New Developments in Constitutional Law

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Essays in Honour of András Sajó

Iulia Motoc, Paulo Pinto de Albuquerque
and Krzysztof Wojtyczek

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Word from the Editors

András Sajó is certainly the most prominent intellectual to have ever served on the European Court of Human Rights. On 23 April 2017 his term of office has ended. In 2015, we took the liberty to create an editorial committee in order to publish in his honour a *liber amicorum* written by friends, colleagues and disciples.

The difficulty of publishing *mélanges* and *Festschrifte* in law is that they tend to become more and more loose sets of contributions on each and every topic, devoid of any common thread. We decided to give the *Liber Amicorum* for András Sajó a different character by proposing to the authors to focus on a more specific topic. We must concede that given the breadth of scholarly horizons of András Sajó, it was not easy to identify a single theme for a book in his honour. Every choice necessarily leaves out the representatives of other branches of law, in which professor Sajó was active, who would have wished to contribute. However, after reflection, we have chosen to invite the authors to write about the most recent transformations of constitutional law, with a special emphasis on its Europeanization and internationalization. We wish to thank here all the contributors who responded to our invitation and submitted their contributions. We apologize at the same time that the present volume is unable to offer the opportunity to authors from several other fields to participate.

We are glad to present to the readers this collection of contributions written by scholars from many countries and various legal systems. We would like to stress that within the framework of the broad general theme of this project, each author was free to propose a specific topic and devise the methodological approach considered as the most appropriate to tackle the issues under consideration. Such an approach reflects the existing methodological pluralism in the field of constitutional law. In our view, the present book is not only a homage to an outstanding scholar but also a reflection on the recent developments in constitutional law.

Iulia Motoc
Paulo Pinto de Albuquerque
Krzysztof Wojtyczek

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András Sajó: A Scholar, a Judge and a Citizen

András Sajó was born in Budapest on 25 March 1949. He graduated from the Eötvös Lorand School of Law in Budapest in 1972 and from that year he linked his academic career with the Institute for Legal and Political Sciences of Hungarian Academy of Sciences, starting as a fellow in the field of constitutional law and achieving the different academic degrees in Hungarian academic system: candidate in legal sciences (1977) and doctor of legal sciences (1982), the rough equivalent of the German *Habilitation*. In 1983, he became a senior fellow at the Institute and was later appointed as a scientific counsellor in this institution. From 1979 to 1999 he worked, in parallel, as an associate professor and a professor of law at the School of Economics in Budapest. In 1991, he participated in the creation of the Central European University in Budapest where he served as the first dean of the Law Faculty (1991-1992) and from 1992 to 2008 worked as professor and held the Chair of Comparative Constitutional Law.

The breadth of András Sajó's field of academic research is impressive: human rights and constitutional rights, Hungarian and comparative constitutional law, administrative law, business law, environmental law, law and economics, sociology of law. He published major contributions in all those areas of legal sciences. His scholarly works address issues as various as emotions in constitutional law and corruption in post-communist states, independent regulatory agencies and the "dark sides" of human rights such as the abuse of rights, Holocaust in Hungary and the representative role of constitutional courts, the concept of militant democracy and the technicalities of the telecommunication law. His voice was particularly strong when he critically addressed the issues of welfare reforms in Hungary and of the judicial activism of the Hungarian Constitutional Court during the first years of democratic transformation. Among the topics that especially lie at his heart, one has to name judicial integrity and independence. His work had an enormous influence in his own country opening new perspectives in legal research, reinvigorating the legal science after the collapse of communism and inspiring the young generation of Hungarian scholars. Just one example to illustrate this point: he introduced the economic analysis of law to Hungary during the dark days of communist dictatorship and despite the hostility of the communist party.

Professor Sajó is renowned across the world as one of the most outstanding contemporary scholars in the field of comparative constitutional law. His polyglotic skills open for him the gates of many legal systems. Given the richness of his contribution, it is not possible to summarize it in this short introduction. Let me only point at two books. One is his masterpiece, *Limiting Government: An Introduction to Constitutionalism* (pub-

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lished in 1999 in English by the Central European University Press), which received an enthusiastic welcome from the academia in the world. The other is one of the numerous books that were written under his direction (co-directed with Michael Rosenfeld): *The Oxford Handbook of Comparative Constitutional Law* (first published in 2012 by Oxford University Press). This is a reference book for all scholars in the field of comparative constitutional law. Reading András Sajó's clear, refined and exceptionally well argued discussions has always been a great intellectual pleasure.

His scholarly recognition is attested by the fact that he is a member of the Hungarian Academy of Sciences (associate member in 1995 and full member in 2001) and of the American Law Institute (since 1997). Membership in numerous scholarly associations reflects a broad spectrum of scientific interests: Association Internationale de Droit Économique, Internationale Vereinigung für Rechtsphilosophie, International Sociological Association, Research Committee on Industrial Democracy. Professor Sajó taught as a visiting professor at the most prestigious American and Canadian universities (including New York University, Columbia University, University of Chicago, Cardozo Law School, State University of New York, Yale University and Toronto University). In 2006 he received the prestigious Hungarian Prima Prissima Award for an outstanding contribution in the field of science.

András Sajó is not only a scholar but also a judge, a manager and a man of action. In 2008 Sajó was elected judge of the European Court of Human Rights in respect of Hungary where he served until the end of his term of office in 2017. In 2015, he was elected vice-president of the Court. He was certainly one of the most influential judges of this Court, able to see so such much more than anyone else in the cases under consideration. His separate opinions not only display a very refined legal approach but first and foremost advocate a *pro homine* approach in human rights adjudication. They show a great sensitivity to injustice and distress. They often trigger and enrich scholarly debates. Freedom of speech and personal autonomy are the values promoted by him with special endeavour. During his years in the Court, Judge Sajó, by his personal example always taught us what the highest professional standards mean, and defended judicial integrity and independence.

Great scholars are rarely good managers. Dean Sajó is undeniably an exception to this rule. His managerial skills are at the origin of the creation and the success of the law school at the Central European University. His efficiency as the vice-president of the European Court of Human Rights and president of the Fourth Section of the Court was due to his managerial skills. In the Court, he devised advanced methods of case management as well as a prioritization policy.

András Sajó's birth almost coincides with the seizure of full power by the communist party in Hungary. At the age of seven he experienced the hopes that begot the Hungarian 1956 uprising and the hellish scenario of the Soviet invasion and repression. For forty years he had to endure the communist dictatorship with all its hardships. Personal ex-

perience of daily life under the communist rule, during the democratic transition and in a liberal democracy have certainly had a decisive impact on his intellectual formation, which is one of the reasons of his broad-mindedness in comparative law. The collapse of the totalitarian regime in 1989 opened new possibilities of action. Professor Sajó is one of the "founding fathers" of the democratic Hungarian institutions. He was a member of the Constitution Drafting Committee in 1988-1989. He drafted the Hungarian environmental legislation in 1991-1992, chaired the Broadcasting Drafting Commission in 1994 and served as a Legal Counsel to the President of the Hungarian Republic in 1991-1992. He has always been a citizen deeply engaged in the public affairs and caring for the common good.

András Sajó is also a top-class liberal intellectual and a *citoyen de la République des lettres* who has authored several novels. He is a man of convictions: he fights for what he believes is right and does not avoid addressing the most controversial issues debated in modern societies. In this context, one has to stress his engagement against death penalty. He was the founder of the Hungarian League for the Abolition of the Death Penalty and for many years acted as the spokesman of this organization.

Finally, we would like to add a few more personal tones. It was an honour and privilege to sit with a man of such a stature on the bench at the European Court of Human Rights and it was a great pleasure to work with him and to enjoy his company. He always presents his views and presides meetings with great tact and diplomacy. We agreed on many issues and strongly opposed on many other but due to his respect for divergent views intellectual clashes never impacted personal relationships. His extremely sharp and perspicacious mind and extensive erudition are now stuff of legend. But above all, he is a warm, obliging and sensitive person full of personal charm and an exceptional sense of humour.

Iulia Motoc
Paulo Pinto de Albuquerque
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1 The Contribution of the Venice Commission to the Internationalization of the National Constitutional Law on the Organization of the Judiciary

Sergio Bartole[*]

1.1 Introduction: Implementing the Separation of Powers

The principles and the standards of the national law on organization of the judiciary are part of constitutional law concerning the structure and the machinery of the powers of the State. This aspect has become evident in the history of the constitutionalism, even if judicial organization has had developments that have kept it separate and distinct from the other branches of the State's organization in view of ensuring its independence and autonomy. As a matter of fact, from a general and abstract point of view, the internationalization of this chapter of constitutional law could be studied with regard to both the organization of the judicial bodies of the international or supernational institutions, and/or looking at the organization of the national judges in the frame of the system of law of the States. Moreover, it has a growing international relevance as far as it is strictly connected with the developments of the safeguard of the human rights (more than other parts of constitutional law dealing with the organization of the State's power). This chapter will deal with this second, internal aspect of the problem, because it is devoted to the study of the activity of the Venice Commission (European Commission for Democracy through Law of the Council of Europe), the main concern of which has been the implementation of the principles of constitutionalism in the internal organization of the States.[1] Therefore, our attention will be paid to the Commission's experience in the elaboration of international principles and standards on organization of national judiciaries in the context of the promotion of the adherence of the national systems of law to the so-called European Constitutional Heritage.

* Emeritus Professor of Constitutional Law, University of Trieste.

1 Sergio Bartole, *International constitutionalism and conditionality. The experience of the Venice Commission*, Rivista AIC 4/2014.

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In the last twenty-five years the intervention of the Venice Commission has been frequently required to support and advise the drafting and the implementation of the new liberal and democratic constitutions of the countries of the Central and Eastern Europe in the follow-up developments that occurred after the dissolution of the Warsaw Pact, of the Soviet Union and of the Yugoslavian Federal Republic. In the aftermath of these events many questions had to be settled. The choice of the possible model of the judicial organization to be adopted was confronted with a dilemmatic alternative either of establishing a reformed judicial organization, while keeping in office the old judicial personnel, or of substituting step by step new judges for the old ones, while proceeding with the contemporary reform of the existent judiciary. The first solution implied the possible immediate recognition to the old incumbent judges of the past regime of the prerogatives of the independence and autonomy that the principles of constitutionalism require: it would have followed that the old judicial personnel is kept in office without promoting the necessary processes of its renewal and reform, and with the risk of strengthening its corporatist tendencies. But, if the preference was to be accorded to the second solution, there was the risk of the initial concentration of all the relevant powers in the hands of the political bodies of the new democracies even with regard to the appointment of the new judges. The Commission clearly said: "choosing the appropriate system for judicial appointments is one of the primary challenges faced by the newly established democracies, where often concerns related to the independence and political impartiality of the judiciary persist." Therefore, the choice of entrusting the Parliament with the power of appointing the ordinary (non-constitutional) judges could be acceptable at the time of the starting of the process of the transition to constitutional democracy, even if in principle "political involvement in the appointment procedure may endanger the neutrality of the judiciary." The ideal shall be a quick compliance with the principle of the separation of powers (CDL-AD(2007)028).

Not always the choices made in the matter have been satisfactory because the experience has raised doubts about the efficiency and the integrity of the reformed judiciaries, even when their independence and autonomy had been guaranteed at the moment of the take-off of the new constitutional orders. Some of the concerned States, for instance Hungary, Ukraine and Albania, have not only started a process a revision of the existing relevant legislation, but also tried to submit the incumbent judges to a vetting procedure aimed at the assessment of their integrity and professional ability. As it happened at the moment of designing the organization of the new judiciaries, also in these recent events problems have arisen in connection with the identification of the guidelines of the constitutionalism in the field of the organization of the judiciary. Which are the models that ensure the implementation of those principles? And which are the justifications and the limits of the possible process of judicial reform? And of a connected "lustration" of the judges presently in office?

1 The Contribution of the Venice Commission to the Internationalization of the National Constitutional Law on the Organization of the Judiciary

The concept of the European Constitutional Heritage necessarily implies a historical approach. We have to look at the traditional legal experiences of the European countries to ascertain their common attitudes in the field, exploring the origins of the shared values and the spreading of these values in Europe from one State's system of law to another legal order. We have obviously to differentiate the different historical processes according to the different items we take into consideration. For instance, if our inquiry regards the general principles of the European Constitutional Heritage, the safeguard of the rights and the rule of law, the starting point is obviously the *Magna Carta* with all the following amendments and integrations of the document of the year 1215 aimed at ensuring its updating to the social and economic developments of the United Kingdom. If we want, in particular, to focus our attention on the principle of separation of powers and on its feedback on the organization of the judiciary, we have to make reference, first of all, to the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 and to the liberal Constitutions of the XIX century. Art. 16 of the *Déclaration* states the principle that all the societies where the guarantee of the rights is not ensured and the separation of powers is not established, don't have a constitution. This is a very general statement that does not say much about the institutional machinery that has to be established for the implementation of the principle. But it underlines the necessary connection of the status of the different branches of the organization of the State's powers, and therefore also the link between the establishment of an independent and impartial judiciary and the arrangements concerning the other powers.[2] It follows that we can derive useful suggestions from the old Constitutions of the XIX century, but they obviously regard arrangements that were compatible with monarchical regimes. Therefore, the reference to these experiences has to be completed and integrated with the analysis of the more recent Constitutions of the last hundred years, which allow us to look at our problems from an operational point of view and to consider the solutions adopted to comply with the principle of the separation of powers in the frame of the contemporary societies of the XXI century.[3] Moreover, in the past century and in recent times an important role in the developments of the Constitutional Heritage has been played by many international documents, especially in the field of human rights, from the Charter of the United Nations of 26 June 1945, and the United Nations Covenant on Human Rights to the ECHR.[4] Their importance derives from the fact that they are the result of a common effort to summarize the main constitutional values and ideals, which are shared by all the concerned countries. Eventually it is evident that when we mention the UN documents, we enlarge the scope of our attention by also including States that are not part of Europe. In this perspective we cannot forget, for

2 Alessandro Pizzorusso, *Il patrimonio costituzionale europeo*, Il mulino, Bologna 2002, 139.

3 Mauro Volpi, *I Consigli di giustizia in Europa: un quadro comparativo, Diritto pubblico comparato ed europeo* 2009, vol. III, n. 2, 948.

4 Mauro Volpi, *L'indipendenza della magistratura nei documenti del Consiglio d'Europa e della Rete europea dei Consigli di giustizia, Diritto pubblico comparato ed europeo* 2010, vol. 4, 1754.

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instance, the documents of the American Revolution and of their historical evolution, analysis and study of which is an essential part of the modern doctrines of constitutionalism.

As a matter of fact, the reference to all these constitutional and international documents has to be appreciated in the light of the intermediation of the legal constitutional culture.[5] We cannot stick to the mere content of the legislative texts alone. We have to consider that their historical relevance makes sense through their cultural elaboration, which can give evidence of their meaning by identifying the ideological basis of the relative institutional choices and their political orientations. In some way we can enlist the legal constitutional culture between the sources of the European Constitutional Heritage. At least, we may say that the products of the legal constitutional culture are part of the materials we have to use in view of the identification of that Heritage in a historical perspective.

When we pay special attention to the legal constitutional culture, the question arises of the relevance of some documents that are not frequently mentioned in the main texts of the doctrine of constitutionalism. I mean, for instance, the Polish Constitution of 3 May 1791, the Hungarian *Bulla Aurea* of the XIII century, the Lithuanian Statutes adopted in the XVI century, but other important texts could be mentioned if we look at the historical developments of the ancient Statehood of the Crown of Bohemia, the Georgian Statehood and of the Croatia Kingdom and so on. Can we say that these documents contributed to the elaboration of the European Constitutional Heritage?[6] When we advance this question, we underline the importance of the analysis of the involvement of the relevant countries in the building of the modern constitutional State. If we look at the history of the doctrines of constitutionalism, we see that the statutes and the constitutions of the Central Eastern Europe are rarely mentioned as constitutive elements of the tradition of the European Heritage. We can find an explanation of this fact when we compare, for instance, the different content and history of the *Magna Carta* and of the *Bulla Aurea*. The first of these texts has been implemented as a guarantee of a general extension of the protection ensured by the customs and freedoms that it mentions, and has opened, therefore, the way to a modern approach to the safeguard of the rights and freedoms, while the *Bulla Aurea* was always interpreted according to a restricted idea of the guarantees that it ensured in partial connection with the fruition of the land and, therefore, in view of the protection of the ruling class. As a matter of fact, in the European historical legal literature Central and Eastern Europe are mainly described as having had a peripheral character in respect to other parts of the European constitutional civilization.[7]

5 Kaarlo Tuori, *Critical Legal Positivism*, Farnharm – Burlington, 2009, 121 and *Ratio and Voluntas*, Farnham: Burlington 2011, 173.

6 I dealt with a preliminary analysis of this problem in SERGIO BARTOLE, *Standards of Europe's Constitutional Heritage, Journal of Constitutional History*, 30/ II, 2015, 17.

7 This conclusion is mentioned in the legal literature as a result of important contributions of Egidijus Jarasiunas concerning the European contest of the Lithuanian constitutional developments.

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Notwithstanding the existence of this gap, it could be interesting underlining that, for instance, according to art. VIII of the old Polish Constitution, "as judicial power is incompatible with the legislative, nor can be administered by the King, therefore tribunals and magistratures ought to be established and elected." But additional rules for the implementation of these principles have not been identified or have been missing, therefore the contribution of the Polish tradition appears to be not very conspicuous. The same can be said with regard to the Hungarian document, which reserved the exercise of the judicial power to the king and his *palatini comites* in the cases concerning indifferently all people, with the exception of the ecclesiastical matters. However, the members of the Hungarian nobility were not required to have a legal preparation, they had only to swear to accomplish correctly the judicial tasks before starting their mandate. It follows that also the Hungarian historical tradition had been very poor in the matter of the status of the judiciary. Only in the XIX century were there developments in the field as far as what Ludwig Gumplowicz called the *Gerichteverfassung in Ungarn*,[8] that is the organization of the Hungarian judiciary, was affected by the constitutional developments of the Austro-Hungarian Empire, which implied a progressive nearing, step by step, to a parliamentary government. Art. 1 of the Law 27 October 1862 provided for the guarantee of the natural judge established by the relevant legislation, which fell in the competence of the Council of the Empire as far as the fundamental traits of the organization of the Judicial Authorities were concerned (§ 11, of the Law, 21 December 1867). The Emperor still retained a central position in the organization of the judiciary. For instance, the Fundamental Law of the State, 21 December 1867, entrusted to him the appointment for life of the president and the vice-president of the Tribunal of the Empire and of its twelve effective and four substitute members nominated in equal number by the Chamber of the Deputies and the Chamber of the Nobles. Moreover, on the basis of art. 5 of the Fundamental Law of the State of 21 December 1867 n. 144, the judges were appointed "definitely and for life" by the Emperor or in his name. But it is true that their dismissal from the office was only allowed in the cases provided for by the legislation and on the basis of a judicial decision. And they could be transferred from one office to another only with their consent.

It is evident that the elaboration of the models of the organization of the judiciaries have been strictly connected with the historical developments of the forms of the government of the States concerned. The precedents of the Venice Commission take into consideration these aspects when, recognizing the existence in Europe of "a variety of different systems for judicial appointments," the Commission has stated that "systems may work well in practice and allow for an independent judiciary" in older democracies, even if "the executive power has sometimes a decisive influence on judicial appointments," because "these powers are restrained by legal culture and traditions, which have grown over a long time." For the Commission the existence of some interesting moves in

8 Ludwig Gumplowicz, *Das Osterreische Staatsrecht*, Manziche k.u.k. hof-Verlags, Wien 1907, 155.

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the direction of the establishment of the independence of the judiciary in the national past of the other States is not sufficient to demonstrate a satisfying compliance with the principles of the European Constitutional Heritage, if a historical continuity – from that past to the more recent times – is missing, or if there are relevant ruptures in its cultural and practical elaboration. Therefore, in the "new democracies," which "did not have a chance to develop these traditions, which can prevent abuse," "explicit constitutional and legal provisions are needed as a safeguard to prevent political abuse in the appointment of judges" (CDL-AD(2007)028).

1.2 The Judicial Councils (and Other Solutions)

This way of reasoning evidently required a special attention on the part of the Commission to the European historical models of the organization of the judiciary, elaboration on which could offer an overview of the guidelines, which today internationally preside over the implementation of the principle of the separation of powers and its consequences on the status of the judges and the related offices. From the very beginning of its activity, the Commission recognized that in Europe there were at least two different organizational models that appeared able to render the judicial bodies autonomous and independent.

On one side, there was what can be roughly defined as a judicial self-management (or self-government) model, which has been apparently patterned after the experience of the Constitutions of some Western European States (Italy, France and Spain, in particular), and in which all decisions on the career of the judicial personnel are entrusted to a council, the majority of whose members is elected by the judges among themselves. This solution gives the impression that the judiciary is in some way self-governing as far as the judges elected apparently take care of the interests of the judiciary in a position of separateness from the other branches of the State. But if this is the substance of the matter at stake, and at the centre of the adopted solution are the State's interests aimed at avoiding interferences of the legislative and executive bodies of the State in the functioning of the judiciary, it is easy to understand that interests dealt with by the members of the judicial councils are not the corporatist interests of the judges. Moreover, corporatist deviations find an obstacle in the constitutional provisions of the concerned States, which integrate the composition of the relevant councils by adding – at least – a minority of members elected by the legislative assemblies, whose mandate is the checking of the correct interpretation of the management of the interests entrusted to the care of the judicial councils themselves.

Another model adopted for the regulation and organization of the judicial-staff management implies that the power of administration of the judiciary is largely assigned to the executive branch of the State. This power is counterbalanced by the recognition of special personal rights granted to individual judges, or by consultative interventions of

the judicial ordinary bodies in the relevant decision-making procedures. Judges may uphold their specific rights or the observance of the relevant procedural rules by way of appeal before the appropriate judicial bodies. Thus the independence of the judiciary is assured by means of specific guarantees of the judges or by specific articulations of the procedural formation of the relevant decisions. In this way the constitutional legislators avoid the inconvenience of a concentration of a great deal of power in a body, separate from all other State organs, whose membership is made up – at least partially – by magistrates who are personally interested in the matter.

As a matter of fact in the Central Eastern Europe, after the dissolution of the Warsaw Pact and of the Yugoslav and Soviet federal Unions, some countries adopted a kind of mixed or intermediate model of organization of the judiciary by providing for a coexistence of deliberative powers of the political State authorities and of the entrusting of specific technical functions to judicial councils or committees.[9] This solution was preferred in view of avoiding the adoption of an overall judicial self-management. The political authorities were supposed to be in a better position than a body of elected magistrates to check the persisting corporatist old-fashioned attitudes of the judges of the past communist regimes who were still in office. Some specific arrangements were justified by the concurring of the will of avoiding a general lustration of the incumbent judges and the political intention of updating the organization of the judiciary according to the Western principles of constitutionalism. Moreover, even the Explanatory Memorandum to the European Charter on the Statute for judges concedes that "some countries would find it difficult to accept an independent body replacing the political body responsible for appointments" of judges (DAJ/DOC898)23).

The Venice Commission elaborated this point by underlining that the appointment of judges by the Parliament is "a method for constituting the judiciary which is highly democratic but … the balance might be tilted much too far towards the legislative power" (CDL-AD(2002)026). Therefore, as it happens in the case of the appointments made by the Executive, some guarantees should be introduced to avoid the prevailing of political interferences, "it would be desirable that an expert body like an independent judicial council could give an opinion on the suitability or qualification of candidates for the office of judge" (CDL-AD(2005)005).

The problem of the intervention of the elected parliamentary assemblies in the procedure for the appointment of the judges has been especially present in the new democracies at the moment of the transition from the old communist regimes to the democratic and liberal systems of government, in particular when the substitution of a new judicial personnel for the old one was at stake. But at the same time it has been recognized – as it was underlined in the previous paragraph – that "in some older democracies, systems exist in which the executive power has a strong influence on judicial appointments." Even

9 Sergio Bartole, *Organizing the Judiciary in Central and Eastern Europe, Eastern European Constitutional Review*, Winter 1998, vol. 7, n. 1, 62.

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if the documents don't mention the example of the United Kingdom, which has given interesting and peculiar evidence of this kind of organizational arrangements, in any case it is frequently conceded that such systems work well "because the executive is restrained by legal culture and traditions, which have grown over a long time," while the States where new democracies have been established, missed "a chance to develop these traditions, which can prevent abuse" (CDL-AD(2007)028).

While distinguishing among the European States – the older democracies and the new democracies – the papers of the Venice Commission adopt a more flexible approach than important documents of other international institutions. A determining role is, therefore, played by the substantive factors of the legal traditions and of the constitutional culture, which are essentially identified in the traditions and culture of Western Europe. The contribution of the historical heritage of the States that are characterized by the advent of the new democracies is considered irrelevant or insufficient to guarantee the independence and separateness of the judiciary, which is, instead, ensured in some older European democracies notwithstanding the decisive role played in their legal systems by the executive in the procedures for the appointment of the judges. As we have seen, a positive evaluation is given of the organization of the judiciary in these States even if they don't formally comply with the different solution of entrusting a judicial council with the power of adopting the decisions concerning the selection and the career of the judges. Therefore, the position of the Venice Commission has to be clearly distinguished from the conclusions drawn, for instance, by the Committee of Ministers of the Council of Europe in its Recommendation (94)12 and by the Consultative Council of European Judges in its Opinion n. 1 and n. 10.

This approach gives a significant answer to our initial question about the matrices of the European Constitutional Heritage, which are mainly individuated in Western constitutionalism. Important historical signs of the presence of the rule of law doctrine in other European countries, especially in Central and Eastern Europe, are considered insufficient to the consolidation of a relevant tradition as far as a long continuity of the relevant practices is missing and a correct implementation of the connected principles is not present in recent times.

It could be objected that also in the Mediterranean countries, such as France, Italy and Spain, in the past the judicial organization and the recruitment of the judges were left in the hand of the executive power, the independence and separateness of the judiciary were inexistent or imperilled and a clear implementation of the principles of constitutionalism was missing. But the objection can be easily rejected by underlining the readiness in the adoption of democratic and liberal constitutions, which characterized the transformation of these legal systems after the end of the Second World War and the fall of the fascist and Nazi dictatorships. Many international documents share the opinion that the fundamental principles of the statute for judges have to be set out in internal norms at the highest level, and its rules at least at the legislative level, and the Venice Commission have agreed

with this approach (Opinion n. 1 of the CCJE and Recommendation (94)12 of the Committee of Ministers of the Council of Europe; CDL-AD(2010)004). At the moment of the adoption of the new constitutions, all those countries chose the modality of the creation of a judicial council as the best arrangement to guarantee the independence of the judiciary, and refused the past tradition of its dependence on the executive power. The solution appeared especially adequate to the compliance with the principle of separation of powers as far as it implied, on one side, the creation of an independent authority that is separated from the other branches of the State, and, on the other side, that such authority has a membership made up by a substantial representation of judges elected by the judges themselves, and has deliberative functions that are decisive in view of the adoption of the acts concerning the professional career and the selection of the judges. Therefore, it is understandable that the large majority of the documents adopted by expert bodies of the international institutions in the field of the organization of the judiciary follow the example of the more recent and modern liberal and democratic constitutions and show a qualified preference for this model of organizing the independence of the judiciary. The guidelines of the position adopted by the Venice Commission in the matter derive from these international sources and from the mentioned Western constitutions. Their extension to the constitutional choices of the new democracies is justified by the general acceptance of the model while the model entrusting the executive power with the relevant deliberative functions is admitted only in the case of the older democracies, which are characterized by a legal culture and traditions that have grown over a long time.

Notwithstanding the general preference accorded to the judicial council model, the experts are conscious that it entails a clear danger of the influence of corporatist prejudices and opinions. Two elements are normally introduced in the configuration of the model and the Venice Commission has taken care to underline their importance in the elaboration of its position. On one side, it has been clearly stated that in order to avoid the danger of corporatism it has to be ensured that the membership of the judicial governing institution "should not necessarily be entirely in the hands of judges" and "the law must provide for the presence of members who are not part of the judiciary, who represent other State powers or the academic or professional sectors of society" (CDL-INF(1998) 009), who are normally elected by the Parliament. The purpose of this arrangement is not opening the doors of the council to the implementation of the political guidelines of the parliamentary majority, but introducing a factor of checking the coherence of its activity with the general interests and avoiding the prevalence of corporatist factors. Therefore, a balanced articulation of the functioning of the concerned body has to be established by excluding a direct participation of members of the executive power in the exercise of the relevant functions, by restricting to a formal role the possible involvement of the Chief of the State and by excluding an active role of the Minister of Justice (CDL-AD(2007)028).

On the other side, the self-administration of the judiciary excludes decisions that imply the free and autonomous adoption of political choices as far as "all decisions concern-

ing appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law" (CDL-AD(2010)004). Therefore, the competent body is bound to stick to the relevant legislative provisions taking care of the exigency that the appointed persons satisfy the general legislative requirements (CDL-AD (2014)008). In CDL-AD(2010)004 the Commission explicitly reminds the Recommendation (94)12 of the Committee of Ministers of the Council of Europe, according to which "there should guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above" in the same document.

1.3 The Functions of the Judicial Councils

A great deal of the materials elaborated by the Venice Commission in the field of the judiciary accounts for the functions that have to be entrusted to a judicial council. The Commission "is of the opinion that a judicial council should have a decisive influence on the appointment…. of judges" (CDL-AD(2007)028). But the decisions concerning the appointments should be a part of a larger deal of decisions, which have to fall in the competence of the councils and affect the professional career of all judges (CDL-AD (2010)004).

Therefore, the implementation of the system of the separation of powers and of the independence of the judiciary requires the legislative identification of different functions that concern the different stages of the career of the judges – from their initial appointment to subsequent promotions and transfers to diverse offices, from the disciplinary control of their behaviour and activity to their eventual termination of office or retirement. The exercise of all these different functions has its own peculiarities, which are singled out by the legislative provisions concerning the organization of the judiciary, which is the main task of Parliament in the constitutional systems whose compliance with the principles of independence and impartiality of the judiciary has to be integrated by the observance of the basic principle of the rule of law.

According to a guideline stated in the European Charter on the statute of the judges (DA-DOC(98)23), the legislator has to provide "for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties." The Venice Commission fully agrees with this way of thinking as it is demonstrated by frequent quotations in the Commission's documents. It interprets this guideline requiring of the legislators of the interested countries the identification of objective criteria in the relevant statutes to be applied in the adoption of the decisions concerning judges (CDL-AD(2010)004). As a matter of fact objective criteria are considered an important element of guarantee in view of the exigency of avoiding the risk of corporative interferences in the decision-making processes of the

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judicial councils. At the same time, the responsibility for adopting such criteria is allocated to the Parliament, which clearly indicates the separate role of self-administration of the judiciary, which is entrusted to the judicial councils and has to be performed in the frame of the unity of the State's legal system and in the compliance of the relevant legislative provisions. The opinions of the Commission certainly provide an important contribution to the elaboration of the international law of the judiciary as far as the core of the competence of the judicial councils is concerned, while, when the modalities of the exercise of the relevant functions are at stake, the general relevance of its comments is minor, especially when they concern the legislative drafting.

Therefore, the task of the judicial councils is, first of all, the execution and application of the legislative provisions concerning the general requirements that the judges need to satisfy with regard to their appointment, their career and their possible transfers from one office to another office (see, for instance, CDL-AD(2014)008, CDL-AD(2014)031, CDL-AD(2012)001). In these cases the council shall perform administrative functions, which means that the judicial self-administration has a substantive administrative content.

The administrative nature of the council's decisions concerning the appointment, promotion and career of the judges is sometimes specially emphasized in the national legislation by the provision of the intervention of the Chief of the State (President of the Republic) in the formal adoption of the relevant acts. The Venice Commission have not contested this solution, but it clearly said that "as long as the President is bound by a proposal made by an independent judicial council…. the appointment by the President does not appear to be problematic" (CDL-AD(2007)028). The idea is that in these cases the president "acts in a 'ceremonial' way, only formalising the decision taken by the judicial council in substance" (CDL-AD(2013)034, and CDL-AD(2015)027 concerning Ukraine and at the same time approving the removal of the Parliament's power to appoint judges).

The suggested exclusion of the admissibility of a discretionary power of the president is a consequence of the fundamental principle that in the appointment of the ordinary judges the danger has to be excluded that "political considerations prevail over the objective merits of a candidate." It is the corresponding face of the guideline that "appointments of ordinary judges…. are not an appropriate subject for a vote by Parliament" (CDL-AD(2007)028).

Special attention needs to be paid to the disciplinary control of the judges. The Venice Commission recognized that also in this field "internationally, there is no manifest approach" (CDL-AD(2014)018). A common detailed approach is apparently missing, but the Commission drew inspiration from the general principles of the rule of law and stated important principles in the matter, especially with regard to the grounds for the disciplinary proceedings, some basic elements of the procedural aspects of the examination of the disciplinary cases and the relevant rights of the concerned judges.

> There is no justification in principle for treating judges differently in matters of discipline and removal according to whether they are members of superior or inferior courts. All judges should enjoy equal guarantees of independence and equal immunities in the exercise of their functions. (CDL(1995)074 rev)

Moreover, the principles of legality, respect for judicial neutrality and impartiality, fair procedure, proportionality of the sanction with the committed offence, transparency shall be in line "with international standards" (CDL-AD(2014)006). Compliance with the rule of law and the exigency of avoiding that judicial councils be entrusted with large discretional power entail that it is "a good practice/approach in conformity with international standards" that "an exhaustive list of specific disciplinary offences" should be drawn up "rather than giving a general definition which may prove too vague" (CDL-AD(2014) 006). "Disciplinary proceedings should deal with gross and inexcusable professional misconduct, but they should never extend to differences in legal interpretation of the law or judicial mistakes" (CDL-AD(2011)012). "A judge may not be limited to applying the existing case-law. The essence of his/her function is to independently interpret legal regulations" (CDL-AD(2014)06). "It would be problematic to discipline judges for merely criticising judicial decisions…. or assessments with regard to the activities of state authorities and of the heads of those authorities" (CDL-AD(2013)035).

The opinion of the Venice Commission is that the procedure of adoption of the disciplinary measures is comparable to jurisdictional procedures. It requires compliance with the principle of the "natural judge," which implies that disciplinary trials have to be conducted by a competent jurisdiction previously established by the law. This guideline excludes an ad hoc establishment of a disciplinary panel "composed on a case-by-case basis" (CDL-AD(2014)038). The reporting member of the panel, "whose position is similar to that of a prosecutor, should be excluded from the deliberations and the vote" (CDL-AD(2010)026). The concerned judge shall have the right to be heard and represented in the procedure (CDL-AD(2009)011). Moreover, if the legislator dealing with disciplinary control does not regulate a procedural issue, "one of the procedural codes can be applied by analogy…. the fact that the criminal procedural codes provide generally better safeguards to ensure the fairness of the procedure should be taken into account" (CDL-AD(2014)032).

1.4 Budgetary and Financial Matters

Judicial councils don't have a decisive say about the remuneration of the judges. The main aspects in the matter should be addressed by the ordinary legislation (CDL(1995) 074 rev). "The Venice Commission is of the opinion that for judges a level of remuneration should be guaranteed by law in conformity with the dignity of their office and the

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scope of their duties. Bonuses and non financial benefits, the distribution of which involves a discretionary element, should be phased out" (CDL-AD(2010)004).

These guidelines have to be possibly considered in connection with the general idea of the budgetary autonomy of the judiciary. The problem of the personal treatment of the judges is part and parcel of the problem of the financial independence of the judiciary itself. Sometimes the Commission, while it has stressed the deliberative role of the Parliament in the matter, suggested that "it would be more practical to entrust one institution as the judicial council with the competence to draft all the parts of the budget for the system of the judiciary as a whole" or, at least, to condition the possibility for Parliament to reduce the budget of the courts without the consent of the judicial council itself, "except in the case of a general reduction of the State Budget" (CDL-AD(2013)005).

This move is the sign of an opening to an enlargement of the concept of the scope of the functions of the judicial councils by extending them to cover not only the personal status of the judges, but also the organization of the courts as a whole. This solution can imply a self-administration of the judicial budget by the courts (CDL-AD(2013)15). Some sort of supervision of the relevant judicial council could be envisaged. But the line of the Venice Commission in this specific field is still hesitating between the idea of entrusting the judicial councils to represent the judiciary in the parliamentary budgetary procedures (CDL-AD(2011)012) and the fear that the involvement of that body in the relative battles could endanger its position by its being "engulfed in the political debate" (CDL-AD(2002)026).

In any case the question deserves some more attention. Notwithstanding that, on one occasion the Commission explicitly admitted that "it would be advisable to ensure that the views of the judiciary are taken into consideration in budgetary procedures" and that the judicial council "could represent the judiciary in this regard and have some influence on budgetary decisions regarding the needs of the judiciary" (CDL-AD(2011)012), and it therefore envisaged a solution which is very similar to arrangements of the relations between the judiciary and the Parliaments, which exist in some countries of the Northern Europe (Denmark, Norway and Sweden). The Commission has not yet elaborated on the experience of the autonomous self-administration of the courts and its extension to financial and budgetary matters, which is practiced in those countries.[10] Further developments in the direction of a convergence cannot be excluded especially if we take into consideration the tendency of the Northern European countries to entrust the bodies, which are competent for the administration of the courts but are apparently different from the Mediterranean judicial councils, with functions about the formation and the continuous information of the judges, the evaluation of their behaviour and the drafting of deontological codes. This tendency is counterbalanced by the progressive growing of the role of the Mediterranean judicial councils. But, on the other side, it is not clear if the

10 Volpi, *I Consigli di giustizia in Europa: un quadro comparative*, 948-954.

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preferred solutions will go in the direction of the centralization of the self-government of the judiciary in the hands of one body only, or if a pluralistic approach will be adopted allowing or suggesting the creation of more than one body active in the field as it happens in the Northern European countries. The Venice Commission has been confronted by this alternative.

1.5 The Prosecution Service

What a report of the Venice Commission (CDL-AD(2010)040) calls the prosecution service, is not always a part of the judiciary. There is a variety of models throughout Europe and the world, in connection with the different legal cultures and the different conceptions of the relation between the investigative activity and the judges. But the same document also recognizes that over the centuries European criminal justice systems have borrowed extensively from each other so that today there are probably no pure systems that have not imported any important elements from outside. In principle it is suggested that the prosecution service should not be overly powerful and has to limit its competence to the criminal law field. The Commission is of the opinion that the rebirth of a prosecution service designed according to the soviet and czarist model of prokuratura should be avoided because "it reflects a non-democratic past and is not compatible with European standards and Council of Europe values" (CDL-AD(2009)048).

In any case, according to the Commission, as far as the criminal prosecution is "a core function of the state," the prosecutors "must act fairly and impartially," even if they are not regarded as a part of the judiciary. They are "expected to act in a judicial manner" (CDL-AD(2010)040). Therefore, the Constitutions and the laws aimed at implementing them have to guarantee both the organizational and functional independence of the service and of its personnel. When the independence of the prosecutorial branch of the executive is not guaranteed, safeguards shall be ensured at least "at the level of individual case that there will be transparency concerning any instructions which may be given" (CDL-AD(2010)040).

When we look at the problem from the different points of view of the "internal" and "external" independence of the prosecutor's office, the position of the Commission looks very articulated because, while the exigency is underlined that external independence "resides in the impermissibility of the executive to give instructions in individual cases" to the service, the prevailing conception of its internal organization allows a system of hierarchical subordination of the inferior offices to the superior ones (CDL-AD(2010) 040).

But, while there are still systems where the Prosecutor general is elected by the Parliament or appointed by the Chief of the State in compliance with the legislative requirements of professional and ethic qualities (CDL-AD(2010)040), a growing tendency goes

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in the direction of the administration of the prosecutorial personnel by (or with the consultative intermediation of) a Prosecutorial council including prosecutors elected by their colleagues and lay members as lawyers and law academics (CDL-AD(2008)019 and CDL-AD(2010)040). The establishment of such a body is suggested even with regard to countries where prosecutors are part of the judiciary: in this case the prosecutorial council could be designed as a special section or branch of the judicial council. But the existence of a single body with general competence covering judges and prosecutors is in any case admissible.

The effects of the decisions of the prosecutorial councils can vary.

1.6 Crisis and Difficulties of the Mediterranean Model

In the last years the model of the independence, impartiality and efficiency of the judiciary designed by the Venice Commission for the new democracies according to the experience of the Mediterranean countries entered in a state of evident crisis. On one side, the judicial councils established by the new democratic and liberal constitutions were criticized for not having always ensured a real guarantee against the temptations of corporatism and of seniority, and, on the other side, the economic difficulties of the concerned countries opened the way to a large spreading of the judicial corruption caused by the exiguity of the judicial salaries and by the great financial relevance of many questions submitted to the decision of the judges.

The constitutional reform adopted by Hungary in 2011 and the following cardinal acts aimed at its implementation offer an example of a transition from a model of judicial independence based on the wide competences of a strong National Council of Judges (CDL-AD(2012)001) to a different model of administration of the judiciary, where the traditional functions of the Executive of the old systems of government are not attributed any more to a judicial council but to a new individual body entrusted with the administration of the judiciary, whose independence from the Executive and from the Parliament should ensure the compliance with the principle of separation of powers. The reform was evidently introduced to facilitate a great deal of changes in the personnel of the judiciary by adopting new modalities for its enrolment and for the substitution of the old judges whose time for retirement was modified with the reduction of their upper age limit. It could be considered as a kind of indirect lustration as far as this last novelty interested many old judges who had started their career during the past regime.

The Venice Commission, while complaining again about the poor flexibility in implementing the cardinal acts that have to be adopted and revised with a two-thirds majority in the Parliament, underlined the novelty of this new constitutional arrangement of the judicial independence but expressed "serious doubts about the reform model chosen, which concentrates…. very large competence in the hands of one individual person, the

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President of the newly established National Judicial Office" (CDL-AD(2012)001). In the same opinion, the wide range of the functions of the Office was criticized: "this raises concern, especially because they are exercised by a single person," even if most of the relevant functions "do not relate to decision-making in individual cases" pending before the judges. In this frame the accountability of the president of the new body, which was presented as one of the main purposes of the new legislation, appeared "clearly insufficient," as far as the principal supervisory body, that is the National Judicial Council, was depending on him/her and was not apparently able to counterbalance the influence of Parliament, which appoints the president. As a matter of fact the competence of the Council looked very poor and "its role … as negligible." In particular the reform apparently offered "guarantees that the appointment of judges" – according to the Commission – "is based on merit, applying objective criteria," but, at the same time, the president of the National Judicial Office had significant powers of interference, whose regulations "do not contain sufficient safeguards in order to exclude that improper considerations play a role." Analogous remarks were extended to the disciplinary proceedings. Moreover, the Commission criticized the legislative provisions concerning the internal independence of the judges in the light of the standardization procedure falling in the competence of the central and superior judicial body, that is the Curia, a procedure that was defended by the Hungarian government by referring to precedents of the XIX century (CDL-AD(2012) 001).

The Hungarian authorities took note of the Venice Commission's remark by adopting new provisions and by attributing to the National Judicial Council the power of expressing a preliminary opinion on persons nominated as candidate for the Presidencies of the National Judicial Office and of the Curia. Important powers were transferred to the Council from the president of the Office, whose accountability was strengthened. Nonetheless, according to the Commission (CDL-AD(2012)020) the capacity to control the activities of the president by the National Judicial Council was weak, notwithstanding the limitation of his interferences in the judicial appointments.

Moreover, the Commission is still of the opinion that the internal independence of the judges is not sufficiently safeguarded in the frame of a controversial standardization procedure. Therefore, the supervision of the judges by chairs and division heads of courts and tribunals should be abolished.

Last but not least, the sudden reduction of the upper age limit for the retirement of the judges, unconstitutionality of which was declared by the Constitutional Court, has been producing unacceptable effects as far as the legislator has not yet adopted provisions reinstating the dismissed judges who so wish, in their previous positions without requiring them to go through a re-appointment procedure.

In 1995 the Venice Commission already observed that "the low level of salaries of judges in Albania, relative to other professions and activities though not comparable positions in the civil service, was repeatedly identified as an objective factor contributing

to corruption among judges and to the consequent reduction of public confidence in the courts" (CDL(1995)074 rev.). This problem has for a long time called the attention of the Albanian political authorities, but also of those of other new democracies, while – at the same time – in other countries complaints have been growing, as it happened in Georgia, for judicial decisions adopted according to political choices and for political reasons, which constituted possible cases of miscarriages of justice and raised questions about the way of restoring law and justice (CDL-AD(2013)013).

In Georgia a temporary State commission was proposed whose activity in examining possible cases of miscarriages of justice was considered admissible by the Commission if regulated in conformity with the principles of separation of powers and independence of the judiciary, and leaving in any case the decisions on the criminal charges against the interested persons to a court (CDL-AD(2013)013). In Ukraine, instead, the existence of corruption, professional incompetence and political miscarriages of justice among the judges justified the adoption of extraordinary measures on the basis of "a choice needed to be made between dismissing all the judges and inviting them to reapply for their position on the basis of a new evaluation, or assessing them" and their qualifications "with respect to their professionalism, ethics and honesty" (CDL-AD(2015)027). In Albania, on the other hand, an inescapable general vetting process concerning all the incumbent judges required the design of exceptional transitional institutions outside the frame of ordinary self-government of the judiciary.

In all these cases a form of assessment of the qualification of the judges or of the correctness of their decisions appeared as an exceptional measure to be made subject to extremely stringent safeguards to protect both, on one side, the judges who have been fit to occupy their position and, on the other side, judicial decisions made in accordance with the law (CDL-AD(2015)027). But both the hypotheses required a wider reform of the judiciary in order to strengthen its independence and impartiality (CDL-AD(2013)013). The same conclusion was adopted by the Venice Commission with regard to the reactions of the Armenian authorities in the presence of the equally dangerous phenomenon of "instructions or pressure on individual judges made by their fellow judges and vis-à-vis their judicial superiors." In such a situation a possible opening of disciplinary proceeding on the basis of the overall results of a specific evaluation was considered admissible, but only in case of the concerned judge's wrongful conduct and of the unlawful exercise of his or her functions (CDL-AD(2014)07).

The comparison between these different experiences is really food for thought. While Armenia solves its not exceptional but engaging problems through a reform of the system of the administration of the judiciary and the utilization of the ordinary institutions and means of that system, quite peculiar are the solutions adopted in other countries, which have been dealing with exceptional problems concerning the actual behaviour of the incumbent judges. On one side, as in Ukraine, a constitutional reform has opened the way to a general assessment procedures with respect to their professionalism, ethics and

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honesty in the frame of the traditional model of government of the judiciary, on the other side Albania has also aimed to starting a vetting process of the judges presently in office by adopting a revision of the constitution, but it has designed a temporary institutional machinery especially justified and destined to deal with the critical situation of the country in the field of the judiciary, which requires – as the Venice Commission recognized – "radical solutions." If the Ukrainian legislation provides for its implementation through the High Judicial Council or the High Qualification Commission of Judges, the Albanian solution should imply the creation of a completely new system of specialized bodies that are entrusted with the functions concerning the vetting procedures of the judges.

As a matter of fact, the Venice Commission is ready to accept the information given by the Ukrainian and Albanian authorities about the existence of general problems of judicial corruption and inefficiency in the relevant countries, which justify the adoption of exceptional constitutional measures. But it received with some doubts the information of the Georgian authorities about the existence in that country of many cases of judicial miscarriages and refused to take a position on whether there really were miscarriages of justice in Georgia, on whether they were of a systemic nature and on whether they required the creation of a temporary State commission (CDL-AD(20139013). In all these situations the Commission admonished the concerned authorities to stick to the fundamental principles of constitutionalism in the matter of the judiciary, having regard both to the external aspects of its independence and impartiality and to the internal organization of the system of courts.

This attitude confirms the line adopted by the Venice Commission in the contemporary overview of the legislative drafts of judicial reform submitted to its attention by Montenegro (CDL-AD(2014)038) and Macedonia (CDL-AD(2015)042), when it took into consideration the preoccupation of the authorities of the two States about the efficiency and fairness of the exercise of the judicial functions, but underlined that the criteria for the evaluation of the judges and of their behaviour have to be primarily qualitative and to focus on the professional skills, personal competence and social knowledge of the judges (CDL-AD(2015)042).

Corruption, inefficiency, miscarriages of justice, wanting of professional qualifications are all signs of a poor ability of governing and administering the judiciary that the bodies presently entrusted with the relevant functions reveal. The institutions that were established in the days of the take-off of the new democracies have not always given positive results. Therefore, it has been necessary to provide for a reform of all the organizational systems of the judiciary. Somewhere the scope of the reforms has been restricted to the revision of the disciplinary rules for the judicial personnel and of the relevant disciplinary procedures, as it happened in Montenegro and Macedonia. In other countries it was considered necessary to underline the role of specific and peculiar institutions as the High Qualification Commission of Judges, which has to work in conjunction with the High Judicial Council in Ukraine, or the establishment of a temporary State Commission

for the assessment of the miscarriages of justice was deemed appropriate as in Georgia. But in Albania the purpose of a general vetting of all the judges has affected even the High Judicial Council and the High Prosecutorial Council, and it has entailed the creation of a separate and distinct institutional organization especially destined to the exercise of the relevant activities: the establishment of a two-instance Independent Qualification Commission at the centre of the system is provided for.

In analysing all these developments the Venice Commission has been very attentive that all these reforms don't become means of interference by the other State powers into the merit of the exercise of the judicial functions. Therefore, special qualification requirements had to be introduced for the appointment of the members of the Independent Qualification Commission; their election depends on a qualified majority vote of the Parliament; specific rules have to guarantee their impartiality and independence. Moreover, specific substantive and procedural rules guarantee the rights of the judges and prosecutors subjected to the vetting.

1.7 Conclusions

A lesson of the crisis of the preferred model of the self-administration of the independent judiciary should be drawn by the Venice Commission in view of the adoption of new opinions in the matter. In the light of the past experience the position could be revised and rethought. Certainly dangers of corporatism and seniority connected with the continuous presence in the office of the old judicial personnel of the communist regimes in the new democracies are due to disappear as the time runs. But they can be still present after the entering in the career of the new judges as they are present in the other democracies of Western Europe.

In the presence of the alternative between the judicial council model and the executive-centred model, a constitutional choice has to be made, which is important and relevant for the developments of constitutionalism in the concerned countries. But the adoption of one or the another model has to be supplemented by choices that fall in the competence of the ordinary legislator and regard the identification of the objective criteria that shall be implemented by the bodies and organs entrusted with the administration of the judiciary. The fight against the corporatist and seniority tendencies of the judicial personnel especially depends on the legislative decisions that have to be at the basis of the measures affecting the career of the judges (CDL-AD(2010)004).

The elaboration of general guidelines for the above measures can be of common interest and relevance for both the principal models, which the Venice Commission has taken into consideration as far as the adoption of the relevant legislative provisions affect the judicial career whatever is the model of judicial administration that is preferred. The work of the Commission should draw inspiration from the different experiences of the

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diverse countries and from the mutual exchange of information and suggestions. Also in these hypotheses the Venice Commission can play an important role in view of the identification of criteria and standards, which can ensure the status, the independence and the potential efficiency of the judiciaries of the countries that seek its advice and support. The search for an organizational model should be complemented by the identification of the regulations that affect the individual status of the judges and the content of the relevant administrative and disciplinary acts.

The purpose shall be the avoidance of situations that could exceptionally require a general lustration of the judges as in Albania or the adoption of measure of early terms of retirement of the judges as in Hungary. Such kind of solutions is not easily accepted by the Commission, which shared the justification of the declaration of the unconstitutionality of the early retirement of the judges adopted by the Hungarian Constitutional Court, and suggested to the Albanian authorities the introduction of procedural and substantive guarantees in view of the general vetting of the judges (CDL-AD(2012)001 and CDL-AD (2015)045). Many problems have arisen out of the legislative interventions in these cases. For instance, even the request for a personal declaration of the patrimonial and financial situation of the judges, adoption of which the Commission accepted. In the case of legislative reforms in Ukraine and Albania (CDL-AD(2015)057 and CDL-AD(2015)045) in the presence of an extensive spread of judicial corruption can arise doubts with regard to the right of privacy of the people concerned. This is true notwithstanding the fact that this request is very frequent in the case of the holders of political and public offices.

Reducing the presence of judges sitting on the judicial council is a solution which is frequently proposed. The Venice Commission has preferred arrangements that imply the presence of a majority of judges in the council, but in Europe there are countries where the judicial members are the minority.[11] This choice can be dangerous and favours political interferences in the life and functioning of the judiciary. If the purpose is elimination of corporatist and seniority tendencies that lie at the root of corruption or unfair deviations from the principles governing the judiciary, a legislative solution has to be pursued. Moreover, at the level of the institutional and organizational arrangements, the search for a strengthening of the parliamentary control or the introduction of individual complaints by the persons affected by the judicial miscarriages could be envisaged. Eventually the creation of the Georgian Parliamentary Commission could be accepted despite objections, but it would be advisable that a more flexible, fair and less intrusive machinery of parliamentary supervision of the judicial activity is provided.

11 Ibid., 948.

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2 The Impacts of Regional Integration on National Constitutional Laws in Asia

*Wen-Chen Chang and Jiunn-rong Yeh**

2.1 Introduction

In the last two or three decades, regional integration has triumphed as one of the key forces driving globalization. States around the world have undergone massive integration with their neighbors. Most remarkable is the integration of Europe on the basis of a few legal mechanisms such as the European Union and the Council of Europe. Even though the ongoing Brexit has posed challenges to the future of European integration, it has not put an end to regional integration that has escalated within and outside Europe.

Compared to Europe, Asia has not seen any region-wide comprehensive integration despite certain sub-regional cooperation such as the Association of Southeast Asian Nations (ASEAN) and the Asia-Pacific Economic Cooperation (APEC).[1] Professor Tom Ginsburg at the University of Chicago has argued that in a foreseeable future, the underlying conditions for European integration would still be absent in Asia, rendering a region-wide Asian integration difficult. According to him, the conditions against the development of a region-wide legal integration in Asia include a positivist conception of law as an instrument of the nation states, a fierce defense of sovereignty as a basis for international law, and a more difficult international environment than what facing post-war European nations.[2] A few years have since gone by, and it is worthy of exploring if some of these conditional dynamics have been changing, and more importantly, independent of these changing or unchanging conditional dynamics, if varying extents of regional integration in Asia may have been in emergence.

In observing Asian regional integration, it is not enough to look into only those formal or institutional mechanisms. It is true that Asia does not have a single integration treaty. Nor does Asia have any regional court of justice or human rights. The absence of these

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1 For the purpose of this chapter, we adopt the definition of Asia used by the Association for Asian Studies (AAS), a well-established scholarly association that have long promoted the studies of Asia in all aspects. The jurisdictions include China, Japan, Mongolia, Taiwan, South Korea, Hong Kong, the 10 ASEAN states, Timor-Leste, India, Pakistan, Bangladesh, Sri Lanka, and Nepal.

2 Tom Ginsburg, *Eastphalia and Asian Regionalism*, 44 U.C. Davis L. Rev. 859, 861 (2010).

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formal institutions, however, is not equivalent to the absence of ongoing region-wide integration. If observed in functional and substantive terms, Asia has been witnessing region-wide integration at escalating speeds and in many aspects exceeding beyond free market and trade. Since the turn of this new millennium, there have been an unprecedented number of Asian states transforming into constitutional democracies that uphold periodic democratic elections for key government posts and observe constitutional rule of law.[3] Supreme courts and constitutional courts/councils that exercise constitutional review of legislation along with national human rights commissions that investigate human rights infringements have been created in one national jurisdiction after another throughout the region.[4]

Most importantly, contrary to a general impression that Asian states have objected to international human rights on the insistence of national sovereignty, the majority of Asian states – by the end of 2016 – have signed and ratified the nine core international human rights instruments under the United Nations.[5] And every Asian state has acceded to CEDAW and CRC, the two instruments protecting for women and children. By adopting similar – or even identical – legal institutions, principles and values in their respective domestic legal system, Asian states have been forging a cohesive legal framework under which they can coordinate better and cooperate deeper even without a single region-wide unifying treaty mechanism.

This chapter is an attempt to demonstrate Asia's escalating region-wide integration in functional and substantive terms and, more importantly, to assess what impacts and challenges such integration has brought to each of the domestic constitutional systems. Aside from the introduction and conclusion, this chapter has three main sections. In Section 2.2, we identify the ongoing Asian integration in three key functional aspects: (1) integration through the market and beyond the market, (2) integration with democratic constitutionalism, and (3) integration through accession to core international human rights instruments. In Section 2.3, we discuss impacts – both encouraging and discouraging – that such escalating Asian integration has already had on domestic constitutions. The main affected areas are seen in: (1) increasing domestic incorporation of international human rights, (2) rising demands for protecting rights of foreigners and

3 *See infra* notes 27-34 and accompanying text.

4 *See infra* note 35 and accompanying text.

5 The core international human rights instruments are treaties protecting human rights and designated with special UN committees to monitor their State Parties' implementation. So far there are nine conventions: the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICRED), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), the 1989 Convention on the Rights of the Child (CRC), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CPED), the 2006 Convention on the Rights of Persons with Disabilities (ICRPD).

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overseas citizens, (3) the deficit of democratic transparency and government accountability, and (4) emergence of vibrant civil societies with closer and closer regional cooperation. In the last section, we conclude by closely examining those challenges lying ahead for further Asian integration.

In response to Tom Ginsburg's finding of the three underlying conditions that have been unfavorable to Asia's regional integration, we nevertheless find that albeit with space for improvement, these conditional dynamics have indeed changed. Asia has relied upon law – particularly constitutional law and international law – as a key instrument for both domestic and regional governance. Asian states have acceded to key international human rights instruments without fierce defense of sovereignty. Perhaps more importantly, with the development of constitutional democracies around the region, civil societies have been booming: not only placing their respective governments in strong checks but also forging regional networks and even a regional civil society. Admittedly, difficult challenges remain, and it may still take some time to see a single unifying treaty in Asia. Before that, however, Asian integration will continue to develop in functional and substantive terms as we illustrate in this chapter, gradually giving rise to a friendlier environment for eventual regional integration.

2.2 Regional Integration in Asia

Regional integration does not always proceed with a form of single unifying treaty. Rather, it can be developed in more functional and dynamic terms. In Asia, regional integration has accelerated with forming of a free market and even beyond the market. Other non-market integration mechanisms also include the development of democratic constitutionalism in the region and the increasing accession to core international human rights instruments as illustrated below.

2.2.1 Integration beyond the Market: ASEAN and APEC

Like Europe and elsewhere, Asia's integration began with the attempt to create a boundary-free market for regional trade. Unlike Europe and elsewhere, however, Asia has not yet formed any single region-wide organization, but has instead developed two sub-regional organizations: ASEAN and APEC.

As shown in the following, both of these two sub-regional organizations have extended close cooperation with other non-member states in the region, and the areas of cooperation have expanded from free market, to security, to human rights protection, and to other social and cultural issues.

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2.2.1.1 The Association of Southeast Asian Nations (ASEAN)

Well into its fiftieth year in 2017, ASEAN was originally established for economic cooperation among Southeast Asian states. While the member states have kept pursuing economic growth,[6] they have agreed on an ASEAN Charter as its constitutional instrument "to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms."[7] Having entered into force in December 2008, the Charter has since created new organs including an ASEAN Community, human rights bodies, and dispute settlement mechanisms.

Based upon the Charter, member states work together on a wide range of issues including political security, economy, and other social and cultural cooperation. The ASEAN Political-Security Community has characterized itself as a rule-based community in order to achieve the goals such as strengthening democracy, good governance and the rule of law, and protecting human rights and fundamental freedom.[8] Albeit still with a strong emphasis on non-interference principle, ASEAN member states are encouraged to share experiences and forge mutual cooperation. For instance, to strengthen rule of law, they have agreed to facilitate judicial cooperation including unifying legal process in the region, assisting with legal training, and collaborating on family law issues.[9]

The Charter also mandates the creation of human rights bodies for "the promotion and protection of human rights and fundamental freedoms."[10] The ASEAN Intergovernmental Commission on Human Rights (AICHR) was established in 2009, and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) was established in 2010. As consultative bodies, the AICHR and ACWC provide assistance for ASEAN member states' capacity building of human rights promotion and protection by urging them to ratify and implement international human rights instruments,[11] developing strategies to circulate human rights information and education, and conducting thematic studies. In addition, the AICHR drafted the ASEAN Human Rights Declaration that was promulgated in 2012.[12] The ACWC has focused on

6 ASEAN Secretariat, *The ASEAN Declaration (Bangkok Declaration)*, August 8, 1967, available at <http://asean.org/the-asean-declaration-bangkok-declaration-bangkok-8-august-1967/>.

7 Charter of the Association of Southeast Asian Nations (with annexes), art. 1, § 7, November 20, 2007, 2624 U.N.T.S. 223 [hereinafter the ASEAN Charter].

8 The ASEAN Secretariat, *ASEAN Political-Security Community Blueprint 2025*, March 2016, available at <www.asean.org/wp-content/uploads/2012/05/ASEAN-APSC-Blueprint-2025.pdf>.

9 Buena Bernal, '*Rule of law must prevail as ASEAN integrates*', Rappler, March 3, 2015, <www.rappler.com/video/reports/85669-rule-of-law-asean-integration>.

10 The ASEAN Charter, art. 14.

11 So far, all 10 member states had signed and ratified the Convention on the rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of Persons with Disabilities (CRPD). *See* United Nations Human Rights Office of the High Commissioner, *Status of Ratification Interactive Dashboard*, available at <http://indicators.ohchr.org>.

12 The ASEAN Secretariat, *AICHR: What You Need to Know* (3rd Edition), June 2016, available at <http://asean.org/?static_post=asean-human-rights-declaration-ahrd-and-its-translation>.

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the rights of women and children through its facilitation for member states to comply with the relevant conventions.

Last but not the least, the Charter created an arbitral tribunal as a new dispute settlement mechanism if member states have disputes over the interpretation or application of the Charter or other ASEAN instruments.[13] In resolving disputes, the tribunal should examine the facts, apply the relevant provisions of the ASEAN Charter or instruments, and render awards with reasoning under detailed procedural rules.[14] The tribunal's decisions are binding to the parties of the dispute.[15] The Secretary-General of the ASEAN is mandated to monitor the compliance of the tribunal's decisions.[16] The creation of the arbitral tribunal showed that ASEAN member states were willing to peacefully settle disputes through a judicial mechanism and endeavored to transform the ASEAN into a rule-based organization.[17]

Aside from its mission expansion from trade to promotion of democracy and human rights, ASEAN also extended its partnership beyond the member states. The cooperation of "ASEAN Plus Three" – China, Japan and Korea – was initiated in December 1997, and developed into a wide range of issues such as promoting sustainable development and developing policies regarding aging society.[18]

2.2.1.2 Asia-Pacific Economic Cooperation (APEC)

In 1989, APEC was created to sustain the growth and development in the Asia-Pacific region for the common good of its people and to promote a freer trading bloc.[19] At present, APEC has 21 member economies including Canada, the United States, Mexico, Chile, Japan, Korea, China, Hong Kong, Taiwan (in the name of Chinese Taipei), and a number of ASEAN states such as Singapore, Malaysia, the Philippines, and Vietnam, among others.[20] In spite of its initial organizational nature in economic cooperation, APEC has since extended its missions beyond regional trade, ranging from regional security, regulatory frameworks, and minorities empowerment.

The APEC leaders have regarded the stability of political and social environment in the region as a top priority. After the 9/11 attack in 2000, statements were issued to condemn the attack and announce close cooperation against terrorism, including fulfill-

13 The ASEAN Charter, Chapter 8. See also Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, April 8, 2010, art. 5, 8, 9, available at <http://agreement.asean.org/media/download/20160829075723.pdf> [hereinafter the Protocol].

14 The Protocol, art. 12, 15; annex 4.

15 The Protocol, art. 15.

16 The Protocol, art. 16.

17 The Protocol, Preamble.

18 The forum and activity of ASEAN Plus Three, available at <http://asean.org/asean/external-relations/asean-3/>.

19 APEC Secretariat, *Third APEC Ministerial Meeting Joint Statement*, November 14, 1991, available at <www.apec.org/~/media/Files/MinisterialStatements/Annual/1991/91_amm_jms.pdf>.

20 APEC member economies, available at <www.apec.org/About-Us/About-APEC/Member-Economies>.

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ing obligations stipulated in the United Nations Security Council resolutions.[21] A task force, later transformed into a working group, was created to assist APEC member economies to coordinate and implement the policies and strategies proposed by the United Nations.[22]

In addition, APEC's economic cooperation has further extended to the facilitation of structural or regulatory reforms in member economies, to the extent of stipulating common regulatory frameworks or law and policy harmonization. In the agenda to facilitate economic cooperation proposed by APEC leaders, structural reforms of regulatory frameworks such as the reduction of regulatory divergences on trade and investment, improvement in full disclosure of budgetary and fiscal activities, implementation of competition law, optimization of public service, and strengthening economic and legal infrastructure were all prioritized. The progress has been promising. On the convergence of good regulatory practices, nine member economies have established a central body to oversee regulatory policies, with these bodies for mutual cooperation, and 14 member economies published the same set of good regulatory principles.[23]

Like ASEAN, APEC has not shielded itself away from the protection of fundamental rights or the empowerment of minorities. For example, APEC leaders have reiterated that human resources development was central to economic growth,[24] and the promotion of women's participation in economic fields as well as the mainstreaming of gender equality were highlighted in the declaration for women's empowerment.[25] After a decade of efforts, a policy partnership dedicated to economic integration of women was established, and a sectoral ministerial meeting of Women and the Economy Forum was held annually. According to the 2015 APEC Women and the Economy Dashboard, there have been an increasing access to training and educational programs for women, the improvement of women health condition, and reforms in the legal frameworks for gender equality on property and inheritance rights.[26]

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21 APEC Secretariat, *The APEC Statement on Counter-Terrorism*, October 21, 2001, available at <www.apec.org/Meeting-Papers/Leaders-Declarations/2001/2001_aelm/statement_on_counter-terrorism.aspx>; APEC Secretariat, *The APEC Statement on Fighting Terrorism and Promoting Growth*, October 26, 2002, available at <www.apec.org/Meeting-Papers/Leaders-Declarations/2002/2002_aelm/statement_on_fighting.aspx>.

22 APEC Secretariat, *The APEC Counter-Terrorism Working Group*, available at <www.apec.org/Home/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Counter-Terrorism.aspx>.

23 APEC Secretariat, *Factsheet: 2014 APEC Economic Policy Report*, November 2014, available at <http://publications.apec.org/publication-detail.php?pub_id=1582>.

24 APEC Secretariat, *The 2010 Leaders' Declaration*, November 13, 2010, available at <www.apec.org/Meeting-Papers/Leaders-Declarations/2010/2010_aelm.aspx>.

25 APEC Secretariat, *The 2015 Leaders' Declaration*, November 19, 2015, available at <www.apec.org/Meeting-Papers/Leaders-Declarations/2015/2015_aelm.aspx>.

26 APEC Policy Support Unit, *The APEC Women and The Economy Dashboard 2015*, September 2015, available at <www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/~/media/2AA295B69D574F6B88ACCEB82032747B.ashx>.

2.2.2 Integration with Democratic Constitutionalism

In addition to integration by the creation of a centralized and formal mechanism such as ASEAN and APEC, Asian regional integration has also been proceeding with a less centralized and formal – but equally functional – mechanism: integration by the spread of democratic constitutionalism. Like Eastern Europe and Latin America, Asia has – since the late 1980s and early 1990s – witnessed an increasing number of states transforming into constitutional democracies.[27] New constitutions were adopted, similar constitutional principles such as separation of powers and protection of fundamental rights and freedoms were enshrined in these new constitutions, and similar constitutional institutions such as constitutional court or national human rights commission were created. The spread of democratic constitutionalism in the region has led to constitutional convergence of many Asian states and further integration on substantial and functional terms.

To illustrate, the so-called third-wave democratization[28] around the globe includes Asian countries like South Korea, Taiwan, Mongolia, and the Philippines. These countries ended authoritarian regimes in the late 1980s, and continued to consolidate democratic governance in the past three decades. South Korea amended its constitution in 1987, and created a new constitutional court that has since developed into a powerful institution safeguarding its democratic constitutionalism. Taiwan lifted the martial law decree in 1987, and has since opened up all key political offices for election, achieving already three rounds of peaceful government turnover. Although not without political turbulence, the Philippines created a new democratic constitution in 1987 and has since maintained democratic constitutional governance with a strong supreme court that placed close judicial checks on political powers. Similar to the Philippines, Mongolia created a new democratic constitution and a new constitutional court in 1992, and has been continuing with constitutional governance till this date.

About a decade later, the so-called fourth wave of democratization[29] was also witnessed in Asia. For example, after four decades of dictatorial regime, Indonesia – in response to the strong student-led, anti-government demonstrations in 1998 – decided to undertake political reforms, leading to four rounds of constitutional revisions between 1999 and 2002. The most recent example was Myanmar. Since the start of the military regime in 1962, attempts at returning to democracy had not succeeded until the unprecedented election in 2010. With a series of reforms lifting past restrictions on human rights, a first civilian president was elected.

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27 See Jiunn-rong Yeh and Wen-Chen Chang, *The Emergence of East Asian Constitutionalism: Features in Comparison*, 59 Am. J. Comp. L. 805, 823-831 (2011).

28 *See* Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991); Bruce Ackerman, *The Future of Liberal Revolution* (New Haven, CT: Yale University Press, 1992).

29 See Michael McFaul, *The Fourth Wave of Democracy and Dictatorship: Noncooperative Transitions in the Postcommunist World*, 54 (2) World Politics 212, 212-213 (2002).

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Admittedly, the process of democratization in Asia had not escaped regression.[30] In Nepal, the election of 1991 brought about democratic rule, but it did not last due to subsequent civil conflicts. After the end of conflict, an interim constitution was made in 2007, but the attempts at making a new constitution were obstructed many times until the eventual birth of the new constitution in 2015. In 1997, Thailand had a new constitution, which, however, was suspended by a coup in 2006, yielding another constitution in 2007, which was suspended yet again in 2014 by an interim constitution. Finally, a new constitution was ratified in April 2017.[31]

With or without regression, the progress of democratization and constitutional reforms in these Asian countries has given rise to the convergence of constitutional rights, principles, and institutions. Such convergence may generate – and indeed has generated – further integration among/between these similar constitutional institutions. For example, the institution of constitutional review exercised by a nation's top court or a separately created constitutional court to maintain constitutional rule of law and safeguard fundamental rights has been widely in practice in Asia.[32] A decentralized system of judicial review on the constitutionality of statutes is mostly seen in common law jurisdictions, while a centralized review by a separated constitutional court or council is popular in civil law jurisdictions.[33] All of these supreme courts or constitutional courts have become functioning or even become powerful institutions in respective countries. India, Singapore, Malaysia, and Hong Kong offer great examples in common law jurisdictions, while constitutional courts or councils in Taiwan, South Korea, Mongolia, Indonesia and Cambodia are exemplary in civil law Asia.[34]

As a result of the widespread creation of these courts that exercise similar powers, a regional association – the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) – was created through the adoption of the "Jakarta Declaration" in 2010.[35] This association is aimed at serving as a regional forum for courts and judges who exercise constitutional review powers to collaborate by exchanging information and deliberating on issues relevant to sustaining democracy, rule of law, and fundamental rights in Asia. Thus far, the association has 16 members in and beyond the region. Among the

30 Wen-Chen Chang, Kevin YL Tan, Li-ann Thio and Jiunn-rong Yeh, *Constitutionalism in Asia: Cases and Materials* 465-466 (Oxford: Hart Publishing, 2014).

31 Panarat Thepgumpanat and Patpicha Tanakasempipat, *Thai king signs constitution in step toward poll*, April 6, 2017, available at <www.reuters.com/article/us-thailand-king-constitution-idUSKBN1780VB>.

32 Chang et al, *supra* note 30, at 308-314.

33 *Id*., at 312.

34 *See* Yeh and Chang, *supra* note 27, 823-831. For Indonesia, *see* Bjoern Dressel, *Courts and Judicialization in Southeast Asia*, in The Routledge Handbook of Southeast Asia Democratization 268, 273 (William Case ed., New York: Routledge, 2015). For the Mongolian court, *see* Tom Ginsburg and Gombosuren Ganzorig, *When Courts and Politics Collide: Mongolia' Constitutional Crisis*, 14 Colum. J. Asian L. 309 (2001).

35 The organization and goals of Association of Asian Constitutional Courts, available at <www.aaccei.org/ccourt?act=aacc>; for the discussions of judicial dialogue, *see also* David S. Law and Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86(3) Wash. L. Rev. 523-577 (2011).

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jurisdictions discussed in this chapter, the Constitutional Court of Indonesia, the Constitutional Court of South Korea, the Federal Court of Malaysia, the Constitutional Court of Mongolia, the Supreme Court of Pakistan, the Supreme Court of the Philippines, the Constitutional Court of Thailand, and the Constitutional Tribunal of Myanmar are AACC members.

Another institution that also safeguards fundamental rights and freedoms is a national human rights institution. In the process of democratization or constitutional reform, many Asian states created a national human rights institution that is responsible for protecting human rights and promoting domestic incorporation of international human rights through submitting reports or recommendation to the government. The Philippines created such an institution in 1987, India and Indonesia in 1993, Sri Lanka in 1996, Malaysia and Nepal in 2000, South Korea, Mongolia and Thailand in 2001, Bangladesh in 2009, and Myanmar in 2011.

Similar to the formation of AACC, the Asia Pacific Forum of National Human Rights Institutions was created in 1996,[36] and has since held regular meetings to exchange information and facilitate human rights dialogue within the region.[37] Its periodic meetings not only monitor, promote, and protect human rights, but also provide technical advice to the governments on the compliance of international human rights standards.

2.2.3 Integration through Accession to Core International Human Rights Instruments

Notwithstanding the absence of a single integration treaty, Asia's integration has been proceeding with multiple treaty forums. In the area of human rights, for instance, while there is no Asian Convention on Human Rights, the majority of Asian states have already acceded to the nine core international human rights conventions under the United Nations.[38] Taken as a whole, these international human rights instruments have functioned

36 The website of Asia Pacific Forum of National Human Rights Institutions is available at <www.asiapacificforum.net/>.

37 Brian Burdekin, National Human Rights Institutions in the Asia Pacific Region 98-99 (Boston: Martinus Nijhoff Publishers, 2007).

38 *See* United Nations Human Rights Office of the High Commissioner, *The Core International Human Rights Instruments and Their Monitoring Bodies*, available at <www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx>. These nine core international human rights conventions include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICRED), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), the 1989 Convention on the Rights of the Child (CRC), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CPED), the 2006 Convention on the Rights of Persons with Disabilities (ICRPD).

as a uniform standard for those Asian jurisdictions acceding to them to enhance human rights protection not only at the domestic level but also at the regional level, especially for collaboration across jurisdictions. All Asian states have ratified both women (CEDAW) and children (CRC) conventions. Among Asian states discussed in this chapter, the average number of ratification to those nine core instruments is 6.5, far more than some Western democracies, such as the United States.[39]

Most Asian states ratified these conventions such as ICERD, ICCPR, ICESCR, and CAT, before the 1990s. The two conventions – CRC and ICRPD – which became effective in the 1990s, were ratified by most of the Asian states. It is worth noting that the accession of Asian states to these nine core international human rights instruments has considerably corresponded to their respective process of democratization and constitutional reforms. For example, immediately after the democratization, South Korea ratified ICCPR, ICESCR, CAT, and CRC in the early 1990s. Most of Indonesian ratifications occurred after its democratization in 1998. So did Thailand. Soon after its independence and acceptance into the UN in 2002, Timor-Leste ratified most of these core instruments in 2003 and 2004. As for Nepal and Pakistan, most of their respective ratifications were completed after the end of the absolute monarchy and start of constitutional democracy.

The accession to international human rights instruments of Hong Kong and Taiwan requires a special note. For Hong Kong, as a colony of the United Kingdom before 1997, it was under the protection of ICCPR. After returning to China as a special administrative region of China in 1997, ICCPR continued to apply to Hong Kong even though China was not a state party.[40] For Taiwan, before losing its status in the UN, it only ratified ICRED in 1970, and signed ICCPR and ICESCR in 1967. The subsequent ratifications of ICCPR, ICESCR, CEDAW, CRC, and ICRPD were all done through domestic legislation after its democratization and constitutional reforms.[41]

2.3 Impacts on Domestic Constitutional Laws

Albeit without a single integration treaty or supranational organization, Asia has undergone substantive integration in functional terms through expansion of sub-regional networks, development of democratic constitutionalism, and embracing international hu-

39 The United States only ratified three basic core human rights conventions: CERD, CCPR, and CAT. *See* United Nations Human Rights Office of the High Commissioner, *supra* note 38.

40 This was partly due to the Negotiation between UK and China that was further implemented in the Hong Kong Basic Law, and partly due to General Comment No 26 by the Human Rights Committee, a body responsible for ICCPR interpretation and implementation.

41 For more, *see* Wen-chen Chang, *The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison*, 36 N.C.J. Int. L. Com. Reg. 101 (2011); and Wen-chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4(3) Nat'l Taiwan U. L. Rev. 203 (2009).

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man rights standards as described above. Such ongoing and escalating regional integration has brought significant impacts – both encouraging and discouraging – on domestic constitutions.

We observe the following four main issues in many Asian domestic constitutions as mostly impacted by increasing regional integration. First, there has been an increase in the domestic incorporation of international human rights laws, particularly shown in the substantial growth of judicial reference to foreign and international laws in many Asian jurisdictions. Second, in response to the rising human flow in the region, a strong demand for protecting rights of foreigners as well as rights of overseas citizens is witnessed, leading to landmark judicial decisions. Third, like elsewhere, the deficit of democratic transparency and government accountability also posts great challenges. Last but not the least, this wave of regional integration in Asia has nurtured the emergence of vibrant civil societies with closer and closer regional cooperation.

2.3.1 Domestic Incorporation of International Human Rights

Asian integration has brought to increasing incorporation of international instruments – particularly human rights ones – into domestic constitutions. The methods includes constitutional, statutory, and judicial incorporation.

Direct constitutional incorporation of international human rights instruments is mostly seen in recently made or amended constitutions. For example, the Timor-Leste Constitution provides that fundamental rights shall be interpreted in accordance with the Universal Declaration of Human Rights.[42] It further states that the legal system adopts the general or customary principles of international law, and that "rules provided for in international conventions, treaties and agreements shall apply" in its legal system, and all rules that are contrary to the provisions of international conventions, treaties and agreements applied in the internal legal system shall be invalid.[43] The Cambodian Constitution stipulates that it

> recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of human Rights, the covenants and conventions related to human rights, women's and children's rights.[44]

Hong Kong Basic Law mandates the government to implement ICCPR, ICESCR, and other ratified international labor conventions through laws.[45]

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42 Constitution of Democratic Republic of Timor-Leste, part. 1, sec. 23 (2002), <http://timor-leste.gov.tl/wp-content/uploads/2010/03/Constitution_RDTL_ENG.pdf> [hereinafter Timor-Leste Constitution].

43 Timor-Leste Constitution, part 1, sec. 9.

44 Wen-Chen Chang, Kevin YL Tan, Li-ann Thio and Jiunn-rong Yeh, *Constitutionalism in Asia: Cases and Materials* 430 (Oxford: Hart Publishing, 2014).

45 Xianggang Jiben Fa art. 39 (H.K.).

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Statutory incorporation is another common method. As most constitutions are typically silent on domestic legal status and effect of international instruments, an increasing number of Asian jurisdictions choose to incorporate these international instruments – particularly human rights ones – and give them direct effects as domestic law. For instance, the South Korean government makes clear to the Human Rights Committee that the ICCPR has a direct effect as domestic law in its jurisdiction, a stance confirmed later by its Constitutional Court.[46] Similarly, albeit barred from formal accession to the UN and related international conventions, Taiwan has in recent years incorporated international human rights conventions through domestic statutes. In 2009, Taiwan passed an implementation act to make the rights and freedoms guaranteed in the ICCPR and ICESCR domestically applicable. Subsequently, implementation acts were also passed to incorporate CEDAW, CRC, and CRPD into domestic legal regimes.

Judicial reference to international or foreign authorities – particularly human rights ones – has become popular in many Asian courts. Most representative are Indian courts. In *Visakha v. State of Rajasthan*, the Supreme Court of India specifically referred to CEDAW for protection of women from sexual harassment in workplace to fill the vacuum in its domestic legal system. According to the Court,

> the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in […] the Constitution and the safeguards against sexual harassment implicit therein.[47]

Courts in the context of democratization are also likely to make references to international or foreign authorities. For instance, the Constitutional Court of South Korea made the first reference to ICCPR in 1991, immediately after the country's democratization and accession to ICCPR. Following that, an increasing number of references to many other international or foreign authorities were seen for the advancement of the rights of women, children, and labors, among others.[48] For example, in one case, the Constitutional Court invoked the CRC and American laws to strike a balance between the right of privacy and children's right to be free from sexual exploitation, and eventually decided that the protection of the former should be subject to the latter.[49] In Taiwan, the first reference of international human rights instruments was made by the Constitutional Court in 1995. References have been made to ICCPR, ICECR, CEDAW, CRC, and labor conventions, among others.[50] For example, in *J. Y. Interpretation No. 549* and *578*, Taiwan's Constitutional Court advised the

46 Constitutional Court of Korea, 2003 Hun-Ba 51, August 30, 2007 (19-2 KCCR 215).
47 *Visakha and Others v. State of Rajasthan and Others*, (1997) 6 SCC 241 (India).
48 Chang, *supra* note 41.
49 Constitutional Court [Const. Ct.], 2002Hun-Ka14, June 6, 2003 (S. Kor.).
50 Chang, *supra* note 41.

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government to overhaul the impugned statutory regime on the basis of related international labor conventions as a benchmark for future reforms.[51]

Judicial references to international or foreign authorities have become so widespread that even courts that were traditionally more reserved in this aspect have begun engaging in such practices. Most noteworthy are the recent practices by the Supreme Court of Japan. In *the Nationality Law Case*, the Court found an impugned statutory provision unconstitutional and referred to both ICCPR and CRC to justify its finding that the law discriminated against the child born out of wedlock of a Japanese father and a foreign mother to obtain Japanese nationality.[52]

However, not every jurisdiction in Asia has welcomed judicial reference to international or foreign authorities. Reticence does exist in some jurisdictions such as Singapore and Malaysia. For example, in *Attorney-General v. Chee Soon Juan*,[53] the High Court of Singapore declined to adhere to English cases since it found that English law had been heavily influenced by the ECHR. In *Attorney-General v. Hertzberg Daniel*,[54] the Court again cautioned that local conditions must be taken into consideration in referencing foreign or international laws.

2.3.2 Increasing Rights Protection for Foreigners and Overseas Citizens

Regional integration has brought flows of many kinds, including flow of people. The movement of people across nation-states has posed challenges to the concept as well as capacity of sovereign nation-state in guarding its own national territory and sovereign power. The challenges are particularly difficult when posed by an ever-growing number of foreigners and overseas citizens within and outside the territory of a nation-state. There is no exception to Asia. As the following illustrates, in response to increasing human flow across the region, Asian states have gradually opened up, rather than jealously guarded, their respective borders. In many jurisdictions, there has been significant progress made in the naturalization as well as general rights protection of foreigners. Meanwhile, the rights of citizens residing abroad have been improved.

Many Asian states have recently lessened restrictions to naturalization of foreigners. Some were influenced by domestic constitutions, while others were by international human rights instruments. For instance, Japan's Supreme Court ruled the relevant provisions in the nationality law unconstitutional as it accorded nationality only to those born of wedlock by a Japanese father.[55] In South Korea, the Constitutional Court held uncon-

51 Jiunn-rong Yeh, The Constitution of Taiwan: A Contextual Analysis 188 (2016).
52 Yeh and Chang, *supra* note 27.
53 *Attorney-General v. Chee Soon Juan* [2006] SGHC 54, 2 SLR 650 (Sing.).
54 *Attorney-General v. Hertzberg Daniel* [2008] SGHC 218 (Sing.).
55 Saikō Saibansho [Sup. Ct.] June 4, 2008, 2006 (Gyo-Tsu) 135, 2002 Hanji 3, available at <www.courts.go.jp/app/hanrei_en/detail?id=955> (Japan).

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stitutional a challenged provision that accorded citizenship only to the child born of a South Korean father but not of a South Korean mother.[56] In Thailand, the government stated in its second ICCPR state report that it amended the nationality act in 2008 to apply *jus sanguinis* principle to children born by either a Thai father or a Thai mother for equality.[57] Likewise, Indonesia's state report stated that it abandoned the law that discriminated against Indonesian women to pass their nationality to their children who were born to a non-Indonesian father.[58] The above liberal trend, however, is not without limit, especially to migrant workers seeking naturalization. Recently in Hong Kong, the court decided not to give the right of abode to a Filipino domestic helper, even though she has worked for decades in Hong Kong.[59]

Aside from naturalization, general rights protection of foreigners has also become a point of concern. In general, civil rights of foreigner have been increasingly ensured in many Asian jurisdictions. For example, in South Korea, the Constitutional Court ruled that a foreigner was entitled to basic rights, and the limitations to those basic rights could only be justified on the basis of the nature of those rights.[60] Taiwan's Constitutional Court also affirmed that foreigners should enjoy the protection of physical freedom, which was "the foundation of all freedoms and rights of humankind" regardless of nationality.[61] As a result, the Court invalidated the challenged provision that failed to accord the protection of due process and judicial remedy to foreigners whose physical freedoms were violated.

The protection of foreigners' economic and social rights, however, is far from satisfactory. In Hong Kong, for example, the protection of labor rights was extended to both local and migrant workers, including foreign domestic helpers. Still, migrant workers in Hong Kong continued to suffer from serious discriminations and rights restrictions. In Singapore, migrant workers received considerably low wages due to the lack of minimum wage laws or regulations,[62] and they have been subjected to labor abuse and exploitations through debts owed to recruitment agents, limitations to movement, and even physical and sexual abuse.[63]

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56 Constitutional Court [Const. Ct.], 97Hun-Ka12, August 31, 2000, (12-2 KCCR 167, 97) (S. Kor.).

57 Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Second Periodic Reports of States Parties due in 2009 (Thailand), para. 91, U.N. Doc. CCPR/C/THA/2 (Sep. 30, 2015), at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/224/88/PDF/G1522488.pdf?OpenElement>.

58 Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Initial Reports of States Parties (Indonesia), para. 327-328, U.N. Doc. CCPR/C/IDN/1 (Mar. 19, 2012), at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fIDN%2f1&Lang=en>.

59 *Vallejos Eveangeline Banao v. Commissioner of Registration & Another*, [2013] 16 H.K.C.F.A.R. 45 (C.F.I) (H.K.).

60 Constitutional Court [Const. Ct.], 99Hun-Ma494, November 29, 2001, (13-2 KCCR 714) (S. Kor.).

61 Interpretation of the Council of Grand Justices, Judicial Yuan, No. 708 (February 6, 2013).

62 Human Rights Watch, *Legal Framework for Migrant Domestic Workers in Singapore*, available at <https://www.hrw.org/reports/2005/singapore1205/4.htm>.

63 Human Rights Watch, *World Report 2015: Singapore*, available at <https://www.hrw.org/world-report/2015/country-chapters/singapore#f176e9>.

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Human flow caused by regional integration has not only seen the coming of foreigners but also the leaving of citizens seeking opportunities abroad. As a result, there have been rising demands from overseas citizens to ensure their rights even though they do not reside in their own home countries. The right to vote of overseas citizens has recently caught public attention in many Asian jurisdictions. For example, in 2005, Japan's Supreme Court held it unconstitutional that overseas Japanese citizens were permitted to vote for parliamentary members under proportional representation system but not under district elections.[64] According to the Court, the right to vote was so fundamental that should be accessible to all citizens regardless of residence, domestic or overseas.

A few other jurisdictions guaranteed voting rights of overseas citizens through constitution or legislation. For example, in Taiwan, the Constitution ensures the right of political participation of citizens residing aboard,[65] by setting aside a few parliamentary seats to be elected by citizens residing abroad,[66] and permitting citizens residing in Taiwan for more than six consecutive months to vote for the President.[67] In the Philippines, as many of its citizens work overseas as migrant workers, it passed a package of law to realize Filipino migrant workers' right to participate in public affairs and the right to vote and be elected.[68] Many measures were undertaken, most important of which was the introduction of "Voting by Mail" system.[69]

2.3.3 Deficit of Democratic Transparency and Government Accountability

Not all impacts, however, are positive. Like elsewhere, regional integration may come with high price at the disempowerment of those underprivileged and the deficit of democratic transparency and government accountability.[70]

In the course of rapid regional integration, those underprivileged in domestic political and economic structures may suffer the most. Farmers in many Asian jurisdictions, for

64 Saikō Saibansho [Sup. Ct.] September 14, 2005, 2001 (Gyo-Tsu) 82, 59 Minshū 2087, available at <www.courts.go.jp/app/hanrei_en/detail?id=1264> (Japan).

65 Xianfa Tsenghsiu Tiaowen [The Additional Articles of the Constitution of the Republic of China] art. 10, § 13 (2005).

66 Xianfa Tsenghsiu Tiaowen [The Additional Articles of the Constitution of the Republic of China] art. 4, § 1 (2005).

67 Zongtongfu Gongbao No. 6548 (October 29, 2003) (Zongtong Fuzongtong Xuanju Bamian Fa [Presidential and Vice Presidential Election and Recall Act] art. 12, § 1 (2005)).

68 Consideration of Reports Submitted by States Parties under Article 73 of the Convention pursuant to the Simplified Reporting Procedure: Second Periodic Reports of States Parties due in 2011 (The Philippines), para. 61, U.N. Doc. CMW/C/PHL/2 (March 27, 2014), available at <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CMW%2fC%2fPHL%2f2&Lang=en>.

69 *Id*.

70 *See*, *e.g.* Dieter Grimm, *Does Europe Need a Constitution?*, 1 Eur. L. J. 282, 297-299 (1995) (discussing the challenges of democratic deficit in the process of European integration); Jiunn-Rong Yeh and Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 Penn State Int L. Rev. 89 (2008) (discussing democratic deficit in the rise of transnational constitutionalism).

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example, have shown great resistance to the recent economic integration. Protests have been all over the region. In 2013, for example, hundreds of Taiwanese farmers – joined by their counterparts from Thailand, Indonesia, South Korea, Japan, and Malaysia – gathered in Taipei to protest against Taiwanese government's plans to lift more bans on agricultural imports.[71] In the same year, Malaysian farmers and fishermen protested against their government's plan to join the Trans-Pacific Partnership (TPP).[72] In April 2016, having suffered from the serious drought, Filipino farmers took to the streets demanding the government to take measures, but the protest was met with a violent dispersal resulting in injuries and even deaths.[73] This tragedy alerted Filipino civil groups, which gave a statement demanding ASEAN institutions to undertake actions against economic inequality and human rights compromises in the course of regional integration.[74]

The lack of democratic transparency and government accountability in the escalating course of regional integration is another grave vital concern. For example, in 2014, when the Taiwanese government tried to expedite the process of signing a trade agreement with China, it stirred up the civil groups and students who protested outside the parliament for months. Attempting at stopping parliamentary deliberation, those protesters broke into the parliament and occupied the assembly hall for about a month, sparking what was later called the Sunflower Movement.[75] The protesters called up the government to suspend all ongoing trade negotiations until a law stipulating a transparent and participatory process in the making of trade agreements would be passed. The government eventually conceded to that demand.

Another similar movement took place in Japan. Having sought a closer cooperation with ASEAN for regional security,[76] the Japanese government initiated a legal package in 2015 with an attempt at expanding military influences in the region and even beyond. Yet, Article 9 of Japan's Constitution enacted after World War II forever renounces war as a sovereign right of the nation, and as a result, the military can be maintained only for Japanese people's collective self-defense. To escape constitutional violation, the govern-

71 Lok-Sin Loa, *Farmers, Activists Protest against Globalization*, Taipei Times, February 4, 2013, available at <www.taipeitimes.com/News/front/archives/2013/02/04/2003554177>.

72 Vignesh Kumar, *TPPA: Fisherman and Farmers Unhappy*, Free Malaysia Today News, December 18, 2013, available at <www.freemalaysiatoday.com/category/nation/2013/12/18/tppa-fisherman-and-farmers-unhappy/>.

73 Karlos Manlupig & Williamor Magbanua, *1 Killed, 13 Hurt after Police Open Fire in North Cotabato Farmer Protest*, Inquirer.net, April 1, 2016, available at <http://newsinfo.inquirer.net/777314/1-killed-13-hurt-after-police-open-fire-in-north-cotabato-farmer-protest>.

74 ASEAN People, *Philippines CSO Statement on ASEAN Economic Integration*, available at <http://aseanpeople.org/philippine-cso-statement-on-asean-economic-integration/>.

75 *See* Jiunn-rong Yeh, *Marching toward Civic Constitutionalism with Sunflowers*, 45 Hong Kong L.J. 315 (2015); Brian Christopher Jones ed., Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements (2017).

76 Ministry of Foreign Affairs of Japan, The 18th Japan-ASEAN Summit Meeting, November 22, 2015, available at <www.mofa.go.jp/a_o/rp/page3e_000422.html>.

ment pursued a reinterpretation of Article 9 from the Cabinet Legislation Bureau, a government agency responsible for providing authoritative interpretation regarding laws and the Constitution,[77] which would allow the use of Japanese military forces for regional or international security. Even a proposal to amend Article 9 of the Constitution was made. These government moves infuriated a great many citizens and students, who denounced the government package of legislation as "War Legislation" rather than "Legislation for Peace." A student movement named SEALDs mobilized a series of protests against the legislation as well as the reinterpretation of Article 9 of the Constitution.[78] A large group of constitutional law scholars in Japan also openly criticized the constitutionality of the "War Legislation."[79] Notwithstanding these protests, the "War Legislation" was still passed, and many protesters vowed to take it to the court for judicial review.[80]

2.3.4 Emergence of Vibrant Civil Societies with Regional Cooperation

The wide spread of democratic constitutionalism in Asia has nurtured the emergence of vibrant civil societies in many – if not all – jurisdictions. In response to more open and democratizing societies, a sharply rising number of nongovernmental organizations (NGOs) have been formed to steer the course of democratization and implementation of constitutionalism in respective jurisdictions, to advocate for domestic incorporation of international human rights, and – most importantly – to provide for regional networks for the cooperation of NGOs across jurisdictions.[81]

In Taiwan, the efforts of NGOs that work closely with their regional and international partners are pivotal to the recent incorporation of and voluntary compliance with core international human rights instruments. Take for example the recent incorporation of the children convention (CRC). The advocacy of the CRC's domestic incorporation was launched by an alliance of NGOs that participated in the International Campaign to End Child Prostitution in Asian Tourism (ECPAT). The Taiwanese NGOs learned many of the advocacy strategies from ECPAT, and eventually succeeded in educating

77 On the functions of the Cabinet Legislation Bureau, *see* Yasuo Hasebe, *The Supreme Court of Japan: Its Adjudication on Electoral Systems and Economic Freedoms*, 5 (2) Int. J. Con. L. 298-299 (2007).

78 Jeff Kingston, *Students Oppose Abe's Assault on the Constitution*, The Japan Times, September 5, 2015, available at <www.japantimes.co.jp/opinion/2015/09/05/commentary/students-oppose-abes-assault-constitution/#.V_jGDJN95E4>. However, SEALDs were dismissed in August 2016.

79 Hajime Takano, *NHK Conceals the Result of the Survey for the Constitutional Law Scholars to Please the Prime Minister*, Nikkan Gendai Digital, July 30, 2015, available at <www.nikkan-gendai.com/articles/view/news/162204/1> (in Japanese).

80 Odaka Chiba & Takuro Negishi, *700 Citizens in Tokyo and Iwaki File Lawsuit against the Constitutionality of the Security Legislation*, The Asahi Shimbun, April 26, 2016, available at <www.asahi.com/articles/ASJ4V5CTRJ4VUTIL03P.html> (in Japanese).

81 *See, e.g.* Wen-Chen Chang, *An Isolated Nation with Global-minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan*, 4 (3) NTU L. Rev. 203, 220-229 (2009).

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the general public and pushed the government for incorporation and implementation.[82] Women's NGOs also served a similar role in the domestic incorporation of the women convention (CEDAW) in Taiwan.[83]

Japanese NGOs have also been playing a vital role in shaping and influencing the government's foreign policies.[84] Most noteworthy was the de-mining campaign launched by the Japan Campaign to Ban Landmines (JCBL), a local NGO established in 1997 to advocate for landmine ban.[85] In close cooperation with the International Campaign to Ban Landmines (ICBL), the JCBL was able to successfully draw public attention and pressure the government to sign and ratify the 1997 Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction.

The networks between and among NGOs in Asia has been thriving. As mentioned above, the farmers from various Asian countries joined Taiwanese farmers to protest against the lifting of restrictions on certain agricultural imports.[86] The leaders of Taiwan's Sunflower Movement in 2014 and Japan's SEALDs in 2015 supported each other by exchanging information and sharing strategies. Both also extended their support to Hong Kong's Umbrellas Movement in 2014, which called for a more direct method of the chief executive's election.[87] In Japan, as stated above, a few lawsuits were filed against the government challenging the constitutionality of the "Military Legislation." The Taiwanese and Hong Kong citizens also sued against the government officials for violation of freedom of assembly and the exercise of abusive state power.[88] In these series of litigation, frequent references to international human rights and their respective domestic constitutional principles were made, further enhancing the respect of universal human rights and strengthening the course of the spread of democratic constitutionalism.

The networks of NOGs for ASEAN member states have also been created. For example, ASEAN People's Forum and ASEAN Civil Society Conference facilitate conversations between and among NGOs from respective ASEAN member states.[89] Through these meetings, domestic NGOs of ASEAN member states have an extra channel to receive information, learn and share advocacy strategies, voice out their agendas, and undertake actions with outside assistance.

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82 Chang, *id*. at 222-224.

83 *Id*. at 224-226.

84 Keiko Hirata, Civil Society in Japan: The Growing Role of NGOs in Tokyo's Aid and Development Policy 113-125 (New York: Palgrave Macmillan, 2002).

85 The organization and goals of JCBL, available at <http://jcbl.jpn.org/?page_id=119>.

86 *See supra* note 71 and accompanying text.

87 Jones, *supra* note 75.

88 Wen-Chen Chang, *The Right to Free Assembly and the Sunflower Movement*, in Law and Politics of the Taiwan Sunflower and Hong Kong Umbrella Movements 30-48 (Brian Christopher Jones ed., New York: Routledge, 2017).

89 The organization and goals of ASEAN People's Forum and ASEAN Civil Society Conference, available at <http://aseanpeople.org/about/background/>.

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2.4 Conclusion: Challenges Lying Ahead

Many years have gone by since Professor Tom Ginsburg had a very dimming picture for Asian integration.[90] However, much has since changed. As this chapter has illustrated, notwithstanding the lack of a single integration treaty or organization, Asian states have been integrating between and among themselves with substantive functional terms and at an escalating speed. Asian regional integration has been built upon ASEAN and APEC, and extended further beyond. Multiple mechanisms and forums on a regional scale have been in full blossom. Such functional and substantive cooperation on a regional scale has not been limited to market and trade, rather it extends to the areas of human rights, regulatory reforms, climate change, and other social and cultural collaborations. Even more striking is the development of functional integration through the development of democratic constitutionalism and accession to international human rights standard in so many – if not yet all – Asian states. By acceding to the same set of universal human rights and adopting similar democratic institutions in the domestic regime, Asian states can integrate – and indeed have been integrating – much like European States on the basis of the European Convention on Human Rights or treaty mechanisms of European Union.

These developments of functional integration in Asia considerably counter what Professor Tom Ginsburg argued quite a while ago that Asian integration was not likely because Asian states still saw law as instrumental, defended sovereignty fiercely, and faced a rather hostile environment for regional cooperation.[91] With widespread democratic constitutionalism in the region, more and more Asian states – particularly through their bottom-up forces such as NGOs – have understood and even turned to insist that the law should be an end in itself but not the means for government control. With regional cooperation on such wide-ranging issues and at escalating speed, it is hard to see that Asian states still fiercely defended their sovereignty and guarded their borders. It is still true that the complicated history of World War II and the following Cold War has rendered Asian regional cooperation enormously difficult, when taken into consideration the relationship of Japan and other Asian states that were colonized or invaded by Japan during World War II, the relationship between China and other Southeast Asian states in fear of the rise of China in political and economic powers, the competing relationship between Japan and China, and the strategic role of the United States in the region. Given – and despite – all of these complicated politics in Asia, closer and closer regional cooperation has been built on ASEAN and APEC, and extended even to "ASEAN Plus Three" – China, Japan, and Korea.[92] And there are ongoing regional security cooperation between ASEAN and Japan,[93] which was quite unthinkable years ago.

90 Tom Ginsburg, *supra* note 2.

91 *Id.*

92 *See supra* note 18 and accompanying text.

93 For the ongoing programs, *see* Ministry of Foreign Affairs of Japan, *The Japan-ASEAN Summit Meeting*, September 7, 2016, available at <www.mofa.go.jp/a_o/rp/page3e_000590.html>.

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Admittedly, there are still reasons for Professor Tom Ginsburg to maintain a dimming view of Asian regional integration. On a formal view, there is no single integration treaty or mechanism. On more functional terms, not all Asian states have become constitutional democracies or acceded to the UN core international human rights instruments. China and Vietnam remain as the Communist Party dominated regimes. North Korea – a dictatorial regime – constantly makes troubles for regional piece. The number of Asian states with accession to many core human rights instruments is still not satisfactory. China has acceded to many instruments but not ICCPR, the one central to the protection of civil and political rights for individuals within its territory. There are only five Asian states that have acceded to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, a key instrument to guarantee the rights of those who travel across borders for work.

