxembourg judges expressed dissatisfaction with a published article, he immediately took steps to prevent such a matter. [426] CML Rev, as the academic foundation of European law, therefore pushed a particularly biased and tendentious theoretical background into the foundations of the emerging European studies community, but a number of studies later maintained a critical line against the further efforts of constitutional law in Brussels and Luxembourg. In the first decades after her departure in 1963, her almost all-Schreberling position alongside the Luxembourg judges and Brussels lawyers changed from the 1980s, despite all the control of O'Keeffe, and some really scientific writings appeared here. It may sound like a surprise today, but *Koen Lenaerts*, judge in Luxembourg since 2003 and President of the Court since 2015, published a study in CLM Rev in 1986 in which he advocated the international nature of the EC treaties. Such "blasphemy" would previously have been unthinkable here. [427] So this magazine, which was created especially for partisan purposes, played the role controlled by Brussels-Luxembourg longer than FIDE, but from the mid-1980s it also became a real academic forum.

The theoretical foundations of the academic community of European studies and European law have since reflected this partisan basis, perhaps unnoticed by most of its practitioners. This partisan justification and the biased theoretical background can be best understood if we consciously turn to the third foundation of the organisation of the cosmopolitan academic community, which is transcended at the transnational level as opposed to the academic communities in the Member States. As indicated in the introductory lines of this chapter, this is represented by the European University Institute (EUI) in Florence, which was founded in 1972 after 24 years of planning and trials.

2.3.Federalist University Institute over Academic Circles in the Member States

Max Kohnstamm was the former general secretary of the Steel and Coal Community and deputy chairman of the Monnet committee in the 1950s and became its director after the University Institute in Florence had been founded in 1972. In addition to securing links with the Brussels elite, the activities within the institute were no longer connected to him, but mainly to *Mauro Cappelletti*, who was the first professor that Kohnstamm appointed to the EUI's legal

[426] „In 1985, he was invited to become an editor, as his position at the ECJ would also enable him to provide a more up-to-date case law section in the journal. However, he would also serve as the link between the ECJ an the *CLM Rev.* in other ways, as he could report when judges were unpleased with articles. In 1990, he wrote to the associate editor Alison McDonnell that a specific article had been 'severly criticised by persons at the court, and that „we should be more careful about our screening." (Byberg 2017:111.)

[427] "A noteworthy exception is Koen Lenaerts, at the time professor of European law and privat international law at the University of Leuven, ECJ judge 2003-2015, and president o the ECJ since 2015, who insisited that the European Communities were institution of public international law, because of their creation by treaty. The fact that the content - as interpreted according to object and purpose - could appear to be functional equivalent of a constitution, was irrelevant in that respect". (Bybreg 2017: 114). Hogy Lenaerts aztán a luxemburgi bírówá,

department. (The other three departments were the Department of History, Politics, and Social Sciences and European Studies.) Cappelletti was a professor of comparative law at the University of Florence for many years and organised a group of university lawyers around him to sharply oppose the positivist tendencies of comparative law. He saw the comparison as a means of organising separate European societies and states in an increasingly unified state. Just like in the Middle Ages and at the beginning of the early modern period, the countries were only separated by formal state borders and, in fact, they implemented a uniform European culture and the law of *ius commun.* He was actually a real scientific activist trying to transform social reality in a certain direction and he was looking for scientific information only for that purpose. In his struggle against the circles of comparative university lawyers of purely scholarly interest - in his value judgment "positivistic" - he came into contact with American legal realists and, as a result, he also received a professorship in Stanford in 1970 while maintaining his professorship in Florence. He then got in touch with the EUI and became a professor and, from a political activist in comparative law turned into an organiser of the theoretical foundations of European law.

When he became more familiar with European law and European integration on the basis of American experience, he immediately perceived the European Community as an emerging federal state and found it important to involve Stanford colleagues from America in presenting such a perspective. To this end, he organised a conference of several days at the EUI in 1977 entitled "*New Perspectives for a Common Law of Europe*", at which he was able to invite both lawyers from the Brussels Commission, judges in Luxembourg and Strasbourg, and some famous American professors. This was the beginning of the monumental plan that was launched in the early 1980s, in which European integration as an emerging federation was presented in several major volumes. In these volumes, the increasing concentration and federalism that had occurred in the United States in the previous century were compared and paired in every aspect with the counterparts of European processes. Funding for the Brussels project was generous, but Cappelletti did not miss the Ford Foundation, which funded his earlier American research, where they enthusiastically received the promotion of European integration along the lines of the United States. Initially, the integration analysis in the light of American federalism was included in the name of the project, but, eventually, the finished volumes were published under the simpler name "*Integration by Law*". [428]

Cappelletti designed the research, gave the main impetus to present European integration as an approach to American federalism, and, with the involvement of American professors, ensured the dominance of federalist experience from the outset, but played only a minor role in real research management. After all, he also practiced comparative law only as an instrument for his political purposes, and, in his new area, it would have been difficult to cope with the enormous case law created by the Court of Justice in Luxembourg until the early 1980s and the internal complexity of the power structure in Brussels to master this mentality. So *Joseph Horowitz Weiler*, of South African descent, but with a degree from Western universities, came to him and applied for his doctoral thesis in 1978. His earlier studies on this subject showed Weiler's great willingness to understand European integration and European law, and his somewhat later study entitled "*The Community System: The Dual Character of Supranationalism*" earned him the greatest recognition among EUI leaders. Weiler later described his relationship with Cappelleti in his own words as the relationship between the "rabbi and his student", but, in fact, he was the one who taught European law Cappelleti when he returned to the United States in 1982 to teach European law there (Byberg 2017:129).

The main work "Integration through Law" was published between 1985 and 1988 in seven volumes with the participation of European professors for international law and European law,

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[428] In December 1977, ongoing research was titled "The Emergence of a New Common Law of Europe: Some Basic Developments and Instruments for Integration Considered in the Light of the US Federal Experience"

who are committed to federalism, as well as high-ranking lawyers from Brussels and American law professors, and contained a monumental representation with the image of federalist Europe and the quasi-constitutional character of its law. The EUI not only organised the production and publication of the monumental representation for academic communities, but also built up the cosmopolitan network of European studies and European lawyers with its doctoral training and extensive scholarship system from the abundant resources of Brussels and other friendly foundation funds. These fellows then disseminated the federalist representation of the European Community in the Member States in the same way as the previous disseminators of Roman law who were trained in Italian medieval universities in Roman law. In addition, for many years, the EUI had organised dozens of conferences in Florence but also at various European universities to better integrate its developed European concept of Europe into science. The involvement of American professors in the cosmopolitan academic community of European law and European studies has also led to the establishment of a research line on European integration in the United States from which a young generation has grown. This is how *Anne-Marie Slaughter, Walter Mattli, Alec Sweet Stone* and *Karen Alter* took up the research field, and, most recently, it has had an impact on the collaboration with critical European scientists.

However, the last crown for Weiler's work would have been the success of the European constitutional preparatory work started in 2002, in which EUI professors and researchers played a central role alongside the civil servant lawyers based in Brussels. Although the failure of the European constitution by rejecting the Dutch and French referenda has removed the federalist plans from the political agenda, but as *Alexander Somek* from Austria wrote in a study in 2012, the failure in the political field in the academic circles they created led to it to use the reformed legal concepts in the federalist spirit. [429] In this way, the concept of a multilevel constitution of federalism was also used for the European Union, and the EU was portrayed as a federation with the member states. At their conferences, comparative constitutional products, which were merely academic *de lege ferenda opinions*, were adopted as the "true European constitution", the upper layer of multi-level constitutionalism. The previous concept of international law was also rejected and began to call this law as „international constitutional law". This sometimes led to the later condemnation of the true state constitutions as a "violation of European constitutionality".

However, the need to tame the political use of the academic cloak has, after some time, reached this transnationally embedded academic community of European studies, as we have seen at FIDE and CML.Rev. Joseph Weiler, whose intellectual capacities and research are by far greater than that of Cappelletti, after the successful completion of his summarising volumes, from the 1980s had become increasingly bothered by the fact that a significant number of the people in his project were basically political activists with no serious scientific qualities. They lacked any critical attitude towards their intellectual products. For example, when the editors of CML Rev. 1989 asked him what to do with a critical study of jurisprudence by the Luxembourg judges ("maybe it should be rejected?"), he replied that it was necessary to publish because of the critical tone, since the problem with the articles in the magazine was that they had no criticism of the case law of the Court. But he also rejected the overly politicising nature of the EUI itself as a leading professor in the 1990s and benevolently took it for granted that Cappelletti's overly personal "idealism" and his love of human rights ideals had a somewhat

[429] See the wording of Somek: „Since nobody appear to belive any longer in a change of the world order by political means, scholarship is increasingly taking comfort from the academic equivalent of practical change, namely the re-description of social realities, If the world cannot be changed, you imagine it changed and pretend the work of your imagination to amount to the real. (…) The most ludicrous form of the re-description is the application of constitutional vocabulary to international law." Alexander Somek: Administration without Sovereignty. In. Petra Dobner- Martin Loughlin (ed.): The Twilight of Constitutionalism? Oxford University Press 2010. 286.p.

more normative attitude than necessary. It was at the expense of science, but also at the expense of democracy, because Cappelletti did not trust the "dirty and repulsive intrigues" of democratic politics, but thought noble goals were achievable along the way of human rights.[430]