Satisfactorily or not so satisfactorily, Asian regional integration is ongoing with an undoubtedly escalating speed. There are already impacts – encouraging or discouraging – felt by many Asian states in the key areas of their domestic constitutions. There have been increasing domestic incorporation of international human rights, as well as rising demands for protecting rights of foreigners and overseas citizens. Like elsewhere, Asian states are also confronting the deficit of democratic transparency and government accountability with such escalating regional integration. Fortunately, recent regional integration in Asia has nurtured the emergence of vibrant civil societies in many – if not all – states and these NGOs have played vital roles in both facilitating regional integration and challenging its democratic deficits. As illustrated above, an increasing number of Asian NGOs have collaborated with each other on wide-ranging issues on a regional scale. They constantly stay vigilant to watch not only their own government but also other governments and powerful centers in the region. Asian NGOs share information, learn from each other on advocacy strategies, and even more importantly organize themselves into the key regional platform or forces, if not yet a formal institution.[94]

We believe that vibrant civil societies across Asian jurisdictions offer a great asset for and are critical to the further success of Asian regional integration. Without these bottom-up democratic forces spreading all over Asia, Asian integration would become an elite-centered enterprise, confront even greater democratic deficit and perhaps repeat the failure of regional integration in other continent. With the vital forces of civil societies that work to bridge the gaps between the nations and between the powerful and the underprivileged, however, Asian regional integration can develop on a more democratic and transparent ground and eventually reach a genuine success.

94 *See supra* notes 81-85 and accompanying text.

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3 Fully Binding EU Bill of Rights for the Member States – A Potential Tool in Constitutional Crisis Management

Nóra Chronowski[*]

3.1 Setting the Scene

The years of the 2010s brought a frustrating crisis era to the European Union. There are still no adequate responses to the credit crunch, refugee crisis, exit striving of certain member states and the constitutional crises in Central Europe. In addition, that there are plenty of crisis somehow veils the backsliding of fundamental rights protection level in the states making an illiberal switch. As András Sajó assessed in 2003,

> The collapse of oppressive regimes in Eastern Europe raised high hopes. It was believed that the strong desire to get rid of communist authoritarianism and the wish to enjoy the advantages of a market economy would result in new societies committed to the rule of law and constitutionalism. It was also believed that the emerging societies would create institutions that would undo past injustices and be concerned about preventing the development of new injustices. Skeptics, on the other hand, argued that the social and economic conditions require a process of transition that does not favor such noble improvement, and that the cultural and structural traditions of these societies are not favorable to the rule of law and market fairness, nor are they sympathetic to human rights.[1]

Now it seems that defeatists were right. Ironically, those member states labelling themselves as illiberal are still highly relying on the benefits from the unique liberal value community that is committed to rule of law, democracy and human rights. In other words, the European Union is keeping to finance – on the basis of the mutual trust –

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1 András *Sajó:* Erosion and Decline of the Rule of Law in Post-communism: an Introduction, in András Sajó (ed.): *Out of and Into Authoritarian Law* (Kluwer Law International, the Hague, London, New York, 2003) x.

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these derogatory members as well. These governments gain from the deficiencies of European value protection system.

The Union was not inactive: to strengthen the rule of law in the EU, the European Commission put forward a new EU framework in March 2014[2] that was inspired by the experiences of the Hungarian constitutional crisis among others. In doing so, the Commission aimed to more effectively address any situation where "there is a systemic threat to the rule of law" within any member state. The framework is designed to complement existing means of protecting the EU's rule of law. These include infringement procedures limited to a breach of a specific provision of EU law pursuant to Article 258 of the Treaty on Functioning of the European Union (TFEU); and the "last resort" or "nuclear option"[3] preventive and sanctioning mechanisms provided for in Article 7 of the Treaty on European Union (TEU). The purpose of the framework is to enable the Commission to find a solution with the EU country concerned so as to prevent the emergence of a systemic threat to the rule of law.

However, this is a soft and careful political tool of persuasion just being tested on Poland. To preserve the rule of law and to prove a systemic threat to EU values of Article 2 TEU[4] an effective legal instrument seems to be necessary that goes beyond the limited infringement procedures. The systemic threat cannot be proved by member state based investigations, because the country threatening the common European values will cautiously and at a preliminary stage undermine the domestic checks and balances.

In my opinion, Article 7 procedures of the TEU should not be put aside as being completely ineffective,[5] instead they should be strengthened and underpinned with legal buttresses. And the European Union already has a legal means, the Charter of Fundamental Rights (Charter). The respect of fundamental rights and freedom is a value equally important as the rule of law, thus their protection should go hand in hand. In other words, the rule of law cannot prevail without the rule of rights. The EU already has an enhanced constitutional mandate for the protection of fundamental rights, and the Charter is an important feature of the architect.[6]

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2 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final, 11 March 2014.

3 This exaggerated term was used by Manuel Barroso, former president of the European Commission. According to Armin von Bogdandy, this qualification was unwise and stuck. See Armin von *Bogdandy:* How to protect European Values in the Polish Constitutional Crisis, <http://verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis/>.

4 Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

5 Balázs *Fekete* and Veronika *Czina*: Article 7 of the Treaty on European Union – is it really a nuclear weapon? <http://hpops.tk.mta.hu/en/blog/2015/04/article-7-of-the-treaty-on-european-union>.

6 András *Jakab:* The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States, in C. Closa and D. Kochenov (eds.): *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, Cambridge 2017) 187.

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The Charter of Fundamental Rights of the European Union has become part of the primary sources of Union law based on Article 6 (1) TEU. This reform has been of key importance from the aspect of the (constitutional) development of the Union. Ensuring the legal binding force of the Charter did not mean a change in the division of competences between the Union and the member states. This follows, on the one hand, from the guarantees relating to the field of application defined in Article 51 of the Charter and, on the other hand, from the statement made by the Court of Justice of the European Union (CJEU) that fundamental rights protection guaranteed by the Union cannot have the effect of extending the competences of the Community defined by the founding treaties,[7] which was also reinforced by the second subparagraph of Article 6(1) of the TEU. Thus to date the Charter does not replace the national systems for fundamental rights protection, instead it just complements them. The Charter addresses first and foremost the EU institutions. Member states are subject to their own constitutional bill of rights, and they have to respect the Charter only insofar as they apply Union law. This logic system is challenged sometimes by the CJEU on the one hand, by the ambiguous interpretation of the "acting within the scope of" criterion, and on the other hand by national courts whose questions in the preliminary ruling procedures seem to indicate an existing need for enhancing the scope of the Charter beyond the application of Union law. However, this soft, case law based expansion of scope is somehow uncertain.[8] Thus, the EU law still does not contain an effective mechanism to compel member states to respect fundamental rights in general.

It is worth mentioning that already in November 2013 the European Commission started to collect impulses and ideas that may contribute to shaping of the European Union's justice policy over the coming years. The forum of the debate on EU justice policies was the *Assises de la Justice*, and the discourse encompassed the potential development of civil, criminal and administrative law, the rule of law and fundamental rights in the EU.[9] To stimulate the debate, five discussion papers were made available. Discussion paper on Fundamental Rights posed the question whether the rights guaranteed in the Charter should be directly applicable to the member states in all cases, by abolishing the limitations of Article 51 of the Charter.[10] That time I already welcomed and urged the direct applicability of the Charter to the member states.[11] Amongst the interventions of

7 Judgment of the Court of 17 February 1998 in *Lisa Jacqueline Grant v. South-West Trains Ltd.*, C-249/96 [ECR 1998, I-621].

8 Michael *Dougan:* Judicial review of Member State action under the general principles and the Charter: defining the "scope of Union law". *Common Market Law Review* 52 (2015) 1201-1246; Bernhard *Schima:* EU fundamental rights and Member State action after Lisbon: putting the ECJ's case law in its context. *Fordham International Law Journal* 38 (2015) 1097, 1113-1114.

9 <http://ec.europa.eu/justice/events/assises-justice-2013/discussion_papers_en.htm>.

10 <http://ec.europa.eu/justice/events/assises-justice-2013/files/fundamental_rights_en.pdf>.

11 Nóra *Chronowski:* Enhancing the scope of the Charter of Fundamental Rights – problems of the limitations and advantages of directly applicable Charter rights with regard to the recent case law developments of the European Court of Justice and national courts. Discussion paper, <http://ec.europa.eu/justice/events/assises-

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the dialogue, one can find the outlines of the rule of law mechanism, but the full direct effect of the Charter was not fostered.[12]

Thus in the present contribution I emphasize again the importance of the direct applicability by collecting some new arguments, and taking into consideration the deepening constitutional crisis in Central Europe. First I outline what I mean by the limited effect and scope of the Charter regarding its legislative effect and applicability. In the second part I argue for the removal of the legal limitations from the way of direct application, taking also its difficulties into account.

3.2 Limited Effects and Scope of the Charter

Despite its clear significance acknowledged by the jurisprudence, the Charter is not able to fulfil its task completely, unless it fully contributes to and serves as a basis for the harmonisation of common European standards of fundamental rights protection.

3.2.1 Limited Legislative Effect

Considering the limitations of Article 6(1) second sentence of the TEU,[13] and Article 51 (2) of the Charter[14] – which agree with the liberal constitutional concept that fundamental rights norms do not attribute power, but merely limit the exercise of powers – the Union cannot directly influence the formation of the common standards, i.e. it has no legislative competences except of the treaty-based rights. In other words, the Commission can propose EU legislation that gives concrete effect to the rights and principles of the Charter only where the EU has competence to act under the TEU or the Treaty on the Functioning of the European Union (hereinafter: TFEU). As a result of this the Union content, effect and protection level of Treaty rights and Charter rights has been developed differently – in the former case by secondary legislation and by judicial way, in the latter only by case law.

The restrictive provisions contained in Article 6(1) of the TEU and Article 51(2) of the Charter give expression to the requirement that the Charter shall not extend the compe-

justice-2013/files/contributions/36.hungarianacademyofsciences__preliminary_contribution_assises_cfr_chronowski_en.pdf>.

12 <http://ec.europa.eu/justice/events/assises-justice-2013/interventions_en.htm>.

13 Article 6(1) second sentence of the TEU: "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."

14 Article 51(2) of the Charter: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

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tences of the Union; in other words, Union legislation relating to fundamental rights shall continue to be based on specific legal grounds provided in the TEU or TFEU, the fundamental rights character of which is merely reinforced by the provisions of the Charter.

The second sentence of Article 6(1) confirms the conviction (or phobia in the case of some member states) that the restrictive interpretation of EU competences shall continue to be ensured. Regulation of such content may be found, for instance, in Article 4(1), Article 5(2), Article 6(2) second sentence of the TEU as well as in Protocol No. 8[15] and the – legally non-binding – Declarations 1 and 2.[16] At the same time, the requirement of restrictive interpretation relating to Union competences and the exercise of these competences is unambiguously expressed and reinforced in the principle of transferred competences or subsidiarity (in particular Articles 4-5); therefore, it would not require further repetition. According to Pernice, the emphasis on restriction is surprising in the context of Article 6 also for the reason that fundamental rights, by their nature, are not of power-transferring but rather restrictive character, in other words, as regards their content, they appear as limiting the exercise of transferred competences (the power-restricting role of fundamental rights). This may also be formulated in the way that insofar as fundamental rights norms exclude the interference of public authorities with particular individual rights and freedoms, they constitute negative competences for the institutions concerned.[17]

3.2.2 Uncertain and Limited Horizontal Effect

The limited effect of the Charter as a legal instrument has also led to differences in respect of vertical and horizontal effect of the Charter rights. The vertical effect of the fundamental rights stems from the historical function of the rights, which is to protect the individuals against the state organs and limit the public power. The horizontal effect of fundamental rights means that they prevail also between individuals; and influence or determine the legal relations of private actors. This horizontal or third party effect can be direct or indirect. According to the theory of indirect horizontal effect, the fundamental rights norm of the constitution is not applicable directly in private law relations; it is only used as an interpretative guide to determine private law relations among individuals inter se. The theory of direct horizontal effect represents that the fundamental rights enshrined in the constitution are applicable in the private relations of the individuals. The result of

15 Protocol (No. 8) annexed to the Treaty of Lisbon relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (OJ C 83, 30. 3. 2010, 273).

16 Declaration No. 1 concerning the Charter of Fundamental Rights of the European Union and Declaration No. 2 on Article 6(2) of the Treaty on European Union, annexed to the Treaty of Lisbon (OJ C 83, 30. 3. 2010, 337).

17 I. *Pernice:* The Treaty of Lisbon and Fundamental Rights, in S. Griller and J. Ziller (eds.): *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer Verlag, Wien, New York 2008) 244.

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this is that private or labour law contracts infringing fundamental rights are invalid. This idea would however transform the private law claims into human rights disputes, and the private law regulation would lose its function.[18]

Naturally it is true, that even in the member states' constitutional practice only the vertical effect of rights is inevitable and in the field of the horizontal effect the indirect version is accepted by most jurisdictions. Only the Portuguese and Greek constitutions allow direct horizontal effect. The European constitutional case law seems to differentiate between rights in respect of their direct or indirect horizontal effect.[19] It is worth mentioning that the courts, even the CJEU, are very careful with the recognition of indirect horizontal effect. See, e.g. *Viking, Laval* (on right to collective action, allowing indirect horizontal effect) and *Dominguez* (on right to paid annual leave, not granting clearly the horizontal effect) cases,[20] or the more recent *AMS* case (on workers' right to information).[21] Although certain rulings of the CJEU contain light indications of direct applicability of fundamental rights as general principles of EU law, and do not exclude the applicability of the rights "in all situations governed by EU law," the potential horizontal effect of Charter rights remains an open question.[22] Why would it be so important to give a chance to EU courts to clarify the horizontal effect of the Charter rights by making them fully binding? The EU has strongly committed[23] itself to promote the United Nations Framework Programme and Guiding Principles on Business and Human Rights,[24] but in the absence of a generally applicable bill of rights, the EU courts remain without means to contribute to the effective remedy system against the human rights violations of powerful private actors.

18 E. *Engle:* Third Party Effect of Fundamental Rights (Drittwirkung) *Hanse Law Review* (2009) 5 (2) 165-166; Verica *Trstenjak*: General Report: The Influence of Human Rights and Basic Rights in Private Law, in Verica Trstenjak and Petra Weingerl (eds.): *The Influence of Human Rights and Basic Rights in Private Law* (Springer International, Heidelberg, New York, Dordrecht, London 2016) 8-9.

19 L.F.M. *Besselink*: General Report, in J. Laffranque (ed.): *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (Tartu University Press, Tallinn, 2012) 91-93.

20 See, e.g. Viking, Laval and Dominguez cases (C-438/05 International Transport Workers' *Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, Judgment of the Court of 11 December 2007; C-341/05 *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Judgment of the Court of 18 December 2007; C-282/10 *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, Judgment of the Court of 24 January 2012).

21 In AMS case concerned the question of potential horizontal effect of the workers' right to information and consultation enshrined in Article 27 of the Charter. Against the opinion by Advocate General Cruz Villalón, the Court did not grant Article 27 and such effect. C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT and Others*, Judgment of the Court (Grand Chamber) of 15 January 2014.

22 Trstenjak *op. cit.* 9.

23 <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm>.

24 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 21 March 2011.

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3.2.3 "Within the Scope of" Practice

The EU institutions are clearly bound by the Charter,[25] thus the CJEU has inevitable role in controlling the EU legislature's compliance with fundamental rights.[26]

The idea that member states are bound by the rights, freedoms and principles laid down in Article 51(1) of the Charter[27] is implemented principally in the "agency-situation" elaborated by the CJEU, at two levels: in a normative and administrative dimension. The normative level means the dimension when, during the transposition – or omitting the transposition – of Union law (directives) into the national law, the member state is bound by the fundamental rights during the adoption of normative decisions. The administrative level appears in the case of directly applicable Union law (regulations): in such a case the law of Union content is regarded formally as domestic law right away.[28] Furthermore, the respect of Charter rights has also been held by the CJEU to apply when a Member State derogates from a fundamental economic freedom guaranteed under EU law.[29]

Considering the CJEU case law related to Article 51(1) of the Charter, it is not clear, however, whether the phrase "implementing Union law" has got a different meaning from "acting within the scope of Union law" thus the margins of member states' obligation to apply the Charter rights remained ambiguous. In other words, the Charter binds the member states as well "when implementing Union law"; however, the CJEU understands this in a wider sense: member states have to respect the fundamental rights "acting within the scope of" Union law.[30] Thus on the basis of the preliminary ruling of the CJEU (*Aziz Melki/Sélim Abdeli*), seemingly national courts of law may apply the Charter directly,[31] but only in those cases where any Union legal act is concerned. In purely domestic cases the national courts apply the bill of rights enshrined in the national constitution,

25 Article 51(1) of the Charter: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity (…)."

26 E.g. C-92/09 and C-93/09. Volker joint cases, Judgment of the Court of 9 November 2010.

27 Article 51(1) of the Charter: "The provisions of this Charter are addressed (…) to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

28 M. *Borowsky:* Kapitel VII. Allgemeine Bestimmungen, in J. Meyer (ed.): *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos, Baden-Baden, 2003) 567-572.

29 See, inter alia, C-260/89 ERT, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, Judgment of the Court of 18 June 1991, para. 42 et seq.; C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, Judgment of the Court of 12 June 2003, para 75; and C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Judgment of the Court of 14 October 2004, paras. 30-31.

30 K.L. *Mathisen:* The Impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States' obligations with respect to the protection of fundamental rights (University of Luxembourg, Law Working Paper Series, Paper number 2010-01, 29 July, 2010) 20.

31 C-188/10 and C-189/10. Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10) joint cases, Judgment of the Court of 22 June 2010.

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and/or international human rights obligations of the given state. The extent and intensity of the latter activity is dependent on the monist or dualist approach of the national legal system. To date, the condition of the direct application of the Charter is the application of another Union legal norm.[32]

In the *Åkerberg Fransson* and *Melloni* cases[33] the Court has even equated "implementation" and "acting within the scope of" Union law, and has gone far beyond the textual meaning of "implementation," but still remained in the framework of the wide literal interpretation. However, according to Lavranos, in these judgments

> the ECJ interprets the scope of application of the Charter of Fundamental Rights, in particular Articles 51 and 53 of the Charter in a very extensive way. The judgments establish the supremacy of the Charter of Fundamental Rights over national (constitutional) law and the ECHR, thereby positioning the ECJ as the «Supreme Court of Fundamental Rights» in Europe.[34]

Anyway, according to the commentaries, these were "ground-braking" decisions,[35] triggering an academic debate on the scope of the Charter and the role of the EU in the framework of the European fundamental rights protection. As to the limitations set up in Article 51(1)-(2) of the Charter, the CJEU ruled as follows:

> the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[36]

> Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (…).[37]

32 As Rosas pointed out, "(…) the real problem is not so much the applicability of the Charter as such but rather the applicability of *another* norm of Union law." A. *Rosas:* When is the EU Charter of Fundamental Rights Applicable at National Level? (2012) 19 (4) *Jurisprudence* 1269-1288.

33 C-617/10 *Åklagaren v. Hans Åkerberg Fransson*, Judgment of the Court of 26 February 2013; C-399/11 *Stefano Melloni v. Ministerio Fiscal*, Judgment of the Court of 26 February 2013.

34 N. *Lavranos:* The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficulté. *European Law Reporter* 4 (2013) 133.

35 D. *Sarmiento:* Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe. *Common Market Law Review* 50 (2013) 1268.

36 C-617/10 Åkerberg Fransson, para. 21.

37 C-617/10 Åkerberg Fransson, para. 22.

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> Where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.[38]

In these judgments the Court declared the *effet utile* of the Charter, and limited the choices of national courts, because they shall compare the national fundamental rights standards with the Charter standard even in those situations where the links to the Union law are indirect and partial. After all, this judge-made basis created by the CJEU is still fragile and uncertain; furthermore, it triggers a debate on the borderlines of the application of EU fundamental rights and their relations with the national fundamental rights protection systems.[39] The case-by-case elaboration of the scope of the Charter vis-à-vis member states even creates tensions between the CJEU and national constitutional courts, for whom the interpretation of fundamental rights is a cherished area and some of them clearly indicated the willingness for scrutinizing EU law in the protection of domestic standards and constitutional identity. The German Constitutional Court almost immediately and unanimously ruled that the *Åkerberg Fransson* judgment of the CJEU neither changes the *status quo* in respect the scope of the Charter, nor expresses a general view. The statements of the CJEU's decision shall be based on the distinctive features of the case, otherwise presumably it were considered *ultra vires* by the Constitutional Court.[40]

The possibilities of the national courts are also limited under the present formulation of Article 51(1), although – considering the increasing number of references to the Charter in preliminary rulings[41] – they would be willing to apply the Charter rights in a

38 C-399/11 Melloni, para. 60., Åkerberg Fransson, para. 29.

39 S.I. *Sánches:* The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights. *Common Market Law Review* 49 (5) (2012) 1582.

40 On the limits of the scope of application of EU fundamental rights see the judgment of the German Constitutional Court of 24 April 2013 on Counter-Terrorism Database Act (1 BvR 1215/07). See also Sarmiento *op. cit.* 1268., Schima *op. cit.* 1106. and D. *Thym:* Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice. *European Constitutional Law Review* 9 (3) (2013) 395-398.

41 The Commission stated: "The important implications of the Charter are to be seen in the increasing number of requests for a preliminary ruling of national jurisdictions received by the Court." COM(2013) 271 final, 2012 Report on the Application of the EU Charter of Fundamental Rights, 7.

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broader scope.[42] It is worthwhile to add that not all of the constitutional courts are reticent with the application of the Charter.[43]

Against this background, about one year after *Åkerberg Fransson* the CJEU tightened its former interpretation by resetting a number of criteria that should be examined to establish whether national legislation "involves the implementation of EU law for the purposes of Article 51 of the Charter" in *Siragusa* case.[44] By doing so, the Court became cautious again and showed due deference towards national courts and national fundamental rights protection. The CJEU ruled that

> in order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.[45]

Regarding the EU fundamental rights protection, the CJEU clarified that it is not an objective in itself, but it has to serve the unity of EU law. In other words, the ground for fundamental rights protection is their basic value-character but to preserve the primacy of EU law.[46] Thus the Court refrained from connecting its rights protection activity with Article 2 TEU, and despite the clarifications the judgment clearly shows the fragility of the case law based scope of protection.

As to the way ahead, it is still worthwhile to consider Advocate General Sharpston's suggestion, which was formulated in his opinion to *Zambrano* case:

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42 Besselink admitted that "… in some Member States the courts have referred to the Charter with such enthusiasm as to disregard whether the Charter could at all be considered applicable". Besselink *op. cit.* 108.

43 The Austrian Constitutional Court "concluded that, based on the domestic legal situation, it follows from the equivalence principle that the rights guaranteed by the [Charter] may also be invoked as constitutionally guaranteed rights (…) and they constitute a standard of review in general judicial review proceedings in the scope of application of the Charter". Thus the alleged violation of the Charter may give rise to the competence of the Constitutional Court. U 466/11-18, U 1836/11-13, Austrian Constitutional Court Judgment of 14 March 2012, point 35.

44 C-206/13. *Cruciano Siragusa v. Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, Judgment of the Court (Tenth Chamber) of 6 March 2014.

45 C-206/13. Siragusa, para 25.

46 "It is also important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States. The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law." C-206/13. Siragusa, paras 31-32.

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> Transparency and clarity require that one be able to identify with certainty what 'the scope of Union law' means for the purposes of EU fundamental rights protection. It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope of a material EU competence.* To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised.*[47]

3.3 Should the Charter Bind the Member States Fully? Difficulties and Advantages

In the second part, the difficulties and advantages of the direct applicability of the Charter shall be measured. Eliminating the limitations on the Union's competences and amending the scope of the Charter, the British and Polish "opt-outs" from, and other member states concerns about the Charter – especially the fears for the constitutional identity and the level of national protection – must be considered. The respect of constitutional identity of the member states was implicitly confirmed by the CJEU,[48] but the member states may expect more explicit guaranties. However, clear advantages of these steps would be that (i) the Union could assume a more definite role in developing the common standards on fundamental rights; (ii) renitent member states endangering these standards might be controlled more effectively even directly by their national courts;[49] and (iii) they could evolve the effect of Article 2 TEU, or moreover, it can contribute to the reform of Article 7 TEU, which remained a kind of political – and practically inapplicable – sanction of violating the Union values. The Charter with direct applicability beyond the scope of EU law – being the part of the primary sources of EU law – will have much stronger position than the European Convention on Human Rights (hereinafter: ECHR) whose applicability is dependent on the monist or dualist approach of the member states to international law. It could contribute to the creation of a European Fundamental

47 C-34/09 *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEM)*, Opinion of Advocate General Sharpston, delivered on 30 September 2010, para 163.

48 See, e.g. the Omega-judgment (C-36/02. *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, Judgment of the Court of 14 October 2004) and the Sayn-Wittgenstein judgment (C-208/09. *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of the Court of 22 December 2010).

49 See the actions taken by the Commission to ensure the respect of the Charter by Hungary, especially C-286/12 *European Commission v. Hungary*, Judgment of the Court of 6 November 2012 (compulsory retirement of judges, prosecutors and notaries), where the national constitutional court avoided the application of the Charter.

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Rights Area and guarantee the Union citizens an equal and calculable level of protection.[50]

3.3.1 Difficulties – Are They Really Significant?

To make the Charter generally binding on member states and directly applicable by national courts, definitely an explicit amendment is necessary.[51] Viviane Reding, former vice-president of the European Commission, EU Justice Commissioner also admitted as follows:

> A very ambitious Treaty amendment – which I would personally favour for the next round of Treaty change – would be abolishing Article 51 of our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States, including the right to effective judicial review (Article 47 of the Charter). (…) This would open up the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law. I admit that this would be a very big federalising step. It took the United States more than 100 years until the first ten amendments started to be applied to the states by the Supreme Court.[52]

At this point it cannot be suppressed that serious concerns were raised on the scope of the Charter during the debate of the Lisbon Treaty. Member states offering the most active resistance were the Czech Republic, Poland and the United Kingdom. Finally, in a Protocol annexed to the Lisbon Treaty (to simplify: the Opt-Out Protocol),[53] the UK and Poland were granted exemption from respect for certain rights and principles. The real opt-out nature of this exemption is, however, questionable from the aspects of both form and content. From a form aspect its authenticity is doubtful because the Opt-Out Protocol, itself, declares: the Charter reaffirms the rights, freedoms and principles recognized in

50 A. *Jakab:* Supremacy of the EU Charter in National Courts in Purely Domestic Cases. <www.verfassungsblog.de/de/ungarn-was-tun-andras-jakab/#.Un652RAtb5R>.

51 It is worth noting that the Charter is not part of the treaty, thus the formal amendment procedure is open to discussion. Sándor-Szalay and Mohay suggests the convention method for the amendment, which is defined by Article 48 of TFEU. Á. *Mohay* and E. *Sándor-Szalay:* Hungary, in J. Laffranque (ed.): *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (Tartu University Press, Tallinn, 2012) 520.

52 European Commission – SPEECH/13/677, 4 September 2013, The EU and the Rule of Law – What next? <http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm>.

53 Protocol (No. 30) annexed to the Treaty of Lisbon on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (OJ C 83, 30 March 2010, 313).

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the Union and makes those rights more visible, but does not create new rights or principles. Therefore, there is no regulative content from which exemption could be granted, since in a legal sense the Charter does not add new rights to the range of earlier rights and obligations.[54] On this basis, the opt-out does not have a genuine legal effect; it rather has the character of a clarification.[55] From the aspect of content, the most important question is in what situations national courts or the CJEU may establish that the national law is in conflict with the fundamental rights of the Union. For instance, shall the CJEU be entitled to question the validity of a piece of legislation of a member state with reference to conflict with the Charter and the violation of fundamental rights guaranteed by it? It is clear that the Court cannot annul laws of the member states; only national courts (constitutional courts) are competent to do so. At the same time, the CJEU may find – in proceedings for failure to fulfil an obligation or in the preliminary ruling procedure (Articles 258 and 267 TFEU) – that the national law is in conflict with Union law. The Czech Republic annexed a Declaration to the Treaties,[56] in which it emphasizes the limited binding force of the Charter on member states, the prohibition of extending the Union's competences and the importance of constitutional traditions common to the member states and that of international agreements. The similar declarations by Poland concern legislation relating to the sphere of family, public morality, family law, as well as the protection of human dignity and human integrity.[57] These declarations have no binding force, i.e. they do not grant exemption from the effect of the Charter in the way that the Opt-Out Protocol does. Overall – even if these protocol and declarations are not completely convincing, they clearly indicate that – an amendment for enhancing the scope of the Charter is expected to be a fiercely debated step by certain member states, thus cautious political preparation is necessary.

However, after the 2016 Brexit referendum in the UK – and despite the stress and uncertainties of the British exit negotiations of the next two years – a treaty reform seems to be inevitable in order to strengthen the common European identity of the remaining countries.

The constitutional identity of the member states is also a strong argument in the dispute on federal development of the EU. It might be a point of reference during the discussions that the extension of the scope of the Charter undermines the constitutional identity of the member states. However, besides affirming the shared values, the TEU also

54 Pernice *op. cit.* 245.

55 C. *Barnard:* The 'Opt-out' for the UK and Poland from the Charter of Fundamental Rights: Triumph or Rhetoric over the Reality, in S. Griller and J. Ziller (eds.): *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer Verlag, Wien, New York 2008) 276.

56 Declaration No. 53 by the Czech republic on the Charter of Fundamental Rights of the European Union.

57 Declaration No. 61 – Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union; Declaration No. 62 – Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom.

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declares that the Union shall respect the national identities of its member states, as inherent part of their political and constitutional structures.[58] The definition emphasizes the constitutional, political and state aspects, thus in this context the national identity can be understood (much more) as constitutional (than as a cultural) identity. One of the legally relevant questions in this respect is who will decide on the content of the constitutional identity of a member state and on the acts or measures of Union affecting or infringing that constitutional identity. It is clear that a relationship of cooperation between the national (constitutional) courts and the CJEU is necessary in case of such conflicts: the first to determine the constitutional identity case by case, and the latter to decide on the meaning of the relevant EU law in dispute. As it is based on the case law, the margin of appreciation is given on both sides, but the CJEU has confirmed in the *Omega* judgment the respect for the constitutional identity, when it gave preference to the German concept of human dignity against the freedom of services.[59] The obligation to respect the constitutional identity of the member states may even mean the restriction of a certain fundamental right, as it happened in the *Sayn-Wittgenstein* case, in which the republican identity of Austria was considered stronger value than the free movement of citizens in respect of carrying the noble title.[60]

As a result of the multilevel European constitutional development, the constitutional traditions of the member states converged in their respective content and interpretation, while the single States managed to preserve their own constitutional identity. An EU member state is henceforth to a great extent free to decide on its own constitutional structure, which is the basis of its constitutional identity.

The introduction of the direct application of the Charter may reopen the debate on the relation of the Charter and the ECHR, the Strasbourg and Luxembourg courts. Analysing the existing text of the Charter, it can be stated that it provides for a satisfactory solution to this problem. The Charter takes the Convention as setting out the minimum level of protection, while making it clear that the Charter itself may provide for a more extensive level of protection. That solution is compatible with the Convention and reflects the principle of subsidiarity governing the relationship between the Convention and the national legal systems. It is furthermore intended to promote harmony between the two instruments and to avoid competition between them. The Charter expressly states

58 Article 4(2) of the TEU: "The Union shall respect the equality of member states before the Treaties as well as their *national identities*, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each member state."

59 See the Omega-judgment of the CJEU (Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*) and the Lisbon-judgment of the Germen Federal Constitutional Court (BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009, 2 BvE 2/08).

60 See the Sayn-Wittgenstein judgment (C-208/09. *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of the Court of 22 December 2010) and Besselink *op. cit.* 72.

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that the meaning and scope of the Charter rights corresponding to the rights guaranteed by the Convention should be interpreted consistently with Convention rights.[61] Article 53 of the Charter contains a "horizontal" clause on non-reversal,[62] which involves the recognition of the other legal mechanisms, in particular national constitutions and the international texts on the protection of human rights and fundamental freedoms, from the time that they are ratified by the member states. On the basis of this recognition, the principle used is that of the most favourable provision: the level of protection guaranteed by the Charter may not be lower than the level offered by the provisions of the texts cited, within their respective fields of application. These provisions of the Charter and the approximated case law of the two European Courts trigger the integration of the European human rights standard.

Although the CJEU in opinion 2/2013 rejected the draft agreement on the accession of the EU to the ECHR presuming that it would "upset the underlying balance of the EU and undermine the autonomy of EU law,"[63] the Strasbourg court in 2016 proved its openness to dialogue again, and in *Avotiņš* judgment[64] for the first time applied the Bosphorus presumption[65] to a case concerning obligations of mutual recognition under EU law. This suggests that the European Court of Human Rights (ECtHR) is still confident in the development of the European human rights area.

3.3.2 Advantages

The discussion paper suggests the direct applicability of the Charter by the national courts "outside the scope" of the Union law. Thus the national courts can apply – and parties can refer to – the Charter even in purely domestic cases, independently from the application of another EU norm. There are two potential versions for the extension of the

61 J-P. *Costa:* The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice. Lecture at the King's College London, 7 October 2008, in Background Documentation. Fundamental Rights Protection in EU Law under the Lisbon Treaty, ERA Trier, 22-23 April 2010.

62 Article 53 of the Charter: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

63 Opinion 2/13 of the Court (Full Court) of 18 December 2014 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Compatibility of the draft agreement with the EU and FEU Treaties.

64 *Avotiņš v. Latvia* (Application no. 17502/07) Judgment of 23 May 2016. See also Stian Øby *Johansen:* EU law and the ECHR: the Bosphorus presumption is still alive and kicking the case of *Avotiņš v. Latvia*. <http://eulawanalysis.blogspot.hu/2016/05/eu-law-and-echr-bosphorus-presumption.html>.

65 The presumption of equivalent protection of ECHR rights by the EU, even though the EU is not a party to the ECHR, in Bosphorus Hava Yollari Turizm ve Ticaret *Anonim Şirketi v. Ireland* (Application no. 45036/98) Judgment of 30 June 2005.

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scope of the Charter. The modest version is – in accordance with Advocate General Sharpston's cited proposal – to prescribe that member states have to apply the Charter in all fields where the Union has competence to act, irrespectively of whether the competence was exercised by the Union or not. Of course, this version might reopen the debate on the exact division of competences between the EU and the member states. A bolder step would be the removal of any limitation and creating the full direct applicability of the Charter in any situations where Union citizens are concerned.

By the extension of its scope, the Charter norms will acquire inevitable and full primary law character, as it reads from Article 6(1) of the TEU. It does not mean that the individuals would get direct access to the CJEU in fundamental rights cases, i.e. the direct applicability of the Charter would neither create a rival human rights jurisdiction parallel to the ECtHR, nor allow this way a potential forum shopping. The amendment of the competences and procedure of the CJEU is not necessary. The elimination of the "only when they are implementing Union law" criterion simply means that the national courts have to apply beyond their domestic bill of rights the Charter as well, seek a harmonized interpretation and can ask for a preliminary ruling under Article 267 of the TFEU. As it was mentioned above, the level of protection is provided for by the guarantees of Article 53 of the Charter, which refers – amongst other legal sources – in particular to the constitutions of the member states. As Sarmiento demonstrates, it is more than a simple minimum standard clause, because the CJEU has construed it as a kind of conflict of laws rule for those cases in which both EU and domestic fundamental rights can be applicable.[66]

The preliminary rulings on Charter rights may be useful on the one hand even to the ECtHR when it interprets the ECHR in comparison with the Charter. On the other hand these kind of judgments of the CJEU may serve as a legal evidence to the European Commission when it enters into a treaty infringement procedure or considers the application of Article 7 of the TEU. To date Article 7 is strongly criticized as a practically inapplicable norm, because it calls for the clear and present danger of the violation of the EU values for the initiation of the Council's procedure and decision. It can be presumed that in practice it would mean multitudinous or at least numerous proceedings and/or omissions leading to foreseeable and certain violation of Article 2 of TEU in a given member state. As Article 7 has never been applied, it also allows the presumption that the actors are very cautious and circumspect with initiating such procedure, because it cannot be legally supported sufficiently when exactly the violation happens, i.e. there is no due evidence procedure prescribed by the primary law. The number of preliminary ruling procedures, content of the questions put by the national courts and the decisions of the CJEU related to the Charter rights and the domestic law may clearly indicate if the respect of common EU values become doubtful in a certain member state. Hungarian and

66 Sarmiento *op. cit.* 1288-1289.

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Polish constitutional crises demonstrate that despite a range of Venice Commission opinions and ECtHR judgments, the EU is still not able and willing to intervene in the absence of legal basis.

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This short proposal can of course be criticized for being utopian or fairly illusory, and can even be labelled as completely unrealistic to date. One must however bear in mind that the EU sometimes did not spare the efforts to enter into projects surrounded by scepticism. In the early 1990s no one thought that a decade later a convention would be called with the mandate of creating a constitution for Europe. The Treaty on the European Constitution failed, but several of its achievements survived and were introduced by the Lisbon Treaty in a more or less modest way. The Charter is definitely the part of the recent evolution of EU law as it was conceived in June 1999 by the decision of Cologne European Council,[67] lived its foetal life during the work of Fundamental Rights Convention and was born on 7 December 2000, when the presidents of the Council, the Parliament and the Commission proclaimed it as an inter-institutional document. The European courts started to bring up the child, but it still lived its childhood until the Lisbon Treaty, which introduced it as a primary source of EU law. I do not think that the Charter's evolution came to an end by acquiring the legally binding force under the present formulation. It is more like a beginning, and it is never in vain thinking ahead for Europe, and work on rendering the existing fundamental rights more effective for the benefit of individuals.

To date, the European institutions try to empathize the importance of the rule of law, and are a bit cautious with promoting the fundamental rights policies. However, it is worthwhile to consider what András Sajó pointed out on the relationship between these constitutional values:

> Given the juridicization of human rights, rule of law and human rights expectations have become significantly intertwined. Human rights are served by the rule of law legal system. In terms of politics and policies human rights and the rule of law have developed an intimate relationship. Human rights are enforced with the instruments of the rule of law and are thus limited by the restricted reach thereof.[68]

67 150/99 REV 1 Presidency Conclusions, Cologne European Council, 2-4 June 1999, point 44-45.

68 András *Sajó:* Introduction – Universalism with Humility, in A. Sajó (ed.): *Human Rights with Modesty: The Problem of Universalism* (Springer Science+ Business Media Dordrecht, 2004) 1-2.

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4 Totalitarianism and Democracy as Extreme Points of Constitutional Law

Dmitry Dedov[*]

4.1 Concepts of Sovereignty Are Not Ideal

There are several different concepts of human rights and fundamental freedoms set up in the constitutional law. They concern either internal or external aspects of sovereignty. Initially, the concept was aimed to restricting state power, so that the power cannot be applied arbitrarily. Recently, another concept called "Responsibility to Protect" was initiated by the International Commission on Intervention in State Sovereignty, which seemed to be the development of the first one. The idea was to recognize that sovereign states have a primary responsibility to protect their citizens from the most serious crimes against humanity like genocide, ethnic cleansing and war crimes. Where the states fail to perform this obligation, then the international community has the right to intervene. It was suggested that the sovereignty, thus, is to be derived from humanity, where the human rights must be respected and promoted. The sovereignty in this concept is being used as a multipurpose phenomenon. It includes state power, independence and the delegation of power from population for a strictly determined policy – to protect all members of the society.[1] But in practice the serious crimes against humanity may happen in states that are considered sovereign and democratic. I would try to explain that a lack of democracy, and no sovereignty, leads to crimes against humanity, and that if there is no democracy, then sovereignty could not exist anymore.

Those two concepts contain different views on the constitutional integrity of the state. On one hand, the state authorities should protect their citizens; on the other hand, the measures of protection may constitute the interference of individual rights and freedoms, and such interference should not be disproportionate. Therefore, the power should be somehow balanced, but the balance is difficult to achieve on a formal basis.

* ECHR Judge (Russian Federation).

1 See, for example: Anne Peters, *Humanity as the A and Z of Sovereignty*, 2009.

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4.2 Separation of Powers Is a Formal Criterion

Under the constitutional law it is commonly acknowledged that the balance have to be achieved through the separation of powers. Every modern state has established three branches of power: executive, legislative and judicial. However, not every state is successful to promote full democratic governance, and real influence of legislative and judicial branches could be diminished because of lack of independence and pressure exercised by the executive branch. This is, I believe, the most serious problem of the constitutional law. Full democracy cannot be explored as the only idea of the separation of powers. There are other ingredients of success such as perfect governance (which includes the art of decision-making and its implementation in practice), principles of governance (rule of law, fundamental freedoms, equality, proportionality, moral and cultural values and other interconnected systemic criteria). It is not clear what kind of "success" we should achieve, but it is clear that democracy is the means and not the final point of arrival. For example, somebody could like the concept of sustainable development, but it is heavily criticized, for example, by Christopher Davis, an international director of corporate responsibility, because of "the apparently continuous and accelerating decline in the planet's health," so that this concept does not help:

> the Earth has lost half of its wildlife in the past 40 years, society is increasingly unequal, and the last time there was this much carbon in the atmosphere humans didn't exist.[2]

The other concept, the quality of life, being the European Union's target, is good, but it was not properly explained by bureaucrats to British and other citizens who favored national priorities. And in other parts of the world quality of life could be understood too narrowly and thus limited to consumption.

Devaluation of cultural and moral values is a sign of a crisis of democracy. It is not because democracy has become a less perfect rule than it initially designed to be, but because of the various distortions of democracy such as concentration and usurpation of power by a tyrant, by the bureaucracy or by the majority. It happened in ancient Greece where Socrates was executed for espousing the cause of freedom of speech. Amartya Sen recalls that "in ancient Greece the idea of democracy took shape and was seriously put into practice…, before it collapsed and was replaced by more authoritarian and asymmetric forms of government."[3] No doubts that the collapse was triggered by distortions of the democracy.

2 Economist, 20 August 2016.
3 Amartya Sen, Democracy as a Universal Value. *Journal of Democracy*, 10.3 (1999) 3-17.

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It takes place also in the modern era of the institutional democracy (rule of institutions, not individuals). There is an analogy with the modern technology, which has devaluated our ability to enjoy a real art. This question has been raised in *Heaven and Hell* by Aldous Huxley who showed that psychological devaluation could be caused by modern technology.

Less democratic authorities propose their own systemic views such as economic and social stability, and those views are aimed to support the doctrine that state control is better than chaos at the time of stagnation. Constitutional law may declare free movement of goods, people and capital along with private property rights, thus forming the constitutional basis for market economy; however, administrative regulation of economy is widely exploited by establishment. So, it is difficult to achieve harmony, and the difficulty starts from the comprehension of the targets and systemic priorities.

The conflict between law and power will always exist since power tends to be monopolized. Even in a situation of division of power between different branches, conflict still remains in the sphere of strategic decisions concerning state policy and finances (within the budgetary issues) or values and principles (within laws and court judgments). In the international arena dissatisfaction with law enacted by the European Court of Human Rights (ECHR) as expressed by the national governments is mostly caused by the will to dominate when establishing the basic values. At the national (constitutional) level we can see the same political problem: whether the courts are allowed to determine the legal order. While determining the legal order (in the form of interference) and strategic priorities, the battle for values, fundamental freedoms and general principles of law will start again and again.

4.3 Democracy Means Decentralization as a Method

Democracy is a method, a common value based on the decentralization of the power. To the opposite, an authoritarian regime gives an example of the concentration of power. Why decentralization is better than concentration? It is not obvious, because both regimes need good governance. The art of decision-making is a very complex discipline, and one person or a small elitist group are better equipped than others to make judgments. But it appeared that concerning strategy, a collective decision is more rational and comprehensive than the decision of an individual for many reasons: independency, impartiality, access and analysis of information, open-mindedness (assessment of data from different conceptual points of view). Collective approach is widely accepted by judicial and legislative branches that are designed to control the executive branch, which is more dynamic and whose actions without such control could have a dramatic effect for the whole society.

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This is why the consequences of the concentration of power are so destructive for any society or organization. They could be much worse than just a mistake or pecuniary damages. They include denial of the freedom of opinion, inequality, total censorship and surveillance exercised by power and, ultimately, a fear as a reaction of any member of the society (regardless of whether you are independent from the state or you are a state agent). Freedom of opinion is the key value targeted by a totalitarian regime. For concentration of power, the freedom of opinion is dangerous as it symbolizes the rational and independent analysis of state decisions and actions. Judges from different legal traditions are unanimous in their opinion that freedom of opinion and public debate is the most important foundation of a constitutional (democratic) state.[4]

4.4 Freedom of Opinion Is a Key Point

The distance between full democracy and a totalitarian regime, between those two extreme points, can be measured, depending on the situation with the freedom of opinion. The analysis could not be an easy one. It may include the assessment of seriousness of certain (occasional or systemic in nature) violations found by the national or international courts or the assessment of the decision-making process, treatment of opposition and control over mass media; also, it would be appropriate to assess the power's approaches in relation to ideology, moral and cultural values. When you do such analysis, it may appear that the regimes pretending for the world leadership stay very close to each other in the democratic index even if they are commonly recognized as democratic and non-democratic.

Therefore, we normally say "democratic state," but it would be more appropriate to measure the proportion of democratic rule and individual power in the decision-making process and actions of a certain state. There could be a high or low proportion of the democratic rule, and a low or high proportion of the sole power, respectively. Usually the number of state agents (constituting the state apparatus) is low in a political regime close to a full democracy.

I would keep in mind the traditional classification of the government:

> Republic is a constitutional government with the sovereign power in the hands of the people; a monarchy, a lawful government with sovereign power in the hands of one man; and a tyranny, a lawless government where power is exercised by one man according to his arbitrary will.[5]

4 See paragraph 4 of my concurring opinion to the judgment in the case *Primov and Others* v. *Russia*, no. 17391/06, 12 June 2014.

5 Hanna Arendt, *On the Nature of Totalitarianism: An Essay in Understanding*. The Library of Congress. Series of Speeches and Writings File, 1923-1975.

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This classification is true, but it only recognizes black and white, it is not dynamic. In any modern government you can always find "fifty shades of gray."

The totalitarian state is not interested in the independent opinion of judicial and parliamentary branches as well as in the independent opinion of ordinary people. It would be better for such power if more people would be employed by the state in all spheres that constitute or support the state affairs. The dependent people or officials do not need the direct instructions, they try to understand themselves what the desire of the power could be in each particular case. Therefore, you may not find the direct pressure on the judges in the modern totalitarian state. They should themselves understand what the power wants from them. This situation constitutes the distortion of rule of law. The totalitarian state thus is the most radical denial of fundamental rights and freedoms.

4.5 From Centralization to Dominance and Control

The power is quite natural. The power is the result of dominance and subordination. All those who want to dominate; they have an unconscious desire to become wealthy and famous without much intellectual efforts. Every ordinary member of the society makes such efforts to participate in the division of labor and the exchange of goods and services. State officials do not produce anything. They function to support the existence of the state affairs. The modern political crisis is caused by the separation of the state bureaucracy from the society. The modern national constitutions are divided in the same manner: there are usually two main and conflicting parts – human rights and powerful political agencies. The constitution provides the institutional basis for the power of state bureaucracy including military forces, office of the Head of the state and the Supreme Commander-in-chief, taxes and tax control.

Power makes it possible to control lives of others and control their property. I have mentioned that power is quite natural keeping in mind the corporate governance. It is interesting to see how executive directors start to believe that the corporate wealth is the result of their sole actions, and that they deserve to invest the property in their projects rather than paying dividends. However, according to the principles of corporate governance, the interests of shareholders should prevail, and the executives do not have any legitimate interests. After the Sarbanes–Oxley Act 2002 I was quite surprised to see how the grandiose corporate scandal relating to abuse of executive power could happen in the USA, an almost fully democratic state.

Power is not a problem for executives, but it is a problem for all those who want to dominate without merits. I think the desire to dominate is now frequently hidden under the declaration of leadership. But in the democratic society, leadership is required only to propose any reforms to improve public institutions.

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The pure desire to retain power provokes intolerance of independent opinion-makers and critics, and other necessary (in a natural way) actions suppress independence and access to information, persecution, and coercion. Therefore, society, through political constitutional rights and freedoms should not only prevent abuse of political power of individuals and organizations, but also limit state power itself as much as possible. As national constitutions legitimize the establishment of state, they fail to reduce state power. Ultimately, we have a controversial situation in constitutional law: an individual's human rights are protected from non-proportional interference, but not protected from the state power as a phenomenon reducing individual's independence.

Since the moral criteria do not work today to limit or prevent the abuse of power, the rule of law becomes ineffective as well. I must say that morality is quite effective in more democratic states and vice versa. In a totalitarian regime the action of fear is more effective and commonly applied by the power. A totalitarian regime does not tolerate the separation of powers, and they cease to be real powers in the sense of independence, leadership, decision-making process and decisive influence on executives. As a consequence, the judicial or legislative branch may not be allowed to make their own independent assessment of actions or proposals, and their members are persecuted in any form by those who believe that the "sovereign" power belongs to them. Constitutional lawyers should promote the idea that sovereign power belongs to everybody since all people should have the opportunity to competently participate in the decision-making process including free access to information, public opinion and public debate ("free discussion and uncensored distribution of news and fair comment" – Amartya Sen[6]).

4.6 Democracy Index Criteria

In general, a review of the democracy model is linked to human rights and based on the monitoring of violations for their intensity and gravity. The violations may be limited by defamation claims, monetary penalties or dismissals, but then they may expand to a short-term or long-term deprivation of liberty, ill treatment or torture. Such measures may be concentrated on prominent political figures, direct political opponents, but then expand to the whole society.

Other criteria for an in-depth peer review of democratic rule may include:

- abuse of power in favor of personal interests (via administrative control and pressure) of the power circle and their family ties;
- use of power to get administrative posts and control over economic assets and resources (administrative – rather than competent – distribution of wealth and power);

6 Ibid., p. 9.

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- ignorance of public political opinion, but the support of basic needs is favored if such a support reduces independence or increases the popularity of the regime;
- exploitation of populist ideas;
- level of political education (to establish the culture of democracy) and the decision-making process;
- practical experience of direct democracy (referendums);
- concentration of power;
- respect for dignity, human rights and freedoms of every individual;
- respect for profession and professional skills;
- respect for power and wealth in the sense of inequality;
- respect for moral and legal principles;
- explanation of political measures to the society; constant dialogue between the state and society; respect for public opinion;
- rational public debates or state patriotic propaganda (seeking for internal and external enemies);
- encouragement of self-employment and economic independence or state monopoly of the economy and natural resources;
- encouragement of free press.

Those criteria could be useful to explain any political or economic crisis. A totalitarian state is not interested in increasing public wealth or in assisting people to become more independent. In the past the king could refuse to support an inventor because the invention threatened social stability and his power. Today the threat is in the economic monopoly to produce products with the added value from relatively cheap natural resources. Therefore, a totalitarian state takes the innovations under its control through financing and participation in the share capital of new startups.

The level of constitutional democracy under peer review is interrelated with violations of individuals' human rights. The lower level of democracy is, the more serious violations could take place. Genocide as the most severe violation indicates that power does not respect human rights at all. Unlike the international definition of genocide, the constitutional law seems to utilize the democracy criteria. According to widespread opinion, the totalitarian regime of Stalin was hostile to many nationalities and social groups, which were repressed under his order: Tatars of Crimea, Chechens, Lithuanians, Ingush, Jews, as well as military commanders, doctors, dissidents and other "cosmopolites." It was genocide under the national constitutional law.

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4.7 Council of Europe's Model of Competences as an Important Step Forward towards Democracy

The Council of Europe recently published a conceptual model of the competences that need to be acquired by learners if they are to participate effectively in a culture of democracy and live peacefully together with others in culturally diverse democratic societies. The document is entitled *Competences for Democratic Culture. Living Together as Equals in Culturally Diverse Democratic Societies*. The competences and skills, in brief, shall include:

- respect for democratic values (human dignity and human rights, democracy, justice, fairness, equality and the rule of law, cultural diversion);
- attitudes (openness to other perspectives on the world, respect for other people, civic-mindedness towards the community; responsibility, self-efficacy, tolerance of ambiguity);
- knowledge and skills (learning, analytical, listening, observing, empathy, flexibility and adaptability, communicative, conflict-resolution and cooperation skills).

It is intended by the authors that "the model will be used to inform educational decision making and planning, helping educational systems to be harnessed for the preparation of learners for life as competent democratic citizens." Well, we can accept that the education and preparation for the life in the culture of democracy is necessary. However, I cannot but find fundamental loopholes in this model.

The competences and skills look like tasks without providing any means to achieve them. They do not explain to school boys and girls why they should respect the judicial process or democracy or rule of law, all of those complex categories that themselves are based on other certain values. The model should propose a convincing explanation of the vital importance of those categories.

Analytical and other skills are very useful for one to be prepared for an adult life, but they cannot be useful in the absence of economic and social conditions necessary to promote democracy. Moreover, many ordinary people respect democratic values without education, and many of them are tempted to compromise the democratic values in favor of personal interests related to the income, career, attribution to a social group, power or monopoly position. Abuse of power is difficult to prevent if the majority does not pursue democratic values, if there is no widespread public opinion that democracy is so vital that the whole nation would collapse without the culture of democracy. I was so satisfied to find the analytical and critical thinking skills in the model. But the moral and cultural values should be constantly promoted.

The document contains explanation of those skills which I do not fully understand:

> Analytical and critical thinking skills are the skills required to analyze, evaluate and make judgments about materials of any kind (e.g. texts, arguments, interpretations, issues, events, experiences, etc.) in a systematic and logical manner.

In my view, critical thinking means the ability to criticize the actions of the government by virtue of broadmindedness and curiosity, the ability to see the whole picture, to understand the mechanism of the whole social system and each element of it, the ability to make a decision identifying more and less important factors and to foresee the consequences of the decision for the respected values, to apply general principles such as legal certainty, legitimate expectation, proportionality, inequality, conflict of interest, impartiality and independence, discrimination, good governance and general good. Nevertheless, the model is a good opportunity to improve the culture of democracy for the future generations. I believe that educational programs should apply to young people and adults, especially to immigrants and criminals as a part of the adaptation, rehabilitation, and socialization and integration process. Otherwise, attitudes such as openness to cultural otherness would be confronted by disrespect of democratic values by newcomers.

For example, international organizations are currently under massive attack by the national governments because they became too independent from the states that created or joined those organizations. Independence is a key element, and any doubts of such independence would be the reason not to accept any decisions or proposals of the organization by the state. However, it would be unreasonable to ignore those recommendations that could be very helpful to improve democracy on a national level. The problem is that democracy may not actually be a constitutional idea even if the national constitution proclaims such an intent.

Another example: critical thinking skills may become worthless if there is lack of access to all sources of information that is necessary to create an objective picture of the reality with all its elements and their interconnections. The less democratic power prefers to establish monopoly on information to make it impossible to identify and evaluate the systemic problems. The next step would be a state ideology that does not recognize any alternative. The authors of the model confirm that critical thinking skills consist of those skills that are required to evaluate and make judgments; in other words, to be able to participate in the decision-making process. This is why critical thinking skills are very dangerous for a concentrated non-democratic power, but those who possess such competences (dissidents) are usually very small in number.

It is noteworthy that ECHR prefers to find systemic problems in the spheres located very far from democracy and democratic government (overcrowding in prisons, non-execution of court judgments, lengthy judicial proceedings). This Court's strategy to stay far from political issues does not correspond to the idea of the European Convention on Human Rights and Fundamental Freedoms. The primary aim of the Convention is to fight against totalitarian regimes and other systemic means including the possibility of

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the monitoring process and recommendations of PACE and other institutions of the Council of Europe being blocked or disregarded on the national level.

4.8 Distortion of Democracy

The constitutional rights were obtained through a long fight for independence. To feel the freedom, an individual should overcome the arbitrariness. The whole history of the rule of law in England, as I understand, is the history of fight against the abuse of power.[7] Therefore, one may consider the Oxford idea that the minority shareholders have to exit from the corporation (to sell their shares) if they do not enjoy the same part of the corporation's value as the controlling shareholder.[8] They have to fight for their rights and equality between shareholders. In a less democratic state we may find a situation where very potent people prefer to leave the country when the state monopoly prevents the development of market economy and the growth of demand for a wide range of goods and services within the chain of production. Similarly, minority shareholders cannot sell their shares for a market value if their rights to equally participate in the distribution of income are not respected. If democracy is restrained, the field for manoeuver becomes narrow for both citizens and shareholders. This is why I always believed that corporate law is very close to constitutional law, and that a corporation is a model of democracy.

The model produced by the Council of Europe does not discuss problems caused by the distortion of democracy, like majority rule or bureaucracy rule. The first problem means that the majority is not always right because of different political, social, theoretical and other preferences. Ultimately, the decision supported by the majority depends on the quality of the analysis of the problem. One can conclude that the report prepared by the UK parliamentary commission to implement the Hirst judgment is not a perfect document as it cannot convince the MPs to allow some categories of prisoners to vote. The majority rule is usually very far from the proportionality. The blanket prohibition of minarets approved in the referendum was initially opposed by the Swiss governing bodies as non-proportional, but the majority preferred to ignore the recommendations of professional decision-makers.[9] In both cases the democratic value (a non-proportional ban is illegal) was disregarded.

The bureaucracy rule is a distortion of democracy, which is opposite to majority rule. The latter is the problem of collective decision, and the bureaucracy becomes abusive when its general or individual decisions are contrary to the basic values or the specific

7 Tom Bingham, *The Rule of Law*. Penguin Books. 2011.

8 Reinier Kraakman et al. *The Anatomy of Corporate Law: A Comparative and Functional Approach*. Oxford University Press. Second edition. 2009.

9 See inadmissibility decisions in cases: *Hafid Ouardiri* v. *Suisse*, no. 65840/09, 28 June 2011; *La Ligue des Musulmans de Suisse et autres* v. *Suisse*, no. 66274/09, 28 June 2011.

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needs of both majority and minority of persons who are subject to the regulation. When the measures proposed are not adequate for the declared tasks, the interference in individual freedoms appears to be non-proportional. The conclusion on proportionality again depends on the decision-making process including access to and analysis of all relevant information. The totalitarian power is reluctant to publicly explain and debate the analysis, so the power is not interested in full transparency. When a young teacher at a state school asked the Russian prime minister why his salary as a teacher is lower than the salary of a military serviceman, the prime minister simply advised him to find another source of income rather than to explain the state's budget policy and to explain why military expenditures are several times higher than the expenses for the educational system.

In the sense of human rights and freedoms, there is no distinction between public and private life as the political disproportionate decisions are always very sensitive to individuals. This is the nature of power regardless of whether it stands close to full democracy or full tyranny. The Chinese government is economically effective because they appear to be masters of decision-making even if, in the view of many Western observers, the state of democracy is far from ideal in that country.

The difference between the majority and minority is that the majority prefers not to make public their judgements and opinions on political issues. This difference becomes more evident in a totalitarian regime where the power opposes any rational analysis of political matters. Minority's opinion is not dangerous for the power, but the majority is more influential and threatening to the stability of the existing power. In a totalitarian regime the power prefers to persecute the minority who is still capable of making rational critical analysis. Therefore, the implementation of the model proposed by the Council of Europe will serve as a test of democracy as the totalitarian power would not put into practice the recommendations to develop the skills of rational analysis of the members of the society.

Corporate law gives us another example of analogy. Public corporations, unlike private companies, are more interested in implementing and realizing the recommended codes of corporate governance because they need to attract the investors in the financial markets. It is interesting that small shareholders, who do not have access to decisive voting (but they constitute the majority in number), are usually reluctant to participate in any general meeting of shareholders or to fill in any voting bulletins. However, it does not mean that they do not make a rational analysis on the share value. They need this analysis to make a decision regarding sale or purchase of their shares. If they are not satisfied with the corporate performance, they sell their shares and quit the company. It might look like the managers do not do anything to enable the majority of tiny shareholders to make a rational choice. But it is not so. The top managers like populist rhetoric very much. Moreover, the dealers and brokers at stock exchanges, especially the branches of investment banks, are very powerful and influential. But their public opinions are far

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from a rational and true macro- and micro-economic analysis. It is better, in my view, not to use their opinion to make an investment decision.

They rather provide an example of awfully irrelevant analysis of factors that would never influence the affairs of a particular company. The high volatility of financial markets, being the main source of the modern economic crisis, also serves as the evidence that the financial prophets are very successful. Manipulation and populism are not as brutal as they are feared to be, but they nevertheless remain the prominent features of a totalitarian regime.

4.9 Persecuting the Judiciary

There are many examples of how the judicial power is diminished or disregarded. The easiest totalitarian way to overcome the opinion of judiciary is to dismiss the judges from their office. Among recent examples I would suggest the arrest of around 2,500 judges in Turkey in 2016, the dissolution of the Supreme Commercial Court in Russia in 2014 and the constitutional reform in Hungary in 2011 leading to early retirement of the most independent and experienced judges, which created a factual basis for the ECHR (the Court) judgment in the Baka case.[10]

Obviously, the Grand Chamber in that case set out a very solid basis in the judgment for its finding of violations of Articles 6 and 10 of the Convention. An important issue was raised by the respondent government in its request for referral to the Grand Chamber, concerning the national authorities' sovereign power to amend the national Constitution. According to the government, the Court cannot, in view of the principle of subsidiarity, limit the State's margin of appreciation to determine its own constitutional system of public authorities. This issue still remains unanswered.

The Court's jurisdiction to examine the provisions of a national Constitution was recently explained in the judgment in the case of *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, 4 July 2013:

> 50. The Court reiterates that Article 1 requires the States Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". That provision makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 153, ECHR 2005 VI; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, § 128, ECHR 2010 (extracts); and *Nada v. Switzerland* [GC], no. 10593/08, § 168,

10 *Baka* v. *Hungary* [GC], no. 20261/12, 23 June 2016.

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> ECHR 2012). It is, therefore, with respect to their "jurisdiction" as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called upon to show compliance with the Convention (see *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, §29, Reports of Judgments and Decisions 1998 I).

As a part of the international legal order, there is no question as to whether the Convention is a higher-ranking legal instrument than the national Constitution; rather, the issue here is whether certain provisions of the Constitution are *in concreto* compatible with the general principles of the rule of law and democracy (see *Anchugov and Gladkov*, cited above, §§51-52).

Indeed, the constitutional majority in the national parliament was so powerful that it seemed to have enough power to do anything it wanted. However, the government provided no evidence to the Court that the people's mandate to the election winners was specifically to annul certain decisions by the national courts and to remove all of the most senior and experienced judges, including the applicant, from office. In other words, no evidence was presented to prove that these measures were subject of the public debate and was consequently supported by the voters as a part of the strategic plan.

It is clear that the judiciary is also a part of sovereign power, along with the legislature. They have different functions, but they are both independent branches of sovereign state power. Moreover, there is something higher than the power to legislate and even to amend the Constitution – namely, the rule of law. Acts of Parliament must also be compatible with the rule of law. When a national supreme court exercises its power to ensure compliance (with the Constitution or with ordinary law), it is responsible for preventing arbitrariness in parliamentary activity. This means that there is no unlimited or absolute power in any branch of State power in a democratic society.

The constitutional relations between the judiciary and the legislature are highly complex. Both branches should respect each other's decisions. This does not exclude criticism as a part of rational public debate. Criticism should not normally be expressed by judges, but on vital issues, namely the protection of democracy or the rule of law, judges are permitted to express their opinion (see the judgment of the Inter-American Court of Human Rights in the case of *Lopez Lone et al. v. Honduras* – Series C no. 302). When this happens, it cannot be considered as a breach of judicial ethics, but should be considered as a dialogue between two branches of power. The criticism raised by the applicant did not affect the dignity of his office as a judge or his impartiality. This idea underlies the provisions of paragraph 4.11.2 of The Bangalore Principles of Judicial Conduct 2002:

> Subject to the proper performance of judicial duties, a judge may… appear at a public hearing before an official body concerned with matters relating to the law, the legal system, and the administration of justice or related matters.

The legislature's power is derived from the public, while the judiciary's power is derived from the highest moral authority and its acknowledged competence. They have different sources of power, but they are equally empowered to make different types of decisions.

Indeed, the courts' powers are also limited. They are limited not only through procedural guarantees against arbitrariness or judicial ethics. In the most sensitive cases, the courts are limited by the legitimate aims and social ideals envisaged by legislation and by the Constitution. They are limited by the general good as a public interest in society. Thus, sovereignty is a balanced power, based on the rule of law for the purpose of promoting the progress of the society as a whole.

In the present case the arbitrariness of the parliament's impugned actions could not be defended by the premise of sovereignty. For example, the government explained that the five-year requirement for the president of the Kúria was intended to prevent any political influence. That was a very good interpretation, and it would be better to include this principle in the text of the Constitution. But this rule did not relate to the applicant, and therefore its application to the applicant's case became arbitrary.

Protection against arbitrariness, as a fundamental right, is vital for any person. Judges require even greater protection because of their public function. They cannot be deprived of their fundamental rights on account of this function. If a judge publicly expresses his or her opinion in connection with a particular case, and this raises doubts as to that judge's impartiality, then the judge should be withdrawn from the case, but not removed from office. In any event, a judge cannot be deprived of his or her fundamental right to express an opinion on very important issues of public concern, especially where that opinion is expressed by the president of the national supreme court.

Equally, both judges and ordinary persons should be protected against arbitrary lustration. I believe that in the present case the reduction of the mandatory retirement age for Hungarian judges from 70 to 62 years was used as a hidden arbitrary lustration, and was exercised by the "revolution in the ballot boxes" in a manner that was contrary to the rule of law, including legitimate expectation and foreseeability. According to paragraph 11 of the Basic Principles on the Independence of the Judiciary 1985, "the term of office of judges… and the age of retirement shall be adequately secured by law". Also, the Measures for the Implementation of the Bangalore Principles (Lusaka, 2010) provide that

> the abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge. Where a court is abolished or restructured, all existing members of that court should be re-appointed to its

> replacement or appointed to another judicial office of equivalent status and tenure. (paragraph 16.3)

Finally, I ought to note that rule of law is a universal cultural phenomenon, a sign of complexity, self-restraint and civilization. Indeed, the fact of holding a constitutional majority in Parliament gives absolute power to those concerned. Such power is difficult to limit in reality (the political pressure exerted on national constitutional courts is always very high, and the Court's examination *ex post facto* cannot be considered as the most effective). At the same time, such power confers on its holders a high degree of responsibility to be creative. It is a difficult task to create something, for example to change laws that will become a basis for freedom and prosperity. I have not seen that in the present case. On the contrary, it appears that absolute power without the necessary cultural heritage becomes immediately destructive.

Small deficiencies may lead to the destruction of the whole system if that system does not have effective resources to resist isolated episodes of entropy. The same approach should apply to a social system. If social institutions such as the legislature or the judiciary do not protect fundamental rights, then democracy is replaced by authoritarian power, and entropy becomes real and dominant. This could create an atmosphere of conflict, distrust, uncertainty, hatred and resentment, in both types of relations: vertical (the State or organizations and individuals) and horizontal (between individuals).

In the present case, the Court referred to the chilling effect of the impugned actions on the judiciary, which means that the independence of all national judges was undermined and that their capacity to protect fundamental freedoms from arbitrary interference was substantially diminished. A process of entropy would then develop in such a way that the laws enacted by Parliament would not be respected by ordinary people. In the light of the principle of subsidiarity, the State as a system of social institutions is primarily responsible for resisting social entropy. This is how I would understand the concept of sovereignty in a modern democratic society.

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5 Does the Constitutional Review Breach the Principle of Separation of Powers? A Shifting Perspective

Tímea Drinóczi[*]

5.1 Introduction

This chapter seeks to propose a perspective from which constitutional review does not breach the principle of separation of powers. It contributes to the debate on who decides what, how, when and why within a constitutional democracy. Based on the constitutional role of courts when conducting a judicial review and the deliberative separation of powers delineated by Conrado Hübner Mendes, this chapter offers a different angle of studying the relationship among judicial review models, as described by Joel I Colón Ríos, and the principle of separation of powers. It advocates that in certain cases, it may legitimately be said that the doctrine of the last word (constitutional courts vis-à-vis legislative power), while, in others, the constitutional dialogue (in weak judicial review systems and in the case of decisions of constitutional courts vis-à-vis constitution-amending power) should be applied. Measures of which courts use in one model should not be used exclusively in the other. The chapter hypothesizes rather than concludes in which constitutional courts, through their constitutional interpretation may transgress their boundaries and intrude not exactly in the field of the legislative but that of the constitution-amending power. Elaborating these issues, however, overreaches the scope of this chapter that is offering another lens through which separation of powers can be theorized, and would require a more extended elaboration on the informal constitutional amendment in states with civil law traditions. However, this chapter may contribute and may instigate the scholarly discussion on separation of powers, from a functional approach, and informal constitutional amendments.

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5.2 Breaching and Intrusion – Putting into Context

'Courts are seen as breaching the principle of separation of powers and intruding into the territory of the sovereign national law-maker.'[1] This statement needs to be further elaborated as courts, their interplay with legislative power, consequently, the assessment of their breaching the principle of separation of power and intrusion is different in, to put it simply, states with common law traditions and civil law states that employ different models of judicial review.[2] In a constitutional democracy,[3] courts, either be ordinary (high) courts or constitutional courts, are empowered to review normative acts by constitution, statute (acts on human rights) or case law (USA). Due to this, different normative legitimacy and result (annulment, different solutions of new constitutionalism[4]) of judicial review and the underlying conceptual framework (common law and civil law) call for differentiation[5] regarding the principle of separation of powers. Differences in legal systems, understanding of constitution and constitutionalism entail different approaches and provide a new angle on assessing if the principle of separation of powers is breached or an intrusion into the territory of the 'sovereign' national law-maker[6] is made. It makes a significant difference if we take the approach of different theories of constitutionalism: as opposed to political constitutionalism relating to the traditional UK approach,[7] which, due to the weak judicial review, has recently shifted towards a new constitutionalism, legal constitutionalism also exists. This latter result is attributed to constitutional democracies having a written constitution, which is perceived

1 In the call for paper, the conference was originally entitled 'Rethinking European Constitutional Democracy – With Special Focus on the United Kingdom and Hungary', ELTE Faculty of Social Sciences, Budapest, 23-24 June 2016.

2 Joel I Colón Ríos, 'A new typology of judicial review of legislation', *Global Constitutionalism*, Vol. 3, No. 2 (2014) pp. 145-148.

3 'It is almost universally accepted that modern constitutionalism requires *some* form of constitutional review'. Mark Tushnet, 'The relation between political constitutionalism and weak-form judicial review', *German Law Review*, Vol. 14, No. 12 (2013) p. 2251.

4 Stephen Gardbaum, 'The case for the new Commonwealth model of constitutionalism', *German Law Review*, Vol. 14, No. 12 (2013) p. 2230. Gardbaum in this article offers an overview about legal and political constitutionalism, their strengths and weaknesses and argues that the third type of constitutionalism 'makes possible a form of "proportional representation" among the strengths of both legal and political constitutionalism, while also serving or minimizing the major weaknesses of each.' Gardbaum, ibid, at p. 2241.

5 This differentiation seems to be missing from the General Report of Allan R. Brewer-Carías, 'Presentation of the general report on constitutional courts as positive legislators in comparative law', XVIII International Congress of Comparative Law of the International Academy of Comparative Law, at the George Washington University Law School, Washington, July 27, 2010, available at <http://allanbrewer.com/Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/I,%201,%201008.%20Brewer-Carias.%20CONSTITUTIONAL%20COURTS%20AS%20POSITIVE%20LEGISLATORS.%20IACL%20Cong.%20Exposici%C3%B3n.doc).pdf>. He writes about trends concerning the classification of constitutional courts as positive legislators.

6 In the global and multilayered constitutionalism, the parliament is not sovereign anymore in the sense that it would have the ultimate power to decide on policy matters.

7 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge 2007).

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as a normative one, binding all, including state organs. Depending on the approach taken, what is considered intrusion or breach in one context is definitely not regarded as such within the other framework. In theory, even a weak form of judicial review[8] is considered illegitimate and unjustified from the perspective of political constitutionalism. From a positivist perspective, if reality, which is the existence and operation of human rights acts in commonwealth states,[9] is taken into account, the institutionalization of the weak form of judicial review has its legitimate and justified place in the legal system, provided we are assuming the new constitutionalism angle.[10] In the arena of legal constitutionalism, judicial review is constitutionally mandated and as such, is an essential element of constitutionalism. The separation of the power-related issue here is based on the proper balancing exercise by the constitutional court when conducting its constitutional role vis-à-vis the parliament as legislative power[11] and the constitution-changing power,[12] which usually manifests itself

8 Recently, new constitutionalism is identified with a weak judicial review system. Under the weak judicial model even if the court expresses its opinion about the consistency of laws with a particular statute, mainly human rights acts, the legislature has the final word in deciding on the issue at hand. Thus it determines whether it considers the position of the court or not. In Canada, after the court strikes down a piece of legislation, the simple majority at the federal or provincial legislature can override the court ruling. In New Zealand, however, judges must not strike down any law but are obliged to give the legislation a rights-consistent interpretation. The system in the UK is similar, but judges have attributed the power to make non-binding 'declaration of incompatibility' the result of which may be that the competent minister amends the legislation through a remedial order. The minister, however, is not obliged to do so. Colón Ríos, loc. cit. n. 2. at p. 144, pp. 145-148. The last word thus rests with legislative power in each state, and courts have to act within the framework established through this kind of constitutional dialogue. For more about the constitutional dialogue model, which originates in Canada, see, e.g., Peter W. Hogg and Allison A. Bushell, 'The CharterDialogue between courts and legislatures (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)', *Osgoode Hall Law Journal*, Vol. 35 (1997) pp. 75-105. For the multiple possibilities of the use of the constitutional dialogue approach, see Anne Meuwese and Marnix Snel, 'Constitutional dialogue: An overview', *Utrecht Law Review* No. 2 (2013, March) pp. 123-140. For a 'civil law-based' account of constitutional dialogue and its application in understanding current constitutional policies in a civil law states, see Tímea Drinóczi, 'Constitutional dialogue theories – extension of the concept and examples from Hungary', *ZöR*, Vol. 1 (2013) pp. 87-110, Tímea Drinóczi, 'Constitutional politics in contemporary Hungary', *ICL*, Vol. 1 (2016) pp. 63-98, respectively.

9 UK, Canada, New Zealand, Australian Capital Territory, Australian state of Victoria.

10 See Adam Tomkins, 'What's left of the political constitution?' *German Law Review*, Vol. 14, No. 12 (2013) pp. 2275-2276.

11 And also vis-à-vis executive power and other related organs and their normative acts.

12 It is applicable only in the jurisdiction where the constitutional court acknowledges the difference between constitution-making and constitution-amending power. It is possible when the constitution-amending power is seen as being confined by the constitution, as being a constituted power. These jurisdictions, to which belong the majority of constitutional democracies, usually employ eternity clauses and/or explicitly entitle constitutional courts to review constitutional amendments, or it is the constitutional or high court, which establishes this competence through constitutional interpretations. The underlying idea is that the constituent constituted the constitution and each traditional state power (legislative, executive and judicial) and other derivative/constituted powers, such as the constitution-amending power and constitutional courts. In other countries, such as Hungary, jurisprudence and the majority of scholarly literature do not recognize the difference between constitution-making and constitution-amending power. For them, a constitutional amendment is the manifestation of constitution-making power, which makes it even theoretically impossible for the constitutional court to review constitutional amendments, which, in their view, after adoption, become the part of the constitution. As the constitution is the benchmark of constitutional review,

through the parliament.[13]

Courts are explicitly empowered to review laws and strike down unconstitutional pieces of legislation (by constitutions[14]) or provide a signal of their incompatibility (by human rights acts, especially in the UK) exactly in order to be a guardian of the constitution or human rights, and thus intrude necessarily into the territory of the law-maker. Nevertheless, they are accused of being intruders,[15] essentially, on two grounds: why (on what legal ground: positive law or case law) and how (doing what kind of activity: annulment, other invasive measures, non-invasive measures) they intrude. No intrusion or breach of separation of power is justifiably detectable when there are constitutional or legislative authorizations to act and implement whatever kind of measures determined by law. Less legitimacy may be attributed to (constitutional) court actions when these are based on their own jurisprudence, case law or interpretation of competences. In these cases, the intrusion into the legislative field may justifiably rise, but the risk of breaching the principle of separation of power is lowered, if not diminished, when the constitutional

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the court, which is itself a constituted power, cannot assess it. For discussing this issue see, e.g., Kemal Gözler, *Judicial Review of Constitutional Amendments. A Comparative Study* (EKIN Press, Bursa 2008), available at <www.anayasa.gen.tr/jrca.htm>, Gary Jeffrey Jacobsohn, 'An unconstitutional constitution? A comparative perspective', *International Journal of Constitutional Law*, Vol. 4, No. 3 (July 2006), an international congress on the topic, which is available at <http://wn.com/Round_Table__Unconstitutional_Constitutional_Amendments__Opening_Session_part_I>, Rosalind Dixon, 'Transnational Constitutionalism and Unconstitutional Constitutional Amendments', May 2011, available at <www.law.uchicago.edu/academics/publiclaw/index.html>, Yaniv Roznai, *Unconstitutional Constitutional Amendments: Study of the Nature and Limits of Constitutional Amendment Powers* (London, February 2014), available at <http://etheses. lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf>. The Hungarian approach is presented in Drinóczi, loc. cit. n. 8 (ICL).

13 For a brief enumeration of different models, see, Richard Albert, 'How unwritten constitutional norms change written constitutions', *Dublin University Law Journal*, Vol. 38 (2015, July 9); Boston College Law School Legal Studies Research Paper No. 364. For a more detailed description of constitutional amendments in the CEE region, see Nóra Chronowski, Tímea Drinóczi, and Tamara Takács, *Governmental Systems of Central and Eastern European States* (Oficyna, Wolters Kluwer Polska, Warszawa 2011).

14 Taking the question of authorization into account, judicial review in the US, due to its judge-made law origin, belongs to a third category, and as such triggers different questions regarding the legitimacy of judicial review, methods and limits of constitutional interpretation. See also the ongoing debate between Samuel Issacharoff and Theunis Roux. Issacharoff makes the claim that, because judicial review is constitutionally mandated in many modern constitutions, the counter-majoritarian difficulty central to the US debate does not have much relevance. However, Roux refutes this, arguing that even when the power of judicial review is constitutionally mandated, similar concerns regarding the scope, nature and legitimacy of review arise in these states. Theunis Roux, 'The South African Constitutional Court's democratic rights jurisprudence: A response to Samuel Issacharoff', *Constitutional Court Review*, Vol. 5 (2014) pp. 11-25. I am gratefult to Tom Gerald Daly for his remark on this deabte. This chapter claims in Section 5.3 that 'similar concerns regarding the scope, nature, and legitimacy of review' arises in the interaction between the constitutional amending power and constitutional courts, especially when the delicate balance is infringed by the political decision-maker when it abuses its power.

15 They are characterized by being positive legislator disregarding the 'why' and the 'how'. See Brewer-Carías, loc. cit. n. 5.

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role of courts conducting judicial review is taken into consideration. The central question is the legitimate extent of the constitutional interpretation by the constitutional courts themselves on both the role they play in the particular legal system and their powers, and on individual constitutional provisions. These bring us to the still undertheorized area of both the informal constitutional amendments by constitutional interpretation,[16] and its limits.[17] I will discuss this very briefly under Section 5.3.3.

Due to the reality of the actual functioning of judicial review models, it is reasonable to recall why and how courts have final word over legislative actions and thus why and how they can legitimately intrude in the field of legislative/constitution-amending power, even if there is no positive law sanctioning these actions.

5.3 Separation of Powers – Last Word and Dialogue[18]

The principle of separation of state powers is a constituent element of constitutional democracy, but due to the different constitutional settings and governmental systems, its actual realization differs.[19] Nevertheless, the common finality is to avoid the concentrated exercise of state powers by separating them and creating a system of checks and balances. Today, branches of government (legislative, executive and judiciary) are not only separated and rendered to oversight and monitoring the activity of one another but are required to cooperate as well, in order to maintain constitutionality. This applies also to other derivative state powers such as the constitution amending power and the constitutional judiciary.[20]

Conrado Hübner Mendes explained in a convincing way how deliberative separation of power works:

16 In states with a common law tradition, this topic has already been addressed by Richard Albert who identified several types of the informal constitutional amendment. See, e.g., Albert, loc cit. n. 13, and Richard Albert, 'Constitutional amendment by constitutional desuetude', *American Journal of Comparative Law*, Vol. 62 (March 1, 2014) p. 641; Boston College Law School Legal Studies Research Paper No. 328. It would be an interesting challenge to check the validity of these types, mainly those that have emerged about and outside of the realm of constitutional interpretation, the role of conventions, desuetudes and extra-constitutional bodies empowered to amend the text of a constitution, in states with a civil law tradition.

17 Roznai, op. cit. n. 12, at pp. 240-241.

18 An inverted version of the understanding of deliberative separation of powers, 'neither dialogue nor last word' by Hübner Mendes. Conrado Hübner Mendes, 'Neither Dialogue Nor Last Word – Deliberative separation of powers 3', *Legisprudence*, Vol. 5, No. 1 (2011) pp. 1-40.

19 See the difference between the parliamentary and presidential governmental system in this respect.

20 It does not make any difference if the constitutional court belongs (e.g., Czech Republic) or does not belong to the judicial power (e.g., in Hungary) as the function and finality of the body is what matters, not the structural setting.

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> Both design and the everyday operation of the separation of powers need to strike a balance between the perspectives offered by dialogue and last word theories, however, irregular and particular this balance might be.[21]

This observation needs to be further elaborated and fine-tuned. First, it has to be decided if we take the position of a legal or a political constitutionalist, or that of a legal positivist focusing on existing legal environment, mainly constitutional design or a political theorist focusing on the best solution possible. Second, in examining existing models in their functioning, one should put herself into the position of a legal constitutionalist and assume the following role: with the exception of the weak judicial review, due to differences in judicial reviews and the answer to the 'why' and 'how' questions, in certain judicial review activities (and not judicial review models), at any given time, the last word seem to be essential for proper performance of the role of (constitutional) courts and the defence of the constitution, human rights and constitutionalism. In other judicial review activities, this task is best performed by the dialogue, the result of which also takes as long as there is another 'decision' is made.

For justifying this position, first, the difference between political and legal constitutionalism regarding the point of departure and institutional design is presented. It is followed by the justification of the need of the last word in some judicial review activities and that of dialogues in others.

5.3.1 About the Difference between Legal and Political Constitutionalism

Recently, it was the German Law Journal (2013) and ICON (2016), which dedicated special attention to the issue of political and legal constitutionalism. A review of articles and related other works[22] reveals that the authors' approach is rather a political philosophical when compared with a positive constitutional law.[23] This phenomenon demonstrates the weaknesses of their arguments that support the ideas of political constitutionalism, all of which indicates a defence of democracy against judicial review.[24] Their reasoning appears to be applicable only partially. More importantly, their claim seems to be feasible at the phase of constitutional design and not when the constitution or the constitutional setting is implemented. To elaborate upon this observation, the point of departure of the two types of constitutionalism and constitutional design need to be briefly presented.

21 Hübner Mendes, loc. cit. n. 18 at p. 31.

22 E.g. Bellamy, op. cit. n. 7, Colón Ríos, loc. cit. n. 2., Hübner Mendes, loc. cit. n. 18, Conrado Hübner Mendes, 'Is it all about the last word? Deliberative separation of powers 1', *Legisprudence* Vol. 3, No. 1 (2009) pp. 69-110.

23 It may be explained as the difference between 'understanding of the relationship between constitutional law and politics', as formulated by Marco Goldoni. Marco Goldoni, 'Two internal critiques of political constitutionalism', *ICON*, Vol. 10, No. 4 (2012) p. 927.

24 Bellamy, op. cit. n. 7, at p. 260.

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5.3.1.1 Points of Departure

Richard Bellamy assumes a position in which legal constitutionalists try to constrain democracy by referring to and applying the superior constitutional rules, they undermine legitimacy and efficacy of law and the courts. Legal constitutionalists generally place more trust in the judge to decide on reasonable disagreements instead of political actors and citizens who should be treated equally. For legal constitutionalists, it is the constitution that represents a fundamental structure for reaching collective decisions in a democratic way.[25] Political constitutionalists, however, see constitution differently: for them, the constitution is the democratic process itself and it is a political, rather than a legal system. Thus, in their view, the constitution is not treated as a superior or basic norm. Disagreements are to be solved within this political framework, which obviously rejects the idea of any kind of review conducted by not political, but independent and not elected, but otherwise selected actors, such as judges.[26] Bellamy, in his book, defends democracy against judicial review, which is mostly arguable if we consider that the baseline (the notion of a constitution) for comparing strengths and weaknesses, legitimacy, and actors of legal and political constitutionalism is not the same. Bellamy himself explains the notion of constitution in legal constitutionalism that it is a higher law that has supremacy and describes the notion of constitution considered by political constitutionalism as a political system and democratic process. Each constitutionalism has its own point of departure, which is not common and significantly differs from the other. This point of origin entails a difference in the notion of the constitution and related legal language (definitions) processes. The reason is that the need for protection of a constitution, which is seen as the highest legal norm within the state, and thus the constitution-making process make sense only in the framework of legal constitutionalism. In the framework of political constitutionalism, these processes and institutions are not relevant at all, as they are not included in its notion of the underlying constitution.

All these, however, do not mean that in theory and as a theory, either type of constitutionalism is better or worse, more or less legitimate than the others. It does not mean either, that any of them need to be defended from the other, especially if we consider, from a positivist perspective, the rise of new constitutionalism as an existing model established by human rights acts and operated by courts when they engage in a certain kind of constitutional dialogue with parliaments. In my view, they simply cannot be compared and the justification of the constituent element of either of them cannot be legitimately contended or criticized from the perspective of the other one. Criticism is reasonable and justified within the individual framework, in this case, political theory and political philosophy, such as it has been done in No 1 of ICON in 2016. *Cormac Mac Amhlaigh* correctly states that he can propose only a partial defence of political constitutionalism by offering an additional layer of moral arguments to defend legislative supremacy as *they*

25 Bellamy, op. cit. n. 7, at p. 2-4.
26 Bellamy, op. cit. n. 7, at p. 4, 5.

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can be reasons only in those jurisdictions where it is actually practiced.[27] Considering the existence and operation of the model of new constitutionalism, political constitutionalism needs to be seen and understood as a part thereof.[28]

5.3.1.2 Constitutional Design

During the process of constitutional design, there is usually a debate about what kind of constitution a state wants to have (written or not written) and how it intends to defend and protect it. This is merely a theory, as constitutional development, since the end of the 18th century, confirms that democratic states[29] showed a strong interest in having a written constitution in which political processes are incorporated and regulated in the first place. Constitutional provisions on fundamental rights protection have evolved over the years and in the newest constitutions, adopted after the Second World War and transitory periods, this part gained equal importance. Moreover, following the First and the Second World Wars (Austria and Germany, respectively), and after the transition processes (in the case of post-socialist states), even stronger efforts are being made to establish institutional guarantees to defend the constitution itself and, more specifically, constitutional rules in which the most important values, such as the rule of law, republic, human rights, etc. are established.[30] Constitutional courts have been established with a mandate to protect the constitution, guarantee its prevalence over the exceeding and thus unconstitutional will of political institutions in matters pertaining not only to fundamental rights but also to the exercises of state (federal and state) competences, and to the respect for other constitutional rules that are not necessarily human rights related in nature.[31] This phenomenon of legal constitutionalism is to be emphasized as it once again

27 Cormac Mac Amhlaigh, 'Putting political constitutionalism in place', *ICON*, Vol. No. 1 (2016) p. 175. It is not in the scope of this chapter at all to collect arguments and views for fine-tuning the political theory of political constitutionalism or choosing between any of the opinions. Therefore no detailed review is offered about the debate in *ICON*, Vol. 14, No. 1 (2016) between Mac Amhlaigh (ibid. and 'Clinging to my turtle: a rejoinder to Adrienne Stone and Richard Bellamy'), Adrienne Stone ('Putting political constitutionalism in place? A reply to Cormac Mac Amhlaigh'), Richard Bellamy (Turtles all the way down? Is the political constitutionalist appeal to disagreement self-defeating? A reply to Cormac Mac Amhlaigh).

28 One can be in full agreement with Tomkins according to whom within the framework of new constitutionalism and its constitutional design, mixing of political and legal constitutionalism cannot be condemned at all. See Tomkins, loc. cit. n. 10, at p. 2292.

29 It is the same with non-democratic states, where, however, constitutions cannot fulfil their functions, which are as follows: legitimacy, constituting, limiting and rationalizing state power, protection of fundamental rights, providing minimal consensus on the most important social matters and the functioning of the state.

30 See, e.g., Chronowski, Drinóczi and Takács, eds, op. cit. n. 13., Tom Gerald Daly, 'The alchemists: Courts as democracy-builders in contemporary thought', available at <www.academia.edu/29208800/The_Alchemists_Courts_as_Democracy-builders_in_Contemporary_Thought> pp. 10-11.

31 For instance, the new Federal Republic of Austria (1918) was – together with the former Czechoslovakia – the first country in the world that gave the final word in the interpretation of the law no longer to the legislator himself but a single and separated (Constitutional) Court. Martin Hiesel, *Verfassungsgesetzgeber und Verfassungsgerichtshof* (Manz Verlag, Wien 1995) 2ff. The main reason for an independent review of both the States' (Länder) law and the Federal law was not to strengthen individual rights but to safeguard the

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demonstrates a different approach and attitude applied towards the notion of constitution and constitutionalism. Those advocating political constitutionalism, often likely due to the traditional concept of parliamentary supremacy and the absence of a written constitution, keep referring on the one hand to the method of how human rights can best be protected.[32] And, on the other hand, they also refer to how a disagreement of rights and other matters of public policy, which in this framework are not necessarily embedded in a constitution, can best be resolved.[33] These arguments are indeed, reasonable as political constitutionalism needs to be defended when the focus has shifted from political to legal institutions which are considered as 'an antithesis of the traditional Commonwealth (more particularly, of the United Kingdom's parliamentary) model of constitutionalism'.[34] Due to the adoption of the human rights act in the Commonwealth,[35] the most affected area was that of human rights and the method of how these rights can best be protected at national and transnational level.[36] A weak kind of protection of human rights by judges (weak judicial review) gave rise to the notions of the new Commonwealth model of constitutionalism or new constitutionalism, advocated by *Stephen Gardbaum.*[37] Expressions such as 'parliamentary bill of rights model' and the 'dialogue model'[38] are also used as interchangeable notions.[39] As explained by Gardbaum: 'the new model is a distinct intermediate institutional form of constitutionalism'[40] in between constitutional supremacy, as it gives some power to judges to enforce human rights, and traditional legislative supremacy, whereas, following the judicial consideration, it gives the last word to the parliament in human rights issues.

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strict distribution of powers between the Federation and the States. Manfred Stelzer, 'Pro Futuro and Retroactive Effects of Rescissory Judgments in Austria', in Patricia Popelier, Sarah Verstraelen, Dirk Vanheule, and Beatrix Vanlerberghe (eds.), *The Effects of Judicial Decisions in Time* (Intersentia, Cambridge, Antwerp, Portland 2014) at 63. As for Belgium, see the remark of, e.g., L. Lavrysen: 'From the seventies of the last century on, Belgium embarked on a process of federalization. It gave rise to an awareness of the need to put in place a constitutional review of legislative acts'. Lavrysen, 'The Belgian Constitutional Court and the separation of powers', available at <www.const-court.be/public/stet/n/L.-Lavrysen,-The-Belgian-Constitutional-Court-and-the-separation-of-powers.pdf> (2014) p. 1.

32 Mac Amhlaigh, loc. cit. n. 27, at p. 176.

33 Bellamy, op. cit. n. 7, at p. 8.

34 Marco Goldoni and Christopher McCorkindale, 'A note from the editors: the state of the political constitution', *German Law Review*, Vol. 14, No. 12 (2013) p. 2013.

35 UK, Canada, New Zealand, Australian Capital Territory, Australian state of Victoria.

36 Goldoni, loc. cit. n. 23, at p. 926.

37 Gardbaum, loc. cit. n. 4 at p. 2230.

38 Gardbaum, loc. cit. n. 4 at p. 2230.

39 See footnote n. 5.

40 Gardbaum, loc. cit. n. 4 at p. 2230.

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As new constitutionalism originates in countries where there is a traditionally strong parliamentary supremacy but no tradition of constitutionally mandated human rights protection,[41] it is reasonable to take the following position. A constitutional policy choice has been made in these countries, according to which courts are invited to participate in policy choice formulations that affect human rights issues by empowering them to evaluate the legitimacy and legality of a piece of legislation.[42] The practical relevance of questioning[43] this basic policy choice, which sets a different type of constitutional model and relies more on the judge and court, by political constitutionalist does not probably make much sense[44] until a reverse policy draft about the institutional and constitutional design is there on the horizon. In this way the debate, from a legal point of view, but probably not from a political scientist's view, is settled; a choice has been made between conflicting positions, as portrayed by *Conrado Hübner Mendes*,[45] surrounding judges and courts and legislators and parliaments. This fundamental legislative choice of Commonwealth states gives legitimacy to judicial review over parliamentary statutes as far as the majority of the parliaments, behind which there is the equally respected and represented citizen do not change the human rights protection mechanism.[46] In this respect, constitutional democracies having a written constitution and constitutional review in place, function in a similar way: as long as there is no constituent or constitution amending power that has the power and political possibility to change the constitutional structure and review system, the constitutional courts (tribunal, council) or the highest courts are entitled to review and even annul pieces of legislation they deem unconstitutional. Constitution designers, the constitution-making power, decide on the way of the institutionalization of separation of powers as well as composition, competences of state organs

41 The constitution provides for human rights protection in none of the Commonwealth states. The UK does not even have a written constitution, and as in the UK also in the other countries, statutes embody human rights protection. It is only Canada which provides for human rights protection at constitutional level; its human rights provision may only be changed through a constitutional amendment process. See, e.g., Ríos, loc. cit. n. 2. at p. 147, 148.

42 This approach seems to be neglected by political constitutionalists (in their internal perspective obviously logically though): 'To sum up: Judicial review is not the best watchdog of rights because it violates the most important of them: the right to equal participation'. Goldoni, loc. cit. n. 23, at p. 932.

43 Theoretical relevance would gain importance again during the process of a new constitutional design. Pros and cons of political and legal constitutionalism, written and unwritten constitutions, legalization of policy making, etc. would significantly contribute to the constitutional policy-making process.

44 Should this design (i.e., the necessity of constitutional review of legislative actions) itself be questioned, it would lead to the following problems: (i) disregard of policy choice that has already been made by the parliament to which political constitutionalists impute supremacy; (ii) disregard of multilayered constitutionalism or human rights protection, which involves international (e.g., Council of Europe) and supranational (EU and its Charter) regimes.

45 Hübner Mendes, loc. cit. n. 22. at 1 pp. 8-28.

46 Analogously, it is what will most probably be happening in the UK regarding the Brexit process and the withdrawal of the 1972 communities act, and a subsequent monitoring of the legal system and abrogating laws that, due to the new political configuration, have become unnecessary.

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and their relationship. It follows that the basic decision influences the institutional operation as to how state organs function, interact and interfere.

5.3.2 Constitutional Review and Separation of Power

5.3.2.1 Overview

In the *weak judicial review* applied in the model of new constitutionalism, the role of courts is to engage in a dialogue with legislative power to give the best possible interpretation of a legal provision. Court interpretation is not made for eternity; it is always up to the legislative power to decide if it considers the court ruling or not.

There are other models of judicial review, as enlisted by *Joel I Colón Ríos*. These include the strong judicial review (North and South America, Europe),[47] strong basic structure judicial review[48] and weak basic structure judicial review.[49] *In these models*, un-

47 In the system of strong judicial review, judges are empowered to strike down legislation deemed unconstitutional. The only way for the legislators to override a judicial invalidation is through a constitutional amendment (Colón Ríos, loc. cit. n. 2. at p. 143, pp. 148-152.), which is exercised by either the constitution-amending power or the constituent power, depending on the position taken by the relevant constitutional or supreme courts. In a strong judicial review system, the last word is at the constitutional or supreme courts, except when their decision is overridden by constitutional amendment. When it happens, it is the constituent or constitution-amending power that has the last word on a particular matter until the following interpretation of the amended constitutional provision is made by the court. At this point, it is again the court that has the final word within the changed constitutional framework. Should this interpretation of the provision not meet the interest of the political decision-maker holding the majority necessary for a constitutional amendment, the constitution may be changed over and over again as a result of a special kind of constitutional dialogue. This practice, which is labeled abusive constitutionalism (David Landau, 'Abusive constitutionalism (April 3, 2013)' UC Davis Law Review, Fall 2013, Forthcoming; FSU College of Law, Public Law Research Paper No. 646, available at SSRN: <http://ssrn.com/abstract=2244629)>, gives rise to serious concerns about the capability of the constitution to restrict the state power and uphold a democratic system that respects the rule of law. Nevertheless, a similar dialogic mechanism can be identified here as in the case of weak judicial review.

48 In *the strong basic structure review model* the constitution, just as in the strong review system, gives power to judges to annul unconstitutional laws but court decisions cannot be overridden if the eternity clause, either be explicit or implicit, is affected. In the case of explicit eternity clause, overriding is possible in a two-tier process: first, the eternity clause needs to be removed; second, the originally wanted amendment can be adopted (Colón Ríos, loc. cit. n. 2. at pp. 152-157.). However, in Western democracies there is no practice in this regard. Herbert Küpper explains for instance that in Germany a constitutional amendment that would deliberately negatively affect eternity clauses would never be considered. Due to the embedded nature of values, the eternity clause protects, and political culture mainly determined by, the constant need for political compromise to maintain coalition government. Herbert Küpper, 'Tur Tur, az álóriás – avagy a Grundgesetz örökkévalósági klauzulájának jelentése a német jogrendszerben [Tur, Tur the fake giant – meaning of the eternity clause of the Grindgesetz in the German legal system]', in Gárdos-Orosz Fruzsina and Szente Zoltán (eds.), *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon [Constitution-making and constitutional changes in Hungary and Europe]* (Nemzeti Közszolgálati és Tankönyv Kiadó Zrt., Budapest 2014) p. 85, 86, 88-89, 93. This two-tier process cannot be applied in the case of implicit eternity clause because it is being discovered through constitutional interpretation by constitutional or supreme courts (India; see also the distinct political-historical circumstances leading to the development of the doctrine by the SC of India). The basic structure doctrine, according to Colón Ríos, abolishes the last remnant of parliamentary supremacy as it prevents even the constitution-amending power to react to an unfavorable court ruling and render it ineffective by a constitutional amendment. This position may be

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constitutional pieces of legislations are annulled and this power of the courts should not be questioned at all as being constitutionally mandated. What is common in these three models is that both full-fledged and flawed constitutional democracies employ one of the judicial review models, and their role partly is to implement and reinforce constitutional rules and defend the constitution against unconstitutional pieces of legislation or amendments. Constitutional courts or high courts are empowered to strike down legislation; their institutionalization is determined by the constitution.[50] Members are selected in a way prescribed by legal norms adopted by the popular representative body, which is the parliament. In the *strong basic structure review* and *weak basic structure review* models, there are constitutional mechanisms set by the constitution (eternity clauses and constituent assembly, respectively) resolving the debate between popular sovereignty (manifested through the parliament) and legal supremacy. For a legal constitutionalist, these are sufficient arguments in realizing that in a given constitutional framework, it is the court that has the final word about the validity of laws and constitutional amendments and not the parliament (*strong basic structure model*) or it is the constituent people that have the final word in respect to constitutional amendments (*weak basic structure models*). A written and democratic constitution *expressis verbis* determines tasks, competences etc. for each state power, with a view of checks and balances as well as prevention of withdrawal of power from one another or intrusion into the competences of the other branch. Against this background, as far as the constitutional and this kind of institutional design (striking down unconstitutional laws) are concerned in the *strong basic structure model*, arguments against judicial supremacy[51] appear to be irrelevant. In the case of the *weak basic structure model*, it could be seen that it has a potential to result in an autocratic regime[52] through the means of abusive constitutionalism. In a constitutional democracy that does not have many democratic traditions, relying on political actions (elections of a constituent assembly, a referen-

challenged on the ground that in this system the traditional parliamentary supremacy cannot necessarily be interpreted as if there has been a constitution confining it. The last word on the validity of constitutional amendment here evidently lies with the courts.

49 Interestingly, in the *weak basic structure review*, the last word is vested with a representative body behind which stands the constituent people. This model is employed in some Latin American states and provides judges with the right of striking down ordinary legislation and constitutional amendments but give the people, acting through a constituent assembly, the final word on the validity of positive law, in cases when a modification would affect fundamental principles of the constitution. Colón Ríos, loc. cit. n. 2. at pp. 157-162., p. 144. Even if it relies on the political community/constituent people to decide on fundamental constitutional changes (Colombia, see Colón Ríos, loc. cit. n. 2. at p. 159. See also Landau, loc. cit. n. 47 at pp. 8-10.), the convocation of a constituent assembly or calling for a referendum could be, and, in certain cases, have been (Venezuela, Ecuador and Bolivia, see Landau, pp. 11-13.) unduly influenced by political leaders and have led to a competitive authoritarian regime where the separation of power evidently ceased to exist. Landau, loc. cit. n. 47 at p. 13.

50 With the already mentioned exception of the US SC.

51 See, e.g., Hübner Mendes, loc. cit. 22, at pp. 8-28.

52 Venezuela, partly in Hungary, depending on the perspective.

dum), as it is advocated by political constitutionalists, rather than courts does not seem to be productive, in terms of democracy, rule of law and human rights.[53] For not restricting political processes, as they are the manifestation of the constitution, certain prerequisites are needed, such as the citizens' commitment to constitutional values, vigorous party competition, as also formulated by *Mark Tushnet*.[54]

This is considerably different in the case of the review of constitutional amendments when the constitution does not contain an eternity clause or does not empower the court to strike down constitutional amendments (*strong review model*). When it is up to the court to decide if it has the competence to review constitutional amendments, arguments that most interest the political constitutionalists about who should have the last word, *mutatis mutandis*, prevail: whether the political process (constitution amendment, with the proper involvement of citizens) should prevail over the decision of the constitutional court. The core question in this respect is whether the constitution amending power is considered the manifestation of the constituent power or a constituted one that has to act within the constitutional limits. In the first case, constitutional courts will not acknowledge any review competence, while in the second case they will. The latter also means a shift to the strong basic structure model. If the court, disregarding feasible comparative analyses, existing case law of other jurisdiction and the actual state of affairs, cannot deduce any competence to review constitutional amendments, such as Hungary,[55] its rulings may be continuously overridden by constitutional amendments containing exactly the same content that has previously been deemed unconstitutional and annulled by the court, provided that the necessary political majority is in place.[56] Here this question may be asked: should the political decision-maker, which in this case equals the constitution-amending power, have the final word over such constitutional matters that have already been decided otherwise by the constitutional court?[57]

There appear to be a decisive *similarity between the four review models*, which suggests the existence of a dialogic interaction between the court and the legislative (in the weak review system) or constitution-amending power (in other systems). Borrowing *Conrado Hübner Mendes*'s theory about circularity and deliberative separation of powers[58] and using them in conjunction with the idea of separation of powers as recognized by constitutions described briefly above, the following can be established. Depending on the

53 It is even truer when Hungarian and Polish actions were taken by the political decision-maker regarding constitutional courts are considered. See also Daly, loc. cit. n. 30, at p. 12.

54 Tushnet, op. cit. n. 3. at pp 2255-2256.

55 See Drinóczi, loc. cit. n. 8 (ICL).

56 This, in the case of Hungary, requires only a two-thirds majority in the Parliament.

57 This is what has happened in Hungary between 2010 and 2013; passing a constitutional amendment only requires the support of two-thirds majority in the parliament. This, in my view, abusive constitutionalism seems to be justified by Hungarian scholarly references to the rising political constitutionalism in Hungary. See Section 5.3.2.2.

58 Hübner Mendes, loc. cit. n. 18 and n. 22, Conrado Hübner Mendes 'Not the Last Word, But Dialogue – Deliberative separation of powers 2', *Legisprudence*, Vol. 3, No. 2 (2009).

constitutional system,[59] separation of powers includes a certain collaboration of branches, i.e., legislative or constitution-amending power, and courts. In a constitutional democracy, with regard to a human rights act or a constitution recognizing human rights, no one is entitled to exclusively judge on rights; collective decisions upon rights are reached by the interaction between legislative or constitution-amending power and courts. It is primarily accomplished by the former, and then it is interpreted or applied by (constitutional) courts. They have overlapping competencies in this regard, but they intervene at different moments of the decisional sequence. There is the last word, in a certain limited sense: for the moment, until it is either overridden by the legislature or re-interpreted by courts. In this sense, taking circularity and temporality into account, there is no final word but a deliberative decision-making in which both sides are active participants. Dialogic interaction, which aims at upholding equilibrium between actors and refrains from vindicating the last word by mainly overstepping competencies assigned to them, does not infringe but reinforces the principle of separation of power.

As for *judicial review systems* in which the (constitutional) court is *constitutionally mandated to annul* legislative or other normative acts, the last word, but again, only temporarily, sides with the court. After striking down a statute, the parliament is still able to modify its position, which has been deemed unconstitutional, and adopts another statute that is more in line with its political agenda but remains within the framework of the constitution, as in a constitutional democracy, each state organ must abide by the constitution. This interaction, even though it significantly differs from that of the players of new constitutionalism, may be seen, from a wider perspective, as a dialogic one. Branches respect the competence of one another and this is the exact way how they engage in dialogue.[60] As it has been mentioned above, the problem is caused by a constitutional amendment that disrespects the ruling of a constitutional court employing strong judicial review, as it happened in Hungary, between 2010 and 2013. In this way, circularity of decision-making in this constitutional system is terminated, the last word is vindicated by the parliament (political decision-maker) referring to the popular sovereignty over the constitutional court interpretation. In this context, due to the different point of departure (notions of the constitution) and the lack of guarantees of political constitutionalism (e.g., commitment and competition), it cannot be said that political constitutionalism prevails. Strikingly, this is exactly why it is misleading to claim that since 2010 political constitutionalism has been on the rise in Hungary.

59 Hübner Mendes, loc. cit. n. 22, at p. 1. 4., 5., 41-42.

60 For a more detailed explanation, see Drinóczi, loc. cit. n 8 (ZöR).

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5.3.2.2 An Elaboration with Example

In Hungary, authors[61] tend to confuse notions, approaches and perspectives. They seemingly assess national legal actions by borrowing ideas from abroad. This exercise in itself cannot be condemned, as it is the essence of comparison and we are in the era of migration of constitutional ideas.[62] However, adopting ideas from other approaches and interpreting actual Hungarian processes within the framework without critically evaluating them does not seem ideally suitable.

Attila Antal describes 1990-2010 as the duration of legal constitutionalism and the period following 2010 as the age of political constitutionalism. 2010 is perceived as the year when political constitutionalism dawned in Hungary. Although Bellamy employed another type of notion for a constitution, Antal conceives the 'rehabilitation of the political character of the written and legal constitution' and the idea in which 'law cannot confine politics' as a manifestation of and need for Hungarian political constitutionalism.[63] In his view, the claim for the rise and existence of political constitutionalism is justified by the unconstitutional constitutional amendments and changes related to the Constitutional Court (competencies, composition and selection of judges; the overruling of a decision; and invalidation of previous case law). The 'character of the Fundamental law based on political constitutionalism' is a result primarily of the Fourth Amendment.[64] It is thus evident, that Antal misinterprets the theoretical framework defined by Bellamy since he describes, assesses and interprets a legal constitution within the context of political constitutionalism. However, political constitutionalism is used for characterizing a political-sociological, not a legal constitution. He arguably states that two positions (legal and political constitutionalism) are present in Hungary at the same time and they are able to feasibly form a healthy political culture and culture of public law together.[65] By taking this position, which is similar to the model of new constitutionalism, Antal explains and even justifies constitutional changes that have occurred since 2010 including the theory of Bellamy, which, despite its criticism,[66] is coherent in its own logic and framework. Antal, however, chooses not to consider whether constitutional, political and social precondi-

61 Antal Attila, 'Politikai és jogi alkotmányosság Magyarországon [Political and legal constitutionalism in Hungary]' *Politikatudományi Szemle*, Vol. 3 (2013). Antal's position is referred to by Erdős Csaba, 'Az 1989-es Alkotmányon nyugvó alkotmánybírósági határozatok hatályon kívül helyezésének egyes aspektusai [Some aspects of invalidation of constitutional court decisions based on the Constitution of 1989]', in Gárdos-Orosz Fruzsina – Szente Zoltán (szerk.): *Alkotmányozás és alkotmányjogi változások Európában és Magyarországon* [Constitution-making and constitutional changes in Hungary and Europe] (Nemzeti Közszolgálati és Tankönyv Kiadó Zrt., Budapest 2014) pp. 310-312; Stumpf István, *Erős állam – alkotmányos korlátok* [Strong state – constitutional restrictions] (Századvég, Budapest 2014) p. 239, 247.

62 Gábor Halmai, 'The use of foreign law in constitutional interpretation', in Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) pp. 1329-1347.

63 Antal, loc. cit. n. 61, at p. 58.

64 Antal, loc. cit. n. 61, at 62.

65 Antal, loc. cit. n. 61, at 66.

66 See, e.g., *ICON*, Vol. 14, No. 1 (2016).

tions of political constitutionalism are present in Hungary. As mentioned earlier, these requirements are *inter alia* the following: first, the existence of competitive elections, which was doubtful in Hungary in 2014 to a certain extent;[67] and second, the genuine participation in legislative processes which is, to a certain extent, defective in Hungary.[68]

If we seek any typology for the Hungarian Fundamental law or constitutional practice since 2010, it is misleading to employ the theory of political constitutionalism, as Antal and others do,[69] mostly since it may lead us to the ill-founded impression that prerequisites of political constitutionalism are also valid in Hungary and we do not have a legal constitution but a political one, which is neither *de facto* nor *de jure* true.

The Fundamental Law is the product of a constitution-making process, even if this process can justifiably be criticized from many perspectives. This fact alone makes it a written constitution, which, according to its own rules, is the 'foundation of the legal system of Hungary',[70] binding for everyone,[71] including state power. The constitution prescribes that it is the Constitutional Court that is the 'principal organ for the protection of the Fundamental Law'.[72]

The theory of political constitutionalism is political since it considers the constitution itself as a product of political processes, which needs to be protected by legal and other, conventional means. Therefore, 'political' here does not mean that the political decision-maker has an omnipotent role without any restraint and legal limitation. This is why the Hungarian strong judicial review model should not be forgotten when evaluating the type of constitutionalism this state applies and when considering the best means the Constitutional Court may have for defending the Fundamental Law. It is constitutionally mandated *expressis verbis* that the Court has the power to annul unconstitutional laws, other normative acts and judicial decisions.[73] If the Constitutional Court sees itself as a body operating in a system where also political constitutionalism applies, it may decide not to annul unconstitutional pieces of legislation but reinforce the efforts of the political decision-maker by using softer measures, as it was openly suggested by one of the last former presidents of the Constitutional Court. In this case, the Court will indeed be an engine of

67 See, e.g., Tímea Drinóczi, 'Dialogic interaction and legislation on parliamentary election in Hungary 2010-2014', *Osteurope Recht*, Vol. 4 (2014); László Róbert, 'A választójogi szabályozás alakulása 2010-2014 [Changes in the regulation of elections 2010-2014]', *MTA Law Working Papers* 2014/21; Halmai Gábor, 'A választójogi szabályozás alakulása 2010-2013 [Changes int he regulation on elections 2010-2013]', *MTA Law Working Papers* 2014/12, OSCE/ODIHR Limited Election Observation Mission Final Report, available at <www.osce.org/odihr/elections/hungary/121098?download=true>.

68 See, e.g., Tímea Drinóczi and Miklós Kocsis, 'Public consultation – theory and Hungarian practice', in Lizius Mader, Sergey Kabyshev (eds.), *Regulatory Reforms. Implementation and Compliance. Proceedings of the Tenth Congress of the International Association of Legislation (IAL) in Veliky Novgorod, June 28th-29th, 2012* (Nomos 2014) pp. 303-324.

69 See Erdős, loc. cit. n. 61, at pp. 310-312, Stumpf István, op. cit. n. 61, at p. 239, 247.

70 Art R) (1) Fundamental Law.

71 Art R) (2) Fundamental Law.

72 Art 24 (1) Fundamental Law.

73 Art 24 (3) a) c) points Fundamental Law.

governance by not blocking its rapid reactions[74] and will spare the prestige and authority of the parliament, which is the supreme organ of popular representation.[75] However, it will do this at the cost of not properly performing its constitutional duty as being the 'principal organ for the protection of the Fundamental Law'[76] and constitutionalism.[77]

5.3.3 Constitutional Interpretation and Separation of Powers

5.3.3.1. Courts in a weak judicial review system have their rules of *statutory interpretation*. Even following the Human Rights Act, UK judges still must comply with the limits set to them by the limited necessity of statutory interpretation, and by presumptions and maxims that delimit their alleged tendency to judicial activism and set clear guidelines as to how statutory interpretation must take place.[78] *Helen Xanthaki* finds it difficult to support the view in which it is the Human Rights Act 'which changed the approach of UK judges to a more activist approach to interpretation'.[79] In her opinion, although purposive interpretation may be attributed in part to the new judicial liberties resulting from the power to declare Acts incompatible, purposive interpretation does not depart from the UK tradition of statutory interpretation as much as some UK common lawyers suggest.[80] As the UK does not have a written constitution, it is not the informal constitutional amendment that may cause democratic legitimacy, rule of law, separation of power problems, but the mere judicial review over laws. Within the framework this chapter offered, it seems that as long as courts conducting weak judicial review respect rules of interpretation that their particular legal culture demands,[81] the mere existence of judicial review does not infringe the principle of the separation of power.

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74 Interview with Barbabás Lenkovics, president of the Constitutional Court, March 2015 in Radió Kossuth. *Summary Can Be Found in Hungarian* at <http://nol.hu/belfold/lenkovics-az-ab-feladata-hogy-ne-blokkolja-a-kormanyzati-munkat-1519643>. See also in English at <http://hungarianspectrum.org/2015/07/18/chief-justice-lenkovics-on-the-fidesz-constitutional-court-part-i/>.

75 Art 1 (1) Fundamental Law.

76 Art 24 (1) Fundamental Law.

77 See for instance decisions on the integration of credit institutions set up as cooperative societies in decision 20/2014 (VII. 3.) of the Constitutional Court, and on the law on tobacco shops in decision 3194/2014. (VII. 15.) of the Constitutional Court. Analysis of the performance of Hungary's 'One-party elected' Constitutional Court judges between 2011 and 2014, available at <http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf> p. 8. For a background information, see, e.g., the following sites: <https://hungarianspectrum.wordpress.com/2013/04/25/hungarys-national-tobacco-shops-who-are-the-happy-recipients-of-the-concessions/>, <https://theorangefiles.hu/state-monopoly-on-the-retail-sale-of-tobacco-2/>.

78 Helen Xanthaki, 'The UK Human Rights Act: a true excuse for judicial lawmaking by the Lords?' *JURA*, Vol. 2 (2012) p. 245.

79 Xanthaki, ibid.

80 Xanthaki, ibid. Similarly, see Tomkins, loc. cit. n. 10, at pp. 2289-2290.

81 For instance statutory interpretation in the UK, or the dialogic attitude in Canada.

5.3.3.2. *Constitutional courts*, beyond annulment, have *other competencies and means* either constitutionally mandated meaning they have been created by the constituent or adopted by the parliament, or developed by the case law of the courts. Here again, importance needs to be attributed to the legality of the action, that is the legal ground based on which the constitutional court performs its function. If there is an expressis verbis *legal authorization*, no intrusion into the law-making territory is possible. *Overstepping* its competence may more justifiably be raised when no rules are in place for regulating either the procedure or the action a court takes. But again, *the finality* of these other measures, such as the declaration of unconstitutional omission, giving a constitution-conform interpretation, determining the temporal effects of legislation, advice-giving, is to perform a better constitutional mission of constitutional courts, which are to be the guardians of the constitution. In the application or deduction of these means from the constitution, constitutional courts can spare the reputation of the legislative power as the highest popular representative body, and engage in a dialogic interaction; this action is just the opposite of intrusion. The decision of the Constitutional Court vis-à-vis the parliament holds the interpreted content of the constitution. This, independently from the applied interpretative method, prescribes a framework in which the legislative power is required to remain as it is bound by the constitution and international obligations that may also appear in the deliberation of the constitutional court.

Comprehensively, this means constitutional courts do not enact anything and, more importantly, their decision may not be considered as the final word in decision-making. It may be claimed that as far as constitutional courts abide by the rules of constitutional interpretation, which beyond its general rules[82] necessarily involves political reality[83] as well as constitution-conform interpretation,[84] and respects the law-making competence of parliament (abstaining from making concrete policy choices), which is its constitutional obligation, it makes no laws from a strictly positivist point of view.

Nevertheless, the result of these efforts of constitutional courts, in which they can engage in a dialogue with other public powers, may, in fact, *be seen as overstepping*. It happens when the constitutional interpretation is made with the intent to supplement the text of the constitution,

82 Constitutional interpretation may not amount to the amendment of the constitutional texts, and cannot result in an interpretation that is contrary to the literal meaning and scope of the text. It has to respect the relevant international law and case law, the precedent-type case law of the constitutional court, which is not strictly binding as changes in political reality may influence the result of a future interpretation activity. Constitutional interpretation has to take into account the fact that the constitution is a whole, content-wise and from a teleological aspect as well. Thus constitutional norms need to be interpreted in a way that they would be consistent with the fundamental principles and values of the constitution. Petrétei József, *Az alkotmányos demokrácia alapintézményei* [Fundamental institutions of constitutional democracy] (Dialóg Campus Kiadó, Budapest – Pécs 2009) pp. 136-137.

83 W. Schmitt Glaeser, 'Verfassungsauslegung', in H. Tilch (Hrsg), *Deutches Rechts-Lexikon Band III* (C.H Beck'sche Verlagsbuchhandlung, München 1992) p. 920.

84 H. Maurer, *Staatsrecht I* (Verlag C.H Beck, München 2001) p. 28, Elisabetta Lamarque, 'The Italian courts and interpretation in conformity with the constitution, EU law and the ECHR', *AIC*, Vol. 4 (2012) pp. 1-27.

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and this meaning is elevated at a constitutional level. It may occur, when in deciding the case the judge uses this newly interpreted, *formerly and textually non-existent constitutional rule* as the one that is the benchmark of constitutionality or unconstitutionality. On the other hand, overstepping may take place when the interpretation gives a *contrary meaning* of the text of the constitution, compared to the sense of the constitution taken as a whole (teleological or purposeful interpretation). It is hard, however, to *identify and marking off the boundaries between unfolding, fine-tuning of the sense of a constitutional provision and a constitutional interpretation that amends the text of the constitution*, mainly because the text itself is not changed from a formalistic viewpoint. Thus, an informal constitutional amendment may occur not only when it is extremely difficult to amend the constitution,[85] but in cases where the constitution does not contain, or vaguely contains, important rules on the rule of law and human rights, the situation calls for a broad interpretation. This type of informal constitutional amendment raises the question of legitimacy and breach of the principle of separation of powers between the constitutional judiciary and the constitutional amendment power. Consider for instance the need for a broad interpretation of the usually vague provisions of the new constitutions that were adopted during and after the transition.[86] Until the adoption of the *Polish* Constitution in 1997, the Constitutional Tribunal delivered necessary gap-filling provisions, the essence of which have later been incorporated into the new constitution.[87] In *Hungary*, the chapter of the constitution on fundamental rights had not been elaborated. It had originated from the text of international agreements, and thus the Constitutional Court, under the regime of the Constitution, raised the level of protection of human rights by developing and later on applying and further elaborating[88] different limitation tests.[89] Transitional constitutional courts, for instance in the Czech Republic and Hungary, interpreted and in a certain manner constitutionalized particular issues of transition, such as the connection between material justice and the rule of law during the deliberation on the recommencement of statutory limitation.[90]

Nevertheless, if the political decision maker eventually considers the informal constitutional amendment, it may come to a conclusion that the constitutional court has had every reason to give the particular constitutional interpretation. It follows that the political decision maker can initiate a formal amendment procedure if it is politically and/or legally feasible. Or, it can act as an ordinary legislative power, and it may initiate a new law that respects the new, informally

85 See works of Richard Albert, e.g., loc. cit. n. 13 and n 16.

86 Sólyom László, 'Alkotmányértelmezés az új alkotmánybíróságok gyakorlatában [Constitutional interpretation int he practice of new constitutional courts]', *Fundamentum*, Vol. 2 (2002) pp. 18-20.

87 Ibid. For a constitutional historical overview, see, e.g., Boguszlaw Banaszak, *Outline of the Polish Constitutional Law* (Wydawnictwo Uniwersytetu Wrocławskiego, Wroclaw 2005) pp. 20-27.

88 See the test on the limitation of the right to property in decisions 64/1993 (XII. 22). and 42/2006 (X. 05.) of the Constitutional Court. Tímea Drinóczi and Gábor Juhász, 'Social rights in Hungary', in Krzysztof Wojtyczek (ed.), Social Rights as Fundamental Rights: XIXth International Congress of Comparative Law/le XIXe Congrès international de droit compare (The Hague, The Netherlands, Eleven International Publishing, 2016) pp. 171-206.

89 Sólyom, loc. cit. n. 86 at pp. 18-20.

90 See decisions 11/1992. (III. 5.) of the Hungarian Constitutional Court and 1993/12/21 – Pl. ÚS 19/93 of the Czech Constitutional Court. The Berlin wall shooting case also may be mentioned here, see briefly, e.g., Ulrich Karpen, 'Transnational justice and the transition to democracy', *Amicus Curiae* (90/2012).

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amended meaning of the constitutional provision. In both cases, the informal constitutional amendment is *addressed by the political sphere*. Should the informal amendment of the constitutional court be *left unreflected*, we can assume that the political decision maker accepted it. In this case, and against the framework this chapter has proposed, the principle of democracy and the majority of the rule of law considerations, including certain aspects of the separation of powers, are respected. Results of constitutional interpretations, used as informal constitutional amendments and benchmarks for the legislative power without being legally addressed by the legislative or the constitution-amending power, *raises concerns* regarding several other components of the rule of law, such as transparency of the legal system, the predictability of actions of state institutions, foreseeability of laws.

As it has been already mentioned, in each judicial review exercised by either constitutional courts or ordinary courts, *separation of power is not necessarily affected or breached*. Instead, it seems to be the method and results of constitutional or statutory interpretation that may be *debated*. In the case of constitutional interpretation, the problem of informal constitutional amendment by courts may emerge. However, should the *courts exceed* the interpretative role according to any of the theories of interpretation, it is again the political decision-maker who can *counteract* assuming the role of either legislative or constitution-amending power.

5.4 Conclusion

Protection and implementation of human rights and other constitutional principles are the joint responsibility of each state actor. When they fail, it is ultimately the court which has to decide on the constitutionality or legitimacy of laws in a given constitutional framework. *Separation of powers*, within a particular constitutional setting, either be a common law or civil law state, *is not breached in the long term as far as the legislative/constitution-amending power and the courts are engaged in a genuine constitutional dialogue*. Nevertheless, without doubt, there are reasonable differences, which is summarized in Table 5.1, between judicial review systems that a state applies, due to the constitutional and institutional design. In a constitutional democracy, *the 'sovereign national lawmaker' is not sovereign and supreme* in the sense it has the *potestas* to legislate without any limits. This seems to be acknowledged by states that introduced weak judicial review, which triggers a more balanced relationship between legislative power and courts. If it can be accepted, then it cannot be surprising that in a state where (the strong type of) judicial review is a constitutional mandate of constitutional courts, the statement of 'breaching the principle of separation of powers' by these courts is less justified.

In the judicial review system, with the exception of the weak judicial review, it is *the task of the courts to annul* legislative and other normative acts. This means that they have the last word. In the case of constitutional amendments, it can either be the courts (strong basic structure judicial review model) or the people (some kind of constituted body in the

weak basic structure judicial review model) that have the final word. At the end of the day, it is the *constituent* who decides with respect to the constitutional system. But until this point, it is a constitutional obligation of state organs to respect constitutional boundaries, competencies of one another and, for full compliance, cooperate in the determination of the meaning of a constitutional provision. Consequently, a strong judicial review system should not identically or even similarly apply measures employed in the weak judicial system. Mingling these systems and the applicable measures (as suggested by Hungarian scholarly literature and some Constitutional Court judges) is misleading and capable of (at least politically) legitimizing a legal solution that does not fit in a given constitutional framework. Should a state having strong judicial review system apply measures that fit in the weak judicial review system, the constitutional protection may be lowered and the constitutional court does not comply with its constitutional mandate.

As for the *constitutional interpretation* and *separation of power*, respect for the rules of constitutional interpretation is of utmost importance. Otherwise, constitutional courts may be charged with acting as a constitutional amending power through informal amendment of the text of the constitution, which is not in line with the ideas of constitutional democracies regarding democracy and the rule of law. Nevertheless, it may be interesting to see exactly in which cases constitutional courts assume constitution amendment power as a result of their interpretation exercise in which they establish more than a mere refinement of constitutional provisions. Moreover, it would require more scholarly attention to study what their reason is for overstepping their power and what answer it triggers from the political decision-maker and when the political power addresses the problem of exceeding the rules of constitutional interpretation.

Table 5.1 Summary

		Political constitutionalism (parliamentary supremacy)	Legal constitutionalism (legal supremacy, judicial review)			New constitutionalism in between legal and political constitutionalism
The notion of a constitution		political notion; political process and political product; no written constitution	legal notion; created by a constituent, has a supreme rank in the legal hierarchy, binds all; written constitution			human right acts are protected by a weak judicial review; constitutional dialogue
Judicial review (jr)		–	**Strong jr.**	**Strong basic structure jr**	**Weak basic structure jr**	**Weak judicial review**
Regulation of	jr on constitution[a]		nonsense			
	jr on constitutional amendment		–[b]	constitution, eternity clauses, case law	constitution, eternity clauses	–
	jr on laws		constitution, laws			
	jr with no annulment[c]		constitution, laws, case law			–
Annulment of	the constitution		nonsense			
	constitutional amendment		–	✓[d]	✓, but in certain cases: people	–
	laws		✓			–
jr with no annulment			possible possibility for engaging in constitutional dialogue			some kinds of declaration of incompatibility and interpretation
From the perspective of positive law		theory	reality			

[a] Depending on the actual approach towards constitution-making and changing power.
[b] '–' sign means a possibility to engage in a constitutional dialogue.
[c] Less intrusive means into the territory of parliament: declaration of omission by legislation, provisory measures, determination of temporal effect, etc.
[d] '✓' sign means that for the time being, because of the constitutional mandate to defend the constitution, courts have the last word; their decision on constitutional amendment may be overridden by the constituent. A decision on laws may be respected by the parliament or may be overturned by constitutional amendment.

6 A Monistic Approach to the Internationalization of Constitutional Law

David Dyzenhaus[*]

In no other juristic discipline does one get as quickly to a discussion of fundamental concepts as in international law.[1]

The debate about the internationalization of constitutional law examines how domestic constitutional norms make their way into public international law or how international legal norms become part of domestic constitutional law.[2] It assumes that there are in some sense two distinct domains of law – the international and the domestic – and the question of the internationalization of constitutional law is about how norms travel between domains. Often a concern about sovereignty drives the debate. If international legal norms do not, as it were, need a visa to enter a domestic legal order, the political sovereign is subject to constitutional norms not of its own making; and for many that raises democratic concerns.[3]

In my view, this concern is mistaken. It assumes the truth of *dualism* – that domestic legal orders are distinct from the international legal order in the same way that they are distinct from each other. I shall thus argue for a version of *monism*: that the plurality of domestic legal orders is part of one overarching international legal order and that what we may think of as norm travel between the international legal order and any particular domestic legal order is understandable only in terms of this view.

I shall make this argument through an analysis of the work of the great legal positivist and international lawyer, Hans Kelsen, and of his students, Alfred Verdross and Hersch Lauterpacht, two of the most important international lawyers of the last century. All three

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1 Georg Jellinek, *Die Rechtliche Natur der Staatenverträge: Ein Beitrag zur Juristichen Construction des Völkerrechts* (Vienna: Alfred Hoelder, 1880).

2 See Wen-Chen Chang and Jiunn-Rong Yeh, 'Internationalization of Constitutional Law' in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 1165 and Erika De Wet, 'The Constitutionalization of Public International Law', ibid., 1209.

3 See Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin, eds., *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) 3.

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were committed monists and they made their arguments before the development of many of the international law institutions we take for granted today, and well before the proliferation of entrenched bills of rights and constitutional courts that make so salient contemporary questions about the internationalization of constitutional law.[4]

Their arguments were at the least influential in the development of the former institutions and perhaps the latter too. For they paved the way for a growing acceptance of the need to have adjudicative institutions to settle disputes about public law norms, whether the norms of public international law or the public law norms of a particular legal order. A return to them may thus help us to understand better our disagreements about what we take for granted, especially at a time when growing nationalism and populism might lead to an effort to dismantle many of the legal structures so painstakingly established in the second half of the twentieth century.

In particular, I wish to explore the claim that there is an inherent relationship between legal form and political substance that comes to the surface in revisiting their arguments. We shall see that Verdross is pivotal to this exploration. As we can learn from a biographical article by Bruno Simma, a student of Verdross and himself an eminent international lawyer, Verdross was a prominent member of Kelsen's positivistic Vienna school that developed the 'Pure Theory' of law. But he came to abandon the 'purity' or value neutrality of Kelsen's theory and put international law on the natural law basis that, in my view, explains the inherent relationship between legal form and political substance.[5]

In Section 6.1, I set out some of the immediate background to the monism developed by Kelsen, Lauterpacht and Verdross. In Section 6.2, I explore an argument that proceeds from substance to form in Lauterpacht. Section 6.3 proceeds in a discussion of Kelsen and Verdross from form to substance. Section 6.4 returns to legal theory. As I shall argue, the key is to see that what I call 'international law monism' is the only position that is both true to the facts and coherent. It is true to the facts because the constitutions of domestic legal orders do not deny the existence of international law. At most, they commit themselves to one or other version of dualism. But dualism is not a coherent position, which leaves international law monism.

4 See, for example, Matej Avbelj and Jan Komárek, eds., *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012), especially Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' 39 and Alexander Somek, 'Monism: A Tale of the Undead' 343.

5 Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 *European Journal of International Law* 33. See Jochen von Bernstoff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge: Cambridge University Press, 2010, Thomas Dunlap, trans.); Aoife O'Donoghue, 'Alfred Verdross and the Contemporary Constitutionalization Debate' (2012) 32 *Oxford Journal of Legal Studies* 799; and Thomas Kleinlein, 'Alfred Verdross as a Founding Father of International Constitutionalism?' (2012) 4 *Goettingen Journal of International Law* 385. For older valuable discussions, see Henry Janzen, 'The Legal Monism of Alfred Verdross' (1935) 29 *American Political Science Review* 387 and Josef L Kunz, 'The "Vienna School' and International Law (1933-34)' 11 *New York University Law Quarterly Review* 370.

6.1 Dualism and Monism in Legal Theory

In his article, Simma describes the proposal during the deliberations that led to the Weimar Constitution that the Constitution should provide for the automatic incorporation of international law as 'an integral part of German law'. The inspiration was this famous passage from Sir William Blackstone's *Commentaries* on *the Laws of England*:

> The law of nations (whenever any question arises which is properly the object of it's [*sic*] jurisdiction) is here adopted in it's [*sic*] full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of it's [*sic*] decisions, are not to be considered as introductive of any new rule, but merely declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world.[6]

It was resolved as a result that the Constitution would contain the following provision: 'The universally recognized rules of international law are part of the law of the Reich.' But in the course of further parliamentary deliberations, the provision was watered down to make it up to the German state when to be bound by a particular international law norm, a position that reflected the then dominant positivist and voluntarist view of international law.

Verdross intervened by publishing an article arguing that

> no choice existed in this regard … and that the only matter left open to constitutional regulation in this area was the concrete determination of the status of international law within the municipal legal order.[7]

And his intervention persuaded the framers to return to the monism of the original proposal, 'which entered into force as the famous Article 4 of the Constitution of the Weimar Republic'.[8]

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6 Sir William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979) Vol. 4, 67.

7 Alfred Verdross, 'Reichsrecht und internationales Recht' (1919) 7/8 *Deutsche Juristenzeitung* 291. I refer to this paper as reproduced in Hans Klecatsky, René Marcic, Herbert Schambeck, eds., *Die Wiener Rechtstheoretische Schule: Hans Kelsen, Adolf Merkel, Alfred Verdross* (Vienna: Europa Verlag, 1968), Vol. 2, 2059; hereafter WRS.

8 Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', 42. Footnote omitted. The actual text read that the 'The generally accepted rules of international law are part of the law of the Reich', which could be seen as a diluted version of the original proposal. Peter Caldwell points out that the committee agreed to this text only after it was assured by government advisors that at most the Article would

One has to be a little cautious in evaluating this anecdote. The historian Peter Caldwell had pointed out that Article 4 played almost no role in the legal practice of the Weimar Republic in part because both legal scholars and politicians sought to 'neutralize its legal significance'.[9] But he also suggests that the Article was not 'just about the validity of international law within domestic law; it was about the principle of legality itself' since it posed the challenge of 'democratic constitutionalism' to the dominant prewar position that the state 'preexisted the constitution'. For democratic constitutionalism

> assumes that legal procedures 'constitute' the state, and that the existence of constitutional rules allows one to determine which activities carried out by someone claiming to act in the name of the state are really actions of state. In this sense, law is not just an element that binds state actors, but law creates state actors.

Article 4 kept alive the 'key issues of legality and of the relationship between democracy and the community of nations that would continue to resonate over the course of the twentieth century'; and its wording provided a model for the West German Basic Law of 1949, as well as for other 'post-authoritarian democratic constitutions after 1989'.[10]

This is not, it is important to note, a judgment that can be ascribed to a mere benefit of hindsight. In a work of 1923, Verdross quotes Hugo Preuss, the legal scholar and 'father' of the Weimar Constitution, as saying that the

> original draft [of the Weimar Constitution] … contains three inherently related propositions: the democratic principle that the authority of the state resides in the people; its organizational division into *Reich* and *Länder*; and the entry of Germany as a democratic *Rechtsstaat* into the international law community.[11]

I want to explore here the possibility that it is a form of monism that explains why the relationship is an inherent one. This was not Kelsen's task. He rejected dualism because

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establish a rule of interpretation already adopted by German courts while doing the political work of placating critics of Germany; Caldwell, 'Sovereignty, Constitutionalism, and the Myth of the State: Article Four of the Weimar Constitution' in Leonard V. Kaplan and Rudy Koshar, eds., *The Weimar Moment: Liberalism, Political Theology, and Law* (Lanham: Lexington Books 2012), 345, 348-49.

9 Caldwell, 'Sovereignty, Constitutionalism, and the Myth of the State: Article Four of the Weimar Constitution', at 346.

10 Ibid., 346-7.

11 Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (JCB Mohr (Paul Siebeck): Tübingen, 1923), 111. For an attempt at a debunking argument, see Carl Schmitt, *Constitutional Theory* [1928] (Durham: Duke University Press, 2008; Jeffrey Seitzer, trans. and ed.) 122-23.

he argued that as a matter of legal logic one cannot be subject to the norms of two legal systems. According to Kelsen, at the base of every legal order is a *Grundnorm* that has to be hypothesized in order to make sense of the idea that there is a unified normative order. The *Grundnorm* tells the officials and subjects of the order that the constitutional norms of that order – from which all other norms derive their validity – must be obeyed. It explains how might is transformed into right through its mediation by law.[12]

On this view, as long as one can hypothesize a *Grundnorm* for the norms of the international order, there is in place a legal order, and one that demands obedience from all those subject to it. It is precisely this conception of legal order that leads to monism because, as Kelsen put it in the second edition of his *Pure Theory of Law*, this time speaking of dualism between law and morality:

> an individual who regards the law as a system of valid norms has to disregard morals as such a system … [because] no viewpoint exists from which both morals and law may simultaneously be regarded as valid normative orders. No one can serve two masters.[13]

But Kelsen also thought that legal science cannot itself decide between what I call 'domestic law monism' and 'international law monism'. The former insists that only one domestic legal order exists so that valid legal norms are only those norms that can trace their validity to its *Grundnorm*. In contrast, the latter states that there are many valid domestic legal orders, but they are all part of the international legal order and so trace the ultimate validity of their norms back to the *Grundnorm* of the international order. According to Kelsen, the choice between the two versions of monism is determined by political preference, which he thought should be for international law monism.[14] It follows that legally speaking the framers of the Weimar Constitution were entitled to opt to exclude international law norms.

Verdross, as we have seen, disagreed, arguing that '*no* choice existed in this regard from the outset'. But one might then be puzzled at his efforts to persuade the Weimar framers to get the Constitution right if the text could not affect the place of international

12 See, for example, Hans Kelsen, *Die philosophischen Grundlagen der Naturrechtlehre und der Rechtspositivismus* [1928], reprinted in WRS I, 281, at 339, where he says that the attempt by the positivist jurist to comprehend law as an objective order through the medium of the *Grundnorm* entails that 'in a certain sense might is transformed into right'. I shall refer to the translation that appears as an appendix to Hans Kelsen, *General Theory of Law and State* (Cambridge, MA: Harvard University Press, 1945, Anders Wedberg, translator), 389, under the title 'Natural Law Doctrine and Legal Positivism', translated by Wolfgang Herbert Kraus. For the relevant passage, see 437, where 'die *Transformation der Macht zu Recht*' (Kelsen's emphasis) is translated as 'the transformation of power into law'.

13 Hans Kelsen, *Pure Theory of Law*, Max Knight trans. (Cambridge, MA: Harvard University Press, 1945) 329.

14 See, for example, Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992, Bonnie Litschewski Paulson and Stanley L. Paulson, trans.) 116-17. This is the translation of Kelsen, *Reine Rechtslehre. Einleitung in der rechtswissenschaftliche Problematik* (1934).

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law in their legal order. Further, he could not and did not deny that the actual practice of existing legal orders must count, as he made clear in his intervention when he bemoaned the fact that both legal theory and practice had generally drifted in the nineteenth century from monism to dualism.[15] And a dualism that requires explicit statutory incorporation before an international law norm applies domestically is the official constitutional stance of many existing legal orders.

I shall now turn to exploring monism in order to get a grip on the question of the significance of this issue of the choice between different versions of monism, as well as between monism and dualism, and on whether, as Caldwell and Preuss suggested, there is an inherent relationship between international law monism and democracy.

Two cautionary notes are in order before I continue and I shall come back to both. First, any claim about the '*civilized* world' is redolent in our post-colonial era of the age of imperialism – of the imposition of 'Western' values on the global South, which continues in different forms to this day, often as a thin veneer over the pursuit of crass material interests.[16] Second, if there is an inherent relationship between international law monism and democracy, it might seem to follow that Kelsen was not really a legal positivist, despite his claim that the choice for international law monism is a matter of political preference, not one compelled by legal theory. At least, he would not be a legal positivist in the perspective of the English tradition of legal positivism, the hallmark of which is the Separation Thesis set out by H.L.A. Hart that there is no necessary connection between law and morality.[17]

6.2 From Substance to Form

Like Kelsen and Verdross, Lauterpacht was an avowed monist. But he distinguished his method of arriving at monism in that monism for him is not the product of abstract reflection on the nature of law, but a deduction 'from the actual practice of States and judicial tribunals'.[18] He realized that such a method had to contend with elements of state

15 Verdross, 'Reichsrecht und internationales Recht', 2059-60.

16 In addition, one explanation for Verdross's move to natural law is that he was a conservative Catholic in the sway of the Scholastic natural lawyers Vitoria and Suarez, who helped to provide the justification for the Spanish conquest of the 'barbarian' peoples of the Americas. See Anthony Carty, 'Alfred Verdross and Othmar Spann: German Romantic Nationalism, National Socialism and International Law' (1995) 6 *European Journal of International Law* 78. On the rather complex relationship between the Scholastics and Spanish imperialism, see Anthony Pagden, *Spanish Imperialism and the Political Imagination: Studies in European and Spanish-American Social and Political Theory 1513-1830* (Yale: Yale University Press, 1990) 37-63.

17 H.L.A. Hart, 'Positivism and the Separation of Law and Morals', in Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) 49, 50.

18 Hersch Lauterpacht, 'Les principes généraux de droit comme source du droit des gens' (1937) IV *Recueil Des Cours* 97, 164. I will refer to the translated version, 'The Place of International Law in Jurisprudence', in Hersch Lauterpacht, *Collected Papers: Volume 1 The General Works* (Cambridge: Cambridge University

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practice that seemed to support dualism. But such contention, in his view, would produce 'a critical and realistic monism, fully alive to the inconsistencies and anomalies of the realities of international life, which must underlie a scientific treatment of international law'.[19]

Significant for Lauterpacht's argument was Article 38(3) of the Permanent Court of International Justice, established by the League of Nations to adjudicate disputes between its members in the early 1920s. Article 38(3) required the Court to apply: 'The general principles of law recognized by civilized nations.' According to Lauterpacht, this Article was 'purely declaratory' because these principles had been recognized in arbitral practice and agreements prior to the statute and, moreover, such principles express 'that social and legal necessity without which law, international and other, is inconceivable'.[20]

He suggested that Article 38(3) was a 'death blow' to legal positivism because it

> denies the fundamental tenet of positivism that custom and treaty are the only sources upon which the judge is entitled to draw [and] … in particular, the doctrine that there exist gaps in international law and that as a result international tribunals are at liberty, nay, are under an obligation, to pronounce a *non liquet* when the point at issue is not covered by either custom or treaty.

The Article, by 'throwing open to the judge the unbounded field of the legal experience of mankind, in substance removes altogether the possibility of the absence of an applicable rule of law'.[21]

Lauterpacht thought that his claim about general principles did not do away with the role of the will of sovereign states and that Article 38 required the Court to take such will into account by making the first mandatory source of law – 'International conventions, whether general or particular, establishing rules expressly recognized by the contesting States'. But he argued that it is important that such will is always to be interpreted against a backdrop of principles of customary international law, recognized as a source of law in Article 38 (2) as well as the general principles of law.[22]

Lauterpacht also thought that the same kind of reasoning helps to show why Kelsen was wrong to resist natural law. 'As a matter of legal experience', he claimed,

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Press, 1970, E. Lauterpacht, editor) 193, 214. Lauterpacht did not make too much of this distinction. See, for example, his reliance on Verdross and Kelsen in Hersch Lauterpacht, *The Function of Law in the International Community* [1933] (New York: Garland Publishing, 1973), 420-23.

19 Lauterpacht, 'The Place of International Law in Jurisprudence', 214.

20 Ibid., 242.

21 Ibid., 242-43.

22 Ibid., 243-44.

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> there takes place constantly an incorporation of natural law by positive law. … Positive law refers to and incorporates, in various forms, extra-legal rules which, but for the fear of flouting suspiciously general disapproval, we might find convenient to call by the name of natural law.[23]

He continued:

> In the daily activities of courts homage is paid to the fact that law is the realization of socially obtainable justice – which means of the socially obtainable natural law. We may have abandoned the theory that statutes repugnant to natural justice are void, but that does not mean that we have ceased to shape positive law and to interpret it, sometimes out of recognition, by ideas for which the term natural law is an elastic and convenient expression.[24]

There several problematic features of his position. First, it seems to pin everything on judicial interpretation and a common law view of the place of judges in a legal order. But the Court had jurisdiction only on the basis of the agreement of states to be bound by specific or collective treaties, so that the occasions for interpretation were limited by state will. Second, legal positivists in the English tradition generally hold that in such a situation a judge is exercising an ultimately legally unconstrained discretion. The more 'unbounded' the array of considerations the judge may draw on, the more such positivists will think there is evidence that judges are wielding a quasi-legislative discretion.[25] Third, if customary international law as well as general principles of international law are mere resources for judges to interpret expressions of state will, states may seem able to choose to make explicit their will that judges not resort to such principles. This could be done at the international level in the text of treaties and at the domestic level in the text of statutes or by a more or less wholesale exclusion of international law in the constitution. Fourth, Lauterpacht seems to equate any extra-legal consideration that influences the judiciary with expansive terms like 'morality', 'justice' and 'natural law'.

Finally, to abandon 'the theory that statutes repugnant to natural justice are void' will seem to many legal positivists tantamount to an abandonment of natural law. It concedes that the vast overlap between the content of the positive law of any domestic legal order and extra-legal values, including whatever we take to be the values of the correct moral order, is entirely contingent on will. Indeed, that moral norms have to be made legally

23 Lauterpacht, 'Kelsen's Pure Science', 425.

24 Ibid., 425-26.

25 The legal positivism that Lauterpacht has in his sights in 1927 is one that denies the existence of gaps in the law, though it finds that this condition can be met only by domestic systems; Lauterpacht, 'The Place of International Law in Jurisprudence', 243.

compulsory by explicit legal incorporation will seem to testify to the truth of the positivist Separation Thesis that there is no necessary connection between law and morality.

In sum, Lauterpacht's method, much like the 'interpretive legal theory' later put forward by Ronald Dworkin, which it closely resembles,[26] seems to be too contingent on how experience happened to turn out to make a case for international law monism.[27] Indeed, Verdross himself thought that the Blackstonian common law methodology on which Lauterpacht seemed mainly to rely could take one only part of the way to rejecting both dualism and domestic law monism.[28] And I shall now explore Simma's suggestion that

> [if] one wants to take sides in this grand debate and to subscribe to Hersch Lauterpacht's famous dictum about general principles [of international law] delivering *un coup mortel au positivisme*, … it was above all Alfred Verdross who contributed to this victory by finally anchoring natural law thought in the essentially positivist, voluntarist, theory of the sources of international law.[29]

6.3 From Form to Substance

I pointed out that one could well be puzzled at Verdross's efforts to persuade the framers of the Weimar Constitution to adopt international law monism if there were no choice in this matter. But Verdross was not so naïve as to suppose that text did not matter. His argument for a provision committing the legal order to monism explored the problems that would arise were the dualist provision to be adopted. Basically, these amounted to the tensions that arose for a state when faced with a conflict between a treaty and a domestic statute. Verdross suggested that the only solution is to empower a court to resolve the tensions, in much the same fashion as a constitutional court decides conflicts between constitutional norms and statutes.[30] That solution may well seem flimsy, as it seems built on the assumption that the constitution is not dualist as well as the assumption that there is a court outfitted with the competence to decide such disputes.

However, in later work, Verdross clarified the argument. The main evidence, in his view, for dualism is that conflicts arise when a domestic statute that violates international law is perfectly valid according to the domestic order's criteria of validity.[31] But Verdross pointed out that such conflicts are to be found just as much in domestic law when a

26 See especially Lauterpacht, *The Function of Law in the International Community*, 85-104.
27 See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005, Reissue with a New Epilogue) 52-58, for just this criticism.
28 Alfred Verdross, *Die Einheit*, 100-1.
29 Simma, 'The Contribution of Alfred Verdross to the Theory of International Law', 47. Footnote omitted.
30 Verdross, 'Reichsrecht und internationales Recht', 2062.
31 Verdross, *Die Einheit*, 159.

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statute is enacted in accordance with the formal criteria of validity of a legal order, but seems to violate some material constitutional value. This will be a perfectly valid statute and the courts will either be empowered to invalidate it or will have to apply it despite its problematic provenance. But in either case, at stake are only provisional not ultimate conflicts, since in each a legal procedure is available for resolving the conflict and so the unity of the domestic legal order is preserved.[32]

Similarly, when a state violates international law, and if there is no independent tribunal that has jurisdiction to decide the matter, another state may protest, in which case the offending state can bring itself into line, or the other state may force it to fall into line. And so the unity of international and domestic law is preserved in the same way as the unity of domestic law, even though the provisional conflict may persist for a considerable time. 'All that is necessary is that the possibility exists for these conflicts to be resolved on the basis of legal rules'.[33]

However, not only does Verdross recognize that a state act contrary to international law may continue to be valid, he also suggests that in the domestic context the resolution of the conflict could be that the constitution comes into conformity with an initially offensive statute.[34] By parity of reasoning, he must suppose that international law could come into conformity with an initially offensive domestic norm. In addition, he emphasized that legal science cannot make the law more complete than it is. Rather, it must present the law with all its advantages and defects, notably at this time, the lack of adjudicative institutions. It is not, in his view, legal science's job to somehow interpret away these tensions. It must inquire into them so that it can determine whether they are consistent with the claim that there is a legal order that makes it possible for there to be a solution in a unity achieved at a higher level than the one at which the tension is manifested.[35]

To this point, Verdross's argument is almost entirely Kelsenian, with the result that the structure of legality he sketches may seem merely formal or vacuous, rendering nugatory the argument that the very conception of a state as a legal authority presupposes an order of norms higher than the constitution of that state, and thus the state's construction as such by international law. The only difference is that Verdross takes the order of positive law as it exists as his starting point, whereas Kelsen takes the idea of an order of positive law as his. On this basis, Verdross can claim that the choice for international law monism has already been made by all states just in that they exist as formally equal members of an international legal order.[36] They can struggle against this choice, by seeking to disavow it explicitly, whether by disavowal of particular norms or

32 Ibid., 159-62.
33 Ibid., 162-69.
34 Ibid., 163-64.
35 Ibid., 168-69.
36 Ibid., 83-86.

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wholesale rejection. But in both cases, they risk either burdening themselves and their organs with tensions or undermining their claim to be a formally equal member of the international legal order.

Verdross's argument becomes clearer in an article of 1937 in which he presents a two-step argument about the place of treaties in international law.[37] The first restates the formal argument for international law monism. The ability to make a treaty presupposes the prior existence of formal legal norms that make it possible for two or more states to make a binding treaty.

> That is the reason why the *possibility* of norms of general international law, norms determining the limits of the freedom of the parties to conclude treaties, cannot be denied *a priori*.[38]

The second step is to show that there are two kinds of substantive norms in addition to the formal. First, there are 'different, single, compulsory norms of customary international law', for example, the norm that states not disturb each other in the use of the high seas, which has the effect that two states may not conclude a treaty that tended to violate the norm. Second, there is the 'general principle prohibiting states from concluding treaties *contra bonos mores*':

> This prohibition, common to the juridical orders of all civilized states, is the consequence of the fact that every juridical order regulates the rational and moral coexistence of the members of a community. No juridical order can, therefore, admit treaties between juridical subjects, which are obviously in contradiction to the ethics of a certain community.[39]

Verdross then bites the bullet that we saw Kelsen and Lauterpacht would not, as he insists that a compulsory norm 'cannot be derogated either by customary or by treaty law … A treaty norm, violative of a compulsory general principle of law, is, therefore, void.'[40] He recognized that this claim presents 'difficulties' because the ethics of the international community are less developed than those of national communities and because it includes 'different juridical systems, built upon different moral conceptions'. But the 'courts of civilized nations give an unequivocal answer': treaties may not '*restrict the liberty of one contracting party in an excessive or unworthy manner or which endanger its most important rights*'.[41]

37 Alfred Verdross, 'Forbidden Treaties in International Law: Comments on Professor Garner's Report on the "The Law of Treaties"' (1937) 31 *American Journal of Intentional Law* 571.
38 Ibid., 572. His emphasis.
39 Ibid.
40 Ibid., 573.
41 Ibid., 574, his emphasis.

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> In order to know what international treaties are immoral, we must ask what are the moral tasks states have to accomplish in the international community. In doing so, we must restrict ourselves to find those principles which correspond to the universal ethics of the international community. We must, so to speak, try to find the *ethical minimum* recognized by all the states of the international community, and must leave aside those particular tasks of the state represented only by particular régimes.[42]

These tasks amount to 'maintenance of law and order within the states, defense against external attacks, care for the bodily and spiritual welfare of citizens at home, protection of citizens abroad.'[43] It follows that a treaty would be void if, for example, it bound a state

> to reduce its police or its organization of courts in such a way that it is no longer able to protect at all or in an adequate manner, the life, the liberty, the honor or the property of men on its territory.[44]

6.4 The Unity Hypothesis

Kelsen at times accepted that the assumption of the unity of legal order introduced a natural law element to his legal theory, thus transcending the limits of a 'strict positivism'.[45] He recognized that the same point had to apply to the assumption when it was made about the international legal order. 'In this sense', he said 'there is absolutely no contradiction between natural law and positive law', though he suggested that his theory's positivistic character was preserved because the content of the legal order would be filled by legislation, that is, his thesis that law can have any content remains intact.[46]

But as Verdross argued, law cannot have any content because the legal order, if it is to be meaningful, has to preserve the legal subjects whom it addresses. In international law, these subjects are primarily states conceived as formally free and equal persons before the law, in domestic law primarily natural individuals so conceived. Legal instruments created through the voluntary acts of particular natural individuals, whether in their capacity as domestic legislators or as the representatives of a state entering into an international

42 Ibid., his emphasis.
43 Ibid., emphasis removed.
44 Ibid.
45 Kelsen, 'Natural Law Doctrine and Legal Positivism', 437. See von Bernstoff, *The Public International Law Theory of Hans Kelsen*, 116 and Mathijs Notermans, 'Social Peace as *Conditio Tacita* for the Validity of the Positive Legal Order' (2015) 34 *Law and Philosophy* 201, 213-14.
46 Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* [1928] (Aalen: Scientia Verlag, 1981, second edition), 252. For an apparent change of mind in this respect, see Hans Kelsen, *Pure Theory of Law* [1960] (Berkeley: University of California Press, 1967, second edition translated by Max Knight), 219.

treaty, have to observe the formal norms that authorize law's creation. But they must also observe the material or substantive norms that preserve the agency of the addressees of the created norms.

If particular positive norms seem to undermine agency, the question whether they do so will become vivid when a legal subject challenges their application. At that point, Kelsen – and following him Verdross and Lauterpacht – suppose that if a legal order exists at all there will be a legal procedure for resolving the issue and that those who resolve it will make a good faith effort to preserve in their legal reasoning what we may think of as the value structure of the legal order. That means there are both formal and substantive aspects to this supposition; and I shall now provide an account of them that I believe to be entailed by Kelsen's position, even if it is one that many Kelsenians as well as legal positivists from the English tradition will reject.

In my view, there are three main levels to this value structure. The lowest consists of norms that are the product of the will of legal actors who have the authority to make law. The second and higher level contains the norms with which the willed norms have to conform in order to be recognized as legal norms. It consists of norms of two types. On the one hand, there are the formal norms that govern the creation of new norms. Even with only these norms in place, as Kelsen, Verdross and Lauterpacht argued, the idea of 'will' when it comes to the creation of norms at the first level has to be heavily qualified since an exercise of will counts as such only if it conforms to the formal norms at the second level. But, on the other hand, there are also the substantive norms to which Verdross drew attention, the norms that maintain the free and equal status of the subjects who are so governed. And an exercise of will has to conform with these as well.

The final level is, of course, the *Grundnorm*, which is usually taken to be a formal norm, hypothesized in order to understand the legal order as a whole as both a unity and an order of right. But as Kelsen indicated at several points, the postulate of unity is not merely formal, since it is also a postulate of peace.[47] It is plausible then to suggest that peace is the overarching substantive value of legal order; and this suggestion has both formal and substantive implications for the lower levels.

Its formal implications have to do with the requirement that for every dispute there be a legal procedure for settling that dispute according to law. Its substantive implications have to do with the legal norms that preserve the agency of legal subjects. Such norms both shape and are shaped by the postulate of peace and condition the application and interpretation of the willed norms at the lowest level.

Kelsen's argument for the postulate of peace is that every legal order must be effective to some degree before it can be said to be valid. If there were total compliance with its

47 For the most striking formulation, see Hans Kelsen, *Law and Peace in International Relations – The Oliver Wendell Holmes Lectures, 1940-41* (Cambridge, MA: Harvard University Press, 1948) 1. In my view, this thought makes Kelsen along with the American legal theorist Lon L Fuller the contemporary end point of what I call 'the long arc of legality', an arc that has its starting point in the legal theory of Thomas Hobbes.

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norms, it would be superfluous, too little compliance and it would not exist as a legal order. In order for it to be effective somewhere in between these two points, it must represent a 'compromise' between 'conflicting interest groups in their struggle … to determine the content of the social order'. In turn, for it to be that compromise, it must be the case that none of these groups is 'wholly satisfied or dissatisfied'.[48] And that is what makes a legal order, including the international legal order, an order of peace.[49]

It is rather a small step, if a step at all, to add that the compromise between conflicting interest groups is unlikely to be achieved if the content of the law so determined relegates the individuals on the losing side of the struggle to second class status. Such individuals will not be able to accept the compromise as sufficient to make sense of their legal order as an order of legal right or authority. Instead, it will appear to them as an order of unmediated coercive power. In other words, the kind of compromise that sustains a legal order is not a compromise on any terms whatsoever. It is a compromise that maintains the status of legal subjects as free and equal before the law.

This intermediate level of value – the one that Verdross identified – thus mediates between the *Grundnorm* and the content of particular norms at the lowest level. Here it is important to keep in mind that for Kelsen sovereignty is not a thing, for example, located domestically in the Parliament in the British legal order and internationally in the executive. Rather, it is a metaphor for the autonomy of a legal order as a whole. Hence, in the domestic order within the lowest level there are various sub-levels. Below the general and abstract norms of a statute or a treaty are the sub-levels at which these norms are applied, interpreted and enforced. At each of these sub-levels, public officials are exercising a delegated authority to further determine or concretize the content of a more abstract norm.

While Kelsen, like his legal positivist counterparts in the English tradition, wishes to emphasize that at each of these sub-levels there is an irreducible moment of creativity, unlike them he denies that there are gaps in the legal order. In this respect, his legal theory is closer to Lauterpacht's interpretative theory and thus to Dworkin's than it is to the legal positivism of Hart and his students.[50] Indeed, his legal theory goes further than Dworkin's since it softens a distinction, that Dworkin relies on, between legislation – the instrument of policy – and adjudication – the realm of principle.[51] The moment of

48 Kelsen, 'Natural Law Doctrine and Legal Positivism', 438-39.

49 See further Lauterpacht, *The Function of Law in the International Community*, 438:
"For peace is not only a moral idea. In a sense (although only in one sense) the idea of peace is morally indifferent, inasmuch as it may involve the sacrifice of justice on the altar of stability and security. Peace is pre-eminently a legal postulate. Juridically it is a metaphor for the postulate of the unity of the legal system. Juridical logic inevitably leads to condemnation, as a matter of law, of anarchy and private force."

50 For discussion of the similarities between Kelsen and Dworkin, see Tony Honoré, 'The Basic Norm of a Society' in Stanley L. Paulson and Bonnie Litchewski Paulson, eds., *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (Oxford: Oxford University Press) 89, 109-12.

51 Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978, second edition).

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creativity in legislation is much more heightened than in adjudication, but still is a legally authorized act that must respect the constitutional norms that govern its authorization.

Kelsen also approaches Dworkin in another important respect, as Dworkin himself recognized in a little-known response to Hart's well-known critique of Kelsen's monism.[52] Hart – the leading English legal positivist of the last century – supposed Kelsen to be committed to the view that the monistic relationship between two legal orders comes about because of what Hart calls a 'relationship of validating purport' whereby a legal norm of one legal order purports to validate the norms of another.[53]

Hart offered the example of an English statute that purports to validate Soviet law and argued that, while this statute would validate Soviet law for the English courts, it did not validate Soviet law. Kelsen thus confused, Hart claimed, questions about the content of the law, with questions about the identity of legal systems, which turn not on the content of the law but on their 'mode of recognition'.[54] He concluded that Kelsen's theory

> has a juristic Midas touch, which transmutes all questions about laws and their relationship into questions of the content of law or questions concerning what laws say; but the touch is perverse, for not all questions are of that kind.[55]

Dworkin pointed out that Hart had failed to see that Kelsen's argument for monism was not addressed to the problem of how to individuate legal orders. Rather,

> [w]hen Kelsen says that if international law and municipal law conflicted, we could not speak of them both as valid at the same time, he means that someone who had to decide what he ought to do – a judge for instance – could not treat them both as valid in the conclusory sense, could not, in Kelsen's phrase, serve two masters.[56]

Kelsen, that is, was primarily concerned with explaining legal order from what Hart himself called the 'internal point of view' of one who accepts that the norms of that order

52 H. L. A. Hart, 'Kelsen's Doctrine of the Unity of Law' in Howard E Kiefer and Milton K Munitz, eds., *Ethics and Social Justice* (Albany: State University of New York Press, 1968) 171. Ronald Dworkin, 'Comments on the Unity of Law Doctrine (A Response)', in ibid., 200. I shall refer to Hart's essay as reprinted in Hart, *Essays in Jurisprudence and Philosophy*, 309.

53 Hart, 'Kelsen's Doctrine of the Unity of Law', 317-21.

54 Ibid., 319-21.

55 Ibid., 321.

56 Dworkin, 'Comments on the Unity of Law Doctrine (A Response)', 201. (Dworkin is referring to the passage from Kelsen, *Pure Theory of Law*, 329 quoted in the text above.) His point shows, in my view, why Alexander Somek's illuminating work on these issues goes wrong in one fundamental respect. Somek says that legal positivists such as Hart fail to see that the relevant question for Kelsenian monism is always, 'What can happen next?' See Somek, 'Monism: A Tale of the Undead', 354-55. But Kelsen's question is not about prediction. It is: 'What *should* happen next?'

are binding, not because of any threat of force, but because they are part of an authoritative order.[57] For if one adopts the internal point of view, one assumes that the answer will be produced by legal procedures and will make sense of that individual's subjection to the material and formal norms of the legal order by displaying them as a unity. One assumes, in other words, that a principle of legality governs, and this assumption shows why Hart is wrong to claim that Kelsen 'transmutes all questions about laws and their relationship into questions of the content of law or questions concerning what laws say'. Rather, Kelsen is mostly concerned to answer questions about what makes an order legal – a polity governed in accordance with the rule of law – questions in which Hart and his followers show remarkably little interest.[58]

It is also revealing that the only way Hart can imagine the relationship between two orders working is via an officially recognized statute. Writing some thirty years after Kelsen first developed with his School the idea of the *Grundnorm*, Hart introduced his own claim about how law transforms might into right in the 'rule of recognition', a rule of practice that legal officials accept specifies the ultimate criteria for what counts as a valid law of the order.[59] In his view, one need not go beyond the observation that, as a matter of actual official practice, there exists a rule stipulating criteria for the recognition of valid laws and that officials exhibit the 'internal point of view' through manifesting their acceptance of the rule by applying its criteria.[60] It follows that one does not need any further idea of a basic norm that prescribes obedience to law. And he made the same point about international law, though there, because of the lack of a rule of recognition in the international legal order, he thought that particular international law norms are legal because they are accepted one by one as such.[61]

In making this critique, Hart begged the question in favour of dualism by assuming that the problem is to show how two legal orders, each with its sovereign whose legal acts its rule of recognition certifies as valid, are contingently connected. This becomes clearest in his discussion of private international law, in which he claimed that when English courts apply the private law of another legal order, they do not really 'apply' the foreign law, 'but … a law of their own with a similar content to that of the foreign law that they recognize'.[62] According to Hart, this suggestion avoids the conclusion, destructive of the idea of the rule of recognition, that 'laws of one country that are recognized and applied

57 H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1991, 2nd edition), 102-3. For a detailed Kelsenian response to Hart, see Lars Vinx, 'The Kelsen-Hart Debate: Hart's Critique of Kelsen's Legal Monism Reconsidered' in Jeremy Telman, ed., *Hans Kelsen in America – Selective Affinities and the Mysteries of Academic Influence* (Switzerland: Springer, 2016) 59.

58 Here I follow broadly the pioneering work of Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (Oxford: Oxford University Press, 2007).

59 Hart, *The Concept of Law*, 94.

60 Ibid., 102-3, 293.

61 Ibid., 236.

62 Hart, 'Kelsen's Doctrine of the Unity of Law', 341.

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by the courts of another belong to the legal system of the latter country as well as of the former.'[63]

This is a very strange idea. Suppose that a couple gets married in country A where the only marital property regime is community of property and divorced in country B where the only regime is separation of property, but where the private international law rule is that on divorce the law of country A governs the division of property. Hart's suggestion seems to be that the court of country B, in applying the legal principles of community of property of country A, is applying B's legal principles of separation of property. As a result, his theory cannot explain why the court in country B finds that it is *bound* to apply the law of country A, any more than he can explain why that state might consider itself bound by international law.[64]

Hart does not then refute Kelsen as much as restate his own version of legal positivism. In so doing, he embraces the dualism of the late nineteenth and early twenty century positivistic theories, despite his rejection of their conception of international law as will-based interstate law, and his attempt to show against his predecessor John Austin that the positivist tradition is not committed to the denial of the legal status of international law.[65]

Hart's response to Kelsen on conflicts also does not take into account that, as Kelsen constantly emphasized, the *Grundnorm* explains legal order as dynamic, not static. Hart's understanding of a conflict is as follows: one identifies a valid norm of the international legal order that has content x (for example, protect minorities) and a valid norm of the domestic legal order with content $-x$ (for example, oppress this minority) and a court within the domestic order is under a duty to decide in accordance with the latter norm. But for Kelsen, that is an incomplete description of the situation. If one is a domestic law monist, there is no conflict because there is only one legal order. In some broad sense of morality, all norms that are not part of the order can gain entry only if explicitly incorporated, and x is not one such norm as shown by the existence of $-x$.

If one is an international law monist, things are more complicated. If the claim that the domestic court has to decide in accordance with $-x$ depends, as it does in Hart, on the assumption that the British Parliament is supreme in that it can enact any law it pleases, that assumption is made vulnerable by the *Grundnorm* of international law. That *Grundnorm* states that the Parliament itself gets authority to make law from a higher level of legality – the domestic constitution – and that constitution is not itself the sole or final

63 Ibid.

64 This same understanding of private international law recurs in the work of Joseph Raz. Hart's most influential student, and he uses it to buttress his general argument that moral values do not become incorporated into law simply because judges give effect to them. See Joseph Raz, 'Incorporation by Law', (2004) 10 *Legal Theory* 1, at 10-11. For earlier references, see Raz, 'The Identity of Legal Systems', in *The Authority of Law*, 78, 97-102, 'The Institutional Nature of Law', ibid., 103, 119-20, 'Legal Validity', ibid., 146 at 149, and Raz, *Practical Reason and Norms* (Princeton: Princeton University Press, 1990, first published 1975), 152-54.

65 Hart, *The Concept of Law*, chapter X, 'International Law'.

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source of domestic authority, because the constitution has to get its validity from somewhere – from the *Grundnorm* of international law.

International law may, of course, not only prescribe *x* but also permit organs within a domestic order to prescribe *-x*. But it is still the case that while at the domestic level *-x* will prevail for the time being, at the international level the state is bound to bring its domestic law into line with international law. There might be no independent body that can pronounce definitively on this issue, nor a body other than another state that is entitled to force compliance. But that would show only that the international legal order is defective from the internal perspective of legality, because it failed to provide the institutional resources that ensure that states will fulfil their obligations. Indeed, the dynamic the *Grundnorm* unleashes brings such institutional problems to the surface where those who are committed to what we can think of as the rule-of-law project can and should address them.

Notice that in order even to conceive of this kind of conflict, one has to abandon domestic law monism. Far from denying the possibility of a conflict arising between norms from different legal orders, international law monism makes it possible to understand how there *could* be such a conflict in the first place by postulating an intrinsic connection between the orders because they are both *legal* orders, as Dworkin suggested in his response to Hart.

But one also has to abandon dualism. Dualist theorists do not deny that international law is law. Rather, they make the claim that international law norms enter a domestic legal order only when these are explicitly incorporated by a domestic legal instrument, whether a constitutional provision or a statute. In addition, their claim in this regard often extends to only some parts of international law, for example treaty-made law. Customary international law will then apply regardless of explicit incorporation, unless it is explicitly excluded by domestic law. Moreover, international law, largely under the influence of Verdross and Lauterpacht, recognizes a core of compulsory principles of customary international law – *jus cogens* – that are considered, though controversially, non-excludable.[66]

But however they construct their theory, dualists do not deny that there is international law and that it binds states. Their differences with international law monism have to do mainly, perhaps exclusively, with whether it is the voluntary acts of sovereign states that bring about such bindingness. If we go back to the quote from Blackstone, the issue is whether these voluntary acts constitute the binding nature of the international norm in question or whether it is declarative of it. And if one holds the former position, voluntarism has to be fully embraced. The binding force of all international norms has to be

66 See Evan Fox-Decent and Evan Criddle, 'A Fiduciary Theory of Jus Cogens', (2009) 34 *Yale Journal of International Law* 331.

traced back to the voluntary acts of a particular state. But that is to be a domestic law monist, not a dualist.

In sum, dualism as a theoretical position is incoherent. This is not, however, to say that states cannot be more or less dualist in practice, if all that is meant is that states will have different ways of giving shape to their relationship with the order of public international law. From a theoretical perspective, this is fake dualism because international law monism is the theory that explains why states are under a prior obligation to give shape to that relationship. States can do a better or worse job of this, just as they can do a better or worse job of arranging their domestic constitutional set up. And in this regard we should note that dualist theories encounter the same problem of understanding how a state is bound by its own constitutional law, as they do when it comes to the bindingness of international law. It is no accident that Austin denied that both international law and constitutional law are really law; in his view, both are a kind of positive or conventional morality.[67]

Even if dualism is incoherent, that still seems to leave domestic law monism standing as a coherent alternative to international law monism. But the choice for domestic law monism is not, as Kelsen thought, suspect on political grounds alone. It is also suspect because at most legal orders claim to be more or less strongly dualistic and dualism is an international law monism that dare not speak its name. More accurately, it is an attempt to squeeze international law monism into a mould that privileges a conception of sovereignty as pre-political and thus legally unlimited. But such a conception is legally speaking untenable, as Hart showed in rejecting Austin's 'command theory', in which the sovereign is conceived as legally unlimited, in order to explain the difference between a legal order and one of sheer coercive power.[68]

Kelsen showed that the move has to be to a dynamic conception of legality, committed not only to the working out of conflicts through legal procedures, but also to the requirement that the solutions display the formal and substantive norms of the legal order as a meaningful unity.[69] If in fact there were only one legal order in the world, domestic law monism would be the only possible position, not merely a coherent one. But since as a matter of undeniable fact there is both a plurality of domestic legal orders and international law, it is incumbent on anyone who accepts this idea of legality to work out the way in which international law and domestic law can be interpreted as a unity.

There are, in my view, clear implications for the dualism about law and morality in Hart's Separation Thesis as well as for the relationship between legality or the rule of law and democracy. In regard to law and morality, at stake when legal subjects confront a law whose moral wisdom they doubt is not simply the contest between the particular law and

67 John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law*, (London: John Murray, 1861, 2nd edition) Volume 1, 177, 204.

68 Hart, 'Positivism and the Separation of Law and Morals', 58-62.

69 See Hans Kelsen, 'The Pure Theory of Law and Analytical Jurisprudence' (1941) 55 *Harvard Law Review* 44.

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their moral sensibility. On the one hand, there is the moral sensibility that goes with seeing why individuals should subject themselves to legal order because only such an order can provide the resources that permit them to live together on equal terms despite their deep moral differences. On the other, there is the sensibility that prompts doubts about the wisdom of the content of the law. The anxieties rightly provoked by the latter sensibility can be allayed only if it is the case that from the perspective of the former sensibility the legal conditions of subjection do make sense to those subjected as providing the requisite resources.[70]

With this last point in place, one can also see a necessary relationship between legal order and democracy, though the relationship goes mostly in one direction. It is possible to have a fully functioning legal order in a non-democratic political order, for example, a monarchy. But democracy requires that the polity be governed in accordance with the rule of law, because once the demos has through its institutions enacted particular statutes, it is essential that the application of those statutes be according to law. The necessity is, however, bi-directional in that, while it is possible to have a fully functioning legal order in a monarchical political order, the monarch of such an order will be subject to and constituted by law; and the autocratic tendencies inherent in the idea of monarchical rule make 'constitutional monarchy' rife with the kinds of tensions that led almost inexorably to the development of democracy.

Put another way, the dynamic unleashed by the *Grundnorm's* provocation of questions about how to reform both domestic legal orders and the international legal order in order to give effect to commitment to legality cannot rest within the limits of law. To the extent that the kind of political order in which the legal order is nested is incompatible with government according to law, a commitment to legality will provoke questions about political reform, the answers to which are shaped by the conception of the legal subject as free and equal, this time not before the law, but in the making of the law.

The choice to understand sovereignty not as a pre-political thing – a fact about the location of sheer power – is then itself both political and consequential. And whether it should be made is not a question that legal theory can by itself answer because the answer has to be informed by the experience of those societies that have made that choice. Legal theory, however, can answer the question of the implications of what follows from that choice and Kelsen's legal theory may be the best answer we have to date. But, as Verdross argued, the choice has to be located not where Kelsen put it as one between domestic and international law monism. It is a choice for international law monism and the consequences are substantive as well as formal. Finally, that choice is not imperialistic in the troubling way sketched above. It is a choice for civilization but in the sense of civility. It is

70 For this idea of making sense, see Bernard Williams, 'Realism and Moralism in Political Theory' in Geoffrey Hawthorn, ed., *In the Beginning was the Deed: Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005) 1.

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the choice to live in a civil condition with others who deeply disagree on many fundamental issues, but who agree that there is a moral imperative to construct a political and legal order that enables the peaceful resolution of their differences on terms that recognize their status as free and equal before the law.

It is thus also a choice for a natural law understanding of what it takes to have an order of authoritative, positive law.

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7 The *Al-Dulimi* Judgment (One Step Forward or Two Steps Backward?)

Lech Garlicki[*]

I believe that under Articles 25, 48 and 103 of the United Nations Charter, the obligations set forth in Security Council Resolution 1483 are binding and prevail over any other international agreement [….].

I believe this case should have been declared inadmissible ratione personae. As the case has proceeded, however, to a judgment on the merits, I join the majority regarding the finding of a violation with respect to Article 6 of the Convention.[1]

The Grand Chamber judgment in *Al-Dulimi and Montana Management Inc. v. Switzerland*, delivered on June 21, 2016, summarizes the most recent position of the European Court of Human Rights (the Court) on the reviewability of national implementation of the UN-mandated measures. The Court considered the freeze of assets imposed on Khalaf Al-Dulimi (alleged former head of finance of the Iraqi secret service under Saddam Hussain) and "his" company as the consequence of his listing by the Sanctions Committee of the UN Security Council (UNSC). The Grand Chamber unanimously decided that the application is admissible and, by a 15:2 majority, held that there had been a violation of Article 6 par. 1 of the Convention. However, on the merits, the Court remained divided as seven judges filed concurring opinions.

Al-Dulimi was, of course, not the first judgment in which the Court dealt with a collision between the Convention standards and the decisions taken by international or supranational bodies.

The first group of cases involved the measures taken or mandated by the European Union. The ultimate position of the Court was adopted in the 2005 *Bosphorus* case. It seems sufficient to recall here that *Bosphorus* was based on three basic assumptions:

– the Convention-States remain responsible for all actions and omissions of its organs regardless of whether they have been taken in the implementation of the domestic law or in the implementation of an international legal obligation;

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1 Partly dissenting opinion of Judge Sajo in: *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of November 26, 2013 (Second Section).

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– as long as an international (supranational) organization ensures an "equivalent level" of human rights protection, "the presumption will be that the State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organization"; this presumption may, however, be rebutted "if, in the circumstances of a particular case, it is considered that the protection of the Convention rights was manifestly deficient."

In the subsequent case-law on EU-mandated measures, the Court consequently applied the *Bosphorus* criteria and focused, in the first place, on the assessment of whether a Convention-State had any latitude in implementation of an EU measure[2] and, if it was not the case, whether the EU protection of fundamental rights has not been "manifestly deficient."[3] This "Solange-logic" allowed avoiding collisions in the EU-cases, but – at the same time – reserved for the Strasbourg Court a considerable potential to intervene.

One of the justifications of the *Bosphorus* approach was based on the geographical identity of both European organizations: as all EU Member-States belong to the Convention system, the relation between both systems is mostly "horizontal," i.e. it reflects their equal ranking under the general international law.

It seemed, at least initially, that this logic could not be applied to the national implementation of UNSC-mandated measures. In the ECtHR's decision of 2 May 2007, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the Court held that the applicants' complaints are incompatible *ratione personae* with the provisions of the Convention. The position of the Court relied on two assumptions. First, the position of the UN is so unique that the decisions of the Security Council should be given a particular respect. Therefore, as long as there is sufficient coverage in the UNSC Resolutions, actions of the Member States (and of their agents and military forces) cannot be attributed to the responsibility (and, therefore, to the jurisdiction) of those States. Second, the UNSC Resolutions should not be "reconstructed" by the Court. It means that the Court is not entitled to impose such additional conditions on the implementation of UNSC Resolutions that were not provided in the text of those Resolutions, even if the protection of human rights is at stake. In other words, the international superiority of the UN excludes any "creative intervention" of the Court into the meaning of the obligations (and powers) which are imposed on the States by UNSC Resolutions.[4]

2 See *M.S.S. v. Belgium and Greece* (judgment of January 21, 2011).

3 See *Michaud v. France* (judgment of December 6, 2012).

4 "… operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security, and […] the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field […] It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself" (par. 149).

In *Behrami* and *Saramati* the Court adopted quite negative position in respect to its jurisdiction. It corresponded to the traditional hierarchy of international law but, at the same time, created a considerable gap in protection of human rights. It was only four years later when the Court, in *Al-Jedda v. the UK*,[5] partly revisited its original position.

In Al-Jedda, the Court reiterated that decisions adopted by the Security Council should be followed by all UN member states and may take precedence before obligations established in regional human rights instruments. On the other hand, however, the Court accepted its competence to reinterpret the UNSC Resolutions in a "human-rights-friendly" manner. The Court held that

> in interpreting the resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a SC Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the UN's important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law. (par. 102)

The gist of the Court's position was that all States that are members to the Convention must apply a "Convention-friendly" interpretation of the UNSC instruments. The Court adopted a "clear and explicit language" test: as long as a UNSC resolution does not remove, in a clear and explicit language, the applicability of a Convention right, the Member States must not construct those instruments in breach of their undertakings under the Convention. In other words, although the implementation of clear and explicit UN obligations cannot engage the responsibility of the Convention States, this exemption does not apply whenever some interpretational choices have been left to the States.

Al-Jedda, particularly in combination with *Al-Skeini*,[6] can be regarded as an important step forward in human rights protection. It prepared a doctrinal background for "black-listing" controversy, which the Court addressed, one year later, in *Nada v. Switzerland*. In the latter case, the problem was more complicated because the relevant UNSC resolutions had been drafted in a more specific language and required all States to impose

5 Judgment of July 7, 2011 – the applicant was detained by the UK forces in Iraq and spent a long time in administrative detention. The UK authorities, invoking Behrami and Saramati, maintained that, since its forces had acted under the auspices of the UN, the internment could not be attributed the United Kingdom. The Court disagreed, confirmed jurisdiction of the UK and found a violation of Article 5 of the Convention.

6 The most important part of the *Al-Skeini* judgment was an extensive construction of the extraterritorial applicability of the Convention. This approach was later confirmed in *Hassan v. the UK* (2014) and *Jaloud v. the Netherlands* (2014).

travel restrictions as well as freeze of assets on persons placed at the Sanctions Committee list. This could suggest that the "clear and explicit language" requirement has been met in the case. However, the Court arrived at the conclusion that "Switzerland enjoyed some latitude, which was admittedly limited, but nevertheless real, in implementing the relevant binding resolutions of the UNSC" (par. 180) and that the Swiss authorities should, in each case, take into account the realities of particular situations (par. 195).

Therefore,

> in the light of the Convention's special character […] the Court finds that the respondent State could not validly confine itself to relying on the binding nature of Security Council resolutions, but should persuade the Court that it had taken, or at least – had attempted to take, all possible measures to adapt the sanctions regime to the applicant's individual situation. (par. 196)

In conclusion, the Court found "that the restrictions imposed on the applicant's freedom of movement […] did not strike a fair balance [and], consequently was not proportionate and not necessary in a democratic society" (par. 198) and constituted a violation of Article 8 of the Convention.

The *Nada* judgment may be regarded as a considerable extension of the scope of control over national implementation of UNSC instruments. The Court decided that its jurisdiction applies also to the implementation of measures covered by the "clear and explicit language" of UNSC resolutions, providing some latitude was left for the implementing State. Furthermore, the Court took a lot of effort to demonstrate that such latitude did exist in the *Nada* case. On top of it, the Court imposed on the States an obligation to differentiate the implementation depending on the particular circumstances of each affected individual. Here the onus lies with the State who must convince the Court that "it had taken or, at least had attempted to take, all possible measures" to take into account those individual situations. Finally, it seems that the Court not only adopted its own reading of the UNSC resolutions (constructing those resolutions in a "Convention-friendly" manner), but also imposed that reading on all Contracting Parties.

The logic of *Nada* was in line with that of *Al-Jedda.* At the same time, however, it was difficult to deny that the Court went very far in confirming the "clear and explicit language" test (although deciding that it has not been met in the particular circumstances of Mr. Nada).[7] In any case, it seemed that, in *Nada*, the Court has reached a limit in discovering areas of latitude left for the national implementation of the UNSC resolutions.

7 That was why, the concurring opinions of Judges Bratza, Nicolau and Yudkivska expressed "a considerable doubt that Switzerland enjoyed some latitude in implementing the relevant resolutions of the UNSC".
The same assessment was submitted by Judge Malinverni, but he also suggested that the Court should go further and re-visit its previous position: "should the Court, as guarantor of respect for human rights in Europe, not be more audacious than the European Court of Justice or the Human Rights Committee when it

This became obvious in the *Al-Dulimi* case, which dealt with another aspect of sanctions, namely with the freeze of assets of the listed persons. As it is well known, the case was, at first, decided at the Chamber level.

The Chamber held that the relevant UNSC resolutions had not left any latitude for national implementation. Under the *Al-Jedda – Nada* case-law such finding would compel the Court to dismiss the case for want of jurisdiction. However, the Chamber adopted another, quite radical, approach. Relying upon the *Bosphorus* doctrine, the Court decided that it has jurisdiction,[8] that the "equivalent protection criterion" has a universal applicability,[9] and that – as the UN sanctions regime does not offer an "equivalent protection" – national implementation of sanctions cannot be immune from the Convention scrutiny.[10] And, within such conceptual framework, it was not difficult for the Court to find that, as the Swiss courts had limited their examination to the mere application of the UNSC resolutions, there had been a violation of the Convention.

The three dissenting judges (Lorenzen, Raimondi and Jociene) observed that

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comes to addressing and settling the sensitive issue of conflict of norms that underlies the present case? […] I am totally aware of the fact that the Security Council resolutions as such fall outside the Court's direct supervision, the United Nations not being a party to the Convention. That is not the case, however, for acts taken by States pursuant to those resolutions. Such acts are capable of engaging the responsibility of States under the Convention. Moreover, the fundamental principles in matters of human rights are nowadays not only enshrined in specific international instruments, but are also part of customary law, which is binding on all subjects of international law, including international organizations.

8 The Court observed that: "In the present case the measures imposed by the Security Council resolutions were implemented at national level by an Ordinance of the Federal Council […] The acts in question therefore correspond clearly to the national implementation of a UN Security Council resolution […]. The alleged violations of the Convention are thus imputable to Switzerland (see, mutatis mutandis, Nada, cited above, § 121). The measures in issue were therefore taken in the exercise by Switzerland of its 'jurisdiction' within the meaning of Article 1 of the Convention. The impugned acts and omissions are thus capable of engaging the respondent State's responsibility under the Convention. It also follows that the Court has jurisdiction ratione personae to entertain the present application (see, mutatis mutandis, ibid., § 122)" (par. 91-92).

9 "The Court observes, however, that it has never ruled out the application of the equivalent protection criterion to a situation concerning the compatibility with the Convention of acts of international organisations other than the European Union. It thus takes the view that the presumption of equivalent protection is intended, in particular, to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of any international organisation which is not party to the Convention. As illustrated by the present case, a State may face such a dilemma not only as a result of its membership of the European Union, as a supranational organisation with a European vocation, but also as a member State of the United Nations" (par. 116).

10 "… the present case should be examined in the light of the equivalent protection criterion, particularly on account of the fact that the relevant Security Council resolutions […], do not confer on the States concerned any discretion in the implementation of the obligations arising thereunder. This essentially distinguishes the situation in the present case from that of the Nada case, where the Grand Chamber found that Switzerland had a certain latitude in implementing the relevant Security Council resolutions" (par. 117).

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> in the present case the Court was therefore confronted with a situation where a conflict between obligations under the United Nations Charter and under the Convention could only be solved by giving one of them priority. With sole reference to the "equal protection" principle – which was not applied or even mentioned by the Grand Chamber in Al-*Jedda* and *Nada* – the majority have not directly addressed the issue of how such a conflict should be resolved but have only indirectly concluded that, where no equal protection exists, the Convention obligations prevail. In [our] opinion the judgment should have addressed the importance of Article 103 of the United Nations Charter.

So, the judgment was supported only by a 4:3 majority; however, even this majority was partly illusory as it included Judge Sajo who, at the same time, regarded the whole case to be inadmissible ratione personae.[11]

The Grand Chamber, in its 2016 judgment, decided not to follow the "*Bosphorus* approach" and returned to the traditional assessment of the latitude criterion.

The Court accepted that it must be, at first, clarified whether Switzerland was faced with a conflict between the obligations stemming from the UNSC Resolution 1483 – and therefore from the UN Charter – and those under the Convention. The Court reiterated its previous position that

> there must be a presumption that the UNSC does not intend to impose any obligation on member States to breach fundamental principles of human rights. [Therefore], in the event of any ambiguity in the terms of a UNSC resolution, the Court must choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. […] Accordingly, where a UNSC resolution does not contain any clear or explicit wording excluding or limiting respect for human rights […], the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. (par. 140)

This "harmonization-duty" must be observed in the national implementation of the UNSC-mandated measures.

11 As observed in one of the first comments on the *Al-Dulimi* judgment: "The chamber's 'real' majority points the way out: no responsibility of UN member states for violations of the ECHT if they have no leeway" (A. Peters: Targeted Sanctions after Affaire Al-Dulimi et Montana Management Inc. c. Suisse: Is there a Way Out of Catch-22 for UN Members?, EJIL Talk. *Blog of the European Journal of International Law*, December 4, 2013). See also S. Hollenberg: The Diverging Approaches of the European Court of Human Rights in the Cases of *Nada* and *Al-Dulimi*", *International and Comparative Law Quarterly* 64 (2015) 445-460.

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The Court did not deny that, as far as the substance of sanctions was concerned, no latitude was left for the national implementation. However, the substantive aspect should be separated from the procedural one. The Court noted that the present case

> does not concern either the essence of the substantive rights affected by the impugned measures or the compatibility of those measures with the requirements of the Convention. The Court's remit here is confined to examining […] whether appropriate judicial supervision was available to [the applicants]. (par. 143)

In this, procedural, dimension,

> there was in fact nothing in [any of the UNSC resolutions] that explicitly prevented the Swiss courts from reviewing, in terms of human rights protection, the measures taken at national level. (ibidem)

Such separation of substance and procedure allowed the conclusion that, in respect to procedural aspects, some latitude has been left for the national implementation, in particular – as to the scope and intensity of the judicial scrutiny ensured at the national level. In the opinion of the Court, this scrutiny need not extend beyond the review of arbitrariness. Such limitation would allow "to strike a fair balance between the necessity of ensuring respect for human rights and the imperatives of the protection of international peace and security" (par. 146).

Thus, the Court's examination was redirected toward the path established already in *Al-Jedda* and *Nada*, namely to the question whether the Swiss authorities had taken all necessary measures within the margin of latitude left for them in the procedural dimension. In effect, the Court found that, in the present case,

> Switzerland was not faced with a real conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter. This finding makes it unnecessary […] to decide the question of the hierarchy between the obligation of the State Parties to the Convention under this instrument, on the one hand, and those arising from the UN Charter, on the other […] [It also] renders nugatory the question whether the equivalent protection test should be applied […].(par. 149)

The Grand Chamber position was one of caution and restraint. The Court was, apparently, not convinced by the reading of the *Bosphorus* doctrine adopted by the Chamber, but – at the same time – was not inclined to reject its merits. The preferred solution was a formal one: the Court managed to "discover" the existence of some margin of latitude and

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held that – within this margin – the national authorities had an obligation to ensure, at least, an adequate protection against arbitrariness. The separation of substantive and procedural aspects of the sanction regime constituted a novelty that, also in the future, offers more room for the applicability of the Convention guarantees. On the other hand, however, there is a lot of force in the observations that the Grand Chamber "stretched the possibilities of a harmonised interpretation beyond the plain text and the general understanding of the relevant Security Council Resolution"[12] and, in effect, turned a "harmonious interpretation" into a "fake harmonious interpretation" that is not in line with basic methodological requirements of international treaty interpretation.[13]

Still, the approach adopted by the Grand Chamber was not without merits. Its net result is beneficial for the protection of human rights: the obligation of national courts to ensure "an arbitrariness review" means that the UN sanctions can no longer be implemented in a purely mechanical manner. In practice, it may put the implementation of sanctions on hold, at least, as long as the Sanction Committee would not be ready to submit more precise information about individual cases. This is not very different from the effects of the 2013 *Kadi* judgment of the Luxembourg Court. However, it should also be noted that, in *Kadi*, the minimal requirements of judicial scrutiny were determined in a more precise manner[14] and went beyond the protection against "arbitrariness" established by the Strasbourg Court.[15]

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12 See, concurring opinion of Judge Keller (par. 4).

13 Dissenting Opinion of Judge Nussberger, part A.

14 As the CJEU held in *Kadi* (2013):

"117. As regards court proceedings, in the event that the person concerned challenges the lawfulness of the decision to list or maintain the listing of his name […], the review by the Courts of the European Union must extend to whether rules as to procedure and rules as to competence, including whether or not the legal basis is adequate, are observed […].

118. The Courts of the European Union must, further, determine whether the competent European Union authority has complied with the procedural safeguards set out in paragraphs 111 to 114 of this judgment and the obligation to state reasons laid down in Article 296 TFEU, as mentioned in paragraph 116 of this judgment, and, in particular, whether the reasons relied on are sufficiently detailed and specific.

119. The effectiveness of the judicial review guaranteed by Article 47 of the Charter also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the listing of a given person […], the Courts of the European Union are to ensure that that decision, which affects that person individually […], is taken on a sufficiently solid factual basis […]. That entails a verification of the factual allegations in the summary of reasons underpinning that decision […], with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated.

120. To that end, it is for the Courts of the European Union, in order to carry out that examination, to request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination […].

121. That is because it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded".

The situation of the CJEU was more comfortable than that of the ECtHR as – technically – the CJEU reviewed the regulations adopted by the European Union. But, practically, the *Kadi's* message was directed

Furthermore, there may also be some merit in that the Grand Chamber avoided to take a clear position as to the eventual applicability of the *Bosphorus* test to the national implementation of UNSC resolutions. Although, in the doctrinal dimension, one of the important questions remained unanswered, the practical advantage is that all options have remained open for the Court. In this way, the Court managed to avoid an immediate challenge to the authority of the UNSC resolutions, but – at the same time – was able to preserve the "equivalent protection doctrine" as its "nuclear option" for the future. It should not be forgotten that practically all judges sitting in both *Al-Dulimi* cases shared the opinion that the present shape of the sanction regime does not satisfy the Convention standards.

It may be safe to assume that the Court would, at least for some time, try to continue its "latitude" approach to the sanctions regime. This would ensure continuity of the case-law and allow a sufficient room for finding Convention violations in the future cases. At the same time, several scenarios could be envisaged should the Court decide to abandon the present approach. Like in many other matters, the "correct" answer depends largely of the choice between international or constitutional vision of the Strasbourg Court.

If the Convention litigation is considered in the traditional perspective of international law, the position taken by Judge Sajo and by some other dissenting judges, seems to fit best to such context. The international law, in its traditional understanding, constitutes hierarchical system. It cannot be denied that obligations established by the UN Charter prevail upon regional human rights instruments. Thus, in case of a genuine conflict between the UNSC resolutions and Convention rights, applications to the Court should be declared as incompatible ratione personae. Such "negative" approach is supported by the logic of international law, but it may not be satisfactory for the protection of human rights as it leaves a considerable gap in this protection. The law-making activity of the UNSC is taking an unprecedented dimension, its anti-terrorism context leaves less room for human rights considerations, there is no global judicial body being able and willing to ensure a sufficient scrutiny. Although it may be maintained that the problem should be dealt with at UN level,[16] there are considerable doubts whether it could ensure a sufficient respect for individual rights.[17]

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also to the UN Sanction Committee and indicated that the EU implementation of sanctions requires that the EU authorities be supplied with sufficient information in each individual case.

15 M. Milanović: Grand Chamber Judgment in *Al-Dulimi v. Switzerland*, EJIL Talk!, Blog of the European *Journal of International Law*, June 23, 2016.

16 E.g. dissenting opinion of Judge Nussberger (2016); dissenting opinion of Judges Lorenzen, Raimondi and Jociene (2013).

17 As observed by Erika de Wet: (Implicit) judicial favoring of human rights over UNSC sanctions: a manifestation of international constitutionalism? [in:] Constitutionalism across Borders in the Struggle against Terrorism, ed. by F. Fabbrini and V. Jackson, Elgar Publishing 2016, p. 50: "The ECtHR for its part relied on a (partly fictitious) presumption of human rights friendly behavior of the UNSC".

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A solution might be found by reference to the concept of *ius cogens*, i.e. to the system of peremptory norms, which prevail over all international treaties, the UN Charter included. This was envisaged already by the EU Court of the First Instance in the first *Kadi* case, and it could be an attractive approach in a situation where UNSC resolutions would encroach upon such basic rights as the prohibition of torture. But, as uniformly held by all European Courts, this cannot be extended to the right to access to a court, particularly in civil cases.[18]

Thus, the traditional perspective of international law requires either to pretend there has been some latitude left to the national authorities or, simply, to bow before the authority of the UNSC. On the other hand, more room for human rights intervention arises within the constitutional vision of the Strasbourg Court. In this perspective, the Convention system may be regarded as an autonomous one and, exceptionally, where it transpires that the protection offered under the UN system was manifestly deficient, the Court may be allowed to intervene along the logic of the *Bosphorus* doctrine. In other words, the Court would then return to the position taken in the 2013 Chamber judgment. Such return would not require any formal overruling of the 2016 Grand Chamber judgment since it only decided that there was no need to consider the question whether the equivalent protection test could and should be applied in the particular case.

It is true that the reasoning adopted in the 2013 judgment was not free of weak points and that more time and trouble might be necessary to justify the "constitutional" approach to a conflict between UNSC instruments and basic human rights protected by the Convention. The Luxembourg case-law could be of some assistance, it should, however, be kept in mind that, in *Kadi* as well as in other similar cases, the EU courts reviewed instruments and decisions adopted by EU authorities and the UNSC resolutions constituted "only" a background. On the contrary, the ECtHR would, probably, have no choice but to confront regulations adopted by the UNSC. And, as long as the problem is placed within "classic" concepts of international law, the mere invocation of the "constitutional" nature of the Convention might not be sufficient.

It seems, however, that the perspective of classic (traditional) international law is not the only admissible one. One way out might be, like it was suggested in the dissenting opinion of Judge Pinto de Albuquerque (joined by Judges Hajiyev, Pejchal and Dedov), to consider that the Council of Europe has already created an autonomous legal order that exist in parallel to the UN system. This would imitate the legal characteristic of the EU and the Court could follow the *Kadi* logic in regard to primacy of the Convention over

18 See *Al-Dulimi* (2016), par. 136. As noted by Judge Sajo in his dissenting opinion (2013): "Established peremptory norms […] do not include the enjoyment of possessions, economic freedom or access to a court or tribunal, particularly in civil proceedings. Nor have these rights yet attained the status of customary international law. Consequently, they do not fall under the jus cogens exception limiting States' duties to implement non-conforming Security Council resolutions".

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external legal orders. Almost automatically, it would extend the applicability of the *Bosphorus* and its equivalent protection test.

Such an approach might, however, be open to criticism as the differences between both European systems are of such fundamental nature that the concept of autonomous legal order can hardly be applied to them in the same manner. It should also be kept in mind that this concept situates EU in a very strong position not only in its relations with the UN system but also (and – first of all) with the legal orders of the EU Member-States. It is not clear whether the Council of Europe States is ready for such revaluation of the position and authority of both, the Convention and the Court.

Perhaps, a more convenient solution would be not to focus on the particularities of the Convention system, but on the general developments common to international and constitutional law, namely on the process of "constitutionalization" of international law and "internationalization" of constitutional law.[19] These developments have been already noted and commented upon by doctrine and some authors talk about "the emergence of a transnational legal-pluralist order"[20] or about a "common law of fundamental rights and liberties."[21] From the domestic law perspective, this process is often seen as a manifestation of "multi-centrism" of legal systems.

Although the visibility of "constitutionalization" and "internationalization" trends considerably differs in particular areas, it has already become well-advanced in human rights. This is clearly the case in Europe (and in most of its states). The question is whether those trends should still be regarded as distinct developments within constitutional and international law seen as two distinct branches of law. Or, whether they are already so advanced that it can be maintained that "internationalization" of constitutionally protected individual rights and "constitutionalization" of internationally protected human rights have reached a new stage of development.

It seems that it cannot be wished away that we are now witnessing a "melting stage" in which constitutional, supranational and regional human rights instruments should be regarded as "a whole" (or – in other words – as an independent human rights order). It seems that we are witnessing the emergence of an amalgam, which can be described as "the law on human (fundamental) rights." It is true that such a proposition can be challenged under the traditional criticism of the "fragmentation" of international law. But, whether we like it or not, such fragmentation has already taken place in regard to international humanitarian law and international criminal law. What is proposed here is to

19 For more elaborate presentation see: L. Garlicki: Conclusion [in:] Constitutionalism…, pp. 330-332. See also positions taken by F. Fabbrini, W. Sadurski, A. Stone-Sweet, L. Wildhaber and several other eminent scholars.

20 P. Zumbansen: Comparative, global and transnational constitutionalism: the emergence of a transnational legal-pluralist order, *Global Constitutionalism* (2012). See also D. Barak-Erez: The international law of human rights and constitutional law, *International Journal of Constitutional Law* (2004).

21 R. Arnold: La multiplication des garanties et de juge dans la protection des droits fondamentaux. Allemagne, XXIX *Annuaire International de Justice Constitutionnelle* (2013), p. 108.

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take one step further, and to accept the ongoing process of melting of human rights segments of constitutional and international law. Such an approach seems to find recognition in the judicial practice, at least in Europe.

If it could be accepted that the "law on human (fundamental) rights" has already emerged as a specific branch that combines constitutional and international law, the logical conclusion is that this branch cannot belong to either of those traditional branches of law. In other words, "the law on human (fundamental) rights" could and should be regarded as a distinct (autonomous) category. In the perspective of constitutional law, it would legitimize the expansion of constitutional jurisdictions at the expense of the traditional understanding of sovereignty and separation of powers. In the perspective of international law (and it might also be important for the debate on the UN blacklisting), it assumes a certain detachment from the institutional scheme under which the UN institutions and instruments have been placed at the very top of the system.

Hence, one of the consequences of the autonomous nature of the "law on human (fundamental rights" is that what would be clearly unacceptable under the classic concepts of international law, might, nevertheless, escape such condemnation if limited to the area of human (fundamental) rights. This may apply to situations in which UNSC resolutions remain in conflict with basic requirements of human rights law. It might also encourage the ECtHR to expand the applicability of the *Bosphorus* doctrine (or any other analogous arrangement). The logic of the "law on human (fundamental) rights" may require that, in reviewing regional and national measures, courts also can assess and challenge their ultimate authorization, including the UNSC instruments.

Both *Al-Dulimi* judgments of the Strasbourg Court could be regarded as important steps in this direction, even if a more precise analysis shows that these steps have not always been headed in the same direction.

8 Decay of Sovereignty?

Dieter Grimm[*]

8.1 Sovereignty in the Past

"Sovereignty" did not always exist. What is understood as "sovereignty" today emerged under certain conditions at a certain time in history. Consequently, it can disappear or lose its meaning if these conditions change. Some authors assume that this has already happened so that we find ourselves in a post-sovereign era. In order to assess whether this is the case it seems advisable to reconstruct the conditions under which sovereignty emerged and then to analyze whether they have changed in the meantime and if so how the changes affect sovereignty. This historical assessment is a precondition of understanding the present situation.[1]

The origins of "sovereignty" are marked by the religious civil wars of the sixteenth and seventeenth century. Luther's Reformation had undermined the medieval world order. This order had been regarded as a divine creation and was thus exempted from man's disposition. As such it could exist only as long as its transcendental basis remained uncontested. It was just this precondition that was affected by the Reformation. To be sure, the Reformation did not question that God's will was the source of the worldly order. But it destroyed the unanimity about what God's will actually was. The dispute about divine revelation concerned a question of eternal truths and was thus fought unforgivingly. It is not without reason that we speak of religious *wars*.

In this situation of existential threat a group of French theoreticians deemed it necessary to give security priority over truth in order to end the civil war and enable peaceful coexistence of people with different religious beliefs. They opted for a political solution of the problem and were therefore pejoratively called "les politiques" by their contemporaries. The outstanding figure among these theoreticians was *Jean Bodin*, himself almost a victim of the civil wars. In his book "Six livres de la Republique" of 1576 he was the first to develop a systematic theory of sovereignty.

Bodin started from the assumption that the civil wars could only be put to an end and that internal peace could only be restored if a superior power was established that succeeded in disarming the parties of the civil war. The precondition was that this power

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1 For the following, see Dieter Grimm, *Sovereignty. The Origin and Future of a Political and Legal Concept*, New York 2015.

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claimed for itself all the prerogatives dispersed among many independent holders in the medieval order, assembled them in one hand and concentrated them into *the* public power in the singular. Thus equipped with the monopoly of legitimate force, the new power would be able to overcome the civil war and to subject the religious parties to a new order that was independent of the contested religious truths. This presupposed the, up to then unknown, power to make law for society without being bound by law in doing so. These two elements combined, the monopoly of public authority and the power to create law, were what Bodin called "sovereignty".

Under the prevailing circumstances this power could only be the monarch who, standing on top of the feudal pyramid, already disposed of the majority of prerogatives. It is true that Bodin could build on earlier attempts of the French kings to enlarge their power and to become independent of the estates. However, one would not do justice to Bodin if one were to characterize his idea as a mere theoretical description of what had already developed in reality. Rather, his theory went far beyond reality in that it offered a coherent concept of a new system of political rule for which no example existed in the political reality of the time.

The notion of "sovereignty" thereby changed its meaning. The word "sovereignty" was known long before Bodin but it described something quite different. There was not yet *the* public power in the singular but only a number of prerogatives that were dispersed among many independent holders. The prerogatives did not apply to a territory but to people. And they were not exercised as an autonomous political function but as a consequence of other legal positions, mostly that of a proprietor. Public and private were still inextricably intermingled.

Hence, before Bodin the word "sovereignty" described every power that was highest in relation to someone subjected to it. It was thus possible that many sovereigns existed on one and the same territory, and a person could be subjected to many sovereigns, yet to everyone only in one or another aspect and to no one totally. Since one could be sovereign only with regard to certain prerogatives, it was not unusual that a person who was sovereign in one relationship was subject to a sovereign in another. The unity of this order was derived from God's will that assigned everybody his position and function in society and vis-à-vis which nobody was free.

Bodin retained the concept of highest authority, but changed all the rest. The dispersed prerogatives were concentrated into a uniform public power that was more than a bundle of individual prerogatives and whose exercise was not subject to any external bond. This power was attributed to a single person, the ruler, who, as a consequence, was the only sovereign. Several sovereigns on one territory were no longer possible. Sovereignty was indivisible. This did not exclude that other persons were authorized to exercise public power, but only in the form of a mandate from the ruler and within the limits set by him. Vis-à-vis the sovereign, all others were subjects.

Bodin's theory did not only draw academic interest. It rather became extremely attractive inside and outside France as can be seen from the many editions and translations of his work within a very short period of time. Beginning with French king Henry IV, many princes set out to transform Bodin's program into reality by extending the monarchical position at the expense of the intermediate powers, freeing themselves from the co-determination of the estates and developing an independent power basis in the form of a bureaucracy, a standing army and a taxing power.