2.4. Epilogue

Before we close this chapter, we should remind the reader of the final result in relation to European studies and European law, which were established by European cosmopolitanism over the member state scientific organisation and which had a decisive influence on the socialisation of the EU legal elite today. The German professor *Martin Höpner*, together with his research team, examined the special selection and pre-socialisation of Luxembourg judges (and their staff) and found that from the outset, the EU legal community had developed a specific internal activist ethos for the lawyer wanting to enter any EU position. Only those lawyers could hope for success and a permanent work position, who adopted this activist ethos and the associated conception of European law. And a Luxembourg judge can only be one who has spent many years in these circles of European lawyers, and who has been socialised into this activist ethos. The general legal ethos traditionally advocates the preservation of the existing one and the lawyer is always trained to resist any change of the existing law and to be persuaded only by specific arguments to do so. In contrast, the European lawyer is transformed by the afore-mentioned ethos into taking it as a norm to constantly seek situations leading to structural changes towards an ever closer European integration. In addition, as a member of the avant-garde of the legal elite, (s)he values this as the basis of his/her identity. Instead of general neutral legal thinking, it is normal for European lawyers to think in relation to the values that represent visions and to force the existing constitutional states in this direction. The Luxembourgish judges and their staff, as well as the members of the Brussels legal elite, were socialised by this missionary European legal milieu, but if this is not enough, only those can take a career who can fully adopt this activist ethos propagating an ever closer European concentration. In Höpner's words: „In einer ersten Stufe geht es dabei um eine Akt der Vorprägung und der Selbstselektion. Richter am EuGH wird nur, wer - in welcher Funktion auch immer - Teilnehmer des europarechtlichen Diskurses ist. Dieser Diskurs beherbergt einige Eigenarten, die ein spezifisches Vorverständnis von den Aufgaben und Funktionen des Europarechts transportieren und von denen die Richter bereits vor ihrem Eintritt in das Luxemburger Gericht geprägt ist. Dabei, so meine These, handelt es sich um Spuren ener rechtspolitischen Agenda, der an anderer Stelle in Reinform zu begegnen ist: in jener „monistischen" Linie des progressiven Völkerrechts, die nach Einhegung nationaler Souveränität in einen verbindlichen übernationalen Rechtsrahmen strebt." (Höpner 2014:11).

The extreme visionary activism of Pescatore, Gaudet and then the Capelletian - that Weiler retrospectively criticises on his way towards academic neutrality even if it is his legacy up till this day - has penetrated the European legal and European study communities and is now difficult to eradicate from these communities. The level of EU science is itself a problem in reforming the European Union, and reforming that science is perhaps the least expected when these reforms are launched. The problematic emergence of the European academic community as a whole, as shown above, answers the partisan and biased leadership of the institutions it has examined (the Court of Justice and the Commission) as well as the constitutionalisation of European law and the institutional systems that were originally enshrined in international law.

[430] Here is in wording of Weilers: „Weiler attributed this to Cappelletti's personal idealism, which made him belives in convergence of legal system and the higher law f human rights rather than the 'messy and oft ugly vicissitudes of democratic politics." (Byberg 2017:120).

In this way, the European Court of Justice was freed from the barriers of international law, and constitutional rectification enabled the freest interpretation of the judges of the Court of Justice and the leaders of the Brussels elite. Indeed, the increasingly expansive doctrines that developed in "EU science" were, in fact, mostly the works of EU jurisprudence itself. Knowing this background, *Anja Wiesbrok*'s testimony, for example, can be understood as proof that the writings are understood of European law professors and the jurisprudence of the ECJ as well as their constitutionalisation and presentation, in this way, are mutually reinforced and legitimised in the studies. [431] In many ways, this EUI "scholarship" system was simply the propaganda of Luxembourgish judges and was only launched on the orders of the Luxembourg and Brussels lawyer elites in the magazines and conferences they grew and funded.

[431] „Legal scholars have played a dual role in promoting the constitutional paradigm of an ever-expanding scope of directly enforceable residence and movement rights in the EU. First, by presenting the expansion of free movement rights as an inevitable outcome of the EU constitutional order based on directly enforceable rights, scholar have played a significant role in legitimizing the jurisprudence of the Court in the face of initial resistance form the member states. Second, legal scholars have been an important source for the Court of Justice in developing its case law in its areaa." Anja Wiesbrok: The self-perpetuating of EU constitutionalism in the area of free movement of persons: Virtuous or vicious cycle? Global Contitutionalism 2013 Issue 1. 125. p.

Chapter 16.
Legitimacy Problems of the EU Juristocracy

The European Union is an international legal formation that was created by an international treaty and not as a state, but its permanent existence over the member states united by the treaty means a superior machine of power that in many ways determines the exercise of power and decisions within states. In particular, by including EU citizenship in the Basic Treaty in addition to the citizenship of each country, the EU made a big step towards transforming it into a real state and it is increasingly becoming a semi-federal state. As we saw in the previous chapters, this has been the most important issue of power struggle within the political elites of the member states from the beginning. This raises the question of what arguments justify and legitimise this machinery of power over the Member States? Are there any such arguments in the ongoing debates about the functioning of the EU, and in theoretical considerations about the nature of the Union? The answers can determine the direction in which the EU must change its organisational structure in order to be legitimate in front of more than half a billion citizens.

Theoretical considerations regarding the necessity of legitimising states and their exercise of power did not emerge with some authors of state theory until the beginning of the 20th century, but justifications can be found, for example, in the early Roman Republic without explicit theoretical considerations. At that time, Agrippa's famous story attempted to justify the structure of rule, including the dominance of the patricians, in the withdrawal of plebeians who were dissatisfied with patrician rule, and explained the role of certain Roman social groups in this regard before the plebeians, and justified this with an analogy to the functions of important parts of the body. In the same way, any more stable state power in the course of civilisations had a way of justifying the assumption of power, such as the assertion of the divine nature of the pharaoh, of the emperor, or the justification of the power delegated by the gods as can be seen in the ceremony of papal anointing of the earthly ruler in the Christian Middle Ages. In the same way, Lenin's theory at the beginning of communist rule of the Soviet empire presented the legitimacy of the avant-garde that led to communism as a fulfilment of historical necessity. [432]

However, the question arises as to why this EU formation, which was created through international treaties and continually modified through treaty changes, has to be justified by special legitimacy efforts at all? It was created by democratic states so that its democratic legitimation also radiates this formation. This was certainly not a problem for the European Economic Community after it was founded in 1957, since after the Treaty of Rome was created by the Member States, all decision-making powers were in the hands of the Council of Ministers, which represented the governments of the Member States. Although the Commission has been chosen independently by the heads of state or government of the Member States, this body only has the right of initiative over the actual decisions of the Council of Ministers, and does not take decisions, although it has a monopoly in this regard and the Council can only decide what the Commission proposed. In principle, however, the Commission and the EU

[432] For a more detailed analysis of the question of the legitimation of states, see my book Political Theory, in the chapter VI.: Béla Pokol: Political Theory. Trilogy of Social Sciences III. Vol. 2006. 91-102. p.

power machinery do not have their own decision-making powers over the intergovernmental mechanism, so they did not have to be legitimised separately. The liberation of the EC and then the EU from full competence of the Member States was only achieved through a series of rulings by the European Court of Justice, and the ECJ proclaimed in 1962, then in 1964, the decisions of *Van Gend en Loos* and *Costa v. Ennel* the direct effect of Community law in the Member States in addition to their national law and its precedence over national law in the event of a conflict between them. Since the Treaty of Rome did not include an accountability mechanism for the Court of Justice and there was no lifting mechanism against this "judicial coup", the Community and then the European Union that replaced it began to act as an independent decision maker.

It quickly became clear that the European community and then the EU power structure, which exercised considerable decision-making autonomy, freed itself from and deviated from the democratic legitimacy of the governments of the member states. Since the modern form of legitimation developed in Europe and it became widespread in many parts of the world states that justification of state power can only be achieved through the election of millions of citizens, the debate on this topic has been termed a "*democratic deficit*". This debate, of course, too benevolently obscures the fact that no democratic deficit should have arisen in the power structure created by the Treaty of Rome, since it was originally driven by the interstate machinery of the Member States and was legitimised "from home". The deliberate wording of the democratic deficit in the debate on the European Community, however, was more to transform the parliamentary assembly, which was originally referred to as a delegate from the national parliaments, from a mere consultative to a real parliament. In the 1960s, MEPs confidently renamed themselves here and also achieved direct elections and the name of the European Parliament in the new founding treaties. However, this has not changed the fact that, beyond the peoples and national identities of individual countries, there is no single European people and no single European identity and, therefore, parties at European level that gradually emerge from national parties are only loose formations.

The debates on the democratic deficit, therefore, only mask the deeper struggle, since a significant proportion of the political elites in the Member States believe that there is no deficit here, but should only push back the power groups that want to transform the EU into a federal state and restore the original Treaty of Rome, namely to put the exclusivity of the intergovernmental structure created by the Treaty in the centre of the EU. In contrast, the federalist supporters want to make the European Parliament the main power and convert today's Commission into a government or make it dependent on the majority of EP. The long-term processes that have led to Euroscepticism show that the power of intergovernmental forces will increase in both the EP and the Commission, depending in part on how the balance of power changes after the EP elections in May 2024, but the ECJ will remain intact and the standoff is unlikely to be resolved. (It is, therefore, worth mentioning in brackets that due to the existence of this supreme judicial power, it is right to call the EU's power structure a juristocracy!) Therefore, in addition to call attention to the democratic deficit, let us also consider the other theoretical considerations regarding the legitimacy of the EU.

The answers to this question can be divided into four main trends. According to one answer, the EU institutions themselves largely only create abstract EU law, which is interpreted by the European Court of Justice, but the application of state sanctions is carried out by the member states and their courts, so that no legitimation at EU level is required (1)). The other admits the need for legitimacy because of the legal power of EU institutions, but gives legitimacy to EU institutions as a neutral arbiter over selfish power struggles between member states, who deserves recognition as the defender of neutral justice over the member states. The highest power of the ECJ also protects individual EU citizens from their own state, and, in this way, this juristocracy is legitimised as an administrator of justice (2). A third line of legitimation

reinterprets the justification for democratic elections and extends it as a mere input legitimation with output legitimation. The content of the output legitimation relates to the welfare growth created by the Union, to legal solutions to disputes between European countries instead of war, and so on, and instead of a democratic deficit, it emphasises the output side as justification (3). Finally, the fourth argument for legitimizing the power of the EU institutions considers the future vision at the beginning of European integration, which has shown European integration as the land of promise for European citizens (4).