Where these attempts were pursued successfully a new form of political rule emerged for which soon a new term appeared, namely "state".[2] "State" was derived from the Latin word "status" that did not stand for itself but needed an object: the state of something. Now the term could be used independently of an object, such as the form of political rule had become independent with the emergence of the modern territorial and monarchical state. State and sovereignty figured as mutual conditions: Where a ruler succeeded in becoming sovereign, the territory was transformed into a state; when the attempt failed or was not undertaken at all (like in the Holy Roman Empire), the premodern order survived, albeit sometimes behind an state-like façade.

However, the emergence of sovereign rule and its transformation into a state must not be regarded as an event. Rather, it took place in a long process that was by no means linear. It resulted in different forms from country to country and was nowhere completed before the French Revolution. Sovereignty was a goal, at which the development aimed and which could be reached more or less. The common denominator was the concentrated public power, necessary to overcome the civil wars. Sometimes it led to an identification of the state with one of the competing religious beliefs, while the other one was extinguished. Sometimes it led to mutual tolerance together with neutrality of the state in religious matters.

How attractive the program was becomes apparent through the fact that all sorts of political regimes began to describe themselves in terms of sovereignty or were described as sovereign in academic writing, even if the preconditions of sovereignty in Bodin's sense did not exist. This could, however, not happen without a number of adaptations. This is why a uniform notion of sovereignty never existed. There were only notions of temporary predominance. For Bodin, sovereignty was conceivable only as indivisible and complete supreme power. But soon notions of sovereignty emerged for which it sufficed that someone was highest in his field of competence or that the highest power was shared by several holders.

This shows that sovereignty was originally a concept for the internal organization of a political entity. Its historical function was to make possible a peaceful coexistence of people with different beliefs, which could only be guaranteed by a concentration of power in one person. Since the new unified entities emerged as territorial states, the sovereign

2 See Paul Ludwig Weinacht, *Staat*, Berlin 1968.

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was functionally unlimited (*legibus solutus*), but limited in terms of space. Every sovereign was sovereign in his territory. Outside the territory there were other sovereigns who claimed the same absolute power with regard to their territory. Under these circumstances the internal sovereignty could only be maintained if external sovereignty existed simultaneously, an independence from other sovereigns regarding the internal affairs of the state. Sovereignty meant to be highest in two respects: externally independent, internally self-determinate.

The relations of the newly emerged states required legal regulations. But in view of the predominant concept of sovereignty they could only be regulated by way of coordination, not of subordination like within the state. Since all rulers were legally equal, the legal relations among states consisted in mutual self-limitations, namely treaties. There was but one legal rule that had to be valid without consent if the system should not collapse: the rule *pacta sunt servanda*. However, as there was no enforcement mechanism for treaty obligations, international law allowed what was forbidden within in the state, namely self-help. War as a means of enforcing one's rights could not be excluded, but only tamed.

The absolute monarchical state was abolished by the French Revolution. However, the revolution did not abolish the state itself and neither its property, sovereignty. To the contrary, state and sovereignty were completed by the revolution. In spite of its claim to absolute rule, the monarch had not succeeded in disempowering all holders of prerogatives, especially the nobility, and to concentrate all public authority in his own hand. In many respects he had to content himself with the claim that the non-state holders of powers exercised them on his behalf, which they of course denied. The complete fulfillment of sovereignty claims was reached only with the revolution.

As far as sovereignty is concerned, the revolutionary aspect of the revolution is the exchange of the subject of sovereignty. Following the state theory of natural law, the revolutionaries assumed that legitimate rule must emanate from the consensus of all. Consequently, sovereignty belonged no longer to the monarch but to the people. However, the people were not able to govern. It needed agents for this purpose that acted on its behalf. The danger of an estrangement of the agents from the principal was met by the constitution. The constitution regulated the principal–agent relationship. The constitution was the document in which the sovereign formulated the conditions under which the agents were authorized to exercise public power.

These conditions were also developed in natural law theory. According to this theory the purpose of rule was no longer the enforcement of a certain concept of the common best but securing the equal liberty of the subjects. The common best was regarded as the automatic product of societal self-regulation by way of contract. In order to guarantee individual freedom fundamental rights limited the government and separation of powers prevented the abuse of power. However, fundamental rights and separation of powers did not limit or divide sovereignty. They found their place below sovereignty. They were the

product of a sovereign decision of the people, which found expression in the act of constitution-making. Sovereignty thus retreated into the constituent power of the people. Within the constitutional state no sovereign existed, but only limited competencies. All the rulers held but constituted power.

How does Germany fit into this picture? In Germany the French Revolution was received with a lot of sympathy, but a German revolution did not come about around 1800. When Germany finally attempted to establish political rule on the basis of popular sovereignty in 1848, the revolution failed. Nonetheless, there were constitutions in Germany, but they owed their existence to the monarch who was willing to give up the absolute character of rule.[3] Does this mean that he gave up his sovereignty? The monarchs themselves did not think so. The Final Act of the Vienna Congress explicitly confirmed their continuing sovereignty. The defense of monarchical sovereignty was the main reason for the German Federation founded in Vienna 1815.

However, it was difficult to overlook that, after having granted constitutions, the monarchs were no longer *legibus solutus*. They tried to bridge this difference by distinguishing between possessing and exercising power: The monarch was the exclusive holder of sovereignty, but on the level of exercising it he bound himself voluntarily to the provisions of the constitution. This was no longer sovereignty in the sense of Bodin. Yet, there could be no doubt either that sovereignty had not been transmitted to the people. The location of sovereignty in monarchical constitutionalism was a constant topic of German public lawyers. Finally, one agreed on the position that sovereignty belonged to the state as such whereas the monarch was but an organ of the state, albeit the most important one.

Another challenge for the concept of sovereignty consisted in political entities composed by states. The founders of the theory of sovereignty had not concerned themselves with this question because they had a unitary state in mind when they developed their ideas. Where, then, was sovereignty located in federal entities, with the member states, with the central state or with all of them together? This was an issue not only in Germany, but in all federal states of that time, so in Switzerland and the United States where it needed a civil war to decide the question. Yet, different from Germany in the nineteenth century, these two states were and still are able to imagine sovereignty as divided.

Irrespectively of the answers to the question as to who was sovereign in a federal state, Bodin's concept of sovereignty could not be maintained in federal units. Those who assumed that sovereignty was located with one part of the state, either the member states or the central state, were forced to give up the principle of indivisibility of state and sovereignty. Rather it became possible to conceive of a state that was not sovereign. This immediately entailed the question as to the characteristics of sovereignty. This was again heavily contested. The dispute was finally settled by the assumption that sover-

3 See Dieter Grimm, *Deutsche Verfassungsgeschichte*, 3rd ed., Frankfurt 1995.

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eignty was vested in the entity that disposed of the *Kompetenz-Kompetenz*, i.e. the power to allocate competences. On the other hand, everybody who thought that sovereignty was shared by the central state and the member states had to wave the indivisibility of sovereignty. It was then possible to be sovereign without possessing the entire public authority.

External sovereignty remained unaffected by these controversies. In international relations sovereignty belongs to the state as such, irrespectively of who is sovereign within the state. Likewise, public international law was not interested in the rights that the state claimed or exercised vis-à-vis its citizens. Public international law remained thus unaffected by changes regarding internal sovereignty. Its scope was limited to the relations among the states and consequently stopped at the borders of the states. It recognized the equal legal sovereignty of states just by closing its eyes before the internal situations. The only limitations of external sovereignty were those that the states had voluntarily accepted in treaties. Self-limitation was not regarded as minimizing sovereignty.

8.2 Sovereignty Today

Today the discussion about sovereignty is no longer limited to the question of who is sovereign and what it means to be sovereign. Rather the more radical question comes to the fore as to whether it is still appropriate to think in categories of sovereignty and to act based on sovereignty claims.[4] The experience of two devastating world wars and numerous violations of elementary human rights that were committed under the umbrella of sovereignty appear behind these questions. They have led to a rapid development of public international law and international relations, which has had consequences for external sovereignty and also affects internal sovereignty, that, in turn, can only exist to the extent that external sovereignty protects it against interventions from outside.

The attempts to a more effective protection of peace started already after World War I with the founding of the League of Nations. Yet, the League of Nations did not exceed the limits of traditional public international law as it was not endowed with the means to enforce treaty obligations vis-à-vis the member states. This changed after World War II with the founding of the United Nations. Different from the League of Nations, the member states of the UN did not only renounce their right to use force in cases of conflict. Rather the UN was authorized to enforce the treaty obligations, if necessary with military force, against which the states could no longer invoke their sovereignty. Sovereignty continued to exist in the horizontal dimension vis-à-vis other states, but it became permeable in the vertical dimension, i.e. vis-à-vis the UN.

The characteristic weakness of public international law, which flew from the predominant understanding of sovereignty, was thereby overcome. The sources of public inter-

4 See Neil MacCormick, *Questioning Sovereignty*, Oxford 1999.

national law were no longer limited to treaties and customary law. International legislative acts with binding force independently of state consent became possible. Obligations under international law could be enforced against reluctant states. War was no longer a legitimate means to assert ones rights. The use of military force was limited to fight military aggression. War was only legitimate for purposes of self-defense, not for purposes of aggression. Measures of the UN required unanimity in the Security Council, but not the consent of the states affected by these measures.

The development that started with the founding of the UN has made further progress in the course of time, at an accelerated tempo after the end of the East–West divide in 1989/90.[5] New supranational organizations were established and endowed with public power by the states. They were authorized to exercise their powers more or less independently of the states, and they do so frequently, even against the will of the states that had transferred the powers. A considerable number of international courts has been established, many of whom are authorized to act without prior consent of the states.[6] Their judgments are binding for the states. Within public international law a *jus cogens* has emerged that claims legal force independently of state recognition and is binding for the states when they conclude treaties.

A special feature of the new public international law is the emergence of international human rights protection. While no binding legal force was accorded to the Universal Declaration of Human Rights of 1948, the two international covenants of 1966 are binding for the signatory states, even if they still lack effective enforcement mechanisms. Special covenants prohibit genocide, torture, race discrimination. The most recent development produced a second ground for UN interventions next to peace keeping: the humanitarian intervention and even a "responsibility to protect" if states commit systematic violations of human rights vis-à-vis groups of the population or if they allow violations to be committed by others. We talk about a "humanization of public international law".[7]

However, nowhere has the progress been greater than in Europe. It began in 1951 with the founding of the Council of Europe and the enactment of the European Convention on Human Rights. Its purpose is to guarantee a minimum standard of fundamental rights protection in the 47 member states. Enforcement of the Convention was laid into the hands of the European Court of Human Rights. The Convention partly remains within the framework of traditional international law, as the European Court is not authorized to annul national acts that violate the Convention. The states are merely obliged under international law to eliminate the violation. Partly, however, the Convention transcends

5 See Andreas L. Paulus, *Die internationale Gemeinschaft im Völkerrecht: Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung*, München 2001.

6 See the comprehensive survey in Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton 2015.

7 Regarding the humanization of international law, see, e.g. Anne Peters, Humanity as the A and O of Sovereignty, *European Journal of International Law* 20 (2009), p. 513; Jan Klabbers, Anne Peters, Geir Ulfstein, *The Constitutionalization of International Law*, Oxford 2009.

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traditional international law because individuals have the right to sue member states for such acts of their organs that violate the Convention. If a violation has been found, the victims are entitled to an indemnification.

More fare reaching than the Council of Europe is the European Union that was founded in 1957 as European Economic Community and meanwhile comprises 28 member states. It is a unique political entity somewhere between a supranational organization and a federal state, but closer to the latter than the former. It is true that the EU, different from the UN, lacks the power to employ compulsory means vis-à-vis the member states. Yet, the use of compulsory means by the UN is permitted only in exceptional cases and occurs rarely because the vast majority of states do not pose problems that would justify a UN intervention or because they possess veto power in the Security Council. This is why most of the states have never been an object of UN interventions.

The member states of the EU, to the contrary, are constantly affected by acts of the Union. These acts claim direct and superior validity within the member states and supplant national law that contradicts European Law. National that is found in contradiction to European Law loses its applicability without member states' involvement. An explicit provision as to this effect is missing in the Treaties of Rome. But the European Court of Justice derived it from the purpose of European integration, and the judgments have found acceptance in the member states.[8] The activity of the EU extends to all branches of government, legislative, executive and judicial, and has effects for almost all fields of politics. The EU thus offers the greatest challenge to the concept of sovereignty.

What then is the state of sovereignty after all these changes? One statement can be made with certainty: He who identifies sovereignty with the classical concept of Bodin must conclude that sovereignty has disappeared. The identity between public power and state power, which persisted for 300 years no longer exists. There is now public power also beyond the state. Because of this development, no state is sovereign anymore in the sense that states could still be sovereign in the first half of the twentieth century. Bodin's notion of sovereignty no longer corresponds with reality. Therefore, many assume that the concept of sovereignty is useful only to describe the past but is no longer able to explain the present situation.

However, before drawing this conclusion, one should remember that Bodin's concept of sovereignty was never universally accepted. There were always competing notions, which, in spite of all their differences, converged insofar as they lowered the rigidity of Bodin's concept. But also in political reality sovereignty à la Bodin could rarely be observed. The absolute state that emerged in reaction to religious wars was by far not as absolute as it may seem. Even where the monarchs of modern territorial states had no superior above them, they found a number of holders of public powers around them-

8 See the two groundbreaking judgments of the ECJ *Van Gend & Loos v. Netherlands*, 1963, 1, and *Costa v. ENEL*, 1964, 1125.

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selves, which limited their power. In Germany in addition the Holy Roman Empire there was a barrier against full development of monarchical absolutism.

When after 200 years the modern constitutional state replaced the absolute state, the highest degree of approximation to Bodin's concept of sovereignty was reached, yet, only by conceding that internal sovereignty exhausted itself in the act of constitution-making, while it remained latent within the state. Here only legally created and limited competencies existed whose holders were not regarded as sovereign. In cases of federal states none of their components enjoyed the full possession of public power, with the consequence that sovereignty could only mean to determine the allocation of powers. Here, the central state and the member states had to share public powers.

External sovereignty was left unaffected by this development. The states remained legally independent of other states or superior political entities and enjoyed self-determination with regard to their internal affairs. Sovereignty was therefore not questioned in international law. But just this is no longer the case after the changes that occurred in the second half of the twentieth century. Unlimited self-determination no longer exists. Self-determination is valid only within the limits of international law. These limits may differ in degree, depending on the supranational organizations to which a state belongs. They are particularly narrow in the EU. Here, even the constituent power of the member states is subject to certain European restraints.

On the other hand, sovereignty has not evolved to supranational organizations. No supranational organization exists out of its own like a state. All are creations of states and received their basic legal order from states, just as states retain the power to alter or abolish the order. Furthermore, no supranational organization received the plenitude of public power, all have but limited tasks and those public powers that they need in order to fulfill these tasks. Finally, no state has given up the monopoly of legitimate physical force in favor of a supranational organization. If enforcing decisions of supranational organizations requires physical force, they have to borrow it from the states.

However, the fact that supranational organizations have not acquired sovereignty does not mean that it still lies with the states.[9] Sovereignty is not a necessity. Just as it lacked before Bodin, it may disappear after Bodin. Are we then already in a pre-bodinian state? This is not the case either. The pre-bodinian state was a state without states. States emerged together with sovereignty. And states continue to exist, regardless of the developments that have occurred in the last sixty years, albeit not unchanged.[10] States continue to form the basic units of the international order. This order has been created by states and is based on the existence of states. The states do not only dispose of scattered prerogatives, but of public power.

9 See Dieter Grimm, 'Sovereignty in Europe', in: Dieter Grimm, *The Constitution of European Democracy*, Oxford 2017, p. 39.

10 See Stephan Leibfried et al. (ed.), *The Oxford Handbook of Transformation of the State*, Oxford 2015.

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New is the division of public power between national and supranational units. Nevertheless, the states are still dominant. They possess the plenitude of public powers, diminished by the portion that has been transferred to supranational organizations, whereas these organizations have not more than the single transferred powers. The scope varies from organization to organization. The EU has without doubt the highest number of public powers of all supranational organizations. But even here the principle of conferral is in force, and in a number of member states the national constitution contains limits as to further transfers of powers.

However, the division of public power between supranational organizations and their member states might suggest that sovereignty, too, is divided or shared. Many authors think that is so.[11] But one should not overlook a significant difference: The self-determination of states regarding their internal affairs may be limited by international law, but it is not abolished. Supranational organizations, to the contrary, have no self-determination regarding their existence, purpose, organization, competencies and means. Concerning all these questions they are hetero-determined. This is even the case with the EU. Should one really call a supranational organization sovereign whose existence and legal foundations depend on the decision of third parties?

Rather one has to distinguish between sovereignty and public powers. The Federal Constitutional Court insists on this difference when it reminds us that article 23 (1) of the Basic Law authorizes parliament to transfer public powers, but not to relinquish sovereignty.[12] However, it seems not impossible that states transfer so many public powers that the rest no longer deserves the name "sovereignty". But this situation has not yet arrived, not even in the EU. Public powers are undoubtedly divided between supranational organizations and their member states, sovereignty is not divided.

Furthermore, it seems insufficient to consider only the vertical dimension of sovereignty, namely the relationship between states and supranational organizations. Since the new world order presupposes the existence of states, the horizontal dimension, namely the relationship among states, has not disappeared. Here sovereignty continues to exist with almost no change. State boundaries are not obsolete.[13] Outside the highly aggregated EU sovereignty is still an evident phenomenon. But even the boundaries between the member states of the EU have not disappeared. They still divide legal orders. Schengen means that one can pass national borders without control. It does not mean that one can take one's law along.

Moreover, sovereignty is still omnipresent in current political imagination as well as in political reality. No supranational organization claims sovereignty, states do, often at highlighted places in their national constitutions. Supranational organizations treat states

11 See Neil Walker, 'Late Sovereignty in the European Union', in: Neil Walker (ed.), *Sovereignty in Transition*, Oxford 2003, p. 14s; Ulrich Haltern, *Was bedeutet Souveränität?*, Tübingen 2007, p. 22.

12 BVerfGE 123, 267 (2009).

13 See Udo Di Fabio, *Der Verfassungsstaat in der Weltgesellschaft*, Tübingen 2001.

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as sovereign, just as states treat each other as sovereign. Legal claims are raised or rejected under reference to sovereignty. Irrespective of all theoretical assertions that sovereignty has disappeared, it is still present as a social fact. One does not escape sovereignty even if one takes it for obsolete.

But is it necessary to take it for obsolete? Self-determination of political entities concerning their internal affairs and the corresponding independence from external forces is still the property of sovereignty, albeit no longer unlimited. Sovereignty neither justifies aggressive wars nor a systematic disregard of human rights. Insofar the fight against sovereignty as the enemy of human rights goes astray. But the new limits do not go so far as to throttle sovereignty. They leave sufficient room for national self-determination.

This room deserves preservation. It is true that self-determination is not the same as democracy. But democracy has become the usual form of self-determination. The people shall decide about its order and its political leaders, not shall the rulers decide about the people. For the time being, democratic self-determination remains bound to a citizenry conscious of its identity and capable of conducting its own affairs. The preconditions for self-determination are still much better in states than in supranational organizations. Sovereignty functions today also as a protection of democracy against the attempts of international authorities to constantly expand their scope of action although their democratic legitimacy and accountability remains feeble.

9 The Internationalization of Case-Law

Catherine Haguenau-Moizard and Nicolas Moizard[*]

In order to honour a leading national and international judge, we would like to develop on a topic that has been studied by many scholars but somehow remains a mystery. Writing about the internationalization of case-law has become increasingly popular.[1] This phenomenon covers a variety of cases. The courts might be superior or constitutional courts in a given State. They might be international courts such as the European Court of Human Rights or of the European Court of Justice. The "internationalization" might stem from the use of international law (including European legal norms) or by the use of foreign law. International or foreign law might be treaties, legislation, case-law or even soft law. We will provide examples of all kinds of internationalization. It is neither possible nor interesting to provide an extensive view of internationalization of every case-law. We have picked up examples that seem relevant for our purpose.

The current literature usually concentrates on the reasons why the courts, be they national or international, refer to international, European or foreign law.[2] They might have to respect the authority of higher norms. When a national court refers to a decision of the European Court of Human Rights (ECHR) or of the European Court of Justice (ECJ), they acknowledge the supremacy of European legal norms, as interpreted by the relevant courts, over national law. They might seek inspiration in foreign countries about sensitive issues, such as death penalty, abortion or the fight against terrorism. They might also want to justify a new decision by showing that it is not as odd as it may seem. In the United States, on the other hand, a debate has developed since 2002 between judges of the Supreme Court and also outside the Supreme Court about the use of foreign law in the

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1 For a global analysis, see Sir Basil Markenesis, *Juges et universitaires face au droit comparé*, Traduit par Michelin Aubrémont-Jestaz, Dalloz, 2006, 244p., Giuseppe de Vergottini, *Au-delà du dialogue entre les cours – Juges, droit étranger, comparaison*, Traduit et présenté par Jean-Jacques Pardini, Dalloz-Rivages du droit, 2013, 255p., Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedents by Constitutional Courts*, Hart, 2014, 431p., Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law*, Oxford University Press, 2015, 735p. On the ECJ, Pierre Pescatore, "Le recours, dans la jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres?" *Revue Internationale de Droit Comparé*, 1980, pp. 317-359, Meinhard Hilf, "The role of comparative law in the jurisprudence of the court of justice of the european communities," in The Limitation of Human Rights in Comparative Constitutional Law, Blais, Cowansville, 1986, pp. 549-574, Koen Lenaerts, "Le droit comparé dans le travail du juge communautaire," *Revue Trimestrielle de Droit Européen*, 2001, pp. 487-528.

2 There are exceptions of course, such as Groppi and Ponthoreau, *The Use of Foreign Precedents by Constitutional Courts*.

reasoning of the Court. In a well-known controversy Justice Ginsburg, Justice Kennedy and Justice Breyer opposed to the late Justice Scalia. The former are open to foreign law because they think it is useful to justify their decisions. The latter explains that the American legal reality is only expressed by the Constitution. No other source is legitimate.[3] Justice Scalia has been followed by the Congress. The House of Representatives and the Senate have adopted resolutions expressing that "judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, pronouncements of foreign institutions."[4] It is thought to be the only way of respecting the sovereignty of the people and the will of its representatives.

The United States are the only place where the internationalization of case-law is thoroughly discussed. In other countries, there is no such discussion, whether the judges use external sources or not. External sources are either taken for granted or – in rare instances – rejected in a bout of legal nationalism. It would be interesting to have similar discussions in other jurisdictions and would help understand the process of internationalization.

The reasons to accept or reject the internationalization of case-law are well documented. It is submitted that the ways and means of this internationalization have not been much dwelled upon. We would like to attempt to analyse *how* the courts deal with international or foreign law. We will only analyse the explicit use of international or foreign law. There is also evidence of implicit influence of those sources but they may only be identified through interviews with judges.[5] Explicit use is easier to find out and is more interesting for our purpose. We will not distinguish between Common law or mixed systems and civil law systems. Courts in Common law or mixed systems have been using external sources for a longer time and keep doing it more often.[6] They are all influenced by the English legal system and share the language, which makes things much easier. Still, it is submitted that the use of external sources is not limited to those courts and that the way the judges use external sources might be the same, whatever the background.

There seems to be various ways of using international or foreign law. A scale of internationalization might be drawn. In its most basic form, internationalization amounts to mentioning external legal norms (Section 9.1). An intermediate form of internationalization is the quotation of external legal norms (Section 9.2). The most advanced – and rare – form of internationalization is the discussion of external examples (Section 9.3).

3 Ruth Bader Ginsburg, "A decent respect to the opinions of humankind: The value of a comparative perspective in constitutional adjudication," *Cambridge Law Journal*, 2005, 64(3), pp. 575-592, Austen L. Parrish, "Storm in a teacup: The US supreme court's use of foreign law," *University of Illinois Law Review*, 2007, pp. 637-680, Stephen Breyer, *The Court and the World*, Alfred A. Knopf, New York, 2015, 382p.

4 House of Representatives, March 17, 2004, H.RES.568; Senate March 20, 2005, S.RES.92.

5 Examples are provided by Groppi and Ponthoreau, *The Use of Foreign Precedents by Constitutional Courts*, p. 426.

6 Groppi and Ponthoreau, *The Use of Foreign Precedents by Constitutional Courts*, pp. 411-431 and also the chapters on Australia, Canada, Ireland, India, Israel, Namibia and South Africa.

9.1 The Mention of External Legal Norms

It has become fairly common for superior courts of all kinds to mention external legal norms. Historically, the ECJ seems to have done this earlier than most because the EEC treaty encouraged it to do so (Section 9.1.1). In the last ten years or so, many national superior courts increasingly mention foreign legal norms (Section 9.1.2).

9.1.1 The Mention of External Legal Solutions by the European Court of Justice

Most of the time, when using external legal solutions, the ECJ either refers to national solutions (Section 9.1.1.1) or to decisions of the ECHR (Section 9.1.1.2).

9.1.1.1 The Mention of National Solutions

Former article 215 §2 of the EEC treaty provided that "as regards non-contractual liability, the Community shall, in accordance with the general principles common to the laws of Member States, make reparation for any damage caused by its institutions or by its employees in the performance of their duties." The "general principles common to the laws of the Member States" had to be established by comparing national legal solutions. Oddly enough, the Court was not able to use national laws a lot in that area. As explains Pierre Pescatore in his leading article about the use of comparative law by the ECJ, the liability of the Communities may only result from the norms they adopt. The rules on liability resulting from norms (as opposed to liability resulting from activities) were not very developed in most of the six founding Member States.[7] The advocate generals managed nevertheless to mention the general views adopted in the Member States when explaining that individuals could seldom get damages as a consequence of an Act of Parliament.[8]

The ECJ has referred to national law much more when deciding on protection of fundamental rights within the Community and the Union. It had to do so in order to reassure the Italian and German Constitutional Courts. In the Frontini and Solange I cases, they had threatened not to apply Community law if it contradicted the constitutional fundamental rights. The ECJ swiftly answered by developing general principles of law based on the "constitutional traditions common to the Member States."[9] It even stated that the Court "is bound to draw inspiration from constitutional traditions common to the Member States" and that measures that would not comply with the national

7 Pierre Pescatore, Le recours, dans le jurisprudence de la Cour de justice des Communautés européennes, à des normes déduites de la comparaison des droits des Etats membres, pp. 317-359.

8 Opinions of advocate general Roemer on ECJ Zuckerfabrik Schöppenstedt, 1971, 989 and advocate general Capotorti on ECJ 1978, p. 1209.

9 ECJ, Internationale Handelsgesellschaft, 1970, 1126.

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Constitutions could not be upheld.[10] As Community law would directly be inspired by national law, the constitutional courts would know that the level of protection guaranteed by Community law would be equivalent to the level of protection guaranteed by national law. The Court itself always remained rather vague as to the national systems from which it got its inspiration. We have to read the opinions of the advocate generals to get more detailed information. They mention decisions of the German constitutional courts[11] or provisions of various national constitutions.[12]

9.1.1.2 The Mention of Decisions of the European Court of Human Rights

Another source of inspiration for general principles of law concerning fundamental rights is "international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories."[13] This covers primarily the European Convention on Human Rights. For a long time, the ECJ did not bother to mention precise decisions of the Strasburg court. It might refer to the decisions of the ECHR generally without mentioning any decision in particular.[14]

The situation changed after the Lisbon treaty incorporated the Charter of Fundamental Rights. Article 52 §3 of the Charter provides that "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention". The "meaning and scope" of the Convention rights are determined by the interpretation of the ECHR. The ECJ is now used to mentioning decisions of the ECHR when interpreting the Charter.

The interpretation of the ECJ is usually the same as the interpretation of the ECHR.[15] In some cases though, the ECJ does mention decisions of the ECHR but it does not respect its interpretation, without saying so of course. In the Åkerberg Fransson case, the ECJ stated that the *ne bis in idem* principle enshrined in article 50 of the Charter did not preclude national authorities from imposing successively a tax penalty and a criminal penalty for the same acts.[16] It did not mention any decision of the ECHR but Advocate General Cruz Villalòn did. After explaining that the ECHR has hesitated on the

10 ECJ, Nold, 1974, 492.

11 Opinion of advocate general Trabucchi on the Nold case.

12 Opinion of advocate general Capotorti on ECJ, Hauer, 1979, 3729.

13 ECJ, Nold, 1974, 492.

14 See, for example, ECJ Johnston, 1986, 1663 on the right to an effective remedy. Advocate general Darmon did not base his reasoning on general principles of law in that case.

15 On the right to family life for children: ECJ, J. McB, 2010, C-400/10 PPU. On the right to private life: ECJ, Volker, 2010, C-92/09. On the prohibition of inhuman and degrading treatments for asylum seekers: ECJ, NS, 2011, C-411/10.

16 ECJ, 2013, C-617/10, Thorsten Kingreen, *Europarecht*, 2013, n 4, p. 446-454, Daniel Thym, *European Constitutional Law Review*, 2013 n° 2, p. 391-402, Bas Van Bockel and Peter Wattel, *European Law Review*, 2013, p. 866-877. In French: Dominique Ritleng, *Revue Trimestrielle de Droit Européen*, 2013 n°2, p. 267-280, Cyril Roth and Fabrice Burgaud, Dalloz, 2013, p. 1977-1984.

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scope of the principle, the advocate general referred to the Zolotukhin case.[17] In that case, the ECHR interpreted article 4 of Protocol 7 in a way that prohibits prosecution resulting from a second offence where that offence is based on identical or substantially similar facts to the ones that were the basis for the first prosecution. It applies to criminal and administrative proceedings as well. If article 50 of the Charter had been given the same "meaning and scope" as article 4 of Protocol 7 of the Convention, the answer of the ECJ would have been different. But the judges of the ECJ have been convinced by Advocate General Cruz Villalòn to give a "partially autonomous interpretation" of the provision of the Charter because the law of many Member States allows to initiate criminal proceedings after an individual has been condemned to an administrative sanction. The ECJ keeps silent on the need for an autonomous interpretation. It merely applies it. This shows first that article 52 §3 of the Charter is not a proper safeguard against violations of the Convention. It also shows that expanding on decisions of the ECHR in an opinion by an advocate general does not prevent the judges in Luxemburg from feeling free about the Convention.

9.1.2 The Mention of Foreign Norms by National Superior Courts

Mentioning foreign norms has become common. Two situations must be distinguished. In some cases, national superior courts have to mention foreign norms because they are binding (Section 9.1.2.1). As we will see, it does not mean that they always do it properly. In other cases, they do not have to but they do it all the same. It is a source of inspiration or legitimation for them (Section 9.1.2.2).

9.1.2.1 The Mention of Binding Foreign Norms

When a State has signed and ratified a treaty, it is binding. All the State authorities, including the judges, have to respect it. It is not surprising that the courts mention international treaties, or secondary law, in their decisions.

The French Cour de cassation is used to applying EU law. Since the Jacques Vabre case of 1975, it has accepted the supremacy of EC (now EU) law over Acts of Parliament.[18] It usually complies both with EU law and with the interpretation of the ECJ. The decisions of the Cour de cassation are short. EU norms are mentioned at the top of the decision. They are not always mentioned in the reasoning itself. The case-law of the ECJ is almost never mentioned. It is probably going to change. The president of the Cour acknowledged that it was necessary to develop the motivation of the decisions.[19] In a

17 ECHR, Grand Chamber, 10.2.2009, *Zolotukhin v. Russia*.
18 Cour de cassation, chambre mixte, January 24, 1975.
19 Interview in the *Semaine juridique*, October 19, 2015.

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recent decision, the Cour not only mentions the decisions of the ECJ but also expands on them (see Section 9.2).

In rare instances, the Cour de cassation mentions a directive but does not comply with the interpretation of the ECJ. In a decision made in 2007, it interprets French labour law "in the light of the 2001/23 directive" on transfers of undertakings without either making a reference to the ECJ or applying the European case-law. The ECJ does not require the transfer of business assets in labour-intensive sectors, such as cleaning or security.[20] The directive is thus inapplicable in a number of cases. As explained in the annual report of the Cour, the Cour de cassation intends to protect the employees whose employers often change. It considers there is a transfer even though the ECJ does not. The employees may thus choose between remaining with their former employer and going with the new service provider. Mentioning the directive tends to show that this interpretation is consistent with EU law, although it differs from the ECJ's.

The Cour de cassation is even freer with the European Social Charter. Although the European Committee of Social Rights has found out that the French legislation on working time did not comply with the European Social Charter, the Cour de cassation did not quash conventions or contracts adopted under French law. It detailed the conditions that had to be met when entering a collective agreement and mentioned the European Social Charter in the visas of its decision.[21] No one knows the influence of the decisions of the European Committee. The Cour de cassation does not mention its decisions because the Committee is not a court and there is no organized cooperation between the Committee and the national courts, such as preliminary references to the ECJ. Above all, the French court uses the European Social Charter in order to confirm its decision. It is not the sole foundation of its reasoning, rather a comforting element.

The Conseil d'Etat also applies EU law, and deems it superior to all Acts of Parliament since the Nicolo case of 1989.[22] It often mentions EU treaties or EU legislation in the list of norms at the beginning of its decisions but it does not expand on the content of those norms in its reasoning. In such a leading case as Arcelor in 2007, the Conseil d'Etat merely refers to "the case-law of the ECJ" on the principle of equality.[23] As the Cour de cassation, the Conseil d'Etat keeps a wide discretion as to the use of EU law. When it does not want to, it does not refer to the case law. When asked about the access to login data by the intelligence services, the Conseil decided that the regulation ("décret") was not contrary to the Convention and to the Charter.[24] It did not bother to mention, let alone discuss, the Digital Rights decision of the ECJ.

20 ECJ, March 11. 1997, Süzen, 1997, C-13/95.
21 For example European Committee of Social Rights, December 11, 2001, n 9/2000. Cour de cassation, Chambre sociale, June 29, 2011, n 09-71.107, Bull. V, n 181.
22 Conseil d'Etat, Assemblée, October 20, 1989.
23 Conseil d'Etat, Assemblée, February 8, 2007.
24 Conseil d'Etat, February 12, 2016, FDN, n 388134.

9.1.2.2 Foreign Norms as Sources of Inspiration or Legitimation

There are many examples of decisions by constitutional courts or other superior courts that refer to foreign norms and particularly to foreign judicial decisions because it gives them additional inspiration.[25] When a legal issue is new or difficult, foreign examples might prove helpful. When balancing the need to fight against terrorism with the protection of fundamental rights, a number of courts have mentioned foreign legislation or foreign case-law. About the criminalization of collusion with terrorism through the media, the Spanish Constitutional court mentioned a number of other European legislations.[26] The Swiss Federal Court referred to the decision of the EU first instance Tribunal in the Kadi case in its decision on an individual suspect of financing the Taliban.[27]

More than sources of inspiration, foreign norms may be a means of legitimizing a bold decision. In its decision about the execution of a European arrest warrant, the German Constitutional Court mentioned a whole list of decisions by other courts of the Member States.[28] They were supposed to show that many superior courts controlled the respect by EU law of national constitutional identity. Many of them did. Some of them were about EU law but had little to do with constitutional identity.[29] The German Constitutional Court attempts to reinforce its reasoning by mentioning foreign case-law but it does not avoid shortcuts.

9.2 The Quotation of External Legal Norms

We will analyse examples from the European Courts (Section 9.2.1) and from national superior courts (Section 9.2.2). In both instances, the courts use quite freely the external legal norms.

9.2.1 Quotations of External Legal Norms by the European Courts

The ECHR has turned to referring to conventions of the International Labour Organization (ILO) in its case law about freedom of association (Section 9.2.1.1). The ECHR and the ECJ often quote each other, in a kind of silent competition about the level of protec-

25 Giuseppe de Vergottini, *Au-delà du dialogue entre les cours*, 255p.

26 Spanish Constitutional Court n 136, July 20, 1999, quoted by G. de Vergottini, p. 153.

27 Swiss Federal Court, November 14, 2007, Nada, 1A.45/2007. Switzerland was latter condemned by the ECHR, September 12, 2012, *Nada v. Switzerland*.

28 German Constitutional Court, December 15, 2015, 2 BvR 2735/14, C.D. Classen, *Europarecht*, 2016, p. 304, M. Nettesheim, *Juristen Zeitung*, 2016, p. 424, Chr. Schönberger, *Juristen Zeitung*, 2016, p. 422, A. Gaillet, *Actualité Juridique Droit Administratif*, 2016, p. 1112, C. Haguenau-Moizard, *Europe*, mars 2016, p. 37.

29 The British Supreme Court merely checks that the national legislation is compatible with directives (2014) UKSC 3.

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tion of fundamental rights. These cross-quotations become more and more frequent (Section 9.2.1.2).

9.2.1.1 The ECHR and ILO Conventions

The ECHR protects Union freedom, which is also protected by conventions of the International Labour Organisation. The Demir and Baykara case is the paramount example of the use of those conventions. In that decision, the ECHR boldly includes the right to collective bargaining in union freedom under article 11 of the Convention. In order to do so, it applies article 31 of the Vienna Convention on the Law of Treaties, which provides that in interpreting a treaty "any relevant rules of international law applicable in the relations between the parties" have to be taken into account. The Court explains that it usually "takes into account the international law background to the legal question before it" and that "in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State."[30] The international texts enable the Court to identify a consensus among the parties to the Convention. The Court then refers to ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise. It does not only refer to conventions. It also mentions texts of soft law, such as conclusions of the ILO Committee on Freedom of Association. It adds up instruments of the Council of Europe (the European Social Charter, recommendations of the Comity of ministers) and the Charter of Fundamental Rights of the EU. The reasoning of the Court is very flexible. The international conventions must not be ratified by the defendant. Conventions may be referred to if

> the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies.[31]

This method of interpretation is not unanimously approved. The decision in Demir and Baykara was unanimous. Since then the Court has used the flexible method again, though

30 ECHR, Grand Chamber, November 12, 2008, *Demir and Baykara v. Turkey*, §76, K.D. Ewing and J. Hendy, *Industrial Law Journal*, 2010, 39(1), 2, Ch. Barrow, *European Human Rights Law Review*, 2010, 4, 419. In French: J.-F. Flauss, *Actualité Juridique du Droit Administratif*, 2009, 872, J.-P. Marguénaud and J. Mouly, *Dalloz*, 2009, 739, N. Hervieu, *Revue de Droit du Travail*, 2009, p. 288, H. Tissandier, *Revue de Jurisprudence Sociale*, 2009, p. 195.

31 Ibid. §86.

its interpretation does not always favour the claimants.[32] Concurring opinions have been published. In a 2014 case, judge Wojtyczek explains that article 31 of the Vienna Convention does not allow the judges to refer to a treaty that has not been ratified by the relevant State.[33] A number of academics share this view.[34] The States should be bound by a treaty when they have not accepted to be bound. Others are more favourable.[35] The flexible method of the Court makes the Convention rights more effective. A third category criticizes the inconsistencies of the case-law[36] or merely wonders what the scope of the flexible method precisely is.[37]

9.2.1.2 Cross-Quotation by the ECHR and the ECJ

A kind of competition seems to be going on between the two European Courts, as if each wanted to prove that it would protect human rights better than the other. In that silent competition, they quote each other as much as possible.

There was no competition at first. In well-known cases about asylum seekers, both courts rather seemed to be collaborating. The ECHR condemned Greece and Belgium in the M.S.S. case because the first had violated article 3 of the Convention by ill-treating asylum seekers and the second had also violated article 3 by sending an asylum seeker back to Greece under the Dublin regulation of the EU.[38] The same kind of question was asked to the ECJ. The Luxemburg judges waited until their colleagues from Strasburg had made their decision. It then decided that when "systemic deficiencies" could be proved in a Member State, the Dublin regulation compelled the other Member States not to send back asylum seekers there and to examine the application instead. They would otherwise violate article 4 of the Charter, which is the same as article 3 of the Convention.[39] The position of the ECHR is not only taken into account. It is summarized in a whole paragraph of the decision (§112). This is rare. The question was tricky enough for the ECJ to wait for the ECHR and develop on its decision. At that time, the ECJ was also willing to show that its own interpretation of the Charter would not lead to inconsistencies with the Convention.

The relationships between the case-law of both European Courts changed dramatically after the negotiations on accession of the EU to the Convention ended up. The draft treaty of accession was published on April 5, 2013. Even before the ECJ stated that the

32 ECHR, April 8, 2014, National Union of Rail, *Maritime and Transport Workers v. United Kingdom*, October 2, 2014, *Matelly and Adefdromi v. France*, April 21, 2015, *Junta Rectora v. Spain*, June 16, 2015, *Manole v. Rumania*.

33 ECHR, April 8, 2014, National Union of Rail, *Maritime and Transport Workers v. United Kingdom*.

34 J.-F Renucci and C. Birsan, Dalloz, 2007, p. 410.

35 J.-P. Marguénaud and J. Mouly, Dalloz 2009, p. 739, N. Moizard, "L'usage des conventions de l'OIT par la Cour européenne des droits de l'homme," *Droit Social*, 2014, p. 365.

36 Ch. Barrow, "RMT *v.* United Kingdom [2014]: The European Court intimidated into timidity or merely consistent in its inconsistency?" *European Human Rights Law Review*, 2015, 3, pp. 277-285.

37 N. Hervieu, *Revue de Droit du Travail*, 2009, p. 288.

38 ECHR, Grand Chamber, January 21, 2011.

39 ECJ, N.S., 2011, C-411/10 and C-493/10.

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accession would be contrary to EU law, it seemed willing to prove that it was able to do better than the ECHR.[40] In two major decisions in April and May 2014, it interpreted the right to private life much more extensively than the ECHR had ever done it. The ECJ decided that the 2006/ 24 directive on the retention of data by providers of electronic services was invalid.[41] The ECJ also acknowledged that the individuals had a "right to be forgotten" under the 95/46 directive on the processing of personal data.[42] It mentions a number of decisions of the ECHR in the first decision, without expanding. Its reasoning is mostly based on aspects of EU law. It does not even mention the ECHR in the second decision, although Advocate General Jääskinen does so at some length.

After the ECJ issued its opinion on the draft treaty of accession in December 2014, the competition continued. In the Schrems case, the ECJ decided that the decision of the Commission on the adequacy of the protection of personal data in the US ("safe harbor principles") compared with directive 95/46 was invalid.[43] It mostly referred to its decision in the Digital Rights case and did not bother to mention the ECHR. This time, Advocate General Bot did not bother either.

The ECHR entered into the competition. It stated that Hungary had violated article 8 of the Convention by allowing its anti-terrorist task force to gather secret intelligence without needing to be authorized by a judge.[44] Among the "relevant international texts," the ECHR extensively quoted the Digital Rights decision of the ECJ. That decision was obviously a major source of inspiration. It is submitted that the ECHR also wanted to show that it could do as well as the ECJ as far as private life was concerned.

Whilst demonstrating that it protects human rights as well or even better as the ECHR, the ECJ strives to keep the autonomy of EU law and its own autonomy at the same time. The ECJ has always stated that the words used in Community law should be given an autonomous meaning. They should not necessarily be interpreted as they are in

40 Opinion 2/13 of December 18, 2014, Bruno de Witte and Šejla Imamović, *European Law Review*, 2015, 40 (5), p. 683, Sarah Lambrechts, *European Human Rights Law Review*, 2015, 2, p. 185, Tobias Lock, *European Constitutional Law Review*, 2015, 11(2), p. 239. In French: I. Bosse-Platière and A. Hervé, Revue Trimestrielle de Droit Européen, 2015, p. 220, H. Labayle and F. Sudre, *Revue Française de Droit Administratif*, 2015, p. 3, Caroline Picheral, Revue de l'Union Européenne, 2016, p. 426, Laurence Usunier, *Revue Trimestrielle de Droit Civil*, 2015, p. 335.

41 ECJ, Grand Chamber, 2014, *Digital Rights Ireland*, C-293/12 & C-594/12, Marie-Pierre Granger and Kristina Irion, *European Law Review*, 2014, 39(6), 835, Tuomas Ojanen, *European Constitutional Law Review*, 2014, 10(3), 528. In French: Jean-Paul Jacqué, *Revue Trimestrielle de Droit Européen*, 2014, 283, Sylvie Peyrou, *Revue Trimestrielle de Droit Européen*, 2015, 117.

42 ECJ, Grand Chamber, 2014 Google Spain, C-131/12. For critical appraisals: Johannes Masing, "Vorläufige Einschätzung der 'Google-Enscheidung' des EuGH," <www.verfassungsblog.de>, Peter Gryffroy, "Delisting as a part of the decay of information in the digital age: a critical evaluation of Google Spain (C-131/12) and the right to delist it has created," *Computer and Telecommunications Law Review*, 2016, 22(6), 149. In French: Olivia Tambou, *Revue Trimestrielle de Droit Européen*, 2016, 249.

43 ECJ, Grand Chamber, 2015, C-362/14.

44 ECHR, January 12, 2016, *Szabó and Vissy v. Hungary*.

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national law.[45] Since the Charter has become compulsory, the ECJ often insists that the interpretation of provisions of the Charter should be autonomous from the interpretation of the Convention. In its opinion on the treaty of accession, the Court based its reasoning on the special nature and the independence of the EU legal order.[46]

The autonomous interpretation of the Luxemburg judges may be directly contrary to the decisions of the ECHR, as we have already seen about the *ne bis in idem* principle. Another example of a contrary interpretation veiled by a reference to the ECHR is provided by a decision about the right to respect for family life as regards immigrants and their children.[47] The Court refused to annul the 2003/86 directive on family reunification because there was no right to family reunification derived from the right to family life. It quoted three decisions of the ECHR, which require the States to weigh the different interests and take into account the age of the child, the ties of the child with his family and his/her link with the environment in the country of origin.[48] The ECJ quoted the Sen decision at length, including the criteria to be used. It then failed to apply those criteria when deciding on the legality of various provisions of the directive and thus recognized a wider margin of interpretation to the Member States than the ECHR. Though the case was decided at a time when the Charter was not binding, it gives a good indication of the ECJ's attitude towards the ECHR. It used it as a source of interpretation on general principles of law.

The autonomous interpretation of human rights may be more subtle, as shown by the J.Z. case.[49] The ECJ was asked whether a nine-hour night-time curfew, in conjunction with the monitoring of the person concerned by means of an electronic tag, an obligation to report to a police station at fixed times on a daily basis or several times a week, and a ban on applying for foreign travel documents amounted to a deprivation of liberty. If it did, article 26 of the framework decision on the European arrest warrant would apply and the curfew period should be deducted from the sentence to be served in the issuing State. Though the ECJ quoted the Guzzardi decision of the ECHR, it did not apply the criteria of a deprivation of liberty identified in Strasburg to determine the scope of article 5 of the Convention.[50] The ECJ quoted Guzzardi in order to explain that a deprivation of liberty could take various forms. It also quoted another decision whereby the ECHR had refused to apply article 5 of the Convention to a psychiatrist patient who had to keep contact with the hospital, report once a month to the police authorities and respect a 9-hour curfew.[51]

45 On the meaning of "public order" grounds justifying limitations to the free movement of workers: ECJ, Van Duyn, 1974, 1338.

46 Opinion 2/13, §153ff.

47 ECJ, *European Parliament v. Council*, 2006, I-5809.

48 ECHR, November 28, 1996, *Ahmut v. The Netherlands*, February 19, 1996, *Gül v. Switzerland*, December 21, 2001, *Sen v. the Netherlands*.

49 ECJ, J.Z., 2016, C-294/16 PPU.

50 ECHR, November 6, 1980, *Guzzardi v. Italy*.

51 ECHR, April 20, 2010, *Villa v. Italy*.

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Then, the Luxemburg judges merely concluded that the measures imposed to J.Z. were not restrictive enough to be considered as a deprivation of liberty. Since the case-law of the ECHR on deprivations of liberty is not as precise as its case-law on family reunification, it is not possible to conclude that the ECJ's interpretation is contrary to the interpretation of the ECHR. But it is not possible to conclude that the Luxemburg judges have been perfectly faithful to their Strasburg counterparts. They do not expand on the criteria of a deprivation of liberty, which have been identified by Guzzardi: type, duration, effect of the measure (possibility to leave the place, control of the police) and consent of the individual.

The attitude of the ECJ cannot be explained only by the way it motivates its decisions, which is quite different from the ECHR. The ECJ definitely seems to assert its authority over human rights, either by giving an extensive interpretation of the Charter or by misusing the case-law of the ECHR. Quotations of the ECHR sometimes hide a quest for autonomy.

9.2.2 Quotation of External Legal Norms by National Superior Courts

The situation is of course different when national superior courts are bound by external norms (Section 9.2.2.1) and when they pick up examples in other legal systems (Section 9.2.2.2).

9.2.2.1 Quotation of Binding External Norms

As seen earlier, the French superior courts are used to writing short decisions, which do not leave room for a lot of explanations, let alone quotations. Quotations appeared in very exceptional cases, when French law had to change under the influence of European law. The Cour de cassation quoted the decisions of the European Court of Human Rights on the right of an individual, kept in police custody, to have access to a lawyer.[52]

Things are slowly changing. The presidents of Conseil d'Etat, the Cour de cassation and the Conseil constitutionnel have all decided to insist on more developed motivations.[53]

A good example is provided by a decision of the Cour de cassation of June 2016.[54] After the dismissal of an employee, the appellate court had confirmed that the employer had to pay for paid leave for a period of several years before the dismissal. The Cour de cassation quashes the judgement because it contradicts the 2003/88 directive on the organization of

52 Cour de cassation, Assemblée plénière, April 15, 2011, n 10.30242, 10.30316, 10.30313.

53 Conseil d'Etat: report on the writing of administrative judicial decisions, 2012, President of the Cour de cassation Bertrand Louvel: interview in the *Semaine juridique*, October 19, 2015; President of the Conseil constitutionnel Laurent Fabius: interview in *Le Monde*, April 18, 2016.

54 Cour de cassation, Chambre sociale, June 22, 2016, n 15-20111.

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working time. Article 7 of the directive, which has a direct effect, only provides for four weeks' paid leave. In order to reach that conclusion, the Cour de cassation summarizes the case-law of the ECJ on the direct effect of directives and quotes the most important cases. Such a detailed reasoning is welcome. It makes the decision easier to understand and the reader is no longer compelled to guess how the Cour has used external sources.

In other jurisdictions, the decisions are longer and quotations are more common. The German Constitutional Court is used to lengthy and pedagogical decisions. When it refers to the case-law of the ECJ, the decisions are quoted at some length. Recent decisions about the European arrest warrant or about the powers of the European Central Bank are good examples.[55]

9.2.2.2 Quotation of Examples

When judges are not bound by international law, they might quote foreign examples. As when they simply mention them, it might give them additional inspiration or help them legitimate their decision.

As Tania Groppi, Marie-Claire Ponthoreau and their co-authors show, the choice between mentioning and quoting external examples depends on the legal style of the judges and of the circumstances. There is a tendency to rely more on foreign examples when a case has to do with human rights, because they are formulated in the same way in most countries when a new Constitution has been adopted or when an issue is controversial.[56]

The Supreme Court of Israel has always relied on foreign judicial decisions.[57] In the early years, it relied mostly on English law because the constitutional rules were largely inspired by the English system. After the Supreme Court decided that the basic laws had a superior value in a landmark 1995 decision, the sources of inspiration/legitimation became more varied. The Israeli judges may quote German or Canadian law but their main foreign source tends to be American law, although the institutions are quite different. The first time foreign law was used was in the Kol Ha'am case about the limits of freedom of expression. Judge Agranat extensively quoted the case-law of the US Supreme Court and of various British courts.[58] Later on, foreign references became common. For example, in a case about the fight against terrorism, it quoted an American legal textbook in order to show that the right to a hearing could be given up in emergency cases.[59]

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55 German Consitutional Court, December 15, 2015, 2 BvR 2735/14, on the EAW; June 21, 2016, 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13, on the OMT programme of the European Central Bank.

56 Groppi and Ponthoreau, *The Use of Foreign Precedents by Constitutional Courts*, p. 415.

57 Suzie Navot, "Israel: Creating a Constitution – The Use of Foreign Precedents by the Supreme Court (1994-2010)," in Tania Groppi and Marie-Claire Ponthoreau (eds), 2014, pp. 129-153.

58 Israeli Supreme Court, October 16, 1953, *Kol Ha'am Company Ltd. v. Minister of the Interior*, HCJ 73/53 & 87/53.

59 Israeli Supreme Court, January 28, 1993, Association for *Civil Rights v. Minister of Defence and others*, H.C.J 5973/92.

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Another reason to quote foreign examples appeared in the European Union. The superior courts of the Member States tend to seek inspiration/legitimation in the case-law of other European superior courts that have been asked to answer the same kind of question.[60] In their decisions on the Lisbon treaty, many Constitutional courts quoted other decisions on the same issue. For example, the Polish Constitutional Court extensively quoted many decisions from other European Courts (France, Austria, the Czech Republic, Latvia, Germany and Hungary).[61]

9.3 The Discussion of External Examples

The discussion of external examples is the most advanced form of internationalization of case-law. It is comparatively rare for a number of reasons. First of all, in some countries, the traditional style of judicial decisions does not leave room for discussion. France is probably the paramount example of *imperia brevitas.* Hence, there is no discussion of any kind in the decisions themselves, although there might be some in the preparatory opinions of the advocate general in the Cour de cassation or the *rapporteur public* in the Conseil d'Etat. Another reason is that judges are not specialists of comparative law. Their job does not consist in systematizing or in analysing external norms in depth.

In countries outside the Common law sphere of influence, discussions are more frequent in concurring or dissenting opinions.[62] When arguing against the majority, the judges need to be as convincing as possible. If they use external examples, they have to develop. In Japan for example, foreign examples are scarcely used but they are a little more frequent in concurring or dissenting opinions. In 1995, the Japanese Supreme Court decided that the Constitution allowed for differences of treatment between legitimate and illegitimate children in inheritance matters. The majority did not refer to any foreign example but the concurring opinions did.[63] In its concurring opinion, Justice Onishi considered that "changes in the international environment surrounding Japan cannot be overlooked" and explained the aim of the legislation in "a majority of European countries." In a case about the relationships between government and religious groups, the majority held that a State authority violated the Constitution by subsidizing religious corporations for their ceremonies.[64] In their concurring opinion, justices Kabe and Ozaki

60 Mattias Wendel, "Comparative reasoning and the making of a common constitutional law: EU-related decisions of constitutional courts in a transnational perspective," *International Journal of Constitutional Law*, (2013), 4 (11), pp. 981-1002.

61 Polish Constitutional Court, November 24, 2010, K32/09, English translation by the Court itself: <http://trybunal.gov.pl/en/hearings/judgments/art/6540-traktat-z-lizbony/>.

62 Groppi and Ponthoreau, *The Use of Foreign Precedents by Constitutional Courts*, p. 421.

63 Japanese Supreme Court, July 5, 1995, 1991 (Ku) 143, English translation on the site of the Court: <www.courts.go.jp/app/hanrei_en/detail?id=222>.

64 Japanese Supreme Court, April 2, 1997, 1992 (Gyo-Tsu) 156, English translation on the site of the Court: <www.courts.go.jp/app/hanrei_en/detail?id=312>.

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discussed a provision of the US Constitution similar to the provision of the Japanese Constitution and the method of interpretation of the US Supreme Court in order to differentiate the purposes of the two provisions. They used a foreign example to explain that it was not relevant in the case.

Foreign example can be important when a leading decision is taken on a controversial issue. When the Israeli Supreme Court decided in the Mizrahi Bank case that the basic laws had a superior value, it relied on an impressive number of foreign precedents.[65] A list of Australian, American, English, German, South African, Indian and Canadian cases is given among the cases cited. In their opinions, the judges relied on foreign cases and foreign literature. Justice Barak, president of the Supreme Court, justified the use of external sources:

> It reveals the possibilities concealed in the text. It sheds light upon the arrangements accepted in constitutional democracies. It gives the judge confidence that his interpretation is accepted and functions well in other places. (p. 238 of the decision)

It is not possible to draw straightforward conclusions for those observations, save that the internationalization of case law is a common phenomenon in all kinds of legal systems and that the judges remain pretty free to use external law as they wish. They "cherry pick" among the international and foreign norms, those which might be helpful. Even when they are bound by international treaties, they are careful to retain a margin of discretion in their interpretation. As Justice Sachs, from the South African Constitutional Court, puts it, "we cherry pick all the time when we use authorities foreign or domestic … it's got to be a cherry that fits."[66] They do use wider varieties of "cherries," though.

65 Israeli Supreme Court, November 9, 1995, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, CA 6821/93.

66 Quoted by Andenas and Fairgrieve, *Courts and Comparative Law*, p. 247.

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10 Second-Grade Constitutionalism? Hungary and Poland: How the EU Can and Should Cope with Illiberal Member States

Gábor Halmai[*]

There's only one degree of freshness – the first, which makes it also the last.
—Mikhail Bulgakov

10.1 Introduction

In this chapter I deal with recent deviations from the shared values of rule of law and democracy – the "basic structure" of Europe – in some of the new Member States in East-Central Europe, especially in Hungary and Poland. The starting point of deviation is Article 2 of the Treaty of the European Union, which demands "respect for human dignity, freedom, democracy, equality, rule of law and […] human rights including the rights of minorities." The principles of Article 2 TEU are elaborated for candidate countries of the EU in the Copenhagen criteria, laid down in the decision by the European Council of 21 and 22 June 1993, to provide the prospect of accession for transitioning countries that still had to overcome authoritarian traditions. The Treaty on the European Union sets out the conditions (Article 49) and principles (Article 6(1)) to which any country wishing to become an EU member must conform. Regarding constitutional democracy, the political criteria are decisive: stability of institutions guaranteeing democracy; the rule of law; human rights; and respect for, and protection, of minorities. This was the main instrument, which governed the largest enlargement in the Union's history: starting in 2004 with ten new Member States, mostly from the former communist countries, followed by the accession of Romania and Bulgaria in 2007, and concluded by the admission of Croatia in 2013. As Dimitry Kochenov argues, the assessment of democracy and the rule of law criteria during this enlargement were not really full, consistent and impartial, and the threshold to meet the criteria was very low. As a result, the Commission failed to establish a link between the actual stage of reform in the candidate countries and the acknowl-

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edgement that the Copenhagen political criteria had been met.[1] Not only were the conditionality requirements not taken seriously, but their maintenance was also missing after accession.[2] The only time the EU expressed some doubts and extended the validity of pre-accession values-promotion was the so-called Cooperation and Verification Mechanism applicable to Bulgaria and Romania, which remained in force even after they became full members.[3] (During the 2012 Romanian constitutional crisis, the Commission successfully used the fact that the Mechanism had been expected to be discontinued in the middle of the crisis as leverage.[4])

The weakness of the Copenhagen criteria and the lack of their application after accession is one of the reasons for non-compliance after accession in some of the new Member States. The other reason is certainly the authoritarian past of the new democracies. Even though the immediate cause might have been the Austrian "Haider affair,"[5] as Wojciech Sadurski rightly argues, the Central and Eastern European applicants' history was the main reason why Article 7 TEU was revised in the Treaty of Nice. This new provision makes it possible to react not only to a serious and persistent breach by a Member State of principles mentioned in then-Article 6(1) TEU, but also when there is a "clear risk" thereof.[6]

The weakening of liberal constitutional democracy has started in Hungary after the landslide victory of the center-right Fidesz party in the 2010 parliamentary elections. (In the Summer of 2012 there was a constitutional crisis also in Romania, where the ruling socialists tried to dismantle both the constitutional court and the president, but the EU was able to exert a stronger influence over events there.[7])

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1 D. Kochenov, "Behind the Copenhagen façade. The meaning and structure of the Copenhagen political criterion of democracy and the rule of law," European Integration online Papers (EIoP) Vol. 8, No 10, (2004), <http://eiop.or.at/eiop/texte/2004-010a.htm>.

2 About the so-called "Copenhagen dilemma," see C. Closa, "Reinforcing EU Monitoring of the Rule of Law," in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, 15-35.

3 M. A. Vachudova and A. Spendzharova, "The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession," *SIEPS European Policy Analysis*, Vol. 1, 2012.

4 See Á. Bátori, "Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU," *Public Administration*, 2016, 10.

5 In 2000, the far-right Freedom Party headed by Jörg Haider became the coalition partner of the center-right government, which led to unilateral measures by the Member States against Austria. But this action has left the Member States and the Union institutions extremely reluctant to use similar mechanisms. As the "report of the three wise men" mentions, the measures taken were perceived by the Austrian public as politically motivated sanctions by foreign governments against the Austrian population and therefore fostered nationalist sentiments.

6 W. Sadurski, "Adding a Bite to the Bark?: A Story of Article 7, EU Enlargement, and Jörg Haider," *Columbia Journal of European Law*, Vol. 16, 2010, 385, 394.

7 About the Romanian crisis, see Vlad Perju, "The Romanian Double Executive and the 2012 Constitutional Crisis," *International Journal of Constitutional Law*, Vol. 13, No. 1, 2015, 246-278; Bogdan Iancu, "Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts," in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, C. H. Beck – Hart – Nomos, 2015, 153-169.

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10.2 Hungary: The "Rule of Law Revolution" of 1989 and the "Constitutional Counter-Revolution" after 2010

Hungary was one of the first and most thorough political transitions, which provided all the institutional elements of constitutionalism: checks and balances and guaranteed fundamental rights. Hungary also represents the first, and probably model case, of constitutional backsliding from a full-fledged liberal democratic system to an illiberal state with strong authoritarian elements.

The seriousness of the core values of the EU can be examined through Hungary's deliberate non-compliance with the principles of constitutional democracy, because it has not yet received significant sanctioning externally nor substantial internal opposition. Therefore, the case has broader implications for Europe and it even has current resonance in some other, especially the former communist, countries of the region.

The characteristic of system change that Hungary shared with other transitioning countries was that it had to establish an independent nation-state, a civil society, a private economy, and a democratic structure all at the same time. Plans for transforming the Stalin-inspired 1949 Rákosi Constitution into a "rule of law" document were delineated in the National Roundtable Talks of 1989 by participants of the Opposition Roundtable and representatives of the state party. Afterwards, the illegitimate Parliament only rubber stamped the comprehensive amendment to the Constitution, which went into effect on 23 October 1990, the anniversary of the 1956 revolution, and which was the basic document of the "constitutional revolution" until 1 January 2012.

Before the 2010 elections, most voters had grown dissatisfied not only with the government, but also with the transition itself, more than in any other East Central European country.[8] Fidesz fed these sentiments by claiming that there had been no real transitions in 1989-1990, and that the previous nomenklatura had merely converted its lost political power into economic influence, pointing to the previous two prime ministers of the Socialist Party, both of whom became rich after the transition owing to privatization. Fidesz's populism was directed against all elites, including the elites who designed the 1989 constitutional system (in which Fidesz had also participated), claiming that it was time for a new revolution. That is why Viktor Orbán, the head of Fidesz, characterized the results of the 2010 elections as a "revolution of the ballot boxes." His intention with this revolution was to eliminate any kind of checks and balances and even the parliamentary rotation of governing parties. In a September 2009 speech, Orbán predicted that there was

8 In 2009, 51% of Hungarians disagreed with the statement that they are better off since the transition, and only 30% claimed improvements. Eurobarometer, 2009.

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> a real chance that politics in Hungary will no longer be defined by a dualist power space. Instead, a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests.

Orbán's vision for a new constitutional order – one in which his political party occupies the center stage of Hungarian political life and puts an end to debates over values – has now been entrenched in a new constitution, enacted in April 2011.[9]

In its opinion, approved at its plenary session of 17-18 June 2011, the Council of Europe's Venice Commission expressed its concerns about the Fundamental Law, which was drawn up in a process that excluded the political opposition and professional and other civic organizations.[10]

Before 1 January 2012, when the new constitution became law, the Hungarian Parliament had been preparing a blizzard of so-called cardinal – or super-majority – laws, changing the shape of virtually every political institution in Hungary and making the guarantee of constitutional rights less secure. These laws affect the laws on freedom of information, prosecutions, nationalities, family protections, the independence of the judiciary, the status of churches, functioning of the Constitutional Court and elections to Parliament. In the last days of 2011, the Parliament also enacted the so-called Transitory Provision to the Fundamental Law, which claimed constitutional status and partly supplemented the new Constitution even before it came into effect. These new laws have been uniformly bad for the political independence of state institutions, for the transparency of law making and for the future of human rights in Hungary.

On 11 March 2013, the Hungarian Parliament added the Fourth Amendment to the country's 2011 constitution, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government urging the government to seek the opinion of the Venice Commission before bringing the amendment into force. The most alarming change concerning the Constitutional Court annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution = old decisions; new constitution = new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions were substantially

9 In an interview on Hungarian public radio on July 5, 2013, elected Prime Minister Orbán responded to European Parliament critics regarding the new constitutional order by admitting that his party did not aim to produce a liberal Constitution. See A Tavares jelentés egy baloldali akció (The Tavares report is a leftist action), Interview with PM Viktor Orbán, July 5, 2013. Kossuth Rádió, <www.kormany.hu/hu/miniszterelnokseg/miniszterelnok/beszedek-publikaciok-interjuk/a-tavares-jelentes-egy-baloldali-akcio>.

10 *See* <www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf>. Fidesz's counterargument was that the other parliamentary parties excluded themselves from the decision-making process with their boycott, except Jobbik, which voted against the document.

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the same, the opinions of the prior Court would still be valid and could still be applied. In cases in which the new constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection to comply with European human rights law. With the removal of these fundamental Constitutional Court decisions, the government has undermined legal security with respect to the protection of constitutional rights in Hungary. These moves renewed serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and the European Convention on Human Rights.

In April 2014, Fidesz, with 44.5% of the party-list votes, won the elections again, and due to "undue advantages" for the governing party provided by the amendment to the electoral system[11] secured two-thirds majority again. In early 2015 Fidesz lost its two-thirds majority as a consequence of mid-term elections in two constituencies, but the far-right Jobbik party has received another 20.5% of the party-list votes. The enemies of liberal democracy still enjoy the support of the overwhelming majority of the voters, who are not concerned about the backsliding of constitutionalism.

10.3 Poland: Negotiated Liberal Democracy of 1989 and "Remodeling" Democracy after 2015

As opposed to Fidesz in 2011, Law and Justice (Prawo i Sprawiedliwość PiS) lacks the constitution-making or amending 2/3 majority in the parliament. Therefore, they started to act by simply disregarding the Constitution of 1997. The first victim was the Constitutional Tribunal, which already in 2007 had struck down important elements of PiS's legislative agenda, including limits on the privacy of public officials to be lustrated and freedom of speech and assembly.[12]

In October 2015, before the end of the term of the old Parliament, five judges had been nominated by the outgoing Civil Platform government, even though the nine-year

11 "A number of amendments negatively affected the election process, including important checks and balances…The absence of political advertisements on nationwide commercial television, and a significant amount of government advertisements, undermined the unimpeded and equal access of contestants to the media," – international election monitors of the Organization for Security and Cooperation in Europe (OSCE) said in its report. See Statement of Preliminary Findings and Conclusions, International Election Observation Mission, Hungary – Parliamentary Elections, April 6, 2014.

12 About the battle for the Constitutional Tribunal, see T.T. Koncewicz, "Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense," Int'l J. Const. L. Blog, Dec. 6, 2015, at: <www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense>.

term of two of them would have expired only after the parliamentary elections. Andrzej Duda, the new president of the Republic nominated by PiS, refused to swear in all the five new judges elected by the old Sejm, despite the fact that the term of office of three of them has already started. In early December, in accordance with a new amendment to the Law on the Constitutional Tribunal, the new Sejm elected five new judges, who were sworn into office by President Duda in an overnight ceremony. As a reaction to these appointments, the Constitutional Tribunal ruled that the election of two judges whose term were not yet over in October 2015, when the previous Sejm elected them, was unconstitutional. The Tribunal also ruled that the election of the other three judges was constitutional, and obliged the president to swear them in. Since President Duda refused to do so, the chief judge of the Tribunal did not allow the five newly elected judges to hear cases.

The governing majority also passed an amendment to the organization of the Tribunal, increasing the number of judges that have to be present in a ruling from 9 to 13 out of 15. As opposed to the previous simple majority, decisions of the Tribunal will be taken by a 2/3 majority. With the five new judges, as well as the one remaining judge appointed by the PiS when it was last in government from 2005 to 2007, it may no longer be possible for the Tribunal to achieve the necessary 2/3 majority to quash the new laws. The six-member PiS faction, combined with the new quorum and majority rules, will be enough to stymie the court. Furthermore, the Tribunal is bound to handle cases according to the date of receipt, meaning it must hear all the pending cases, most likely regarding laws enacted by previous parliaments, before any new ones adopted by the new Sejm. For the same reason, the amendment also states that no decision about the constitutionality of a law can be made until the law has been in force for six months. Disciplinary proceedings against a judge can also be initiated in the future by the President of the Republic or by the Minister of Justice, which gives power to officials loyal to PiS to institute the dismissal of judges. In early March the Constitutional Tribunal invalidated all of the pieces of the law restricting its competences. The government immediately announced that it would not publish the ruling because the Court had made its decision in violation of the very law it invalidated. By Polish law, the decision of the Court takes effect as soon as it is published. If the decision is not published, it cannot take effect. As a reaction to the government's (lack of) action, the General Assembly of Poland's Supreme Court judges adopted a resolution stating that the rulings of the Constitutional Tribunal should be respected, in spite of a deadlock with the government. The councils of the cities of Warsaw, Lodz and Poznan have resolved to respect the Constitutional Tribunal's decisions, in spite of the fact that the government is not publishing its rulings.[13]

In Orbán's playbook, which is seemingly followed by Kaczyński, the other major target has been the media. At the end of 2015, the PiS government introduced a new law, the

13 <www.thenews.pl/1/9/Artykul/250415,Polands-Supreme-Court-opposes-government-in-constitutional-wrangle>.

so-called "small media law", amending the former Law on Radio and Television Broadcasting. This amendment enabled the government to appoint and dismiss the heads of the public television and radio. According to the new rules, the presidents and members of the board of both institutions will be appointed and dismissed by the Minister of Treasury instead of the National Broadcasting Council from among multiple candidates. The new law also terminated the current managers' and board members' contracts with immediate effect, allowing the government to replace them.

The third danger to PiS's "centre of political direction" has been an apolitical civil service. Here Kaczyński, just like Orbán, started the complete politicization of the civil service by removing a previously existing rule that the new head of the civil service must be a person who has not been a member of a political party for the last five years. The same law also allows the new head to be appointed from outside the civil service. Another element of Orbán's agenda was to build up a surveillance state. In early February 2016, the new Polish Parliament also passed a controversial surveillance law that grants the government greater access to digital data and broader use of surveillance for law enforcement. On 13 June, the Venice Commission issued an opinion on this, criticizing the government for exercising nearly unlimited capacities without adequate independent checks or reasonable limits to the law.[14] In early May 2016 Jarosław Kaczyński announced his party's aim to change the 1997 Constitution: "the constitution must be verified every twenty years," hinting "next year will be the 20th anniversary of Poland's contemporary basic law." He admitted, however, that

> we might not find enough support to change the constitution this term, but it's time to start to work. We can ask Poles if they prefer Poland that we've all seen or? the one that's ahead of us.[15]

A day later Polish president Andrzej Duda said the country's current constitution was a "constitution of a time of transition," adding that "it should be examined, a thorough evaluation carried out and a new solution drawn up."[16] These references to a new basic law leave open how the party intends to circumvent the lack of the necessary 2/3 majority in the Sejm for constitution-making. But as critics argue, PiS does not really need a new constitution because what they have been doing since the fall of 2015 is already a *de facto* change of the constitution through sub-constitutional laws. This is what Wojciech Sadurski calls a constitutional coup d'etat.[17]

14 <www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)012-e>.
15 <http://uatoday.tv/news/poland-may-soon-change-its-constitution-j-kaczy-ski-642126.html>.
16 <www.thenews.pl/1/9/Artykul/251184,Polish-president-calls-for-constitution-to-be-reexamined>.
17 M. Steinbeis, "What is Going on in Poland is an Attack against Democracy," Interview with Wojciech Sadurski <http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/>.

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10.4 Possible Explanations of the Backsliding

The main reasons for the turn of constitutionalism in these two countries can be described as follows.

(a) Historically, in the East-Central European countries there were some unexpected moments of quick flourishing of liberal democracy followed by an equally quick delegitimization of it. First the period between the 1860s-1870s and the end of the nineteenth century, second after WWI, except in Hungary, where the short liberal democratic period led by Mihály Károlyi was soon followed by the red terror of commune, and white terror of the right wing. The third such short moment occurred after 1945, till the communist parties' takeover. And the fourth was after 1989, when liberal democracy again seemed to be the "end of history."[18]

As surveys on the links between modernization and democracy show, the society's historic and religious heritage leaves a lasting imprint.[19] According to these surveys, the public of formerly agrarian societies including Hungary and Poland emphasize religion, national pride, obedience, and respect for authority, while the publics of industrial societies emphasize secularism, cosmopolitanism, autonomy, and rationality.[20] Even modernization's changes are not irreversible: economic collapse can reverse them, as happened during the early 1990s in most former communist states. These findings were confirmed by another international comparative study conducted by researchers of Jacobs University in Bremen and published by the German Bertelsmann Foundation.[21] According to the study, which examined 34 countries in the EU and the OECD, Hungary has had a low level of social cohesion ever since the post-communist transformation, ranked at 27th, between Poland and Slovakia. Social cohesion is defined as the special quality with which members of a community live and work together.

(b) Even though the transition to democracy both in Hungary and Poland was driven by the fact that a large share of the population gave high priority to freedom itself, but people expected the new states to produce speedy economic growth, with which the country could attain the living standards of West overnight, without painful reforms. In

18 See the results of the research project "Negotiating Modernity": History of Modern Political Thought in East-Central Europe, led by Balázs Trencsényi, and supported by the European Research Council <https://erc.europa.eu/"negotiating-modernity"-history-modern-political-thought-east-central-europe>.

19 See R. Inglehart and C. Welzel, "Changing Mass Priorities: The Link between Modernization and Democracy," *Perspectives on Politics*, Vol. 8, No. 2, 2010, 551-567.

20 Id., 553. Christian Welzel in his more recent book argues that fading existential pressures open people's minds, making them prioritize freedom over security, autonomy over authority, diversity over uniformity and creativity over discipline, tolerance and solidarity over discrimination and hostility against out-groups. On the other hand, persistent existential pressures keep people's minds closed, in which case they emphasize the opposite priorities. This is the utility ladder of freedom. Ch. Welzel, *Freedom Rising. Human Empowerment and the Quest for Emancipation*, Cambridge University Press, 2013.

21 D. Schiefer, J. van der Noll, J. Delhey, and K. Boehnke, *Cohesion Radar: Measuring Cohesiveness*, Bertelsmann Foundation, 2013 <www.bertelsmann-stiftung.de/bst/en/media/xcms_bst_dms_36378__2.pdf>.

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other words, one can argue that the average Hungarian and Polish people pursued the West in 1989, though not so much in terms of the Western economic and political system, but rather in terms of the living standards of the West. Claus Offe predicted the possible backsliding effect of the economic changes and decline in living standards, saying that this could undermine the legitimacy of democratic institutions and turn back the process of democratization.[22] This failure, together with the emergence of an economically and politically independent bourgeoisie, the accumulation of wealth by some former members of the communist nomenclature, unresolved issues in dealing with the communist past, the lack of retributive justice against perpetrators of grave human rights violations, and a mild vetting procedure and lack of restitution of the confiscated properties, were reasons for disappointment.

(c) According some arguments, the prospects for democracy in the newly independent states of Central and Eastern Europe following the 1989-1990 transition were diminished by a technocratic, judicial control of politics, as well as the loss of civic constitutionalism, civil society, and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism.[23] This concept argues that the legalistic form of constitutionalism (or legal constitutionalism), while consistent with the purpose of creating the structure of the state and setting boundaries between the state and citizens, jeopardizes the development of participatory democracy.[24] In other words, this view suggests that legal constitutionalism falls short, reducing the Constitution to an elite instrument, especially in countries with weak civil societies and weak political party systems that undermine a robust constitutional democracy based on the idea of civic self-government.[25]

The concept of civic or participatory constitutionalism is based on "democratic constitutionalism" (James Tully), emphasizing that structural problems in new democracies include the relative absence of institutions for popular participation, which is also related to "counterdemocracy" (Pierre Rosenvallon), as well as robust institutional linkage of civic associations and citizens with formal politics. Critics of this approach say that it does not sufficiently take into account the rise of populism and the lack of civic interest in constitutional matters, the elite disdain for participatory institutions. Moreover, the approach does not account for the increasing irrelevance of domestic constitutionalism resulting from the tendencies of Europeanization and globalization, especially the inter-

22 Cf. C. Offe, *Designing Institutions for East European Transitions*, Institut für Höhere Studies, 1994, 15.

23 See this argument *in* P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, Routledge, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a "negative effect" in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society. See W. Sadurski, "Transitional Constitutionalism: Simplistic and Fancy Theories," *in* A. Czarnota, M. Krygier and W. Sadurski (Eds.), *Rethinking the Rule of Law after Communism*, CEU Press, Budapest, 2005, 9-24.

24 See R. Albert, "Counterconstitutionalism," *Dalhousie Law Journal*, Vol. 31, No. 1, 2008, 4.

25 *Cf.* Sadurski, 2005, 23.

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nationalization of domestic constitutional law through the use of foreign and international law in constitution-making and constitutional interpretation.[26]

(d) There was also a lack of consensus about liberal democratic values at the time of the transition. In the beginning of the democratic transition of these new democracies preference was given to general economic effectiveness over mass civic and political engagement.[27] The satisfaction of the basic economic needs of the populace was so important for both the ordinary people and the new political elites that not even constitutions really did make a difference.[28] Between 1989 and 2004 all political forces accepted a certain minimalistic version of a "liberal consensus" understood as a set of rules and law rather than values, according to which NATO and EU accession was the main political goal. But as soon as the main political goals were achieved, the liberal consensus has died,[29] and the full democratic consolidation is still better viewed as having always been somewhat illusory.[30]

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Despite the many similarities, there are also some differences between the illiberal constitutional systems and their circumstances in Hungary and Poland.[31] Besides the previously mentioned lack of constitution-making and amending power of PiS,[32] the chances of stopping the backsliding of liberal constitutionalism are better in Poland. As regards internal differences, the parliamentary opposition to PiS, which was not as compromised as its Hungarian counterpart, is much stronger. Fidesz's strongest challenger is the far-right Jobbik party, against which it is always easier to win elections, especially since Fidesz fulfils the agenda of Jobbik. Civil society is also playing a crucial role in Poland, thanks to the more active opposition movement against the Communist regime. In fact, since the end of 2015, there have been constant civic demonstrations in Poland, which with the exception of when the Orbán government was about to introduce an

26 See the reviews on Blokkers book by Jiri Priban and Bogusia Puchalska in ICONnect. <www.iconnectblog.com/2013/09/book-reviewresponse-paul-blokker-jiri-priban-and-bogusia-puchalska-on-civic-constitutionalism>.

27 Dorothee Bohle and Béla Greskovits state that East Central European democracies had a "hollow core" at their inception. See D. Bohle and B. Greskovits, *Capitalist Diversity on Europe's Periphery*, Cornell University Press, 2012.

28 See U. Preuss, *Constitutional Revolution. The Link between Constitutionalism and Progress*, Humanities Press, 1995, 3.

29 See I. Krastev, "Is East-Central Europe Backsliding? The Strange Death of the Liberal Consensus," *Journal of Democracy*, Vol. 18, October 2007, 56-63.

30 J. Dawson and S. Hanley, "What's Wrong with East-Central Europe? The Fading Mirage of the Liberal Consensus," *Journal of Democracy*, Vol. 7, January 2016, 20-34.

31 About more political differences, see S. Sierowski, "Pathetische Gesten," *Die Zeit*, Vol. 21, January 2016.

32 Although in early 2015 Fidesz lost its 2/3 majority by two votes, it seems that they are able to get these votes if necessary from the far right Jobbik party.

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Internet tax, has not happen in Hungary. On the other hand, the exceptionally powerful Catholic Church in Poland seems to support the PiS government. Fidesz can count not only on the public but also the private media, which is mostly in the hands of their own oligarchs. Orbán's main interest seems to be to build up a new financial oligarchy around himself, while Kaczyński is more ideological, including in his opposition to the EU. As Wojciech Sadursi put it, he and his people are not oligarchs, they pursue and really believe in an ideology of Poland as a proud sovereign state based on Catholic national identity.[33] In other words, while the Polish system is ideology-driven, the Hungarian system only uses ideology.[34]

The main external difference is that while Fidesz belongs to the European People's Party, the center-right party faction in the European Parliament, and the EPP needs the votes of Fidesz' MEPs to maintain its majority, PiS is member of the much less important group of Conservatives, which makes the EU more committed to stand up to violations of EU values by the Polish government.

10.5 The Use of EU's Authority and Capacity to Protect Constitutional Democracy in Hungary and Poland

Based on the Hungarian example, Mark Dawson and Elise Muir argue that the EU, instead of addressing its values directly toward Member States not complying with the principles of fundamental rights and rule of law, prefers to use indirect means of pressure, dependent on EU economic competences to a large extent.[35] But the European Union indeed has authority to protect the values of constitutionalism in the Member States. In the case of Hungary, the EU, until 2013, when the Fourth Amendment to the Fundamental Law was enacted, did not use any of its capacities. In March 2013, after the Fourth Amendment was introduced to the Hungarian Parliament, the Danish, Finnish, Dutch and German Ministers of Foreign Affairs issued a Joint Letter, which called for a new mechanism to safeguard the fundamental values of the EU, secure compliance, and for the Commission to play a greater role in it.[36] Later, upon the request of the European Parliament, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment on the Fundamental Law of Hungary.[37] With its acceptance of the Tavares

33 See Steinbeis, What is Going on in Poland is an Attack against Democracy.

34 This is the main conclusion of a Polish-Hungarian comparative study as well. See B. Magyar and M. Mitrovits, "Lengyel-magyar párhuzamos rendszerrajzok," [Polish-Hungarian parallel system drawings], *Élet és Irodalom*, August 12 and 19, 2016.

35 See M. Dawson and E. Muir, "Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law," *German Law Journal*, Vol. 14, No. 10, 2013.

36 Available at <www.Ministerie van Buitlendlandse Zaken brief-aan-europese-commissieover-opzetten-rechtsstatelijkheidsmechanisme%20(1).pdf>.

37 <www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN>.

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Report, the European Parliament has created a new framework for enforcing the principles of Article 2 of the Treaty. The report calls on the European Commission to institutionalize a new system of monitoring and assessment.

Due to the pressure, the Hungarian government finally made some cosmetic changes to its Fundamental Law, doing little to address concerns set out by the European Parliament. As none of the available tools has worked in the case of Hungary, the European Commission proposed a new EU framework to the European Parliament and the Council to strengthen the rule of law in the Member States.[38] This framework is complementary to Article 7 TEU and the formal infringement procedure under Article 258 TFEU, which the Commission can launch if a Member State fails to implement a solution to clarify and improve the suspected violation of EU law. As the Hungarian case has shown, infringement actions are usually too narrow to address the structural problem that persistently noncompliant Member States pose. This was the reason that Kim Lane Scheppele suggested to reframe the ordinary infringement procedure to enforce the basic values of Article 2 through a systemic infringement action.[39]

The new framework allows the Commission to enter into a dialogue with the Member State concerned to prevent fundamental threats to the rule of law. This new framework can best be described as a "pre-Article 7 procedure", since it establishes an early warning tool to tackle threats to the rule of law, and allows the Commission to enter into a dialogue with the Member State concerned, in order to find solutions before the existing legal mechanisms set out in Article 7 will be used. The Framework process is designed as a three-step procedure. First, the Commission makes an assessment of the situation in the member state, collecting information and evaluating whether there is a systemic threat to the rule of law. Second, if a systemic threat is found to exist, the Commission makes recommendations to the member country about how to resolve the issue. Third, the Commission monitors the response and follow-up of the member country to the Commission's recommendations.

In June 2015, the European Parliament passed a resolution condemning Viktor Orbán's statement on suggesting the reintroduction of the death penalty in Hungary and his anti-migration political campaign, and called on the Commission to launch the Rule of Law Framework procedure against Hungary.[40] But the Commission ultimately refused to launch the procedure with the argument that though the situation in Hungary raised

38 Communication from the Commission of March 11, 2014, A new EU Framework to strengthen the Rule of Law, A new EU Framework to strengthen the Rule of Law.

39 See K. L. Scheppele, "Enforcing the Basic Principle of EU Law through Systemic Infringement Procedures," in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, 105-132.

40 <www.europarl.europa.eu/news/en/news-room/content/20150605IPR63112/html/Hungary-MEPs-condemn-Orb%C3%A1n%E2%80%99s-death-penalty-statements-and-migration-survey>.

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concerns, there was no systemic threat to the rule of law, democracy and human rights.[41]

The first step to use the new Rule of Law Framework was taken by the European Commission against Poland in early January 2016. The Commission initiated a dialogue with Poland. Meanwhile, the Polish Foreign Minister asked the Venice Commission, the advisory body of the Council of Europe, for an opinion on the legal solutions contained in the amendments to the Law on the Constitutional Tribunal. The Venice Commission issued its opinion in mid March of 2016.[42] The report states that

> Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections.

Regarding the Constitutional Tribunal, it remarked:

> as long as the situation of constitutional crisis related to the Constitutional Tribunal remains unsettled and as long as the Constitutional Tribunal cannot carry out its work in an efficient manner, not only is the rule of law in danger, but so is democracy and human rights.

In early June 2016 the Commission decided to send its opinion, despite a furious statement of Jaroslaw Kaczyński, who warned that if the Commission continued to press its unprecedented rule of law procedure against Poland, the country could issue a challenge to the European Court of Justice "at any time", adding that the inquiry was "dreamed up" and went beyond what is allowed by the EU treaties.

The Polish parliamentary majority responded by adopting a new law on the Constitutional Tribunal on 7 July that leaves no doubts that they are not holding back. The law reintroduces the provisions that were already either disqualified by the Court as unconstitutional, or criticized by the Venice Commission. As a reaction to this, on 27 July, the European Commission opened the second phase of the mechanism by publishing its Recommendation. The document closely reflects the content of the Opinion, but puts more emphasis on the issue of the effective functioning of the Polish Constitutional Tribunal following, *inter alia*, the adoption of the law on the Constitutional Tribunal by the

41 Hungary: no systemic threat to democary, says Commission, but concerns remain, Press Release, December 2, 2015.

42 Opinion no. 833/2015 on Amendments to the Act of June 25, 2015 on the Constitutional Tribunal of Poland. Adopted by the Venice Commission at its 106th Plenary Adopted by the Venice Commission at its 10 Plenary Session (Venice, March 11-12, 2016). Before the Venice Commission discussed the draft report at its plenary meeting, the draft was leaked and published in the Polish daily, Gazeta Wyborcza at the end of February.

Polish Parliament on 22 July 2016. The Recommendation announced that there was "a systematic threat to the rule of law in Poland."[43] On 28 October, a day after the expiration of the deadline set by the Recommendation in a letter to the European Commission, the Polish prime minister dismissed the Commission's demand to take steps to rectify its alleged erosion of democratic standards, saying that the issue would be resolved domestically.[44] On 21 December 2016, the Commission adopted an additional Recommendation regarding the rule of law in Poland, because "there continues to be a systemic threat to the rule of law in Poland", hence the Commission invites the Polish government to solve these problems within two month, and if there is no satisfactory follow-up it will decide "whether or not to resort to the procedure laid down in Article 7 TEU".[45] The concerns of the Commission were linked to the adoption of three new laws that permitted the President of the Republic to name a temporary Constitutional Tribunal President replacing the outgoing head of the court. The new interim President's first action was to allow the three so-called 'anti-judges', unlawfully elected by the PiS majority in Sejm to assume their judicial duties suspended by the previous Tribunal President, and participate in the meeting to nominate a new President to the head of the state, who two days later appointed the temporary President as the new permanent President of the Tribunal.

On 20 February, 2017 the Polish government once again has dismissed the European Commission's demands by saying that the changes Warsaw has implemented are "in line with European standards' and that it has created "the right conditions for a normal functioning" of the Constitutional Tribunal.

There are critiques of the Framework, which were formulated in general terms, without any reference to its use in the Polish case. The UK government, for instance, criticized the proposal right after its adoption. The Cameron government raised two critical objections: the duplication of existing institutions and procedures to deal with the same issue, and the undermining of the role of Member States in the Council by the Commission's enhanced role.[46]

The British criticism was followed by some harsh concerns of the Council, first formulated in an Opinion of its Legal Service, the main argument being that the absence of solid and unambiguous Commission competence made the Framework procedure incompatible with the principle of conferral.[47] Based on this Opinion, the Italian Presi-

43 Commission Recommendation (EU) 2016/1374 of July 27, 2016 regarding the rule of law in Poland <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.217.01.0053.01.ENG>.

44 A. Erikkson, "Poland Rejcts 'Interferences' on Rule of Law," euobserver, October 28, 2016 <https://euobserver.com/institutional/135716>.

45 <http://europa.eu/rapid/press-release_IP-16-4476_en.htm>.

46 See UK House of Commons, European Scrutiny Committee Documents considered by the Committee on May 7, 2014 – Commission Communication, A new EU Framework to strengthen the Rule of Law. <www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xliii/8304.htm>.

47 Council of the European Union, Opinion of the Legal Service, Commission's Communication on a new EU Framework to strengthen the Rule of Law: compatibility with the Treaties Doc 10296/14. <http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/en/pdf>.

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dency of the Council prepared a short paper about a potential mechanism, which emphasized the exclusive role of the Council and the method of "constructive dialogue".[48] The Council endorsed both the "dialogue among all Member States" and its own exclusive role under the new mechanism

> based on the principles of objectivity, non-discrimination and equal treatment of all Member States…without prejudice to the principle of conferred competences, as well as the respect of national identities of all Member States.[49]

As Carlos Closa observed, the proposed "naming and shaming" procedure, which takes place once a year in the Council, and does not even need to be public, does not foresee any ultimate consequences.[50] Joseph Weiler on the other hand argues that the Council's dialogue approach was driven from an implicit acknowledgement of the constitutional limits imposed on the Union against the "appetite for jurisdictional and competence expansion of the Union in general and the Commission in particular."[51] Weiler, while acknowledging the mostly noble intention of the Commission by framing the states' violation of the Union's core values as one concerning the rule of law, suggests to replace the formalist notion of the rule of law with a substantive and not merely procedural content, which entails an insistence on democratic legitimation. And since neither of the two primordial features of democratic legitimization – accountability and representation – operates in the EU, Weiler concludes that although the Union should take robust actions within its competences and jurisdictional limits against Member States violating the rule of law, it should also eliminate its own democratic deficit.[52] But even regarding the Member States' democratic crisis, Amichai Magen raises the question of why it has been framed exclusively in terms of the rule of law, rather than the other foundational values listed in Article 2 TEU.[53]

Another general theoretical critique of the Framework comes from the sociological reflections of Paul Blokker, who also characterizes the EU's action as being a one-sided

48 Italian Presidency of the Council of the European Union A Fresh Start Programme of the Italian Presidency 1 July to 31 December 2014 <http://italia2014.eu/media/1349/programma en1 def.pdf>.

49 Conclusion of the Council of December 14, 2014. Press Release of the Council, December 16, 2014, PRESSE 652 PR CO 74. In October 3 the Italian government hosted the "annual rule of law dialogue" in Rome with the participation of 12 governments' representatives. <www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law/>.

50 For a detailed critique of the "dialogue," see Closa, Reinforcing EU Monitoring of the Rule of Law, 32-35, as well as P. Oliver and J. Stefanelli, "Strengthening the Rule of Law in the EU: The Council's Inaction," Special Issue of the *Journal of Common Market Studies* on the Rule of Law, JCMS, Vol. 54, No. 5, 2016.

51 J.H.H. Weiler, "Epilogue: Living in a Glass House. Europe, Democracy and the Rule of Law," in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, 313.

52 Ibid.

53 A. Magen, "Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU," Special Issue of the *Journal of Common Market Studies* on the Rule of Law, JCMS Vol. 54, No. 5, 2016.

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legalistic and formal-procedural approach.[54] He argues for consideration of "supporting circumstances" in terms of the social and political structures and cultural support within the Member States that encourage more civil participation in constitutional matters.

Similarly, Armin von Bogdandy and his colleagues argue that the most apt European response to systemic deficiencies is to combine judicial mechanisms with complementary political approach. Therefore, they propose to consider complementing their earlier "Reverse Solange"[55] approach with a "Systemic Deficiency Committee", composed of eminent figures, which should monitor the respect of fundamental European values in all Member States.[56]

Critics of the Framework's use in the case of Poland argue that the pre-Article 7 procedure of dialogue, which could lead to the Commission's advice to move on to activate Article 7, is based on the Commission's assumption that the state of rule of law is not that bad in Poland, and that it will take a lot of time, especially because the Polish government is not ready for a constructive dialogue. Therefore, reliance on the Rule of Law Framework alone, if only because of its soft and discursive nature, cannot remedy a situation where systemic violations of EU values form part of a governmental plan to set up an "illiberal" regime, as happened both in Hungary and Poland.[57]

Hence, it is a legitimate question whether the Commission should have started an Article 7 procedure in the first place, and preferably not only against Poland but against its forerunner, Hungary, at once in order to avoid that Hungary – as Prime Minister Orbán already indicated in early January on the Hungarian public radio[58] – vetoes the sanctions of Article 7, which requires unanimity.[59] But one has to also take into account that Article 7, especially in the case of new Member States, which are very dependent on

54 P. Blokker, "EU Democratic Oversight and Domestic Deviation from the Rule of Law. Sociological Reflections," in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, 2016, 249-269.

55 See J. Sargentini and A. Dimitrovs, "The European Parliament's Role: Towards New Copenhagen Criteria for Existing Member States?" Special Issue of the *Journal of Common Market Studies* on the Rule of Law, JCMS, Vol. 54, No. 5, 2016.

56 See A. v. Bogdandy, C. Antpöhler, M. Ionnidis, *Protecting EU Values – Reverse Solange and the Rule of Law Framework*, MPHIL Research Paper Series, No. 2016-04.

57 See D. Kochenov and L. Pech, "Better Late Than Never? On the European Commission's Rule of Law Framework and Its First Activation," *Journal of Common Market Studies*, Vol. 54, Issue 5, 2016, 1062-1074. Similarly "Assessing the strategic use of the EU fundamental and human rights toolboox," Working Package No. 14. <www.fp7-frame.eu>.

58 <www.politico.eu/article/poland-strikes-back-at-eu-on-media-law-frans-timmermans-stepkowski-andrzej-duda/>.

59 D. Kochenov, "The Commission vs Poland: The Sovereign State Is Winning 1-0," verfassungsblog.de, January 25, 2016. About the suggestion to start a joint Article 7 procedure against Poland and Hungary, see K.L. Scheppele, "EU Can Still Block Hungary's Veto on Polish Sanctions," politico.eu, January 11, 2016. Armin von Bogdandy sees a realistic chance that even the current Hungarian government does not stand with the PiS government in undoing Europe. See A. v. Bogdandy, "How to Protect European Values in the Polish Constitutional Crisis," verfassungsblog.de, March, 31 2016.

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EU funding, is not the most effective tool without the threat of economic sanctions.[60] In principle sanctions could concern any "right deriving from the application of the Treaties" to the Member State concerned, but Article 7(3) is unclear as the substance of the sanctions that can be imposed. There are arguments that the suspension of EU funding can be among them.[61] But even if this is the case, it is also true that economic sanctions should be backed by a strong regional consensus and strong domestic support, and neither of these conditions is currently present in Poland or Hungary.

Instead of the Article 7 approach, Brussels has chosen the very cautious pre-Article 7 option, and only against Poland. This indicates that the EU is not quite ready to treat equally serious problems equally, irrespective of the importance and the political color of the governing forces of a particular Member State. Also, the action indicates the Commission's reluctance to sanction either of these backsliding Member States. In the case of a small Member State, such as Hungary, one must keep in mind first and foremost that the governing Fidesz party delivers votes to the EPP, the largest faction at EP.[62] In the case of Poland, the main reason for the reluctance may lie in its importance of the country within the EU that is a reliable ally against Russia's threatening rhetoric. In other words, the main reason why the Parliament has not had much of an impact on rule of law development may be explained with reference to its own internal political division.[63] But the Parliament is far from being the only one to have treated the issue as a purely political one. The Commission also politically calculated its inaction in the case of Hungary and slow action regarding Poland. In other words, the Commission disengaged from conflicts that it assessed to be too costly, trying to maintain its credibility.[64] Also after the enormous blow of Brexit, EU leaders do not want to reinforce the impression that the EU is disintegrating rather tolerating non-compliance with the joint values.[65] This allowed Member States to engage in symbolic or creative compliance, designed to create the appearance of norm-conforming behavior without giving up their original objectives. The

60 See B. Bugarič and T. Ginsburg, "The Assault on Postcommunist Courts" *Journal of Democracy*, Vol. 27, No. 3, July 2016, 69-72, at 79.

61 See L. Besselink, *The Bite, the Bark and the Howl. Article 7 TEU and the Rule of Law Initiative*, Amsterdam Law School Legal Studies Research Paper No. 2016-02. University of Amsterdam, 2016, 9.

62 See this conclusion in R.D. Kelemen, "Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union," *Democratic Dysfunction*, a special issue of *Government and Opposition: An International Journal of Comparative Politics*, Vol. 52, No. 2, doi: 10.1017/gov.2016.41.

63 Sargentini and Dimitrovs, The European Parliament's Role.

64 See a similar critique of the Commission's behavior by Sophia in't Veld, rapporteur of the LIBE committee, while proposing a new proposal, known as the EU Pact for Democracy, the Rule of Law and Fundamental Rights: "The Commission will only do something when there's a problem somewhere. Political considerations play a role: is it a big country or a small country? Which parties are in government? The big leap that we need to take is that we monitor all member states on the same basis." <www.politico.eu/article/meps-call-for-better-monitoring-of-rule-of-law/>.

65 See J-W. Müller, *Hungary's Refugee Referendum Is a Referendum on Europe's Survival, Foreign Policy*, September 29, 2016.

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implication of this is that both compliance and enforcement are symbolic.[66] The Council openly formulated a harsh critique of the Rule of Law Framework, willing to replace it with the harmless approach of yearly dialogue with all Member States. In other words, besides the political unwillingness of the Parliament, there was a clear rivalry between the Council, which has been given a role by Article 7, and the Commission, mandated to act by the Rule of Law Framework.

10.6 Present and Future of Constitutionalism in Poland and Hungary

What happened in Hungary and Poland is certainly less than a total breakdown of constitutional democracy, but also more than just a transformation of the way that liberal constitutional system is functioning. Both Hungary and Poland became illiberal and undemocratic systems,[67] which was the openly stated intention of PM Orbán[68] and also PM Beata Szydło (with Kaczyński, ruling from behind the scenes as he holds no official post), describing their respective actions as a blitz to install an illiberal state.[69]

The backsliding has happened through the use of "abusive constitutional" tools: constitutional amendments and even replacement in the case of Hungary, and unconstitutional laws in Poland.[70] These two case studies have shown that both the internal and the external democratic defense mechanisms against this abusive use of constitutional tools

66 This phenomenon is convincingly proved by Ágnes Bátori through the examples of the 2010 French, 2012 Romanian and the 2010-2013 Hungarian constitutional crises. See Bátori, Defying the Commission.

67 As Jan-Werner Müller rightly argues, it is not just liberalism that is under attack in these two countries, but democracy itself. Hence, instead of calling them "illiberal democracies" we should describe them as illiberal and "undemocratic" regimes. See J-W. Müller, "The Problem with 'Illiberal Democracy'", Project Syndicate, January 21, 2016.

68 In a speech delivered on July 26, 2014 before an ethnic Hungarian audience in neighboring Romania, Orbán proclaimed his intention to turn Hungary into a state that "will undertake the odium of expressing that in character it is not of liberal nature." Citing as models he added: "We have abandon liberal methods and principles of organizing society, as well as the liberal way to look at the world… Today, the stars of international analyses are Singapore, China, India, Turkey, Russia.… and if we think back on what we did in the last four years, and what we are going to do in the following four years, than it really can be interpreted from this angle. We are … parting ways with Western European dogmas, making ourselves independent from them … If we look at civil organizations in Hungary, … we have to deal with paid political activists here…. [T]hey would like to exercise influence … on Hungarian public life. It is vital, therefore, that if we would like to reorganize our nation state instead of the liberal state, that we should make it clear, that these are not civilians … opposing us, but political activists attempting to promote foreign interests … This is about the ongoing reorganization of Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating in national interests." See the full text of Viktor Orbán's speech here: <http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnad-furdo-of-26-july-2014/>.

69 Sławomir Sierakowski, "The Polish Threat to Europe," *Project Syndicate*, January 19, 2016.

70 The category of "abusive constitutionalism" was introduced by David Landau using the cases of Colombia, Venezuela and Hungary. See D. Landau, "Abusive Constitutionalism" *UC Davis Law Review*, Vol. 47, 2013, 189-260.

failed so far. The internal ones (constitutional courts, judiciary) failed because the new regimes managed to abolish all checks on their power, and the international ones, such as the EU toolkits, mostly due to the lack of a joint political will to use them.

The democratic backsliding in Hungary and Poland as has been described here demonstrates that an institutional framework is a necessary but not sufficient element of a successful democratization. The other lesson of these case studies is, on the one hand, that the very definition of democracy is changing, and it is not necessarily liberal. On the other hand, the borders between democratic and authoritarian regimes are blurred, and there are a lot of different hybrid systems, such as the current Hungarian and Polish regimes. Another important aspect of these developments is that emerging democracies are not anymore influenced exclusively by the liberal democratic West.[71] There are economists claiming that the real question is not why are there less and less liberal democracies, but why liberal democracies still exist.[72] Others search for "post-liberalism"[73] in the wake of financial crisis, and after Brexit.

The behavior of the Hungarian government, supported by the other three Visegrád countries, among them Poland during the refugee crisis, has taught us that the strengthening of populist and extreme nationalist movements across Europe is incompatible with the values of liberal democracy, and that membership in the European Union is not a guarantee for having liberal democratic regimes in all Member States. Unfortunately, an outsize fear of threats, physical and social, lately, for instance, the refugee crisis and its main reason, the Syrian conflict, strengthened illiberal systems, such as Turkey and authoritarian regimes, such as Russia, all over Europe, and in the case of Hungary and Poland even inside the EU, not to mention the impact of Trump's presidency in the US. The division between the old and the new Member States, and the support of the far-right parties, have been strengthened even in the old Member States.[74] EU institutions have proven incapable of enforcing compliance with core European values.

71 See R. Youngs, "Exploring 'Non-Western' Democracy," *Journal of Democracy*, October 2015.

72 S. Mukand and D. Rodrik, "The Political Economy of Liberal Democracy," *Institute of Advance Study, Princeton*, 2015.

73 See J. Milbank and A. Pabst, *The Politics of Virtue, Post-Liberalism and the Human Future*, Rowman and Littlefield, 2016.

74 Regarding the constitutional crisis of the EU, Michael Wilkinson draws attention to the dangers of "authoritarian liberalism." See M. A. Wilkinson, "The Specter of Authoritarian Liberalism: Reflections on the Constitutional Crisis of the European Union," *German Law Review*, Vol. 14, 2013, 527.

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11 Constitutional Borrowing: The Case of the Monarchical Principle

Yasuo Hasebe[*]

Public law scholarship in contemporary Japan has, often unconsciously, inherited many doctrines and concepts from the era of the former constitution: the 1889 Constitution of the Empire of Japan (the Meiji Constitution). Among them, we can detect those deriving from the monarchical principle (*monarchisches Prinzip*), which the drafters of the 1889 constitution imported from southern German states, which in their turn borrowed it from the 1814 French constitutional charter. This chapter traces the trajectory of this principle, and evaluates its significance in contemporary Japan. It also examines the related concepts of 'limited monarchy' and 'imposed constitution (*constitution octroyée*)'.

11.1 The French Charter of 1814

After Napoleon's abdication in April 1814, Louis XVIII entered Paris on 3rd May, and nominated a commission to draft a constitutional charter on 18th May. The commission met four times and the king presented the Charter to both Houses of Parliament on 4th June. The word 'constitution' was not adopted because it implied collaboration between the king and his people; the word 'charter' better communicated the idea that the document was freely conceded by the sovereign to his subjects.[1]

The preamble of the Charter confirms that the foundation of the royal authority is divine providence and the historical rights of the house of Bourbon. While it asserted that the whole of political authority (*l'autorité tout entière*) resided in 'the person of the king', the Charter also admitted that previous kings modified the '*exercice*' of their powers in accordance with 'the change of the times'. Therefore, originally the king retained the plenitude of political authority, and the Charter was the result of a totally free concession on his part. He was the sole holder of sovereignty and continued to be so despite the existence of the Charter.[2] It followed that he could modify or rescind it at his will at

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1 Alain Laquièze, *Les origines du régime parlementaire en France (1814-1848)* (Paris: PUF, 2002), p. 53; Marcel Morabito, *Histoire constitutionnelle de la France de 1789 à nos jours*, 14th ed. (Issy-les-Moulineaux: LGDJ, 2016), p. 186.

2 This also implies that since the death of Louis XVII, Louis XVIII had reined France in accordance with the adage that: 'le roi est mort, vive le roi' (Morabito, supra note 1, p. 186).

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any time,[3] though the Charter contained no amendment clause. The preamble also indicates the drafters' intention to integrate the Charter with the legal system of Ancient France before 1789, which was supposed to have remained in force even during the revolutionary era.

The king effectively monopolised state powers, and he alone held executive and judicial powers. Article 57 of the Charter provided that 'all justice emanates from the king. The judicature shall be exercised, in the name of the king, by judges whom he nominates and appoints', and Article 13 provided that 'the executive power belongs solely to the king'. With regard to legislative power, while the two Houses of Parliament collaborated in deliberating and voting on the contents of legislation, the king remained the dominant organ. He exclusively retained the right to propose legislative bills (Art. 16), he was able to refuse any amendment to bills which he regarded as inconvenient (Art. 46), and he alone could sanction legislative acts (Art. 22). Furthermore, he had the power to issue 'orders necessary to implement legislative statutes and to maintain the security of the state' (Art. 14). The whole state power indivisibly belonged to the king; no genuine separation of powers was established in the Charter.

The Charter was the model for modern constitutional monarchies founded on the monarchical principle.[4] It pointed to the way for the constitutions of the Southern German states enacted in 1818-1820. In the eyes of the German princes, the Charter had the essential merits of keeping the leadership of state affairs solely in the hands of the prince and strictly restraining the powers of assembly. The German constitutions adopted the Charter's distinction between the *substance* of the state power pertaining to the prince and the *exercice* of this power in accordance with the provisions of the conceded charter.[5]

The Charter is understood as having established a typical 'limited monarchy', in which the king retains the whole state power but exercises his power only in accordance with the charter he conceded. Raymond Carré de Malberg thought that limited monarchy was in its essence similar to absolute monarchy because both regimes were founded on the monarchical principle, though in an absolute monarchy the king is absolved from any positive law. In a limited monarchy, the king is still 'the centre of the whole political life and state power'.[6] A genuine demarcating line should be drawn between regimes founded

3 Laquièze, supra note 1, p. 66. In 13 July 1815, Louis XVIII amended the clauses of the Charter regarding the election system by a royal order, which he could issue when 'necessary to implement legislative statutes and to maintain the security of the state' (Article 14 of the Charter). And Charles X's abusive use of this power in July 1830, including the dissolution of the newly elected house of deputies and suspension of liberty of the press, provoked the revolution of 1830. On this point, see Stéphane Rials, 'Essai sur le concept de monarchie limitée, in his *Révolution et contre-révolution au XIX^e siècle* (Paris: Albatros, 1987), pp. 109-11 and Laquièze, supra note 1, pp. 92-93.

4 Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham: Duke University Press, 2008), p. 104.

5 Jacky Hummel, *Le constitutionnalisme allmand (1815-1918)* (Paris: PUF 2002), p. 55.

6 Raymond Carré de Malberg, *Contribution à la théorie générale de l'État*, tome II (Paris: CNRS, 1962 [1922]), pp. 63-64; see also Rials, supra note 3, p. 121, Laquièze, supra note 1, p. 75 and Éric Maulin, *La théorie de l'État de Carré de Malberg* (Paris: PUF, 2003), pp. 113-14.

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on the monarchical principle and those that are not.[7] Whether there is a constitution or not cannot give us a genuine criterion indicating the true nature of the regime.

11.2 The Monarchical Principle in Germany

Among the constitutions of the Southern German states of 1818-1820, some were literally conceded by the princes to their subjects (e.g., Bavaria, Baden), but others were agreed between the princes and their subjects (as was done in Württemberg). Reflecting compromises between the ancient orders and new liberal principles, these constitutions established the system of the bicameral *Landtag* (state assembly), composed of a House of privileged nobles and one of deputies indirectly elected by wealthy voters. Any law affecting liberties or property was expected to be enacted with the consent of the House of Deputies; the prince has the unlimited power of legislative veto, and following the example of the French Charter, he had the power to issue orders necessary to implement legislative statutes and to maintain the security of the state. With regard to the area of public finance, no tax could be raised without the consent of the *Landtag*. However, the influence the *Landtag* could exert on the government was not considerable; the prince alone retained the power to nominate and dismiss ministers, who were responsible to him through the system of countersignature, and he alone had the power to convene, adjourn and dissolve the *Landtag*.[8]

These constitutions were based on the idea that the prince alone monopolised the state's power in its entirety, including constituent power.[9] The Constitution of Bavaria of 26 May 1818 clearly stated that 'the king is the head of state. He retains all the sovereign powers and exercises them in accordance with the provisions established by him in this constitution.'[10] The constitution is regarded as a result of a voluntary concession on the part of the prince, even where its contents are negotiated with his subjects.[11] These constitutions denied the idea that the people as a whole could be represented in the assembly, because to do so was incompatible with the monarchical principle. Under this principle, the prince was the sole representative of the body politic, and united in his hands the 'plenitude of the state power'.[12] Only the *exercise* of legislative power was

7 Carré de Malberg says that the 1791 French Constitution establishes an apparent (not genuine) monarchy, where the king derives his powers from the constitution. He is not the bearer of the state power prior to the constitution (Carré de Malberg, supra note 6, p. 64).

8 Michael Stolleis, *Public Law in Germany, 1800-1914*, trans. Pamela Biel (New York: Berghahn Books 2001), pp. 61-61; Hummel, supra note 5, pp. 48-53.

9 Ernst-Wolfgang Böckenförde, *State, Society and Liberty*, trans. J.A. Underwood (Oxford: Berg, 1991), p. 91.

10 Article 1 in the Second Title. This article was included in the Constitution on the initiative of Georg Friedrich von Zentner, who was a member of the ministerial conference drafting the Constitution. See Markus Prutsch, *Making Sense of Constitutional Monarchism in Post-Napoleonic France and Germany* (Basingstoke: Palgrave, 2013), pp. 92-93.

11 Hummel, supra note 5, p. 54.

12 Schmitt, supra note 4, p. 104.

shared between the sovereign and the *Landtag* particularly when new laws affected the liberties or property of the subjects. A constitution was regarded as a self-binding of princely power, and was not the foundation of but merely a limitation on the power. As princely power did not derive from a constitution but was merely voluntarily limited by it, competences not clearly attributed to some of the state organs were generally presumed to have pertained to the prince.[13]

However, contrary to the French Charter of 1814, in the Southern German states, it was recognised that a prince could not unilaterally revise a constitution, although he could veto any proposed revision that he regarded as inconvenient (Hummel 2002: 56). In this regard, the monarch no longer possessed the state but was merely an organ of the state as a legal person.[14] Besides, Markus Prutsch points out that while in France the objective of the monarchical principle was to re-establish the traditional authority of the crown, in Germany, the objective was to defend the political standing that the monarchs had gained during the Revolutionary age.[15]

While the monarchical principle rapidly declined in France, its mother country, in Germany it was elevated to the status of an institutionally guaranteed principle,[16] embodied in Article 57 of the Final Act of Viennese Ministerial Conferences of 15 May 1820, which stipulated that:[17]

> Since the German Confederation, with the exception of the free cities, consists of sovereign princes, the entire authority of the state must, according to the basic concepts provided thereby, remain united within the head of state, and the sovereign can be required to permit the constitutionally guaranteed assembly of the estates of the land to participate only in the exercise of certain rights.

When the assembly represented by member states of the German Confederation regarded constitutional provisions of a member state as incompatible with the monarchical principle, the Confederation could demand the state rescind and repeal the provisions. Therefore, the principle constituted an exceptional constraint on the sovereign power of the prince.[18]

The monarchical principle, which was an unstable compromise between the princely sovereign power and the aspirations of the rising liberal bourgeoisie represented in the

13 Hummel, supra note 5, p. 81. This doctrine is called the *paesumptio pro rege*.
14 Stolleis, supra note 8, p. 66.
15 Prutsch, supra note 10, p. 119. For example, Bavaria could expand its territory considerably under Napoleon's policy to create a counterweight against Austria and Prussia (ibid., pp. 74-75).
16 Böckenförde, supra note 9, pp. 90-91; Stolleis, supra note 8, p. 62; Hummel, supra note 5, pp. 71-74.
17 Zentner was also involved in the formulation of the monarchical principle in this Final Act (Prutsch, supra note 10, p. 135). I follow here the translation by Jeremiah Riemer. See <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=234>.
18 Hummel, supra note 5, pp. 71-72.

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state assembly, remained the distinctive characteristic of German constitutionalism, different from both absolutism and the UK parliamentary system. It should be noted that this principle contained a theoretical difficulty; that is, can a sovereign prince equipped with the plenitude of state power validly limit his own power?[19] Simply put, how is the thesis that the power of a prince is restricted by a constitution supported by the thesis that a prince holds the plenitude of power? If the supporting thesis is valid and the prince still retains the plenitude of power, his power is not restricted. On the other hand, if the power of the prince is genuinely restricted, he no longer retains the fullness of power. The logic of such a voluntary self-binding is contaminated with vicious self-reference, as Alf Ross points out regarding the alteration of amendment clauses.[20]

11.3 The Constitution of the Empire of Japan

After the Meiji Restoration of 1868, a popular movement to establish a national assembly swelled up. In 1875 Emperor Mutsuhito issued a proclamation that a constitutional system should gradually be established, and in 1882 he ordered Hirobumi Ito to research constitutional systems in European countries. Ito visited various constitutional scholars, including Lorenz von Stein and Rudolf von Gneist, and after returning to Japan, he prepared a draft constitution with the help of Kowashi Inoue, Miyoji Ito and Kentaro Kaneko. Karl Hermann Roesler,[21] who studied at the Universities of Munich and Tübingen, and taught public law at the University of Rostock, assisted them in his capacity as an official advisor to the Cabinet. Although there was a strong opinion among the populace advocating a British-style parliamentary system, the draft constitution they designed was based on the German constitutional system. The Constitution of the Empire of Japan was made public on 11 February 1889, with no participation on the part of the populace. It was a typical imposed constitution.

The preamble originally drafted by Roesler states that

> the rights of sovereignty of the state, We have inherited from Our ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in the future fail to wield them, in accordance with the provisions of the Constitution hereby granted.

19 Cf. Léon Duguit, *Traité de droit constitutionnel*, 3rd ed., tome 2 (Paris: Boccard, 1928), p. 775.

20 Alf Ross, 'On Self-reference and a Puzzle in Constitutional Law', (1969) *Mind*, vol. 78, 1. It should be noted that Ross himself ultimately recognised the possibility that a seemingly supreme legislature (L) can restrict or abdicate some part of its competence, merely on the presupposition that L is actually not the supreme organ and is accorded its competence by another even higher authority, which orders inferior organs to obey L until its subsequent legislature (L_1) is nominated, and then orders them to obey L_1 until the next legislature (L_2) is nominated, and so on (Ross, ibid., 21ff.). However, since the monarchical principle does not allow such an authority above the monarch, this principle cannot be rescued from the paradox in this way.

21 As to Roesler, see Stolleis, supra note 8, pp. 383-84.

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Article 4 states that 'the Emperor is the head of state, combining in Himself the rights of sovereignty, and exercises them in accordance with the provisions of the present Constitution.' It is clear that the monarchical principle was adapted from the German system and faithfully respected.[22]

While the Emperor exercised legislative power with the collaboration of the Imperial Diet (Art. 5), he convened, closed and adjourned the Imperial Diet, and had the power to dissolve the House of Deputies (Art. 7). He sanctioned laws and ordered them to be executed (Art. 6), and issued orders to implement laws, and to maintain the public order and peace (Art. 9). The Emperor nominated and dismissed ministers, who were responsible to him alone (Art. 55). The Constitution meticulously reproduced the French and German model of limited monarchy. The quasi-official commentary on the constitution, *Kenpō Gige*, made public in 1889 in the name of Hirobumi Ito, but mainly written by Kowashi Inoue, states in the commentary on Article 4, that the 'substance of sovereignty is retained by the Emperor, but it is exercised in accordance with the provisions of the constitution'. The monarchical principle, (referred to in Japan as the principle of imperial sovereignty) was maintained until 1945, when Japan accepted the Potsdam Declaration and surrendered to the allied nations.

11.4 The State=Corporation Doctrine and the Principle of Imperial Sovereignty

It should be noted that constitutional scholarship of Tatsukichi Minobe, who developed the mainstream doctrines under the Constitution of the Empire of Japan, was not founded on the monarchical principle. In a standard textbook on constitutional law he authored, *Kenpō Satsuyō*, Minobe holds that the state is a corporation constituted by people, and denies the idea that the emperor retains the whole state power prior to the constitution.[23] The emperor merely derives his powers from the constitution as one of the organs of the state. While Article 4 stipulates that 'the Emperor is the head of state, combining in Himself the rights of sovereignty, and exercises them in accordance with the provisions of the present Constitution', Minobe argues that 'we cannot attain the true nature of the state, drawing on the languages the constitution uses'.[24]

Minobe borrowed his theoretical framework from the public law theory of Germany of late 19th century. The German public law theory in this era tried to establish itself as a legal science by conceptualising the state as a corporation, and understanding various

22 Masatsugu Inada points out that Kowashi Inoue learned the monarchical principle from writings by Hermann Schulze (Masatsugu Inada, *Meiji Kenpō Seiritsu-Shi (History of the Making of the Meiji Constitution)*, vol. 1 (Tokyo: Yūhikaku, 1960), pp. 537-42. As to Schulze, see Stolleis, supra note 8, pp. 314-15.

23 Tatsukichi Minobe, *Kenpō Satsuyō (Elements of Constitutional Law)*, 5th ed. (Tokyo: Yūhikaku, 1932), pp. 15 and 23. Minobe (1873-1948) was Professor of Public Law at the University of Tokyo from 1902 to 1934.

24 Minobe, supra note 23, p. 23.

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legal phenomena surrounding the state as, for example, delegations of legal powers, interrelationships between state organs, or creation of state wills and its implementations, etc. Every legal effect in public law is, thus, to be attributed to the state as a corporation. According to Carl Friedrich von Gerber:[25]

> The public law (*Staatsrecht*) is a science of state power, and deals with such questions as: what can a state will; what organ can and should express state wills in what forms and procedures. The starting point and core of public law resides in the legal personhood (*Persönlichkeit*) of the state.

Therefore, if concepts or languages that cannot be explained in terms of this state =corporation doctrine appear on texts of the constitution, they should be excluded from the domain of public law and cast away as merely expressing 'political' ideas. Public law theory should be purified as a science 'above all from non-legal but also from the consideration of ethical and political material'.[26] According to Minobe, the text of Article 4 is a typical case expressing such 'political' or 'mythical' concept which cannot belong to constitutional scholarship.[27]

At least up to the beginning of 1930s, Minobe tried to replace the monarchical principle with the state=corporation doctrine, and to promote a British-style parliamentary democracy in Japan. The concept of sovereign who can create as well as destroy constitutional system was, for him, an incoherent oxymoronic idea. If sovereign power belonged to the emperor as an individual person, war should be regarded as his private fighting, taxes as his private incomes, and the national railway as his private enterprise, he sarcastically pointed out.[28] However, his theory was accused as foreign, treasonable, inconsistent with the principle of imperial sovereignty, and he was ferociously attacked politically as well as physically. The government publicly condemned his doctrine in 1935, and prohibited publication of his books, including *Kenpō Satsuyō*.[29]

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25 Carl Friedrich von Gerber, *Grundzüge des deutschen Staatsrechts*, 3rd ed. (Leipzig: Bernhard Tauchnitz, 1880), pp. 3-4. Sometimes the legal personhood of the state is characterised as the 'self-binding (*Selbstbeschränkung*)' of the state (cf. Georg Jellinek, *Allgemeine Staatslehre*, 3rd ed. (Kronberg: Athenäum, 1976 [1914]), p. 386). However, this conception is not contaminated with the same vicious self-reference as the monarchical principle. The concept of the state as a corporation is merely a necessary presupposition in order to construct coherently legal phenomena surrounding the state. Jellinek states that the self-binding of the state is not 'intentional (*willkürlich*)' at all (ibid., p. 386).

26 Gerber, supra note 25, p. 237; Cf. Stolleis, supra note 8, p. 318 and Yan Thomas, *Mommsen et "L'Isolierung" du droit* (Paris: Boccard, 1984), p. 32.

27 Tatsukichi Minobe, *Chikujō Kenpō Seigi (Article by Article Commentary of the Meiji Constitution)* (Tokyo: Yūhikaku, 1927), p. 73. The 'political' signifies the 'non-legal' here.

28 Minobe, supra note 23, p. 22.

29 The series of events is called the 'Tennō-Kikan-setsu (Emperor=Organ Doctrine)' incident. Emperor Hirohito himself was reported to be in favour of Minobe's doctrine. See *Honjō Nikki (Memoire by Shigeru Honjō)* (Tokyo: Hara-Shobō, 2005), pp. 203-11. General Honjō was a military officer in attendance to Emperor Hirohito from 1932 to 1936.

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11.5 The Constitution of Japan

The Constitution of Japan of 1946 was imposed by the occupying forces on the Japanese government after World War II.[30] After the war, the Japanese government was placed under the authority of General Douglas MacArthur, then the Supreme Commander for the Allied Powers. At the beginning of the occupation, the Japanese government maintained that despite the surrender, the basic legal form of the state, the monarchical principle, was still intact, and that there was no need to revise the Constitution of the Empire of Japan.

However, MacArthur repeatedly urged that the Constitution be revised as a crucial step towards implementing the terms of Japan's surrender as stipulated in the Potsdam Declaration. The government reacted by establishing a committee, chaired by Jōji Matsumoto, to consider the need for amending the Constitution. After several months of deliberation, the Matsumoto Committee produced a draft proposal, the conservative contents of which were regarded as unresponsive to the international climate of hostility towards the imperial regime. Accordingly, under orders from MacArthur, the General Headquarters of the Supreme Commander (GHQ) produced its own version of a draft constitution and urged the Japanese government to revise the Meiji Constitution on the basis of this document. The GHQ draft was drawn up in two weeks, and delivered to representatives of the Japanese government on 13 February 1946.

Although stunned by the unexpected presentation of the GHQ draft, the Japanese government finally agreed to amend the Constitution on the basis of this document. The amendment process adhered strictly to the procedure stipulated under the Meiji Constitution: the draft proposal by the government, which drew heavily on the American draft, was first presented to the House of Deputies, then reviewed by the House of Peers. Finally, with the consent of the Privy Council, the Constitution of Japan was promulgated by the Emperor on 3 November 1946, as an amendment to the Meiji Constitution.

The reaction of constitutional scholars to the new Constitution was overwhelmingly favourable. Toshiyoshi Miyazawa, who was a key member of the conservative Matsumoto committee, admitted later that upon reading the GHQ draft, he was filled with joy and became its fervent supporter.[31] Prior to reading the GHQ draft, Japanese scholars could not imagine that their country might adopt such a liberal and democratic constitution. The resulting constitutional bill of rights is quite similar to those standard in Western constitutions. Equipped with an American-style judicial review system (Art. 81), postwar Japan was reborn as a normal constitutional democracy.

30 For the facts surrounding its adoption, see Yasuo Hasebe, 'Constitutional Borrowing and Political Theory', (2003) *International Journal of Constitutional Law*, vol. 1, 224, 224-226.

31 Miyazawa (1899-1976) was Professor of Constitutional Law at the University of Tokyo from 1934 to 1959. He was a disciple of Minobe.

Although this constitution was indeed imposed upon the government, it is not true that it was imposed against the will of the Japanese people. One of the reasons that the Japanese government agreed to amend the Meiji Constitution on the basis of the GHQ draft was that the GHQ threatened to make its draft public if the government refused to do so. If the Constitution of Japan was null and void because it had been imposed, the Japanese people would have to continue living under the Meiji Constitution, which had itself been imposed upon them by Emperor Mutsuhito. In short, the contention that the Constitution of Japan is void because it was forced upon the Japanese people is untenable.

There still remains one theoretical difficulty in explaining the validity of the new constitution: can we say that this constitution is valid as an amendment of the old constitution? The amendment procedure stipulated in the Meiji Constitution was strictly adhered to when the new constitution was established, but is it possible to coherently establish a new constitution (based on the principle of popular sovereignty) as an amendment to the old constitution (based on the monarchical principle)?

Miyazawa proposed the following explanation: when the Japanese government accepted the Potsdam Declaration in August 1945, which demanded the implementation of popular sovereignty, the basic legal foundation of the Japanese constitutional system was revolutionised, and the monarchical principle was abandoned. The basis of the Meiji Constitution itself then shifted to popular sovereignty. This fundamentally transformed constitution could work as a foundation to support the legal validity of the new constitution, which could then be validated as an amendment to the transformed former constitution. This thesis, called the August Revolution thesis, is the dominant view used to explain the validity of the Constitution of Japan.[32]

11.6 Inheritance from the Monarchical Principle

Public law scholarship in contemporary Japan has inherited many doctrines and concepts from the principle monarchy, which very few, if any, would regard as legitimate principle of constitutional law. It is also contaminated with a logical defect as well, since it cannot coherently explain how the sovereign monarch remains to be sovereign while restrained by the constitution he himself conceded.

However, the fact that the origins of these concepts can be traced to the principle does not necessarily entail that we should discard these concepts. For example, whether we should still retain the idea that legal norms affecting rights or liberties of the people are to

32 Cf. Yasuo Hasebe, 'The August Revolution Thesis and the Making of the Constitution of Japan', (1997) *Rechtstheorie*, Beiheft 17, 335; Chaihark Hahm and Sung Ho Kim, *Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea* (Cambridge: Cambridge University Press, 2015), pp. 145-57. In this case too, we cannot coherently claim that the emperor conceded his sovereignty to the people on the basis that his sovereignty includes the competence to concede his sovereignty to other person. Such a presupposition is contaminated with vicious self-reference.

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be enacted by Parliament (*Vorbehalt des Gesetzes*)[33] should be decided by such considerations as whether there is any better alternative idea that can clearly indicate the domain that is to be reserved for Parliament. The same consideration could be applied to the idea that the substantive concept of the executive power is to be defined only passively, that is, the remains of the whole state power after the legislative and judicial powers are deducted. If there is no better alternative, we should retain this passive concept however unsatisfactory it seems.

On the other hand, as to the idea that the powers that cannot be clearly attributed to any organ are to be presumed to belong to Parliament because Parliament is the 'supreme organ of the state power' (Article 41 of the Constitution of Japan), we cannot support this idea by making recourse to the analogy with the *paesumptio pro rege*.[34] Under the monarchical principle, because the monarch originally retains the whole state power prior to the constitution, powers not clearly attributed to any state organs by the constitution may be presumed to belong to him. However, under the Constitution of Japan, Parliament is not the sovereign that retains the whole state power prior to the constitution. Instead, we might make recourse to the essential matters doctrine (*Wesentlichkeitstheorie*) in order to support the presumption for Parliament.

Similarly, since the emperor is no more the holder of the entire state power prior to the constitution, his powers are limited to those accorded by the current constitution. As Article 4 provides, the emperor 'shall not have powers related to government', his powers are merely nominal and ceremonial ones from the outset. He is an apparent (not genuine) monarch.[35]

11.7 Imposed Constitutions[36]

If a constitution is imposed on a people without their full agreement, that is an imposed constitution. Inherent in this concept is the assumption that constituent power belongs to the people. Therefore, a constitution that the monarch concedes to his subjects (*constitution octroyée*) is also a kind of imposed constitution. The French Charter of 1814 is a

33 As Article 57 of the Final Act of Viennese Ministerial Conferences states, the monarchical principle implies that 'the sovereign can be required to permit the constitutionally guaranteed assembly of the estates of the land to participate only in the exercise of *certain rights*' (the author's emphasis). However, in Japan, Minobe's view that people's liberties in general require the consent of Parliament for their limitation has become the ruling doctrine. In other words, limitation of liberties not enumerated in the constitution still requires the consent of Parliament.

34 See the text corresponding to note 13 above.

35 See note 7 supra.

36 This section derives from my article 'constitution, imposed' in *The Max Planck Encyclopaedia of Comparative Constitutional Law*. This article was discussed at National Taiwan University in Mach 2016 as well as at the University of Melbourne in August 2016. I am greatly indebted to the participants there, including Wen-Chen Chang, Jiunn-rong Yeh, and Cheryl Saunders.

model case that influenced the conceded constitutions of Southern German states of 1818-1820, and indirectly the Constitution of the Empire of Japan of 1889. If a constitution is imposed, it is usually supposed that it lacks legitimacy because the people themselves, as the inherent holders of constituent power, should be able to establish their own constitution.

Sometimes a part of people imposes a constitution on the rest of a country. After the Civil War in the United States, the triumphant Republican Congress excluded representatives from the Southern states, and proposed that the Fourteenth Amendment should be ratified, which ten of the eleven Southern states rejected. Congress enacted a series of Reconstruction Acts in 1867, which divided the ten Southern states into five military districts and placed the Union Army in control of any further statehood.[37] The commanding generals were authorised to call constitutional conventions, and Congress inspected whether newly enacted state constitutions were truly 'republican'. Moreover, Southern representatives were admitted into Congress only after each state legislature ratified the Fourteenth Amendment.

Similarly, we may say that after World War II the Constitution of the Republic of China, enacted on 25 December 1946 and promulgated on 1 January 1947, was imposed on Taiwan by the Kuomintang government without any meaningful democratic participation from the people in Taiwan.[38]

Because the concept of the imposed constitution is predicated on the theory of the constituent power (*pouvoir constituant*) of the people, the concept loses its pertinence to a large extent if the theory cannot explain the validity and legitimacy of constitutions.

There are several reasons why the concept of constituent power is unnecessary to justify or legitimise a constitution.[39] First, the idea that an assemblage of individuals not yet constituted as a people – because the constitution is not yet established – can establish a constitution as an autonomous agent is oxymoronic. Second, the fact that a majority of a people at a certain time consented to a constitution does not mean that the said constitution will always remain legitimate. Third, the logical difficulty infecting the monarchical principle also infects the principle of popular sovereignty. As noted before,[40] the logic of a voluntary self-binding on the part of the sovereign is contaminated with vicious self-reference.

Russel Hardin points out that because the basic function of a constitution is to coordinate interactions in society, what is essential is not the agreement of the people but

37 Bruce Ackerman, *We the People*, vol. 2, *Transformation* (Cambridge, Mass.: Harvard University Press, 1998), p. 110.

38 Wen-Chen Chang, 'East Asian Foundations for Constitutionalism: Three Models Reconstructed', (2008) *National Taiwan Law Review*, vol. 3, 111, 121-24; Jiunn-rong Yeh, *The Constitution of Taiwan: A Contextual Analysis* (Oxford: Hart Publishing, 2016), pp. 28-30.

39 Yasuo Hasebe, 'On the Dispensability of the Concept of Constituent Power', (2009) *Indian Journal of Constitutional Law*, vol. 3, 39.

40 See the last paragraph of Section 2 above.

their acquiescence to the constitution.[41] Joseph Raz argues that constitutions are inherently self-validating. 'They are valid just because they are there, enshrined in the practice of their countries.'[42] According to Raz, a constitution is legitimate as long as it is effectively working as a constitution, and remains 'within the boundaries set by moral principles'. It does not derive its authority from the authority of its authors. If Hardin and Raz are right, then the concept of constituent power is dispensable, and along with it the pertinence of the concept of the imposed constitution would be lost.

41 Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999), pp. 85-90. Hardin says 'If a constitution is to be stable, it must be self-enforcing, it must be a co-ordination, because the nation cannot go to a supranational agency to enforce its citizens' contractual agreement with each other or with their government' (ibid., p. 98).

42 Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', in Larry Alexander, ed. *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), p. 173.

12 Changed Vocabularies: A Few Semantic Ambiguities of Network Constitutionalism

Bogdan Iancu[*]

12.1 Introduction

A skeptical poise and distance from ready-made frames of reference are the better part of constitutionalist valor.[1] The dominant discourse in the growing literature on international or transnational – more recently, even "global" – constitutional law or constitutionalism assumes or asserts that the migration and cross-hybridization of ideas, values, procedures associated with national constitutionalism and constitutional law would represent an unmitigated international public good. This is arguably the case in both directions envisioned or represented by the growing internationalist doctrine: the argument of increased homogeneity at the national level as a result of international codification and advocacy of "best practices" and that of increased "constitutionalization" of international structures.

To be sure, there is much to be celebrated in the post-WWII permeation of international guarantees into the once sovereign realm of nation state constitutions; the evolution of the ECtHR's jurisprudence, constitutionalizing human rights within the Council of Europe system gives, for instance, ample reasons for a triumphalist narrative. The metamorphosis of the European Union into a hybrid political object, which borrows or mimetically approximates some of the features of national constitutions (rights, separation and balance of powers, parliamentary procedures, etc.), is also an apposite case in point for advocates of constitutionalism beyond the nation state.

Nonetheless, many processes, phenomena, and institutional developments associated in the celebratory line of thought with the umbrella concept of "international constitutionalism" are fraught with ambiguity and uncertainty. In many cases, "international constitutionalism" is a counter-concept rather than an extension. To wit, the laundry lists of criteria included under "good governance" structural convergence standards and good practice guidelines, albeit formulated in constitutionally recognizable language (democ-

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1 András Sajó, *Limiting Government: An Introduction to Constitutionalism* (Budapest and New York: CEU Press, 1999).

racy, the rule of law, judicial independence), do not necessarily have the same meanings as their nominal counterparts in constitutionalism and constitutional law. Moreover, at the interface of international soft or hard law guarantees and national fundamental law practices, competing quasi-constitutional discourses have emerged (for instance, anticorruption or apolitical expertise), whose policy-oriented implications are not necessarily, at least not automatically, constitutionalism-inducing. Furthermore, the exponential emergence and cross-hybridization of ostensibly neutral networks and institutions as a result of international "juridification" presents, from a classical perspective, significant problems of accountability and legitimacy (calling these processes "network constitutionalism" obfuscates a clear grasp of such phenomena and their constitutional effects).

The chapter will exemplify some of the perplexities of network constitutionalism using the example of "Europeanization" via interactions between the European Union Commission, the Venice Commission, and the Romanian Constitutional Court. The general connotations of institutional neutrality will be explored against the backdrop of recent developments related to the redefining of the concept of judicial independence by amendment, constitutional interpretation, institutional discourse, and "soft law" instruments. Romania was subject to much more stringent pre-accession and post-accession conditionalities than the previous, 2004 CEE accession states, at a time when the Commission, as master of the conditionality, could conceptually distil and refine its initially haphazard Copenhagen checklists. The country is therefore a "prototypical" case study of the ambivalence and tensions embedded in multi-level constitutional interactions.[2]

Pre-accession monitoring by the EU Commission and the post-accession obligations undertaken by Romania through the Act of Accession of Romania and Bulgaria (Arts. 37-38) have for example brought about an intensely dynamic phenomenon of neutralization in the fields of anticorruption policies and judicial independence. The two issues are related in the broader constitutional context, both national and European. Romania has entrenched an autonomous High Judicial Council in 2003, through constitutional amendments undertaken in view of preparations for membership, to the effect that the judiciary (which, in Romania, encompasses both judges and prosecutors as "magistrates"), was insulated from social and majoritarian political influences. An Anticorruption Prosecutor's Office was simultaneously established, with attributions related to the prosecution of high- and medium-level corruption. Although it is formally a part of the "Public Ministry", the structure is functionally autonomous by virtue of symmetrical appointment procedures and terms of office applying to the Prosecutor General and the Chief Prosecutor of the General Anticorruption Directorate, respectively. Whereas the latter is formally subordinated to the former, both are appointed in the same way (by the President, upon the nomination by the Minister of Justice, following the receipt of a

2 See Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law," *American Journal of Comparative Law*, Vol. 55 (2005), p. 125.

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consultative opinion on the candidate by the High Judicial Council), for fixed three-year terms, renewable once. An autonomous administrative authority, the National Integrity Agency, with attributions in the fields of asset verifications, conflicts of interest, and incompatibilities, was also created, at the behest of the EU (the fulfillment of this obligation was a formal conditionality of Romania's 2007 accession, monitored through the ongoing instrumentality of the Cooperation and Verification Mechanism). Although not all fit the strictly legal definition of an *autonomous administrative authority*, the high judicial council, the anti-corruption prosecutor, and the integrity agency function effectively as "independent agencies", i.e., functionally self-standing structures, endowed with large degrees of autonomy both in terms of insulation from political and social control and with respect to their autonomous capacities to interpret and reinforce, i.e., determine the scope of their mandates.

The conceptual and institutional interplays generated by these institutional processes and enhanced by the porous nature of the overhanging general mandate (the fight against political corruption) have resulted in contradictory constitutional developments, modifying, by virtue of sophisticated ratchet and ripple effect mechanisms, the functioning of the local constitutional system. For instance, the autonomy of the judiciary from any external influence is, in a bootstrapping and ratchet effect logic, both predicated upon and serves to justify the struggle against corruption. Celebratory discourses about neutrality have certain problematic implications, for example shift in the meanings of established constitutional institutions and procedures (parliamentary immunities or the exercise of presidential attributions), which are placed under stress by the emphasis on neutrality, without reference to the logic of such concepts in local or comparative constitutional traditions and law.

In what follows, I will argue that the neutral nature of the EU Commission, that of a supranational counterpart of an "independent" or "autonomous" administrative agency at the national level, will produce negative effects when the institution, initially designed to serve primarily regulatory purposes, is called upon to reduce complex problems of value and context, which surpass its functional capabilities. A second articulation of this chapter will inquire into the effects of this mandate shift or overreach, namely the transformation of value-laden concepts entrenched in the practice and philosophy of limited government into often oversimplified, instrumental imperatives of "good governance," such as the laundry lists of criteria, which have been imposed or advocated by the Commission under its ostensibly qualitative monitoring of political conditionalities.[3] In the end, I will exemplify the way in which multilevel constitutional interactions can pro-

3 *See*, on qualitative vs. quantitative assessment and trade-offs by international organizations, the comparison by Nikhil K. Dutta, "Tradeoffs in Accountability: Conditionality Processes in the European Union and the Millennium Challenge Corporation," in S. E. Merry, K. E. Davis, and B. Kingsbury (eds.), *The Quiet Power of Indicators – Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015), pp. 156-196.

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duce shifts in the meanings of inherited concepts and practices with the metamorphosis of the notion of judicial independence in Romanian constitutional law practices. In essence, I argue that the ensuing de-contextualization and de-politicization of this concept is fraught with ambiguity and serves as a cautionary tale for the dark side of transnational interactions. The argument is not a *sub rosa* melancholy defence of a return to the nation state constitutionalism. This chapter serves the more modest role of a rejoinder to mainstream triumphalist narratives, advocating implicitly for more contextualized, historically and conceptually fine-grained interactions within the expanding "European constitutional space".

12.2 Agencification and Constitutionalism

"Independent agencies" have initially emerged as a peculiarity of the separation of powers structure and the incapacity to fit regulatory attributions within the classical branches of US government. State railroad regulation commissions were established in the second part of the nineteenth century, autonomous from the political branches. The Interstate Commerce Commission, created at the federal level in 1887, followed this blueprint. The model was taken up again in 1914, when the Federal Trade Commission Act provided for a body with broad enforcement competence in the fields of cartelization, restraints of trade and unlawful trade practices. Here, independence (autonomy; neutrality) from the political branches resided in the fact that these agencies were staffed with bi-partisan appointees and, unlike executive officeholders, commissioners could not be dismissed by the president arbitrarily ("at will") but only removed for cause (malfeasance, neglect of duty, gross inefficiency and the like). Idiosyncratically American power politics played a certain role in the rise of this institutional innovation later on, during the New Deal: Congress sought best not to entrust vast, discretionary prerogatives to the Executive, in the hope that fragmentation would preclude presidential aggrandizement. Conversely, attributions were broadly specified also as a result of objective uncertainties related to the nature of modern social and economic regulation. The model of the independent commission took hold of the administrative imaginary of the New Deal,[4] when a congeries of new agencies were created, with sectoral regulatory powers ranging from labor relations (NLRB) to the stock exchange market (SEC) or the policing of broadcasting (FCC).

4 An emblematic example is James Landis's contemporaneous pamphlet, *The Administrative Process* (New Haven: Yale UP, 1938), where the author cavalierly dismisses the separation of powers theory, arguing that there were no reason why there should have been three, rather than four or five or any number of powers in modern government. Landis was a prominent and enthusiastic New Dealer and his affirmations have to be understood in their context but contemporary variations on this theme are not uncommon.

From the very beginning, it was difficult in the jurisdiction of origin to justify with precision the independence of such commissions from democratic politics: was independence justified since the administrative tasks performed, for instance standard-setting, were strictly related to the application of scientific knowledge to fact ("expertise")? Or perhaps was expertise, contrariwise, created and fostered by institutional neutrality? Was impartiality rather than expertise the dominant factor and, should autonomy be predicated primarily upon impartiality, were the courts not the natural choice for impartial adjudication? Were both expertise and impartiality mutually reinforcing justifications for insulation from majoritarian politics?

These are not only important questions theoretically, as stress on a particular premise has practical, positive-legal implications and consequences. Constitutional law proper has traditionally experienced an almost intractable uneasiness with accommodating these innovations in the classical framework of separation of powers.[5] The normative logic of constitutionalism and constitutional law still revolves conceptually around the classical triad of functions and branches.[6] It is telling that, when the Supreme Court of the United States gave its imprimatur to the novelty, by upholding the constitutionality of the Federal Trade Commission Act, in the landmark 1935 case of *Humphrey's Executor v. United States*, it did so with a muddled, hesitant rationale, namely, that the removal of the Commission from direct presidential control was justified by virtue of the fact that the Commission's powers were neither executive nor could they squarely fall under the one of the functions exercised by the other branches. According to the Court's reasoning, the functions of the FTC were of a mixed nature, "quasi-legislative" and "quasi-judicial".[7] This qualification validated in effect an amalgamation of institutional structures whose common denominator was only that they stood apart from direct control by the political branches, yet whose autonomy could not be analogized fully to that of courts or even national banks and thus explained normatively in inherited categories.

In the wake of *Humphrey*, a cluster of commissions, boards, tribunals were created in the interstices of the three classical powers, as a "headless fourth branch" of government,[8] an institutional cluster that evinces neither a clear hierarchy nor a coherent point of ascription for assigning legitimacy and accountability. Whereas, at the beginning, the

5 András Sajó, "Independent Regulatory Authorities as Constitutional Actors: A Comparative Perspective," in *Annales Universitas Scientiarum Budapestinensis de Rolando Eötvös Nominatae, Sectio Iuridica* XLVIII (2007), pp. 5-51, at p. 5: "Regulatory authorities constitute a constitutional dimension that is not captured in constitutional theory. Independent authorities challenge the triadic arrangement separation. Doctrines of separation of powers have difficulties in accommodating the organizational anomaly of independent authorities. If they are not made visible on the constitutional landscape a major sphere of decision making and state activity will exist outside democratic control deprived of constitutional values."

6 Administrative law is no exception. Bruce Ackerman, "Good-bye, Montesquieu," in Peter L. Lindseth and Susan Rose-Ackerman (eds.), *Comparative Administrative Law* (Cheltenham, Edward Elgar, 2010), pp. 128-133.

7 *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

8 President's comm. On admin. Management, report with special studies 37 (1937).

independent commission model was embraced wholeheartedly by progressive academics and practicing lawyers alike, the constitutional equivocations inherent in this novelety relented, as evidenced for instance by Justice Jackson's 1952 observation that

> [t]he mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.[9]

In the United States, the place of origin for the independent agency model, the initial trend was slowly reversed. Newer regulatory bodies, created in the 1970s, like the Environmental Protection Agency, have been for instance attached to the Executive Branch. Administrative law doctrines followed course, in step with newer practices. The so-called *Chevron* deference in modern administrative law was explained by the Supreme Court not by reference to expertise but by pointing out that the legitimacy of discretionary choices taken by the EPA flows from the nationwide democratic legitimacy of the president who appoints and oversees agency heads.[10] The courts have to yield (defer) to "reasonable" interpretations of vague legal provisions and departures from prior interpretations not because the commissioners were experts in their field of competence but because democratic politics have in such hypotheses the final say. Legal developments were reinforced and confirmed by functionalist studies on the impact of autonomy, beginning with Marver Bernstein's 1955 book on regulation by independent commission.[11] The functionalists pointed out that autonomy from democratic politics is fraught with shadowy implications, which include the possibility of capture by organized business interests, in the case of business regulation commission, tunnel vision, "ossification", etc. The gist of this line of argument was that a complete elimination of political control does not necessarily entail the consequence that such institutions would not be controlled by other, less ostensible and thus less accountable forces and influences.

9 Jackson, J., dissenting in *Federal Trade Commission v. Ruberoid Co.* 343 U.S. 470 (1952).

10 See *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, at 843-844: "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

11 Marver H. Bernstein, *Regulating Business by Independent Commission* (Princeton, NJ: Princeton University Press, 1955).

12.3 Agencification and De-Politicization: The Language of Governance

In the rest of the world and at first sight paradoxically given the mixed experiences with this institutional pattern in the country of origin, the autonomous commission model was embraced enthusiastically. In a recent comparative, primarily taxonomical survey of the global tendency towards autonomous agencies, contemporary processes of agencification have been aptly dubbed as a "rise of the unelected."[12]

In addition to rephrased explanations of older American doctrines concerning administrative independence, newer elaborations of autonomy from majoritarian democracy have been tested to account for these phenomena. The influential argument proffered by Juan Linz builds for example on the ideal-type of national banks, explaining the need for autonomy from democratic choice as a direct implication or function of policy credibility. As his thesis runs, modern societies are dominated by policy imperatives with a much longer implementation span than that afforded within the constraints of representative democracy. Since the election cycle ordinarily straddles brief segments of two (American House of Representative) to six years (French or US Senate), structures must be put in place and entrenched that are insulated in the exercise of their functions from political pressures exercised by electioneering politicians.[13] Autonomous regulation cannot be manipulated for political purposes and regulatory mandates (and specific policies) can thus be pursued consistently over long periods of time. Other explorations gloss on the resilient expertise/impartiality dilemma. Frank Vibert, for instance, distinguishes between value choices, which are best left to democratic decision, and policy choices based on empirical, scientifically obtained and tested information, which are best delegated to the neutral expert. The line between democratic bodies and the new branch of unelected commissions, agencies, tribunals, etc., is in this logic constantly reinforced from both sides of the spectrums, as self-effacing experts in the agency stand apart from politics and solve minute problems, providing in turn democratic forums with the requisite knowledge for making better-informed, value-driven political decisions.

Such explanations, albeit appealing at the level of overarching theory, are assailable in point of fact. National banks have traditionally constituted a limited and qualified institutional exception to democratic accountability. It is historically true that the Bank of England was created roughly at the same time (1694) as Parliament secured a place for the principle of judicial independence in the 1689 Bill of Rights. The historical rationales behind creating and entrenching – respectively – both kinds of institutions (bank and courts) were analogous. By the same token, the degree of autonomy of national banks from direct political influence has traditionally differed from one system to another.

12 Frank Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge: Cambridge UP, 2007).

13 *See* Juan J. Linz, "Democracy's Time Constraints," *International Political Science Review*, Vol. 19, No. 1 (1998), pp. 19-37.

Moreover, the reason why it is systemically important to detach direct political access to monetary policy cannot be easily extrapolated to other fields where autonomous structures have been recently created. Likewise, leaving aside the optimism in the self-effacing, apolitical bureaucrat (which is the latent profession of faith behind such accounts), the line between policy and politics, values and expertise, runs very thin in many minute issues, spanning from standard-setting to GMOs and is almost non-existent in many case, such as Ombudsmen, or non-discrimination and human rights administrative tribunals.

In spite of the doctrinal-theoretical ambiguities of neutrality, the phenomenon of agencification is an impending reality that cannot be ignored. Part of the reason for the spread of neutral agencies across systems, particularly in developing countries and fledgling constitutional systems, can be found in the global discourses of "governance," as promoted by international organizations and institutions starting with the early 1990s. Good governance criteria, as synthesized by the World Bank, IMF, OECD, etc., include benchmarks that are phrased in policy, output efficiency terms ("anticorruption," "government effectiveness," "regulatory quality"), which invite or presuppose apolitical mechanisms of implementation.[14] The term "governance" as such is a "neutral" counter-concept to the politically and historically laden term "government." Recent studies of governance as an emerging discourse differ in their attempts to capture this fleeting, insufficiently crystallized notion but a common denominator of definitions is that governance as a counter-concept to government presupposes a number of emphasis changes or predilections. These include a shift from hierarchy to *heterarchy* ("network"), a transition from normativity to non-normative criteria and indicators (output efficiency and issue fragmentation) and from majoritarian politics to policy decision making by experts.[15] The good governance discourse has practical implications when, for example, a structural adjustment program attached as conditionality to a loan includes recommendations for the creation of specific neutral institutions. Sometimes such recommendations are formulated as soft law instruments but disparities of power and prestige, as well as pressures from norm entrepreneurs,[16] lend them in practice more weight than that attached to formal international public law obligations.

14 For instance, the World Governance Indicators (WGI) used by the World Bank since 1996 to rank economies in terms of their governance performance are "Voice and Accountability", "Political Stability and Absence of Violence", "Government Effectiveness", "Regulatory Quality", "Rule of Law" and "Absence of Corruption." <http://info.worldbank.org/governance/wgi/index.aspx#home>.

15 Christoph Möllers, "European Governance: Meaning and Value of a Concept," *Common Market Law Review*, Vol. 43 (2006), pp. 313-336; Bo Rothstein, "Good Governance," in David Levi-Faur (ed.), *The Oxford Handbook on Governance* (Oxford: Oxford University Press, 2012), pp. 143-154; Lorenz Engi, "Governance-Umrisse und Problematik eines staatstheoretischen Leitbildes," *Der Staat*, Vol. 47, No. 4 (2008), pp. 573-587.

16 Significant resources are also spent to promote good governance (legislative and institutional) reforms. According to a 2006 estimate, the World Bank alone had funded 330 'rule of law' projects with $ 2.9 billion since 1990 (David Trubek, "The 'Rule of Law' in Development Assistance: Past, Present and Future," in

At the level of regional phenomena such as the consolidation of the EC/EU, explanations can be more easily isolated for the expansion of institutional independence from democratic politics. The initial Communities were institutionally built around autonomous bodies (High Authority, Commission of the European Communities, European Commission). As long as the attributions of these bodies could be envisioned as limited and primarily regulation-oriented, the nature of the Communities/Community/Union could also be depicted as inherently administrative, whereas the autonomy from majoritarian politics of the Commission itself could be accounted for in the familiar expertise paradigm. This is essentially the tenor of Majone's 1996 argument: "Statutory regulation by independent agencies … is rapidly becoming the most important mode of regulation, indeed the leading edge of public policy-making in Europe."[17] The same themes (expertise, autonomy, and administration rather than politics) inform Peter Lindseth's thesis concerning the essentially administrative character of supranationalism.[18] Both accounts build on an common presupposition, namely, that there is a neat dichotomy between supranational administrative/expert institutions and constitutional democracy, whereby the political values of constitutionalism, on the one hand, and those of politically neutral (national and supranational) administration, can develop symbiotically, side by side, and be reconciled.

This presupposition has been qualified and challenged by two interrelated developments. First, it is hard now to describe the current Commission only in the key of neutral regulation, i.e., as a supranational instantiation of national independent agencies. The Treaty of Lisbon has further "parliamentarized" the process of appointing the president of the European Commission, by linking it directly with European parliamentary results. Politically, the results of the *Spitzenkandidaten* controversy have reasserted at the level of practices this solution, lending more credence to the supranational analogy (however imperfect) with a national government. Second, the powers of the Commission have clearly transgressed the regulatory divide ever since the start of the accession negotiations with the countries that joined the Union in 2004. The monitoring of political conditionality as part of the 1993 Copenhagen criteria resulted in the effect that the Commission was endowed with significant leverage (as "master of the conditionality") in defining broad, almost metaphysical terms such as "rule of law" and imposing particular interpretations of these requirements on the eager, primarily post-communist candidates. The

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Trubek, David and Santos, Alvaro (Eds.), *The New Law and Economic Development* (New York: Cambridge UP, 2006), pp. 74-94, at p. 74).

17 Giandomenico Majone, *Regulating Europe* (New York, London: Routledge, 1996), at p. 47.

18 Peter L. Lindseth, "Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community," *Columbia Law Review*, Vol. 99, No. 3 (April 1999), pp. 628-738 and (same) *Power and Legitimacy-Reconciling Europe and the Nation-State* (New York: Oxford University Press, 2010).

political *acquis* was from the very beginning a blanket mandate to spread democracy and the rule of law in the post-communist "wilderness".[19]

Even though not all the Commission preferences were adopted and although such preferences and demands have differed significantly in their definition and imposition from one state to another, trends can be observed, for instance a growing predilection for certain criteria as dominant (e.g., anticorruption) and a clear preference for certain institutional blueprints (for instance judicial reforms in the form of autonomous judicial councils). Some accession states have resisted the pressures to conform; for example, Slovakia adopted the Judicial Council "Euro-Model" in 2002, in the same year as Estonia did, Latvia resisted initially, whereas the Czech Republic has consistently refused.[20]

These variations can be explained both as a consequence of contextual differences and asymmetries of power. The monitoring of the 2004 candidates followed a softer path of persuasion to adopt this institutional form or to ratify anticorruption conventions to which some of the older Union members were not parties. But Romania and Bulgaria, in a much weaker position[21] and faced with a stronger Commission, were compelled to reform their judiciaries by adopting the judicial council model tale quale, "as it was,"[22] and were in addition subjected to post-accession conditionality along anticorruption and judicial reforms benchmarks.[23] Between the two aspects, namely, quasi-politicization of the regulatory Commission model at the level of the Union and the ambivalent nature of the *acquis* impact on the political systems of the newer Member States and on the Commission itself, there is a mutually reinforcing interrelation. For instance, the inclusion of

19 W. Sadurski, A. Czarnota, M. Krygier, *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy, and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer, 2006).

20 David Kosař, Michal Bobek, "Global Solutions, Local Problems: A Critical Study in Judicial Council in Central and Eastern Europe," *German Law Journal*, Vol. 15, No. 7 (2007), pp. 1257-1292 and (same) "Euro-products" and Institutional Reform in Central and Eastern Europe: A Critical Study in Judicial Councils", in Michal Bobek (ed.) *Central European Judges under the European Influence: The Transformative Power of the EU Revisited* (Hart Publishing: Oxford and Portland, OR, 2015), pp. 165-196; David Kosař, *Perils of Judicial Self-Government in Transitional Societies* (New York: Cambridge University Press, 2016). For an early, unheeded warning on the implications of systemic judicial autonomy in the CEE context, see András Sajó and Vera Losonci, "Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?", in D. Greenberg et al (eds.) *Constitutionalism and Democracy-Transitions in the Contemporary World* (New York: Oxford University Press, 1993), pp. 321-335.

21 Mihaela Serban, "Rule of Law Indicators as a Technology of Power in Romania," in S. E. Merry, K. E. Davis, and B. Kingsbury (eds.), *The Quiet Power of Indicators-Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015), pp. 199-221.

22 Anja Seibert-Fohr, "Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle," *German Yearbook of International Law*, Vol. 52 (2009), p. 405; Daniel Smilov, "EU Enlargement and the Constitutional Principle of Judicial Independence," in Adam Czarnota, Martin Krygier, and Wojciech Sadurski (eds.), 2006; See also, Cristina Parau, "The Drive for Judicial Supremacy," in Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (Heidelberg, Berlin: Springer, 2012), pp. 619-665.

23 P. W. Schroth and A. D. Bostan, "International Constitutional Law and Anti-Corruption Measures in the European Union's Accession Negotiations – Romania in Comparative Perspective," *American Journal of Comparative Law*, Vol. 52 (2004), pp. 625-711.

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ever more stringent and focused anticorruption standards on the 2004, 2007, 2011 accession countries and current candidate countries[24] has resulted, by virtue of a ratchet effect, in the creation at the level of the Union of a corruption monitoring mechanism, in essence by fiat or – put more mildly – by soft law.[25]

The implementation of political conditionality criteria and particularly the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania, in the context of Hungarian and Romanian constitutional backsliding in 2011 and 2012,[26] have prompted Justice Commissioner Reding to recommend a Post-Accession Copenhagen for Europe,[27] a mechanism that would scrutinize all member states for conformity with the rule of law and democracy (as benchmarked by the Commission). This mechanism has in the meanwhile been created, as another soft law monitoring structure, pegged on the relatively tenuous legal basis of *lex Austria*, Article 7 TEU. Resistance by the Council to this bootstrapping endeavor and arguments according to which such changes should go the formal way of treaty amendments are met by the Commission and academia alike with resistance or even derision. A recent commentary refuted such objections (changes ought to be formal and follow procedure and democratic choice) as "asking turkeys to vote for Christmas." It is unclear whether Christmas in this allegory would be the Commission or the rule of law but one understands unequivocally that the democratic nation state stands for the proverbial turkey.[28] It is difficult to argue the case for the nation state in a context where reform backsliding and tendencies towards authoritarianism are undeniable realities.[29] Context aside, the partial translation as such of constitutionalism to the supranational level would not in itself be problematic, should the new structural setting be able to produce discourses equivalent in sophistication, and norms and institutions comparable functionally to those which evolved in the best tradition of nation state constitutionalism.

24 Patrycja Szarek-Mason, *The European Union's Fight Against Corruption-The Evolving Policy Towards Member States and Candidate Countries* (Cambridge, Cambridge UP, 2010).

25 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0308>.

26 See generally, on Romanian 2012 developments, "Bogdan Iancu, Separation of Powers and the Rule of Law in Romania: The Crisis in Concepts and Contexts," in A. von Bogdandy and P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Oxford: Hart Publishing, 2015), pp. 153-169 and the analysis of the developments in Bianca Selejan-Guțan, *The Constitution of Romania: A Contextual Analysys* (Oxford: Hart, 2016).

27 <http://europa.eu/rapid/press-release_SPEECH-13-348_de.htm>.

28 Dimitry Kochenov and Laurent Pech, "Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality," *European Constitutional Law Review*, Vol. 11 (2015), pp. 512-540, at p. 529: "By avoiding Treaty change, the Commission sensibly avoided a situation akin to asking turkeys to vote for Christmas."

29 But cf. Matej Avbelj, "Transformation in the Eye of the Beholder", in Bobek (ed.) 2015, pp. 275-291, challenging the uneven degree of attention presupposed by EU/Western mainstream narratives about democratization in the East. As Avbelj contends, Western discourses impart crudely reductionistic, positive or negative qualifications, as momentary interests dictate: "What was really going on and the actual existing quality of the social capital on which the new liberal democratic frame was attached in these countries was of little concern, as long as the external interests were not threatened." (at p. 290).

12.4 "Agencification" as De-Politicization: Metamorphoses of Institutional Neutrality

The influence of the Union, and particularly the leverage of the Commission on the new member states and current accession countries, produces not only undeniable benefits but also contradictions in the functioning of local constitutional systems. As argued above, these tensions result from the ambivalent nature of the Commission, an originally administrative agency (i.e., a supranational bureaucracy) endowed now with the task of providing abstract and relatively standardized ("expert") solutions to complex, value- and context-dependent political and constitutional problems. In order to reduce uncertainty and enhance the legitimacy of its recommendations, the Commission has more recently resorted to cross-referencing or "outsourcing" expertise to the Venice Commission, presumably a more adroit technician in matters constitutional. It is, however, not self-evident that such exercises in international networking unequivocally lead to more legitimacy or – indeed to better choice. The European Commission of Democracy through Law is a welcome additional forum for international debate on fundamental law topics but neither its methodology nor its procedure or solutions in particular cases recommend it without qualification for its new-fangled role of constitutional oracle.[30]

The nature of proffered solutions, resulting from the bureaucratic reformulation of value choices in terms of output efficiency, results in clashes with the normative and context-dependent language of constitutionalism. Romania, as noted above, is an ideal case study for observing the effects of more general trends and tendencies. Unlike the 2004 Member States, Romania was in a much weaker position relative to the Commission and is currently one of only two member states subject to a post-accession monitoring mechanism. The somewhat oxymoronically titled mechanism for "cooperation and verification" has been from the beginning associated with an unstated perception of dissatisfaction and uneasiness with respect to the two countries' accession in 2007, creating a peculiar limbo or second-rate membership of sorts.[31]

The Mechanism is in itself a telling example of both self-reinforcing determinations and the systemic ripple effects of contradictions between the neutral language of autonomous administration, formulated in efficiency terms, and the normative language of constitutionalism and constitutional law. Scheduled initially, in 2007, to lapse after three

30 Maartje de Visser, "A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform," *American Journal of Comparative Law*, Vol. 63 (2015), p. 963.

31 Serban *supra* note 21, at pp. 202-203: "First, the CVM divides EU members into countries that need to be constantly monitored – Romania and Bulgaria and countries that do not (all the others), thus creating a two-tier rule of law system. The very existence of the CVM suggests that Romania and Bulgaria continue to be seen as 'bottom of the heap' (Judt 2001) and the only two countries in the EU that face problems of corruption and inefficient judiciaries (a critique echoed, among others, by Gunther Verheugen, the former European Commissioner for Enlargement). The CVM is thus a symbol of Romania's inability to reach modernity and overcome its past."

years, CVM monitoring has been extended, seemingly indefinitely, both in terms of duration and in terms of scope. The four benchmarks of the CVM were initially formulated in ostensibly technical terms: adoption of new civil and criminal law and procedure codes, judicial reform, fight against high and medium-level corruption, the creation of an autonomous administrative authority with monitoring and sanctioning attributions over conflicts of interest, incompatibilities and unjustified wealth, and the implementation of anticorruption policies in local public administration. Within the scope of CVM monitoring, initial reports carefully avoided tackling problems of constitutionality, except insofar as specific Constitutional Court decisions hampered the adoption of particular measures related to a specific benchmark (for instance the functioning of the National Integrity Agency).

Starting in 2012, in the aftermath of a local crisis occasioned by an attempt to impeach the president, reports by the Commission have incorporated analysis and admonitions directly related to the functioning of the constitutional system. More recent positions comprise specific suggestions (both substantive and procedural) with respect to future constitutional amendments. In the consequentialist argument of the Commission, judicial reform has to do with the rule of law, the rule of law is a supreme value entrenched in the Constitution, and the Constitution is ultimately interpreted by the Constitutional Court. As a 2014 report tersely puts it: "Though not strictly a part of the judiciary, the Constitution and the Constitutional Court are at the heart of the rule of law."[32] As a result of these evolutions, CVM monitoring has been expanded in scope to encompass in principle any aspect, however minute, of the constitutional system as such (ranging from the powers attached to the office of the Ombudsman to the frequency of adopting governmental ordinances) and projected somewhat nebulously in the future, apparently *sine die*.[33]

The constitutional story of judicial independence is perhaps the most revelatory example of these metamorphoses. Romania has a typical continental (Latin) judicial system, meaning that a career judiciary composed of both prosecutors and judges is encompassed under the umbrella term of "magistracy". Since under the Constitution of 1866, in 1909, a judicial council had been created, attached to the ministry of justice, the 1991 Constitution, in a qualified return to tradition, provided for a Superior Council of the Magistracy. Its members were initially selected by Parliament for terms of four years. The Council, in its initial configuration, had only two functions, namely, to nominate judges and prosecutors for appointment by the president and to serve as a disciplinary court *for judges only* (Arts. 132-133 RC (1991)). The place of prosecutors in the system was left somewhat underspecified. In the constitutional committee, debates were polarized on the matter,

32 2014 CVM Monitoring Report on Romania.

33 Progress reports tie the lifting of this mechanism to a definitive proof of the "irreversibility" of anticorruption reports. Since corruption is notoriously hard to quantify, it is unclear when the fight against it could be proven to have taken an irreversible path.

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some believing that preserving the position of prosecutors as "magistrates" was a throwback to Communist and Stalinist times, therefore incompatible with the new democracy, others considering that the practice, consonant with French or Italian practices, was perfectly orthodox.[34] In the end, the status quo carried the debates and prosecutors preserved their position as magistrates, not as an element of "judicial power" proper but as a part of the "judicial authority". Nonetheless, in recognition of the distinctions between judges and prosecutors, and the executive connotations of the latter, Arts. 130-131 entrenched a more qualified status of the Public Ministry, specifying that prosecutors exercise their duties according to the principles of "legality, impartiality and hierarchical control, under the authority of the Minister of Justice" (Art. 131 RC (1991)).

In preparation for the accession, the Constitution was amended in 2003. What appears at first sight as a constitutional overhaul is in effect the adoption of a new institution, namely, the transplantation of the "Judicial Council Euro-model." The judicial council Euro-model is certainly not a creation of the Commission but a synthetic adoption by the same of various templates circulated by transnational professional networks (the Bangalore Principles adopted by the Judicial Integrity Group in 2001, the Palermo Declaration drawn up by MEDEL in 1993) and validated subsequently by international organizations.[35] For instance, the Council of Europe incorporated the Palermo Declaration, recommending it to its members since 1994 as international good practice, whereas the UN gave its imprimatur to the Bangalore Principles in 2002. The international good practice, which underpins the "Euro-Council" model, consists in the recommendation to create judiciary high councils with broad attributions with respect to the career of judges/magistrates (appointment, promotion, disciplinary action) and ideally also budgetary prerogatives. The structure would be rendered autonomous from direct political influence by virtue of selecting at least half of their membership through professional-corporate elections (the rest could be by implication political appointees). This blueprint initially corresponded to the French and Italian models. Whereas the French *Conseil* was modified by constitutional amendment in 2008, the Italian model still operates in its original form: two-thirds of the elected members are judges and prosecutors elected by their peers, one-third are political appointees, three members sit in the *Consiglio Superiore della Magistratura ex officio* (the president of the Republic, the president of the Court of Cassation, the Prosecutor General of the Court of Cassation). Thus the Italian model, an idiosyncratic judicial organization structure tied to local traditions and subject to a fair

34 In A. Iorgovan, *Odiseea elaborării Constituției-fapte și documente, oameni și caractere; -cronică și explicații, dezvăluiri și meditații.* Editura Uniunii Vatra Românească, Târgu Mureș, 1998, at p. 43 (Nicolae Cochinescu and Teofil Pop).

35 Nuno Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," *American Journal of Comparative Law*, Vol. 57 (2009), pp. 103-134.

measure of criticism at home, has come to serve as a global good practice imperative.[36]

The Romanian version is an extreme variation on the Italian template. In 2003, the term of office was lengthened from four to six years and its exact composition was constitutionally specified. Membership is heavily lopsided toward the corporative element, much more than in the Italian case: the ratio of elected magistrates to the *ex officio* and politically appointed members is 14 (9 judges and 5 prosecutors, which form the two sections) to 5. A president of the council is elected yearly, from among the 14 elected members. In 2003, the Romanian CSM also received the full gamut of powers relating to the training and career of magistrates. In lockstep with these innovations, three judiciary laws, adopted as a package in 2004 (303, 304, 317), further reduced political influence and added prerogatives to the CSM, for instance the right to be consulted with respect to any modification of these laws.

Nominations to high prosecutorial positions (General Prosecutor, the Chief Prosecutors of the Anticorruption Directorate (DNA) and the Counterterrorism and Organized Crime Directorate (DIICOT) are the only input left to the executive into the judicial system, whereas the selection of the two "civil society representatives" remains the only formal legislative check. In the CSM section decisions, which serve also as first-instance disciplinary courts, only the elected prosecutors or judges have the right to vote. The *ex officio* members can sit in section meetings without the right to vote, whereas the two civil society representatives (the only political appointees in the Council) can only take part in plenary sessions (Arts. 133-134 RC (2003)).

This is prima facie (one of) the most powerful and autonomous – "independent" – judicial councils in the world. Its autonomy was predicated upon a universal principle (judicial independence) but, upon closer examination, one can notice that the principle, in this particular rendition, hardly finds correspondents in either national or international practices. Nonetheless, the interplay between the Commission and the domestic system has set in motion a reflexive, expansive process, in the sense of ever-greater demands for autonomy and requests for constitutional entrenchment in the name of judicial independence, a notion that, in turn, has come to be understood as complete isolation from any political, social, and even professional peer pressure.

All attempts to change the status quo have been deflected in the name of "judicial independence." The understanding as such of "judicial independence," once it gained the

36 Bobek and Kosař, at p. 1270, arguing that the preference results from the fact that international standards were drafted on the basis of standards initially compiled by professional bodies (which naturally favored the model which gives most power to their profession/caste) and that such networking meetings were often presided by Italians (who were naturally accustomed and partial to their domestic experiences): "More narrowly, why is it that the JC Euro-model so closely resembles the Italian model of judicial council? How was it possible that the Italian model found so widespread support among judges from other European states and became translated into a 'Euro-model'? True, the Italian *Consiglio superiore della magistratura* (CSM) is considered a success in Italy and is one of the oldest judicial councils in Europe … Still, the Italian CSM has also been repeatedly criticized for corporativism, a lack of judicial accountability, and suboptimal efficiency."

meaning of a self-governing judicial system, was further extended in the name of European standards and integrity imperatives, with the imprimatur of the Commission, to encompass first judicial self-government understood as a preponderance of elected magistrates and the entrenchment of this model against future amendments; second, the entrenchment of the current configuration against any initiative that would attempt to increase political and social representation on the Council; third, the protection of the elected Council members from any measure of control exercised by their peers throughout their six-year terms of office; and fourth, the attempt to give the Romanian Council (and the Venice Commission) a pre-emptive say in all future constitutional revision processes.

In 2011, the Constitutional Court rendered an opinion on a presidentially initiated amendment proposal. The bill provided for a modification of the composition of the Council, by adding four more civil society representatives, increasing thus the number of political appointees to a total of six members (three selected by the president and three elected by the Parliament), and correspondingly reducing the number of elected judges from 9 to 5.[37] The Court held that the amendments were conducive to the "annihilation of the constitutional guarantee of judicial independence," due to the fact that an increase in the number of the politically appointed members, in conjunction with a proportional decrease in the number of elected magistrates (from 14 currently, to 10), would have led to "an alteration of the representation proportion in the Council [to the detriment of career magistrates], susceptible to produce negative effects on the activity of the judicial system."[38] The reasoning included selective comparative references to the Spanish, Portuguese and Italian models. In *obiter*, the Court sought to dispel reservations concerning a lack of accountability, noting that, in accordance with the organic law of the Superior Judicial Council, 317/2004, elected magistrates "are accountable to their peers with regard to the performance of their mandates." The recall procedure under Law 317/2004 (Art. 55 (4)) provided that a member of the council could be revoked with the votes of the judges or prosecutors corresponding to his or her jurisdictional tier (trial court, tribunal, court of appeals, High Court of Cassation and Justice). The Court's argument reduced in effect the constitutional guarantees of judicial responsibility to corporate accountability. Yet, the argument corresponded to the logic of the reasoning (which could be restated as follows: "Judicial independence means that the judicial system is autonomously governed by magistrates, elected and controlled exclusively by their peers").

37 I discuss these evolutions at length and in more detail in "Standards of 'Good Governance' and Peripheral Constitutionalism: The Case of Post-Accession Romania," in A. Febbrajo and G. Corsi (eds.), *Sociology of Constitutions: A Paradoxical Perspective* (London: Routledge, 2016), pp. 180-197 and "*Romania* – The Vagaries of International Grafts on Unsettled Constitutions" in Anneli Albi (ed.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (The Hague: T.M.C. Asser Press, forthcoming).

38 Decizia Nr. 799 din 17 iunie 2011, M. Of. Nr. 440 din 23 iunie 2011.

In 2013, by virtue of an exception of unconstitutionality, the Court was called on to render a decision on this recall provision whose application had been implicitly portrayed in 2011 as the main guarantee of accountability within the judicial system.[39] According to Art. 55 (4) of the CSM organic law, any general assembly of prosecutors or judges could trigger the recall procedure to revoke an CSM member representing its jurisdictional hierarchy level (prosecutor or judge on the level of county courts, tribunals, etc.) for "not accomplishing or faultily carrying out the attributions for whose execution he was elected to the Council." The procedure could be triggered by any general assembly by voting on the recall proposal by a two-thirds vote. Once the initiative was notified to the CSM, a countrywide recall ballot would be held in each general assembly corresponding to the tier represented by the member and, once votes in favour of revoking the Council member reached the requisite two-thirds majority, the procedure was halted and the result announced, without waiting for all the general assemblies to vote. The Council took note of the result, vacated the seat and subsequently organized a by-election in order to fill the vacated seat. One may remember that this precise recall procedure had been declared in *obiter* by the Constitutional Court, two years before, as the main safeguard and guarantee of accountability: the Council would be isolated from politics but not from the profession. Nonetheless, deciding on this precise issue, in the process of analyzing the exception of unconstitutionality raised by a recalled member, the Constitutional Court held this provision unconstitutional, with the arguments that the mandates on the Council were representative rather than imperative, that professional attributions were not entrusted by the (corporative) electorate to Council member and thus discharge of entrusted functions could not be evaluated by the latter, and that the procedure as such was lacking in due process ("fair trial") guarantees. In essence, this rendered not only the specific recall provision at bar unconstitutional. In the parameters of the reasoning attaching to the holding, any attempt to amend the law and make the procedure effective was rendered nugatory beforehand. Recall, originally an instrument of direct democracy, cannot function in any setting by analogy to a criminal trial.

In 2013, the Parliament initiated a constitutional revision, including a proposal to modestly raise the number of civil society representatives from two to four. In its 2014 decision on the constitutionality of the amendment bill, the Constitutional Court went a long step farther than in 2011. Now, *any* increase in the number of the external members without a countervailing increase in the number of judges and/or prosecutors would in and of itself change the proportion of representation and affect the independence of justice:

> The current proposal leaves the number of magistrates [sitting in the Council] unchanged, while nonetheless increasing the number of civil society represen-

39 Decizia Nr. 196 din 4 aprilie 2013, M. Of. Nr. 231 din aprilie 22, 2013.

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> tatives, a fact that determines an alteration of the relative representation proportions. Thus, the considerations that underpinned the [2001 decision] subsist, due to the fact that a modification of representation rates by increasing the number of members in the Council recruited from outside the judicial system is of a nature to jeopardise the activity of the judiciary.[40]

The 2014 Constitutional Court simply cited its 2011 precedent, which in its view applied *tale quale*, invoking the overarching value of judicial independence. Nonetheless, the reference to the 2011 amendment initiative and unconstitutionality holding obfuscated the essential difference between the two normative hypotheses. In 2011, the argument underlying the finding of unconstitutionality was that a significant decrease in the number of elected judges corresponding to a threefold increase in the number of appointed external members, so that the votes of the latter could have overpowered those of the former in disciplinary proceedings, endangered judicial independence. In 2014, *any* increase in the number of civil society representatives, provided that it would not be accompanied by a corresponding increase in the number of magistrate members, was represented as imperilling the independence of the judiciary.

An expansive logic of judicial independence meaning judiciary neutrality and autonomy from democratic change, social and even professional accountability grows on the fragile foundation of unresolved constitutional and infra-constitutional antinomies. The Public Ministry is described constitutionally as hierarchical in nature but the anticorruption division, albeit technically a part (directorate) of the General Prosecutor's Office attached to the High Court of Cassation and Justice is in reality completely autonomous from the latter: both structures are led by chief prosecutors appointed in the same manner, for the same terms of office. Furthermore, the precise institutional status as such of the CSM is constitutionally unclear.[41] Moreover, the role of this institution as "guarantor of the independence of justice" (Art. 133 (1) RC (2003)) coexists in a tense relationship with the constitutional provisions on the Public Ministry: "Public prosecutors shall carry out their activity … *under the authority of the minister of justice*." (Art. 131 (1))

Once the reflexive process was set in motion by virtue of which independence means full autonomy of the institution from any kind of overt influence or change, claims for higher neutrality and more prerogatives have constantly been added in a snowball effect. The European Commission, whose CVM delegations have been liaising with the Constitutional Court since the 2012 governmental crisis, clings unflinchingly to independence. In its

40 Decizia Nr. 80 din 16 februarie 2014 asupra propunerii legislative de modificare a Constituției României, M. Of. Nr. 246 din aprilie 7, 2014.

41 See for instance E.S. Tănăsescu E S (2011) Reforma Consiliului Superior al Magistraturii între analogia dreptului și nimicuri etice. *Pandectele Române* 2: 19-28, arguing that the CSM could be considered an "autonomous administrative authority" (the term used to designate independent agencies in the Romanian Constitution).

own narrative, prosecutorial and judicial independence are the only solution to corruption, whereas the uprooting of domestic political corruption is the only path to emancipation from the CVM and, perhaps, to joining the Schengen Area. For instance, a January 2014 European Commission CVM report asks Romania to consult the CSM in future amendment processes affecting judicial independence and intimating that general consultations with both the Venice Commission and the EU Commission would be in good order:

> With the Constitutional debate expected to return this year, it will be important to ensure that the Superior Council of the Magistracy has the opportunity to comment on all areas relevant to the judiciary. In particular, care will be needed to exclude changes which increase the opportunity for politicians to influence the judicial leadership or challenge judicial independence or authority. For this reason, the commitment of the government to consult the Venice Commission in particular is an important sign of Romania's commitment to base any future Constitutional change on European norms. The Romanian authorities have also made clear their intention to keep the European Commission informed.[42]

The last Commission report (of January 2016) recommends the use of future constitutional amendment processes to "*consolidate judicial independence* at Constitutional level" [emphasis added], asks that criticism of judges and the judiciary by the press and politicians be curtailed, and urges for a further reduction of the ministerial (i.e., political) role in nominating prosecutors for appointment to high positions. The report advocates, more specifically, for the replacement of political appointments to chief prosecutor and general prosecutor positions with "an independent system … settled in law, with the support of the Venice Commission" and the provision of "financial or legal help for magistrates seeking redress in court [for damages to their professional reputation, independence and impartiality]"[43] [emphasis added]. Paradoxically and unselfconsciously ironic, in a country where judges and prosecutors have come to enjoy supra-constitutional autonomy and where their salaries and pensions sensibly exceed, other things equal, the emoluments of any other category of public officials,[44] the Commission continues to up the legislative and constitutional ante. According to the Commission, the

42 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM (2014) 37 final.

43 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism of January 27, 2016, COM (2016), pp. 3-4 and 16.

44 After the onset of the sovereign debt crisis, austerity measures included the scrapping of special pensions. The the special pension of magistrates, calculated at 80% of the the last monthly salary (gross income), including all bonuses, was in the end the only category exempted from these budgetary cuts, since the Constitutional Court held, in 2010, that the elimination of special pensions in this case would infringe on judicial independence (Decizia Nr. 873 din 25 iunie 2010, M. Of. Nr. 433 din 28 iunie 2010). The only dissenter, Justice Motoc, pointed out that the reductions were proportional and nondiscriminatory, operating across the board, and that the primary duty of the state, in the field of regulating pension benefits, was to

state would have to sponsor, in the name of judicial independence, the legal representation of judges and prosecutors in torts suits.

Thus the independence (or isolation) of the judicial-prosecutorial system, as represented by the Judicial Council has, in the complicated, multi-level dialogical dialectics around the meanings of "judicial independence", expanded into ever-greater claims for institutional autonomy: from constitutional amendment, from political appointments, from the peers of the judicial and prosecutorial mandarins in the Council, from political criticism, and, more recently, from the press. The increased opacity of the system has expectedly generated a good number of anticorruption crusades and anti-anticorruption conspiracy theories but the more worrisome result is systemic opaqueness as such. The few facts that came out in the last few years give cause for concern: one civil society member resigned accusing foul play and cabals, another criticised the institution after the end of her term, several professional associations have made accusations concerning the existence of undercover intelligence service (SRI) operatives in the judiciary, whereas a number of 'anticorruption heroes' were mired in corruption- or abuse-related scandals.[45] The degree of involvement of the intelligence service, an institution by definition secretive, is hard to gauge and adds additional complications to the general conundrum.

This degree of insularity of entire state structures is problematic, be it only for the reason that the already intrinsic informational asymmetry (vis-à-vis the other branches *and* the citizens) embedded in the normal operation of any judiciary, as a consequence of the peculiar characteristics of this branch, is increased exponentially and colours the functioning of the political-constitutional system writ large. But the local hermeneutics

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protect vulnerable members of society, "whereas the beneficiaries of special pensions, including magistrates, do not fit this category."

45 The Romanian Intelligence Service (SRI), albeit not part of the armed forces, is a militarized institution. Its budget has steadily increased over the years (for instance, the SRI had in 2016 a budget of roughly 411 million Euros, which compares favorably with the resources of its counterparts in more affluent, more populous European countries); the number of its employees is classified. The intelligence service figures largely, for sound reasons, in debates on the judiciary. Anticorruption wiretaps (the technical surveillance warrants) were executed by the SRI, until last year, when a Constitutional Court decision struck down an article of the criminal procedure code that made the practice possible. Even though in theory the National Anticorruption Directorate (DNA) was the principal in this relationship, the disparity in terms of resources gave rise to reasonable doubts as to whether the proverbial tail was not in fact wagging the dog. The institutional cooperation between the DNA and the SRI was regulated in confidential protocols concluded on the basis of a (classified) decision by the National Defense Council (CSAȚ) declaring corruption to be a matter of national security, bringing thus anticorruption within the purview of the SRI. A public scandal occurred when the director of the legal department in the SRI, General Dumbravă, declared in the course of an interview posted on a professional website, that anticorruption actions, from the moment when the court is seised and up to the rendering of a final court decision, was a "tactical field" [*câmp tactic*] for the internal intelligence service. (The interview in Romanian is available at: <https://www.juridice.ro/373666/dumitru-dumbrava-sri-este-unul-dintre-anticorpii-bine-dezvoltati-si-echipati-pentru-insanatosirea-societatii-si-eliminarea-coruptiei.html>) Occasional wiretap leaks in the press have helped foment a steady stream of colorful conspiracy theories.

of judicial independence have by now become a ludic exercise, across ever more expansive and freewheeling dialogical interactions, in which both internal (Constitutional Court, the Council as such, a number of NGOs) and external (EU Commission, Venice Commission) partners take part, until the old meaning of the concept is fully severed from its initial underpinnings and becomes an empty shell, otherwise put a slogan into which all participants pour meaning to fit their respective purposes. The purposes of the network participants are for the most part divergent: more power to the vested interests in the Council or judiciary, more influence to various institutions and professional bodies, more stability in a system perceived in Brussels as hopelessly, irredeemably corrupt and thus manageable only by a- or anti-political, technocratic means.[46] To be sure, the Commission insists on independence due to both instrumental (political corruption is perceived as the root of all evils, anticorruption as a master-key solution to all local problems, whereas the autonomy from politics of the judicial system as such and the pockets of autonomy within it are regarded as directly conducive to the eradication of the phenomenon) and reputational (since the Commission advocated for this institutional-constitutional setting, it has much to lose if the anticorruption/independence discourse is questioned or even qualified in any way)[47] reasons. Path dependencies and the status quo or 'new normalcy' of failed past reforms (in the absence of conditions of the possibility for new or corrective reforms) most likely play a role at least equal to that of rationalized institutional interests.[48] As long as the specialized prosecutors crunch a steady line of high corruption indictments and stiff convictions follow in the courts, CVM reports will routinely ask for more of the same, i.e., more anticorruption and more independence.

46 Similar dysfunctions resulting from the imposition by the Commission of this model as "Euro-product" in the region have been extensively documented by Kosař 2016 and Kosař and Bobek 2007, 2015. Similar instrumental attitudes towards judicial independence (deflection of criticism in the name of this concept, used as a slogan to justify positions of power) have also been documented. See, for instance, Jan Zobec and Jernej Letnar Černič, "The Remains of Authoritarian Mentality within the Slovene Judiciary", in Bobek (ed.) 2015, pp. 124-148, at p. 148: "Another problem of the Slovene judiciary is that each public criticism of the judiciary is now viewed by the members of the judiciary as an attack on judicial independence and the rule of law. The judiciary accepts with difficulty that the origin of the requirement of trust in the judiciary is in the responsibility of the judiciary towards the people." The Romanian case is set apart by virtue of the magnitude of these phenomena and patterns. Its specificity results from the mutually reinforcing effects of the anticorruption and judicial independence discourses and from fragmentation by 'cascade' autonomies and autonomy claims (i.e., not only those of the judiciary as such from external interference but also of the CSM representatives from their judicial electorate, of the DNA within the Public Ministry, of the Public Ministry from the Justice Ministry, etc.).

47 *See also* Kosař 2016, at p. 136: "[T]he EU and the CoE have too much to lose if the rosy picture of the Judicial Council Euro-model falls apart, because they presented [it] as a 'universal good' and if they are proven wrong their credibility will suffer."

48 Bobek, "Conclusions", in Bobek (ed.) 2015, pp. 391-418, at p. 417: "The transformation reformist momentum is lost. Arguably, in Central Europe, this moment came at or soon after the accession to the EU in 2004. At the latest, any remnants of further reformist zeal were effectively terminated with the advent of the economic crisis in 2007/2008. Since then, remaining system deficiencies, including those within CE judiciaries, simply became the new normalcy."

As a common denominator, in the unprincipled, somewhat freewheeling nature of the exchanges and the instrumental manipulation of constitutional principles, an Eastern European may perceive a partial return, now in internationalized garb, to prior forms of instrumentalism, such as, for instance, the "Pepsi feeling" of newfound freedom without structure, care or responsibility in the early 1990s.[49] Romanians, inebriated after 1989 with nineteenth-century fables of *restitutio in integrum*, only to see a few years down the line the devastation to follow from the tides of savage privatizations emerging from post-communist implementations of the grand idea, have some experience with wholesale transpositions of crude ideological constructs masquerading as principles. They have for instance witnessed the deforested (privatized) mountain slopes, the "Wild West" graft caused by the privatization of the entire industry including almost all public utilities, the restituted and summarily vacated buildings of kindergartens, schools, research institutes, universities, museums. On a more general note, the specific Romanian case described here may stand as a cautionary tale, from which a plea for increased attention to both local context and inherited traditions in the transnational handling of constitutionalism and constitutional concepts can be extrapolated to the emerging European constitutional area and beyond.

49 See András Sajó, "Parks, Dogs, and the Rule of Law: Post-communist Reflections," in David Dyzenhaus (ed.), *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart, 1999), pp. 227-242, at p. 238: "The dignity of loafing around, the comfort without empathy, the Pepsi feeling, is not a Hungarian invention. But it discovered very "cool" soil here among us.)."

13 Is Suffrage for Children the Constitutional Solution for the Sustainability Challenge Faced by Democracies?

András Jakab[*]

Now civilisations, I believe, come to birth and proceed to grow by successfully responding to successive challenges. They break down and go to pieces if and when a challenge confronts them which they fail to meet.[1]

Sustainability, as compared to the rule of law, human rights, sovereignty or democracy, is a relatively new key constitutional concept.[2] It is increasingly explicitly mentioned in constitutional discourses, and – even more importantly – it helps to reconstruct a number of current constitutional debates under one conceptual umbrella.[3] Sustainability comprises different responses to long-term social challenges, which cannot efficiently be responded to via democratic mechanisms. Democratic mechanisms are based on election terms and which are, consequently, structurally short-sighted. In the present chapter I am going to analyse whether suffrage for children can be considered as the solution (or at least one of the main solutions) for the sustainability challenge faced by democracies.

A short preliminary terminological remark: I am using the expression 'sustainability' instead of the more popular 'sustainable development'.[4] The concepts are almost identical, the former being slightly less ambitious: sustainability does not require an improvement, it merely requires that a situation does not deteriorate.

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1 Arnold J. Toynbee, *Civilization on Trial* (OUP 1948) 56.

2 The present paper is based on a research supported by a research grant of the Hungarian Scientific and Research Fund (OTKA/NKFIH K 112900).

3 On doctrinal reconstruction, see Armin von Bogdandy, 'The Past and Promise of Doctrinal Constructivism' (2009) 7 *International Journal of Constitutional Law* 364-400; András Jakab, 'Seven Role Models of Legal Scholars' (2011) 2 *German Law Journal* 757-784, esp. 758-765.

4 See, e.g., 'Sustainable development means that the needs of the present generation should be met without compromising the ability of future generations to meet their own needs. […] It aims at the continuous improvement of the quality of life and well-being on Earth for present and future generations'. *Sustainable Development Strategy* (2006) European Council DOC 10917/06 para 1.

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13.1 Sustainability Challenges

The moral instinct and the common sense of most people would probably suggest that sustainability should be aimed for in every society. One approach that could be used to justify sustainability would be to refer to the idea of distributive justice (more precisely: intergenerational justice),[5] another approach would be to refer to the long-term interests of the political community. Instead of the first, moral philosophical approach, in the present chapter we are going to employ the second, rather pragmatic one, in the hope of minimising overheated emotional debates. Sustainability is nothing more than the principle of following the *long-term* interest of the political community. 'Long' basically means anything that is beyond the usual four or five year election period that is the primary time span of democratic politicians.

There are several factors that might endanger sustainability. For example, the EU Sustainable Development Indicator (prepared by Eurostat on the basis of the 2006 EU Sustainable Development Strategy) consists of 106 individual indicators (some of them being composite themselves) including education, public health, fertility rate, different aspects of environmental protection, public debt, just to name a few.[6] Composite indicators imply 'weak sustainability', meaning the (at least partially) mutual substitutability of the different types of capitals (environmental, demographic, etc.).[7]

13.2 Why Does the Response Have to Be Constitutional?

Constitutions have the task of providing the rules of the political game, to establish taboos that politicians might otherwise break.[8] Structurally, democratically elected politicians are focused on short-term (election period) consequences, and they are likely to go for

5 For excellent overviews of the intergenerational justice approach, see Axel Gosseries, 'What Do We Owe to Next Generations?' (2001) 35 *Loyola of Los Angeles Law Review* 293-355; Lawrence B. Solum, 'To Our Children's Children's Children. The Problems of Intergenerational Ethics' (2001) 35 *Loyola of Los Angeles Law Review* 163-234; Axel Gosseries and Lukas H. Meyer (eds.), *Intergenerational Justice* (OUP 2009); Lukas Meyer, 'Intergenerational Justice' (2008) in Edward N. Zalta (ed.), *Stanford Encyclopedia of Philosophy* <http://plato.stanford.edu/entries/justice-intergenerational/>.

6 For further aggregated sustainability indicators, see Armin Grunwald and Jürgen Kopfmüller, *Nachhaltigkeit* (2nd ed. Campus 2012) 81-86.

7 On the concept in general, see Eric Neumayer, *Weak versus Strong Sustainability. Exploring the Limits of Two Opposing Paradigms* (4th ed. Edward Elgar 2013). For a usual classification (ecological, economic and social components), see, e.g., Guy Beaucamp, *Das Konzept der zukunftsfähigen Entwicklung im Recht* (Mohr Siebeck 2002) 19-31 with further references.

8 For more details on the function of constitutions, see András Jakab, *European Constitutional Language* (CUP 2016) chapter VIII.

the easy solution that buys votes for them.[9] In order to prevent them from being seduced, constitutions ought to bind them, like Ulysses was bound to the mast so he could resist the sirens.[10] This is an admittedly paternalistic solution (constitutions in general can be considered as paternalistic tools): they indirectly also prohibit voters from voting in favour of the wrong solutions, because we just do not trust their judgments in certain issues.[11]

From the different possible constitutional solutions (e.g., rights of future generations; codification of a general principle of sustainability; substantive rules on public finance), in the following we are going to analyse the topic of suffrage for children.

13.3 Suffrage for Children and Sustainability

The electoral system in modern democracies only allows those citizens who have reached a certain age to vote, i.e., children are excluded from this right. It also means that their interests are less represented than those of retired people,[12] which makes the emergence of structurally biased social security systems more likely (and in fact they are biased).[13] By giving suffrage to children – so the argument goes – this structural bias could be corrected,[14] as the population is growing older and it is consequently more interested in shorter term goals.[15] By granting a stronger say to children, it is also likely that the social security system (including social benefits) for families will be more favourable, which could encourage them to have more children[16] (an issue especially pressing in countries

9 William A. Niskanen, 'The Case for a New Fiscal Constitution' (1992) 6.2 *Journal of Economic Perspectives* 13-24.

10 Jon Elster, *Ulysses and the Syrens. Studies in Rationality and Irrationality* (CUP, Maison des Sciences de l'Homme 1984) 36-37, 87-96.

11 For constitutions as tools to protect future generations, see Axel Gosseries, 'The Intergenerational Case for Constitutional Rigidity' (2014) 27.4 *Ratio Juris* 527-539, esp. 536-538; Axel P Gosseries, 'Constitutions and Future Generations' (2008) 2 *The Good Society* 32-37.

12 Suffrage of children in order to avoid gerontocracy: Philippe van Parijs, 'The Disenfranchisement of the Elderly, and Other Attempts to Secure Intergenerational Justice' (1998) 27.4 *Philosophy and Public Affairs*, 292-333. More and more of these pensioners will have no children: this also makes the probability of the consideration of children's interests lower, see *ibid.* 315.

13 Paul E. Peterson, 'An Immodest Proposal: Let's Give Children the Vote' (1992) 121.4 *Daedalus* 151-174; Robert I. Gal, Endre Szabo, Lili Vargha, *Children cost to Parents, the Old Cost to Taxpayers: An Application of National Transfer Accounts and National Time Transfer Accounts* (Budapest Demographic Research Institute 2013).

14 Robert H. Pantell and Maureen T Shannon, 'Improving Public Policy for Children: A Vote for Each Child' (2009) 9.4 *Intergenerational Justice Review* 139-144.

15 See van Parijs (n 12) 293 and 298 on the unavoidably short-term self-interest of the elderly and on the empirical evidence that age-related self-interest affects voting behaviour (with further references).

16 Cf. Anne Hélène Gauthier and Jan Hatzius, 'Family Benefits and Fertility: An Econometric Analysis' (1997) 51.3 *Population Studies* 295-307, 302: a 25% increase in the benefits given to the first two children raises fertility by 0.01% child per woman in the short run and 0.07% in the long run. *Contra* Karl Hinrichs, 'Do the Old Exploit the Young? Is Enfranchising the Young a Good Idea?' (2002) 43.1 *Archives Européennes de Sociologie* 35-58, 48 stating that pronatalist policies are hardly effective with regards to their original aims,

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with extremely low fertility rates like Germany, Japan and Hungary).[17] In a more generalised form we could even state that not only demographic, but also financial or environmental sustainability arguments might support the introduction of suffrage for children: as children 'represent the future', their voice would strengthen the weight of long-term considerations in general.

Besides the justification with reference to sustainability, there are also arguments for the suffrage of children based on democracy. As democracy is considerably more established as a constitutional principle in the constitutional discourse than sustainability or intergenerational justice (many doubt that the latter two are constitutional principles at all),[18] justifications based on democracy seem to be stronger legal arguments. The history of democracy can basically be reconstructed as an ever-broadening suffrage. Originally only the white, the male and the rich had suffrage, and step-by-step it was broadened to include poor, coloured and women citizens.[19] Children are also citizens, they are also part of the 'people' from which all state power is supposed to stem.[20] Today, children have remained the only major group of citizens that does not have representation in the legislature.[21]

A further possible argument for the suffrage of children would be to state that children also pay taxes, and consequently they should also have suffrage.[22] This is, however, a weak argument: many foreigners (including tourists) pay taxes in every country, and they do not have suffrage either: connecting suffrage to taxes is an outdated view, which would (if turned around) lead to disenfranchising poor people.

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but they normally do reduce the risk of child poverty (with further references). For an optimistic view on the question, stating that it *is* possible to improve low fertility rates through public policies: Jan M Hoem, 'The Impact of Public Policies on European Fertility' (2008) 19.10 *Demographic Research* 249-260, with further references. For the sake of testing the argument we suppose in this paper that pronatalist policies *do* positively influence fertility rates.

17 Reiko Aoki and Rhema Vaithianatham, 'Is Demeny Voting the Answer to Low Fertility in Japan?' (2009) *Center for Intergenerational Studies, Institute of Economic Research, Hitotsubashi University*; Balázs Schanda, 'Családi választójog – alkotmányjogi képtelenség vagy a fenntartható demokrácia biztosítéka?' (2010) 57.10 *Magyar Jog* 608-611; Johanna Fröhlich, 'Alapkérdések a családi választójog vitájában' *Pázmány Law Working Papers* 2011/20; Paul Kirchhof, *Das Gesetz der Hydra* (Droemer 2006) 184-185. For a wider overview including the French, Austrian, Belgian and Swiss debates, see Isabel Rupprecht, *Das Wahlrecht für Kinder. Verfassungsrechtliche Zulässigkeit und praktische Durchführbarkeit* (Nomos 2012) 26-44.

18 See Winfried Kluth, 'Demographischer Wandel und Generationengerechtigkeit' 68 (2009) *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 247-289, 282 explicitly denying the constitutional nature of the requirement of intergenerational justice.

19 András Jakab, 'Full Parliamentarisation of the EU without Changing the Treaties. Why We Should Aim for It and How Easily It Can be Achieved', *Jean Monnet Working Papers* 2012/3, 4-13.

20 Hinrichs (n 16); Lore Maria Peschel-Gutzeit, 'Unvollständige Legitimation der Staatsgewalt oder: Geht alle Staatsgewalt nur vom volljährigen Volk aus?' (1997) 43 *Neue Juristische Wochenschrift* 2861-2862.

21 Hinrichs (n 16) 40; Konrad Löw, 'Kinder und Wahlrecht' (2002) 35 *Zeitschrift für Rechtspolitik* 448-450.

22 Robert H. Pantell and Maureen T Shannon, 'Improving Public Policy for Children: A Vote for Each Child' (2009) 9.4 *Intergenerational Justice Review* 139-143, 141.

There are basically three ways to achieve this: (1) children themselves exercise the right to vote (i.e., lowering the age limit to 16, 14 or even to 0); (2) their parents can receive proxy-votes for them; (3) children collect their unexercised votes until they reach the minimal age and then they use all their 'stored' votes at once. The second and third solutions can be combined with the first one.

There is, in theory, also a fourth way: granting the right to vote to the parents who would not simply substitute their children but have the extra suffrage on their own rights *because* they have children.[23] This fourth option is, however, in open conflict with the equality of suffrage, a basic tenet of modern democracies, so we are not going to consider it further. Besides this, it would also open up the debate for further weighing systems (more suffrage for those who pay more taxes, who have higher education, etc.), which have all been tried and rejected in legal history. For both of these reasons, I do not consider proposals suggesting fractional votes for children either.[24]

There is an obvious paradox about establishing any of these measures, nicely explained by Claus Offe: if there is a majority to vote for the children's suffrage, then there is no need for it; if there is no majority, then it is unclear how to introduce it.[25] For the sake of the argument I am going to ignore this problem at this point of the chapter and return to it later.

13.4 Option 1: Lowering the Minimal Age for Suffrage

In most European countries, the minimal age required for suffrage is 18, but in Austria this has recently been lowered to 16, just like in certain German *Länder*.[26] There are

23 Between the two world wars, each father of four children or more received an extra vote in the French colonies Tunisia and Morocco, see André Toulemon, *Le suffrage familial ou suffrage universel intégral* (Sirey 1933) 121-122; Anne Marlene Simon-Holtorf, *Geschichte des Familienwahlrechts in Frankreich (1871 bis 1945)* (Peter Lang 2004) 168-169. For the similar Belgian system (combining it with financial and educational aspects for extra votes) from 1893 until 1919, see Léon Dupriez, *L'organisation du suffrage universel en Belgique* (Larose 1901); Maxim Mauranges, *Le vote plural, son application dans les élections belges* (Larose 1899); Joseph Barthélémy, *L'organisation du suffrage et l'expérience belge* (Giard & Brière 1912); Laurent de Briey, Aurélie Héraut and Elise Ottaviani, 'On Behalf of Children? Plural Voting System in Belgium from 1893 to 1919' (2009) 9 *Intergenerational Justice Review* 144-145.

24 Andrew Rehfeld, 'The Child as Democratic Citizen' (2011) 633 *The Annals of the American Academy of Political and Social Science* 141-166, 158: 'Imagine that upon turning 12, a child received 1/7 of a vote, with an additional 1/7 added for every year after (at 18 they have a full vote)'.

25 Claus Offe, 'Zusatzstimmen für Eltern. Ein Beitrag zur Reform von Demokratie und Wahlrecht?' in Evangelische Akademie (ed.), *Zukunft wählen – Zusatzstimmen für Eltern?* (Evangelische Akademie 1993) 1-26, 20. This kind of objection can be brought against most legislative reform proposals though.

26 For further examples outside of Europe with age limits of 16 (Brazil, Cuba, Somalia, Nicaragua) or 17 (East Timor, Indonesia, Sudan, North Korea), see Róbert Iván Gál, Attila Gulyás and Márton Medgyesi, 'Intergenerációs alkotmány' (2011) 5 *Nemzeti Fenntartható Fejlődési Tanács Műhelytanulmányok* 25. For proposals lowering the voting age to 16 in the UK and the US, see Alex Folkes, 'The Case for Votes at 16' (2004) 1 *Representation* 52-56; Daniel Hart and Robert Atkins, 'American Sixteen- and Seventeen-Year-Olds are Ready to Vote' (2011) 633 *The Annals of the American Academy of Political and Social Science* 201-222.

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proposals to lower this to 14 in some countries (or even lower if the child can express his/her will to vote in front of an authority),[27] but this has not yet been implemented. Besides the general democracy arguments mentioned above, the arguments for such a change range from synchronising the age of criminal liability with the minimal age of suffrage,[28] the full realisation of children's rights[29] to the denial of maturity or intellectual capacity as a precondition of suffrage.[30] A general reference to children's rights is unconvincing: fundamental rights can be limited if they conform to the tests of rights limitation (in our case: proportionality test), the first step of which is to establish the rationale for the limitation. Synchronising age limits does not really seem a convincing argument *on its own* either: for different legal possibilities (e.g., for being elected president or senator, for being able to sell properties) most legal orders require very different ages, because there are different rationales behind the different age limits.

The question is, then, rather whether there is a rationale behind having a minimum of age for suffrage and what age this rationale would require to be set as a minimum age of suffrage. Throughout history, there seems to have been a tendency to have lower and lower age limits (now it is mostly 18, but more and more countries are introducing 16). The question about the 'right' minimum age is not a strictly constitutional one: introducing a minimum age of 40 would probably violate most international human rights instruments, but the question as to whether 14, 16 or 18 is the right one, seems to be left to political decision. The real issue is, however, whether there is a rationale at all behind any age limit. The most obvious answer would be to say that the rationale is that voters should have a minimum level of maturity (implying intellectual capacity). This would, however, be an unsatisfying answer: the right to vote is in fact *not* based in any democracy on intellectual capacities. If it was, then a good proportion of the mature population should be excluded from suffrage (and possibly substituted with intelligent teenagers). If we begin to introduce a minimum level of intellectual capacity as a precondition of suffrage, then there is no reason why this level should not be higher and higher, leading to the exclusive suffrage of a handful of professors in each country. Such a system would, how-

27 Wolfgang Gründinger, 'Wer wählt, der zählt' in Stiftung für die Rechte zukünftiger Generationen (ed.), *Wahlrecht ohne Altersgrenze? Verfassungsrechtliche, demokratietheoretische und entwicklungspsychologische Aspekte* (Oekom 2008) 21-52. Before that time, the parent can exercise the suffrage for the child. For fourteen as the lowest acceptable age of suffrage see Hans Meyer, 'Wahlrechtsgrundsätze', Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band III* (3rd ed. CF Müller 2005) 543-604, marginal number 12. For a proposal to abolish age limits in general (without any formal procedure for expressing the will to vote) Mike Weimann, *Wahlrecht für Kinder. Eine Streitschrift* (Beltz 2002) 1-23.