1. A Juristocratic Confederation Together with a Number of Democratic Member States as a Solution to the Problem of Legitimation

In a critical study, *Willimam Scheuerman* examined the idea of *Hauke Brunkhorst* and *Jürgen Habermas*, which arose after the failure of the European constitution in 2003 and which dealt with the possibility of global governance without a global state, taking into account the possible legitimation of the EU (Scheuerman 2011: 75 -104). After Scheuerman's reconstruction, Habermas basically only followed Brunkhorst's analyses of the EU, which, in turn, was based on Kelsen's theory of the world legal revolution from the early 1950s. Scheuerman's reconstruction creates a specific EU legitimation basis for Habermas and Brunkhorst, from which he distances himself, but the structure of this issue of legitimation is clearly visible in his explanation.

The essence of this legitimation is that Brunkhorts and Habermas separate the individual government functions, and while the state administration and law enforcement function remains at the level of the member states (which must be legitimised!), only the legislative function will take place without direct compulsion at the EU level transfer. The latter essentially means that the fundamental treaties are specified by the European Court of Justice and, based on this specification, only the abstract EU law is created by the Commission, the Council and the co-decision EP. In this way, the EU is only an abstract legal apparatus, the law of which is applied in practice at the level of the member states and ultimately enforced under state pressure.

In this presentation, legitimation only requires the constitutional judgments of the European Court of Justice as the centre of legal machinery at EU level, while the executive decisions and ultimately the coercive measures of the Member States, which are subject to EU law, require democratic legitimacy and they undoubtedly have this legitimation. Brunkhorst and, in his footsteps, Habermas even readily recognise that the creation of EU law, which is shaped by the consensus of the member states at EU level, does not constitute statehood. In his opinion, the search for a federal state should be a misguided adherence to an old tradition of thought. [433] In today's intertwined globalised world, world government or regional governance like the EU no longer require statehood and sovereignty because, at their discretion, these concepts are only partially valid, which is no longer appropriate in a fully globalised world. These concepts have been partially reinterpreted and partially rejected by them, and, in recent years, at the discretion of the Western world, three-tier governance has been established that radiates from there around the world. [434] The world government is regulated by the United Nations and specialised world organisations, such as the WTO or the World Labor Organization, the ILO, etc., which bring about comprehensive human rights standards and their

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[433] Scheuerman ironically points out that even before the fall of the draft European constitution to implement federalization in 2005, Habermas was the main proponent of EU statehood in referendums (Scheuerman 2017: 88).

[434] See Hauke Brunkhorst: Legititamationskrise der Weltgesellschaft. Globale Rule of law, Global Constitutionalism. In: Mathias Albert /Rudolf Stichweh (Hg.): Weltstaat und Weltstaatlichkeit. Springer Verlag 2007. 63-107. p. illetve Jürgen Habermas: The Divided West. Cambridge. Polity Press 2006.

industry-specific standards. In this context, regional organisations like the EU form additional standards, which means that the human rights standards are specified at this level. However, in addition to the Member States (at least in the EU), individual citizens and legal entities are recipients of EU standards and EU rights, about which they can hold their nation states also accountable. At this level, however, this does not require an organisation with statehood, but a "confederation of states" that has been known in the past is sufficient. Ultimately, the lowest level belongs to the (nation) states and they have the remaining elements of sovereignty, but this level is under the control of the higher levels.

In William Scheuerman's criticism, however, it is clear that this picture is idealised and a number of tensions are hidden. The assumption that a constitution without a state (only in a loose confederation) is possible ‚contradicts the obvious tendency that if the member states disobey, the entire EU system can be put into question without a coercive apparatus (Scheuerman 2011: 82-96). Ultimately, this type of liberation of the EU from statehood (= monopoly-forced use) and thus from legitimation means nothing more than the uncertain floating of decades in the state of semi-statehood and this is presented here as a final solution. But if past prosperity and peaceful global economic conditions disappear (as they now appear), this could drag the bottom out from under it. So this explanation only shifts the answer to the problem of legitimation.

2. Exposing and Justifying the EU's Juristocratic Character

Jürgen Neyer follows Brunkhorst and Habermas in that he also regards the search for the EU's democratic legitimation as a bad question and answer, but he does not claim that the EU does not need legitimation without a violent apparatus, but only the member states that use coercive means. In his view, the EU has a high level of legitimacy, but has so far been searched in the wrong direction. The title of a study on the subject, *"Justice not Democracy"*, summarises its position. [435] In this context, he argues that ensuring justice in the relations between Member States and beyond guarantees the rights of individual EU citizens against their own state through EU courts and this is a specific basis for the legitimacy of the EU. Neyer is not concerned with the parliamentary elections in relation to the legitimacy of the EU, which must be debated here, because there is no such thing as European people; instead, there are at least twenty national communities, represented by national parliaments in a way that is never accessible to the European Parliament, but the abolition of dominance between weaker and stronger Member States and the decision of the European Court of Justice in their disputes turn power disputes into legal justifications. The arguments under the EU treaties and secondary EU law and in the EU replace the earlier power decisions with legal justice decisions. Likewise, the fact that EU law entitles citizens to legal protection against their own state means that the citizens of the Member States can demand a justification for the EU member state measures that restrict their freedom. And if this justification is insufficient, the EU court enforces the right of EU citizens to actual justification by annulling the state measure.

This is the basis for the legitimation of the EU, which Jürgen Neyer describes with a basic formula as "right to justification": "It is justice, not democracy, which is the appropriate concept for questioning and explaining the legitimacy of the EU. (…) In contrast to democracy, the notion of justice is not tied to the nation-state, but can be applied in all contexts and to all political situations, be the global economic structures, domestic election procedures or the EU.

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[435] See Jürgen Neyer: Justice, not democracy. Legitimacy in the European Union. In: Forst Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 14- 35. p.

(…) It relaxes the national-state focus inherent in the language of democracy and opens the way for reflecting about new means to facilitate legitimate governance. It is a critique of methodological nationalism and asks for new solutions to new problems. " (Neyer 2011: 14). [436] The right to justification as a legitimising principle essentially means that any measure restricting an individual or a private organisation in the EU (both at Member State and EU level) must be justified and that justification can be challenged before an EU court. And if the Court considers this to be insufficient, it declares it to be incompatible with EU law and ultimately imposes it by imposing a penalty (in the final stage of the infringement procedure). [437]

With this shift in focus, Neyer places the European Court of Justice at the centre of the EU's power structure, and this is in line with the real power structure that we have examined so far. Accordingly, effective EU law results from the case law of the European Court of Justice, in which the treaties are freely and fundamentally interpreted against the will of the founding states, which is essentially the constitutional adjudication of this Court. As a further effect of its case law, the Commission largely codifies the case law of the Court of Justice with its monopoly on the proposal of regulations and directives and submits it to the Council for adoption. The Member States could only act unanimously to amend the Court's decisions on the interpretation of the treaties, which is practically impossible due to conflicts of interest. Not only for this practical reason, but also formally, Luxembourg judges are insured against the questioning of this decision-making structure, which secures their highest power position, since the existing situation is also formally anchored in the basic contracts. Under Article 281 TFEU, the Council and the EP have the right to rule on an amendment to the Statute of the Court of Justice of the European Union under the co-decision procedure, but they can do so on a proposal from the Commission if the Court agrees. [438] Otherwise, they can rule on a proposal from the Court in this area, in which case the approval of the Commission is required before a decision can be made. In other words, the Court of Justice is indispensable for changing its decision-making mechanism, and, in this way, it is formally elevated to the role of the highest EU power because it is essentially free as it has been in the EU's founding treaties for over sixty Years of uncontrolled interpretation. That is why the EU, at its deepest foundation, is not based on the principle of democracy but on juristocracy. This means that the functioning of European societies and the changing of details in power struggles with legal or disguised arguments will ultimately always be decided by the Court.

Thus, with regard to the main power role of the Court of Justice, one has to agree with Neyer, but it has to be critically asked whether this structure of juristocracy is actually the

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[436] The articulation of the democratic deficit as a manifestation of "methodological nationalism" sounds innocent to the Hungarian ears, but it should be pointed out that the adjective of nationalism among Germans (especially in German intellectual life!) Has been synonymous with "Nazi" for decades . Although all topics are saturated with emphasis, this is above average in Jürgen Neyer's German intellectual environment, and the assessment as "methodological nationalism" essentially implicitly expresses the need for a moral judgment regarding the opposing debaters.

[437] See in wording of Neyers: "The idea of justice as a right to justification has the important strength that it is both emprirically and normatively sound. It is established on the assumption that we have a human right to demand and receive justification from all those individuals or organizations, that restrict our freedom. This does not necessarily imply that no limitations of our freedom are legitimate, but only holds that the legitimacy of any such intervention depends on the reasons that are given to explain it." (Neyer 2011:18).