28 Rupprecht (n 17) 209.

29 Weimann (n 27) 1-23.

30 Steven Leece, 'Should Democracy Grow Up? Children and Voting Rights' (2009) 9.4 *Intergenerational Justice Review* 133-139, 133: 'excluding children from the franchise normally rests explicitly on the premise that political authority should be knowledge-based'.

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ever, result in governments that would protect the interests of professors in the name of the public interest.[31]

The fact that the majority of children would not want to vote or that they are easily influenced (other possible counter-arguments against the suffrage of children), can also be applied to many mature voters, yet nobody proposes their exclusion. Another possible counter-argument is that lowering the age limit increases the number of voters who are actually not paying taxes, so it would lead to higher public debt again. Sustainability arguments have a weaker emotional (and legal) force than democracy or fundamental rights arguments, so this would not outweigh our argument for the suffrage of children.[32]

The equality of suffrage is based on the moral equality of citizens, and not on their equal intellectual capacity. The only argument that seems strong enough is self-protection: we protect them from their own bad choices. Just like in many Continental European contract laws, children are not allowed to sell their properties (under market price) *as long as they are children*, we can also protect them constitutionally from possibly making bad political choices *as long as they are children*. This paternalistic argument seems to be sufficient for a temporary limitation of the right to vote. But it is very difficult to explain why *nobody* can exercise this right for them. In the current electoral systems, we can use two conceptualisations to describe the legal situation:[33] (1) children do not have suffrage at all as long as they are children (this would contradict the principle of the moral equality of citizens); (2) children have suffrage but they are not allowed to exercise it as this is in their own best interest as long as they are children. The key question thus becomes whether it should be possible for someone (in practice: for the parents) to exercise the right to vote for the children. In the following, I am going to analyse this question.

13.5 Option 2: Proxy Votes by Parents (Demeny Voting)

Parents voting vicariously for their children is often referred to as Demeny Voting as it was (also) proposed by demographer Paul Demeny in 1986.[34] This means that children do have a suffrage but they cannot exercise it themselves, their parents exercise it for

31 See the masterful critique of Plato by Robert A. Dahl, *Democracy and Its Critics* (Yale UP 1989) 52-79.

32 On the strength of the language of rights see Dieter Birnbacher, 'What Does it Mean to Have a Right?' *Intergenerational Justice Review* (2009) 9.4 128-132, 128. We translate interests into rights in order to make them stronger, see Mark Tushnet, *The Constitution of the United States: A Contextual Analysis* (Hart 2009) 188.

33 On the undertheorised nature of the question in political (and constitutional) theory, see Francis Schrag, 'The Child's Status in the Democratic State' (1975) 3.4 *Political Theory* 441-457, 443: 'Children are a nuisance to most adults; they are a particular nuisance to the democratic theorist who wishes to exclude them from having a voice in the direction of the policy with as much vehemence as he wishes to include every adult (except, of course, felons, the insane, the mentally retarded, and aliens)'.

34 Paul Demeny, 'Pronatalist Policies in Low-Fertility Countries: Patterns, Performance and Prospects' (1986) 12 *Population and Development Review* (supplement) 335-358.

them vicariously. The situation is similar to contract law: parents make contracts in the name of and for their children. With this solution, the 'one man one vote' principle is not violated. Similar solutions are known in the UK and in France where relatives can vote for you if you are unable to attend the elections, but this substitution can only happen if you already have the right to exercise your suffrage.[35] Sometimes proxy voting is referred to in the literature as 'family suffrage', but I am going to use the expression 'suffrage for children' as this more precisely expresses the actual doctrinal suggestion. In most European countries, this proposal has a political colour, namely a conservative one, except for Germany where you find supporters of this idea from all over the political spectrum.[36]

Possible counter-arguments are manifold: (1) Some objections concern the directness of votes, i.e., whether someone can exercise the right to vote for someone else at all. Certain legal acts (marriage, will) can only be done personally, and votes – so the objection goes – are similar. (2) Others concern the equality of votes, as parents in many cases would cast two votes. (3) Some object to the implied presupposition that parents would act in the interest of their children. (4) Finally, some doubt whether there can be any solutions for the technical details (conflict between parents, etc.).

Ad (1). *Directness.* A usual answer to the first objection could be to refer to blind people for whom someone else is making the cross at the ballot. This answer can, however, be countered with reference to the fact that the blind person can give a direct order about the vote, whereas children cannot do so. Another answer could be to refer to votes via post. This, again, is not really a convincing answer, as votes via post express the will of the voters, whereas in the case of children they normally would not express any such wish. A third answer would be to refer to doubts concerning the requirement of directness of votes in a democracy. We can do so either by using comparative law arguments (UK and France, see above in footnote 35), or by referring to the fact that this requirement was historically only introduced to avoid the sale of votes (purposive interpretation of the concept),[37] or by referring to the general system of democracy, with the words of Jane Rutherford: 'Proxies are a common system for delegating the right to vote. In fact, the entire system of democracy can be seen as giving elected representatives proxies for their constituents.'[38] As a matter of fact, any of the three arguments seems pretty strong to me to counter objection (1).

35 Called *proxy voting* in the UK, see *Representation of the People Act 2000*, section 12(1). In French law, it is called *vote par procuration*, see *Code électoral*, article 147bis.

36 Van Parijs (n 12) 311.

37 David Krebs, 'Wider die amputierte Wahl. Physiker und Philosophen als Hebammen einer echten Demokratie' in Stiftung (n 27): 267-300, 283.

38 Jane Rutherford, 'One Child, One Vote: Proxies for Parents' (1998) 82 *Minnesota Law Review* 1463-1525, 1502.

Ad (2). *Equality.* The objection concerning equality is probably the strongest of all the concerns.[39] There are two strategies to counter it. The first one is to admit that Demeny Voting would indeed encroach upon the principle of equality, but to state that the universality of elections is more important.[40] In this case a conflict between two principles is shown, that of equality of suffrage and that of universality of suffrage, and the principle of universality is judged to be more important as it is more directly connected to the principle of democracy. The universality – so the argument goes – is logically prior, as it concerns the 'whether', whereas the equality only concerns the 'how'.[41]

The second strategy is to deny the encroachment upon the principle of equality and to stick strictly to the doctrinal reasoning: everyone only has one vote, parents merely exercise votes vicariously for their children. This second reasoning is probably what is behind the existing French and UK (adult) proxy voting systems, and from a strictly legal point of view it also sounds more convincing than the first answer.

Ad (3). *Interests.* The objection concerning doubts about whether parents would actually cast their votes in the interests of their children is a weak one:

> Arguing that parents cannot act as their children's representative because they might abuse their position becomes absurd in comparison to all the other powers parents already have over their children.[42]

Parents represent their children in court, they receive and spend the subsidies for their children.[43] We can also legitimately ask: if not the parents, then who else could represent them?[44]

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39 Even though doctrinally different, *in practice* it means that certain citizens have more than one vote which downgrades all other citizens in comparison to them, see Rainer Wernsmann, 'Das demokratische Prinzip und der demographische Wandel. Brauchen wir ein Familienwahlrecht?' (2005) 44 *Der Staat* 43-66, 55-56, 66. Some even go further and suggest that it would be such a grave breach of the constitutional principle of democracy that not even a constitutional amendment could introduce it, see Matthias Pechstein, 'Wahlrecht für Kinder?' (1991) 3 *Familie und Recht* 142-146, 146; Wolfgang Schreiber, 'Wahlrecht von Geburt an – Ende der Diskussion?' (2004) 21 *Deutsches Verwaltungsblatt* 1341-1348; Werner Schroeder, 'Familienwahlrecht und Grundgesetz' (2003) 58 *JuristenZeitung* 917-922. The latter argument is a very local (German) objection though, probably inapplicable to other European countries. For an argument *contra* this objection, see Hanna Quintern, *Das Familienwahlrecht* (Lit 2009), esp. 167-235. Under US law, a constitutional amendment would be necessary to introduce it, see the detailed analysis by Robert W. Bennett, 'Should Parents Be Given Extra Votes on Account of Their Children?' (2000) 94 *Northwestern University Law Review* 503-565.

40 Krebs (n 37) 267-300.

41 Krebs (n 37) 281.

42 Stefan Olsson, 'Children's Suffrage: A Critique of the Importance of Voters' Knowledge for the Well-Being of Democracy' (2008) 16 *The International Journal of Children's Rights* 55-76, esp. 72.

43 Udo Hermann, *Ökonomische Analyse eines Kinderwahlrechts* (Freie Universität Berlin, Univ. Diss. 2010) 204.

44 Krebs (n 37) 274.

Ad (4). *Technical details.* The objection concerning technical details (especially, which parent should exercise the right to vote) is also unconvincing. As a matter of fact, there are a number of proposals with different technical solutions.[45] Referring to the technical details as an objection just begs the real question, i.e., whether we should introduce it or not. All technical details (e.g., separated or divorced parents, step parents, disappeared parents, children in state custody, etc.) are logically secondary and by no means insurmountably difficult questions.

13.6 Option 3: Storable Votes

A further possibility to give suffrage to children without facing the objections of proxy votes is to apply the so-called 'storable votes'.[46] This would mean that children collect their uncast votes until they reach 18 and then they can cast four or five votes at once. In this way, nobody should exercise their votes for them but they still could keep all of their votes. This ensures that the moral equality of all citizens (incl. children) is abided and avoids the problems associated with parents vicariously exercising their children's votes: no vote would be lost.

Such a suggestion is, however, conceptually flawed. A vote at a parliamentary election is not capital that you can collect and store like money, but it is an *act of deciding about somebody (or a group of people) at a certain time*. The concept of storable votes was developed as a decision-making technique for expressing the intensity of preferences by minority groups about *certain issues* and not about setting up a decision-making organ.

It would probably also mean – as a conceptual side-effect – that everybody should have the possibility not to go to the ballots in order to collect his/her vote for future elections. Or you could even take a 'vote loan' and exercise your future votes immediately. Why not?

13.7 Conceptual Side-Effects

The actual social purpose of suffrage for children only necessitates the active suffrage (the right to vote), but for the sake of conceptual coherence, some also suggest the passive

45 Van Parijs (n 12) 312-313 listing different technical proposals concerning who can exercise the vote (with references): only the father, only the mother, until 10 years the mother and then the father, fathers for their sons and mothers for their daughters, half vote to each parent, father for first child and mother for second (or the other way around) etc. According to Franz Reimer, 'Nachhaltigkeit durch Wahlrecht? Verfassungsrechtliche Möglichkeiten und Grenzen eines Wahlrechts von Geburt an' (2004) 35 *Zeitschrift für Parlamentsfragen*, 322-339, 329-339 every parent should only be able to exercise one additional vote, and the parents should agree who exercises the vote for the first child (in lack of an agreement neither of them can exercise it).

46 For the concept, see A. Casella, 'Storable Votes' (2005) 51 *Games and Economic Behavior* 391-419.

suffrage for children (the right to be elected).[47] A further conceptual side-effect is that if we accept the suffrage for children, then – with the same arguments – we also have to accept the suffrage for (mentally) disabled people. As a matter of fact, such arguments have already been used by the European Court of Human Rights for mentally disabled people (but not for children),[48] so we can also turn it around: a conceptual side-effect of the suffrage of mentally disabled people is the suffrage of children (at least in the form of children voting for themselves without any age limit; proxy voting is not suggested in the discourse of mentally disabled people).

13.8 Practical Consequences for the Sustainability Challenge

All the above could lead us to the conclusion that we should introduce the suffrage for children. As a matter of fact, from the perspective of the conceptual coherence of democracy, the suffrage for children (more precisely proxy votes, possibly combined with lowering the minimum age for suffrage) seems more favourable than the current situation. But for the actual issue of this chapter, i.e., sustainability, the situation is much less clear.[49] To put it in short: it seems to be a *useful but actually not decisive* change.

On the one hand, even children can be voted out with or without suffrage for children if the ageing population is large enough, and on the other hand, if we accept the premise of self-interest then children (or their parents) will only be interested in sustainability as long as they are alive.[50] This means that the time span will be longer, but structurally it just delays the problems (for a few decades).[51] According to model countings on Germany, e.g., the amount of child subsidies would only be 10% higher than currently.[52] Depending on the voting model (probabilistic vs. median voter model), pensioner voters will take over the electoral system either in 2016 or in 2030.[53] Both of these data are very disappointing from a sustainability perspective.

Besides these problems, there is also a questionable implied presupposition about voting behaviour behind every suggestion on suffrage for children, according to which 'citizens are following their own interest' (instrumental voting). This presupposition has

47 Gründinger (n 27) 31. *Contra* Rupprecht (n 17) 15 calling such proposals 'not serious'.

48 *Alajos Kiss v. Hungary*, judgment of 20 May 2010, no. 38832/06.

49 On the inconclusiveness of statistical models on the practical effects, see also Achim Goerres and Guido Tiemann, 'Kinder an die Macht? Die politischen Konsequenzen des stellvertretenden Elternwahlrechts' 50 (2009) *Politische Vierteljahresschrift* 50-74, esp. 71-72.

50 E.g., they might want child subsidies to be very high *now*, even if this causes long-term debt for future generations, see Goerres and Tiemann (n 49) 58.

51 Tom Krieger, 'Generationengerechtigkeit und das "Wahlrecht von Geburt an" – kritische Anmerkungen aus Sicht der Public-Choice-Theorie', in: Stiftung (n 27) 301-330.

52 Hermann (n 43) 138. The usual distortion of electoral systems favouring educated and rich people because they are more likely to vote also applies to parents voting for their children, see Hermann (n 43) 125.

53 Hans-Werner Sinn and Silke Übelmesser, 'Pensions and the Path to Gerontocracy in Germany' (2002) 19 *European Journal of Political Economy* 153-158; Hermann (n 43) 202.

been criticised both from an epistemological ('citizens do not know and cannot actually know what their own best interest is') and from an anthropological point of view ('citizens very often vote against their personal interest, if they think that it is the interest of the political community').[54] A further possible, rarely discussed, argument against children's suffrage is that they often behave deliberately against the parents' will.[55] If this is true, a question that shall be left open here, then it raises further doubt about the actual impact of children's suffrage on demographic sustainability.

Suffrage for children might thus be a useful (and doctrinally probably more coherent than the current exclusion), but for our issue definitely not a decisive suggestion, so we have to continue our search for further constitutional solutions. This combined with the practical difficulty of introducing such a change, both facing the fierce ideological debates and the paradox by Claus Offe as shown above, it is probably not worth fighting – from the perspective of sustainability – for this change at all. Instead, we should concentrate our intellectual efforts and time on constitutional solutions, which serve the purpose of sustainability more efficiently.

54 Alexander A. Schuessler, *A Logic of Expressive Choice* (Princeton University Press 2000); Joel M Guttman, Naftali Hilger and Yochanan Shachmurove, 'Voting as Investment vs. Voting as Consumption: New Evidence' (1994) 47.2 *Kyklos* 197-207; Kamhon Kan and CC Yang, 'On Expressive Voting: Evidence from the 1998 US Presidential Election' (2001) 108.3-4 *Public Choice* 295-312.

55 *Cf.* Sebastian Müller-Franken, *Familienwahlrecht und Verfassung* (Mohr 2013) 45 with further references to psychological literature.

14 Indivisibility and Justiciability: New Pathways for the Protection of Social Rights

Gábor Juhász[*]

14.1 Introductory Notes

I studied András Sajó's works as a candidate for PhD in sociology (social policy) some 20 years ago when I investigated whether social rights could be recognized as human rights. This was a turbulent time in the history of Hungary when basic institutions of democracy have just started their operation, and at the same time the transition process to market economy have undermined the social security of large groups of Hungarian society. As a young researcher who was in search for the possibilities to create legal safeguards against widening the gaps in society, I got involved in a dispute with András Sajó who did not hide his reservations about incorporating social rights in national constitutions of post-communist countries.[1] Due to the difference in our perspectives András Sajó was not able to convince me that social rights were utterly useless in a constitution, but his well-founded criticism of them inspired me to pay more attention to counter-arguments. Nevertheless, Sajó's views definitely had a productive effect on the debates over the constitutional (and human rights) nature of social rights.[2] The position that Sajó consequently represented stimulated the scholarly thinking of many students of human rights about the indivisibility and justiciability of social rights. In this chapter I pay tribute to András Sajó's oeuvre, focusing on the development of these two concepts in relation to the international constitutional protection of social rights.

14.2 No Indivisibility without Justiciability – International Protection of Social Rights during the Cold War

Social rights are perhaps the most controversial among human rights. Despite the doctrine of indivisibility of human rights emphasized by UN organs and bodies, social (as

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1 Sajó 1995, Juhász 1997, Sajó 1997.

2 Sajó and Uitz 2006.

well as economic and cultural) rights were regulated by separate conventions and the design of their enforcement mechanisms was also weaker than their civil and political counterparts. The separation of the protective measures created deepening divide between the two groups of human rights. It has gradually become the generally accepted view that the international community could only have aspirations for the enforcement of civil and political rights while social rights were only promises not to be taken seriously. Scheppele thus put it in witty wording:

> Most attempts to defend social rights at conferences on comparative constitutionalism … are met with the sort of polite dismissal that is reserved for particularly excited children who are not mature enough to understand the full practical consequences of the evidently charming things they say.[3]

In other words, the concern is that social rights are considered of secondary importance, which is also reflected in the terminology that says they belong to the *second* generation of human rights. However, the classification of human rights by generations is hardly appropriate if we have a look at the history of their formation in international law. The international community declared civil, political and social rights simultaneously in the United Nations Charter and in the Universal Declaration of Human Rights. Later on the preparation of the covenants determining their content took place simultaneously as well, and the two human rights covenants were adopted by the UN General Assembly at the same time. The difference in the time when they entered into force is noticeable: the International Covenant of Economic, Social and Cultural Rights overtook the International Covenant on Civil and Political Rights by two months. However, the disconnection between the human rights declared in two separate conventions had far-reaching consequences since this move served as a basis for the terminological distinction between the first and second generations of human rights – a distinction that was first mentioned by Karel Vasak in 1977.[4] Making out a distinction between various generations of human rights, Vasak wanted to call attention to solidarity rights as a new, third generation of human rights. The quick spread of the new classification was perhaps a result that it was matching the ideology of the New Right, which was the dominant intellectual trend of the period in the United States and the United Kingdom contrasting civil and political freedoms with social (and economic) rights. In this intellectual atmosphere Vasak's terminological innovation came to life of its own, and subsequently development of a theory for its verification began. According to this theory, the cleavage between the rights for freedom and the rights for social welfare was a result of the confrontation between the superpowers. According to this theory, the market economies of the West placed a greater

3 Scheppele, p. 2.
4 Vasak 1977.

emphasis on protecting civil and political rights, and in contrast to it, socialist planned economies of the East made effort to strengthen the protection of economic and social rights.[5] However, this explanation has been questioned recently. According to Whelan and Donnelly, for the rapid development of Western welfare states, which was fueled by the recognition of economic and social rights, it is frivolous to assume that Western democracies were inherently hostile toward social rights. The authors call attention to the fact that the idea of international protection of human rights was mentioned in President Roosevelt's State of the Union address in 1941. The president's address has gone down in history as the 'Four freedom speech' in which the freedom from want constituted an organic unity with the other three freedoms, the freedom for speech and expression, religious freedom, and the freedom from fear, which means a

> world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor – anywhere in the world.[6]

The message emphasized the importance of economic and social rights, which were regarded essential to preserving democracy. Several months later the Atlantic Charter emphasized that the allied partied hope to see that 'all the men in all the lands may live out their lives in freedom from fear and want'.[7] Whelan and Donnelly also emphasizes that when the Universal declaration of human rights was formulated, neither the United States nor the Western Europe countries had a dismissive attitude to economic and social rights. Their delegations received instructions neither to question that economic and social rights belong to human rights nor to make efforts for separating them from civil and political rights. Facts suggest it to be just the contrary: Eleanor Roosevelt, as the chairperson of the committee for the formulation of the text of the declaration, specifically supported the incorporation of social and economic rights in the document.

From 1950 onward, the State Parties started to design the enforcement mechanism of human rights announced in the Universal Declaration. In doing this, the Commission of Human Rights

> envisioned an incremental approach beginning with the oldest and less controversial set of rights and planned to consider 'additional instruments and measures' on 'economic social, cultural' and even political rights at its next session.[8]

5 For more about it see for example Pollis and Shwab, Hehir and Felice.
6 Roosevelt 1941.
7 Cites Whelan and Donnelly, p. 903.
8 Ibid., p. 928.

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Countries of the West played an active and innovative role in the formulation of the text: they did not reject the idea of designing a single covenant and supported the incorporation of social and economic rights into it. Separate procedures for the enforcement of the rights announced in the Universal Declaration came to the agenda quite early without a claim for designing separate conventions. The idea of putting the protection of human rights on a double track came from the Indian delegation in 1952, which argued that only 'civil and political rights were justiciable'.[9] Although the proposal was refused by the Commission of Human Rights, it revived in the Economic and Social Council and the General Assembly and led to a 'division resolution' of the General Assembly in February 1952.[10] From this time the formulation of the covenants ran on two tracks which contributed to the development of a dualistic regime of human rights protection. As far as the protection of civil and political rights was concerned, appeal to independent bodies with the power to decide over the cases was established. The enforcement of economic and social rights was organized in a less powerful way where the governments were required to submit country reports in which they had to demonstrate their own efforts for the progressive fulfillment of the rights declared in ICESCR.

In order to overcome the shortcomings of the reporting system, the monitoring bodies (the UN Committee of Economic, Social and Cultural Rights and the European Committee of Social Rights) turned to alternative sources of information on the implementation of social rights. By doing this both bodies tried to channel the opinion of organizations dealing with the protection of economic and social rights such as trade unions and civil organizations. The European Committee of Social Rights developed a sophisticated questionnaire for the collection of information that is additional to the country reports. Each step served to make more comprehensive the monitoring activity and to suppress the subjectivity of the country reports. Even though trade unions and civil organizations produced much important information, the cooperation with them was less effective than in the field of civil and political rights. This was a consequence of the small number of civil organizations dealing with economic and social rights and the scarcity of resources at the disposal of these organizations, which prevented them on many occasions to participate in committee meetings.

14.3 Indivisibility and Justiciability: In Search of Effective Measures for Protecting Social Rights

The end of the Cold War, and regime changes in the countries of the communist block as well as the fall of the apartheid regime in South Africa, revived interest in the development of the protection of human rights in general and social rights in particular. The

9 Ibid., p. 930.
10 Ibid.

elimination of the tension between the two superpowers swept away the ideological confrontation that served as a basis for making a distinction between the first and second generations (often interpreted as first and second classes) of human rights. The changing ideological and political environment created favorable conditions for a comeback to the concept of indivisibility of human rights originally envisioned in the Universal Declaration some forty years ago. Human rights conventions that have been designed since the end of the 1980s reflected such differences in approach: they do not separate civil and social rights (for example, the Convention on the Rights of People with Disabilities, or the Convention of the Rights of the Child).

At the same time the European Community started to deal with the incorporation of human rights in the EC law far more actively than it did before. Article 6 of the Maastricht Treaty declared that the EU

> respects fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States as general principles of Community law.

Later on the Amsterdam Treaty made fundamental rights a founding element of the European Union. These developments required to determine the rights to be regarded fundamental. This process was completed by the proclamation of the EU Charter of Fundamental Rights in 2000. The structure of the Charter 'transcends the traditional dichotomy between two main categories of rights by grouping all rights in a single document', which gives 'the impression that the trajectory of fundamental social rights is very much part of the overall trajectory of fundamental rights in EU law' – at least in terms of rhetoric.[11]

However, despite the renaissance of the concept of the indivisibility of civil, political and social rights and their declaration in single documents, these developments could not automatically answer the problems concerning the differences in the enforcement of various branches of rights. In other words, the absence of answering the question about the justiciability of social rights prevented the chances to develop a human rights regime to be based on equal respect for civil, political and social rights. Thus, solving the problem concerning the justiciability of social rights had a crucial importance, and various approaches were implemented to do this. One possible answer is the simplification of the problem by emphasizing that justiciability of social rights is a hot topic only in Anglo-American legal systems where constitutional rights are to be enforced by the judiciary whereas in continental legal regimes this is a less sensitive issue. A second approach places the emphasis on the derivation of social rights from civil (and political) rights in order to give social rights the same level of protection as civil rights. The third approach is

11 De Witte 2005, p. 153.

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also based on the mobilization of civil rights, but in this case they are not subjects of derivation but rather play the role of external factors that give support to civil rights aspects of social protection claims. The fourth approach is linked to the development of new forms of 'legal action termed as public interest litigation'[12] in India and *tutela* in Latin America. Last but not least, a fifth approach focuses on violations of social rights in order to make the review process consistent with other ones used for other international human rights instruments.

14.4 Is Justiciability a Negligible Problem?

Challenging the usual critique concerning the judicial enforcement of social rights, Scheppele calls attention to the divergent nature of common law and especially American legal system and legal systems 'that have constitutional courts with the power to review the constitutionality of statutes in the abstract'.[13] As she puts it, questioning the justiciability of social rights taking financial consequences of the courts' decisions into consideration is almost obvious in the United States where courts are 'involved almost exclusively in deciding… concrete disputes between concrete parties'.[14] In such legal systems, court decisions 'serve as a notice' to the executive branch of the government. In other words, 'court decisions are demands made of political executives that should be followed in an all-or-nothing fashion'.[15] In relation to the enforcement of social rights, it means that governments can easily lose control over the reallocation of resources of which they are, quite understandably, bristle up. This is not the case in legal systems where constitutional courses have the power to make abstract reviews of legal regulations, since 'abstract-review cases typically come in the form of guidelines' in which the court does not 'tell the government what it must do in the all-or-nothing form of a directive'.[16] In such legal regimes the constitutional court and the government 'are engaged in a negotiation about what the final policy will be' where the court decides about methods and practices that should not be followed and the government remains free to accomplish its purposes in other ways.[17] Scheppele thus summarizes it: 'The court establishes limits on the permissible means that can be used to effect policy, and establishes requirements for what must be taken into account in so doing' and thus, the court can prevent 'the government to minimize or ignore the needs of the vulnerable' but 'the government is ordinarily still left with the choice of tactics and strategy in forging policy from there'.[18]

12 Verma 2005, p. 3.
13 Scheppele, p. 12.
14 Ibid., p. 11.
15 Ibid., p. 12.
16 Ibid., p. 12.
17 Ibid., p. 12.
18 Ibid., p. 13.

No matter how smart this argumentation might appear, it lacks the capacity to give a general answer to the doubts about the justiciability of social rights: it offers solution only for a small group of countries that have a rather special institutional framework of constitutional control. Countries that lack such a framework cannot benefit from this approach. Moreover, the *erga omnes* nature of the decisions of the constitutional court is a strict condition necessary for the successful operation of this type of control, which prevents its application at an international level.

14.5 The Derivation Approach

Substitution of direct international or constitutional protection of a right for its derivation from other human rights is a fairly widespread method, and it is often applied for civil rights as well. For example, due to the absence of direct constitutional regulations, the Hungarian Constitutional Court ensured the protection of the right to privacy by way of deriving it from the right to life and human dignity.[19]

14.5.1 The Right to Life

In relation to social rights, there are many examples of ensuring their protection in similar ways. In *Bandhua Mukti Morchha v. Union of India and Ors*, the Indian Supreme Court

> declared that the non-enforcement of welfare legislation like the Minimum Wages Act, 1948 and the Bonded Labour (Abolition) Act, 1976 was tantamount to denial of the right to live with human dignity enshrined under Article 21 (the right to life) of the Constitution.[20]

With a similar technique, the right to housing, which has no direct guarantees in the Indian Constitution, was 'defined through judicial interpretation of the right to life' and the Constitutional Court declared that 'reasonable residence is an indispensable necessity for human development and the fulfilment of the right to life'.[21]

In *Koolwal v. State of Rajasthan* the state's duty to protect human health (Article 47) and the natural environment (Article 51A) was read in conjunction with the right to life, and recognized that the right to health is an integral part of the right to life. According to the Court, 'the maintenance of health, sanitation and environment falls within Article 21

19 Alkotmánybíróság (Constitutional Court) No. 46/1991. (IX. 10).

20 Verma 2005, p. 17.

21 Verma indicates *Francis Coralie* v. *The Union Territory of Delhi*, 1 SCC 608 (1981) and *Francis Mullin* v. *Union Territory of Delhi*, 2 SCR 516 (1982). Ibid. p. 18.

(the right to life) thus giving the citizens the fundamental right to ask for affirmative action', consequently 'the Municipality had a statutory duty to remove the dirt, filth etc. from the city' of Jaipur.[22]

14.5.2 The Rights to Human Dignity, Freedom and Equality

In South Africa public authorities were ordered to provide minimal shelter to illegal occupiers of land who were forcibly evicted, even though the South African Constitution does not guarantee a fundamental right to housing. As the Cape of Good Hope High Court argued, the right of access to adequate housing cannot be seen in isolation: 'realizing socio-economic rights enables people to enjoy the other rights in the Bill of Rights' and 'human dignity, freedom and equality are denied to those without food, clothing and shelter'.[23] Since Section 28(1)(c) declares that every child has the right to shelter, their parents became entitled to shelter through their children's right.

14.5.3 The Rights to Property, Health and Family

In the *Serac and CESR v. Nigeria* the African Commission of Human Rights held that 'the right to housing (including protection from forced eviction) is derived from the express right to property health and family'.

14.5.4 The Limits of Derived Rights Approach

Derivation of social rights from traditional human rights has serious limitations because this approach reduces international and/or constitutional protection to those aspects of social rights that are in close connection with one or the other component of civil rights. Protecting social benefits by the right to life reduces protection for situations of extremity when a failure to provide benefit (housing, health care etc.) endangers human life, or it threatens with serious damage to the health of individuals. This approach cannot say too much about states' duties concerning the provision of general health care. Other rights with a potential for deriving social rights from them suffer from similar problems because they offer protection only for special aspects of the rights we call social. For example equality usually means equality of treatment in the administration of social benefit claims but says almost nothing about the substantial question of how a state should reflect on economic inequalities.

22 Ibid., p. 22.
23 Verma 2005, p. 43.

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Consequently, this approach has very limited capacities for determining the essential content of various social rights.

14.6 Protecting Social Benefits by 'Satellite' Rights

'Satellite' rights offer a kind of external protection for social rights claims in situations where the claim is not recognized as being fundamental on ground of its social right component but rather protected because of having some 'external' civil right component. Even though there are similarities of this approach to the previous one, they differ from each other in an important characteristic. Using this approach, social rights as such are not derived from civil rights but rather some of their components get a treatment as if it was a civil right. A good example of this is the protection of social insurance benefits and pensions in particular as property rights, which constitute a widely used concept in Central European human rights law. The first step in this direction was taken by the German Constitutional Court, which was soon followed by the Hungarian Constitutional Court. By 1996 social insurance entitlements have also been fallen within the protection of property rights before the European Court of Human Rights according to the Gaygusuz judgement. Reflecting on the development of ECHR practice, Austria also classified contributory benefits as properties in a constitutional sense.[24]

The limits of this approach is obvious: satellite rights are suitable for providing protection only for those components of social benefit claims that share the characteristics of a given civil right. The problem is similar to the one we could face where derived rights are concerned: satellite rights can protect some aspects of social rights but they are incapable of providing general protection in the field of social claims.

14.7 New Forms of Legal Action Concerning the Enforcement of Social Rights

Another source of developing jurisprudence of economic, social and cultural rights is the creation of new forms of legal actions introduced in the constitutional systems of the global South, for example in India and Latin America.

In India, public interest litigation and the supportive attitude of the Supreme Court as well as the High Courts contributed to overcoming concerns about the non-justiciability of social rights. Public interest litigation is based on various regulations of the Indian constitution[25] and practically gives the power to any citizen to file a petition in the Su-

24 Sonnevend, p. 366.

25 Article 32 and Article 226 of the Indian Constitution.

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preme Court as well as the High Courts for the benefit of the public or for removal of some public grievance. This form of litigation

> is characterized by a non-adversarial approach, the participation of amicus curiae, the appointment of expert and monitoring committees by the court, and the issue of detailed interim orders by the Supreme Court and the High Court.[26]

Derivation of the right to work, shelter, education, water and food from the right to life is a result of public interest litigation jurisdiction.

In Latin America *tutela* actions fills the role of public interest litigation. Tutela was introduced in the 1991 Colombian Constitution and it gives the power to every citizen to

> directly request any judge in the country to protect his or her fundamental rights when they are being violated by a state agent or an individual to which the person is subordinated, and when there is no other legal action that can effectively be used to prevent the right violation from continuing.[27]

A tutela judge decides about the petition and all tutela decisions are sent to Colombian Constitutional Court, which can discretionally review any of the cases.[28] Among the tutela judgements the best-known is Decision T-760 of 2008 where 22 health systems related tutela cases have been accumulated. According to the case law of the Colombian Constitutional Court, the right to health for plaintiffs is enforceable when '(1) there is an identifiable nexus with "fundamental rights", such as the right to life; (2) when the case is brought by a person representing a vulnerable group such as children, pregnant women, or the elderly; and (3) when the health service at issue is included in the national health policy which defines the state's obligation with regards to the minimum core content of the right to health'.[29] In this case the court ordered the authorities 'to modify regulations that cause structural problems within the system'.[30]

14.8 The Violations Approach

In the 1990s a UN survey clearly demonstrated the defects of this second method: a majority of the countries that ratified the ICESCR had not presented any report on the

26 Verma 2005, p. 3.
27 Summary of Decision T-760 of 2008.
28 Ibid.
29 Ibid.
30 Ibid.

progressive development of economic and social rights to the Economic and Social Council. Some of the reports were quite superficial and many of them tried to hide the problems with the implementation of rights instead of revealing them.[31] Maybe not to that extent, but the same can be said of the European regime protecting social and economic rights. The idea to turn the focus on the identification of violations of social rights was a consequence of these experiences, and it was formed in the mid-1990s. There are obvious advantages of this approach, mainly because it helps to get the review system of civil and political and economic, social and cultural rights closer. The violations approach uses the same tripartite scheme that was developed for the control of the implementation of state duties in relation to civil and political rights, and distinguishes three types of violations: (1) violations resulting from 'actions and policies on the part of governments' that do not respect the concerned right; (2) violations resulting from actions and omissions on the part of governments leading to failure of protecting the concerned right; and (3) violations related to the 'state's failure to fulfil the minimum core obligations' of the concerned right.[32] Despite the methodological clarity of this concept, its implementation was hopeless using traditional mechanisms of enforcement. Building on the experience with public interest litigation and tutela cases, as well as the conceptual statements that can be found in the General Comments of the UN Committee of Economic, Social and Cultural Rights, an Optional Protocol was adopted with regard to UN Convention on Economic, Social and Cultural Rights. This move opened the way for the submission of communication

> by or on behalf of individuals or groups of individuals under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by the State Party.[33]

14.9 Conclusions

As I tried to demonstrate, indivisibility of human rights was questioned because of problems with the justiciability of ECOSOC rights, and particularly social rights in the period of the Cold War. The ideologically based confrontation between the United States and the Soviet Union contributed to making distinction between two groups of human rights. Even though the groups were named by generations, the distinction could be easily traced back to differences in various characteristics, which include enforceability and, thus justiciability. UN institutions being in charge of reviewing the implementation of human rights conventions insisted on the indivisibility of human rights but in reality it was no

31 Chapman, pp. 28-29.
32 Ibid., p. 43.
33 Article 2, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

more than rhetoric regarding the double track that served for the enforcement of the two generations of human rights.

The end of the Cold War made possible to come back to the original concept of the indivisibility of different groups of human rights. By this time, many questions about the nature of ECOSOC rights have emerged, which could have been used as a good opportunity for the formulation of theoretical as well as practical answers to them. Questions concerning the justiciability of social rights were no exception to this process. As we could see, answers have been formulated in a great variety of ways by national as well as international actors. Approaches developed for supporting the enforcement of social rights mutually affected the actors having a role in this field. Interaction between various methods applied by different actors is demonstrable in many cases. The development of national and international regimes for the protection of social rights is supporting each other by accepting of and developing further each other's arguments. Of course, it does not mean that various bodies using similar arguments would come to exactly the same conclusions, but this even happens sometimes. The protection of social insurance based entitlements, such as property rights, is a good example for the latter one: its concept was developed by the German constitutional Court in the early 1990s and it was applied in a couple of years by the European Court of Human Rights. In other cases the interplay has not have so direct effects. Derivation of social rights from other rights is a point that has been reached only in some countries. However, the UN Committee on Economic, Social and Cultural Rights repeatedly emphasized in its General Comments that social rights are directly interdependent with a large number of civil rights, and, for example, some of them are 'integral components of the right to health'.[34] For another example, Paragraph 22 of General Comment No. 19 (on the right to social security) states that

> States parties must also pay full respect to the principle of human dignity contained in the preamble of the Covenant, and the principle of non-discrimination, so as to avoid any adverse effect on the levels of benefits and the form in which they are provided.

Today the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights can be regarded as a synthesis of the development of the enforcement mechanisms of social rights in the last quarter of a century. It incorporates the legal instruments developed in Asia and Latin America for making litigation in cases where the concerned social rights are possible as well as new methods applied for strengthening the enforcement mechanism of ECOSOC rights by changing the focus of the review process from the gradual implementation of state duties to immediate detection of the violations of the rights concerned.

34 Paragraph 3, General Comment No. 14.

If someone compares the regimes, concepts and methods to protect ECOSOC rights in the late 1980s with the current one, he can detect significant changes on each term. This change cannot be simply explained by the dramatic changes to world politics. Of course, disintegration of the bipolar world order was a necessary precondition for the release of the driving forces behind these changes. However, developing new concepts and methods was in great part inspired by debates over the characteristics of ECOSOC rights as human rights. Justiciability of social rights was an important factor in these debates to which András Sajó contributed significantly with his characteristic position. If the future development keeps to the line of trying to identify components of ECOSOC rights that can be protected in similar ways as their civil and political counterparts, it will be a result of the criticism of legal theorists like him.

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15 Standing upon Stilts: Philosophical Interpretations of the European Convention on Human Rights

Kriszta Kovács and Gábor Attila Tóth[*]

Observing the political upheaval in France, in his famous *Anarchical Fallacies* Jeremy Bentham dismissed the abstract and slippery character of the 1789 Declaration of Rights of Man and of Citizen as "rhetorical nonsense, nonsense upon stilts." He argued vehemently that rights are the children of law:

> from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, gorgons and chimeras dire.[1]

Debates between various philosophical defenders and skeptics on the justification for human rights as universal mandatory moral norms having a higher priority over ordinary legal norms have not finished; on the contrary, continue unabated, and the concept of human rights constantly provokes new normative ideas and doubts. Obviously, a rejection of human rights does not necessarily go together with an acceptance of autocratic public power. From Jeremy Bentham to András Sajó, many advocates of individual autonomy believed that freedom of expression, separation of church and state, abolition of death penalty, or equal rights for vulnerable minorities can be served by real laws, that is, by reasonable and self-limiting legislative acts and judicial precedents, better than by fictional and zealous human rights.[2] However, as the worldwide rise of new authoritarianism warns us, human rights are the ultimate shelters against abuses of political, social,

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1 J. Bentham, "Anarchical Fallacies," in *Selected Writings on Utilitarianism* (Wordsworth, 2001) 405 and ff. See also J. Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Routledge, 1987).

2 A. Sajó, "Az emberi jogok jogi haszontalanságairól és lehetetlenségeiről" (Why are Human Rights are legally useless and impossible?), *Világosság*, 1990/8-9, 573-579. See also A. Sajó, *Limiting Government: An Introduction to Constitutionalism* (CEU Press, 1999).

and legal powers, committed even in the name of either a god, or a relative majority of citizens.

Despite never-ending controversies, what remains clear is that human rights exist in the sense that their promotion and balanced cooperation between constitutional powers have been the ambitious enterprise of the European legal order for seven decades. Sadly, it was nothing less than the cataclysmic Second World War that led the European nations into a new era of human rights. One account proposes the term "Cosmopolitan Legal Order" to describe and assess contemporary transnational legal systems in Immanuel Kant's terms.[3] The initial words of the Universal Declaration of Human Rights echo – among others – Kantian practical ideas. As an anthropological foundation, it expresses that all human beings are autonomous entities, "endowed with reason and conscience." Based on these considerations, the text declares that

> recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

In its Preamble, the European Convention on Human Rights goes beyond the Universal Declaration by asserting that it is the first comprehensive enforceable human rights treaty in Europe.[4] Irrespective of the dividing line between European countries during the Second World War, the Convention regards governments of contracting European countries as "likeminded," having a "common heritage of political traditions, ideals, freedom and the rule of law." At that time, the drafters felt able to declare without doubt or hesitation the

> profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend.

From the beginning of the Cold War, countries on the western side of the Iron Curtain were in the exceptionally fortunate position to become active participants in the political, legal, and economic integration process.

The Council of Europe, founded by 10 states, has become a community of 47 Member States committed to shared values of human rights, rule of law, democracy, and economic

3 A. S. Sweet, "A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe," *Global Constitutionalism*, Vol. 1, No. 1, 2012, 53-90.

4 For historical background, see W. A. Shaba, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2015) 8-9.

development. Although the Council of Europe as an international organization cannot make binding laws like national legislatures do, the binding jurisprudence of the European Court of Human Rights, the interpreting body of the binding Convention, is a unique contribution to the legal culture of the Member States and beyond. It is not an exaggeration to say that the Court has the most extensive jurisprudence on fundamental rights adjudication, which today forms the main European human rights framework. Even the European Union defers to the Court on many human rights issues, such as on the restriction of fundamental rights in a state of emergency.

The Convention is formally an international treaty between sovereign states; yet it is regarded by the Court as a "constitutional document" of European public law, and the Court therefore functions as a transnational constitutional court.[5] Having a constitutional feature, the Convention is not only a supranational legal instrument, but has also been incorporated into national legal systems.[6] It is therefore also a subject of application of judicial bodies on national level. This cooperative legal order is customarily labeled as development through dialog of courts as well as dialog between courts and legislature, constitution makers included.[7]

Concerning substantive human rights matters, rival theoretical conceptions – whether deontological, consequentialist, teleological, or other – provide rival answers to the questions of the content, nature, scope, and limitations of human rights and of positive obligations on the part of the State. Taking into account the existence of different concepts, the Convention does not set out explicitly a particular conception of human rights.

As to methodology, although the text of the Convention contains some guidelines for judicial interpretation (e.g. Article 17 – prohibition of abuse of rights), it does not determine any authoritative way of interpretation, thereby letting the Court interpret its own role in ensuring fundamental rights protection with coherence.

The main interpretive challenges the Court faces from the beginning are almost the same as for constitutional courts. As a famous invention, the Court has been in favor of the so-called "living instrument" or "evolutive" doctrine,[8] rejecting both textualism and

5 *Loizidou* v. *Turkey* (Preliminary Objections), Judgment of 23 March 1995, para. 75. *Al-Skeini and Others* v. *the United Kingdom*, Judgment of 7 July 2011, para 141.

6 The Convention for the Member States has different legal stands. In some states the Convention is considered the law that "shall prevail over all laws." In other states it has constitutional status. It also happens that constitutions include some parts of the text of the Convention. There are also differences among the Member States in whether the constitutional courts declare themselves bound by the rulings of the Court. For more on this, see K. Kovács, "Cooperative Decision-making: The Relation between Hungary and Strasbourg," *International Constitutional Law Journal*, Vol. 5, No. 2, 2011, 188-199.

7 The sources of rights and jurisdiction overlap. This means that typically three sources of judicially enforceable rights coexist: national constitutional rights, EU rights, and rights of the Convention. Institutionally, national and supranational judicial authorities have been developed in parallel, resulting in decentralized adjudication. A. S. Sweet, "A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe", 61.

8 In the seminal *Tyrer* case, the Court developed the "living instrument" doctrine: the Convention "must be interpreted in the light of present-day conditions. (…) the Court cannot but be influenced by the develop-

search for original intent as interpretive approaches. At the same time, some kind of conventionalist or traditionalist interpretation is also present in the case law. In many of its judgments the Court relies heavily on the so-called European consensus: in cases where a significant number of Member States accept or deny a specific human rights claim, the Court tends to defer to this common or majority opinion. In many other cases, when it cannot recognise European consensus, the Court leaves it for the Member States' authorities to weigh the competing interests involved, saying that State authorities did not exceed their margin of appreciation.[9] In other words: if there is no consensus on European level, the applicant does not have the right she claims.

However, these traditionalist approaches often raise at least as many doubts as problems they solve. Judicial interpretation of the Convention is clearly not a matter of arithmetic. The number of similarly regulating States in itself does not justify an infraction of fundamental rights. While prevailing consensus of Member States is inconclusive, a meta-consensus has significance: as bases of drafting and interpreting the Convention, certain principles of liberal democracy are legally binding. Moreover, when the Court finds no European consensus on a specific human rights claim, it is far from acceptable that local public morals, veiled by margin of appreciation, are a justified ground for limiting rights.

As George Letsas has pointed out, for the Court the reference to the European consensus or margin of appreciation serves nothing more than that a particular interference has been justified without stating explicitly the substantive principle upon which the conclusion is based. Although the Court holds that margin of appreciation is a tool for the interaction between the Court and national authorities, it is often a vehicle of unprincipled deferentialism. This is why it is so important that there are many other hard cases when the Court further substantiates its conclusion by clearly expressed principled reasoning. The Court does not exercise illegitimate judicial discretion in reading the Convention as a catalog of moral rights by applying objective moral principles to hard, controversial cases.[10]

Is the Court in the position to choose between searching for a quantitative European consensus or applying the moral reading the Convention? Not exactly. There is no such thing as a single moral reading; rather, behind the listed rights of the Convention one can reveal different theories of rights. Therefore, the task of the Court and the judges is to

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ments and commonly accepted standards (…) of the Member States of the Council of Europe." *Tyrer* v. *The United Kingdom*, Judgment of 25 April 1978, para 31.

9 For instance in the *Lautsi* case the Court argued that in deciding to keep crucifixes in the classrooms of the State school, the Italian authorities acted within the limits of the margin of appreciation left to the respondent State. *Lautsi* v. *Italy*, Judgment of 18 March 2011, para 70.

10 G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007).

choose among the various political theories of rights that best fit the text of the Convention.

In sum, we share the view that the bases of the rights are moral principles that justify them. But we should not forget that it is the Convention that the judges are expounding, therefore we cannot imagine a constructive application of the Convention without commitment to values and principles of liberal democracy. In the context of this contribution we will not provide either an extensive description of the various thinkable interpretation methods – from textualism to purposivism – of the Court, or a detailed list of rival moral theories – from skepticism and cultural relativism to natural law doctrines – behind the European human rights cases and controversies.

But rather we take a few representative judgments of the Court, mostly those in which Judge András Sajó was involved, and with the help of these judgments we aim at illustrating how some of the most influential moral and political theories (libertarian, utilitarian, and liberal egalitarian) are present in the text of the Convention and in the jurisprudence of the Court. One of the common aspects of these ideas is that individuals have a right and a responsibility to choose and pursue their own conception of the good life, as opposed to moralistic and paternalistic constraints on liberty. We believe that some of the philosophical readings lead toward the right answers in hard cases of human rights, while others are – to borrow Bentham's word but not his conclusion – fallacies.

15.1 *Ternovszky v. Hungary*: A Dead End for Libertarianism

This is a notable "right to choose" case: whether pregnant women have a right to choose the place of becoming a parent.[11] Childbirth claims, like those of abortion, require the Court to weigh the mother's rights against the protection of the unborn child. However, while lack of access to abortion is obviously a constraint on the right to self-determination, it is a matter of dispute if prescribed hospital birth is an interference with rights of highest importance ("human" or "fundamental" rights).

The applicant, Anna Ternovszky was a pregnant woman who wanted to give birth at home, rather than in a hospital. At that there was no comprehensive legislation on home birth in force in Hungary, though there was a Government Decree in effect under which any health professional assisting a home birth ran the risk of conviction for a regulatory offence. Anna Ternovszky alleged a violation of both Article 8 and 14 of the Convention: first, she could not choose freely due to the unjustified yet real threat to health professionals inclined to assist home births; second, the fact that she could not benefit from adequate professional assistance for a home birth as opposed to those wishing to give birth in a health institution amounted to discrimination in the enjoyment of her right to respect for her private life.[12]

11 *Ternovszky* v. *Hungary*, Judgment of 14 December 2010.

12 *Ternovszky* v. *Hungary*, Judgment of 14 December 2010, paras 3-6.

The Court held that there had been a violation of the applicant's right to respect for her private life. From the Court's point of view, however, what made the justification difficult was that no European consensus could be established, because a comparative report from the WHO described many legitimate models from feasible hospital birth to home-like atmosphere birth centers and home birth. As a principled reason, the Court – with a reference to the *Pretty* case[13] – established a strong claim that:

> The notion of personal autonomy is a fundamental principle underlying the interpretation of the guarantees of Article 8. Therefore the right concerning the decision to become a parent includes the right of choosing the circumstances of becoming a parent.[14]

But following this, the Court did not give a clear explanation of what makes this right-claim paramount, decide on the merits of home versus hospital birth, or advise whether States may ban home birth and under which conditions. The only specific reason why the violation of the right to private life was established is the fact that the Government Decree posed a permanent threat to health professionals inclined to assist home births, and the absence of comprehensive legislation limited Anna Ternovszky's choices regarding home delivery. Since the legal situation was not foreseeable, "the matter of health professionals assisting home births was surrounded by legal uncertainty prone to arbitrariness." Therefore, interference with the applicant's right to respect for her private life was not "in accordance with the law."

In contrast with the Court's reasoning, Judge Sajó together with Judge Tulkens attached a philosophically supported joint concurring opinion to the decision. They pointed out that home birth in Hungary had become a hard and risky choice, even if the choice itself remained formally without interference. And the reason for that was the fact that where regulation is the default, lack of enabling regulation may be detrimental to the exercise of the given right. The two judges nostalgically referred to libertarianism, better known as classical liberalism, arguing that

> the background assumption of classical liberalism does not necessarily work in the contemporary welfare State, especially in the medical environment. In this welfare system practically everything is regulated; regulation is the default, and only what is regulated is considered safe and acceptable. Suddenly, in the absence of positive regulation, what was a matter of uncontested private choice becomes unusual and uncertain. In a very densely regulated world some disadvantages emerge for freedoms without regulatory endorsement.[15]

13 *Pretty* v. *the United Kingdom*, Judgment of 29 April 2002.

14 *Ternovszky* v. *Hungary*, Judgment of 14 December 2010, para 22.

15 Joint concurring opinion of Judges Sajó and Tulkens to the judgment in the case *Ternovszky* v. *Hungary*, Judgment of 14 December 2010.

At the time of the adoption of the Convention, libertarianism was likely to serve as one of the background political philosophical theories of those who drafted the text. If we take a look at the rights and freedoms protected by the document, we may notice that many of the so-called classical fundamental rights and freedoms had been already protected by the French Declaration of the Rights of Man and of the Citizen, and the US Bill of Rights. What worried the drafters of these historical documents was that the State – in the former case, an absolute monarch, in the latter, the tyranny of the majority – might violate rights. This is why they found that the rights are held against the State. In Lockean terms, persons have natural rights to life, liberty, and property, but since such persons have trouble enforcing these rights, they set up a State mechanism to enforce these rights and punish rights violations.[16] In this view, persons can act within their liberty; and as long as there is no State or other doer interference with the freedom, there seems to be no difficulty.

In the twentieth century, Robert Nozick affirmed a renewed version of this theory. The basic rights should be shielded from the State, not provided by it. Only "a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified."[17] The main reason for this, according to Nozick, is that only in this kind of minimal state can we avoid rights violations. First, because all persons have ownership title over their bodies and minds. Hence, we legitimately own ourselves and we have natural moral rights to live as we choose, and not to be harmed by others without consent. Second, because "no one may be sacrificed for others." The theory takes natural moral rights of the individuals (including their property interests) seriously, justifies the existence of the minimal State, but holds that a more extensive State would violate the rights of the person not to be forced to do or not to do certain things. Hence, Nozick was of the view that redistribution violates people's rights, and for instance the "taxation of earnings from labour is on a par with forced labour."[18]

This argument could seem powerful and convincing, especially the claim that, independently of social arrangements, we have basic rights providing liberty of action and protection against interference from power holders – but we should add the theory's well-known weaknesses too. First, it is backward looking in supposing that the current status of rights depends on what the past was like: what abuses of liberty rights took place and what were the chains of valid agreements of people. The problem is that we have hardly any knowledge about the factual origins and transactions of rights; and if we have any, it reveals that the hypothetical just original position is counter-factual: in the "no man's land" we mostly find violence and arbitrariness. Second, if we still suppose that there was an original just situation, it has almost nothing to do with the justification of the status and distribution of rights today. Principled explanation is needed as to what hu-

16 J. Locke, *Two Treatises of Government* (Cambridge University Press, 1962).
17 R. Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) ix-xi.
18 R. Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 169.

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man conditions are the moral bases of the contemporary human rights endowments and why; and what principles qualify state interventions as right or wrong.

In the spirit of Locke and Nozick, Judges Sajó and Tulkens in their concurring opinion recall the basic natural rights doctrine by blaming the positive regulatory State for creating a hostile legal environment: pregnant women have to interact with authorities and medical professionals have to act as figures of some kind of public authority and accordingly fear and secrecy may result in fatal consequences for mother and child. This is why the "rights to respect for parental choice" now necessitates a minimum of positive regulation, while "such choice would have been a liberty in the 19th century."

Fear and secrecy were truly the dominant feelings in the given Hungarian case, because giving birth at home has been actively discouraged: simply assisting a home birth could result in prosecution. But the general historical component of justice offered by the two judges is fallacious, because there was not and could not have been such a right to choose before the coming into being of a welfare state, or the acknowledgement of positive human rights duties of the State. It cannot be held that in the nineteenth century and before, pregnant women were justly treated and their rights respected, since they did not have any alternative but to give birth in a natural but risky way, with folk-traditional or unprofessional (self-)help measures. The overwhelming majority of expectant women faced serious risks, from infection to death, showed clearly by maternal and neonatal morbidity figures. Many of the positive effects that public regulation and distribution of wealth can bring about were not available, as libertarianism supposes, through voluntary mechanisms. The prevention and appropriate care available in today's developed countries are not comparable with the conditions of previous ages.

In brief, the historical explanation on the extensive nature of the State – in itself – does not seem satisfactory for justification as to why and to what extent public authorities have positive obligations under the Convention. The reasoning of the Court declares that "the notion of personal autonomy is a fundamental principle," but does not clarify what it means today – which may give clues about the conceptual relations between liberty rights and positive rights, as well as the right to receive or refuse health care services.[19]

19 The case of Internet comments is another example of that the libertarian approach works unsatisfactorily in today's technical and legal environment. The Court in the case of *Magyar Tartalomszolgáltatók Egyesülete and index.hu* v. *Hungary* (Judgment of 2 February 2016) held that online intermediaries couldn't be held liable for online user-generated comments that do not constitute clearly unlawful speech. Should the Court adopt the classic liberal view of editorial freedom and the autonomy of the press, the Court should have decided the case the way the Hungarian Constitutional Court decided it: that the operator of a website (such as the editorial board of the ordinary press) is responsible for blog entries or comments that violate others' rights even if those comments are moderated and even if the operator was unaware of such entries and had removed them without delay after receiving a complaint. (The HCC made a distinction between online news portal and Facebook posts, arguing that the latter are like "private letters," they are not part of the great publicity.)

15.2 *Mouvement Raëlien Suisse v. Switzerland*: Multifaceted Utilitarianism

Some insist that they have an inalienable human right to believe in aliens. Many believe that inalienable freedom of conscience includes a right to express disbelief in God. The Mouvement Raëlien Suisse (Swiss Raelian Movement) is an association that belongs to the group of dissenters. It promotes scientific atheism, condemns established religions, and prefers utopianistic "geniocracy," a political model based on intellect and human cloning, rather than democracy, and, what is more, devoted to the "sexual awakening" of children. In 2001, the association requested permission from the police to put up posters featuring the faces of extraterrestrials and a flying saucer, together with the address of its website where one can find for example the message "Science at last replaces religion." The Swiss authorities refused to allow the association to put up the posters on the ground that the organization's views on "geniocracy" and its criticism of contemporary democracies were capable of undermining public order and safety, as well as public morals.

The Movement complained that the Swiss authorities' refusal to allow its poster campaign had violated its freedom of expression (Article 10) and freedom of thought, conscience and religion (Article 9). Although the Convention recognizes these freedoms as human rights, it provides that the exercise of these rights may be subject to restrictions such as are prescribed by law and are necessary in a democratic society, in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals. Hence, the restrictions on these fundamental rights may be justifiable to protect public interests.

The Court attached a significant weight to these interests. With the narrowest majority (nine votes to eight) it dismissed the application, stating that the ban on the disposal of posters fell within the margin of appreciation given to states, because the association's expression was not strictly political, but closer to commercial speech deserving less protection, and the management of public billboards in the context of campaigns might vary from one state to another, or even from one region to another within the same state.

The majority, however, went far beyond the simple use of margin of appreciation. Although it emphasized that only serious reasons could have led to overrule the assessments of the national authorities, the Court found that the Swiss ban on the poster campaign met a pressing social need; namely, the restriction was seen as indispensable for the protection of health, morals, and the rights of others, and for the prevention of crime. Thereby the Court upheld that the Swiss authorities attached more importance to the values of public morals and public order than to the association's fundamental right to free speech. It accepted without further investigation the domestic authorities' view on the capacity of an idea to undermine public order and morals. Hence, the majority decision seems to be in line with the Court's previous argument in *Dudgeon v. the United*

Kingdom, where it pointed out "that some form of legislation is necessary to protect not only particular sections of society but also the moral ethos of society as a whole."[20]

The argument of the majority could remind us how many influential utilitarians treat rights: they give them a derivative status by preferring acts with a motivation of promoting the general interests of society. According to Jeremy Bentham, the classic theorist of utilitarianism, the all-comprehensive end of a society should be "the greatest number of happiness for the greatest number of peoples."[21] While advancing this universal interest, he also emphasized that one of the many ends the State should achieve is the non-violation of rights, that are "acknowledged to owe their existence to government."[22] Applying a cost–benefit analysis, he was of the view that society as a whole, not just the individual, would lose by the repression of those legal rights.

It seems to us that the majority opinion applied a vulgar Benthamian concept on public interests by allowing the restriction of fundamental rights in the interests of national security, public safety, public health, and morals. The judges read the enumerated rights in the Convention, one of the successors of the French Declaration, not as ends themselves, but as tools only: the State should ensure the Convention rights to effectively serve collective goals. Without empirical evidence, the judgment called for the protection of minors against sexual abuses and clearly deferred to national authorities' competence to protect not so clearly existing majoritarian religious sentiments against free speech.

Importantly, there are utilitarian thinkers who take rights (legal rights instead of natural rights) more into account, and incorporate rights not into one of the ends the State should achieve, but as side constraints upon the actions of the individuals to be done. These rights forbid everyone to violate these rights in the pursuit of their goal. John Stuart Mill would be very surprised to see that under the Convention public morals could be one of the legitimate reasons for state intervention, since one of his many famous theses is that the government has no right to enforce popular morality by law and that society and the law ought to give importance to individual freedom of choice in action in matters of private morality. Mill's argument is not purely consequentialist like other utilitarians would be, at the center of this thought is the passionate belief that men are made human by their capacity for choice.[23] This capacity for choice plays a major role in promoting free discussion.

In his essay "On Liberty", Mill uses different arguments for free speech in cases where the majority view is false, where the minority view is false, and where both parties of opinion have a portion of the truth but not the whole of it. Mill holds that in each case

20 *Dudgeon* v. *the United Kingdom*, Judgment of 23 September 1981, para 12.

21 J. Bentham, "Anarchical Fallacies" in *Selected Writings on Utilitarianism* (Wordsworth, 2001) 463.

22 Ibid., 404.

23 I. Berlin, "John Stuart Mill and the Ends of Life," in *Four Essays on Liberty* (Oxford University Press, 1969) 173-206.

the search for truth is best served by allowing free discussion.[24] As his well-known invention suggests, interfering with this free discussion is legitimate only if it aims to prevent harm to others. According to this Harm Principle, "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[25]

In the case of Mouvement Raëlien Suisse, one of the dissenting judges, Pinto De Albuquerque, explicitly referred to Mill's theory on the search for truth to promote free speech in order to substantiate his argument that the purpose of Article 10 is to

> preclude the State from assuming the role of watchman for truth and from prescribing what is orthodox in matters of opinion. The State must strictly adhere to the principle of content-neutrality when it decides how to make a public space available, refraining from banning a campaign on the pretext that authorisation could imply approval or tolerance of the opinions in question. Such prohibitions are not compatible with the pluralism inherent in democratic societies, where ideas are freely exchanged in a public space and truth and error emerge from an unrestricted confrontation of ideas.[26]

One might recognize the Millian argument in the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska, and Vučinić. One of their main points is that a majority that shares a certain view seek to silence the minority who disagree.

> It is particularly regrettable to see the protection of freedom of expression being diminished in respect of the world view of a minority. Moreover, at least the original justification for the ban given by the local police reflects the fact that the poster contained ideas and opinions which were at odds with the prevailing opinions of the local authorities and, perhaps, the majority of citizens of Neuchâtel.

Behind the three dissenting judges' reasoning is also the Millian thought that societies should protect disapproval and protest, first because they might have good arguments, and second because "there needs protection also against the tendency of society to impose, by means other than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."[27] Here, Mill warns us that "coerced conformity"[28]

24 J. S. Mill, "Liberty," in *Utilitarianism, Liberty and Representative Government* (J. M. Dent and Sons, 1962) 65-174, 78. More on this, see W. Cartwright, "John Stuart Mill on Freedom of Discussion," *Richmond Journal of Philosophy*, Vol. 5, 2003, 1-7, 2.

25 Mill, Liberty, 73.

26 Dissenting opinion of Judge Pinto de Albuquerque to the judgment in the case of *Mouvement Raëlien Suisse* v. *Switzerland*.

27 Mill, Liberty, 68.

28 C. S. Sunstein, *Why Societies Need Dissent* (Harvard University Press, 2003) 24.

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would have harmful effects not only on the affected individuals but also on the society.

The joint dissenting opinion of Judges Sajó, Lazarova Trajkovska, and Vučinić, and the joint dissenting opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić, and Yudkivska also assert that the Swiss ban on posters considers a viewpoint-based restriction. The dissenters maintain that one could read the majority decision as something that argues that freedom of expression in public space could be restricted solely for the reason that the authorities disagree with the ideas conveyed. The Movement wanted to promote its ideas through posters that were not unlawful in themselves, but the authorities refused to give their consent. The facts of the case suggest that only those were limited in their rights who did not agree with that society's general and mainstream approach. Looking at the case from this point of view, the dissenters argue that the majority decision should have held the Swiss authorities' refusal to put up posters as a violation of the right to free speech.

To put it simple, the authorities restricted disfavored points of view. This is the reading of the free speech clause that has been treated as undesirable by courts at least since the jurisprudence of Justice Holmes, whose words echo as follows:

> if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought not free thought for those who agree with us but freedom for the thought that we hate.[29]

One can interpret Articles 9 and 10 of the Convention allowing the restriction of the fundamental rights for the protection of the rights and freedoms of others in accordance with the Millian thought by holding that the damage or the real possibility of the damage to the rights of others can justify the interference of society. From a Millian or Holmesian point of view, in the given case the question the judges could have raised is the following: Does moral distress and moral outrage of the kind the Swiss authorities were concerned about count as harm or "imminent lawless action"?[30]

If the judges think that Mill's utilitarianism is not a Benthamite one, and prefer the value of liberty as utility "grounded on the permanent interests of a man as a progressive being,"[31] then they may agree even with either Ronald Dworkin on "the right to ridicule,"[32] or Jeremy Waldron that moral "distress occasioned by contradiction or the pain and shock of forceful debate … are not experiences which a progressive being has a genuine interest in avoiding."[33] In other words, the dissenters here might have applied

29 Dissenting opinion of Justice O. W. Holmes, *United States* v. *Schwimmer*, 279 U.S. 644 (1929).

30 *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). This standard based upon the previous "clear and present danger" standard first elaborated by Holmes in the case of *Schenck* v. *United States*, 249 U.S. 47 (1919).

31 Mill, Liberty, 74.

32 R. Dworkin, "The Right to Ridicule," *The New York Review of Books*, Vol. 53, No. 5, 23 March 2006.

33 J. Waldron, "Mill and the Value of Moral Distress," *Political Studies*, Vol. 35, 1987, 310-423, 326.

Kantian arguments to disapprove viewpoint-based restriction: As an autonomous being, every person has equal status and value in society, therefore everyone is equally entitled to express and share his or her views in public. The Swiss authorities violated this principle since their judgments were biased: they favored implicitly the emotional commitment of some religious believers.

The different reasoning of the judges may reveal that in itself consequentialism is not conclusive in human rights conflicts, because it cuts both ways. Either principle of giving a group priority over liberty rights, or limitation on public power in the name of liberty rights can be built on utilitarian thoughts. What is more, the question arises why should judges be committed to the philosophy of utilitarianism at all.

15.3 *Horváth and Kiss v. Hungary*: The Vulnerability of Liberal Egalitarianism

Principles of freedom and equality are both at the core of the text of Convention and the jurisdiction of the Court. Equality, just like freedom, is an interpretive concept. The way in which the case law of the Court affects the meaning of the phrase of the Convention, rights "shall be secured without discrimination," is determined by values and principles that explain why interpretation should have that role.

The applicants of the case, István Horváth and András Kiss, two young Roma men, were diagnosed as having mental disabilities when they were children; hence, they were educated at a "special" or "remedial" school with a limited curriculum. Neither of the two could be enrolled in a Baccalaureate program, which restricted their access to higher education and employment. István Horváth was unable to follow a course to become a dance teacher; András Kiss was unable to pursue his ambition to become a car mechanic. They both argued that their education in a remedial school constituted ethnic discrimination in the enjoyment of their right to education.

The Court agreed and unanimously found a violation of the Convention on the ground of indirect ethnic discrimination. The decision noted that Roma children have been overrepresented in the past and in the present in special schools due to the systematic misdiagnosis of mental disability. The proportion of Roma students at this school was 40-50 percent in the last ten years, although Roma represented 8.7 percent of the total number of pupils attending primary school in the given town. Thereby a general measure exerted a disproportionately prejudicial effect on the Roma, a vulnerable minority group. The State argued that the difference in treatment was not discriminatory, since all the children who were examined sat the same tests, irrespective of their ethnic origin. The Court did not accept it as a sufficient justification for the impugned treatment, because, as experts found, the diagnostic methods were old-fashioned, and Roma children could have performed better in the tests if these had not been designed for children belonging to the

ethnic majority. So it was "uncontested that the different, and potentially disadvantageous, treatment applied much more often in the case of Roma than for others." The test might be culturally biased and have a clear outcome: unequal treatment.[34]

Far from establishing consensual precedents, the Court had already delivered judgments in Roma school segregation cases and found violation of the Convention in the cases of *D.H. and Others v. the Czech Republic* and in *Oršuš and Others v. Croatia*.[35] In addition to holding discriminatory the impugned treatment of Roma students, the Court had found it to be the State's positive obligation to put in place "safeguards that would ensure that … the State had sufficient regard to [Roma children's] special needs as members of a disadvantaged group."[36] Interestingly, the Court in the case of Horváth and Kiss went further than this kind of procedural requirement and insisted on a substantive positive obligation,[37] namely to "undo a history of racial segregation in special schools."[38] What specific remedial measures should the State take in order to desegregate schools is uncertain, but it is crucial that the Court recognized that in some cases there is indeed a need for state intervention in order to prevent discrimination. In the given school segregation case the Court was of the opinion that it is not the individual, but the State that has to catch up.

One might suspect that the philosophical background theory behind this statement could be the autonomy-based analysis of discrimination. For instance John Gardner, applying a variation of Mill's harm principle, argues that anti-discrimination measures are justified on the basis of duties to respect personal autonomy. Under this view the State should ensure that people have the liberty to choose among valuable choices.[39] This autonomy-based argument could serve to protect, for example, women's right to abortion, LGBT persons against sodomy laws, or the wheelchair persons' right to access to public buildings. In the first and the second cases, the prohibition of unwarranted state interference, and in the third case, the requirement of justified state interference secure the freedom to act in accordance with one's desires.

But this kind of autonomy-based justification might not work in school segregation cases. Assuming that "special" or "remedial" schools are just as well equipped as the "ordinary" schools, because they are given the same resources, and the curriculums are on an equally high level, the choices of Roma students are not restricted. But this dual

34 *Horváth and Kiss* v. *Hungary*, Judgment of 29 January 2013, paras 109-129.

35 *D.H. and Others* v. *the Czech Republic*, Judgment of 13 November 2007, *Oršuš and Others* v. *Croatia*, Judgment of 16 March 2010. In the former case, the Chamber judgment found no violation, by 6 votes to 1, subsequently the Grand Chamber reversed it by 13 to 4. In the latter case, the Grand Chamber delivered its judgment on the violation of Article 14 in conjunction with Article 2 of Protocol No. 1, by 9 votes to 8.

36 *Oršuš and Others* v. *Croatia*, Judgment of 16 March 2010, para 183.

37 A. Timmer, *Horváth and Kiss* v. *Hungary*: A strong new Roma school segregation case, 6 February 2013, <strasbourgobservers.com>.

38 *Horváth and Kiss* v. *Hungary*, Judgment of 29 January 2013, para 127.

39 J. Gardner, "On the Ground of Her Sex(uality)," *Oxford Journal of Legal Studies*, Vol. 18, No. 1 (1998) 173.

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school system remains "separately equal," which is not equal at all. The fact that schools are separated stigmatizes the Roma minority and demonstrates that the community refuses the Roma student's membership in society as a free and equal citizen. Moreover, this justification is typically counterfactual since segregated "special schools" lack those resources "normal" schools have; as a consequence, they serve neither the individual's claim for proper education, nor the community's need of ethnic integration.

Hence, in school segregation cases an equality-based justification might do a better job. At the core of the equality-based justification is the liberal egalitarian credo under which everyone has an equal right to human dignity, therefore the State must treat all its citizens as equals in the sense that political decisions must display equal concern and respect for the life, liberty, and equality of all. The weaker members of a political community are entitled to the same concern and respect of their government as those members who are capable of securing more political power for themselves. Thus, the guiding principle is not a formally equal treatment, as the Hungarian government argued in the case of Horváth and Kiss ("the same diagnostic methods were applied to everyone"), but treatment as an equal of Dworkinian terms ("diagnostic methods should take into account the cultural, linguistic, and social background of children belonging to minorities").[40]

Liberal egalitarians believe, furthermore, that equal concern requires state intervention to improve the social position of the members of socially disadvantaged groups so that their opportunities are equal. Therefore they hold special benefits for disadvantaged groups as fair and morally acceptable (preferential treatment or affirmative action).[41] The reason for this is that the State should not hold people responsible for their unalterable identifying traits over which they as individuals have no control (race, ethnicity, etc.), but because of which they are much more likely to be disadvantaged by legislation and/or social practice. Racial and ethnic classifications presumably reflect prejudice or hostility. That is why the Court requires from the State special vigilance and a vigorous reaction, and applies a stricter scrutiny.[42] This concept makes much harder for the State to classify on the basis of such unalterable identifying traits, and observes that the given unalterable identifying trait defines those persons as a discrete group, and it is this trait that distinguishes the members of the group from other members of the society. The Court, calling these groups of people disadvantaged or vulnerable, usually applies the concept of vulnerability and recognizes that "people are differently vulnerable; that vulnerability is par-

40 R. Dworkin, *DeFunnis* v. *Sweatt*, in M. Cohen, T. Nagel, and T. Scanlon (eds.), *Equality and Preferential Treatment* (Princeton University Press, 1977) 63-83. "The right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances." at 68.

41 J. Rawls, *A Theory of Justice* (Harvard University Press, 1999, revised edition), 65.

42 *D. H. and Others* v. *the Czech Republic*, Judgment of 13 November 2007, paras 175-176. *Horvath and Kiss* v. *Hungary*, Judgment of 29 January 2013, para 101.

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tially constructed depending on economic, political and social processes of inclusion and exclusion."[43]

What principle justifies the protected status of vulnerable groups? In this case, the Court reaffirmed that "as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority."[44] The Court has long defined a vulnerable group as a historically disempowered group deserving greater protection from the State. It has expressly recognized the Roma minority,[45] people belonging to a sexual minority,[46] persons with mental disability,[47] and persons living with HIV[48] as vulnerable groups in society.

This backward-looking concept of vulnerability might remind us of the theory of one of the most prominent liberal egalitarian thinkers, Thomas Nagel expressed in the late 1970s. He called this phenomena compensatory discrimination, which dealt with the effects of past social injustice, for instance, racism or sexism. According to this account, the State should be held responsible for reducing only socially produced inequalities.[49] Those groups should be compensated who have suffered discrimination throughout history if their discrimination was caused by society.

However, this backward-looking, compensatory justification for holding a group of people vulnerable is questionable. If we take seriously the liberal egalitarian view that holds that all citizens are equal in a moral sense, all are free in being able to take responsibility for planning their own lives, and no one's aim in life is more important than another's, then we may draw a Rawlsian conclusion that no one has a stronger claim to the needed resources to pursue a given aim. This is also true for inherited capacities. And if that is so, society's responsibility is not simply to compensate those or the descendants of those who were victims of racism and sexism of the society. It is better to say that the society's responsibility is not to maintain unjustified social inequalities.[50]

In accordance with this, in today's Court case law, not only past discrimination but also present injustices may serve as a basis for holding a group of deprived persons as vulnerable. In the case of *M.S.S. v. Belgium*, the Court opened the way for a more inclusive definition of vulnerableness.[51] It held the applicant, as an asylum-seeker, a member

43 L. Peroni and A. Timmer, "Vulnerable Groups: The Promise of An Emerging Concept in European Human Rights Convention Law," *International Journal of Constitutional Law*, Vol. 11, No. 4, 2013, 1056-1085, 1061.

44 *Horváth and Kiss* v. *Hungary*, Judgment of 29 January 2013, para 102.

45 *D.H. and Others* v. *the Czech Republic*, Judgment of 13 November 2007, para 182. *Oršuš and Others* v. *Croatia*, Judgment of 16 March 2010, paras 147-148.

46 *O. M.* v. *Hungary*, Judgment of 5 July 2016, para 53.

47 *Alajos Kiss* v. *Hungary*, Judgment of 20 May 2010, para 42.

48 *Kiyutin* v. *Russia*, Judgment of 10 March 2011, para 64.

49 T. Nagel, "Equal Treatment and Compensatory Discrimination," in M. Cohen, T. Nagel, and T. Scanlon (eds.), *Equality and Preferential Treatment* (Princeton University Press, 1977) 3-18.

50 J. Kis, "Az igazságosság elmélete. John Rawls magyarul" (A Theory of Justice: John Rawls in Hungarian), *Világosság*, 1998/8-9, 59-60.

51 *M. S. S.* v. *Belgium and Greece*, Judgment of 21 January 2011, para 232.

of a particularly underprivileged and vulnerable population group to be in need of special protection. The Court was of the opinion that M.S.S. was particularly vulnerable because of everything he had been through during his migration from Afghanistan and the traumatic experiences he was likely to have endured previously. Judge Sajó disagreed with the majority:

> although many asylum-seekers are vulnerable persons, they cannot be unconditionally considered as a particularly vulnerable group, in the sense in which the jurisprudence of the Court uses the term (as in the case of persons with mental disabilities, for example), where all members of the group, due to their adverse social categorization, deserve special protection. … The reason for this approach, which questions certain classifications per se, is that such groups were historically subjected to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualized evaluation of their capacities and needs.[52]

In his partly concurring and partly dissenting opinion, Judge Sajó insisted on the Court's previously accepted backward-looking test of vulnerableness and argued that as a group asylum-seekers not only did not suffer past injustices, but are not a homogeneous group at all. He offered an individualized examination of the situation of asylum-seekers by holding that "it is possible that some or many asylum-seekers are vulnerable (i.e. they will feel a degree of deprivation more humiliating than the man on the Clapham omnibus), but this does not amount to a rebuttable presumption with regard to the members of the 'class'." In the given case, Judge Sajó did not find M.S.S. vulnerable because he was in possession of considerable means, paid a considerable amount of money to a smuggler, and as a former interpreter he was capable of communicating abroad.

This controversy between the judges shows, again, that a backward-looking definition of vulnerable groups is – in itself – not convincing. As pointed out earlier, present injustices and not past discrimination could justify the special treatment of disadvantaged groups. What matters is not that during a given historical period a group was subjected to prejudice with lasting consequences, but that the group now suffers from social, political, or legal exclusion under unjust circumstances. Somewhat self-contradictingly, Judge Sajó emphasizes that asylum-seekers have their own horrible past experiences, which means that they were forced to leave their homes, and now they should live in a completely different environment under many legal and social uncertainties about their future, which is a fundamental existential issue.

Judge Sajó is right that asylum-seekers are members of a heterogeneous social group, which makes individualized judicial examination necessary. But this is true in many cases

52 Partly concurring and partly dissenting opinion of Judge Sajó.

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of other acknowledged vulnerable groups too. There are privileged Roma individuals, extremely powerful women, and persons with physical disabilities belonging to the VIPs. This kind of exception excludes neither that the group is in justified need of special care, nor that as individuals they may be victims of violation of freedoms, discrimination, or social exclusion.

15.4 Final Remarks

It has been a long journey for European jurisprudence from the Benthamian principle of utility directing that collective welfare be maximized to the Dworkinian approach requiring that this be done by treating people as equals in dignity. It has been a long way for the Court and its distinguished judges to establish and follow solid standards that protect human rights from encroachment, not only because it is good for the community but distinctly because for the individual.

Matters of interpretation are, however, inherently controversial, and the judges rarely acknowledge or openly endorse that they invoke philosophical principles of political morality in their day-to-day work. But this is what they do. So far as the judges try to follow any coherent interpretative strategy, they already use those principles – instinctively, implicitly, if not explicitly. Despite denial of the influence, even deferential, doctrinal, or pragmatic approaches have their own – unsatisfactory – theoretical roots, whereas other principled considerations may be as supportive as stilts for seeing the whole landscape.

As shown in the present piece, the dignity-based conception of equality is a well-settled principle in case law. In this liberal egalitarian model, everyone has a right to equal respect and treatment. We can also call it a comparative model: individuals and members of particular groups have certain rights because others, in a comparative situation, also enjoy them.

Similarly, in many judgments we can find the counterpart of the dignity-based conception of equality, the dignity-based individual freedom.[53] In those cases the scope of rights is independent of egalitarian, distributive principles. Individuals have fundamental rights and freedoms not because others, in a comparative situation, enjoy them, but because as human beings they deserve certain treatment.

Regardless of the necessarily imperfect precedents and regrettably uncertain future of the Court, we may conclude that what it has already achieved with the contribution of

53 Under the Court's case law the very essence of the Convention system is respect for human dignity (see, inter alia, *Pretty* v. *the United Kingdom*, Judgment of 29 July 2002, para 65; and *Vinter and Others* v. *the United Kingdom* on the life imprisonment, Judgment of 9 July 2013, para 113). Furthermore, in the case of *Karakó* v. *Hungary*, Judgment of 28 April 2009, the Court made it clear that "inalienable personal integrity rights" are also protected by the Convention.

those judges, including Judge András Sajó, committed to principled reasoning is not anarchical fallacy at all. On the contrary, if we imagine, for the moment, that there is such a thing as eternity, the achievements of the Court echo in it.

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16 Constitutionality, Conventionality and National Courts

Luis López Guerra[*]

16.1 Internal and Convention Law: A Realistic Approach?

Reflecting a general phenomenon, the last few decades have witnessed a progressive increase in the world of law and elsewhere of relations and ties among European countries, resulting in an accumulation of rules of a supranational nature, as well as the appearance of agencies entrusted with their application. This process is evident in two specific developments. On the one hand, in the creation of a supranational legal order rooted in the creation and expansion of the European Union; and on the other (and encompassing a larger number of States, but being more limited and specialized in scope) the appearance of a "European public order" of human rights, derived from the European Convention on Human Rights. Both of these instances of legal globalization have their own distinctive characteristics, but they share at least two common traits. Both espouse the primacy of their rules over national law, and both have a specialized court of last resort in charge of ensuring that such a primacy is guaranteed in practice.

As a result of the coexistence of two levels of legal order (national and supranational), a growing number of cases raise issues concerning the relationship between national legal rules and the legal mandates derived from European Union law and the European Convention. Using a term borrowed from Latin American legal scholarship and practice,[1] the question posed refers to the "conventionality" of the internal legal order, that is, the compatibility of the internal legal rules with rules derived from an international convention, whether it is the EU treaties or the European Convention on Human Rights. In the European case there may even be instances of "double conventionality," since this compatibility must often be verified with respect to both EU law and the mandates of the ECHR.

The relationship between internal and convention norms (including, in a broad sense, EU and ECHR law) may be examined from two perspectives, which could be loosely termed dogmatic and practical. The dogmatic perspective refers to the system of sources of law and, more precisely, to the position of convention norms in the national legal

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1 On the concept of "conventionality," see Raul Canosa Usera, *El control de convencionalidad*, Civitas, Cizur Menor, 2015; Luis Jimena Quesada, *Jurisdiccion nacional y control de convencionalidad. A propósito del diálogo judicial global y de la tutela multinivel de derechos*, Aranzadi, Cizur Menor, 2013.

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order, and to whether they are supra- or subordinated to internal norms according to the higher rules at both levels (i.e., the national constitutions on the one hand, and the EU Treaties and the ECHR on the other). The practical approach entails examining the actual position and concrete rulings in that regard by the last-instance national agencies or bodies that decide specific cases involving the primacy of internal or convention law, and particularly the higher jurisdictional bodies such as the supreme and constitutional courts.

Both aspects are certainly intimately related. But, in any event, an initial review of both the "positive" law in force in the European states and the case law of their respective courts on the one hand, and of the "positive" convention law and the case law of their "convention courts" (Luxembourg and Strasbourg) on the other, would indicate that at present there is no generally shared consolidated model concerning the relationship between internal and convention law. Today it is not possible to consider that the states involved share any universally accepted framework in either of the two supranational systems concerning the mutual relationships between their internal legal orders (including their constitutional and infra-constitutional norms) and the "conventional" legal orders set forth in the EU treaties and the ECHR. The (relative) novelty of the process of legal globalization and integration in the European context (at least in comparison with other evolutionary processes in the history of law) means that these are *in fieri* processes in which important aspects of the total final design are still to be confirmed. The fact that the systems derived from the EU treaties and the ECHR are still evolving also means that the national and international agencies in charge of both obviously have different and sometimes opposite views as to how they should function. Indeed, the existence and survival of both systems is probably due not so much to the existence of a universally accepted conceptual framework or model, but rather to the shared desire of all actors concerned to find a practical concordance between them, even though relevant organizational principles may not have yet been clearly defined or commonly acknowledged.

Thus, in order to understand the complex relationship between state and supra-state legal orders, it would appear to be more useful to adopt an approach that is more realistic than dogmatic or, in the words of Oliver Wendell Holmes, to assume that "the law is not logic but experience." This approach leads us to focus on the second methodology mentioned above, that is, on the solutions adopted by national and convention judicial bodies in specific cases in which these two types of legal orders either coincide or are in conflict with one another. This approach requires a casuistic analysis of rulings adopted by the national and convention courts in charge of establishing not only *res judicata* effects in each specific case, but also in more general terms, the scope of *res interpretata*.

Of course, individual rulings derive from the general approach that courts adopt concerning the respective positions of convention and national law in their national systems of sources of law, as well as from the determination on which are the judicial bodies in charge of deciding this type of cases. For instance, the decision as to which court (ordin-

ary or constitutional) has jurisdiction in cases of conflicts between internal and convention law will depend on the rank granted to convention norms in the internal order, whether they are considered on par with constitutional mandates, are deemed to be ordinary statutes, or are at an intermediate level between constitutional and statutory norms.

As an initial point of departure, from a convention perspective (that is, from the Luxembourg Court's perspective concerning EU law, and the Strasbourg Court's perspective vis-à-vis the ECHR), the primacy of convention law over national law has generally been recognized by the convention agencies. This derives not only from the general principles of international law such as the "*pacta sunt servanda*" principle. In the case of the EU, the primacy principle proclaimed in *Costa/Enel* derives from an additional consideration of the Luxembourg Court: the EU legal order must be conceived as autonomous, independent and separate from any national legal order, existing outside of the normative pyramid of state law, and therefore having its own validity and efficacy that is not subordinated to any internal norm. With respect to the ECHR system, for the first time the Convention established international responsibility of states vis-à-vis their own citizens and explicitly recognized member states as being bound by its mandates (Art. 1 ECHR) as well as the contracting parties' undertaking "to abide by the final judgment of the Court in any case to which they are parties" (Art. 46.1). The result (even without an express *Costa/Enel*-type pronouncement on the part of the Strasbourg Court) is the general assumption that the Convention must be applied with preeminence over any internal norm. From the perspective of EU bodies, this convention primacy refers not only to norms at the legislative level, but also (as explicitly stated in Luxembourg case law commencing with the judgment in *Internationale Handelsgesselleschaft*) to constitutional norms. According to the Court of Justice, there are no exceptions or reservations with respect to the primacy of EU law over any type of national norm, apart from those actually recognized in Art. 4 of the Treaty on European Union.

However, this does not mean that this view is universally accepted by national authorities. The general point of view of those authorities, particularly concerning the level of constitutional law, is precisely the opposite. Despite the increasingly frequent constitutional texts proclaiming a decided vocation toward European integration and in favor of human rights, the principle of constitutional supremacy is clearly present, for instance, in the need for a constitutional amendment in order to ratify treaties containing clauses that contradict constitutional mandates, or in the repeated "warnings" in the case law of constitutional courts concerning the permanent conditioning of the application of conventional norms to their compatibility with basic constitutional principles.

In any case, the lack of a universally accepted conceptual framework concerning the relative positions of convention and internal norms and decisions (as evidenced by conflicting declarations issued by both convention and state higher courts) has not been an obstacle to the progressive evolution of both of the European convention systems. Indeed,

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those involved (mainly the courts at the national and convention levels) have increasingly sought to achieve a practical convergence between the different levels of legal norms. The result is a situation in which a realist approach to law (reflected in Holmes' famous assertion that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law") seems in many cases to be more appropriate for understanding the complex European legal order(s) than an approach based on the elaboration of a "dogmatic" definition of the hierarchy of convention and internal sources of law.[2]

The advantage of this realistic approach is particularly evident in one of the European convention systems, the one reflected in the European Convention of Human Rights to which the following observations will be devoted. In contrast with the EU system, the goal of the ECHR is not to achieve a homogeneous legal regime in member states with respect to certain areas, but to establish a common European standard for the minimum guarantees of human rights, allowing for a variety of levels above that standard. As a result, no uniform formula is imposed on member states in order to regulate the relationship between convention and internal legal mandates, or on the state's agencies (courts or other state bodies) in charge of establishing that relationship in concrete cases. Therefore, taking the ECHR as a point of departure, it would be out of the question to attempt to define a generally valid dogmatic approach in which each Convention country should seek to harmonize the internal and convention legal orders. Furthermore, in many of the member states this relationship is not explicitly regulated, so that the understanding of the "practical concordance" between internal and convention norms is only possible by taking a realistic approach, observing the positions adopted by internal authorities and, more significantly, by the courts.

16.2 Review of Conventionality and Formal Review of Constitutionality

This realist approach can be applied, for instance, when analyzing how the relationship between internal and convention (ECHR) mandates has been defined to date in the French legal order.[3] The French manner of dealing with questions concerning the con-

2 For a comparison of both approaches, see Luis Gordillo and Giuseppe Martinico, *Historias del país de las hadas. La jurisprudencia constitucionalizadora del Tribunal de Justicia*, Cizur Menor, Civitas, 2015, 30-46. Concerning the Convention, see the opinions of Jörg Polakiewicz, "Mobile, Counterpoint or Pyramid – The interaction between National and European Courts in Human Rights Protection" in Christian Callies, ed., *Liber Amicorum für Torsten Stein zum 70. Geburtstag*, Nomos, Baden-Baden, 2015, 1051-1070: "In any case, the idea of a Kelsenian-type hierarchical pyramid is generally rejected" (1051).

3 See Céline Lageot, "France" in Jeannette Gerard and Joseph Fleuren, eds., *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in national case law. A Comparative Analysis*, Cambridge, Antwerpen, Intersentia, 2014, 217-260; Constance Grewe, "The ECHR in French Law: Status, Implementation and Debates", in Katia Ziegler, ed. *The UK and European Human Rights A Strained Relationship?* Oxford, Hart, 341-377.

ventionality of domestic legal norms is based on separating that type of control from constitutional review, and it is the result of a progressive development of the domestic courts' case law. According to that case law, review of conventionality is, in principle, a formal control based on the mandates of Art. 55 of the French Constitution stating that

> Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject with respect to each agreement or treaty, to its application by the other party.

As interpreted by the French courts, when an internal authority (administrative, judicial or otherwise) must decide cases involving a conflict between an internal legal norm and the mandate of an international agreement, the point of reference is the formal prevalence rule of Art. 55. As a result of this formal approach, the courts in charge of resolving conflicts between internal and international norms are the "ordinary" jurisdictional bodies (judicial and administrative courts), excluding the Constitutional Council.[4]

This system of allocating the review of the conventionality of norms to the ordinary courts originated in the Constitutional Council's interpretation of Art. 55 in its famous ruling in the *Interruption volontaire de grossesse* case (15 January 1975). The Council considered that the European Convention on Human Rights is not a part of the *bloc de constitutionnalité*, and therefore the ECHR is not a point of reference when reviewing the constitutionality of a legal norm. As a consequence, conflicts between domestic rules and ECHR mandates were not considered matters for constitutional review at all, but rather as conflicts between infra-constitutional norms not to be resolved by the Constitutional Council (whose jurisdiction refers to matters of constitutional review), but rather by the agencies in charge of applying those norms, whether jurisdictional or otherwise. The effect of this ruling is that "ordinary" jurisdictional agencies, and not the Constitutional Council, are entrusted with reviewing the conventionality of norms, not only with respect to EU law, but also with regard to ECHR mandates as interpreted by the European Court of Human Rights. Thus, in the light of the prevalence mandate of French Constitution Art. 55 establishing the primacy of convention law, the "ordinary" jurisdictional agencies are empowered to decide whether internal or international (convention) norms are to be applied in cases of conflict. Following the *Conseil Constitutionnel's* ruling, the *Cour de Cassation* recognized the primacy of convention law over domestic law in both civil cases (*Societé des cafés Jacques Vabre*, 24 May 1975, concerning EU law) and criminal cases (*Respino*, 3 June 1975, concerning the preferential application of ECHR mandates). The *Conseil d'État* was slower to accept the primacy of convention law over domestic legal

4 At any rate, after the constitutional reform of 2008 the courts may (via the *Conseil d'Etat* and the *Cour de Cassation*) refer a law to the Constitutional Council for a review of its constitutionality. An example of the complex relationship between constitutionality and conventionality (with respect to EU Law) is reflected in the ECJ's well-known judgment in *Aziz Melki* (C-188/10) of 22 June 2010.

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norms, but it has adopted this approach since applying the prevalence mandate in the *Niccolo* case (20 Oct. 1989) with respect to EU law.

In summary, several observations may be made concerning the review of conventionality of French norms with respect to the mandates of the ECHR as follows.

1. First, such control exists in practice, that is, internal norms must be examined to determine their compatibility with convention norms.
2. Second, review of conventionality of internal norms with respect to the ECHR is separate from and independent of any (substantive) review of constitutionality. The initial examination of conventionality of an internal norm involves comparing its content with the Convention norms, without any reference to substantive constitutional mandates.
3. Third, as a consequence, the ordinary courts (civil, criminal or administrative) and not the Constitutional Council are entrusted with examining the compatibility of internal norms with the Convention.
4. Fourth, the internal norm eventually considered as contrary to an ECHR mandate is not subject to constitutional review (and possible annulment) and, thus, review of conventionality determines the applicability of a norm in a specific case, and not to its overall validity.

Italy provides another example of different ways of providing for practical concordance between internal and convention norms. Italian constitutional case law concerning the relationship between ECHR mandates and internal legal norms has given rise to a formula that, although based on the same general principles as the French case (that is, a formal approach to the preeminence of convention law), has had very different consequences with regard to the type of courts that may determine the compatibility of both types of norms.[5] In the Italian system, the "ordinary" (i.e., non-Constitutional Court) judge does not have the power to decide in cases of conflicts between domestic and ECHR law. This role is reserved for the Constitutional Court, which must rule on the constitutionality (and possible nullity) of domestic norms.

This formula is not explicitly established in any written norm, but is the result of Constitutional Court case law commencing with its rulings 348 and 349 in 2007, interpreting Art. 117 (1) of the Italian Constitution, as amended in the 2001 reform. In its reformed version, this article provides that "legislative power shall be vested in the State and the Regions subject to the Constitution and with the constraints deriving from the EU legal order and international obligations." In the aforementioned rulings the Constitutional Court determined that EU law and ECHR provisions are different in nature,

5 See Oreste Pollicino's analysis in "The European Court of Human Rights and the Italian Constitutional Court: No 'Groovy Kind of Love'" in K. Ziegler, *The UK and European Human Rights*, 361-377.

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since the latter do not have direct effect "such as to make national judges competent to put aside the national provisions in conflict with them."

In the reasoning of the Court, Art. 117 (1) of the Italian Constitution grants ECHR mandates a higher status than those enjoyed by subsequent internal norms and, thus, the introduction of any (infra-constitutional) mandate of domestic law contrary to the ECHR would violate that constitutional precept. Since the task of safeguarding the Constitution against infra-constitutional norms is reserved for the Constitutional Court, that court and no other must decide (by solving a request for a preliminary ruling) whether there is a conflict between domestic and ECHR convention law.

The result of this case law is that while ordinary judges may review the compatibility of internal norms with EU law, they are deprived of that function with respect to internal norms that may conflict with ECHR mandates. When such a conflict arises in a specific case, the ordinary courts must refer the matter to the Constitutional Court by means of a question of constitutionality, for a ruling concerning the compatibility of the applicable internal norm with Art. 117 (1) of the Constitution. As in the French case, this approach is eminently formal, since the point of reference is the constitutional prevalence rule, without any reference as to whether the questioned domestic norm is compatible or incompatible with any substantive constitutional provision. As in the French system, an assessment of the potentially conflicting domestic norm and the ECHR mandates, as interpreted by the ECtHR,[6] is made (initially by an ordinary court judge, and ultimately by the Constitutional Court) and decided according to the prevalence order established in Art. 117 (I) of the Constitution. No comparison is made of the questioned internal norm and substantive constitutional mandates (as would be the case in the Spanish system, which we will see later in the chapter).

Control of conventionality and control of constitutionality of domestic norms are therefore connected, but only by means of a formal link, that is, the mandate of Art. 117 (1) of the Italian Constitution as interpreted by the Constitutional Court. But the ultimate review is reserved for Constitutional Court, the ordinary courts' role being limited to initially identifying a possible conflict between internal and convention (ECHR) law. And the Constitutional Court does not merely declare the internal norm inapplicable, but rather as unconstitutional and null and void.

6 Although since its 49/2015 judgment the Constitutional Court has made the *well established* case law of the ECtHR its point of reference. See Giada Ragone, "Nota a Corte cost. 49/2015. Giurisporudencia CEDU e ordinamento intreno: nuove istruzioni per l'uso da parte della Corte costitzionale italiana," *DPC online* 2015, 2, <www.dpce.it/wp-content/uploads/2015/07/20152-10-Ragone.pdf>.

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16.3 Review of Conventionality and Substantive Review of Constitutionality

As is the case in Italy, in Spain the review of conventionality to determine the compatibility of internal infra-constitutional law with the mandates of the ECHR is closely related to the review of the constitutionality of norms performed by the Constitutional Court. However, in the Spanish system there are considerable differences with the Italian formula, given the substantive nature of the review of conventionality and constitutionality in Spain.[7]

Article 96.1 of the Spanish Constitution adopts a monist approach to international law:

> Validly concluded international treaties, once officially published in Spain shall be part of the internal legal system. Their provisions may only be repealed or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law.

This means that as an international treaty ratified by Spain and published in its Official Gazette, the European Convention of Human Rights has direct binding force on Spanish administrative and judicial authorities. As a consequence and following Constitutional Court case law, in the event of conflicts between the provisions of a treaty and those of a parliamentary or administrative law, domestic authorities should give treaty mandates preference (Constitutional Court judgments 49/1988 and 26/1991).

In reality, however, Spanish Constitutional Court case law has taken a different direction in cases concerning conflicts between internal law and ECHR mandates as interpreted by the ECtHR. This direction is based on another constitutional provision, Art. 10.2, which provides that

> the principles relating to the fundamental rights and liberties recognized by the Constitution should be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.

According to Art. 10.2, constitutional rights and liberties must be interpreted according to the mandates of the ECHR and, as underscored by the Constitutional Court, following the case law of the ECtHR.

7 For a general overview, see Francisco Rubio Llorente, "Espagne" in *Cours suprêmes nationales et cours européennes: in memoriam Louis Favoreu*, Bruyllant, Bruxelles, 2007, 151-165.

In practice, this article of the Constitution has guided Spanish courts when assessing possible contradictions between internal law and ECHR mandates. The reason for doing so resides in the fact that the fundamental rights included in the Spanish Constitution are practically identical to those recognized in the European Convention and its Protocols. As a result, and as a general rule, a law in direct violation of a Convention rule (as interpreted in ECtHR case law) would also be considered as directly contravening a constitutional mandate. From this perspective, a Convention violation is likewise a violation of the Constitution. Thus, review of conventionality coincides with (substantive) constitutional review.

In the Spanish system, the Constitutional Court has a monopoly on the constitutional review of norms. If an ordinary court considers that a domestic legal norm is contrary to any Convention mandate as interpreted by the ECtHR and, as a consequence (by virtue of Art. 10.2 of the Constitution), violates a constitutional right, before giving its ruling the ordinary court must refer that internal legal norm to the Constitutional Court for a preliminary ruling (*cuestión de inconstitutionalidad*). In other words, when deciding the matter the Constitutional Court does not declare a law unconstitutional because its provisions are contrary to ECHR Convention mandates, but because those provisions are contrary to constitutionally recognized rights in light of the ECHR and ECtHR case law. The Constitution and not the ECHR is the only immediate point of reference in determining the constitutionality of a law. From this perspective, review of conventionality is tantamount to constitutional review.

As underscored above, this type of review is reserved for the Constitutional Court, excluding all ordinary courts. In this aspect, the situation developed by the courts in practice is similar to the Italian one. But there is a relevant difference. The point of reference in Italian Constitutional Court case law is formal one, i.e., the prevalence rule set forth in Art. 117.1 of the Italian Constitution. In contrast, in Spain the point of reference for determining the constitutionality of a legal norm questioned in the light of an ECHR mandate are the substantive provisions of the Spanish Constitution recognizing specific fundamental rights. The Constitutional Court's decision will not be based on any hierarchical relationship between the ECHR (as an international treaty) and the internal law in question, but rather on a possible conflict between that law and substantive constitutional mandates. It should be noted that as a general rule, when examining the compatibility of a legal norm with a constitutional right, when that right is equivalent to one recognized in the Convention the Constitutional Court takes the Strasbourg case law as the determining factor when assessing the content and extent of that right, considering that Strasbourg case law "has singular interpretative value" (Spanish Constitutional Court Judgment 50/1989).

In parallel with similar developments in Latin America, an interesting discussion has recently arisen concerning the possibility of introducing in Spain what might be called "diffuse judicial control" of the conventionality of parliamentary laws. As noted pre-

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viously, the Spanish Constitution reserves the task of reviewing the constitutionality of parliamentary laws for the Constitutional Court, and not for ordinary court judges. If a judge considers that a law he must apply is unconstitutional, he must refer it to the Constitutional Court for a preliminary ruling.

However, as also noted previously, according to the Spanish Constitution international treaties rank higher than parliamentary laws. This means that when a law contradicts a provision of an international treaty, judges must directly apply treaty mandates, rather than the conflicting law. According to academic opinion, repeatedly expressed by specialists in international law and the Constitutional Court, laws that contravene treaty provisions are not unconstitutional, but are simply deemed inapplicable.

Thus, in application of this constitutional mandate, it has been proposed that when a judge considers that a parliamentary law is contrary to the European Convention of Human Rights or to the case law of the Strasbourg Court on that matter, he need not refer the matter to the Constitutional Court for a preliminary ruling on its constitutionality, but should immediately proceed to ignore the parliamentary law and apply Strasbourg Court case law instead. According to this interpretation, the Constitutional Court would retain its "concentrated" review of constitutionality while the ordinary courts assume this "diffuse" review of conventionality.[8]

16.4 Indirect Control of Conventionality?

In contrast to the three previous cases in which review of conventionality in France, Italy and Spain are characterized by a "monist" approach to international law, it is possible to assume a dualist position in that regard. In such cases the role of the courts (and particularly the Constitutional Court) has been shown to be crucial for defining how possible conflicts between internal law and ECHR mandates will be resolved.

The rulings of the Federal Constitutional Court of Germany provide an example of the means employed in a dualist system for reaching a "practical concordance" between

8 This proposal, which has been defended in a somewhat different context in Latin America by authors such as Eduardo Ferrer Mac-Gregor, Mexican judge at the Inter-American Court of Human Rights in San Jose, Costa Rica "Interpretación conforme y control difuso de convencionalidad: el nuevo paradigma para el juez mexicano" in A. Saiz Arnaiz and E. Ferrer Mac-Gregor, *Control de convencionalidad, interpretación conforme y diálogo jurisprudencial*, Porrúa, México, 2012, has enjoyed a mixed reception in Spain. Several some constitutionalists such as Luis Jimena Quesada, former Chairman of the Council of Europe's Committee on Social Rights, have supported this view. See Luis Jimena Quesada, *Jurisdiccion nacional y control de convencionalidad*. Other constitutionalists such as Victor Ferreres Comella, "El juez nacional ante los derechos fundamentales europeos. Algunas reflexiones en torno a la idea de diálogo" in A. Saiz Arnaiz and Maite Zelaiagaragarza, eds., *Integración europea y poder judicial*, Instituto Vasco de Administración Pública, Oñati, 2007, 231-270, believe that such a system would greatly undermine the Spanish system of reviewing the constitutionality of parliamentary laws.

national and international human rights norms.[9] Pursuant to the German Constitution, international treaties have the rank of ordinary federal statutes:

> Treaties that regulate the political relations of the federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law (…).

As a consequence, the ECHR was initially considered to have the rank of a federal statute, since it was integrated into the German legal order through such a norm. Thus, in cases of conflict between ECHR mandates and internal law the German courts did not initially grant the ECHR preferential treatment over national legislation, following instead the usual criteria applied to conflicts between norms of equal rank. But despite the constitutional provision set forth in Art. 59.2, from the onset the Federal Constitutional Court has played a relevant role in giving ECHR mandates a preferential place in the German legal order, likewise creating a type of indirect control of conventionality (through a constitutional complaint procedure, among others) when conflicts between internal norms and ECHR mandates arise.

In the *Görgülü* case, the Constitutional Court stated that in their rulings German courts should "take into account" the mandates of the ECHR, as interpreted by the Strasbourg Court. In that judgment the Constitutional Court encouraged German courts in their interpretation of internal law to seek a practical concordance between apparently conflicting norms. If, in application of Art. 59.2 of the Constitution, a court decides not to follow ECHR mandates, it should sufficiently justify that decision. In any case, an internal law deemed to be contrary to the Convention could eventually be subject to two means of review by the Constitutional Court, a referral for a preliminary ruling or a constitutional complaint procedure.

In that regard, the ordinary courts may request a preliminary ruling from the Federal Constitutional Court if they consider that a conflict between a federal law and ECHR mandates reflects also a conflict between that law and substantive mandates of the German Constitution. In such cases, this constitutional review is tantamount to an indirect review of conventionality, given the presence of a conflict between ordinary and constitutional law. This is similar to what occurs in Spain, and here the *Görgülü* doctrine plays a

9 For the relations between the ECHR law and German domestic law, see Angelika Nussberger, "Report on Germany" in *Enhancing National Mechanisms for Effective Implementation of the European Convention on Human Rights*, Saint Petersburg, 2013, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680598bd8>; Julia Rackow, "From conflict to Cooperation: The relationship between Karlsruhe and Strasbourg" in Katia Ziegler, *The UK and European Human Rights*, 380-399; Alessandra Di Martino, "National Constitutions and the ECHR; Comparative Remarks in light of Germany's Experience" in Giorgio Repetto, ed. *Relevance of the ECHR in Domestic and European Law. An Italian Perspective*, Antwerp, Intersentia, 2013, 119-134.

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role similar to Art. 10.2 of the Spanish Constitution, that is, the requirement to interpret fundamental rights in accordance with the Convention.

Another way in which the German Constitutional Court exercises a review of conventionality is when it rules on individual constitutional complaints concerning the application of domestic law that contravenes the ECHR, affecting a constitutional right. In such cases the Constitutional Court ruling would offer an appropriate interpretation of the constitutional right in question, indicating how the federal statute should be applied in the light of the Convention mandates in what amounts to an indirect review of conventionality. It should also be noted that ordinary courts may to a certain extent review the conventionality of Land norms. Since the ECHR has the rank of a Federal statute, it takes precedent over Land norms. As a consequence, ECHR mandates could be applied with preference to that type of norm.[10]

10 Rackow, From conflict to Cooperation, 392-393.

17 Normative Universalism and Constitutional Pluralism

Matthias Mahlmann[*]

17.1 What Is the Point?

The remarks that follow are intended to explore questions of normative universalism and constitutional pluralism. Normative universalism holds that certain normative standards are valid for any human being, irrespective of ethnic, cultural, social, political or historical background. Normative universalism is an ethical epistemological theory and – at the same time – intrinsically political: It is a precondition for the possibility of fulfilling the promise of a common human civilisation based on at least some basic shared normative standards. If there is no ethical understanding, the aspiration of building a common order of right clearly makes no sense.

This would not be an unimportant conclusion: Given the problems humanity faces, its capacities to end its own existence by force, the destructive powers at play in history and with unmitigated sway in contemporary politics, the question of the preconditions of some kind of common ground for human life may turn out to be not merely an idle pastime of romantic day dreamers but of existential importance for human life.

This normative universalism has left some traces in contemporary legal systems. An important example is the universal human rights regime of international law. This comes to no surprise. Such rights are of crucial importance for framing a decent human life. These fundamental rights form the necessary framework for securing that human variety can flourish under conditions that offer equal respect for everyone.

The Universal Declaration of Human Rights (UDHR) is very outspoken in that it regards the universal nature of the rights proclaimed to be foundational for the whole civilising project of human rights. It famously asserts in the preamble that the

> recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[1]

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1 UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Preamble; (from heron in: UDHR).

These rights are nothing less than "a common standard of achievement for all peoples and all nations."[2] This sets the tone for other legal instruments, including regional systems of human rights protection which may have universalist aspirations, though they are by their very legal nature capable of realising these only within the scope of their jurisdiction. The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR) accordingly expresses in the preamble, with reference to the UDHR that it "aims at securing the universal and effective recognition and observance of the Rights therein declared."[3] It adds that its intention is "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."[4] There were great efforts taken by the Colonial powers to not extend the application of the Convention to colonies through the colonial clause, a rather disenchanting reminder of what the realities behind the universalist language of the convention were. But in many ways, the further development of the Convention system has vindicated the universalist aims formulated in the preamble and not the power politics of some founding members. It is worth noting that the UDHR itself explicitly states that its rights should apply to the then existing colonies as well.[5]

The American Convention of Human Rights (ACHR) contains some equally clear language in this respect, "recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality."[6] National constitutional systems should take up the task of securing "the common standard of achievement for all peoples and all nations." A good example for an attempt to face up to this challenge is the Basic Law of Germany, which considers human dignity inviolable and as the foundation of acknowledging the "inviolable and inalienable human rights as the basis of *every* community, of peace and of justice in the world."[7]

The experience of authoritarian regimes with deadly, in the German case even genocidal, contempt for human persons, often perpetrated on the grounds of some anti-egalitarian ideology, like the conception of the superiority of a Master race and its barbarous consequences, seems to make universalism an almost self-evident approach to the most important rights that human beings enjoy – at least as long as this experience forms a vivid memory and has not faded away.

2 UDHR, Preamble.
3 Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, Preamble; (from hereon in: ECHR).
4 ECHR, Preamble.
5 Cf UDHR, which lists among the duties it identifies "by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States *and among the peoples of territories under their jurisdiction*" (emphasis MM).
6 Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Preamble (from heron in: ACHR).
7 Art. 1.2 Basic Law of the Federal Republic of Germany (from hereon in: Basic Law) (emphasis MM).

The South African Constitution is a useful illustration of this for more recent times, not the least because of its substantial influence on contemporary constitutionalism. It formulates in Art. 1 (a) South-African Constitution that the new normative edifice it erects is founded on: "Human dignity, the achievement of equality and the advancement of human rights and freedoms." The reference is to *human* dignity, rights and freedoms, not to the dignity, rights and freedoms of South Africans. Again, the basic assumption is clearly that some rights are enjoyed by everyone and that they are universally justified.

However, the universal aspirations of current law reach beyond the core area of human rights. A helpful illustration is the rule of law, which is related to, arguably even founded upon but not identical with, human rights. The UDHR refers to the importance of the protection of human rights by the "rule of law."[8] The respect for the rule of law is a precondition for membership in the Council of Europe.[9] The ECHR regards the rule of law as a common heritage of the member states.[10] One of the fundamental treatises on the EU even identifies the rule of law together with freedom, democracy and equality explicitly as a "universal value."[11] The inclusion of democracy as a universal value in such a list also comes to no surprise, given that the Universal Declaration already regards democracy as a demand of human rights.[12]

In addition, there is another important development on the level of the interpretation of norms: There are signs of some normative convergence of different legal systems in core areas, not the least in the concretisation of human rights and the standards of the rule of law.[13]

At the same time legal systems still differ in many respects and this is not the least so for constitutional law. Various kinds of constitutional pluralism can be distinguished. First, there is a *pluralism of content*. The catalogues of rights coalesce around certain core rights like right to life, civil liberties and equality and non-discrimination clauses, but many differences exist as well, with nuanced provisions that matter considerably in practice. These differences are even more evident in the law of the organisational structure of constitutions. The issues regulated, as well as the creation, use, limit and control of political power, are of great relevance. The normative make-up of the structure of public authority, of the ways of government, of the elements of democracy and of the rule of law varies in many respects.

8 UDHR, Preamble.
9 Art. 3 Statute Council of Europe, 5 May 1950, ETS 1.
10 ECHR, Preamble.
11 European Union, Consolidated version of the Treaty on European Union, 13 December 2007, 2008/C 115/01, Preamble, cf. Art. 2; (from hereon in: TEU).
12 Art. 21 UDHR.
13 Cf. for example as a case study M. Mahlmann, Human Dignity and Autonomy in Constitutional Orders, in: M. Rosenfeld and A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford University Press 2012, p. 370ff.

Case-law adds to the variety. As much as there are some areas of convergence of the interpretation of certain rights and other constitutional concepts, important differences persist, creating distinctive patterns of interpretation of norms of different legal systems that – as such – appear prima facie similar or even identical.

This constitutional pluralism of content can be a *pluralism of legal means* and a *pluralism of legal ends*. There are different paths to freedom and constitutions may choose one over the other. Constitutions may also differ in their aims. At least if one uses a wide and formal concept of constitution even the creation of limited government may not be essential. If one limits the concept of constitution to some of the core characteristics developed in modern normative constitutionalism, which is based on the purpose of preserving human freedom, equality and dignity with the means of fundamental law, there are still many different constitutional aims that can be pursued within this framework. A classic example is the question whether constitutions should be designed to attempt the fostering of social justice[14] or – more recently – environmental protection or should better refrain from such aims.

Second, there is a *pluralism of form*. There is a wide-ranging debate over the question of whether today's world is distinguished by forms of constitutions that are not the product of mechanisms described in constitutional theory, like enactment by the *pouvoir constituant* in some kind of normatively bound procedure. Instead, it is argued, constitutions are created in society itself.[15] Such social constitutions are taken to have become increasingly important and to already be more relevant than the state-centred legal constitutions. The twilight of legal, democratically created constitutions is at the same time the dawn of a fertile heterarchically fragmented social constitutionalism, some argue.[16] This kind of approach is embedded in a very long and intense debate about legal pluralism in general.[17]

14 The normative enrichment of the state under the rule of law (Rechtsstaat) is interpreted as part of a deeply rooted historic trend towards a social state, cf. e.g. J. Habermas, Theorie des kommunikativen Handelns, Suhrkamp 1981, Vol. II, p. 524ff (Verrechtlichungsschübe).

15 G. Teubner, Constitutional Fragments: Societal Constitutionalism and Globalization, Oxford University Press 2012.

16 Ibid.

17 These debates have different roots in legal sociology and legal anthropology, among others, cf. E. Ehrlich, Grundlegung einer Soziologie des Rechts, 4. Aufl., Duncker & Humblot 1989; B. Malinowski, Crime and Custom in Savage Society, Rowman & Littlefield Publishers 1985; K. N. Llevellyn and E. A. Hoebel, The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence, University of Oklahoma Press; New edition edition 1983; L. Pospísil, Anthropologie des Rechts: Recht und Gesellschaft in archaischen und modernen Kulturen, Beck 1982; S. E. Merry, Legal Pluralism, Law & Society Review 22 (1988), 869; S. F. Moore, Law as Process: An Anthropological Approach, Lit 2000; B. de Sousa Santos, Toward a New Legal Common Sense. Law, Globalization and Emancipation, 2nd ed., Butterworths LexisNexis 2002. For an excellent overview and critical assessment cf. P. Gailhofer, Rechtspluralismus und Rechtsgeltung, Nomos 2016.

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Given the interdependence of the human world, today the question of a constitutionalisation of the international order is much discussed.[18] One approach to the problem consists in the assumption of different forms of constitutions at the national and international level that may or may not share central features with each other.[19]

Yet another issue concerns a *pluralism of constitutional sources*. The idea entails that there is more than one source with a claim to final constitutional authority and that this leads to conflicts. The solution is not to be found in some kind of hierarchical, but rather in a heterarchical order. There is, for example, an intense debate on whether the European order is best described by constitutional pluralism in such a sense, namely as an order with a plurality of interwoven constitutional regimes. From this point of view the constitution of Europe is one that is derived from member state constitutions and EU Law, and possibly other sources, which are intricately interlinked.[20] These perspectives may inform an analysis of international law as well, e.g. in the context of the discussion of its fragmentation.[21]

Against this background of multifaceted theories of constitutional pluralism, the question is whether this perceived pluralism is compatible with normative universalism at all, and if so, how this would be achieved.

Are such phenomena the death knell of the idea of normative universalism? Or can one reconcile constitutional pluralism in its tenable content with the aspirations of normative universalism? Is there a practice of constitutional pluralism that makes universalist sense?

This is a crucial question for the internationalisation of constitutionalism because such internalisation presupposes a common normative ground on which an international culture of constitutionalism can grow and bear fruit. On the other hand, it is not to be expected, or even wished for, that all constitutional systems should be formed from the same mould.

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18 Cf. J. Klabbers, A. Peters and G. Ulfstein, The Constitutionalization of International Law, Oxford University Press 2009; O. Diggelmann and T. Altwicker, Is There Something Like a Constitution of International Law?, ZaöRV, 68 (2008), 623; A. Tschentscher, Verfassung im Völkerrecht – Konstitutionelle Elemente jenseits des Staates?, VVDStRL Bd. 75 (2016), S. 407ff.; H. Krieger, Verfassung im Völkerrecht – Konstitutionelle Elemente jenseits des Staates?, VVDStRL Bd. 75 (2016), S. 439ff.

19 Cf. e.g. Diggelmann and Altwicker, Is There Something like a Constitution of International Law ZaöRV 68 (2008) 623, 633 on uses of the term constitution with different meanings in the context of international law.

20 Cf. e.g. N. Walker, The Idea of Constitutional Pluralism, The Modern Law Review 65 (2002), 317; M. Kumm, Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism, in: M. Avbelj and J. Komárek (eds.), Constitutional Pluralism in the European Union and Beyond, Hart 2012, p. 39ff; M. Poiares Maduro, Three Claims of Constitutional Pluralism, in: M. Avbelj and J. Komárek, Constitutional Pluralism in the European Union and Beyond, 2012, p. 67ff; I. Pernice, The Treaty of Lisbon. Multilevel Constitutionalism at Work, Columbia Journal of European Law 15 (2009), 349.

21 Fragmentation of International Law: Difficulties arising from the diversification and expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by M. Koskenniemi, General Assembly, A/CN.4/L.682, 13 April 2006.

An important issue in this context concerns the understanding of constitutionalism and constitutions. Constitutionalism is not about legal technicalities. Constitutionalism is a political and legal theory that holds that constitutions are a central element of a well-ordered society. It is about a political and ethical vision of society realised by the means of the law. This vision has deep roots in a substantial moral theory and a certain political conception of humankind. This idea was developed against the background of the nation state in modernity but is in its normative core not limited to it, as the discussion of the constitutional nature of international law illustrates.

To understand the point of constitutionalism as an ethical, legal and political theory, the concept of a constitution has to be clarified. This will be the first step of these remarks. The second will try to sketch out what universalism means and whether it is worth a thought. The third step will outline the challenges of constitutional pluralism in its various forms in more detail. The fourth and last step discusses to which degree constitutional pluralism is reconcilable with normative universalism. Some forms of pluralism are certainly not compatible with normative universalism, say a pluralism of torture or of authoritarianism. In other cases, however, this could be different. It may turn out that it is a misconception to mistake pluralism for proof of the truth of relativism and, accordingly, that it is an error to regard certain forms of constitutional pluralism as irreconcilable with universalism. Instead, it will be argued, there are good reasons to believe that normative universalism as an epistemic regulative idea of argument and thought does not exclude at all the possibility of legitimate constitutional pluralism. The reasons for this are manifold. The most important arguments are derived from a modest practical epistemology, curiosity for new forms of human living, a proper assessment of the cultural sources that feed human law, the importance of autonomy and the nature of a human history devoid of any teleology.

17.2 Constitution as a Concept of Constitutionalism

Most states of the world possess a constitution. This does not imply that these constitutions are relevant legal instruments determining social life. Constitutional window dressing is not an unknown practice of political reality. But the sheer fact of a need for at least the appearance of a constitutional state indicates the importance of this idea.

The concept of a "constitution" can mean many things. It can be understood as a factual state of affairs of a political order or as some kind of existential decision about the very nature of a body politick that transcends any written constitution.[22] The concept is often used in a normative sense, designating the basic, normatively prescribed structure of such an order. The concept can be linked to modern statehood or used as a category

22 C. Schmitt, Verfassungslehre, Duncker & Humblot 1928.

applicable to pre-modern societies and political structures.[23] This list can be prolonged; however, this does not necessarily settle the issue, given the enormous debates about this concept and its content.

A useful starting point for clarifying the sense in which constitutions are understood in what follows are the constitutional revolutions of the 18th century and the normative aspirations embodied in the political movements that were inspired, though in different forms, by the idea of constitutionalism. The following elements seem to be a kind of ideal-type characterisation of the concept of a constitution that emerged in these contexts:

First, a constitution is the originary creation, definition, organisation and limitation of public, monopolised power by the means of law, by an autonomous decision of the subjects voluntarily associated under the newly established constitutional rule.[24] Power created by historically contingent factors, like the successful use of violence to establish and maintain a certain kind of rule, is replaced by legitimate public authority derived from the political exercise of public sovereignty of the *pouvoir constituant*.[25] "A constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without a right."[26] Constitutions are the expression of claims to political autonomy, of the idea that human beings cannot legitimately be subjected to rules that are not created by themselves.

Second, constitutions are means of binding public power without reservation of any prerogative of power beyond the law.[27] Whenever public power is used, its foundations and limits are the rules of law. Such constitutions are today usually written law, in a single document or in the form of certain legal enactments like the *bloc de constitutionalité* in France, but can be unwritten as well like in the United Kingdom.[28]

A very wide concept of constitution can encompass a legal document that protects an oligarchy or rationalises the functioning of a dictatorship. In this sense, one can talk about an Apartheid constitution. Such orders are, however, missing the very point of a constitution.[29] Constitutionalism is not connected to the project of democracy by accident. Constitutions are political tools to secure the autonomy of human beings by defining and limiting the powers of government by a fixed set of basic binding prescriptions. Democracy is the most immediate expression of this political end of the protection of human autonomy. The normative aim of constitutions is consequently only truly reached

23 Cf. e.g. C. J. Thornhill, A Sociology of Constitutions, Cambridge University Press 2011, p. 10f.

24 Cf. D. Grimm, Types of Constitutions, in: M. Rosenfeld and A. Sajó (eds.), The Oxford Handbook of Comparative Constitutional Law, p. 103.

25 Cf. E.-J. Sieyès, Qu'est-ce que le Tiers État, Chap. V, S. 53.

26 T. Pain, Rights of Man, Chap. 4.

27 D. Grimm, Types of Constitutions, p. 103.

28 On this matter A. V. Dicey, Introduction to the Study of the Law of the Constitution, 8th ed., Macmillan 1915 or – in the interesting context of Brexit: High Court of Justice (2016) EWHC 2768 (Admin), 3 November 2016 para 18 (para 22 referring to Dicey).

29 Cf. Grimm, Types of Constitutions, p. 115.

in a democracy. There were intermediate steps in constitutional history, like constitutional monarchies that were uneasy political compromises of democratic forces and the stakeholders of a monarchic order that confirm this point. Thus, third, constitutions are democratising political power in two ways: one, through the democratic creation of the constitution itself and, two, through the democratic process of political decision making within the framework of the constitution.

Fourth, a constitution determines the possibilities of creating valid new law. It is the highest law of the land, with the possible exception of public international law defining the ways of generating other norms.[30]

A central problem of the concept of a constitution is the following: Is some necessary material normative content the precondition to achieve the aims of constitutionalism? A formal concept of a constitution is imaginable, which as mentioned constitutionalises for example the superiority of a certain imaginary race, the disenfranchisement of women or the discrimination of a certain religion. There are many examples of constitutional norms or at least interpretations of norms to this effect. A classical example for the latter is the interpretation of the US-American constitution as including the principle of "separate but equal,"[31] to buttress racial segregation. But such norms are at odds with the basic normative aims at the foundation of the constitutional project. This project intends to secure the rights of persons associated among each other in a political community, their liberty and equality as autonomous agents through the creation of a legal order based on their decisions as parts of the *pouvoir constituant*. This order is meant to limit public power in a way that is consistent with these rights of persons. The very point of constitutionalism is the protection of fundamental rights. The idea of the concept of a constitution properly understood is therefore only fully realised, if a constitution is a constitution of rights. Fifth, constitutions are legal instruments to create a material normative order protecting freedom, autonomy and the equality of the status of human beings as subjects of their lives. A necessary property of such an order is consequently, besides the incorporation of rights, its democratic structure. In recent decades the idea has gained credence that this normative programme has to be enriched by social rights, at least with some social dimension of state action and environmental concerns, not the least to enhance the chances of the survival of the species the rights of which a constitution is designed to serve. The legitimation of such rights and its democratic structure rests on reasons that must be accessible to all and must therefore not be tied to some kind of particular religious outlook. The constitutional state is a product of a central project of modernity – the justification of basic ethical and legal concepts by secular means.[32] This

30 Cf. Grimm, Types of Constitutions, p. 103.

31 *Plessy v. Ferguson*, 163 U.S. 537 (1896).

32 Cf. the programmatic formulation in I. Kant, Religion innerhalb der Grenzen der bloßen Vernunft, Akademie Ausgabe, Bd. VI, 1913, p. 3:
"Die Moral, so fern sie auf dem Begriffe des Menschen als eines freien, eben darum aber auch sich selbst

does not at all imply an anti-religious stance.[33] It just maintains that for justifying the basic concepts of ethics and law, secular reasons are sufficient. Constitutions are not meant to be high roads to salvation. The constitutional order is not the custodian of religious redemption.[34] This is the consequence of the inner-worldly nature of constitutionalism.[35]

The sixth characteristic of constitutions as political and ethical projects is that they create a public power with the comprehensive competence to shape the political order. The public power created is not limited to certain tasks, like, for example, private entities as corporations or NGOs, but designed to foster the common interests of the political community in potentially all its manifestations. This is important because a political order needs institutionalised agents of the common good based on rules that are designed to enable the pursuit of aims that transcend particular interests, though in fact such institutions may be used in political reality more often than not for other, partisan purposes.

Seventh, a constitution forms a normative framework for an open-ended political process that respects, however, certain normative signposts. A constitutional order creates a protected space for political pluralism and obligates every party of this process to respect certain minimal normative standards. One important reason to regard the possibility of such political pluralism as a central element of any political order with a claim to legitimacy is mistrust in indubitable political truths. The idea of a constitution as a framework of political pluralism is, however – despite such well-justified mistrust –, not based on ethical relativism or scepticism. Constitutionalism implies the assumption of the legitimacy of the normative framework constituted as such, for example of fundamental rights and foresees means to protect these normative standards. This presupposes that

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durch seine Vernunft an unbedingte Gesetze bindenden Wesens gegründet ist, bedarf weder der Idee eines anderen Wesens über ihm, um seine Pflicht zu erkennen, noch einer anderen Triebfeder als des Gesetzes selbst, um sie zu beobachten".

33 A classic example for this is the Etiamsi–Daremus argument of scholastic thought, which Grotius put to use to legitimise natural law without recourse to divine order, at least in principle. Cf. H. Grotius, In Tres Libros de Iure Belli ac Pacis Prolegomena, in: H. Grotius, De Iure Belli ac Pacis Libri Tres, Ed. nova, Vol. I, reproduction of the ed. of 1646 by J. Brown Scott, Carnegie Institution of Washington 1913, Para. 11. On the older scholastic tradition, cf. G. *v.* Rimini, Gregorii Ariminensis Lectura super primum et secundum Sententiarum, A. Damasus Trapp and V. Marcolino (eds.), Vol. VI Super secundum Dist. 24-44, in: Spätmittelalter und Reformation. Texte und Untersuchungen, Bd. 11, hrsg. *v.* H. A. Oberman, de Gruyter 1980, Dist. 34-37, q. 1 art. 2, S. 235. Cf. the reference to *v.* Rimini by F. Suárez, De Legibus, II 1-12, hrsg. *v.* L. Pereña and V. Abril, Consejo superior de Investigaciones cientificas 1974, II, VI, 3, S. 79 ff.

34 As the German Constitutional Court, BVerfGE 42, 312 formulated: The constitutional state is not the "Hüter eines Heilplans," the guardian of a project of religious deliverance.

35 Cf. on this matter A. Sajó, Preliminaries to a Concept of Constitutional Secularism, Int J Const Law, 6 (2008), 605ff; H. Dreier, Säkularisierung und Sakralität, Mohr Siebeck 2013; M. Mahlmann, Roads to Constitutional Secularism: The Foundation of a Political-Legal Concept, in: R. Uitz (ed.), Religion in the Public square: Perspectives on Secularism, Eleven International Publishing 2015, pp. 1-17.

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these basic rules are well justified and that it is legitimate to enforce them against dissenters, say those who want to interfere in the political process with force. Other issues are, however, regarded in this order as the legitimate objects of political strive.

17.3 Universalism

A Constitution as a normative concept is thus based on some guiding normative principles: At the core are principles of the protection of the autonomy of self-determining subjects, their freedom and equality as human beings, their equal worth and entitlement to equal respect.

A constitution is a political and legal tool in order to do justice to the autonomy and equal dignity of human beings. That is a core reason for the appeal and greatness of the idea of constitutionalism.

This normative idea has conquered the world. It is an interesting factor of today's political and legal development that the idea of a constitution has such widespread appeal, even if only to abuse it for the manipulations of power politics.

This leads to the next question: Are constitutions in this qualified sense only legitimate for some groups of human beings, say Europeans, North Americans, Christians and whites? Do those who connect, for instance, the liberation from Apartheid in important respects with the South African constitution miss the point that the normative project of constitutionalism is not for them? Is the global appeal of constitutionalism based on an epistemological error, namely on the flawed idea that the core normative ideas underlying constitutionalism can be justified across the borders of different communities? Or are these principles potentially of universal validity and thus the project of constitutionalism, too?

To answer this question, one needs to clarify what universalism actually means and what its epistemological merits are, at least in rough contour.

Universalism in the sense relevant for ethics and law, is an epistemological stance.[36] It holds that the truth conditions of normative claims are the same for any human being. These truth conditions are thus not relative to certain contingent properties of human beings, for instance the groups they belong to or their social, cultural, religious or other background. This epistemological doctrine applies to any normative propositions, including those concerning the moral rightness and justness of intentions, actions and states of affaires brought about by such intentions and actions. It also applies to the obligations people have, to what they are prohibited and permitted to do or to what rights they enjoy. Such universal standards are valid even if a given subject thinks otherwise. From such a

36 For some other uses of the term universalism, cf. e.g. S. Benhabib, Another Universalism: On the Unity and Diversity of Human Rights, Proceedings and Addresses of the American Philosophical Society 81 (2007) 7, p. 11.

point of view, a man is obligated to respect the right of a girl to education, even if he thinks that this is contrary to important norms of his patriarchal customary morality.

Universalism is a theory about the justification of normative propositions. It does not imply that universally valid principles are in fact universally accepted. The fact of even deep moral disagreement is no contradiction to universalist perspectives. A parallel observation is possible in the realm of science. There are rather good reasons to assume that the earth is not flat. These reasons are in no discernible sense relative to contingent properties of a thinking subject making this proposition about the shape of the earth. This does not mean, however, that there were not times in history where the opposite of this insight was the common wisdom of the age.

A defence of universalism may be based on two lines of argument: The first is an indirect argument for the plausibility of universalism derived from the implausibility of the opposite of universalism, which is relativism.[37] There are various reasons to be sceptical about the epistemological reach of relativism. A common argument for relativism is the argument from moral disagreement. The fact of the great diversity of moral opinions is taken to be an argument for the relativity of moral propositions. This is a fallacious argument, if it can be shown that other factors, entirely reconcilable with universalism, may account for this – evident – diversity. This is by no means a hopeless task. Important factors to explain moral disagreement in the framework of a universalist theory are the factual preconditions of moral judgements, interests or ideologies. Taking into account such factors, the true reach of moral disagreement may be reduced considerably. To take an example: People around the world disagree about the rights of women, often drastically so. One factor that is of crucial importance is whether or not women are regarded as fully autonomous, self-determining beings with the same capacities as men. This is an example of the non-moral preconditions of moral judgement, more precisely anthropological assumptions about the nature of women. Much of the arguments put forward in history and contemporary cultures attempting to justify the discrimination of women are based on the idea that there are relevant differences between men and women in this respect. If this evidently groundless, but historically incredibly tenacious and harmful assumption is abandoned, it becomes rather difficult to justify the different treatment of men and women. The importance of patriarchal ideologies, often clothed in religious terms on the perception of rights of women, needs no explanation. That the interest of men in the privileges (stale as they are) derived from the subjugation of women are another factor in the self-serving justification of unequal treatment needs no further elaboration, either.

37 Cf. e.g. G. Harman and J.J. Thompson (eds.), Moral Relativism and Moral Objectivity, Blackwell Publishers 1996, pp. 3-64; P. Foot, "Moral Relativism," in P. Foot, Moral Dilemmas and Other Topics in Moral Philosophy, Clarendon Press 2002, pp. 20-36; R. Rorty, Objectivity, Relativism, and Truth, Cambridge University Press 1991; B. Williams, "The Truth in Relativism," in Williams, Moral Luck, Cambridge University Press 1982, pp. 132-43; R. Dworkin, Justice for Hedgehogs, Harvard University Press 2011, pp. 23ff.

In addition, relativism suffers from an insufficient determination of the factors moral principles are supposed to be relative to. The reference to cultures or religions is a good example for that. Cultures or religions are no monolithic wholes, but encompass a whole variety of ideas. The Western culture (whatever the exact boundaries of this entity may be) was characterised for centuries by religious intolerance leading to bloody wars, authoritarian regimes and dogmatic systems of thought, contempt for human beings, various forms of racism, slavery, colonialism and imperialism, to name just some features that may spring to mind. At the same time, great ideas of human benevolence, freedom, autonomy and justice were outlined in sometimes breath-taking, history-making forms. Who is the true European – Kant or Friedrich Wilhelm III? Or – more precisely – the Kant of the principle of humanity and dignity[38] or the Kant of the disenfranchisement of women?[39]

Another problem is the following: How do such background factors as culture or religion exactly determine moral perceptions? Cultural determinism is a highly implausible theory given the fact of constant change in the normative sphere. How can normative principles be determined by the cultures that these principles ultimately transform?

The central problem of relativism is that it overlooks the importance of human subjectivity and autonomous reasoning for the development of ethics and the legitimation of law. Human reflective subjectivity and reasoning mediate any cultural influence. There are many cultural influences on human beings, but no person's ethical identity is necessarily just the mirror image of the songs sung by the hand that rocked the cradle. On the contrary: Human reasoning is the ultimate source of ethical beliefs. Critical reflection can transcend given parameters of culture and history and ultimately change their course. This does not mean that such autonomous thinking is what always or even predominantly determines the actual moral and political path of the human species. The reality of ethics and law is often prey to outlived custom, self-righteous perpetuation of principles without thought, reverence to social authorities, powerful and harmful political emotions like hatred of minorities, fear and other such influences. But all these need not be the last word. People are not just the malleable victims of such factors. As thinking subjects, they are in a position where they are responsible for reducing the importance of such driving forces for the course of history, sometimes successfully – as the many steps taken towards a humanisation of the world indicate, from the partial vindications of the rights of women to the defences of democracy and human rights.

This has already led to the second path of making universalism plausible. This path is marked by the defence of certain normative propositions as universally justifiable. Justification is crucial.[40] There is no a priori meta-criterion that is not in need of scrutiny and

38 I. Kant, Grundlegung zur Metaphysik der Sitten, Akademie Ausgabe Bd. IV, 1911, p. 429.

39 Ibid., p. 313ff.

40 As convincingly emphasized by R. Forst, Das Recht auf Rechtfertigung, Suhrkamp 2007 irrespective of whether one shares the discourse of ethical foundations of this approach.

defence. Ethical reflection is not about revelation of higher truths. It is, however, not about whimsical scepticism either. One needs reasons to justify any normative propositions but one needs reasons to doubt it too. Maintaining that one could still doubt a certain normative position is not good enough. One can doubt any proposition, including the idea that the earth is not flat. No bolt of lightning will punish such doubt, no voice from heaven will confirm that the earth is in fact not flat. Nothing renders doubt about anything impossible. Nothing in the best imaginable argument compels a thinking subject to get its point. It is a flawed demand that a good argument should be literally indubitable because such a demand is too exacting. Not even the best argument about the shape of the earth commands irresistible assent. This is a necessary consequence of the assessment of the truth value of any proposition being an act of human mental cognition. There is no epistemic instance over and beyond such acts of cognition. There is no more stable ground of human insight. Such acts of human cognition are the stuff the perception of truth is made of.[41] It is consequently always possible to ask: Is this right? The possibility of doubt is the necessary consequence of the human capability of unfettered, free thought. It is a fallacy, however, to mistake this possibility of doubt of any proposition for the proof that no proposition is better justified than others. It is necessary to have arguments for doubt that are more convincing than the arguments that (for the time being) confirm a certain normative position, at least if the argument is supposed to be more than a superfluous game.

To take the example of the principles important for the project of constitutionalism, the idea of the right to protected dignity, autonomy and equality of any human being. There are many thoughtful and rich theories of human rights that cannot be recon-

41 A classical epistemological question concerns the problem of whether moral judgments are referring to objective moral facts in the world, as moral realists assert or not. In the former case, a truth condition of moral propositions consists in correspondence with moral facts, in the latter case other truth conditions are central.

It is useful to note that not only in the latter but also in the former case, there is no escape from acts of cognition: The correspondence of a moral proposition with a moral fact can only be ascertained by such an act of cognition. For a defence of the view that there are, to the contrary objective, irreducibly normative facts, cf. e.g. R. Shafer-Landau, Moral Realism: A Defence, Clarendon 2003; D. Enoch, Taking Morality Seriously: A Defense of Robust Realism, Oxford University Press 2011; That there are genuine normative reasons the truth of which does not depend on correspondence with entities that are part of the non-mental fabric of the world is defended from different points of view. Cf. C. Korsgaard, The Sources of Normativity, Cambridge University Press 1996, p. 108, 122ff, 165 arguing for a "reflective endorsement theory" that bases normativity on the self-endorsement of the humanity of the autonomous self; R. Dworkin, Justice for Hedgehogs, 2011 outlining an interpretative theory "all the way down"; D. Parfit, On What Matters, Vol. II, Oxford University Press 2011, arguing that there are "some irreducibly normative reason-involving truths", which are "not about entities or properties that exist in some ontological sense", ibid., p. 618;. T. M. Scanlon, Being Realistic about Reasons, Oxford University Press 2014 developing a realistic "reasons fundamentalism". For a critique of such theories, arguing in particular with the impossibility to distinguish on internal grounds true reasons and false moral propositions, rendering all argument indistinguishable from fictions, D. Enoch, Taking Morality Seriously, 2011, p. 121ff.

structed and critically assessed here.[42] But there are rather good reasons to assume that these rights are legitimate not only in Zurich but in Laos, Bogota or Beijing as well, because the goods they protect, if ever enjoyed, turn out again and again to be of very high value. This is shown, for example, by the longing for equal dignity and freedom of the victims of Tiananmen, a powerful example of important "Asian values," though expressed from below, not through government announcements.[43] That this basic good should be distributed equally among human beings, that it is not justifiable that some groups, say party functionaries and their partners in the economy, are entitled to such freedoms but peasants are not, seems equally plausible in light of the basic principles of equal treatment that are constitutive of justice. If one doubts these arguments, one needs to give reasons as well, e.g. that in fact serfdom is good for some people, say coloured persons, and that justice means unequal treatment as plausibly as equal treatment, at least for some, for example the Global South. This burden is not easy to shoulder.

42 E.g. by "affirmative genealogy": H. Joas, Die Sakralität der Person, Suhrkamp 2011; social functionalism: N. Luhmann, Die Gesellschaft der Gesellschaft, Suhrkamp 1997, p. 1094ff; economic analysis of law, classical or behavioural: R. A. Posner, Economic Analysis of Law, 9th ed., Wolters Kluwer 2014, p. 978; E. Zamir, Law, Psychology and Morality: The Role of Loss Aversion, Oxford University Press 2015, p. 143ff; contractualism: J. Rawls, A Theory of Justice, Belknap Press of Harvard University Press 1971; T. M. Scanlon, What We Owe to Each Other, Belknap Press of Harvard University Press 1998; discourse theory: J. Habermas, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, Suhrkamp 1992, p. 138; R. Forst, Das Recht auf Rechtfertigung, 2007, K. Günther, Anerkennung, Verantwortung, Gerechtigkeit, in: R. Forst, M. Hartmann, R. Jaeggi and M. Saar (Hrsg.), Sozialphilosophie und Kritik, Suhrkamp 2009, p. 269, 286f; S. Benhabib, Another Universalism: On the Unity and Diversity of Human Rights, Proceedings and Addresses of the American Philosophical Society 81 (2007), 7; interest theories: J. Raz, The Morality of Freedom, 1986, p. 166; J. Tasioulas, On the Foundations of Human Rights, in: R. Cruft, S. M. Liao and M. Renzo (eds.), Philosophical Foundations of Human Rights, Oxford University Press 2015, p. 63ff; need theories: D. Miller, Grounding Human Rights, Critical Review of International Social and Political Philosophy 15 (2012), 407, 422; personhood theories: J. Griffin, On Human Rights, Oxford University Press 2008, p. 32ff; human dignity based interpretationism: R. Dworkin, Justice for Hedgehogs, 2011.

43 There is an interesting debate about such "Asian value," which is paradigmatic for some important features of the debate about relativism, not the least its political side, more precisely on the political instrumentalisation of relativism for authoritarian purposes. Cf. e.g. F. Zakaria, Culture is destiny. A conversation with Lee Kuan Yew, Foreign Affairs 73 (1994), 109 and the rejoinder: Kim Dae Jung, Is Culture Destiny? The Myth of Asia's Anti-Democratic Values, Foreign Affairs 73 (1994), 189. These discussions sometimes turn around the question, whether there is a particular tradition that is predominantly endorsing human rights or other such values, or rather authoritarian. This is an interesting question that, however, misses the most important problem: The crucial point is not whether or not there is a given tradition, e.g. of authoritarianism, but whether such a practice is justified. There is certainly an authoritarian tradition manifest in much of European history. A central achievement of the dawning constitutionalism, for instance, was to break with this tradition to vindicate some of the most important rights of human beings step by step. The same holds for any other tradition as well (if it is more than an ideological construct):
"The so-called Asian values that are invoked to justify authoritarianism are not especially Asian in any significant sense. (…) The case for liberty and political rights turns ultimately on their basic importance and on their instrumental role. This case is as strong in Asia as it is elsewhere".
A. Sen, Human Rights and Asian Values, in: J. Rosenthal (ed.), Ethics and International Affairs, Georgetown University Press 1999, p. 170ff, 190.

There is a long debate about foundational theories in ethics and law.[44] What are the ultimate principles of justification and what is their status? How can one argue for such principles without being entangled in infinite regresses, dogmatism or tautologies?[45] One answer to this question lies in the epistemic resilience of certain principles against critical thought, though a thought that is committed to the decisiveness of reasons and open to the possibility that, sometimes, such reasons are good enough to rest a case. That human autonomy is a justified right seems to be an example of an already complex principle that may pass this epistemic test, pointing at principles that are arguably truly constitutive of morality, like the equal treatment of equals as the core of justice.

It is worth noting that there are arguments from the theory of mind that buttress these findings, for example in the framework of the project of determining the content and origin of a universal moral grammar underlying human ethics and legal justification. There is nothing in the theory of mind or human psychology that would indicate the impossibility of universalism.[46]

To defend such a kind of universalism does not mean to fall prey to dogmatism, eurocentrism or moral imperialism. The epistemic status of a proposition is one thing, the practical consequences drawn from the status of such propositions quite another. One may think that certain normative principles have universal validity, e.g. the equality of women, without implying that this gives sufficient reason to invade other countries to spread the gospel by force in communities that think otherwise. Universalism with humility is a very helpful starting point.[47] The parallel to science may be illuminating yet another time: A scientist may have compelling reasons to assume the existence of Black Holes. This does not mean, however, that she is entitled to muster an army to subdue all those astronomers who think otherwise. The reasons are the very rights universalism defends, including the autonomy of free human thought and cognition.

44 Cf. for a survey M. Mahlmann, Rechtsphilosophie und Rechtstheorie, 4th ed., Nomos 2016.

45 Cf. on this trilemma H. Albert, Traktat über kritische Vernunft, 5th ed., Mohr 1991, p. 14.

46 Cf. M. Mahlmann, Mind and Rights, in: M. Sellers (ed.), Reason, Emotion and Law (forthcoming); J. Mikhail, Moral Grammar and Human Rights: Some Reflections on Cognitive Science and Enlightenment Rationalism, in: R. Goodman, D. Jinks and A. K. Woods (eds.), Understanding Social Action, Promoting Human Rights, Oxford University Press 2012, p. 160ff. For a different view: J. Greene, Moral Tribes, Penguin Press 2013; J. Haidt, The Righteous Mind: Why Good People Are Divided by Politics and Religion, Pantheon Books 2012.

47 Cf. A. Sajó, Universalism with Humility, in: ibid. (ed.), Human Rights with Modesty. The Problem of Universalism, Martinus Nijhoff Publishers 2004, p. 26:
"Overreaching application of norms should really only be grounds for criticism of what they in fact are: the erroneously extended application of universalism, and not for criticism of the underlying concept of universalism itself."

17.4 Constitutional Pluralism

17.4.1 Constitutional Pluralism of Content

Constitutions around the world evidently differ in many respects. There are various reasons for that. Bills of rights stem from different eras, for instance, and these Bills differ accordingly. A right that no soldier shall be quartered without consent ranks rarely high in contemporary bills of rights.[48] The selection of those rights protected often mirror important political decisions that, as of now, do not command universal assent. Many constitutions contain norms that explicitly abolish the death penalty[49] or interpret such norms as prohibiting it.[50] Others still maintain that this form of punishment is justifiable under the respective bill of rights.[51]

Some new bills of rights contain rights to the protection of data.[52] Others do not. Rights of women to equal treatment may be qualified by reference to some religious laws.[53]

Even if there are comparable norms, the interpretation of such norms by courts can vary significantly. Systems can protect the classical rights to life or liberty, but disagree whether such rights include positive duties to protect the enjoyment of such rights.[54] Freedom of speech is an archetypal right at the core of any bill of rights with a claim to legitimacy. An important issue is hate speech or other forms of limited, well-qualified content control. Some constitutional systems do not accept such forms of content control,[55] whereas others regard the protection against hate speech as an important element of a developed system of law.[56]

Another central right is freedom of religion. This right is also a standard element of any bill of rights on the national, supranational or international level. The interpretations of this right vary, however considerably. A ban on certain garment with religious symbolic value, a head scarf, kippa, monk's habit or turban is regarded in some legal systems as permissible, at least in some social sphere, sometimes with reference to principles of

48 US Constitution III. Amendment.

49 Cf. Art. 102 Basic Law of Germany; Art. 10 Sec. 1 Sentence 2 Federal Constitution of Switzerland.

50 Constitutional Court of South Africa, *S v. Makwanyane* and Another (CCT 3/94).

51 Cf. e.g. *Gregg v. Georgia*, 428 U.S. 153 (1976).

52 Cf. e.g. Art. 13 Sec. 2 Federal Constitution of Switzerland.

53 Vgl. Art. 11 in conjunction with Art. 2 Constitution of Egypt.

54 Positive obligations exist in various constitutional systems, e.g. Germany BVerfGE 7, 230 (233); 25, 256 (263); 34, 269 (280); 73, 261 (269); Switzerland: some norms include a reference to protection, like Art. 7 Federal Constitution in the case of human dignity; in other cases it is a matter of case law, cf. BGE 136 IV 97 E. 6, p. 106ff (Rappaz); on a different view cf. *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

55 Cf. e.g. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *Snyder v. Phelps*, 562 U.S. 443 (2011).

56 Cf. e.g. for *Canada R v. Keegstra*, [1990] 3 S.C.R. 697; Germany: BVerfGE 90, 241 (246ff) (holocaust denial); Switzerland: BGE 131 IV 23 E. 3.1, S. 27ff (racial discrimination).

state neutrality or laicité.[57] This is, however, denied in others (or – yet another constellation – in the same country at a different time) and regarded as a violation of this very important right.[58]

By now, privacy is an almost universally accepted right. It is part of many systems of the protection of rights in one form or the other. There are, however, significant differences in the interpretation of these rights. Some doctrines have considerable ramifications in this respect, e.g. the third party disclosure doctrine of the US Supreme Court that allows for very far reaching access to private data that is much more restricted in other legal systems.[59]

A last example: Human dignity is widely regarded as a cornerstone of the modern human rights architecture and there is, contrary to some assertion, substantial common ground of the interpretations of its meaning.[60] Notwithstanding, there are still important differences in the interpretation of this right, some on a very fundamental level. Whereas some systems regard, for instance, the protection of human dignity as absolute,[61] others take the possibility of limitations as entirely warranted.[62]

There is a further dimension of pluralism: the variety of different legal opinions stemming from the same legal background. Interpretations of norms are regularly challenged from within the legal system. The third party disclosure doctrine is as much the object of debate[63] as the question of the limits of hate speech in Europe. The dissenting opinion of

57 Cf. for France: loi no 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics; Switzerland BGE 123 I 296 E. 4b/bb, p. 310 ff (Islamic headscarf in schools); Germany BVerfGE 108, 282 (prohibition of head scarves of teachers constitutional).

58 BVerfGE 138, 296 (prohibitions of head scarves for teacher unconstitutional).

59 Cf. *Katz v. United States*, 389 U.S. 347, 351 (1967): "What a person knowingly exposes to the public (…) is not subject of Fourth Amendment protection"; *Hoffa v. United States*, 385 U.S. 293, 302 (1966); *United States v. Miller*, 425 U.S. 435, 443 (1976); *Smith v. Maryland*, 442 U.S. 735 (1979); *California v. Greenwood*, 486 U.S. 35 (1988).

60 Cf. Mahlmann, Human Dignity and Autonomy in Constitutional Orders, p. 370ff; ibid., The Good Sense of Dignity: Six Antidotes against Dignity Fatigue in Ethics and Law, in: C. McCrudden (ed.), Understanding Human Dignity, British Academy/Oxford University Press 2013, S. 593ff; for an emphasis of the variety of interpretations, but underlining some common core: C. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, EJIL 19 (2008), 655; ibid., In Pursuit of Human Dignitiy: An introduction to current debates, in: C. McCrudden (ed.), Understanding Human Dignity, 2013, p. 1ff.

61 This is the standard interpretation of Art. 1 Basic Law, cf. *v.* I. v. Münch and P. Kunig (ed.), Grundgesetzkommentar, 6. ed, C. H. Beck 2012, Art. 1 para 4.

62 Cf. *Public Committee Against Torture in Israel v. The State of Israel*, H.C. 5100/94, 6 September 1999, para 23.

63 Cf. e.g.:
"Privacy is not a discrete commodity, possessed absolutely or not at all. Those who disclose certain facts to a bank or a phone company for a limited business purpose need not assume that this information will be released to other persons for other purposes."
The reasons seem compelling:
"It is one thing to say that one loses one's expectation of privacy with respect to one's garbage; it is another entirely to say that one has forfeited it with respect to every transaction recorded by a computer in the modern age."
Smith v. Maryland, 442 U.S. 735, 749 (1979), Marshall, J., dissenting; *United States v. Jones* 565 U.S. _ (2012), Sotomayor, J., concurring.

today may be defining the law tomorrow. Lawyers and activists struggling for the protection of privacy in Europe and the US have more in common than the apologetics of surveillance happily united in arms on both sides of the Atlantic.[64] This is an important observation because it prevents from falling into the trap of assuming the existence of monolithic legal cultures.

There is an intense debate over the degree to which a supranational order like the EU or the international order has been constitutionalised, an issue to which we will return later. Even if one thinks that constitutionalisation is the wrong term for the development that is taking place at this level, these supranational and international norms are important for constitutional systems. One reason is very straightforward: Some of these norms are part of national legal systems, the ECHR, for example in Switzerland because of its monist system,[65] through constitutional incorporation in Austria[66] or through legal enactment, as in the United Kingdom[67] or Germany,[68] though in different forms. At least in Germany the implementation even has constitutional effects through the interpretation of fundamental rights in the light of the ECHR.[69] Other legal mechanisms are at work as well in this respect. The supranational legal order of the EU contains the Charter of Fundamental Rights as part of primary law[70] with direct effect[71] and supremacy over national law.[72] One cannot understand any of the constitutional systems of the EU member states without carefully considering the legal effects of the Charter and other legal instruments with a clear human rights profile, e.g. EU anti-discrimination law, on those legal systems.[73]

In addition, international law plays an important role for the interpretation of domestic and supranational law. The fundamental rights conception of EU law is, from its pretorian inception, for example, deeply influenced by ECHR.[74] Finally, there are informal influences. There is, for instance, an international discourse about fundamental

64 Cf. e.g. D. Cole, Preserving Privacy in a Digital Age: Lessons of Comparative Constitutionalism, in: F. Davis, N. McGarrity and G. Williams (eds.), Surveillance, Counter-Terrorism and Comparative Constitutionalism, Routledge 2013, p. 95ff.

65 Cf. e.g. BGE 105 II 49 E. 3, p. 58 ff.

66 Cf. H. Tretter, Austria in: R. Blackburn and J. Polakiewicz (eds.), Fundamental Rights in Europe, Oxford University Press 2001, p. 105ff.

67 Cf. United Kingdom: Human Rights Act 1998 [United Kingdom of Great Britain and Northern Ireland], 9 November 1998.

68 Based on Art. 59.2 Basic Law.

69 BVerfGE 111, 307.

70 Art. 6.1 TEU.

71 CJEU, Case C-26/62, 1963, 1, 24ff. (Van Gend & Loos).

72 CJEU, Case C-6/64, 1964, 1251, 1269 f. (Costa/E.N.E.L.).

73 Cf. e.g. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Official Journal L 180, 19/07/2000 p. 22-26; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation Official Journal L 303, 2 December 2000, pp. 16-22.

74 Cf. Art. 6.3 TEU and for the background, e.g. M. Mahlmann, 1789 Renewed? Prospects of the Protection of Human Rights in Europe, Cardozo Journal of International and Comparative Law 11 (2004), 903.

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rights, which has a quite considerable impact on the domestic understanding of rights which in turn shapes the contours of international human rights law.

The pluralism of content outlined is mirrored to a certain degree in these supranational and international bills of rights, which vary in some respects. An example is the differentiated right to data protection in the EU Charter of Fundamental rights in contrast to other legal systems without such protection.[75]

The pluralism of content of constitutions is even more clearly visible in relation to norms determining the structure of the constituted state, like the systems of government, the design of federalism or a centralised state, the separation of powers, the structure of democracy, the parliamentary institutions, the principles of the judiciary, the financial and economic constitution or the constitutional basis of the use of military power.

In addition, there is a further dimension to the pluralism of content, the pluralism of aims. By now, constitutions quite often formulate policy aims. These aims differ in important respects, e.g. whether or not there are explicit references to a social state[76] or environmental concerns with discernible legal effects.[77]

17.4.2 Constitutional Pluralism of Form

Yet another dimension of pluralism is a pluralism of form. There are at least two potential issues here. The first one concerns so-called social constitutions, the second the much discussed constitutionalisation of the international order.

Social constitutions are a concept of some popularity in recent reflections about the law.[78] The argument is that bottom-up processes of constitutionalisation exist, beyond the sphere of the state, by social forces in the framework of autopoietic, self-creating, self-maintaining social systems. Examples are international economic law or the normative framework of the internet, among others.[79]

Concepts can be used in different contexts with different meanings. So there is no problem with the application of the concept of constitution to such phenomena, if it is

75 Article 8 creates a "right to the protection of personal data concerning him or her" (Art. 8 para. 1), including procedural safeguards, as it provides the following:
"such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified" (Art. 8 para. 2) and "compliance with these rules shall be subject to control by an independent authority" (Art. 8 para. 3).
In addition, the EU has secondary law that is to be superseded by a new data protection regulation coming into force in 2018, cf. Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995, L 281/31.

76 Cf. e.g. Art. 20.1 Basic law.

77 Cf. e.g. Art. 20a Basic Law.

78 Cf. Fn 15 above.

79 Cf. Fn 15 above.

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clarified and intended that the term "constitutions" in this sense is designating something different from constitution in the sense derived from the political theory of constitutionalism. This is important because such social constitutions do not share the characteristic elements of the constitutional idea outlined above: They do not originarily create and comprehensively limit public power. They are not created democratically and are not necessarily structured democratically. They do not define the ways to make law. They are not linked to fundamental rights. They are not directed at regulating the common affairs of the people, nor do they define the framework for an open political process.

If the differences between such systems of social norms and constitutions in the sense outlined above are not underlined, two dangers are the consequence. First, the danger of parasitically borrowed legitimacy. Normative frameworks called social constitutions may – as they are regarded as constitutions – borrow some of the legitimacy of constitutions in the sense of constitutionalism derived from democratic procedures and material content though these social constitutions lack both: They have no democratic legitimacy whatsoever and are not bound to justified material principles such as human rights.

The second danger is the danger of erosion of legitimacy of constitutions: If such systems of social norms claim to be constitutions the true sources of the legitimacy of constitutions are obscured. There are therefore good reasons to refrain from the term social constitution because it does not help to clarify the problems at hand. This terminology blurs the boundaries of phenomena that should be kept apart.

Another problem is the constitutionalisation of the international order.[80] This can mean many things, from the erection of state-like structures in the international sphere to the transfer of core normative ideas of constitutionalism to the international level, but institutionally adapted to the particularities of the international community. There are arguments for and against the idea that the system of the UN and public international law as such is usefully described as a constitution. The same applies for other international organisations like the EU with a much more developed legal structure. It is possible to attempt to resolve these issues by arguing that there is a plurality of constitutional forms on the national and international level and that it therefore makes sense to use the concept of constitution for international and regional legal orders as it is used for states, but in each case in a different sense.[81] These questions are, however, not the most interesting and practically relevant core of the matter. More important are the normative principles that nourish the idea of constitutionalism, which lead back to the question of their universal validity. In this sense the idea of constitutionalism, as sketched out above, can have a useful function, not descriptively but as a normative signpost for the conditions of the legitimacy of the international order. The idea formulates from this perspective a task:

80 Cf. Fn 18 above.
81 Cf. Fn 19 above.

The incremental approximation of the international order to the realisation of those core normative elements of the project of constitutionalism that make it a striking idea.

17.4.3 Constitutional Pluralism of Sources

Yet another problem is the idea of a plurality of not hierarchically but heterarchically ordered sources of constitutional orders, each with a claim to final authority.[82] The prime example being the order of the EU establishing the supremacy of EU law and the constitutional orders of Member States, which accept the supremacy of EU law, but may retain the residual right to enforce the supremacy of national constitutional law under exceptional circumstances.[83] But there are other examples as well, concerning the relationship between the ECHR and other international law, more precisely UN Security Council resolutions.[84] The same problem arises also for EU Law.[85] What exists may be called conditioned hierarchies of law: Hierarchical structures of law are accepted under the conditions that minimum material requirements are met, most importantly fundamental rights.[86] If this analysis points in the right direction, the legitimacy of such legal orders depends on the legitimacy of the protected prescriptions, centrally fundamental rights.

17.5 Universalism and Constitutional Pluralism

The preceding remarks illustrated some of the facets of constitutional pluralism. The pluralism of substantial content is most obvious. The argument for a constitutional pluralism of form is not entirely compelling in the case of social constitutions if one keeps in mind the core ideas of modern constitutionalism and its normative point. The debate concerning the constitutionalisation of the international order and – related to this question – the problem of a pluralism of authoritative constitutional sources point to the question whether any universal norms are justifiable that may legitimately guide the organisation of the international order, maintaining the core aspirations of constitutionalism and solve conflicts of law.

Now the central question of these remarks can be addressed: Is constitutional pluralism reconcilable with normative universalism? This may seem implausible if one assumes

82 Cf. Fn 20 above.

83 Cf. as a particularly influential example BVerfGE 37, 271; 73, 339; 89, 155; 113, 273; 123, 267.

84 ECrtHR, app. No 45036/98, 30.6.2005, *Bosphorus v. Ireland*, para. 154, 155.

85 CJEU, joined Cases C-420/05 and C-415/05, 2007, ECR I-67, para. 303 ff. (Kadi and Al Barakaat).

86 M. Mahlmann, Conditioned Hierarchies of Law in Europe. Content, Legitimacy and Default lines, in: A. Epiney and S. Diezig (Hrsg.), Schweizerisches Jahrbuch für Europarecht 2012/2013, Schulthess 2013, p. 395 ff.

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that universalism must lead to normative uniformity. But this is not at all a necessary conclusion. There are various reasons for that.

The normative questions constitutionalism is concerned with are difficult and complex. Even if one assumes that normative universalism makes good sense as an epistemological theory, this does not imply that there should be any reasonable expectation that everybody agrees on all normative matters after a bit of deliberation. Moral and legal problems are more complicated than that. There is no reason to believe that the dire path of cognition is easier to walk in practical reflection than in other fields of human knowledge, including natural science. Modern theory of science is manifold and the historicisation of scientific paradigms is an important element of this reflection.[87] Such qualifications do not change, however, the epistemic claim of science that, whatever seems to be the best theory available at a given moment enjoys this status universally. Higgs particles are supposed to make sense in Geneva at CERN as much as in Saigon. The history of science of getting where it has gotten so far has not been a smooth ride to insight. On the contrary, the path is so fascinating and rich because of the many difficulties encountered, dead-end roads pursued and breakthroughs achieved. To think that normative insight is easier to gain by practical, ethical and legal thought seems a rather exotic expectation.

Universalism as an epistemological stance gives no reason whatsoever for anybody to be sure that she has in fact reached normative insights of universal validity. The reason for this is the consciousness of the irredeemable fallibility of human thought, not the least practical thought. This is important for individuals and their sense of epistemic modesty and for collectives to avoid unjustified self-righteousness about the justification of the respective realisations of some basic values they (at the given historic moment) deem to be right. Any normative claim is at best a more or less good approximation of perhaps actual universally justified principles.

The internal pluralism of interpretations of given norms within ethical reflection or legal systems therefore comes to no surprise. The origins of such diverse opinions are manifold. Legal norms, in particular, pose many problems and are often ambiguous and vague. In addition, there are political agendas, interest-based legal interpretations and the like at play.[88] The difficulties of identifying the content of underlying normative principle are, however, another reason for the diversity of legal opinions, even about the content of very fundamental norms.

87 Cf. e.g. T. Kuhn, The Structure of Scientific Revolutions, 4. ed., 50th anniversary ed., The University of Chicago Press 2012; P. Feyerabend, Beyond Method, 4th ed., Verso 2010.

88 "There is nothing that interpretation just is", C. R. Sunstein, A. Constitution of Many Minds. Why the Founding Document Doesn't Mean What It Meant Before, Princeton University Press 2009, p. 19ff.

This consciousness of the fallibility of human practical thought has a pragmatic side: It implies the necessity of the freedom for experiments in living,[89] of attempts to explore different forms of realisations of certain important normative principles. This is equally evident for systems of government, of federalism etc. Such systems offer the opportunity for many choices in institutional design that may all, in a comparable way, be suitable to serve the basic values of constitutionalism. There is more than one way to organise a constitutional state well.

This is also true for fundamental rights. It is not always obvious, how to protect rights best and it makes good sense to see how certain approaches work in practice. There will be limits to such experiments[90] but universalism certainly does not categorically exclude the possibility of such searches for normatively justified solutions; to the contrary, the consciousness of the tentativeness of any normative conclusion demands space for it.[91]

One of the practical consequences of this uneven path of practical cognition is therefore the plurality of attempts to approach some kind of set of well-justified norms. Constitutional pluralism is a necessary tribute to difficulties of the problems posed for practical reflection in human affairs and to the fallibility of human thought.

Another reason why normative universalism is reconcilable with constitutional pluralism is very straightforward, namely respect for democratic choices, another source of the legitimacy of experiments of living. If autonomy means anything, it means the ability to make such choices, without content control, if no basic normative principles are violated, most importantly the rights of others. Any legitimate order must leave space for such acts of self-determination. This includes acts that may appear, with good reason, as less than wise that are the product of partisan interest politics or passing political passions. Constitutional orders are not just the products of deduction from the textbook of normative insights. They are embedded in the political process of societies with all the political upheavals and untidy decision-making that make democracies a living, admirable and demanding form of political life. Such political processes have effects on constitutional orders, sometimes becoming constitutional law, sometimes colouring the in-

89 J. S. Mill, On Liberty, in: ibid., On Liberty and other Essays, J. Gray (ed.), Oxford University Press 1991, p. 89.

90 From this perspective, the importance of the "Western" systems of rights protection can be relativised. Cf. H. Bielefeld, "Western" versus "Islamic" Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion on Human Rights, Political Theory 28 (2000), 90, p. 101f. on the "Western model" being an example, not a normative paradigm for the struggle for human rights.

91 J. Donnolly argues, e.g. for a "relative universalism," variation of universal concepts being derived from alternative conceptions and implementation of rights on the basis of an overlapping consensus on universalism, taken as a Rawlsian political approach. Freedom of religion is, in his view, reconcilable with the prohibition of apostasy, with, however, the crucial qualification that sanctions of the prohibition should not violate human rights. With this qualification, the argument becomes tautological. Whether human rights allow for such variation is the question in point. C.f. J. Donnolly, The Relative Universality of Human Rights, Human Rights Quarterly 29 (2007) 281, p. 298 and more generally J. Donnolly, Human Rights in Theory and Practice, 2nd ed., Cornell University Press 2003.

terpretation of norms, adding to and modifying the meaning of the pluralism of constitutions.

The autonomy of decision-making of political subjects is a core tenet of a plausible set of norms with a warranted claim to universality. As that is so, pluralism of normative orientations is the welcome companion of universalist normative theory. Pluralism, including constitutional pluralism, thus, is not only reconcilable with universalism, it is its necessary consequence due to the idea of autonomy.[92]

A further point needs mentioning: Values are not just intellectual positions. A certain view on freedom of expression or religion, equality or human dignity is not of the same nature as a position on the question whether or not Higgs particles exist. In contrast to descriptive propositions, value statements have emotional dimensions in at least two senses. First, certain emotions are the consequences of moral judgements, say moral outrage at the sight of gross injustices. The moral judgement is the precondition of such emotions, the emotions do not constitute the moral judgement, as emotivists maintain.[93] Second, emotions have a heuristic function: They are necessary to fully understand what certain acts mean for human beings. One has to have fathomed the importance of the goods protected by human rights to give them their proper weight: One will not fully understand what freedom of expression means, if one has not experienced the preciousness of the possibility of free speech. Freedom of religion will only be appropriately appreciated if one has a conception of the existential importance of religion for many people, irrespective of one's own religious, atheistic or agnostic views. The meaning of prohibitions of discrimination can only be understood, if one has a sense of the emotional harm done through the degradation by the many forms of discrimination, e.g. by racism. Human equality will only acquire its whole importance if one has a sense of what respect and disrespect of humans as equals feel like.

This consciousness of the existential meaning of human rights, how they and their violations are spelled out in concrete human lives, is of central importance for ethics, but for law, as well. It is a key to the weight of rights. The appreciation of the importance of certain rights guides decisions about the inclusion or exclusion of rights in a given human rights catalogue. It is of great importance in the concretisation of rights, in particular in respect to weighing and balancing of rights in the framework of a proportionality analysis. It depends very much on as how important one views freedom of religion if one faces

92 This does not imply that all factually held positions are equally justified. It just means that there are reasons derived from human autonomy to respect normative position despite the fact that they may not be fully justified. For a different view, arguing for the idea of the possibility of diverging positions, which are equally justified, J. Rawls, Political Liberalism, Columbia University Press 1996, p. 144. Rawls, however, assumes the shared norm that human beings are free and equal, which seems not to be open for reasonable disagreement from his point of view: The idea of reasonable disagreement does not reach all the way down to the core principles.

93 Cf. M. Mahlmann, Cognitive Science, Ethics and Law, German Law Journal 8 (2007) 577, pp. 585ff.

the question of whether a limitation, for instance a ban on head scarves, kippahs, monk's or nuns' habits, or turban, is legitimate or not.

Such sensitivities need time to grow and they will do so on an unequal path in different societies. They may fade away because certain experience become remote, for example, the experience of what religious strife may mean for a society or how life in societies without freedom feels like. Accordingly, normative views will shift, adding, reinforcing, altering the variety of normative positions held on certain issues. All this can be expressed in constitutional norms and interpretations. Given today's internationally interwoven legal systems, such variety of approaches will include a transnational dimension of norms with a constitutional function.

In addition, powerful political passions influence the course of history, including constitutional history, that are in the best case channelled and put to good use for the fostering of the core ideas of constitutionalism, which is not an easy task: "We are not passion's slave, but we have to apply cunning for reason's success."[94]

These observations lead to a final point: There is no teleology in any universalist theory worth a thought. Universalism does not imply that universally valid norms will necessarily become the law of humankind. Nothing in history or theory can nourish this thought. Human beings have moral insights, but they are driven by many motives, some of the most powerful are the most destructive. The possibility of human societies ruled by universally justified norms, at least approximately, though always only tentatively identified, is a hope, not a certainty, entertained to a large degree despite not because of human history.

The pluralism of constitutional orders may therefore again and again violate universally valid norms of equality, liberty and autonomy and the equal worth of human beings. It did so in the past and there is no guarantee that it will not do so in the future. But this is not necessarily the case. Pluralist orders can be something else, namely the fertile attempts of human beings to move a few steps closer to the ideas of legal justice that are the core of the attraction of the constitutional project.

94 A. Sajo, Constitutional Sentiments, Yale University Press 2011, p. 2.

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18 Europe in Crisis: Two Liberal Questions

Iulia Motoc

The word 'crisis' belongs to the gallery of words that are overstated and overused. But what is a crisis and in particular an European crisis? In his famous conferences in Vienna and Prague in 1935, Edmund Husserl, already forbidden to speak by the Nazis, had warned us that the crisis in Europe had only two outcomes. Either it "will sink into hatred of the spirit and into barbarism; Or else Europe will be reborn from the spirit of philosophy." And to conclude: "The greatest danger that threatens Europe is lassitude."[1] Husserl's understanding of the nature of the European crisis remains providential.

One of his brilliant disciples, Paul Ricoeur, stated in 1998:

> Je conclurai cette réflexion sur la crise de la conscience historique en Europe, (…) à savoir la perte de tout sens de l'histoire, de toute orientation dans le temps historique. Si certains parlent d'époque post-moderne, l'expression est justifiée, dans la mesure où l'on peut identifier la modernité à l'idée rationnelle de progrès. Au fond, nous ne souffrons pas moins de l'effacement de l'idée de progrès reçue de l'époque des Lumières que de la sécularisation qui affecte l'Europe chrétienne, voire d'un éloignement aussi marqué de la source grecque que de la source juive de notre culture privée et publique. C'est ainsi que l'effondrement de l'idée de progrès conduit par contraste à majorer tour à tour le sentiment de l'aléatoire, ou celui d'une destinée écrasant, quand il ne conduit pas à céder à la séduction exercée sur nous par les idées de chaos, de différence, d'errance. (…) C'est pourquoi la question se pose de savoir si, pour reprendre une formule de Habermas, le projet des Lumières est aujourd'hui épuisé, ou, en remontant plus haut dans le passé, si l'héritage gréco-romain et l'héritage judéo-chrétien sont encore susceptibles d'être réactivés.[2]

It is a constant affirmation – this last time – that Europe is going through a multitude of crises and is confronted with complex challenges. In a rapidly changing world and in-

1 Edmond Husserl, Philosophy and the Crisis of European Man. *Phenomenology and the Crisis of Philosophy* (Translated by Quentin Lauer, New York: Harper Torchbooks 1965). 149-192; "The Vienna lecture." Translated by David Carr. *The Crisis of European Sciences and Transcendental Phenomenology. An Introduction to Phenomenology* (Northwestern University Press, 1970). 269-299; "Die Krisis der europäischen Wissenschaften und die Psychologie." (Public Lecture before the "Cercle philosophique de Prague pour les recherches sur l'entendement humain" in Prague).

2 Paul Ricoeur, La Crise de la Conscience Historique et l'Europe, in *Ética e o Futuro da Democracia, Lisboa* (Ediçôes Colibri/S. P. F. 1998), pp. 29-35 (II A 648 b).

adequate global governance, the European space, despite its undisputed success in intergovernmental cooperation and integration at the regional level it has marked in the past, is now in a period of political, economic and institutional recession.[3] This observation is more striking, in particular in terms of those which illustrate its strength, namely the values and principles that constitute the common heritage of Europeans: democracy, human rights and the rule of law. Indeed, these European values, both ideology and law, moral and political – constitute the foundation of European institutions.[4] Thus, within the range of different constructions of the regional and universal organization, they delimit the European institutional architecture in this field, as the most advanced system in these areas of democracy or the rule of law.[5]

Indeed, under these circumstances, a climate emerges that encourages discomfort in European public opinion now doubtful and suspicious. The discontent of European citizens gives rise to a dispute with the European institutions (Euroscepticism, Brexit, etc.), which – for them – seem too technocratic, distant and closer, it is said, to "markets" than to peoples. In addition, the phenomena of populism, nationalism, extremism and, of course, xenophobia toward the foreigner are manifested in momentum. Europe – in part – now seems to be moving away from its values and principles, the foundation of its institutional political and legal foundations, that reflect a well-established European public order.

I would like to address here two of the liberal answers that were exploited as length by Andras Sajo: the first is the question of the role of feelings in political life, and the second one is about militant democracy.

18.1 Istan Bibo – The Misery of the Democracy and Rule of Law

How can we make sure that man can no longer, in the future, "make everything of man" (Gombrowicz)?[6] To this question, many intellectuals from Central Europe devoted their work, their commitment, their very lives. So it is more than time to rediscover this formidable community of minds dominated by three emblematic figures. Three men standing with exemplary courage, who also count among the greatest consciences of our time. The Polish poet and essayist Czeslaw Milosz (1911-2004), Nobel Prize winner of litera-

3 For a comprehensive and updated overview of the current challenges and crises the EU is facing, see; Kristin Archick, *The European Union: Current Challenges and Future Prospects*, February 22, 2017, Congress Research Services report prepared for Members and Committees of Congress (USA), in particular on terrorism, migration. pp. 10-15.

4 Report by the Secretary General of the Council of Europe, State of democracy, human rights and the rule of law in Europe (2016).

5 S. Perakis, Les valeurs Européennes en question dans l'Europe des crises d'aujourd'hui. Défis, perspectives et le rôle du Conseil de l'Europe.

6 Witold Gombrowicz – Cosmos?

ture in 1980, who owes the very notion of "another Europe" and whose work is haunted by the tragedy of the twentieth century. The Czech philosopher and opponent Jan Patocka (1909-1977), who was murdered in Prague by the political police, was the first spokesman of Charter 77 for human rights and democratic freedoms, with Vaclav Havel.

How can the meaning of "the European heritage" be made visible again? – remains more than ever ours. Same was the preoccupation of Istvan Bibó (1911-1979), probably the least known of the three. Hungary's political thinker and hero of the 1956 revolution, his visionary analysis of the "collective hysteria" that regularly shook European societies has taken on a new resonance since 9/11. In the seventies and eighties, their impact was considerable on the intelligentsia of the ex-Eastern Europe disappointed by Marxism. Beyond that, the attempt of these three lighthouses of dissent in order to rethink in depth the ethical foundations of European civilization reveals itself to be fascinatingly topical. She's not behind us. She's in front of us. With Milosz, Patocka and Bibo, Central Europe – better still, Europe itself – undoubtedly finds its most accomplished and completed philosophical, moral and political expression.[7]

It is thus around the ideas, the journey and the radiance of these three emblematic passengers of the century that we chose to organize our remarks. Between the history of ideas, intellectual biographies and diagnosis of the present time, we have traced their extraordinary itineraries while restoring, in the background, the dramatic epoch that shaped them. Three poles, in a way, around which we will hear, in echo, many other voices of Central Europe. Some of them are famous, from Kafka to Kundera, through Vâclav Havel, Imre Kertész (Nobel Prize for Literature 2002) or the philosopher Leszek Kolakowski. The others are less famous, whether it is the Polish writer Kazimierz Brandys or the Prague essayist Ivan Klíma. We wish to bring out underground correspondences, elective affinities and reciprocal influences, from Musil to Milosz and Husserl to Patocka, from Hannah Arendt to Arthur Koestler (born in Budapest), or from Max Weber to Zygmunt Bauman, author of Modernity and Holocaust,[8] originally from Warsaw. How is it that this continent, swallowed up by European culture, has passed almost unnoticed in the West? Of these great witnesses haunted by the twilight of Europe and the question of evil in politics, the public will certainly have read some works, sometimes reexamined in favor of the fashion "*Vienne-fin-de-siècle*,"[9] sAn interest, therefore, but no overall vision.

The most astonishing thing about Bibo, whose aim is to draw lessons from the impasses that have permanently disrupted democratic development in Central Europe, is that it never ceases to refer us, mutatis mutandis, to our own "miseries." Disastrous misery of what he calls political, nationalist or communist hysteria, when they seize the

7 See A. Leignel-Lavastine, Esprits d'Europe. Autour de Czesław Miłosz, Jan Patočka, István Bibó, Paris, Calmann-Lévy, 2005.

8 Zygmunt Bauman, *Modernity and the Holocaust* (Cornell University Press 1988).

9 Carl E. Schorske, *fin-de-siècle* (Vienna: Politique et Culture 1979).

masses to transform themselves into lasting states of resentment and collective fear. Misery of the habituation of certain social strata to hate speech: Bibo analyzes the disconcerting ease with which they integrate themselves into the ideological decoration, including in democracy. Recurrent misery of anti-Semitism, the "anti-Semitic vision of the world," he said, that lamentable escape from reality, which allows comfort to always think of itself as an object rather than a subject of its own history. The misery of a divided intelligentsia when the necessity of elaborating a "program of humanist resistance" would be imposed. Misery, finally, of fearful majorities, ready to revel in the troubled waters of cowardice and indifference. Misery, above all, of irresponsibility, because "to be adult and free," says Bibó, "is first to glimpse the mediocrity of our actions determined solely by our conditioning" and thus "to begin to feel responsible."[10]

István Bibó, it is important to note, was among the first observers of the European scene to give affects – to the affective part of politics – a crucial importance in the study of the dysfunction of human communities. Is it not a coincidence that one of the most profound sentences ever written about democracy can be found in his pen, in which he strikes one of the cardinal intuitions of Patocka: "To be a democrat, It is in 1946 to be free from fear."[11] Another formula that could usefully be inscribed on the frontispiece of the European Union. Especially since in a different context, it seems very difficult, since the September 11 earthquake, not to perceive the relevance of this remark. How can the "mechanism of fear" supplant the "mechanism of reason?" In Bibo's eyes there was no more serious or serious political question than this one. At a time when the specter of radical Islamism and terrorism makes fragiles our democracies and confronts them with an unprecedented challenge, there is hardly any more imminent.[12]

It is in this tense context that the young man begins his studies of law and political science at the University of Szeged, a small town in the south of the country. But it also opens onto the vast world, complementing its formation by several stays abroad. In Vienna first, then in The Hague, passing by the Graduate Institute of International Studies of Geneva, which welcomes him from 1934 to 1935, and where he follows the teaching of the jurist Hans Kelsen and of the Italian historian Guglielmo Ferrero, then a celebrity; without forgetting Paris, where he went several times between 1936 and 1939. Among other decisive encounters during this period, Bibô crossed a monster on his way. And not just any one. "The most formidable monster," he will say, "of modern times": anti-democratic nationalism. It is not surprising that the two books he published

10 Alexandra Leignel-Lavastive, Esprits d'Europe. Autour de Czesław Miłosz, Jan Patočka, István Bibó, Paris, Calmann-Lévy, 2005.

11 István Bibó, *The Misery of the Small States of Eastern Europe* (1946) "Above all, being a democrat means not being afraid; not being afraid of people with different opinions, different mother tongues, or people from different races … not being afraid of all those imaginary fears which are only made real by our fear of them."

12 Alexandra Leignel-Lavastine, op. cit.

at that time, *The Problem of Sanctions in International Law*[13] and *Coercion, Law and Liberty*,[14] partly announce the direction his thought will take after the Second World War. The search for a way out of the European crisis is already outlined, but also the credo that dominates its political philosophy, namely that freedom is first and foremost an "inner experience" such that, subject to the worst constraints, the individual preserves Always have the option of choosing between several options and resisting.[15]

Close, like Milosz, of the milieus of the Anti-Fascist Resistance, the scientist, it is true, is caught up in other emergencies, more precisely what Petcock calls "the urgency of human suffering." As a secretary at the Ministry of Justice, Bibó uses his office to make all sorts of false papers and other safe-conducts for the persecuted Jews. In a beautiful autobiographical book, *Departure and Return*, the future dissident György Konrád, a child at the time, gives an idea of the climate of panic that then reigns in the country. The writer remembers how his sister and he succeeded, on the eve of the great raid, in leaving the little provincial town where they lived. If we had waited another day, we would have been deported to Auschwitz. Aged fourteen, my sister may have survived. I was eleven: Dr. Mengele had sent all my classmates to the gas chamber.[16]

18.2 Militant Democracy from the National to the International Level

Recent case-law on the question of mass surveillance in the terrorism context involves the concept of militant democracy. The "war against terrorism" has entailed recent restrictions on freedom of expression and association have been introduced.[17] Evolution of the use of the concept by the Court following the course of History, from post WWII cases dealing with Communist parties, to the Turkish political parties cases, to reviewing of anti-terrorism measures.

18.2.1 The Concept of "Militant Democracy": Karl Lowenstein, 1937

The concept of militant democracy[18] was invented by Karl Lowenstein in a series of two articles published in 1937 in the *American Political Science Review*.[19] He attempted to ex-

13 István Bibó, The Paralysis of International Institutions and The Remedies: A Study of Self-Determination, Concord Among the Major Powers, and Political Arbitration (Hassocks (Royaume-Uni): The Harvester Press, 1976), 152p.

14 István Bibó, *Democracy, Revolution, Self-Determination* (Columbia University Press, 1991), 578p. Articles publiés en hongrois dans diverses revues entre 1946 et 1979.

15 Alexandra Leignel-Lavastine, op. cit.

16 Ibid.

17 For an overview of European responses to terrorism, see van Leeuwen Marianne, *Confronting Terrorism: European Experiences, Threat Perceptions and Policies*, Kluwer 2003.

18 For a broad analysis of the concept of militant democracy, see, Paul Harvey, "Militant democracy and the European convention on human rights." *European Law Review*, vol. 29 (2004), pp. 407-420; Andras Sajo,

plain the failure of the Weimar Republic, and the fall of other democratic regimes in the period following the First World War. His idea was that those regimes had not been given the instruments to combat anti-democratic movements. In some respects, those problems harked back to similar dilemmas in the nineteenth century in the form of Bonapartism and Caesarism, which adopted plebiscitarian methods. In 1949 Germany incorporated some of those defense mechanisms in what became its Constitution. In the words of Rory O'Connell,

> Lowenstein's militant democracies were an answer to Carl Schmitt's critique of representative democracy: a militant democracy is not an interminable talking shop, and it's capable of identifying the enemy it has to combat.[20]

18.2.2 Safeguards of Militant Democracy Conception Contained in the Convention:[21]

The same type of safeguard of militant democracy lies in the European Convention on Human Rights. The Convention was created in the aftermath of the Second World War

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"From militant democracy to the preventive state?," *Constitutional Law Review*, no. 1 (November 2009), pp. 63-83; Andras Sajò (ed.) *Militant Democracy* (Utrecht: Eleven International Publishing, 2004). Andras Sajò, "Militant democracy and emotional politics." *Constellations*, vol. 19, no. 4 (2012), pp. 562-574; M. Thiel (ed.) (2009) *The "Militant Democracy" Principle in Modern Democracies* (London: Ashgate). Roach Ken, "Anti-terrorism and militant democracy: Some western and eastern responses." In Sajò, A. (ed.) *Militant Democracy* (Utrecht: Eleven International Publishing 2004); S. Rummens, "Defending democracy: The concentric containment of political extremism." *Political Studies*, vol. 58, no. 4 (2010), pp. 649-665. O'Connell, Rory, "Militant democracy and human rights principles," *Constitutional Law Review*, no. 1 (November 2009), pp. 84-90; J-W. Müller, "A 'Practical dilemma which philosophy alone cannot resolve?' Rethinking militant democracy." *Constellations*, vol. 19, no. 4 (2012), pp. 536-539. P. Macklem, "Militant democracy, legal pluralism, and the paradox of self-determination." *International Journal of Constitutional Law*, vol. 4, no. 3 (2006), pp. 488-516. M. Klamt, "Militant democracy and the democratic dilemma: Different ways of protecting democratic constitutions." In: F. Bruinsma and D. Nelken (eds), *Explorations in Legal Cultures*. (The Hague: Elsevier 2007), pp. 133-159.

19 K. Loewenstein, "Militant democracy and fundamental rights." *American Political Science Review*, vol. 31, no. 3 (1937), pp. 417-432.

20 Rory, pp. 84-90, p. 84.

21 For an analysis of the concept of Militant democracy in the jurisprudence of the ECtHR See P. Macklem, "Guarding the perimeter: Militant democracy and religious freedom in Europe." *Constellations*, vol. 19, no. 4 (2012), pp. 575-590. "This essay tracks the concept of militant democracy in the jurisprudence of the European Court of Human Rights, where militant democracy appears to have migrated from a principle that authorizes a state to act in a militant manner to preserve democratic processes to one that entitles a state to establish perimeters and guard against threats of a different kind." Most of this migration has to do with the ambiguities surrounding the concept of democracy itself. The author identifies 4 substantive conceptions of democracy: liberal, secular, republican and conservative. "The migration of militant democracy, I argue, signals an ominous shift in the way in which the European Court of Human Rights comprehends the relationship between religion and state power. Instead of treating the protection of religious freedom as

to give Europe a program through which the most serious human rights violations committed during that war could be avoided in the future.

That explains, in part, the recurring references to principles "necessary in a democratic society" even though such principles are not at all defined in the Convention itself. The best judicial definition of democracy can be found in the judgment Refah Partisi (The Welfare Party) and Others v. Turkey:[22] "In view of the fact that these plans were incompatible with the concept of a 'democratic society' and that the real opportunities *Refah* had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a 'pressing social need'."[23]

Refah Partisi (The Welfaire Party) and Others v. Turkey marks the endorsement of militant democracy conception by the Court.[24]

> it is not at all improbable that totalitarian movements, organized in the form of democratic parties, might do away with democracy, after prospering under a democratic regime, there being examples of this in modern European history.[25]

In *Suresh v. Canada* Supreme Court of Canada, 2002[26] – frames the dilemma between defense of fundamental values of democracies vs. Security in the following terms:

> it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values," namely, "values that are fundamental to our democratic society liberty, the rule of law, and the principles of fundamental justice.

18.3 Recent ECtHR Case Law on Mass Surveillance in the Context of Terrorism

In the Concurring opinion of Judge Ziemele in *Rohlena v. the Czech Republic*, Jan. 2015 (Art. 7) on the need to use the notion of a European Consensus with care:

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essential to democracy, the Court has begun to reframe religious freedom as a threat to democracy and immunize states from judicial oversight when they take preemptive measures to curb its exercise." p. 3.

22 Case of Refah Partisi (The Welfare Party) and *Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98, 35 EUR. H.R. REP. 3 (2001) (including a joint dissenting opinion by Judges Fuhrmann, Loucaides, and Sir Nicolas Bratza) [hereinafter Refah].

23 See Kathleen Cavanaugh, "Rethinking what is necessary in a democratic society: militant democracy and the Turkish State," *Human Rights Quarterly*, vol. 38, no. 3 (August 2016), pp. 623-654.

24 Refah op. cit.

25 Refrah para. 99.

26 *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3.

> The notion of European consensus needs careful reflection and fine-tuning in the Court's future case-law. I would like to hope that this will be done keeping the relevant elements of international law in mind. The use of this notion should not be unpredictable.

In his book *The Idea of Europe* the philosopher George Steiner[27] states that there are five axioms about Europe. The fourth is a "tale of two cities," Athens and Jerusalem. "Being European means seeking to negotiate, on a moral, intellectual and existential level, between the contrasting ideals and praxis of the city of Socrates and the city of Isaiah." The ultimate criterion is the consciousness of its own contingency and the possibility of its own downfall. A theme of which Paul Valéry is fond; he wrote of its beauty and the horror of a century that has just recently come to an end. If European identity is the result of a project and a process, if the question of who we are is a question about who we want to be, that means that we are committed to being in and building a future in Europe. This is precisely the reason why the Court has granted a key role to European consensus. This term often appears in our judgments. On occasion we have, like all judges, a different interpretation of the term "European consensus," as shown by the concurring opinion of Judge Ziemele in the *Rohlena v. the Czech Republic* judgment of January 2015,[28] but we are all aware of the fundamental importance of that notion in preserving the unity of Europe.

18.3.1 *Violation of Article 8: Compliance of a System of Covert Interception of Communications* Zakharov v. Russia *Dec. 2015.*[29]

The European Court of Human Rights has begun to respond to that question in the Grand Chamber's *Zakharov v. Russia* judgment (no. 47143/06), of 4 December 2015 – a judgment which answers common questions: "Having regard to the secret nature of the surveillance measures provided for by the contested legislation [in Russia], the broad scope of their application, affecting all users of mobile telephone communications, and the lack of effective means to challenge the alleged application of secret surveillance measures at domestic level, the Court considers an examination of the relevant legislation in abstract to be justified." That paragraph of the judgment has been rightly regarded as an expression of the priority given by the Court to human rights. In that connection the Court has examined the principles on which to assess whether the interference was "necessary in a democratic society," emphasizing the tension between measures taken to protect safety and their consequences for society. The Court has stressed that it must be

27 Georges Steiner, *The Idea of Europe*, Nexus Institute, 2004.
28 *Rohlena* Concurring opinion Judge Ziemele.
29 *Roman Zakharov v. Russia [GC]* (no. 47143/06, 4 December 2015).

satisfied that there are appropriate and effective safeguards against abuse. A limited degree of involvement will not suffice for judicial authorization to obtain. On the contrary, judges must be sufficiently empowered to verify the existence of a reasonable suspicion against the citizen. In addition, the judiciary must also have the capacity to assess the proportionality and necessity of the surveillance. In that sense, this judgment also mirrors the subject of judicial scrutiny of anti-terrorism measures.

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19 Constitutional Pluralism

*Cesare Pinelli**

19.1 Original Meaning of Constitutional Pluralism

> Where there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers), it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another. In this case, 'constitutional pluralism' prevails.[1]

Neil MacCormick prospected the 'possibility' of constitutional pluralism as a way for escaping the *Kompetenz–kompetenz* dilemma emerging from the opposition between the monist conception of the EU order as sustained by the ECJ since 1964, and the German Constitutional Court's (as well as of other national courts) assumption that it itself had the final power of decision over the outer limit of European competence in respect of matters concerning the national State or of fundamental constitutional principles. But he was aware that such possibility needed a theoretical framework.

To this end, he first recalled that 'non-state law', such as international law, EU law, law of churches and other religious unions, laws of games, and laws of national and international sporting associations, has 'the character of being institutional normative order' as well as state-law, and it may indirectly become physically coercive 'through the action of organs of a state-system'.[2] Then he ascertained that

> Each state has amended its criteria of recognition to include validity-in-EC-law as a criterion of validity domestically. Moreover, the concept of the 'supremacy' of EC law has entailed its being a high-ranking criterion, ranking above legislation and all subordinate forms of law locally. Without such recognition, it does indeed seem doubtful whether the process of creating a common market could really have come successfully to fruition.[3]

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1 N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, OUP, 1999, at 104.

2 Ibid., at 114.

3 Ibid., at 115.

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However, he added, validity in EC law could not be made a criterion superior to a state's constitution itself without outranking 'the whole constitution among the criteria of validity', which 'would be a manifestly absurd and unacceptable interpretation of the processes of unification of Europe under the treaties'.[4]

The hypothesis that questions of ultimate legal authority could be left unsettled in the EU context still corresponds to the functioning of the EU/Member States constitutional law relationship. Even the challenge launched in *Gauweiler* by the German Constitutional Court over the ECJ with respect to the ECB's OMT program, that for some scholar would have demonstrated the 'unsustainability of constitutional pluralism',[5] ended with the German Court's acceptance of the conditions stated by the ECJ on 21 June 2016.

What about, then, the UK Leave vote in the EU referendum, that occurred just two days later? Didn't it demonstrate that the final decision on withdrawal from the EU rests with the Member States? It did. But the object of such decision, corresponding to the provision that 'Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements' (Article 50, para. 1, TEU), differs from the settlement of questions of ultimate legal authority within the EU system, that presupposes the permanence in that system. Member states may indeed exert the former prerogative, that corresponds to their sovereign power. But, as long as they don't, they remain subject to a system that leaves unsettled questions of ultimate legal authority, unless reform of the TEU is not at stake. Hence the alternative, for constitutionalists, either to content themselves with the portion of sovereignty that rests in the hands of the 'Masters of the Treaties', or to further explore how public powers are, and should be, adjusted, in the European polity, and which theoretical constructions might follow in this respect. The choice of constitutional pluralism goes in the latter direction.

19.2 Further Meaning of Constitutional Pluralism

In MacCormick's version, constitutional pluralism was fundamentally affected from an explanatory intent, namely that of giving a plausible account of the functioning of the EU-member states relationship, although not disconnected from a normative claim. It was Neil Walker that reshaped 'the idea' of constitutional pluralism both by adding an epistemic dimension to it, and, strictly related, by affording a far broader picture of its implications at the global scale.

In his words,

4 Ibid., at 116.

5 R.D. Kelemen, 'On the Unsustainability of Constitutional Pluralism. European Supremacy and the Survival of the Eurozone', *Maastricht Journal of European and Comparative Law*, January 2016, 136ff.

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> the very representation of distinct constitutional sites – EU and member states – *as* distinct constitutional sites implies an incommensurability of the knowledge and authority (or sovereignty) claims emanating from these sites. That is to say, it is only possible to identify the different sites of different units if we already acknowledge that the underlying symbolic work in representing each of these sites units – and so also as *unities* – requires a different way of knowing and ordering, a different epistemic starting point and perspective with regard to each unit(y); and that so long as these different unit(ies) continue to be plausibly represented as such, there is no neutral perspective from which their distinct representational claims can be reconciled.[6]

Accordingly,

> The incommensurability of authority claims – in particular of the discrete claims to final authority over the interpretation and extent of jurisdiction of the various political units implicit in the very process of representing these units as unities, means that the idea of a fully consensual 'sharing', 'pooling', 'division' or 'co-ordination' of authority between units, still less of the transcendence of the need for a vocabulary of authority in a 'post-sovereign' future, can never be more than an aspiration whose full realisation is frustrated by the resilient distinctiveness and authoritativeness-in-the-last-instance of the units who might pursue it.[7]

From this it follows inter alia that, while in its statist version the claim to sovereignty or ultimate authority implies both autonomy and exclusivity, in the emerging post-Westphalian order

> it becomes possible to conceive autonomy without exclusivity – to imagine ultimate authority, or sovereignty, in non-exclusive terms. This is because of the emergence of polities whose posited boundaries are not (or not merely) territorial, but also sectoral or functional. That is to say, claims to ultimate legal authority are no longer limited to (state) claims over a particular territory, but now also embrace sectorally and functionally limited claims, whether such claims are also territorially limited, as in the EU, or global, as in the WTO.[8]

6 N. Walker, 'The idea of constitutional pluralism', *Modern Law Review*, 65, May 2002, 3, 338.
7 Ibid., 338-9.
8 Ibid., 346.

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Here comes a further distinction from the original version of constitutional pluralism. The 'sectorally and functionally limited claims' reflect the fragmented landscape of globalization, which is taken into account in the new perspective as well as the EU. To the extent that it 'poses the most pressing paradigm-challenging test to what we might call constitutional monism',[9] EU law is in fact only one of those tests. Walker's map encompasses 'a number of different phenomena, state, post-state polity and non-polity, each with their own separate but related discourses', namely the intra-state sphere of the relations between ethnic, religious, gender, linguistic and other groups, direct interference from single states in the institutional structures and normative frameworks of domestic law, public or private transnational regulation, post-state polities such as WTO and NAFTA, the new EU and WTO methods of governance, the EU and the Council of Europe's interaction over human rights.[10]

Against such background, constitutionalism

> is *necessarily* conceived of not only as a propriety of polities and political processes but as a medium through which they interconnect – as a structural characteristic of the relationship between certain types of political authority or claims to authority situated at different sites or in different processes as well as an internal characteristic of these authoritative claims.[11]

While revisiting constitutional pluralism few months before the UK referendum, Walker addressed the main objections to such theory, and adjourned it in the light of the increasing difficulties of the European integration. His main concern here is 'the future of a polity which has had its basic legitimacy questioned as never before'. Constitutional pluralism, he contends,

> assumes a new complexion. It graduates from being a relatively contained exercise in assessing and managing the high judicial and legal-theoretical implications of the EU's early movements towards polity maturity to what, with the benefit of a longer view, might now be seen as a response to the inherent, unavoidable and perhaps unbearable stresses of its mature condition.[12]

9 Ibid., 337.
10 Ibid., 355.
11 Ibid., 340.
12 N. Walker, 'Constitutional Pluralism Revisited', University of Edinburgh School of Law, Europa Working Paper No 2016/05, at 21.

In his view, in the European context

> Each citizen has to ask herself how to live together both nationally and supranationally, and also with regard to the proper boundary and terms of interaction between these two contexts of living together. A documentary constitution of and for the higher pan-European level, then, should affirm not just the importance of that continental 'particular place', but also of the relationship of coequality between that form of communal political life and the various and diverse communal political lives of the 28 member states.[13]

Accordingly,

> In the presence of a documentary constitution of the supranational level, those tending towards national constitutional particularism would instead have to concede the indisputable institutional fact of a parallel supranational constitutional authority. Equally, those tending towards supranational constitutional particularism would, on the insistence of their own supporting documentary source, instead have to accept the hardness of the boundaries of supranational jurisdiction and the limits of legislative *kompetenz-kompetenz*, and so concede the preservation of an unimpeachable domain of national constitutional self-regulation. In this way, the very understanding that makes the attitude of mutual recognition and accommodation associated with CP necessary and appropriate would be politically validated and textually affirmed. And so, no longer the somewhat strained or even wishful product of a particular line of constitutional theory, pluralism rather than particularism might become the default judicial perspective on the EU order as a whole on either side. This, in turn, would surely encourage less defensive judicial dispositions across the national-supranational faultline and the more generous contemplation of what is or might become constitutionally in common across the different systems.[14]

Irrespective of the feasibility of the project, even restricted to the now 27 member states, what is telling in this account is the maintenance of a dual identity of citizens, and the conviction that whichever constitutional assessment of the EU should be grounded on it. Walker invites thus theorists to deal with a structural ambivalence of that polity, contrary to the opinion of the federalists not less than of those denying that a constitution beyond the state is even conceivable. However, it is from the latter that has come the most significant attack on constitutional pluralism.

13 Ibid., 29.
14 Ibid., 30.

19.3 A Critique

Martin Loughlin's critique of constitutional pluralism assumes that contemporary scholars, pluralists included, have forgotten the basic distinction of 'positive public law' between state and government, that goes back to Bodin and is still asserted by Carré de Malberg: the state is 'a volitional entity (a juristic person)' that is provided with sovereignty, namely 'a condition of legal omnipotence', or 'the faculty the state is assumed to possess in order to express its will in the form of law', whereas 'governmental institutions are vested with legal rights and are subjects of legal obligations'. From this it follows inter alia that 'Constitutional law does not purport to control the state, but only its government. These laws are the creation of the state and the limitations they impose do not impose a limitation on the state', and that

> Being itself a principle of juristic reason, the state operates exclusively through legal processes. But, juristically conceived, the state itself is not and cannot be controlled by law, and logically cannot be regarded as the subject of legal rights and duties. The idea that 'the law is sovereign' or 'the constitution is sovereign' has no juristic significance other than that the state is able to speak its will only in the form of law and in accordance with its constitution.[15]

Loughlin's theoretical account poses a question of internal congruence. Being sovereign, in the sense of omnipotent, or provided with *potestas absoluta*, the state as 'a volitional entity' acting in the real world should be free in choosing means or processes for expressing its will. If it is instead 'a principle of juristic reason', that as such 'operates exclusively through legal processes', the state is bound to operate through that means. Rather than with *potestas absoluta*, we deal here with *potestas ordinata*, namely a legal order that permeates the state. The inherent tension between these versions of the state can be elucidated with a brief reference to their respective historical roots.

The notion of the state as 'a volitional entity' reflects the anthropomorphic, and essentialist, view of the state that the *Allgemeine Staatslehre* inherited from Hegel, and which Kelsen discredited for its epistemological fallacies and political implications. Rather than distinguishing state from government, the *Allgemeine Staatslehre* served in fact the purpose of legitimizing the executive, that was reputed to embody the omnipo-

15 M. Loughlin, 'Constitutional Pluralism: An Oxymoron?' *Global Constitutionalism*, 3, 1, 2014, 9ff. See also M. Loughlin, 'The Nature of Public Law', *in* C. MacAmhlaigh, C. Michelon, and N. Walker (eds.), *After Public Law*, OUP, 2013, at 24:
'Although modern constitutions are generally presented as establishing a scheme of 'fundamental' or 'higher-order' law, this status is conferred only within the frame of positive law. From the perspective of public law (that is, from public law as political jurisprudence), such constitutional rules are invariably regulative rather than constitutive'.

tent sovereignty of the state, vis-à-vis parliament, that in the *Rechstaat* represented 'civil society'. At the same time, while presupposing that the state could pursue whatever political aim, the *Rechstaat*'s model put a ban on the revolutionary ideals of freedom and equality that permeated the French *tradition républicaine*, and reduced the concept of constitution to a description of the state's institutional machinery. Such an authoritarian ideology was deeply rooted in, and at the same time hidden by, the German construction of public law, and extended to the later *Scuola italiana di diritto pubblico*.[16]

The notion of the state as 'a principle of juristic reason' reflects instead a purely conventional, or artificial, construction, whose trajectory goes from Hobbes to Kelsen, who conceives the state as a mere center of legal imputation, and therefore of unification, of all the acts of public powers. Here law is not in the hands of 'a volitional entity', but results itself from a legally established procedure, sovereignty is not referred to as an omnipotent subject, and the state is clearly distinguished from government. The premises are put for the development of constitutionalism.

It is on the former version that rely Loughlin's objections to MacCormick, Walker, Maduro, Kumm, and Pernice, namely the authors that are reputed to share the theory of constitutional pluralism. His assertion that 'Under the pluralist conception, constitution as textual constitution is the highest authority and all reference to the concept of the state must now be jettisoned'[17] presupposes the idea of the state as omnipotent subject that is far from exhausting the legacy of the sovereignty concept.

Constitutional pluralism is further criticized on the ground that it fails to provide 'evidence for its claims about the nature of existing relations between member states and the EU',[18] particularly in the light of the 1993 *Bundesverfassungsgericht*'s ruling on the Maastricht Treaty, according to which the Union remains an entity both created and regulated by member states. But, as already reported, beyond his statements about the nature of the EU even the *Bundesverfassungsgericht* continues to date to avoid the *Kompetenz-kompetenz* challenge. This confirms the empirical claim on which constitutional pluralism is founded since the seminal essays by MacCormick. On the other hand, the pluralist assumption that public authority is now to be conceived as autonomously constituted at a multiplicity of sites, that for Loughlin does not tell whether it is 'an empirical claim or a conceptual assertion',[19] is related to the thesis that, in a post-Westphalian order, autonomy can be conceived without exclusivity, namely to a conceptual assertion inferred from empirical evidence.

Finally, in Loughlin's words, while substituting the state acting as the source of law with 'a set of overarching constitutional principles and values of constitutionalism', pluralists do not realize that a pluralism of values or institutions cannot be extended to a pluralism of founda-

16 On this, see C. Pinelli, 'The Formation of a Constitutional Tradition in Continental Europe since World War II', *European Public Law* 22, 2 (2016), at 262.
17 Loughlin, 'Constitutional pluralism', at 22.
18 Ibid., at 29.
19 Ibid., 23.

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tions without destroying 'the precondition for the establishment of political authority'.[20] This argument needs to be carefully addressed with respect to its historical underpinnings.

In Loughlin's essay, a preliminary reference is made to the considerable influence that the concept of political pluralism acquired within Anglo-American political thought in the first decades of the past century. Such concept condensed the crucial role exerted by local authorities, churches, guilds, and trade unions in contemporary political life with a view to afford an intermediate solution between bourgeois individualism and absolutist statism, but was soon subjected to the decisive objection that it failed to provide a final authority for resolving conflicts between these groups: even Harold Laski, who exerted a pivotal role in diffusing the theory of political pluralism, recognized that the state was necessary in this respect.[21] 'A century on', so the argument goes,

> and pluralist thinking is once again in the ascendancy. Once again, there is a background of cultural crisis, though today the concern is that the post-1989 period of apparent triumph of the constitutional state is also marked by the growth in governmental power exercised by international agencies operating beyond the structures of constitutional accountability.[22]

Apart from the question of whether Laski's recognition of the decisive role of the state, rather than to the fallacy of the pluralist theory, was due to the contextual rise of the Welfare State, that forced liberals and Marxists, not less than pluralists, to address institutional and political changes, Loughlin's account of the pluralist 'Anglo-American political thought' neglects the rich evolution of 20th century's pluralist thought in the US, from Bentley to Dahl. First and foremost, it does not even refer to the far more articulated paths of political and legal pluralism in continental Europe, and to their connection with the resurgence of constitutionalism in the aftermath of totalitarianism.