[438] Article 281 TFEU "The provisions of the Statute for a Court of Justice of the European Union, with the exception of Title I and Article 64, may be amended by the European Parliament and the Council in accordance with the ordinary legislative procedure. The European Parliament and the Council act either at the request of the Court of Justice and after consulting the Commission, or on a proposal from the Commission and after consulting the Court of Justice." The text does write a consultation that leaves open whether the involvement of the Court of Justice means a right of consent or just a simple request for comment, but if at least once would result from an internal shift in power - e.g. after the EP elections in 2024 a binding interpretation by the Court of Justice to rule on the case when the Commission and a majority of the EP would confront the Court of Justice over its interpretation.

embodiment of justice or whether it is just a disguise of power struggles in which the dominant power groups fight while the masses of millions of Europeans are pushed back. This brings to the fore the dominant social groups, which may not have been in power through the elections, but have the resources of the intellectual and media sectors, and can, therefore, assert their interests behind juristocracy. I do not want to repeat the analysis of previous chapters on NGO networks established by some wealthy global foundations behind the ECHR and the EU institutions, so I will only refer to them. The narrative taken seriously by Neyer, according to which EU citizens have only been given the right and freedom to act against their own states by the Court of Justice and the ECHR, is already evident in the above-mentioned decisions of the „*judicial coup"* of 1962-64 (van Gend and Costa v Ennel) in which this emerged as an argument. In this narrative, Member States' rights were granted directly to citizens, and this was portrayed as a radical extension of rights. However, this obscures the much more important point that, instead of a system of Member State leadership that has been created and cyclically replaced by citizens in their parliamentary elections, an elite of judges not elected by them begins to make decisions about them, as well as the fact that their centuries-old National communities and nation states have started going down on the path of putrefaction.

For me, this one-sided, wrong argument gives rise to the argument that is often heard, and which has defended the trend within states in recent decades for constitutional courts to extend constitutional rights at the expense of legal rights, that constitutional judges only give new fundamental rights to citizens, and whoever goes against it can only be bad! In fact, what elevates an activist constitutional court from a simple level of legislative law to a constitutional jurisdiction by referring to a constitutional principle has once been removed from the scope of legally changing rights and the legislature will no longer have it from now on. In other words, it empties the scope of citizens' democracy and gives them a constitutional right, while, at the same time, takes away the democratic stipulation. Of course, this essential moment is missing in the narrative, and Neyer uses this narrative even if he legitimises jurisocracy rather than democracy.

3. Democratic but Relativized Legitimation: Input Legitimation versus Output Legitimation

In addition to the suppression of the legitimation principle of democracy mentioned above, there were lines of argument that wanted to keep this legitimation, but only in a weakened form.

In addition to the democratic legitimation in the member states, in which the state power depends on millions of citizens, the leaders of the highest power of the EU, the European Court of Justice and the Commission do not depend in any way (as the former) or only indirectly (as the latter) on elected bodies. Although the Council has democratic legitimacy with the ministers of the Member States, its decision-making powers are limited because the Commission has a monopoly on proposals before taking a decision. The problem of EU legitimacy was, therefore, primarily raised as a democratic deficit. [439] This was changed for the first time by *Fritz Scharpf*'s distinction from the conceptual apparatus of systems theory in the 90s, which reformulated the concept of democratic legitimation as input legitimation and also considered output legitimation as possible. [440] With this enlargement, it has become possible that the EU's power decisions can only be linked in a fragmentary way to democratic legitimacy, but that its arguments for

[439] An exception to this is Andrew Moravcsik, who despite a dozen critical studies describes the structure of the EU as a model of democratic empowerment. See Moravcsik: In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union. JCMS (Vol. 40.) 2002 No. 4. 603-624. p.

[440] See after several explanations, e.g. B. Fritz Scharpf: Problems-Solving Effectiveness and Democratic Accountability in the EU. Max Planck Institute für Gesellschaftsforschung. Working Papers Serie 2003. No 1.

prosperity and economic growth can be justified in front of millions of people. This expansion was already evident in the 1970s in analyses of the legitimacy of today's western democracies as a supplement to true legitimation, which was represented with the category of *diffuse mass loyalty*, which is, however, only brainwashing and distraction by public affairs in the consumer society. This is to say that only a lower level of satisfaction and acceptance is created, but not the level of recognition that legitimation requires. But in this reformulation, this negativity has already disappeared here and, as two members of an equivalent pair, the input and output legitimation stand side by side. [441]

In this way, however, they not only extended the proof of the legitimacy and worthiness of the recognition of the existing state power to the achievements created by power (welfare, consumption, etc.), but also limited the question of legitimation to the legitimation of the current state power. This narrowing becomes visible only if we focus on the fact that the legitimation debate originally dealt with whether the divine origin of state power and the consecration of the current new king through papal anointing or another Christian rite of the ruling dynasty were sufficient to do so to justify. Or, as it spread after Rousseau in the late 1700s and especially in the 1800s, only state power derived from the people can be considered legitimate. The elections were only a technical means of doing this, but in Hungary, for example, this democratic legitimation was literally not accepted by *Margit Schlachta'*s Legitimacy Party even after 1945. (In contrast to the two, the legitimacy of the Communist Leninist avant-garde for the legitimate leadership of society proclaimed the power of a state leadership that understood and applied the scientific laws of society and did not require popular elections!)

Since the turn of the millennium, the explanation of the power structure of the EU with this dual legitimation concept - input/output - has become common practice, and even if there are problems with democratic legitimation on the input side, this can be corrected accordingly with the performance legitimation on the output side. This was refined by a study by *Vivien Schmidt* from 2013, which introduced the *throughput legitimation* in addition to the two - by dividing the output side into two. These are indicators of the quality of the governance process - efficiency, accountability, openness, transparency, inclusion of the ruled people, etc. - and it summarises these indicators as a third side of legitimation. [442] In my opinion, however, this only answers the success of a particular EU government (Commission) in front of hundreds of millions of people as a subordinate question, but it does not answer the way in which the Union is managed and how it is identified. This superficial nature comes to the fore when a major global economic crisis or other global catastrophe suddenly pulls the soil out of the previously appropriate level of economic governance and welfare. It then becomes clear to what extent the masses regard the power over them as worthy of recognition in addition to everyday problem solving, and to what extent they feel strong in their identity with them so that they themselves

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[441] Claus Offe started criticizing diffuse mass loyalty instead of legitimation in the early 1970s and for me there was the key in Eastern Europe to formulate that in the early 1980s in the case of Kádár Hungary ("goulash communism") after the former tougher Stalinism, in which legitimation by the future of communism had already been given up, *legitimation by consumption* formed the basis of legitimacy. Even if the level of domestic consumption did not reach the level of the West, but its continued small increases since the 1960s - and especially with reference to the plight of the other surrounding socialist countries - this was widely recognized. (Since this part was removed from my first article in Valóság in Hungarian on this subject in 1981, I could only publish it as an article in the university magazine in German. See in Hungarian: Béla Pokol: Stabilitás és legitimáció. Valóság 1983 No. 1 13-22; and in German "Stability and legitimation. The reinterpretation of legitimation in Western sociology." Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Section iuridica. 26. tom 1984. 173-179. P. But in my analysis it was clear that it is not legitimation, but an addition to their lack.

[442] „Throughput legitimacy builds upon yet another term form system theory, and is judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and opennes to consultations with the people." Vivien A, Schmidt: Democracy and Legitimacy in the European Union Revisited. Input, Ouput and „Throughput". Political Studies (Vol. 61.) 2013 No 1. 2. 2-22. p.

can endure great difficulties. On the other hand, their tolerance was previously only for everyday comfort and what they thought about a state power worthy of recognition was suppressed.

The global economic crisis that began in 2008 and has yet to be seen to end - and economic analyses are constantly predicting even more serious phases in this area - as well as the already visible outlines of Europe's demographic breakdown and the EU's sluggishness against the influx of millions of Muslims, the previous level of diffuse mass loyalty to the EU has been resolved in recent years. Especially since the governments of the member states have already started to tackle these problems due to increasing mass dissatisfaction, and it is the EU elite in Brussels and Luxembourg that is blocking this due to their previous political practice and case law. This raises the question of legitimacy and the question is "Who authorised them to paralyse the governments that we have elected with a parliamentary majority ?!". On the one hand, the positive results of the Union will disappear and on the other hand, it will be irrelevant that the Brussels elite will otherwise discuss the plans with thousands of self-created NGOs and that the expenditure of the Commission and some of its Directorates-General will be transparent. As was the case with Kadarism in Hungary, it only lasted while this one-party system without real elections managed to make itself bearable by a so-called legitimation through consumption.

4. The Legitimation of the EU “by” the Future and its Eventual Decay

Joseph Weiler was not satisfied with the reinterpretation of democratic legitimation as the devalued input legitimation and the expansion of output legitimation did not meet his theoretical needs. Although he had been a star professor of the Brussels-Luxembourg lawyer-elite working towards a federal Europe since the early 1980s, and he had been a key player in the academic backing of the tandem between the Court and the Commission, and for several decades he had been moving towards a pan-European federation, following the failures that the EU suffered in this area, he pointed out with the utmost sincerity the internal contradictions and the baselessness of the entire project, which he had previously helped. After the failure of the draft European Constitution of 2005, in which Weiler had played an important role before the failure with the EUI lawyers in Florence, and the impact of the global financial crisis of 2008 on Europe, he considered the cause of the failure in several studies. As a young EUI researcher, he was involved in the creation, support and research of an increasing level of European integration with this institute from the second half of the 1970s, and he found that in the years after the millennium, the entire milieu of the EU aspirations had changed. The earlier milieu, which characterised the founding of the French and Italian associations for European law in the mid-1950s (mainly with members who had been socialist and communist partisans against the German occupation in the Second World War), was filled with the belief of a united Europe as a Promised Land. He saw this milieu as gone and this change has shown him that this is not just about the “democratic deficit” and that the output legitimacy that has been developed to cure it and express the EU's welfare benefits was more like the "circus and bread" method to please the crowds in dying Rome.

Except for a few smaller groups and countries, an ever closer European integration has not been called into question up till then. What caused this change and what has changed so far that the original ideal is no longer effective? - asked Weiler. His answer arose from the fact that post-World War II European integration promised to end the gruelling war between peoples and the highest level of hostility and hatred that had lasted for many years, and it proclaimed a prosperity perspective instead of deprivation and hunger. For the European elites, this was the land of promise, and everything that was wrong in their daily lives meant exceeding it and

reaching almost earthly paradise. With a view to Soviet ideology, Weiler saw the power of the Bolshevik avant-garde, which was legitimised by the future of communism, but also in the fascist Italian and German states he saw the legitimation with the visions of the future in front of enchanted masses. [443] In a vision of a wonderful future state, he even demonstrated legitimacy in the great European states of the 19th century. With this justification through future visions, these states have achieved widespread recognition. Against this background, in his opinion, democratic legitimacy was accepted for states only from the middle of the 20th century, but was only accepted by the European economic community, which was created without a state organisation and whose goals found the greatest support among the peoples and elites of the then Western European member states and the legitimation was spontaneously restored through future visions. Legitimation through the future ensured that the broad masses regarded the march towards ever closer integration as commendable. But when the goals were largely achieved, the hatred between the French and the Germans disappeared and the prosperity rose to unimaginable heights and the needy were also granted social benefits etc., this condition was obvious to the new generations, and the legitimation through which visions of the future have lost their appeal. In addition, the discrepancy between the promised ideal state and the distortions of everyday reality leaves only feelings of disillusionment and deception. The global crisis of 2008 and the stagnation of prosperity that had plagued the masses for years had completed the reversal of earlier positive relations with the EU. The rapid rise in Euroscepticism is only a superficial sign that it is really the deeper legitimation crisis of the entire integration project.

What way out does Weiler see in his diagnosis? We have to stop here because he has two writings for this problem from 2011 and 2012, and there is a big shift in the latter compared to the previous one. The first was given by him as a guest professor at the *Herti School of Governance* in a lecture and is available online as a study. The second was published a year later, which, in addition to an important insert, means the earlier one. The first lecture ends with a pessimistic statement that future legitimisations always are like this, and that the land of promise is necessarily only fragmentary, and is, therefore, always followed by a sober disillusionment. If it could, democratic legitimacy would help, but it has been lacking in the EU's historical past. In Weiler's words, "Democracy was not part of the original DNA of European integration" (Weiler 2011: 18).

However, in his 2012 publication, there was a major change that put the issue of legitimacy from Weiler in a completely different perspective. In the insertion here, he emphasises the role of the European Court of Justice in the constitutionalisation of the originally international community law and the institutions of the community (and later the EU). He points out that he does not want to criticise this and has pushed integration in the right direction, but that it has led to the overestimation of the unsuitable EU institutions (the Commission, the Council, COREPER and the EP). These organisations are only caricatures of true democracy, but the Luxembourg decisions of 1962-64 on the direct effect and the primacy of Community law over the law of the member states have constitutionally constituted these bodies for which task they were actually not suitable: "But can that level of democratic representation and accountability, seen through the lens of normative political theory, truly justify the immense power of direct governance which the combined doctrines of direct effect and supremacy placed in the hands of the then Community institutions? Surely posing the question is to give the answer. In some deep unintended sense, the Court was giving its normative imprimatur to a caricature of democracy, not the thing itself. "(Weiler 2012: 265).

Although Weiler expresses himself vaguely - he half criticises, half defends the

[443] Naturally, he emphasizes that, in contrast to the visions of communism and fascism, which led to terrible consequences, the vision of European integration was incomparably nobler and he did not want to exempt the two terrible systems (Weiler 2012: 256).

Luxembourg judges - he sees the causes of the lack of legitimacy and the current fate of the EU as well as the growing skepticism about European integration in the decisions of the European Court of Justice in 1962-64, which started the constitutionalisation and the federalisation of European integration. The EU cannot do justice to this, and even the global crisis and other crises (e.g. millions of migrants) question its successes so far, not to mention the future increase in wealth and security in question. The suffocation of legitimation by the future has given us no chance for decades to restore the old belief. This raises the question of how Weiler sees a way out after genuinely acknowledging the failure of the EU's constitutionalisation and federalisation project. Taken into consideration that for decades, he was the chief professor and then director of the EUI, which helped the lawyers in Brussels and the judges in Luxembourg, and acted as editor-in-chief of several European legal journals, one could almost regard his proposals as expressions of genuine repentance. In comparison, he now sees a way back to the return to nation states: "It will be national parliaments, national judiciaries, national media and, yes, national governments, who will have to lend their 'legitimacy' to a solution which inevitably involve yet a higher degree of integration. It will be an entirely European phenomenon at what will have to be a decisive moment in the evolution of the European construct, the importance, even primacy of the national communities as the deepest source of 'legitimacy' in the integration project will be affirmed yet again. "(Weiler 2012: 268).

Weiler's recognition that the "revolution" of the European Court of Justice in 1962 and the over-stretching of the entire institutional system of the EU towards federalisation have caused the entire legitimacy crisis can be clarified by the fact that today's dead end means an intermediate phase, i.e. the EU is a mixture of the semi-federation and the half-blocked, partially oppressed nation-state member states, and the dead end can only be removed by an eruption in either direction. Fragmented national identities and the lack of a single European people and identity only make this a realistic direction for the restoration of the sovereign nation-state, and the last sentences of Weiler's writings suggest this. He wants to achieve this by returning to nation states and letting them be the main protagonists who sincerely determine to create a federal Europe instead of only the Courts doing this. In contrast, it should be emphasised that if we have truly learned from the EU's failure to date, we must use the return to the 1962 situation and to European integration at the level of a European Economic Community. This is the only way to ensure that the EU will be fully functional again through intergovernmental mechanisms, and thus the democratic legitimacy that the member states are realising "from home" will also eliminate the crisis of legitimacy here.

Chapter 17.
The global Export of European Juristocracy

The European Union's semi-federal organisation across national states and their addition to the continental human rights jurisdiction were seen as a great success towards global control by global power groups, and these mechanisms have been exported to other continents. It has not succeeded in Asia, and only constitutional adjudication has taken root here, but in Africa and Latin America, these efforts to export have led to partial success.

The courts are at the heart of this semi-federal organisation, and they have only been completed by supplementing them with a Council of Ministers of the Member States or a Parliamentary Assembly. It is, therefore, worth focusing on the courts in the following analyses. The Court of Justice of the European Union (CJEU) and the Strasbourg Court of Human Rights (ECHR) largely fulfilled the hopes of the possibility of judicial control over individual states until the early 1980s. As a result, this type of regional court was used to unite countries into regional economic communities, and it used the establishment of human rights conventions and the establishment of human rights courts as a prerequisite for the control of countries by the great powers. Let us see these processes.

1. Clones of the ECJ and the ECtHR in Latin America and Africa

Looking at the experiences of the individual clone courts in general, it can be said that none of them has achieved the effectiveness of the European model - the CJE or the ECtHR - and a certain success can only be asserted in the case of the Inter-American Court of Human Rights. This was modelled on the ECHR and is attached to a human rights convention concluded by the states of the American continent. The Human Rights Court, affiliated with the African Convention on Human Rights, is only minimally active, which is also due to the fact that here in Africa the tribunals for economic country associations that were created under Western pressure - which were modelled on the CJE to deal with economic and related issues - are undergoing a transformation and they have been dealing more with human rights issues since then. Courts modelled on the CJE are generally characterised by little decision-making activity within their original function and either shift to human rights or limit their decision-making to a narrow area such as the *Andean Tribunal of Justice* in Latin America, where they are largely concerned with legal issues dealing with intellectual property and patent litigation. In the following, we first look at the ECJ's attempts at exportation to Latin America, which aim at human rights and semi-federal organisations, and then we look at it in an African context.

It should be noted that in Asia, unlike the very successful export of constitutional adjudication to some states, no major attempt has been made to export continental human rights courts or to found semi-federal communities, although this is sometimes heavily criticised by intellectuals. For the latter, the reason for the rejection is that it is not compatible with Asian values and mentalities, while those who support it deny this (Agostini 2015). The creation of

quasi-federations, which have been persistently experimented with on other continents, has neither progressed in Asia along the lines of the European Union, nor has it become in the semi-federal direction through the subsequent streamlining of the ASEAN (Association of Southeast Asian Nations) early free trade zone. The ASEAN countries founded the ASEAN Economic Community (AEC) in 2015. However, this remained at the level of the international organisation, since decisions of the AEC community have no direct impact on the legal systems of the member states: "Distinguishable from the super-national EU ASEAN has operated under the soft-law horizontal integration more than a top-down hard law approach. The result of this difference is the lack of ASEAN law's 'direct effect' to override domestic law. Although the Charter requires members to 'take all necessary measures' to implement ASEAN treaties, national constitutions are unlikely to be interpreted as granting such treaties self-executing. " (Hsieh 2017: 13). More recently, its further development within the framework of the regional comprehensive economic partnership (RCEP) has been based on many bilateral international agreements by the participants and not on the adoption of a community form of EU jurisprudence that enables a quasi-federation. Therefore, in the following, we will only concentrate on the analysis of global juristoctratic forms in Latin America and Africa.

1.1 The Latin American clone courts

(Latin American Human Rights Justice) The Latin American human rights jurisdiction can be seen as the equivalent of the ECHR in Strasbourg. Only 25 of the 35 signatory states have submitted to the Human Rights Court established by the 1969 United States Human Rights Convention, and the two largest, the United States and Canada, have signed but not ratified the convention. Apart from them, the small Caribbean island states with an earlier English colonial history classified this convention as a Catholic Latin American affair and they remained outsiders. The convention entered into force in 1978 with the eleventh ratifying state, and the seven judges at the *Inter-American Court of Human Rights* (IACHR) in San Jose, Costa Rica, made their first decisions in the early 1980s. In contrast to the European model, there is the *Inter-American Commission on Human Rights*, which is included in this system before the IACHR procedure and can be described as a preliminary dispute settlement forum, which initiates the procedure. Only when the Commission is unable to agree to the state accused of human rights violations to make amends and reorganise its legal system will this body initiate legal proceedings. The Commission is headquartered in Washington and its entire operations are influenced by the United States. [444] Before the IACHR, only states outside the Commission can complain to each other, unlike the ECHR, but indirectly, through the Commission, individuals can also initiate human rights proceedings through the IACHR. For NGOs, who are actually the driving force behind such procedures everywhere, this is only a small circumvention.

Another difference from the ECHR is that, in addition to making decisions on applications for human rights violations, the judges also have an advisory role, which in practice means that laws or even constitutional changes in the Member States are reviewed based on the IACHR convention or case law. The latter thus represents a comprehensive Latin American constitutional court and doubles the otherwise far-reaching domestic constitutional adjudication, which exists almost everywhere here. And the IACHR judges, who practice the

[444] Although the United States itself did not ratify the Convention and thus did not submit to the jurisdiction of the IACHR, the text of the Convention was such that any citizen of the United States Organization could be a judge, even if its state had not signed the Convention. From the beginning of 1979 to 1991, the USA was able to win one of the leading judges, Buergenthal, who was President of the IACHR for four years (see Hennebel 2011: 59).

most active interpretation of this advisory power, have tried in recent years to control the entire internal legal system of states. In the case of the ECHR, the model provider, attempts have been made to do this, but only with the help of the *Venice Commission*, but they have not even tried to determine the constitutional order of the European states. By early 2010, the IACHR judges had made a total of 120 judgments and twenty advisory decisions, but the number of judgments has increased in recent years.

Several Member States have objected to the IAHCR, which was converted from an international human rights court into a constitutional court since the turn of the millennium, and have rejected this type of decision-making as an unauthorised interference with their sovereignty. In essence, it is viewed as an instrument by the United States, which, despite failing to comply with the Convention, is trying to shape the internal politics and legal system of the Latin American countries through its global concept of power. Venezuela withdrew from the agreement in 2013 and several countries have initiated the withdrawal procedure in recent years.

(***Activities of ECJ clones in Latin America)*** For the Latin American countries, three alliances of the economic community type have been concluded since the late 1960s. The Andean region founded the Andean Community Court, the Andean Triubunal of Justice (ATJ), just a few years after it had been founded in 1984. The Caribbean Community of the Caribbean (CARICOM) (CCJ) started operating in 2005, while the Central American Court of Justice (CACJ) of the Central American Community was founded in 1994. However, more extensive activity could only be achieved by the ATJ, and the Caribbean Community Court, the CCJ, could only take over the jurisdiction over the small Caribbean islands, i.e. the former English colonies, from Privy Council in London. However, it has not yet been able to begin its original jurisdiction, Community jurisdiction along the lines of the European Court of Justice as the CARICOM Commonwealth Court, on the basis of which it was founded. The ultimate reason for this is that Trinidad/Tobago, the largest island nation in CARICOM, did not recognise the jurisdiction of the CCJ, but according to certain information, CARICOM itself was unable to establish effective economic cooperation in the region. [445] In addition to the small English-speaking islands, the economic community of the Spanish-speaking Central American countries SICA and a court revived in 1994 called CACJ have not been able to take any significant measures in recent years. Although the CACJ was able to make 70 decisions in the controversial community cases from 1994 to 2007 compared to the total paralysis of the English-speaking island court, the CCJ. Let us take a closer look at how the ATJ works in the Andean countries and what justified its founding and what prevented it from achieving the dominant power role of the exemplary European CJE. [446]

The Andean countries (Colombia, Bolivia, Ecuador, Peru and Chile and later Venezuela)

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[445] See internal tensions in the Caribbean economic community Michelle Scopbie: The Caribbean Court of Justice and Regionalism in the Commonwealth Caribbean. Caribbean Journal of International Relations and Diplomacy. (Vol. 4.) 2016. No. 1. 93-103. p. In an *Economist* article from 2012, CARICOM of the Caribbean island states is also described as a complete dead end of economic cooperation in general. *"The Caribbean Integration - centrifugal Force: Half a century of small islands with big egos."* The Economist Jun 2nd 2012.

[446] The following description of the difference in the style of the preliminary ruling before the ECJ and the ATJ is as follows: „As discussed in the introduction, scholars have identified national courts as the key actors in facilitating the expansion of the EC law and its penetration into national legal systems of EC member states. Moreover, national judges spurred by requests from self-interested litigants, referred provocativ questions to the ECJ, providing that court with multiple opportunities to expand the scope and reach of EC law. The willingness of national judges to apply the far-reaching doctrines that European judges developed in response to those questions legitimated the ECJ's expansive lawmaking and the transformed nanitonal courts into crucial compliance cnstituences for EC law. In Andean context too, national judges request preliminary rulings from their Andean colleagues and apply those rulings once the ATJ has spoken. But our analysis of cases, coding of ATJ rulings, and extensive interviews reveal that in practice national judges are mostly passive intermediaries who do not engage in an active dialogue with the ATJ. (Helfer/Alter 2009:912).

wanted to capitalise and accelerate industrial development by consolidating them into an economic community, but this process only stopped until the late 1980s. Then, as a result of the so-called Washington Consensus, they attempted to breathe new life into the undead community by dismantling national borders and acknowledging the pressure of global money capitalist patterns, and, in this way, market economy control was built in place of the state. The ATJ was founded by imitating the institutions of the European Economic Community and directly advised by the judges of the ECJ. In the first few years, the new court frequently adopted the ECJ's literary doctrine in order to transform the international economic community into an EU-compliant constitutional federation. However, the Member States' courts have been reluctant to do so, and, unlike their European counterparts, the ATJ has been ignored by some Member States (Bolivia and Venezuela), and mainly only the Colombian judges and some judges in Peru and Ecuador have some preliminary rulings transmitted, but these were almost exclusively the cases in intellectual property litigation. However, the questions raised for the ATJ judges also held firm to the literal interpretation of the Community Treaty and its secondary Community law, without the ATJ judges being able to constitutionalise the Treaty and expand the Community's wide-ranging jurisdiction.

Karen Alter and her research team counted and analysed 1,338 preliminary decisions from the beginning of ATJ activity through 2009, of which 96% were intellectual property decisions and of which they could present an image of the assessment based on the narrowest text (Helfer/Alter 2009: 874 -875). However, the judges of the ATJ answered rather reticently to some of the questions that could evoke expansive answers, and while their European counterparts formally explained the direct impact of Community law and its precedence over national law, they always related to national jurisdiction. These judges saw the convention they applied as an international treaty and not as a constitution of a semi-federal state. The researchers gave two reasons to explain the deviation from the European pattern. On the one hand, the economic community did not bring the success expected from the employees of large multinational companies to expand the scope of free trade between states and to push the boundaries of state regulation. On the other hand, behind the ATJ judiciary, the network of legal professors and academic researchers established by the Luxembourg judges and the Brussels Commission since the early 1960s, as well as the FIDE and the circles of the member states for European studies and European law, did not exist. Hundreds of publications that were disseminated and supported the extensive jurisdiction of Luxembourg judges and the transformation of the European Community into a semi-federal state did not exist in the case of ATJ. This background structure, according to investigations, is completely lacking behind the ATJ, although officials of the Andean Economic Community Commission began to grope around 2003 through the NGO *Comisión Andina de Juristas*, a subsidiary of the International Commission of Lawyers in South America. The situation at the beginning of this contact showed the researchers how much of this background organisation is still in its infancy. (Helfer/Alter 2009: 927).

1.2. The ECJ clones in Africa

The situation in Africa with clone courts rooted in Europe is similar to that in Latin America, which began there in the late 1970s, and in the late 1980s one or the other court actually started to work. In Africa it all started a few years later, and after similar problems, it only started to take action after the turn of the millennium. Here, too, a human rights court based on the model of the ECHR was set up for all of Africa and several economic communities, one in West Africa, one in East Africa and one in southern Africa, as well as a community court based on the model of the ECJ. For the sake of clarity, it should be noted that in recent decades, due to disputes

between the leaders of each African state and the pressure from various western states (former colonies) in several waves, economic communities have emerged in several parts of Africa that the states have sought to unite. Some countries have joined several regional economic communities in order not to be excluded from a community that ultimately turned out to be successful. However, some of them only stayed on paper, others started to function in some way, and only a few were able to carry out actual activities. The available studies have found it useful to process their operations in relation to this last round, so I will review them below. [447]

(The African Court of Human Rights) The African Court of Human Rights (ACHPR), which is annexed to the African Convention on Human Rights, was decided by African states in 1988, but the 15 ratifications required for its entry into force did not come together until 2004 and it was then that the court was set up. Eleven judges were elected in 2006 by the Executive Committee of the Heads of State or Government of the Contracting States, who then elected the Vice President of the Court himself for a two-year term and he was re-elected once. The latter occupy their full-time positions, while ordinary judges only take part in the work of the court whose seat was set in the city of Arusha in Tanzania. Since then, they have not had to work too much, and their first decision, a negative decision, was made in 2009, and then the first substantive decision was made in 2013. In total, only 74 cases were received by 2016, most of which were rejected, and only 25 cases were resolved. This is also because 30 states have ratified the Protocol to the Human Rights Convention establishing the ACHPR, but only eight have recognised the right of individuals and private organisations to initiate proceedings. However, the states that have the exclusive right to make an application in this way mostly avoid the court to resolve their disputes, and, therefore, this body hardly functions. [448] Just as most of the Latin American IACHR decisions on human rights are more of an international criminal nature and affect the cases of murdered journalists and opposition leaders, so are a small number of decisions and they do not extend to other areas of law under the guise of human rights. The future and precarious situation of the court can be seen in the fact that, before the substantive work began at the summit of African heads of state in 2008, it was decided that a broader African court of justice should take its place, which could take decisions on human rights cases. However, of the 15 state ratifications required for entry into force, only five have taken place so far, indicating its lasting ineffectiveness.

(ECOWAS court in West Africa) Based on the encouragement of Western powers, the independent West African states, which were recently freed from colonial status, adopted the Economic Community of West African States (ECOWAS) along the lines of the European Community in 1975. The court to be dispatched, the ECCJ, was not decided until 1991, and it took another decade for it to be set up. It was officially opened in 2001 in the city of Abuja, Nigeria. However, since only the Member States had the right to sue each other for violations of the free trade rules that they did not take advantage of, the 2003 ECCJ judges received the first case. This was submitted by a Nigerian trader because the closure of the Nigerian border with Benin violated his trading activities between the two countries. Finally, the judges who did not follow the courageous example of the Luxembourg ECJ judges rejected the application

[447] The following African communities have emerged for a complete list of all: for the whole of Africa *African Economic Community;* for the Eastern and Southern Africa *Common Market for Eastern and Southern Africa* (COMESA), and *East-African Community* (EAC), az *Economic Community of Central African States* (ECCAS), *Southern African Development Comunity* (SADC), *Southern African Custom Union* (SACU), *Southern African Confederation of Agricultural Unions* (SACAU), *Economic Community of West African States* (ECOWAS), *Arab Maghreb Union* (UMA), *Greater Arab Free Trade Area* (GAFTA).

[448] The eight states are Benin, Burkina Faso, Cote d'Ivoire, Ghana, Mali, Malawi, Runada és Tanzánia.

as an incompetent person without a factual decision. They have also been encouraged to do so by the Nigerian government in which the ECCJ operates. This government protested vigorously against the acceptance of a person's request, arguing that the provisions of the Statute on ECCJ do not allow this. Although the exemplary Luxembourg judges generally went beyond such arguments, the ECCJ judges in Africa were more cautious and accepted the arguments of the Nigerian government. [449]

However, the case has been exploited by subsidiaries of US-based international NGOs based in Africa and ECOWAS representatives, as well as ECCJ judges themselves, and after ongoing lobbying, the ECOWAS High Authority has a protocol in response to foreign pressure passed in 2005 that individuals can now apply to the ECCJ, but only on human rights issues under the African Charter on Human and Peoples' Rights. As almost all 15 ECOWAS member states are among those who have agreed to submit to the Pan-African Human Rights ACHPR, which will come into operation in the coming years, and have instead filed their human rights violations complaint with the ECCJ, this also contributes to the fact that the ACHPR has hardly been able to operate without cases since then.

In any case, the ECCJ has, therefore, moved to a human rights line rather than the original economic free trade issues between states, and it shows some decision-making activities here. On the one hand, this is due to the fact that trade relations between West African countries are minimal and that what is involved in this narrow circle is not clarified by the courts, but by direct negotiations between heads of state. On the other hand, human rights issues arise from an African political mentality that opposition newspapers and opposition party leaders find it difficult to tolerate, and, above all, from the wars between hostile tribal peoples that were forcibly united and attached to each other in the form of states, and the resulting massacres and genocides. While the jurisdiction of the economic community has finally died here, relatively numerous human rights decisions have been made since then. In the post-2005 period, the ECCJ judges have been making 50-90 decisions on human rights cases each year, and a cautiously wide interpretation has been introduced so that people who initiate human rights cases, and, in particular, the international NGOs behind them, can deal with economic freedom issues. To some extent, this also obscures the decline in their jurisdiction over the economic community: "ECCJ judges appear to favor giving private litigants access to the Court in both economic and human rights cases. We find a document seemingly prepared by the Court, that include a plea for access to justice for both West African traders and human rights victims. The ECCJ's statement is illustrative of a broader tendency among ECOWAS officials, advocates and NGOs to conflate human rights and economic freedoms. "(Alter/Helfer/McAllister 2013: 758). "Blood does not turn into water", that is how the ingenuity of Luxembourg judges works through the training of international NGOs in Africa, even if the role of the ECJ as a role model is only realised to a limited extent.

(Court of Justice of the East African Economic Community) The East African states did not

[449] According to a relevant study, the entire discussion took place as follows: "Nigeria responded by challenging the Court's jurisdiction and Afolabi's standing to bring the suit. The government argued that 1991 Protocol authorized only member states and ECOWAS institutions not private parties, to file complaints with the Court. Afolabi countered by invoking a provision in the 1991 Protocol that authorized govenrment to initiate proceedings on befalf of their nationals. The provision stated that "a Member state *may,* on behalf of its nationals, institute proceedings against another Member state." Afolabi asserted tghat the word "may" permits states to raise such cases but did not preclude the ECCJ for receiving applications from individuals. Afolabi also argued that ECCJ review of complaints from private actors was especially appropriate where a party is instituting action againts his Country. In such a cases, Afolabi claimed, the Member state cannot represent the party because the Member State cannot be both the plaintiff and the defender. Lastly, Afolabi invoked the principle of equity in the 1991 Protocol to support an expansive interpetation of the Court's jurisditional rules to allow individual acces." (Alter/ Helfer/ McAllister 2013: 756).

form their regional economic community (EAC) until 1999, following the European model, and their court was only put into operation in 2005. However, experience in recent years shows that they are gradually becoming more active. Compared to its West African counterpart, its structure resembles even more closely that of the European community. In addition to its court, the EACJ, it has a Community Parliament, EALA, a Council of Ministers from the Member States, supported by a Community Secretariat, in line with the model of the EU Commission. However, it is much more subordinate to the Council, and so the latter is the dominant organ in the continuation of the EAC, but above that the Head of State and Government (the Summit) is the ultimate determinant of the Treaties. [450] The EACJ was originally set up with only one chamber after it had accepted a petition by EALA representatives against the Kenyan government on a politically sensitive issue in 2006, which called into question the Kenyan MPs' election rules in the Community Parliament on a proposal from the Kenyan government. At that time, the number of judges was increased to 15 and a first instance was installed at a lower level. The latter currently works with six judges, with the Court of Appeal setting the second tier of the court with five judges.

Deciding on issues of almost constitutional importance makes the EACJ politically more important than its counterparts in West Africa, but overall they decide fewer cases, and since the beginning of 2005 there have been 60 to 70 cases a year. In addition, only 150 decisions were made, 62 of which were substantive (Apiko 2017: 8). It is typical that important quasi-constitutional cases are always resolved in the shadow of the threat that the judges' work can be terminated or cut if they do not find sufficient support against the negatively affected states in the other states. For example, they also faced more severe sanctions after their decision against Kenya, but the governments of Uganda and Tanzania stood behind the judges, which ultimately led to the Kenyan government resigning, thereby only increasing the number of judges and the said Organisation of a new court of first instance.

In the case of the EACJ, competencies developed somewhat differently than in the case of their West African colleagues. Here, disputes can be officially brought to the judges in disputes about economic community affairs - and this can be done by individuals or private organisations - but decisions on human rights have not been stalled here. In reality, however, judges have expanded their powers based on contractual provisions on economic freedoms and the rule of law, and, according to a relevant study, 90% of their cases concern human rights (Apiko 2017: 16). The judges are also being pushed in this direction by international NGOs who appear to be more active in East Africa. As private organisations can submit petitions in addition to the Member States and the Community Secretariat, these NGOs are at the forefront when it comes to EACJ cases. According to the European model, both the East African Law Society and the East African Judges and Magistrates Association and the East African Civil Society Organisations Forum Partner are in collaboration with EACJ judges and bring cases before them. The latter, for example, challenged the decision of the Burundian constitutional court before the EACJ with the PALU (Pan African Lawyers Union) in May 2015 to recognise the election of the President of Burundi for a third term as constitutional. Although the EACJ rejected the decision as overdue, it also shows the volume of the problems before it (Apiko 2017: 19).

(COMESA Court) In North Africa, the states that lie slightly to the east have joined together to form a free trade zone on the southern line and, after their founding in 1994, they also wanted to adopt the models of their jurisdiction from the Luxembourgish court of the European Community. According to the descriptions, however, this turned out to be impossible due to the political and legal environment and was then slowly classified as an official court for COMESA

[450] See Philomena Apiko: Understanding the East African Court of Justice. Paper presented at conference in European Centre for Development Policy Management. 2017. 2-8 p.

employees (Gathii 2015: 2). The study analysing the activities attributes this to the fact that it was not possible to set up background support structures that could have been seen in the case of the EACJ judges, and that there was no NGO support or lawyer association. There were simply no cases on more general business law or human rights issues, and, in response to complaints from COMESA employees, it was slowly becoming a mere civil court. However, if one looks at these, this also seems to be due to the fact that the judges pursued the narrowest interpretation of the contract and avoided all possible broad interpretations in their decisions. In addition, the Treaty establishing the Community provides for the exhaustion of legal remedies in each Member State for the admissibility of disputes, and this has been strictly followed by the judges here, rejecting requests for evasion, which has resulted in the expiry of non-duty requests (Gathii 2015: 13).

Overall, the total failure of this court, with its development in a direction opposite to that of the Luxembourg judges, is a good indication of what was important for a supranational court in Europe to achieve global juristocratic power. There is a need for: 1) advanced private capitalist groups who have an interest in building free economic and political alliances between states and who have strong foundations, institutes and apparatus that have been able to build close relationships and alliances independent of states; 2) There is a need for a global network of NGOs with which their subsidiaries have already networked the internal processes of each state. 3) In particular, there is a need for special NGO networks that, if possible, are already integrated into legal university education and the legal academy in each state. 4) In addition, the integration of these human rights NGOs into the judiciary and the training of their judicial academies is important in order to raise the awareness of the judges of the member states, thus connecting these judges with the human rights jurisdiction of the entire region and beyond the community judiciary, which encourages them to turn to the Court of Human Rights and Community Courts as many times as possible. Against this background, judges in national as well as regional human rights and community courts dare to become more active. Where in the above-mentioned African courts - but also in the previously analysed Latin American courts - these props were present to a certain extent, there was a recovery in their activity. Where this was lacking, as was almost exclusively the case with the COMESA court, the development of the role of the juristocracy remained minimal.

Let us now take a closer look at the positions that have emerged in academic circles under international law and in academics of international politics with regard to the nature of transnational organisations. This can help us to better understand our topic here, to encourage states to form regional economic communities and to set up courts next to them.

2. Theoretical implications

After analysing the above, we can see that the export of European patterns of supranational integrations and human rights conventions to the African and Latin American countries only works in part. Several analyses have shown why the countries concerned created them at all, even if they did not even ratify their important protocols after their establishment - or if they had not elected their governing bodies for years. These human rights conventions and regional integrations were created at the instigation of the great Western powers, including the United States, who combined aid delivery and capital inflow with their creation. But why were these supranational international formations and EU-modelled half-federations important to the West? If, in the case of human rights conventions, the prevention and restraint of African tribal struggles, which often lead to genocide, are given as the reason for the values of European humanity, it only has to be pointed out that European colonists have shaped their abandoned

colonies into independent states in such a way that they have deliberately united hostile peoples for centuries, such as Shiites and Sunnis in Iraq or Tutsis and Hutus in African countries. The massacres of hundreds of thousands in Rwanda, Iraq and a number of other countries were, therefore, largely the result of deliberate activity by Europeans. In a roughly similar era, in the 1950s and 1960s, the same Western powers established human rights conventions and then propagated them to Africa and Latin America in the 1970s and 1980s. However, the promotion of regional integration must be explained in the same way, since the countries of this continent were really important to the European powers only because of their natural resources and raw materials, and they could get them without integration because of their relations with the leaders of the individual countries. So how can these be explained?

It brings us closer to the explanation when we look at the debate that has flared up in recent years on the nature of international law in the research communities of international law and international relations. This was summarised for a long time - most recently by *Hans Kelsen* - in the question of whether international law is a law at all or just a collection of purely moral requirements. The question of the nature of international law has been redesigned in recent years, and the question is now formulated as follows: What is motivating states to follow the rules of international law? [451]Traditional international lawyers, as real lawyers, have only assumed that the answer may sound like the law is generally followed but is often violated, even under international law. In this way, it is not a real question for jurisprudence, which is concerned only with avoiding the logical contradictions in legal analysis. Since the beginning of the 20th century, however, the analyses of normative legal science have been supplemented by legal sociologists, and their analyzes increasingly looked at the origin and application of law and the development of its legal concepts from the side of the socio-political struggles going beyond. In this way, the community of professors of international law was supported by a community of researchers in the theory of international relations, mainly political science, and this started to go beyond the analysis of international law.

For their comparison, the individual theoretical directions were named as *realistic skeptics versus idealistic positivists* or the former as *"new revisionists"*. [452] In the multi-directional confrontation, it is now important to point out that *realistic skeptics* see the need to comply with international legal norms if they coincide with their self-interest and this includes for weaker states in the self-interest to do so. Traditional international lawyers are committed to a broad obligation to comply with standards without pursuing further calculations and develop this on a moral basis: *pacta sunt servanda*, contracts must be complied with. This stance then implied that *realistic skeptics* profess the greatest possible primacy of domestic law, while *positivist professors* of international law generally support interpretations that enhance the power of international law and welcome developments that suppress domestic law. The latter confrontation is also important because international law has undergone a radical change since the late 1940s and, in recent decades, the international ad hoc arbitration discussion forums in disputes between contracting states have disappeared and, in addition to the proliferation of multilateral international conventions, international courts of a permanent nature are increasingly being established, which not only separate themselves from states that have international treaties, but also create their own case law that interprets the conventions, but which is gradually going far beyond the original convention.[453]

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[451] See Oona A. Hathaway: Rationalism and Revisionism in International Law. Harvard Law Review (Vol 119.) No. 3. 1404-1443. p.

[452] On the camp of traditional international law professors, in addition to the Hathaway study cited above, see David Ohlin: The Assault on International Law. Oxford Univ. Press, 2015 .; or from the side of the skeptics Eric A. Posner: Some Comments on Beth Simmons's Mobilizing for Human Rights. International Law an Politics (Vol. 44.) 2017. No. 3. 819-831.p.

[453] Incidentally, the legal principle of *pacta sunt servanda* could no longer apply to most international contracts, since the case law of international courts that have grown beyond the contracts of states could never be

The increasing power of international courts over international law and over domestic legal systems has also manifested itself in the past few decades in the fact that, in the case of the two leading European courts, the CJE and the Strasbourg ECtHR, the litigation for individuals and organisations outside the States became possible. This pattern has been expanded and the adoption of this model has been established in international courts similar to Latin America and Africa, and a theoretical reinterpretation has been initiated that international law can also be viewed as international constitutional law over domestic legal systems.This soon gave rise to the assumption of a multilevel constitutionality among those in favour of these developments, according to which constitutional principles and norms prevail at the international level, and the constitutions of individual states only have scope for action within this framework, and the international law professor and comparative law groups have the right to control the constitutions of individual states.

This theoretical development and ongoing debates about it have been going on for many years since the early 1990s, but in recent years a different direction has emerged in the debates of international research communities in the United States and the weight of international law has increased. In the U.S. legal system, centuries of rigid separation of state branches of power have allowed large social groups to permanently occupy certain branches of power and, in recent decades, the judiciary has been under the constant control of liberal urban intellectuals and financial capitalist groups. By contrast, legislation remained largely under the control of millions of conservative rural masses. The search for more room for maneuvre in relation to the national laws of conservative legislation has prompted the law professors behind the liberal-democratic elite to promote the import of international law in order to partially free the related branch of the judiciary from the legislation. The fact that the link between this theory and the underlying political camp is not a mere supposition is also supported by the fact that it was created by a law professor who would then take up the position of Deputy Secretary of State in the president's left-liberal Clinton government and then after 2008. He also received a leadership role in the Obama administration. He is *Harold Hongju Koh*, who proclaimed the theory "*Bringing international law Home!*". [454]It can be said that this not only increases the power of international law through constitutionalisation, and not only does international constitutional law take precedence over the domestic law of states, but it also creates a different kind of legal creation besides legislation. The branch of justice can expand the norms of legislative law by incorporating the principles of international law or on the basis of the general rules of international law that are based on common law. In this way, state administration can also be in direct contact with international law outside the legislature of the state and incorporate certain international norms or principles into domestic law - or at least what they describe as such - without waiting for the legislature.

The general theoretical basis of this concept in Koh's theory is the *disaggregated concept of the state* instead of the traditional, uniform concept of the state. Indeed, he generalised this strategy by analysing the strategies for influencing states through global human rights NGOs so that these NGOs do not keep an eye on the individual state but bring their demands into the state by dividing them into individual state actors and then try to bring the norms thus introduced into the institution of national law as stably as possible. In other words, norms of international law can be achieved not only through horizontal efforts between states - and compelling some states to obey - but also internally through the vertical division of states: "I have suggested that if our goal is more internalized compliance, or what I have called "obedience" then attempted internalization, not coercion, must be the preferred enforcement mechanism. This suggests that the best compliance strategies may not be "horizontal" regime

anticipated as mandatory by the signed states. So the principle of *pacta sund servanda* no longer applies in this area.

[454] Harold Hongju Koh: Bringing International Law Home. Houston Law Review (Vol. 35.) 1998. 623-981. p.

management strategies among nation-states but, rather, vertical strategies of interaction, interpretation, and norm-internalization. " (Koh 1998: 677).

In fact, Harold Koh only drew theoretical conclusions from the decades of activity of global NGOs and presented the possibility of external influence and the definition of states that were fragmented from the inside out by the sharing of power. In my view, Koh's insight can be used beyond him to explain the international processes of the past decades. Since the years after World War II, some of the U.S.-dominated western elite has attempted to reinterpret and remodel a number of past state theory and international legal solutions and institutions in the light of their search for a world state. This, in turn, aimed to create the possibility of world powers to have a freer influence on the internal affairs of states and to reduce the restrictive effects of sovereignty. The unified power structure of the state is one of the inhibiting factors for the influence of external power. Instead of the legislative primacy of the former European states based on English parliamentalism, they gradually began to reinterpret the props of democracy to the division of powers according to the American model. The fragmented state thus became a synonym for the rule of law, and after 1990 all Eastern European countries liberated from the Soviet empire were encouraged in this framework by Western advisors of "transitology".

European integration, which was aimed at the creation of the United States of Europe by some Western European elites from the early 1950s, failed due to the resistance of the then dominant part of the elite. But with the help of the CJE, sovereignty was increasingly dismantled despite all opposition to this purpose and placed in a semi-federal framework. (See, for example, the referenda on the European Constitution of 2003 in the Netherlands and France.) All of this reflects what *Harold Koh* described at the time in his recipe and the vertical occupation of states that were internally dissolved by international NGOs and other actors.

In my opinion, this explains why the European human rights and semi-federal model was then applied to African and Latin American countries. The emerging elite leaders of the new independent states, who fear and rely on their sovereignty, would have found it difficult to influence them if they had not been addressed "vertically" by the courts of comprehensive human rights conventions and regional community courts, as well as by NGO networks. In this way, the pluralism of power in these states can be shaped somewhat from the outside, and in this way, also the agents of the global power circles can be brought into the institution. And in human rights and regional courts, these agents and the subsidiaries of their global NGOs can always count on background support while they are essentially controlled by global powers.

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