However, it should be noted that Loughlin attempts at least to afford a picture of pluralism's historical roots, whereas theorists of constitutional pluralism omit whichever reference to the issue. Hence the fact that the 'paradigm shift' is reputed to derive from the evolution affecting the post-Maastricht relationship between the EU and its member states, as if post-totalitarian constitutionalism was compromised with the old continental Europe's legacy of the state's monistic sovereignty. This account is widely diffused in the literature on globalization and on multiculturalism,[23] but is also implicitly held by theorists of constitutional pluralism. Things are more complicated.

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20 Ibid., 30, with references to Schmitt and to de Jouvenel.

21 Ibid., 10.

22 Ibid., 10.

23 See inter alia N. Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law*, OUP, Oxford, 2010; J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, Cambridge, Cambridge University Press, 1995.

19.4 The Meaning of 'Limitations of Sovereignty' in Continental Europe's Constitutionalism

On theoretical grounds, MacCormick's assumption that each institutional normative order might acknowledge the legitimacy of every other within its own sphere, while none asserts constitutional superiority over another, resembles, e.g., the pluralist approach that was first adopted by an Italian legal theorist, Santi Romano, with respect to the rules of collision governing private international law. These rules, he argued, follow from a 'unilateral coordination' of the state legal order resulting from the state's limitation of the efficacy of the relevant domestic rules, together with the recognition of the efficacy of foreign rules within its own territorial sphere: such coordination represented thus a limitation, rather than a surrender, of the state's sovereign powers.[24]

Many decades later, the Constitutional Court adopted the same reasoning while interpreting the 'limitations of sovereignty', which Italy may consent to for the purposes of participating in 'an order aimed at ensuring peace and justice among nations' and in the 'international organizations' promoting such end (Article 11 of the Constitution). While reading those 'limitations of sovereignty' through the lens of Romano's theory, the Court considered the State and the EC as 'autonomous albeit coordinated' legal orders, thus allowing ordinary courts to directly implement EC law without sharing, however, the ECJ's monist conception of the EC (decision n. 170/1984). Such rulings still govern the judicial treatment of EU law in the domestic order.

It was not only a specific, although significant, constitutional adjustment to the EU. Formulas such as 'limitations of sovereignty' recur in fact frequently in continental Europe's constitutional texts, and reflect a common reaction to the totalitarian evil that discredited the absolute, and therefore monist, conception of the state even on the plane of external sovereignty. In the aftermath of World War II and of the totalitarian state's demise, the idea that international law is founded on the mere coexistence of sovereign states, corresponding to the statist conception of constitutional law, was deemed at least insufficient for preparing an European peaceful future. Obligations were foreseen that might derive from the state's membership in international and supranational organizations, including those concerning legislation. And 'limitations of sovereignty' were accordingly needed. These formulas presuppose thus that a solipsistic perspective of the state's sovereignty had become untenable, threatening as such peace and international security and, on the other hand, laid the foundation of, rather than simply anticipated, the constitutional state in its external projection.

24 S. Romano, *L'ordinamento giuridico* (1918), Sansoni, Firenze, 1946, at 177.

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19.5 Constitutional Pluralism between Continuity and Change

These elements appear alien to theorists of constitutional pluralism, whose rejection of 'legal solipsism' in the name of a 'non-exclusive version of perspectivism' seems to depend solely on a theoretical choice.[25] Hence the impression of a certain fragility of their theory vis-à-vis the critique of 'jettisoning the state', namely an entity that endures for various centuries and is unlikely to disappear. Constitutional pluralism, to the contrary, needs to be comprehended against a historical background, and in the light of constitutional provisions, that denies the pretention of opposing to it the whole construction of the state. In this respect, failure in contextualizing constitutional pluralism both in legal and in historical terms resembles a self-inflicted wound.

On the other hand, such contextualization may demonstrate that refusal of the solipstic version of sovereignty emerging from the aforementioned constitutional formulas is far from being a relic of the past. Formulas such as 'limitations of sovereignty' are of course open-textured, and are thus likely to be interpreted beyond the original intent of their framers. And, more than totalitarianism, new forms of fundamentalism, be it economic or religious, do represent an increasing threat for our polities to the extent that these are insulated one from another, or maintain unconvincing common assessments such as those of the EU.

It is true that 'limitations of sovereignty' presuppose sovereignty as a clear-cut concept, although already revised in the light of the changes, and now of the achievements, of the constitutional state: a state whose ultimate ends are no more at disposal of political authorities, but correspond to constitutional principles, peace and international security included. Constitutional pluralism aims instead at addressing the challenges of a world where,

> within the more fragmented, fluid, and contested configuration of authority of a multidimensional order, sovereignty too, like the other indices of constitutionalism, becomes more amenable to understanding as a graduated and tenuous property of normative order.[26]

The challenge of fragmentation risks, however, to engender anxiety in following changes, with the related difficulty in discerning those that really count. Awareness of the historical context, and of the principles orienting our normative commitment, may be helpful even in this respect.

25 N. Walker, 'Constitutional Pluralism', 31, with reference to K. Tuori, *European Constitutionalism*, Cambridge, CUP, 2015, 86.

26 N. Walker, 'The idea', at 347.

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20 The Constitutionalisation of the Legal Order of the Council of Europe

Paulo Pinto de Albuquerque[*]

20.1 Evolutive Interpretation

The Council of Europe is an autonomous legal order, based on agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms (Article 1, paragraph b, of the 1949 Statute of the Council of Europe).[1] With more than 217 treaties, the legal order of this international organisation has at its top an international treaty, the European Convention on Human Rights (the Convention).

The Convention cannot be interpreted in a vacuum, but must be interpreted in harmony with other international law and soft law. Ever since *Golder*, account shall be taken of any relevant principles and rules of international law applicable in the relations between the parties, as indicated in Article 31 §3 (c) of the Vienna Convention on the Law of Treaties of 1969.[2] Hence, the European Court of Human Rights (the Court) departs

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* Judge at the ECHR.

1 See, in this respect, *inter alia*, Greer and Wildhaber, "Revisiting the debate about 'constitutionalising' the ECtHR," *Human Rights Law Review* 12:4 (2012), pp. 655-687; De Londras, "Dual Functionality and the persistent frailty of the European Court of Human Rights," *European Human Rights Law Review*, 1 (2013), pp. 38-46; Arnold, "National and supranational constitutionalism in Europe," in *New Millennium constitutionalism: paradigms of reality and challenges*, Harutyunyan (ed.), 2013, pp. 121-134; Sweet, "Sur la constitutionnalisation de le Convention européenne des droits de l'homme: cinquante ans après son installation, la Cour européenne des droits de l'homme conçue comme une Cour constitutionnelle," *Revue trimestrielle des droits de l'homme* (2009), pp. 923-944; Levinet, "La Convention européenne des droits de l'homme, socle de la protection des droits de l'homme dans le droit constitutionnel européen," in *Études: le droit constitutionnel européen, quel droit constitutionnel européen ?* Gaudin, *Annuaire de droit européen*, 6 (2008), pp. 89-123; Costa, "La Cour européenne des droits de l'homme est-elle une cour constitutionnelle?" in *Mélanges en l'honneur de Jean Gicquet*, Montchrestien (ed.), 2007, pp. 1-15; Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects*, Cambridge University Press, 2006, pp. 172-173, 195; Wildhaber, "The role of the European Court of Human Rights: An Evaluation," *Mediterranean Journal of Human Rights*, 8 (2004), pp. 9-29; Alkema, "The European Convention as a constitution and its court as a constitutional court," in *Protection des droits de l'homme, Mélanges à la mémoire de Rolv Ryssdal*, Paul Mahoney et al. (eds.), Carl Heymanns Verlag KG, Köln, 2000, pp. 541-63; Flauss, "La Cour européenne des droits de l'homme est-elle une cour constitutionnelle?" in *La Convention européenne des droits de l'homme: développements récents et nouveaux défis*, Bruylant, Brussels, 1997, pp. 68-92; Schokkenbroek, "Judicial review by the European Court of Human Rights: constitutionalism at European level," in *Judicial Control: Comparative Essays on Judicial Review*, Bakker et al. (eds.), Antwerpen-Apeldoorn, Maklu, 1995, pp. 153-165.

2 *Golder v. the United Kingdom*, February 21, 1975, §29, Series A no. 18.

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from the contested position that there are "self-contained regimes" within international law.[3] From the Court's perspective, there is no methodological difference between the interpretation of international human rights law and other international law, or between contractual and law-making treaties, and therefore it assumes that the same interpretative methods can be applied in both fields of international law. As Judge Rozakis so elegantly formulated it, the judges of Strasbourg

> do not operate in the splendid isolation of an ivory tower built with material originating solely from the ECHR's interpretative inventions or those of the States party to the Convention.[4]

This methodology is warranted by the Court's cardinal principle of interpretation, according to which the Convention must be interpreted in the light of present-day conditions.[5] It was in the seminal case *Tyrer v. the United Kingdom* that the Court for the very first time used the leitmotiv of "the Convention as a living instrument," whose interpretation has to take account of evolving norms of national and international law.[6] Deeply entrenched into American[7] and Canadian[8] constitutional law since the early twentieth century, this interpretation technique was introduced in European human rights law in 1978.

In *Tyrer*, confronted with the Attorney General of the Isle of Man' arguments advanced under former Article 63 of the Convention that, "having due regard to the local

3 The point was already made in my opinions in *Al*-Dulimi *and Montana Management Inc*, cited above, §71, *Sargsyan v. Azerbaijan [GC]*, no. 40167/06, June 16, 2015, footnote 23, and *Centre for Legal Resources on behalf of Valentin* Câmpeanu *v. Romania [GC]*, no. 47848/08, July 17, 2014, footnote 14.

4 Rozakis, "The European Judge as a Comparativist," *Tulane Law Review*, 2005, p. 278.

5 *Tyrer* judgment of April 25, 1978, Series A no. 26, p. 15, para. 31.

6 *Tyrer*, cited above, §31, and later on repeated in many other leading cases, such as for example in *Soering v. the United Kingdom*, July 7, 1989, §102, Series A no. 161.

7 *Missouri v. Holland* 252 U.S. 416 (1920). Writing the majority's opinion, Justice Holmes made this remark on the nature of the constitution:
"With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."
The Supreme Court's reference to "evolving standards of decency" is also understood as a clear mention to the "living constitutionalism" (see *Trop v. Dulles*, 356 U.S. 86 (1958): "The words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society").

8 *Henrietta Muir Edwards and others v. The Attorney General of Canada* [1929] UKPC 86, [1930] A.C. 124 (October 18, 1929). The case is not only memorable because it established that Canadian women were eligible to be appointed senators, but also because it introduced the "living tree doctrine" in Canadian constitutional law, according to which the constitution is organic and must be read in a broad and liberal manner so as to adapt it to changing times.

circumstances in the Island," the continued use of judicial corporal punishment on a limited scale was justified as a deterrent, the Court replied that

> it is noteworthy that, in the great majority of the member States of the Council of Europe, judicial corporal punishment is not, it appears, used and, indeed, in some of them, has never existed in modern times; (…) If nothing else, this casts doubt on whether the availability of this penalty is a requirement for the maintenance of law and order in a European country.

By concluding that the Isle of Man must be regarded as sharing fully that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble to the Convention refers, the Court rejected that there were local requirements affecting the application of Article 3 in the Isle of Man and, accordingly, found that the applicant's judicial corporal punishment constituted a violation of that Article.

Hence, since the very beginning of the Court's existence, the evolutive interpretation of the Convention was intimately linked to the need for a consensual reading of the text, based on the consideration of the domestic legal framework of the "great majority" of the member States of the Council of Europe and, ultimately, of the common heritage of political traditions, ideals, freedom and the rule of law, to which the preamble makes reference.

20.2 European Consensus

In Strasbourg, soft law provided, and still provides, the most important source of crystallisation of the European consensus and the common heritage of values. In fact, soon after *Tyrer*, the Court took the fundamental step of enlarging the array of sources of law in the light of which the European consensus may be established. In *Marckx v. Belgium*, the Court took into consideration the European shared values based on the domestic law of the "great majority" of member States of the Council of Europe, as well as the 1962 Convention on the Establishment of Maternal Affiliation of Natural Children, prepared by the International Commission on Civil Status, and signed, but not ratified by the respondent State, and the Council of Europe 1975 Convention on the Legal Status of Children born out of Wedlock, not even signed by the respondent State, and finally the Committee of Ministers Resolution (70) 15 of 15 May 1970 on the social protection of unmarried mothers and their children. To the argument that the 1962 and 1975 conventions had a small number of parties, the Court replied that

> Both the relevant Conventions are in force and there is no reason to attribute the currently small number of Contracting States to a refusal to admit equality

> between "illegitimate" and "legitimate" children on the point under consideration. In fact, the existence of these two treaties denotes that there is a clear measure of common ground in this area amongst modern societies.[9]

Mirroring the interpretative techniques of constitutional courts, the Court went even further and modulated the effects of its judgment in view of the principle of legal certainty, "which is necessarily inherent in the law of the Convention as in Community Law," dispensing the respondent State from reopening legal acts or situations that antedate the delivery of the judgment. For that purpose, it made reference to the fact that "a similar solution is found in certain Contracting States having a constitutional court: their public law limits the retroactive effect of those decisions of that court that annul legislation."[10] As if it were a European Constitutional Court, the Court resorted to the principle of legal certainty to accord itself the implied power of modulation of the temporal effect of its own judgments.

Later on, in *Mazurek v. France*, the Court invoked again the Convention on the Legal Status of Children born out of Wedlock, which at that time had been ratified by only a third of the member States of the Council of Europe, but not by the respondent State, as evidence of the "great importance" attached by member States to the equal legal treatment of children born out of wedlock.[11]

In the cases of *Christine Goodwin,*[12] *Vilho Eskelinen*,[13] and *Sørensen and Rasmussen*,[14] the Court was guided by the European Union's Charter of Fundamental Rights, even though this instrument was not binding. Furthermore, in *McElhinney*[15] the Court took note of the European Convention on State Immunity, which at the time had been ratified by eight member States, not including the respondent State. In *Glor*,[16] the Court referred to the Convention on the Rights of Persons with Disabilities as the basis of "a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment," despite the fact that the relevant facts took place before the adoption of the Convention by the United Nations General Assembly and the respondent State had not ratified the Convention at the time of the Court's judgment.

Finally, in the landmark case of *Demir and Baykara v. Turkey*, after having recalled that

9 *Marckx v. Belgium*, no. 6833/74, §41, June 13, 1979.
10 *Marckx*, cited above, §58.
11 *Mazurek v. France*, no. 34406/97, §49, ECHR 2000-II.
12 *Christine Goodwin v. the United Kingdom [GC]*, no. 28957/95, ECHR 2002-VI.
13 *Vilho Eskelinen and Others v. Finland [GC]*, no. 63235/00, ECHR 2007-II.
14 *Sørensen and Rasmussen v. Denmark [GC]*, nos. 52562/99 and 52620/99, ECHR 2006-I.
15 *McElhinney v. Ireland [GC]*, no. 31253/96, ECHR 2001-XI.
16 *Glor v. Switzerland*, no. 13444/04, §53, ECHR 2009.

> the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies,

and having regard to the developments in labour law, both international and national, and to the pertinent practice of Contracting States, the Court concluded that the right to bargain collectively with the employer had, in principle, become one of the essential elements of the right to form and to join trade unions for the protection of one's interests set forth in Article 11 of the Convention. For that purpose, it cited the relevant ILO conventions, which the respondent State had ratified, the respective ILO Committee of Experts' interpretation, as well as Article 28 of the European Union's Charter of Fundamental Rights, Article 6 §2 of the European Social Charter, which Turkey had not ratified, the European Committee of Social Rights' interpretation of this article, and Principle 8 of Recommendation No. R (2000) 6 of the Committee of Ministers of the Council of Europe on the status of public officials in Europe.[17]

In other words, for the purpose of the interpretation of the Convention, the legal relevance of human rights standards set out in other treaties and conventions depends neither on the number of their respective ratifying parties, nor on the number of Council of Europe member States bound by them and nor even on the fact that the respondent State ratified them. Thus, under European human rights law, hard law is profoundly interwoven with soft law.

Evolutive interpretation of the Convention also led the Court to support its reasoning by reference to norms emanating from other Council of Europe organs, even though those organs have no function of representing States Parties to the Convention, whether supervisory mechanisms or expert bodies. In order to interpret the exact scope of the rights and freedoms guaranteed by the Convention, the Court made use, for example,

17 *Demir and Baykara v. Turkey [GC]*, no. 34503/97, §§146-154, ECHR 2008-VI. In paragraph 78, the Court stated, in a remarkably clear way, that
"The Court observes in this connection that in searching for common ground among the norms of international law it has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State."
Another feature of this judgment worth mentioning is that the Court sometimes referred to the situation of domestic law in the "great majority" of States (§§76, 79) and other times in the "majority" of States (§§82, 85, 106, 165). In para. 151, it refers to both! This clearly shows that the Court did not accord much relevance to the quantitative weight of the majority relevant for the purposes of building a European consensus, admitting that such majority may well be a narrow one, when articulated with other sources of international law.

of the work of the European Commission against Racism and Intolerance (ECRI)[18] and the European Commission for Democracy through Law (the Venice Commission).[19]

20.3 International Democracy

From the seminal formulation of the European consensus in *Tyrer* emanates a vision of an deliberative, international democracy in which a majority or representative proportion of the Contracting Parties to the Convention is considered to speak in the name of all and thus is entitled to impose its will on other Parties. As a matter of constitutional principle formatting the Council of Europe, consensus is decoupled from unanimity. Consensus as a *volonté générale* can still exist even if not all Contracting Parties concur in the same reading of the Convention.[20]

As it has been shown above, it cannot be argued today that the founding fathers did not want this to happen, and States had been trapped into engagements that they did not agree upon.[21] The now worn-out argument of lack of State consent is sometimes accompanied, as the reverse side of the coin, by the no less *démodé* critique to the Court's lack of political legitimacy to interpret innovatively the Convention, *rectius*, to create law,[22] using soft law to circumvent the competent legislative bodies and to flout the principles of democracy, rule of law and subsidiarity.[23] Underlying this speech is almost invariably the sovereignist leitmotiv *in dubio pro mitius*.

The preamble sets the Convention against the background of the Council of Europe general aims, with a view to creating a "closer union" among member States, based on "a common understanding and observance of the Human Rights upon which they depend." In the Statute of the Council of Europe, the language used makes reference not only to a "closer unity between all like-minded countries of Europe," but also to an "organisation which will bring European States into closer association." The very first Article of the Statute sets as the aim of the Council

18 The first case where the Court cited an ECRI General Policy Recommendation was *Beard v. the United Kingdom [GC]*, no. 24882/94, §70, January 18, 2001. The source quoted was Recommendation No. 3: Combating Racism and Intolerance against Roma/Gypsies.

19 The first case where the Court cited the Venice Commission was *Hirst v. the United Kingdom (No. 2)*, no. 74025/01, §24, March 30, 2004. The source quoted was the Code of Good Practice in Electoral Matters, adopted by the Venice Commission at its 51st Plenary Session (July 5-6, 2002).

20 It is highly symbolic that the Court resorts to this historically and philosophically much charged expression (*volonté générale*) in the French version of *Demir and Baykara*, cited above, §84.

21 See above footnote 13.

22 See on this critique my opinion joined to *Centre for Legal Resources on behalf of Valentin* Câmpeanu, cited above.

23 It is interesting to note that a similar critique was addressed by the European Parliament to the use of soft law by the Commission, which is accused of acting *ultra vires* and extending the competence of the Union beyond the principle of *compétence d'attribution* (European Parliament Resolution of September 4, 2007 on institutional and legal implications of the use of "soft law" instruments (2007/2028(INI)).

> to achieve greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

In the explicit terms of the Statute, the realisation of these ideals and principles warrants "agreements and common action" in all relevant areas of social life (economic, social, cultural, scientific, legal and administrative matters) and "in the maintenance and further realisation of human rights and fundamental freedoms." No better words could proclaim the primacy of human rights obligations in all areas of governance. The principle *in dubio pro persona* could find no better formulation. Hence, social and economic progress is intimately connected to the progress of human rights as two sides of the same coin.

With this, the evolutive interpretation, European consensus and hardening of soft law compose the three pillars of the European normative system within which State consent is relevant. Based upon these pillars from the very beginning, and animated by the common quest for "economic and social progress," the Council of Europe legal order can no longer be confused with the traditional international accord of juxtaposed egoisms. Sovereignty is no longer an absolute given, as it was in the Westphalian times, but an integral part of a human rights-serving community.[24]

In this context, the Convention cannot but be interpreted in the light of the formally binding "agreements" (i.e. treaties)[25] and the immense plethora of formally not binding "common actions" performed by the political and technical bodies of the Council of Europe,[26] such as recommendations, guidelines and declarations of its Committee of Ministers.[27] Furthermore, the Convention itself calls for an open-minded approach to international law and soft law, since it is inspired by the Universal Declaration on Human Rights, as the preamble states, and open to other legal instruments, both of domestic or

24 On this point, see my opinion joined to *Sargsyan*, cited above.

25 There are two types of Council of Europe treaties: harmonisation treaties which seek to achieve harmonisation of national legislation and cooperation treaties which aim at facilitating and improving international cooperation between national law enforcement agencies (see Bartsch, The Implementation of Treaties Concluded within the Council of Europe, in Jacobs and Roberts (eds.), The Effect of Treaties in Domestic Law, 1987, p. 197; The specificity and added value of the acquis of the Council of Europe treaty law, Working document prepared by Mr Jeremy McBride, AS/Jur (2009) 40, September 17, 2009.

26 As the Court itself put it in *Soltysyak v. Russia*, no. 4663/05, §51, February 10, 2011:
"The Court reiterates its constant approach that it takes into account relevant international instruments and reports, and in particular those of other Council of Europe organs, in order to interpret the guarantees of the Convention and to establish whether there is a common European standard in the field."

27 On Council of Europe law, Kleijssen, Council of Europe standard-setting in the human rights field, in NJCM-Bulletin: jaarg. 35, nr. 7 (nov.-dec. 2010), pp. 897-904; Benoit-Rohmer and Klebes, Council of Europe Law – Towards a pan-European legal area, Strasbourg: Council of Europe Press, 2005; Polakiewicz, Treaty-making in the Council of Europe, Strasbourg, Council of Europe Press, 1999. As put by Kleijssen, soft law instruments in the Council of Europe "are usually adopted by all member states and thus represent a common European position which refers to legally-binding standards (such as the case-law of the Court)." This makes that "the relationship between the Court's case-law and other Council of Europe standards is not circular, but it could be rather described as a spiral, or even as a symbiosis."

international legal nature, when these offer a better human rights protection (Article 53 of the Convention). In sum, this interpretative latitude is dictated by the letter and the very nature and purpose of the Convention themselves.

20.4 The Council of Europe as a Democratic International Community

In European human rights law, a formal theory of sources of law is still prevailing. Based on the doctrine that the International Court of Justice expounds in its *North Sea Continental Shelf* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits judgments*,[28] the Court admits that a treaty provision may become customary international law, if the following conditions are fulfilled: the provision concerned is of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law, there is corresponding settled State practice and there is evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*).[29] The Court has also pronounced itself on the existence of peremptory norms in international law, like the prohibition of torture[30] or the prohibition of genocide.[31]

Yet, as it has been demonstrated, there is no water-tight, binary distinction between hard law and non-law, since European human rights law evolves by means of a rich panoply of sources that do not necessarily share the classical, formal features of hard international law.[32] The "further realisation of human rights" calls for a certain degree

28 *North Sea Continental Shelf* judgment (I.C.J. Reports 1969, pp. 41-44, paras. 71-78) and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 98, para. 186.

29 See on the Court's formal theory of sources of law, *Vasiliauskas v. Lithuania [GC]*, no. 35343/05, §§165-175, October 20, 2015, *Perinçek v. Switzerland [GC]*, no. 27510/08, §§266-268, October 15, 2015, *Jones and Others v. the United Kingdom*, nos. 34356/06 and 40528/06, §§88-94, 202-215, January 14, 2014, *Hirsi Jamaa and Others v. Italy [GC]*, no. 27765/09, §75, February 23, 2012, *Van Anraat v. the Netherlands (dec.)*, no. 65389/09, §§90-92, July 6, 2010, *Kononov v. Latvia [GC]*, no. 36376/04, §§203, 211, 215, 221, May 17, 2010, and the dissenting opinion of judge Costa joined by judges Kalaydjieva and Poalelungi, *Medvedyev and Others v. France [GC]*, no. 3394/03, §§65, 85, 92, March 29, 2010, *Cudak v. Lithuania [GC]*, no. 15869/02, §66, March 23, 2010, *Stoll v. Switzerland [GC]*, no. 69698/01, §59, December 10, 2007, *Al-Adsani v. the United Kingdom [GC]*, no. 35763/97, §§61-66, ECHR 2001-XI, and *Banković and Others v. Belgium and Others (dec.) [GC]*, no. 52207/99, §66, ECHR 2001-XII. In *Jones and Others*, cited above, §198, the Court considered the ICJ's case-law as "authoritative as regards the content of customary international law." It has been argued that a certain acceleration of the custom-formation process, in the light of the ICJ's doctrine, could turn soft law unnecessary, but the Court's case law does not confirm this point of view.

30 *Al-Adsani*, cited above, §61.

31 *Jorgić v. Germany*, no. 74613/01, §68, ECHR 2007-III.

32 The typology of these forms is immensely rich. These forms include non-conventional international agreements, like the Helsinki Final Act (for example, *Freedom and Democracy Party (ÖZDEP) v. Turkey*, no. 23885/94, §40, December 8, 1999); treaties not ratified by the respondent State (for example, *Marckx*, cited above); declarations of international organisations, like the Universal Declaration on Human Rights and other General Assembly Declarations (for example, *K.-H. W. v. Germany [GC]*, no. 37201/97, §95, March

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of deformalisation, without abandoning the formal theory of sources of law. The monopoly of formalism in the ascertainment of international law is over – *rectius*, it never existed – in Strasbourg law.

But the inherent deformalisation of European human rights law is not a synonym of nihilist dissolution of legality, and this for a very fundamental reason. In the Council of Europe legal order, State consent is framed within the context of a cosmopolitan perspective of the universality of human rights and a dialogic understanding of the common heritage of values of European societies.

In the Council of Europe, the recognition rule is no more a *Lotus*-type,[33] State-centred, narrowly bilateral, exclusively voluntarist, top-down norm creation mechanism, but a democratic-type, individual-centred, broadly multilateral, purposefully consensual, bottom-up norm creation mechanism that involves European States and other European and non-European non-State actors. Distancing itself from an outdated *ius inter gentes*, the Council of Europe legal order has become a truly *ius gentium*, based on a participated, accountable and multilevel international law making system, which is not the preserve of States.[34]

Cosmopolitanism links the Council of Europe legal order with the world, as much as the dialogue with the European domestic legal orders, and notably with their apex domestic courts, links it with the values of European society. Since the Council of Europe normative order already meets standards of democracy, its recognition rule is not linked to democratic decision-making processes on the domestic level. Soft law, which does not require formal domestic ratification, is in any case not exempt from democratic control within the Council of Europe, which is performed by the Committee of Ministers, the Parliamentary Assembly and, ultimately, the Court, as a politically legitimised guarantor of the Convention (Articles 19 and 22 of the Convention). Furthermore, the involvement

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22, 2001); resolutions and recommendations of international organisations, like those of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe (for example, *Mosley v. United Kingdom*, no. 48009/08, May 10, 2011, §§87, 119 and 124); General Comments of international organisations, like those adopted by the United Nations treaties bodies (for example, *Bayatyan v. Armenia [GC]*, no. 23459/03, §105, July 2007); and Codes of Conduct and Guidelines of international organisations, like those of World Health Organisation (for example, *Oluic v. Croatia*, no. 61260/08, §60, May 20, 2010); commentaries and studies by ONG, like the International Committee of the Red Cross study on customary international humanitarian law and commentaries on the Geneva conventions (for example, *Korbely v. Hungary*, no. 9174/02, §§50, 51 and 90, September 19, 2008), and reports of individuals, like those of the United Nations Secretary-General (*Korbely*, cited above, §90). This latter case is also remarkable due to the high relevance given to scholarly opinion in paragraphs 82 and 87.

33 1927 P.C.I.J, ser. A, No. 10, at. 18: "The rules of law binding upon states … emanate from their own free will."

34 This is not a new claim (see on the role of other subjects in international law, *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion: I.C.J. Reports 1949*, p. 178, and also Lauterpacht, The Subjects of International law, in Lauterpacht (ed.), International Law, The Collected Papers of Hersch Lauterpacht, volume I: The General Works, Cambridge, CUP, 1970, para. 48).

of States and grassroots non-State actors in the exercise of law-making powers not only pays tribute to the principle of subsidiarity, but indeed reinforces the democratic nature of the process and the responsiveness of international public policy making system towards the European people.

Put differently, European normative order exists beyond sovereign statehood, bilateralism and opposability. Since the State is not the sole possible subject that might create international law, a State's-will theory of sources of law gives way to a democratic international community-based normativity theory.

The obvious higher degree of complexity of such recognition rule should not be misunderstood as commending a higher degree of legal uncertainty, and therefore that the value of the rule of law diminishes or entirely vanishes. There is no necessary correlation between the former and the latter. The degree of legal certainty will rather depend on the substance of the legal discourse.[35] In a world of decentralised and deformalised international law, legal certainty is more a question of substance than a question of form and procedure, and certainly not of the more or less transparent intent of the stakeholders. The touchstone of legal certainty is neither the form that encapsulates the norm nor the procedure by which the norm is created, but definitely the substance of the norm. This is all the more so in a constitutional order, like the one of the Council of Europe, where the rule of recognition is not neutral and value-free, but substantive and value-charged.

20.5 The Council of Europe as a Constitutional Order

In light of the above, it does not come as a surprise that the Convention has direct, supraconstitutional effect on the domestic legal orders of the member States of the Council of Europe.[36] This effect prevails, if need be, against any contradicting domestic constitutional claim, regardless of the size of the supporting political majority.[37]

35 On this point, see my opinion joined to *Centre for Legal Resources on behalf of Valentin* Câmpeanu, cited above, and its main message: legal discourse, and particularly judicial discourse, is not an instrument of interest-oriented *Realpolitik*. The present opinion on law sources must be read in the light of my reflections in the *Câmpeanu* case on legal argumentation.

36 See *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, §50, July 4, 2013; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, §§40, 41, 54, ECHR 2009; *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, §103, April 26, 2007; and *United Communist Party of Turkey and Others v. Turkey*, January 30, 1998, §29, *Reports of Judgments and Decisions* 1998-I. In other words, the principles of primacy and direct effect developed by the CJEU are to be found in the Court's case-law as well. Similar principles have been ascertained under the American Convention on Human Rights by the Inter-American Court of Human Rights, especially since *"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile, Merits, Reparations, and Costs, Judgment*, February 5, 2001 (see Mac-Gregor, "The Constitutionalization of International law in Latin America, Conventionality Control, The New doctrine of the Inter-American Court of Human Rights," in *AJIL Unbound*, November 11, 2015, and the case-law referred to therein).

37 See my separate opinion, with Judge Dedov, in *Baka v. Hungary (GC)*, no. 20261/12, June 23, 2016. As the Inter-American Court of Human Rights has quite rightly pointed out, breaches of human-rights law may

Being more than just a multilateral agreement on reciprocal obligations of States Parties, the Convention creates obligations for States Parties towards all individuals and private entities within their jurisdiction. With its transformational role emphatically proclaimed in the preamble as an instrument for building a closer union of European States and developing human rights on a pan-European basis, the Convention is subordinated neither to domestic constitutional rules, nor to allegedly higher rules of international law, since it is the supreme law of the European continent.[38] In the Council of Europe's own internal hierarchy of norms, United Nations law is equal to any other international agreement and subordinated to the primacy of the Convention as a constitutional instrument of European public order.[39] It is relevant to note in this context that the preamble to the Convention only refers to the Universal Declaration of Human Rights and not to the Charter. Moreover, the Convention does not contain a general provision, unlike other treaties, to the effect that the rights guaranteed therein are qualified to the extent required or authorised by the Charter or by United Nations Resolutions.

From this derives the nature of the Court as the European Constitutional Court, whose judgments have a *res interpretata* effect that goes far beyond its *res judicata* effect, as well as a potent prescriptive effect that goes far beyond its commonly stated declaratory effect. The pilot-judgment and the quasi-pilot judgment procedures are typical constitutional review instruments that play a critical role in resolving the dysfunctional operation of domestic law or the legislator's failure to regulate systemic dysfunctions.[40]

If need be, the Court exercises an indirect annulment power, by means of Article 46 injunctions, in the operative part of its judgments, summoning the respondent State to review its laws and administrative regulations and practices. Although not yet used, the Court also has competence to entertain an infringement action (Article 46 §4 of the Convention).

Finally, the Court has the power to determine its own jurisdiction (*Kompetenzkompetenz*), which does not exclude the possibility that, in case of a political blockade of the execution procedure and the infringement action at the level of the Committee of Ministers, it may agree to play its supervisory role with regard to the non-execution or incomplete execution of a judgment of the Court, even in the absence of such an action.[41]

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not be whitewashed by a vote of the political majority, even if the vote is democratic and the majority large (*Gelman v. Uruguay, Merits, Reparations and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C.) No. 221, paras. 238-239, February 24, 2011).

38 As it has been stressed above, this does not mean that the Convention is an exclusive, self-contained document. On the contrary, it is an inclusive treaty, generously open to other texts which promote a higher degree of protection of human rights (Article 53 of the Convention).

39 See *Loizidou v. Turkey* (preliminary objections), March 23, 1995, §75, Series A no. 310.

40 See, among many other authorities, *M.C. and Others v. Italy*, no. 5376/11, September 3, 2013; *Kurić and Others v. Slovenia* [GC], no. 26828/06, ECHR 2012; *Greens and M.T. v. the United Kingdom*, nos. 60041/08 and 60054/08, ECHR 2010; and *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, November 3, 2009.

41 See my separate opinions in *Fabris v. France* [GC], no. 16574/08, ECHR 2013, and *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, ECHR 2013.

It is stating the obvious today that the once primarily intergovernmental enforcement mechanism has radically changed its nature as a result of the Court's own leading role in guaranteeing the efficiency of the European human rights protection system. The Council of Europe can thus put forward a strong constitutional claim.

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21 Bridge Is Down, *Data* Truck Can't Get Through… A Critical View of the *Schrems* Judgment in the Context of European Constitutionalism

Oreste Pollicino[*]

21.1 Introduction and Purpose of the Research

In 2014 and 2015 the Court of Justice of the European Union delivered three landmark judgments, which have marked an important turning point in the constitutional protection of the right to privacy and personal data.

Behind these unprecedented judicial efforts are mainly two leading factors. The first one relates to the entry into force as primary law of the European Union of the EU Charter of Fundamental Rights (hereinafter, also 'Charter'), which has the same rank as the Treaties. The fact that the Court can now enforce its own bill of rights, a set of provisions protecting fundamental rights binding on Member States to the extent that the scope of application of EU law is concerned, has permitted such an unprecedented wake of judicial activism to protect personal data.

The second factor consists of the direct or indirect relevance, in all these decisions, of the use of the Internet and digital technologies that place the exercise of the concerned fundamental rights beyond the domestic and European borders.

Then, as reaction to the new threats deriving from the digital scenario, a reaction to a certain degree parallel to the efforts of the European Court of Human Rights, the Court of Justice has taken the right to 'digital' privacy seriously. Also, the existence of various legal regimes that encapsulate different views as to the degree of constitutional protection of both the right to privacy and the other competing rights that must be balanced with the same has triggered the efforts of the Court of Justice. At the root of the judgments delivered by the Court of Luxembourg, indeed, is the need to protect the right to privacy vis-à-

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vis, for instance, the safeguard of national security or the guarantees concerning freedom of speech. Since legal orders assume different perspectives on how this balance must be carried out, the use of the Internet has made it relevant the standard of protection of a given community (e.g. Europe) also for other states.

In the *Digital Rights Ireland*[1] and *Schrems*[2] judgments, the relevant relationship concerned the protection of personal data and the safeguard of national security. This connection was clear in the *Digital Rights Ireland* case, where the Court of Justice invalidated the Data Retention Directive[3] on the basis of the failure to set out criteria that could make compatible the retention of personal data with Article 7 and Article 8 of the Charter. The relevance of national security is less evident in the *Schrems* case, where the Court of Justice did however invalidate the Decision 2000/520/EC[4] of the European Commission as the legal basis for the transfer of personal data to the US also in the wake of the NSA scandal.

The strengthening of the protection of personal data through this judicial path has resulted in consequences that touch upon different areas of the transnational regime of the digital privacy.[5] These transformations are all the more relevant in light of the approval of a new General Regulation on Data Protection that will replace the Directive 95/46/EC.[6]

The objective of this chapter is to let them emerge these transformations from a constitutional perspective and to point out the critical impact they may have in terms of fundamental rights protection.

The *Schrems* decision has given rise to strongly debated issues among lawyers and experts. The judgment has been felt to cause overwhelming consequences for organizations processing huge amount of personal data every day, including collecting and transferring the same from Europe to the US.

As it is well known, these worries persist for a limited time, even though at the very beginning they spread out across and outside Europe resulting in a domino effect that led some data protection authorities of non-EU countries (including Israel and Switzerland)

1 ECJ, *Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources*, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General; and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others, Joint Cases C-293/12 and C-594/12 (8 April 2014).

2 ECJ, *Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14 (13 October 2015).

3 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

4 2000/520/EC Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

5 *See* Orla Lynskey, *The Foundations of EU Data Protection Law*, Oxford (2015).

6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

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to withdraw from the respective safe harbor agreements in force with the US. This factor confirms how the model of protection of fundamental rights in the European Union is crucial also from a merely political and non-legally binding perspective.

Eventually, the consequences of the *Schrems* decision have turned out to be quite limited, insofar as the invalidation of the safe harbor agreement has led the European Union and the US to revisit the conditions for an effective protection to be ensured to personal data. This new compromise that resulted in the signing of the Privacy Shield, along with other minor acts to reduce threats to personal data when data are processed by law enforcement authorities.

The coming into being of the Privacy Shield does not seem to have resolved, *prima facie*, all the uncertainties surrounding the appropriateness of the level of protection provided by the US legal order and most notably by the safe harbor principles. Nevertheless, the purpose of this chapter is not to analyze whether the acts adopted as a reaction to the *Schrems* decision are likely to prove successful or not. On the contrary, it is interesting, also with a view to appreciating the possible evolution and the next steps in the field of the enforcement of the digital privacy, to explore the most relevant constitutional issues raised by this case.

At the outset, this chapter assumes that, like in the *Google Spain*[7] and *Digital Rights Ireland* judgments, also in *Schrems* the Court of Justice has taken a broad view of the right to privacy and the right to data protection enshrined, respectively, in Article 7 and Article 8 of the Charter. The aim of granting to data privacy an extensive protection has been pursued according to a similar methodology as that used in the aforesaid judgments: by manipulating the interpretation of the relevant provisions to be enforced with a view to making privacy and data protection prevail over any conflicting interest. In particular, the Court seems to have replaced the standard of adequacy of the level of protection with the higher standard of equivalence, taking a road that paves the way for a strict scrutiny on the restrictions to fundamental rights.

Then, as a second point, the chapter speculates on the reasoning of the Court of Justice while enforcing the said Article 7 and Article 8 of the Charter. In particular, another legal device that has supported a high level of protection lies with the adoption of a strict scrutiny by the Court when it comes to reviewing restrictions to the right to privacy and data protection. In this respect, it is argued that the perspective embodied in the judgment, quite new to the case law of the Court of Justice, ranks fundamental rights at a higher level compared to the economic freedoms established by the Treaties, an outcome that might sound puzzling to those who are familiar with the evolution of the European integration process.

As a third point, the chapter tries to provide an interpretation of the judgment through the lenses of two important elements. The first one lies with the approach taken

7 ECJ, *Google Spain SL and Google Inc. v. Agencia Española de Protectión de Datos (AEPD) and Mario Costeja Conzález*, Case C-131/12 (13 May 2014).

by the Court of Justice while restrictions to the fundamental rights to privacy and data protection were under scrutiny in its case law. Particularly, this focus looks at the way the Court has enforced Article 52 of the Charter throughout its case law, most notably in the most recent decisions.

The second element, which can help contextualizing the *Schrems* decision, consists in the case law of the Court of Justice relating to the application of the principle of equivalence, that is at stake insofar as the safe harbor principles have been found not to provide personal data of European citizens with an adequate level of protection.

These remarks may lead to deem the decision of the Court of Justice likely bringing even more problematic consequences, most notably to the extent that the judgment calls for more room for national authorities whereas it would be crucial to set common grounds at European level and ensure legal certainty and uniformity through a specific data protection framework.

21.2 The Broad Interpretation of the Right to Privacy and Data Protection in the Reasoning of the *Schrems* Decision

The first assumption of this chapter is that behind the decision of the Court of Justice is the goal of extending as much as possible the protection of data privacy, according to a manipulative approach that had already emerged in the *Digital Rights Ireland* and *Google Spain* judgments.

This approach has come up several times through the lines of the decision, most notably when the Court has tackled certain points. At the very outset, as a preliminary remark, the Court has highlighted that

> the provisions of Directive 95/46, inasmuch as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter.[8]

This methodological premise has paved the way for the Court to rely on a flexible and broad interpretation of the legal framework that is compatible with the purpose of a manipulation of the same.

A second point where the judgment of the Court reflects this goal lies with the amplification of the powers entrusted to national data protection authorities. In particular, one of the questions raised before the Court of Justice was whether national regulators have *marge de manouvre* to challenge the decision of the Commission, like that subject to

8 *See* Case C-362/14, at para. 38.

invalidation by the Court of Justice, assessing the adequacy of the level of protection ensured by third countries legal systems. According to the Court of Justice, even though a decision adopted pursuant to Article 25 of the Data Protection Directive is binding on all the Member States,[9] the existence of such an act does not deprive individuals of the right of appealing before the competent authorities according to Article 28, par. 4 for the protection of their fundamental rights. In this respect, it is Article 47 of the Charter to be taken into account, prior than Articles 7 and 8, by the Court of Justice.[10]

However, the Court underlines that the Decision of the Commission may not undermine the powers of the national regulatory authorities to protect individuals' rights. In this respect, then, the grounds for a manipulation of the legal framework in force take their roots when the Court provides a broad interpretation of the powers of these authorities with a view to providing individuals appropriate means to seek protection of their personal data.[11]

All the foregoing has led the Court to express the view that

> it would be contrary to the system set up by Directive 95/46 and to the objective of Articles 25 and 28 thereof for a Commission decision adopted pursuant to Article 25(6) to have the effect of preventing a national supervisory authority from examining a person's claim concerning the protection of his rights and freedoms in regard to the processing of his personal data which has been or could be transferred from a Member State to the third country covered by that decision.[12]

Then, by interpreting the legal framework in force in light of Article 47 of the Charter, the Court has come to strengthen the individuals' rights under Articles 7 and 8 and has opened the door for extending the degree of protection of data privacy.

But the third and most important point that brings to light the manipulative approach of the Court corresponds to the part of the judgment where it has reviewed whether the conditions set forth by Article 25 of the Data Protection Directive, which requires an adequate level of protection for personal data to be transferred to third countries, were actually met by the Decision 2000/520/CE.

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9 *Id.*, at para. 51.

10 *Id.*, at para. 52:
'[U]ntil such time as the Commission decision is declared invalid by the Court, the Member States and their organs, which include their independent supervisory authorities, admittedly cannot adopt measures contrary to that decision, such as acts intended to determine with binding effect that the third country covered by it does not ensure an adequate level of protection. Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality.'

11 *Id.*, at para. 54.

12 *Id.*, at para. 56.

At the same stage of the decision, the Court shows its attitude to manipulate the content of the relevant EU law provisions when the right to private life and the right to data protection are at stake.

Particularly, this review required the Court of Justice to determine first of all whether the US legal system, and notably the safe harbor principles, afforded personal data of European residents 'an adequate level of protection'. Only if this requirement is fulfilled, the transfer of personal data to third countries is indeed legitimate.

The Court has pointed out that the Data Protection Directive assumed a relatively flexible notion of 'adequate level of protection'. A rather significant degree of ambiguity and vagueness then surrounds this parameter.

The Directive, in fact, does not lay down in an exhaustive and systematic way the criteria for such an assessment to be carried out by the competent European authorities. Nor does even the Directive provide a specific definition of the concept of 'adequacy'. Article 25, par. 2, only provides that

> The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations.

And does additionally suggest that

> particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

Indeed, in order to reduce the said ambiguity and vagueness, the Data Protection Directive spells out some factors to be considered while assessing whether the level of protection offered by a third country is actually 'adequate'. Nonetheless, Article 25 does not clarify if these parameters are binding and exhaustive, preventing any evaluation from relying on different ones.

If a certain degree of uncertainty affects the crucial notion of 'adequate level of protection', then the Court of Justice can benefit of a wider room for speculation as well as interpretative manipulation therefrom.

On the one hand, the Court has pointed out that Article 25, par. 6, of the Data Protection Directive requires that a third country 'ensures' an adequate level of protection by reason of its domestic law or its international commitments; on the other hand, in the Court's view, the adequacy of the protection has to be assessed 'for the protection of the

private lives and basic freedoms and rights of individuals'. So, that to be taken is not a purely normative assessment, but – more demanding – a fundamental rights based one.

While the compatibility of the Decision on the safe harbor agreement with the Data Protection Directive is called into question, in fact, the Court of Justice is asked to wear the clothes of a fundamental rights adjudicator with a view to enforcing Article 7 and Article 8 of the Charter.

But when the Court observes that the assessment of the adequacy of the level of protection is necessary for the protection of the fundamental rights at stake, it seems that while *prima facie* the judges aim at elaborating that notion a little bit more, they eventually deprive the same of any specific and binding meaning.

In the following point of the judgment,[13] the Court provides arguments that confirm its fundamental rights oriented-approach based on a strict interpretation of the notion of 'adequate level of protection', which converts this parameter, de facto, into a standard requiring equivalence between the compared legal orders. In this respect, in fact, the Court calls back the goal behind Article 25 of the Data Protection Directive, i.e. 'to ensure that the high level of that protection continues where personal data is transferred to a third country'. Behind the view taken by the Court of Justice, then, is the assumption that the level of adequacy referred to by Article 25 requires a geographical extension of the scope of application of the guarantees provided for by EU law.

However, the most important manipulation can be found at the point 73[14] of the judgment where it is said that, even though an adequate level of protection does not require third countries to adopt an identical standard, individuals may nevertheless enjoy a degree of protection that is 'substantially equivalent' to that offered by EU law.[15] The equivalence of the degree of protection is required, according to the Court, 'by virtue of an interpretation of the Data Protection Directive in light of the Charter'.

13 *Id.*, para. 72.

14 *Id.*, para. 73.

15 *Digital Rights Ireland Ltd. v. Minister for Communications*, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General; and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl and Others, Joint Cases C-293/12 and C-594/12, Opinion of the Advocate General Bot (23 September 2015). *See* in particular para. 141:

'[A] third country ensures an adequate level of protection only where, following a global assessment of the law and practice in the third country in question, it is able to establish that that third country offers a level of protection that is essentially equivalent to that afforded by the directive, even though the manner in which that protection is implemented may differ from that generally encountered within the European Union.'

Therefore, it has been first of all the Advocate General to manipulate the interpretation of the Directive. After having taken this crucial point, however, he has pointed out that, at para. 142:

'142. Although the English word 'adequate' may be understood, from a linguistic viewpoint, as designating a level of protection that is just satisfactory or sufficient, and thus as having a different semantic scope from the French word 'adéquat' ('appropriate'), the only criterion that must guide the interpretation of that word is the objective of attaining a high level of protection of fundamental rights, as required by Directive 95/46.'

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The Charter, then, becomes the legal device for the Court to raise the level of protection required by EU law through a manipulation of the parameter of 'adequacy'. This approach is everything but rhetorical, since the Court has actually taken inspiration from the coming into force of the Charter to revisit the provisions enshrined in the Data Protection Directive and rely on a renewed interpretation of the same. It comes out, then, that the meaning of the provisions of the Data Protection Directive has been affected and, accordingly, the level of protection provided to personal data is nowadays much broader than before, when the Directive was adopted and the Charter was not yet in force.

Also, the judgment seems to pay attention to the dynamic nature of the level of protection that may vary depending upon a number of factors. This is basically the reason why the Court urges the Commission to regularly carry out an assessment on whether the finding relating to the adequacy of the level of protection offered by third countries is still factually and legally justified. In addition to that, 'such a check is required, in any event, when evidence gives rise to a doubt in that regard'.[16]

To this end, the European institutions should take into account all the factually and legally relevant circumstances that arose once the assessment has been carried out. This approach mirrors a revisited interpretation of the standard of adequacy according to which a kind of 'continuity' in the level of protection must be guaranteed not only from a geographical point of view but also over the time.[17]

This dynamic view of the concept of adequacy comes up also at point 74, where the Court has pointed out that

> even though the means to which that third country has recourse, in this connection, for the purpose of ensuring such a level of protection may differ from

16 *See* para. 78.

17 Once again, this approach reflects the influence of the Advocate General's opinion, particularly at paras. 146ff.:

'[I]n order to ensure that Article 25(1) to (3) of Directive 95/46 is effective, account should be taken of the fact that the adequacy of the level of protection afforded by a third country involves a developing situation that may change with the passage of time, depending on a series of factors. The Member States and the Commission must therefore be constantly alert to any change of circumstances that may necessitate a reassessment of whether the level of protection afforded by a third country is adequate. An assessment of the adequacy of that level of protection cannot be fixed at a specific time and then be maintained indefinitely, irrespective of any change in circumstances showing that in reality the level of protection afforded is no longer adequate.

The obligation for the third country to ensure an adequate level of protection is thus an ongoing obligation. While the assessment is made at a specific time, retention of the adequacy decision presupposes that no circumstance that has since arisen is such as to call into question the initial assessment made by the Commission.

Indeed, it must not be forgotten that the objective of Article 25 of Directive 95/46 is to prevent personal data from being transferred to a third country that does not ensure an adequate level of protection, in breach of the fundamental right to protection of personal data guaranteed by Article 8 of the Charter.'

> those employed within the European Union in order to ensure that the requirements stemming from Directive 95/46 read in the light of the Charter are complied with, those means must nevertheless prove, in practice, effective in order to ensure protection essentially equivalent to that guaranteed within the European Union.

So, the Data Protection Directive does no longer constitute the sole basis on which the legitimacy of the Decision on the Safe Harbor hinges. Indeed, the parameter that the Court has relied on the review the decision of the Commission extends to the Charter, whose coming into force has led from a mainly market oriented Europe to a fundamental rights oriented one.

This remark is crucial for the Court in order to highlight that the measures taken by third countries must be effective in order to ensure a protection substantially equivalent to the standard applied within the European Union.

On one hand, the Court has conceded that such an adequate level of protection can be reached through the implementation of measures that may not necessarily correspond to those practiced within the European Union and provided by Member States' domestic legislation. The Court seems to take a step back, by a self-restraint approach, where it recognizes that the goal of guaranteeing appropriate protection may be pursued by different means, tailored to the specific and relevant legal context. This step apparently could be the basis for the Court to declare itself incompetent to review the legal measures in force in countries other than the EU Member States according to the EU law standard.

On the other hand, indeed, the Court does not take this road and explores on the merits the legal instruments in force in the legal order of the US with a view to determining whether the same are compatible with the purpose of granting personal data an adequate level of protection. The Court of Justice challenges the decision 2000/520/CE by adopting a reasoning that is quite uncommon when it comes to protecting fundamental rights. In particular, the judgment is remarkable for its rather unambiguously pragmatic view, that is reflected by the efforts put by the Court in order to determine if the objective of ensuring an adequate protection is actually met ('in practice' according to the text of the decision).

These remarks constitute the premise of the analysis that the Court has carried out on the compliance of the safe harbor principles with EU law. The judgment specifically explores the framework in force in the US to draw the conclusion that it does provide personal data with an adequate protection compared to the EU standard. Even though the review is formally conducted by comparing the Data Protection Directive with the content of the safe harbor principles, from a substantial standpoint the decision of the Court of Justice has found, in the end, that the US legal system was not compatible with the protection of the fundamental rights enshrined in Article 7 and Article 8 of the Charter.

21.3 Economic Freedoms v. Fundamental Rights?

The extensive interpretation of the scope of the right to privacy and data protection, when it comes to balancing these interests with other fundamental rights, does not represent a novelty in the case law of the Court sitting in Luxembourg.

The same view had already come up in the *Google Spain* decision, in particular with regard to two specific points.[18] First, the primacy of privacy and data protection was mirrored, in the reasoning of the Court of Justice, by point 97, where it said that the rights protected, respectively, by Article 7 and Article 8 of the Charter should in principle prevail over the economic interest of search engine service providers. As is well known, the *Google Spain* case concerned, in a nutshell, the enforceability of the rights set forth by the Data Protection Directive vis-á-vis Internet search engine service providers. Accordingly, the question raised before the Court also required to consider the impact on the freedom to conduct business that organizations enjoy pursuant to Article 16 of the Charter.

In addition, the same 'data privacy-oriented' approach is confirmed by the lack of any reference to freedom of information in the reasoning of the Court, that did not even mention Article 11 in the judgment. It goes without saying that this judgment actually affected the exercise of freedom of expression,[19] although to a limited extent, albeit more limited than in the case where the removal of personal data would have been required to the websites from which the information was retrieved.

In light of the above, it comes up that the Court of Justice has revisited, starting from the judgment on the invalidation of the Data Retention Directive, the status of data privacy within the European context. The reconstruction of the new digital right to privacy has been supported, as noted, by an emphatic enforcement of Article 7 and Article 8 of the Charter.

However, this underestimation of the importance of economic freedoms resulting from this approach does not seem to be consistent with the Charter, which is inherently placing on the same level the various fundamental rights that fall within its scope. No difference as to the rank of fundamental rights, indeed, seems to emerge if one looks at the catalogue encapsulated by the Charter.[20]

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18 *See also* Oreste Pollicino and Marco Bassini, 'The Luxembourg Sense of the Internet: Towards a Right to Digital Privacy?' in *The Global Community Yearbook of International Law and Jurisprudence*, 2014, 223 (Giuliana Ziccardi Capaldo ed., 2015).

19 *See* M. Ronsenfeld and A. Sajo, 'Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech in New Democracies', in Choudhry, S. (ed.), *The Migration of Constitutional Ideas*, Cambridge: Cambridge University Press (2006), p. 146.

20 *See* Article 52, Charter of Fundamental Rights of the European Union:
'1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the

Against this background, it goes without saying that fundamental rights may conflict each other under certain circumstances: it is up to the Court, in such a case, to find a balance in order to ensure that the substantial essence of the rights at hand is in any case respected, or that the necessary restrictions are proportionate to the aim pursued.

The same rationale lies behind the judgment of the Court in *Schrems*. At point 48, most notably, the Court has noted that while regulating the transfer of personal data from the European Union to third countries, the Data Protection Directive has assumed that said transfers are necessary for the expansion of international trade. The judgment then takes into account that transfers are strategic within the international context and they also impact the fundamental freedoms provided by the treaties.

When it has come to exploring how the safe harbor principles did actually protect personal data, the Court has adopted an empirical approach to put under scrutiny how the same principles practically operate in the US legal order and how they actually safeguard the protection of personal data as well as other relevant freedoms, including freedom to conduct business.

But the Court has set up an important requirement: transfers of personal data must not occur when an adequate level of protection is not ensured. According to this view, freedom to conduct business, as well as any other interests related to organizations processing personal data, shall never prevail over data protection, unless very exceptional conditions are met. This way, the Court has placed itself in the wave of the *Google Spain* decision,[21] relying once again on an extensive view of data privacy in the digital context.

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conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.'

21 In this judgment, many points supported the view that individual fundamental rights prevailed over economic freedoms. The first element to take into account is the lack of any reference to Article 16 of the Charter, which protects the freedom to conduct business. The absence of any mention is particularly relevant also in light of the abundance of references to Article 7 and Article 8. Indeed, also Article 11, which provides the right to freedom of information, is not regarded as a crucial one through the lines of the decision of the Court.

In addition, the Court has expressly pointed out, as far as Article 7 and Article 8 are concerned, that these

The circumstance that the Court has called back the approach taken in this leading case may sound weird. Once again, the Court has thus reversed its well-established traditional approach as guardian of the fundamental economic freedoms established by the Treaties. While fundamental rights represented, in the past, legitimate exceptions that, under compelling reasons, could be enforced to justify restrictions of economic freedoms, now the relationship follows a completely different way. The assumption of the Court, in fact, is that the protection of economic freedoms shall not prevail over individuals' fundamental rights.

However, this way the Court has introduced through the back door a difference among the rights and freedoms covered by the Charter that is not rooted in the same, that equally protects, instead, fundamental rights. This new interpretation of the catalogue of fundamental rights protected by the Charter has indirectly paved the way for manipulating the standard of adequate protection of personal data in order to require a substantially equivalent one, as said above.

Against this scenario, two important factors that may apparently lead to an opposite outcome have to be taken into account. The first point relies on the attitude of the Court of Justice to reverse, from a chronological point of view, the legal significance of the Data Protection Directive and that of the Charter.[22] Following a trend that had already emerged in *Google Spain*, the Court has pointed out that Article 25, par. 6, of the Data Protection Directive[23] implements the obligation to provide personal data with protection enshrined in Article 8 of the Charter. Likewise, in *Google Spain*, the Court had observed that certain provisions of the Data Protection Directive aim at transposing and making enforceable the obligations stemming from Article 7 and Article 8 of the Charter.[24]

This way, the Court of Justice has revisited the relationship between the said provisions and the respective acts. According to this view, the Data Protection Directive, which entered into force in 1995, is meant to implement to the rights entrusted to the Charter, that has been drafted in 2001 and formally ranked among EU law primary sources only in 2007. By reversing the chronological order of the acts at hand, the Court has reaffirmed the natural relationship existing between primary sources and secondary acts of EU law, and most notably between the Charter and directives.

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rights 'override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name'.

22 In this respect, *see also* Oreste Pollicino, *Un* digital right to privacy *preso (troppo) sul serio dai giudici di Lussemburgo? Il ruolo degli artt. 7 e 8 della carta di Nizza nel reasoning di Google Spain*, in Il diritto all'oblio su Internet dopo la sentenza Google Spain 14 (Giorgio Resta & Vincenzo Zeno Zencovich eds., 2015).

23 Case C-362/14, at para. 72.

24 Case C-131/12, at para. 69.

This argument does not undermine the assumption that the Charter only reaffirms, as it is stated in its preamble, the rights and freedoms already protected under EU law, for instance through the category of general principles (or by reference to the European Convention on Human Rights). But in order to justify the understanding attached by the Court to the Charter and the Data Protection Directive one should see, behind this judgment, nothing but an attempt to extend to a maximum degree the protection of the right to personal data.

Furthermore, it should not be forgotten that the same values (protection of private and family life) are shielded since 1950 as part of Article 8 of the European Convention on Human Rights. The Convention has been very influential even in respect of EU law, affecting de facto the content of Member States' constitutional traditions and playing a significant role as part of the general principles of EU law pursuant to Article 6, par. 2, of the TEU.[25]

However, even assuming that the provisions of the Data Protection Directive were 'indirectly' implementing the obligations stemming from the Convention, which more than half a century later have been encapsulated in the Charter, two objections cannot be overcome.

First, the Court has not referred to the Convention but only to the relationship between the Charter and the relevant provisions of the Data Protection Directive. The interpretation of the Court, in other words, seems to be very formalistic and focused only on the enforceable sources of EU law.

A second critical point comes up with regard to the difference between the extent of the protection ensured by the Charter compared to the Convention. Indeed, the Charter does expressly refer to both the right to private and family life (Article 7) and the right to data protection (Article 8), whereas the Convention concentrates the relevant protection in Article 8, that formally only deals with the right to privacy. So, at least from a formal and textual point of view, the Charter is apparently affording a broader protection to the interests at stake.

Notwithstanding the above, the Court has also pointed out (p. 76) that it is for the Commission to regularly carry out a check on whether the legal orders of the concerned third countries provide personal data with an adequate level of protection, in light of the legal and factual circumstances that may affect the same. This statement reflects a dynamic and changing understanding of the standard of adequacy. It should be called into question, however, whether the Court of Justice has indeed felt a decrease in the level of

25 *See*, among others, Alessandro Pizzorusso, *Common constitutional tradition as Constitutional law of Europe?*, in Sant'Anna Legal Studies Research Paper No. 1/2008, available online at <www.stals.sssup.it>; Wojciech Sadurski, *European Constitutional Identity?*, EUI Working Papers Law No. 2006/33, available online at <www.cadmus.eui.eu>; Cesare Pinelli, 'The Formation of a Constitutional Tradition in Continental Europe since World War II', *European Public Law*, 22, no. 2 (2016): 257. *See also* Leonard F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter', *Maastricht Journal*, 8, no. 1 (2001): 68.

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protection ensured by the US legal system, compared to the standard in force when the safe harbor agreement was entered into, or the judgment was instead reacting to the risk of a lower protection for European residents in light of purely internal factors. In a nutshell, the question is whether the Court decision reflects an evolution of the relevant background or rather an involution that urged Europe to raise its defenses.

There is, it goes without saying, an inherent connection between the degree of protection provided by third countries and that enjoyed by European residents whose data, like in the case of Mr. Schrems, could be transferred outside the European Union. There is, thus, room to assume that the most recent events occurred in the US, most notably the Snowden' revelations about the NSA scandal, have played a role in the assessment of the Commission carried out in 2000 and, accordingly, in the review carried out by the Court of Justice.

Then, if this second factor supports the idea of a dynamic level of protection for privacy and personal data, this understanding nevertheless brings about two consequences. On one hand, the range of factors to be considered in order for the Commission to evaluate the adequacy of the protection offered by third countries becomes broader and broader.

As said, the Commission will not limit itself to considering the status quo but will be required to regularly check whether any assessment previously carried out does still correspond to the standard of adequate protection in light of the relevant factual and legal circumstances.

Therefore, the Commission is supposed to be able to carry out an overall evaluation of the external and internal factors that, separately or jointly, may lead to revisit its previous assessments. In addition, the Court has pointed out that this check is required, in any event, when evidence gives rise to a doubt in that regard. This statement does not clarify under which conditions the Commission is actually required to take the necessary steps but it supports once again the idea that the standard of adequacy must be intended as a dynamic one: every time it is necessary is probably the answer.

In addition to that, even though the assessment of the standard of adequacy refers to third countries to which personal data are transferred, it might be possible that the level of protection provided by EU law changes over time, thus affecting the outcome of the 'adequacy test'.

Also non-legal factors may contribute to defining this standard and lead European institutions to raise their defenses against the risk of diminishing the protection of the data of European citizens. The judgment has called back, in this regard, the opinion of the Advocate General, who had emphasized the importance of paying regard also to the circumstances that arose from the adoption of the invalidated Decision 2000/520/CE.[26]

26 ECJ, *Maximillian Schrems v. Data Protection Commissioner*, Case C-362/14, Opinion of the Advocate General Bot (23 September 2015), at paras. 137-138: 'Given the particular nature of an adequacy decision, it

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On the other hand, by making the assessment on the compliance with the standard of adequacy a dynamic process the Court of Justice has recognized that the *marge de manouvre* of the Commission in evaluating the protection offered by non-EU countries is narrower.

In this respect, while imposing a 'strict scrutiny' over the limitation of the right to data privacy, the decision of the Court of Justice seems to bring to light a judicial cross-fertilization process. The reasoning of the Court, in fact, mirrors to a certain degree the approach taken by the US Supreme Court in the well-known *Footnote 4* to the *Carolene Products* decision.[27]

According to this view, the standard of review may differ depending on whether the relevant provisions subject to scrutiny deal with economic matters or not. In the former case, a presumption of constitutionality shall apply and the test to be adopted corresponds to the *rationale basis review*. This kind of scrutiny is placed on a lower rank compared to the strict scrutiny that applies, instead, to the provisions affecting the protection of individuals' fundamental rights.

The adoption of the strict scrutiny test reflects the revisited understanding of the Directive 95/46/EC. This act was intended, at the very beginning, to regulate purely economic matters while more recently has been regarded as the cornerstone to afford the fundamental rights to privacy and personal data a high degree of protection.[28] Then, the standard of review has moved from the *intermediate scrutiny* behind the rational basis review to a *strict scrutiny* one. The Court of Justice itself confirms the adoption of the new test while requiring (p. 78) a strict scrutiny on the conditions set forth by Article 25 of the Data Protection Directive. This is another important evidence of the 'manipulation through interpretation' that the Court has carried out in this decision.

21.4 *Schrems* in Context: *Digital Rights Ireland*, So Far Away, yet So Close

As is well known,[29] it is pretty uncommon that the Court of Justice, while reviewing whether restrictions to fundamental rights are in accordance with Article 52 of the Char-

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must be regularly reviewed by the Commission. If, following new events which have occurred in the meantime, the Commission does not amend its decision, that is because it confirms implicitly, but necessarily, the initial assessment. It thus reiterates its finding that the third country concerned ensures an adequate level of protection of the personal data transferred. It is for the Court to examine whether that finding continues to be valid in spite of the intervening circumstances.

In order to ensure effective judicial review of that type of decision, the assessment of its validity must therefore in my view be carried out by reference to the current factual and legal context.'

27 *United States v. Carolene Products Company*, 304 U.S. 144 (1938).

28 To analyze the different stages of the European integration process, *see also* Paola Bilancia, 'The Dynamics of the EU Integration and the Impact on the National Constitutional Law'. *The European Union After the Lisbon Treaties* (2012).

29 *See*, again, Pollicino, *Un* digital right to privacy *preso (troppo) sul serio dai giudici di Lussemburgo?, supra* note 22, at 13.

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ter, does separately consider the two profiles that are mentioned by this provision, e.g. the violation of the essence of the right at stake and the disproportionate nature of the limitations.

This approach was set aside by the Court in the *Digital Rights Ireland* judgment.[30] In this decision, the Court carried out the assessment on the validity of the Directive 2006/24/EC ('Data Retention Directive') in light of two separate and different criteria. On one hand, the Court found that no violation of the essence of the rights protected by Article 7 and Article 8 had occurred; nonetheless, on the other hand, the judges deemed disproportionate the interference posed by the Data Retention Directive with the same.

The *Schrems* case, if read through the lenses of this trend, has clearly followed a different approach, to the extent the reasoning of the Court does substantially ground the invalidation of the Decision 2000/520/EC on the inappropriate (or, better to say, inadequate) level of protection offered by the US legal order, most notably by the safe harbor principles.

Behind the judgment at hand, by way of 'untold story', one cannot ignore the influence of the NSA scandal and the relevant legal and political consequences. Then, if the *Schrems* case is put in connection with the *Digital Rights Ireland* decision, a *climax* of rising attention to the US dimension of data privacy and, accordingly, a stricter approach come to light.

While in the decision that invalidated the Data Retention Directive the Court of Justice had focused on the sole European context, then on a purely 'internal' context, the *Schrems* judgment has extended the scope of review to the US safe harbor principles, which have been taken by the Court as an 'indirect parameter' to check the compatibility with Articles 7 and 8 of the Charter.

In the first case, the Court restricted itself to considering that the interference with the fundamental rights protected by the Charter was not proportionate. In the latter case, instead, the Court found that the Decision 2000/520/CE, by assuming the adequacy of the US safe harbor principles, led to a violation of the essence of the rights protected by Articles 7, 8 and 47 of the Charter.[31] This way, the Court has gone beyond the mere

30 Ibid.

31 Joint Cases C-293/12 and C-594/12, *supra* note 1, at paras. 39-40:

'So far as concerns the essence of the fundamental right to privacy and the other rights laid down in Article 7 of the Charter, it must be held that, even though the retention of data required by Directive 2006/24 constitutes a particularly serious interference with those rights, it is not such as to adversely affect the essence of those rights given that, as follows from Article 1(2) of the directive, the directive does not permit the acquisition of knowledge of the content of the electronic communications as such.

Nor is that retention of data such as to adversely affect the essence of the fundamental right to the protection of personal data enshrined in Article 8 of the Charter, because Article 7 of Directive 2006/24 provides, in relation to data protection and data security, that, without prejudice to the provisions adopted pursuant to Directives 95/46 and 2002/58, certain principles of data protection and data security must be respected by providers of publicly available electronic communications services or of public communications networks. According to those principles, Member States are to ensure that appropriate technical and organisational

proportionality test and has probably derived some arguments for such a far-reaching assessment from the *Digital Rights Ireland* decision. In that case, in fact, the essence of the fundamental rights at hand had not been affected because the measures provided by the Data Retention Directive only concerned the metadata, and not the content of data flows.

It has to be noted that the Court, in *Schrems*, seems to have produced such an outcome regardless of the broad interpretation of the parameter of 'adequacy'. According to the Court, where the safe harbor principles apply, the personal data of European individuals are not properly protected and the essence thereof is undermined. The Court has thus reviewed, through the lenses of the US legislation, the compatibility of the Decision on the Safe Harbor with the Charter.

However, two points have to be made in relation to the problem of mass surveillance. First of all, it is worth noting that the interference of the US authorities, most notably of the law enforcement ones, with individuals' data privacy has probably to be revisited in its degree in light of some improvements that the decision of the Court of Justice could not take into account, partially or entirely.

Among others, the Court of Appeals for the Second Circuit, in *ACLU v. Clapper*,[32] has recently ruled that Section 215 of the Patriot Act did not authorize NSA to conduct bulk surveillance and to massively collect metadata.

Second, the mentioned Section 215 of the Patriot Act, which allowed FBI to take the necessary orders for investigative purposes, contained an expiration clause, renewed for many times until the last June, when the Senate, while passing the Freedom Act[33] has not extended the validity of this provision.

In light of the above, it should be called into question whether the US is actually taking steps in order to improve personal data protection. These improvements, perhaps, have not been taken into account by the Court of Justice. However, they may have influenced the negotiations between the US and EU in the aftermath of the *Schrems* decision, where the respective understandings of data privacy have been subject to compromise with a view to building 'a bridge' allowing data flows to move from one side of the Ocean to the other. In the end, it may be debated whether when it comes to privacy and data protection the gap between Europe and the US is still as broad as it was in the past or it has

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measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data.' As it is clear, the Court of Justice, strangely enough, has considered Article 7 and Article 8 no longer as a unitary parameter, like in the previous and well-established case law, but separately, as distinct references, in order to examine more precisely the actual impact of the measures provided for by the Directive on, respectively, the right to private life and the right to data protection.

32 *ACLU v. Clapper*, No. 14-42 (2d Cir. 2015).

33 *See* Alan Yuhas, *NSA reform: USA Freedom Act passes first surveillance reform in decade – as it happened*, in *The Guardian* (2015), available online at <www.theguardian.com>; Cindy Cohn and Rainey Reitman (2015) *USA Freedom Act Passes: What We Celebrate, What We Mourn, and Where We Go From Here*, available online at <www.eff.org>.

reduced over time.[34] Looking at the results of the negotiations that were commenced to agree the Privacy Shield, the gap seems to be still significant.

The second relevant point deals with the problem of reconciling the protection of personal data according to common standard and the safeguard of national security, which remains inherently connected to the discretion in the hands of Member States. Protection of national security is not subject to harmonization in EU law, then Member States can adopt very different solutions that may also impact protection of personal data, despite the existence of a data protection framework. In this regard, the fact that from 1995 a directive has been in force reflected into a margin of discretion for Member States while implementing the respective obligations and transposing them into domestic law.

In light of these factors, it is likely that the policy options taken by Member States when it comes to protecting national security and public order may result in undermining the goal of protecting personal data according to EU law standards. Across Member States, then, there could be very different options to balance the interests at stake.

The remedy to the lack of a consistent approach, in this regard, can perhaps be found, on one hand, in Article 6, par. 2, of the TEU, which ranks the ECHR among the general principles of EU law, on the other one, in Article 52, par. 3, of the Charter,[35] where it is said that insofar as the Charter contains rights that correspond to those guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. These provisions may constitute a sound basis to interpret EU law in accordance with the model of protection underlying the ECHR.

Recently, in *Zakharov v. Russia*,[36] the Court sitting is Strasbourg has released a decision that has been rather convincingly labeled as the 'follow-up' of the *Schrems* case.[37] The applicant, a journalist, complained that his telephone conversations had been inter-

34 For a comparative overview, *see*, among other Francesca Bignami and Giorgio Resta, 'Transatlantic Privacy Regulation: Conflict and Cooperation', *Law and Contemporary Problems*, 78 (2015): 231.

35 *See also*, ECJ, Case C-399/11, Stefano Melloni c. Ministerio Fiscal (26 February 2013) and Case C-617/10, Åklagaren c. Hans Åkerberg Fransson (26 February 2013). Among others, *see*: Leonard F.M. Besselink, 'The Parameters of Constitutional Conflict after Melloni', *European Law Review* 531 (2014); Vassilios Skouris, 'Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts Melloni et Åkerberg Fransson', *Il diritto dell'Unione Europea* (2013): 229; Maartje De Visser, 'Dealing with Divergences in Fundamental Rights Standards', *Maastricht Journal of European and Comparative Law* (2013): 576; Giulia Cavallone, 'European arrest warrant and fundamental rights in decisions rendered in absentia: the extent of Union law in the case C-399/11 *Melloni v. Ministerio Fiscal*', *European Criminal Law Review* (2014): 19. See also, for some remarks, Oreste Pollicino, 'From Partial to Full Dialogue with Luxembourg: The Last Cooperative Step of the Italian Constitutional Court', *European Constitutional Law Review*, 10 (2014): 143; Filippo Fontanelli, 'Fransson and the Application of the EU Charter of Fundamental Rights to State Measures – Nothing New Under the Sun of Luxembourg' (2013), available online at <www.diritticomparati.it>; Ulf Bernitz, 'The Akerberg Fransson Case. Ne bis in idem: Double Procedures for Tax Surcharge and Tax Offences not Possible', *Human Rights in Contemporary European Law*, 91 (Joakim Nergelius & Eleonor Kristoffersson eds., 2015).

36 ECtHR, *Case of Roman Zakharov v. Russia*, Application No. 47143/06 (4 December 2015).

37 Paul De Hert and Pedro Cristobal Bocos, *Case of Roman Zakharov v. Russia: The Strasbourg Follow Up to the Luxembourg Court's Schrems Judgment* (2015), available online at <www.strasbourgobservers.com>.

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cepted by the Russian authorities for the sake of preventing terrorist attacks. He alleged that telecommunication service providers had been obliged to set up appropriate devices for the interception of private communications without a prior judicial order and deduced that he had been subject to illegal seizure of communications. The domestic courts rejected the applicant's claim, arguing that he had failed to provide evidence that he suffered the consequences of the implementation of the relevant surveillance program.

The Grand Chamber,[38] however, has found that the right to private life under Article 8 had been violated. In order to reach this goal, the ECtHR has taken, not dissimilar from the recent approach of the Court of Justice, a very broad view of the right to private life. Even though there was no evidence that the applicant had actually suffered a harm, in the view of the Court a violation of Article 8 ECHR had occurred.

This way, the Court has revisited its well-established case law on the implementation of mass surveillance systems: whereas in certain cases it required a 'reasonable likelihood' that the seizure of communications had been actually carried out, in other cases the mere threat related to the existence of a surveillance system had been deemed a sound basis to hold that a violation of Article 8 took place.

Between the two aforesaid approaches, in *Zakharov* the Court has followed the latter, in accordance with the *Klass* leading judgment[39] as it was construed in the *Kennedy* case[40] where the Court had found the existence of a mere threat to be sufficient to establish a violation of the Convention, provided that two conditions were met: (i) The applicant had to be among the individuals potentially affected by the implementation of the mass surveillance systems at hand; (ii) The absence of any legal remedies available to the applicant. According to the *Kennedy* decision, it is sufficient that the applicant's right to private life has been potentially at risk for his application to be lodged before the Court. This way, the European Court has circumvented the 'reasonable likelihood' test, by extending the room for the protection of individuals' data privacy regardless of the existence of an actual and concrete harm.

Then, the European Court has moved from its traditional approach to an *individual justice* perspective where, even in the absence of a harm, violations of Article 8 ECHR can nevertheless be enforced. It is probably in this wake that the Court of Justice and Member States might revisit the model of protection of privacy and personal data.

The decision of the European Court in *Zakharov*, in fact, mirrors to a certain degree the *Schrems* judgment. In both the cases, indeed, the existence of a specific and actual violation of the fundamental rights at hand does only rely on the assessment of a legal environment that is likely to put under threat the essence of those rights.

38 *See also* Lorna Woods, *Zakharov v. Russia: Mass Surveillance and the European Court of Human Rights* (2015), available online at <www.eulawanalysis.blogspot.it>.

39 ECtHR, Case of Klass e altri c. Germania, Application No. 5029/71 (6 September 1978).

40 ECtHR, Case of Kennedy c. Regno Unito, Application No. 26839/05 (18 May 2010).

On the other side of the coin, the *Zakharov* case is most likely to trigger individuals to file a number of applications with respect to alleged violation of their right to private life, also in the wake of the 'emotional' element that characterizes the current scenario in Europe.

It is most likely relying on these features that European Union institutions shall outline a new model of protection, as much uniform and balanced as possible, taking inspiration from the approach of the European Court of Human Rights.

21.5 *Schrems* in Context: The Principle of Equivalence in the Case Law of the Court of Justice

The *Schrems* case can be contextualized also within the framework of the application of the principle of equivalence for the protection of fundamental rights in Europe. As noted above, the adequacy of the level of protection constitutes the parameter on which the Court has relied, also through a manipulative construction, to review the compatibility of the Decision subject to invalidation with the Charter. It has therefore a crucial importance.

First of all, it is worth recalling the *Kadi* saga,[41] which the same Court has mentioned in *Schrems* (p. 60). The Court has pointed out that the European Union is a union based on the rule of law in order to clarify that 'all acts of its institutions are subject to review of their compatibility with, in particular, the Treaties, general principles of law and fundamental rights'. This point is crucial for the Court to emphasize that all the decisions taken by the Commission pursuant to Article 25, par. 6, are subject to the same rationale.

Connecting the *Schrems* decision with the *Kadi* judgment,[42] the existence of an autonomous model of protection of fundamental rights comes up. In this model, there is no room for restrictions that are not properly grounded and justified. With respect to other legal orders interacting with EU law, the protection of fundamental rights constitutes a bulwark, a distinguishing feature that may not be compromised by the European institutions when 'opening' to any act of domestic or international law.

41 *See*, with respect to the *Kadi* saga: General Court, Case T-315/01, *Kadi v. Council and Commission* (21 September 2005); ECJ, Joint Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat *International Foundation v. Council of the European Union and Commission of the European Communities* (3 September 2008); General Court, Case T-85/09, *Yassin Abdullah Kadi v. European Commission* (30 September 2010); ECJ, Joint Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and others v. Yassin Abdullah Kadi* (18 July 2013).

42 *See*, for some comments, among others: Juliane Kokott and Christoph Sobotta, 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' *European Journal of International Law*, 23, no. 4 (2012): 1015; Matej Avbelj, Filippo Fontanelli and Giuseppe Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (2014); Christian Tomuschat, 'Primacy of the United Nations Law. Innovation Features in the Community Legal Order', *Common Market Law Review*, (2006): 537.

It seems that the European Union is taking the last say on fundamental rights back, emancipating itself from the mainly economic characterization of the European project. As already pointed out, while at the very beginning of the European constitutionalism protection of fundamental rights may justify restrictions to the economic freedoms provided by the Treaties, as exceptions to the same, nowadays it is the level of protection of fundamental rights to determine the degree of openness of the European Union toward other orders. In this respect, the importance of the Charter is crucial, like in the *Kadi* saga.

However, an important difference with *Kadi* has to be noticed. Here, the 'external' source of threat to fundamental rights lay with an act of international law, most notably a resolution of the United Nations Security Council. The EU legal order had then to raise its defenses, albeit through the 'mirror' of the relevant EU law provisions, against an act adopted by an entity of international law and more precisely against the act of the Council implementing the content of the said resolution.

In *Schrems*, the challenges to fundamental right that EU law had to face were not posed by an act of international law but by the US legal systems, through the safe harbor principles. It is the legal order of a third country that has raised some threats to fundamental rights and has led, accordingly, the Court of Justice to enforce Articles 7, 8 and 47 of the Charter by invalidating the Decision 2000/520/EC, which relied on the aforesaid safe harbor principles. The invalidation of the Decision at hand relies on the choice to revisit according to a fundamental rights oriented approach an act of EU law adopted with a main economic understanding of personal data.

In addition to the above, it should be noted that some interesting connections can also emerge in light of the case law of the German Federal Constitutional Tribunal relating to the principle of equivalence in the field of fundamental rights protection.

The judgment of the Court of Justice (p. 73), in fact, has pointed out that 'a third country cannot be required to ensure a level of protection identical to that guaranteed in the EU legal order'. This point is very telling as it puts the Court of Justice decision in connection with the two leading judgments of the *Bundesverfassungsgericht* in *Solange I*[43] and *Solange II*.[44]

The decision of the Federal Constitutional Court in *Solange I*[45] (1974) concerned the enforcement of the clause transferring sovereignty to international organizations enshrined in Article 24 of the German Basic Law. According to the *Bundesverfassungsgericht*, in light of the very seminal stage of the European integration process, where no act protecting fundamental rights was in force at EU law level and, generally speaking, a

43 *BVerfGE* 37, 271.

44 *BVerfGE* 73, 339.

45 See, among others, Ulrich Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law', *Common Market Law Review*, 12 (1975): 171.

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democratic deficit was felt a common loophole of the European Community, this clause had to be interpreted according to a strict approach.

Hence, the *Bundesverfassungsgericht* reserved itself the power to prevent the application of EU law provisions that might conflict with the fundamental rights protected by the German Grundgesetz.

This interpretation has been revisited in the decision *Solange II*, released by the Federal Constitutional Tribunal in 1986. In this judgment, the *Bundesverfassungsgericht* recognized the attitude of the Court of Justice to provide fundamental rights with a level of protection comparable (here is the connection to the 'adequacy' standard of the *Schrems* case, p. 73[46]) to that guaranteed by the Basic Law. This way, the *Bundesverfassungsgericht* found that as long as these conditions were met, it would have refrained from exerting its jurisdiction to challenge the application of EU law in fundamental rights-sensitive matters.

As far as the principle of equivalence is concerned, a third important reference may be found in the *Bosphorus v. Ireland* decision of the European Court of Human Rights.[47] As it is well known, in this judgment the Court sitting in Strasbourg refused to review the compatibility of a regulation with the ECHR by arguing that, insofar as secondary sources of EU law, which do not require implementation by Member States, are concerned, a presumption of conventionality applies.[48]

Even before this judgment the European Court had already clarified that Contracting States bear no liability for conducts that originate from obligations stemming from EU law in cases where these acts do not leave States any room for discretion.

This principle has been substantiated a bit more in the *Bosphorus* case, where the European Court said that the principle of equivalence must be interpreted by taking into account the comparability of the orders at stake. In particular, the European Court said that

> by 'equivalent' the Court means 'comparable'; any requirement that the organisation's protection be 'identical' could run counter to the interest of international cooperation pursued […]. However, any such finding of equivalence

46 Cfr. Franz C. Mayer, *The Force Awakens – The Schrems Case from a German Perspective* (2015), available online at <www.verfassungsblog.de>.

47 ECtHR, *Case of Bosphorus Hava Jollari Turizm ve Ticaret v. Ireland*, Application No. 45036/98 (30 June 2005).

48 Among others, *see* Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', *Human Rights Law Review*, 6, no. 1 (2006): 87; Frank Schorkopf, 'The European Court of Human Rights' Judgment in the Case of *Bosphorus Hava Yollari Turizm v. Ireland*', *German Law Journal*, 6, no. 9 (2005), 1255; Steven Peers, 'Bosphorus – European Court of Human Rights: Limited responsibility of European Union member states for actions within the scope of Community law. Judgment of 30 June 2005, *Bosphorus Airways v. Ireland*, Application No. 45036/98', *European Constitutional Law Review*, 2 (2006): 443.

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> could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection.

Then, Member States cannot incur any liability for violations of the ECHR when they have acted in accordance with EU law provisions that are directly applicable. Such a presumption that Member States guarantee an equivalent level of protection can be rebutted only if the protection of the rights covered by the ECHR is manifestly insufficient.

It is worth noting that the accession of the European Union to the Convention – which the Court of Justice has deemed to be not permissible under the Treaties in force in the Opinion no. 2/2013[49] – is a mission most likely very far from being accomplished. Then, the question of whether the guarantees provided for by EU law for the protection of fundamental rights are compatible with the conventional standards is still pending.[50]

Two important concluding remarks are necessary at this stage. First of all, it is worth noting that, if read through the lenses of the relevant case law on the principle of equivalence, the *Schrems* decision introduces significant novelties.

In fact, while in the three cases mentioned above the problem of granting an equivalent level of protection had been faced with respect to the interaction either between the EU legal order and a domestic legal order (*Solange I* and *Solange II*), or between the EU legal order and a global international legal order (like in *Kadi*) or, again, between the EU legal order and a regional international legal order (so it was in *Bosphorus*), in *Schrems* things have gone differently. Here, the Court of Justice had to face the relationship between the EU legal order and the level of protection guaranteed to fundamental rights by a national legal order, that of the US. No international (either global or regional) legal order is at stake, for the first time, in a decision that impacts the principle of equivalence, in the manipulative interpretation provided by the Court.

This factor, however, may lead to critical consequences, including a risk of isolation and loneliness for the Court of Justice, protecting data privacy according to a standard that no legal order can match but also problems in terms of comity as long as the political relations between US and the European Union are concerned. This is a particularly hot topic, since the European Union recently released the new general data protection reg-

49 ECJ, Opinion no. 2/13 (18 December 2014). *See* Steven Peers, *The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection* (2014), available online at <www.eulawanalysis.blogspot.it>; Leonard F.M. Besselink, *Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13* (2014), available online at <www.verfassungsblog.de>; Sionaidh Douglas-Scott, *Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice* (2014), available online at <www.ukconstituionallaw.org>.

50 *See*, among others, Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon', in *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Sybe de Vries, Ulf Bernitz & Stephen Weatherill eds., 2015); Olivier De Schutter, 'Bosphorus Post-Accession: Redefining the Relationships between the European Court of Human Rights and the Parties', in *The EU Accession to the ECHR* (Vicky Kosta, Nikos Skoutaris & Vassilis Tzevelekos eds., 2014): 177.

ulation, which is supposed to trigger controversial reactions especially among US organizations.[51]

The second remark relates to the role of the actors involved in the *Schrems* case. In the aforesaid judgments on the principle of equivalence, the Court of Justice had the competence to affirm a given principle but also to enforce the same. In fact, the same body that had developed a given principle had the power to assess whether the same had been actually enforced. On the contrary, in *Schrems*, the Court of Justice has struck down the safe harbor agreement, by invalidating the Decision that incorporated the assessment of adequacy. But the Court of Justice does not have any power to work on the *pars construens*, as the task to determine which guarantees apply to personal data is left in the hands of national authorities. What once was compromised and defined at the level of the European Union has now been entrusted, to a certain degree, to the single Member States.

This approach, however, has not been adopted by the European Union institutions, which quickly after the decision started negotiations with the US authorities to enter into a new agreement, the Privacy Shield. The road taken is consistent, among others, with the recommendations of the Article 29 Working Party,[52] whose statement in the aftermath of the *Schrems* decision urged a: 'robust, collective and common position on the implementation of the judgment'.

At least in this respect, then, the risk of a balkanization of the protection of personal data across Europe through an empowerment of the national authorities has been neutralized.[53] This scenario would be in the end detrimental insomuch as an effective protection of privacy and personal data requires common standards instead of a fragmented scenario.

21.6 Final Remarks

To sum up, the decision of the Court of Justice in *Schrems* has followed up the wave of judicial activism that was emerged in *Google Spain* and *Digital Rights Ireland* with the purpose of strengthening the enforcement of the digital right to privacy.

However, the Court seems to have taken an approach that makes Europe, in an almost paradoxical way, a fortress of personal data without considering the political and legal impact of this decision with regard to the relationship with third countries.

51 European Commission, 'Agreement on Commission's EU data protection reform will boost Digital Single Market', *Brussels*, 15 December 2015.

52 Statement of the Article 29 Working Party, Brussels, 16 October 2015.

53 Evgeny Morozov, 'The World Is Not Enough – How to Reinvent the Internet', in *Sueddeutsche Zeitung*, 20 January 2014. *See also* Sérgio Alves Jr., *Internet Governance 2.0.1.4: The internet balkanization fragmentation*, 20th ITS Biennial Conference, "The Net and the Internet – Emerging Markets and Policies", Rio de Janeiro, 2014.

In the aftermath of *Schrems*, the European Union and the US have reached a compromise and entered into a Privacy Shield, a new agreement covering the transfer of personal data under stricter rules than those applying under the safe harbor scheme. Although many commenters have challenged the adequacy of the new conditions, arguing that the Privacy Shield does only add a little to what the safe harbor decision already provided for, it is worth noting that this way the European institutions have filled a gap that, in the absence of this agreement, it would have been for Member States (and the respective authorities) to handle according to their discretion.

Nevertheless, it would be of course wrong to deem the new agreement coming into force to be a remedy to the invalidation of the safe harbor agreement simply replacing the same. National regulatory authorities still hold the power, in light of the decision of the Court, to challenge the adequacy of the level of protection offered by third countries and thus stimulate the competent bodies to review whether any acts authorizing the transfer of personal data thereto do appropriately safeguard the rights protected by Articles 7 and 8 of the Charter.

It is then crucial for the Court of Justice to consider more and more carefully the overall scenario on which its decisions are likely to impact. In this respect, as noted, a horizontal dialogue with the European Court of Human Rights may support the establishment of a common model of protection of the fundamental right to privacy. A more balanced model that may facilitate a further step of the dialogue, beyond European borders, i.e. the transatlantic one with the US.

That said, a challenging question is on the table: will this wake of judicial activism end with the coming into force of the new General Data Protection Regulation, whose content reflects, to a certain degree, the impact of the information society? A question that can stimulate more speculations, but the answer to which is hard and too early to foresee.

22 Constitutional Sovereignty in Post-Sovereign Europe in Crisis: A Central European Perspective

Jiří Přibáň[*]

The first decade of the twenty-first century was full of hopes of European unity and identity shaped by cosmopolitan values and democratic constitutionalism. Post-communist countries, such as the Czech Republic and Hungary, had entered the second decade of their post-1989 economic and political transformation and, after initial reforms of constitutional democratisation, are fully focused on their prospect to join the European Union – one of the most prominent goals of the 1989 revolutionary events promising 'the return to Europe'.

Unlike Hungary and Poland, the Czech Republic and Slovakia, together with the Baltic states and Slovenia, had all been 'new states' reconstituting and reconfiguring their sovereignty. In the case of the Czechoslovak federation, it was the political and constitutional deadlock leading to the peaceful split of the country and the establishment of two successive states – the Czech Republic and Slovakia on 1 January 1993. In the case of accessing Slovenia, Estonia, Latvia and Lithuania, their state sovereignty and its reconfiguration vis-à-vis the prospect of EU membership was marked by the threats, risks and violence related to the international turmoil of the collapsing Soviet Union and Yugoslav federation in the early 1990s.

The post-1989 political and constitutional process of regaining state sovereignty and using it to negotiate EU membership coincided with optimism regarding Europe's ascendancy, which was to peak in the process of constitution-making and ratifying the Constitutional Treaty to rule all Member States. For the post-communist candidate states, EU membership symbolically represented a new form of statehood and political identity making them part of the democratic and liberal European order. The most generous decision of the EU to invite the candidate states to participate, albeit in limited ways, in its Convention's constitution-making was perceived as another sign of Europe's political confidence and unity guaranteeing the bright future for the whole continent abandoning its internal borders, introducing the common currency and heading for entirely new and unprecedented forms of cooperation in the areas traditionally reserved for sovereign states, such as foreign affairs and judicial policies.

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While further limiting sovereignty of Member States, the Constitutional Treaty, this new basic norm of the EU's legal order, was perceived as enhancing rather than weakening the liberal democratic constitutional state in candidate countries and creating new opportunities of supranational and transnational cooperation across the continent.

Nevertheless, frictions between 'old' and 'new' Europe had been present even at those time of the EU's ascendency and long before the Constitutional Treaty's rejection in the French and Dutch referenda of 2005 and anti-liberal counter-revolutions in Hungary and Poland steered by Prime Minister Orbán and President Kaczynski in the second decade of this century. One such friction emerged before the second Iraq War in 2003 when large parts of the European public and some politicians vehemently protested against the US-led war campaign. Philosophers joined the public protests and Jürgen Habermas, Jacques Derrida and others drafted an open letter in which they attempted to define 'what binds Europeans together'.[1]

Though conceived with the noblest intentions and being politically correct, Habermas and Derrida's call for constructing the distinct European identity in opposition to the United States also paradoxically came dangerously close to the traditional European cultural chauvinism and anti-Americanism formerly associated with conservative and extremist streams of European politics. Its purpose was not merely to highlight wrong international policies of the United States in the post-9/11 global constellation, especially its readiness to go to the unjustified war in the volatile Middle East. It was not just to emphasise the global political value of legality in international politics and the United Nations as its central institutional framework. The core of their argument actually consisted of defining the cosmopolitan notion of democracy and human rights as the foundational value of the European polity and its collective identity, which was to be codified through the then ongoing process of EU constitution-making.

According to these advocates of Europe, the new Union ruled by its Constitution was to protect Enlightenment's ethical and political ideals and we, the peoples of Europe, were to be the cosmopolitan avant-garde from which the rest of the world should learn the important lesson of European integration. Responding to the ferocious debate on European identity, the 'hard core' European Union states and the Union's transatlantic relations initiated by Habermas and Derrida, the Hungarian novelist Péter Esterházy ironically commented:

> Once, I was an Eastern European; then I was promoted to the rank of Central European. … Then a few months ago, I became a New European. But before I had the chance to get used to this status – even before I could have refused it – I

1 Jürgen Habermas and Jacques Derrida. 'February 15, or, What Binds Europeans Together? Plea for a Common Foreign Policy, Beginning in Core Europe'. In *Old Europe, New Europe, Core Europe. Tranatlantic Relations after the Iraq War*, edited by Daniel Levy, Max Pensky, John Torpey (London: Verso, 2005) 3-13.

> have now become a non-core European. It's like someone who has always lived in Munkács, and has never left Munkács in his entire life, but who has been, nevertheless, a one-time Hungarian, one-time Czech, one-time citizen of the Soviet Union, then a citizen of the Ukraine. In our town, this is how we become cosmopolitans.[2]

In my view, this statement wonderfully illustrates the power of military and diplomatic winners to distribute their symbolic language alongside territorial control and to 'provide' losers with new collective identity. If winners and losers change too often, like in modern history of Central Europe, cosmopolitanism looks like the best fitting survival kit rather than a grand normative project of European modernity.

However, there is another more general lecture in this whole exercise of defining who are 'true' Europeans and what makes the difference between 'old' and 'new' Europe now, in the second decade of the twenty-first century, when 'liberated' Iraq continues to experience political chaos and the 'liberal' EU is being directly threatened by illiberal populism due to the failure of its policies, lack of responsibility and false ambitions. In Central Europe, we have historical experience and knowledge of how grand ideas and general concepts often disguise contingency of our ethical and political reality. Recent events in Central Europe including the crisis of liberal democratic constitutionalism in some countries, therefore, should not be perceived as another evidence of frictions between 'old' and 'new' Europe. Instead, these events should be analysed as one of many examples of the current crisis of democratic politics, statehood and constitutionalism.

Indeed, we live in 'post-national constellation', 'post-democracy', 'post-constituent' and 'post-sovereign' globalised and/or Europeanised society. Nevertheless, the sovereign constitutional state, nation and democracy did not wither away in the context of supranational and transnational economic, political, legal and other societal changes. The nation state as political institution certainly has transformed and changed its structural framework but it also persists and continues to be perceived as one of the few institutions that still can challenge the otherwise uncontrolled and ever-growing forces of economic globalisation. No wonder that populists of all kinds recreate the symbolism of nationhood and state sovereignty to mobilise their supporters and attack the existing political and economic status quo including supranational and transnational economic, political and legal structures of the EU.

The following text, therefore, raises the question I addressed in a different context in my monograph *Sovereignty in Post-Sovereign Society*,[3] namely the question of what hap-

2 Péter Esterházy. 'How Big Is the European Dwarf?' In *Old Europe, New Europe, Core Europe. Tranatlantic Relations after the Iraq War*, edited by Daniel Levy, Max Pensky, John Torpey (London: Verso, 2005), 74-79 at 74.

3 Jiří Přibáň, *Sovereignty in Post-Sovereign Society: A Systems Theory of European Constitutionalism* (Aldershot: Ashgate, 2015).

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pened to the political and legal concept of sovereignty in post-sovereign European society and how its both persistence and transformation affected recent theories of constitutionalism. I argue that the persistence of sovereignty as a political and legal concept in the post-sovereign Europeanised social constellation needs to be addressed against the background of the tension between the semantics and structures of the systems of positive law and politics evolving at supranational and transnational level. For this reason, I believe that the conceptual framework of the autopoietic social systems theory offers the most persuasive theoretical response to the recent problems of democratic constitutionalism within and beyond the nation state in Europe and elsewhere.

22.1 State Sovereignty's Persistence in Post-Sovereign Society

The concept of sovereignty signifies both political power and its legal form. It is prominent in modern society because of its specification of the relationship between public authorities and their subjects. It, therefore, defines both the power of political commands and the conditions of political obedience. No wonder that political and legal 'realistic' perspectives of decision-making processes are accompanied by their 'idealistic' assessment exploiting the common good and political virtues behind these processes and the maintenance of political and social order.

Jeremy Bentham's classic definition of law as the sovereign's command may be strikingly inadequate, yet continues to be a conceptual pillar of modern analytical jurisprudence drawing on the sociological and psychological notion of 'the general habit of obedience'. According to this view, sovereignty as the command power is the first precondition of the constitution of society. However, this highest power of command over a particular territory and its citizens becomes a matter of self-reference in modern polity constituted by the principle of popular sovereignty.

This sovereignty is no more externality of politics[4] but its absolute foundation and the source of legitimation of all laws. The modern transformation of sovereignty from the polity's externality to its internal foundation, however, illuminates all conflicts and tensions arising between political will and its legal definition, regulation and limitation. Indeed, popular will is enhanced by legality and legal decision-making needs to be backed by political enforcement.[5] Politically unbound popular sovereignty takes the exclusive legal form of a constitution in modern society.

Instead of the constitution *of* society, sovereignty now signifies interconnectedness of the systems of positive law and politics *in* modern society. In other words, sovereignty

4 Michel Foucault, 'Governmentality'. In *Power. Essential Works of Coucault 1954-1984, volume 3*, edited by James D. Faubion (London: Penguin, 2000), 204-205.

5 Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton, NJ: Princeton University Press, 2001), 143.

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can no longer be used as a metaphor of external foundations of the totality of society. It needs to be examined as an internal product of modern law and politics evolving in society through a specific social organisation – the constitutional state. Constitutions are no more than societal structures facilitating this communication between law and politics and their first function is to establish equilibrium between political tendencies to use legal norms as an instrument of political will and juridical tendencies to normatively restrict political goals and preferences.

The concept of constitutional sovereignty exactly signifies this paradoxical relationship between the systems of law and politics. Sovereignty, in its popular form, constitutes politics and even exceeds the regulatory logic of political institutions. At the same time, its exclusive form is the legal form of a constitution. Sovereignty is thus both outside and inside the domain of law. It means both the power to enact laws (the political sovereignty of constituent power) and the basic norm constraining the people's constituent power (the legal sovereignty of constituted power).

This paradox of constitutional sovereignty is general and the modern nation state, drawing on the image of the sovereign people as a nation, is just one of its manifestations. Popular sovereignty historically materialised in the nation state, which effectively used paradoxes and differences between the constituent power of the people and the constituted power of the democratic constitutional state.

In contemporary society, the nation state as the central organisation of constitutional politics becomes challenged by manifold processes of globalisation in economy, technology, health, security, migration etc. At the same time, two main legitimation pillars of modern constitutional democracy – popular sovereignty and the civil-rights-based rule of law – are possible to extend beyond the nation state's structures and semantics. The initial paradox of state constitutionalism finds its variations at supranational and transnational levels and the process of European integration shows that societal operations originally associated with constitutional sovereignty evolve beyond the nation state. In other words, structures and semantics of modern law and politics originally associated with constitutional sovereignty of the nation state persist and evolve beyond statehood in post-sovereign society and its post-national constellation, such as the EU.

22.2 Sovereignty beyond the State: A Systems Theoretical View

If early conceptualisations of sovereignty drew on its externality, modern theories of state sovereignty formulated it as a matter of coeval juridification of political power and political instrumentalisation of law. The rule of law and constitutional state exactly signify this interdependence of the systems of positive law and politics and their contribution to the overall evolution of modern society. Sovereignty becomes inseparable from constitutionalism.

This generalisation of the problem of constitutional sovereignty stretches beyond the territorial nation state and informs the realm of international law and politics as well as new emerging supranational and transnational legal and political regimes and networks. These dynamic societal changes require adopting both classic theories of state constitutionalism analysing normative structures and recent theories of governance, administrative practices and activities independent of state organisations. Instead of signifying the domain of order and discipline, sovereignty needs to be reformulated as a dynamic concept responding to societal changes and evolution.[6]

Information exchange between politics and law is unlimited to the sovereign state and international law and consists of structural and semantic changes lacking patterns typical of state constitutions. As the German sociologist Niklas Luhmann commented, 'the structural coupling of the political system and the legal system through constitutions does not have an equivalent at the level of global society'.[7] The modern territorial state's intensive coupling of the political and legal concepts of sovereignty including the notions of the sovereign rule of law and popular sovereignty has been absent at the global societal level. Recent European and global developments, therefore, show a need to examine how specific *structures* and *semantics* of the legal and political systems couple with each other and how this coupling affects the meaning of sovereignty.

According to the autopoietic social systems theory,[8] society is a functionally differentiated system consisting of different subsystems of economy, law, politics, religion, education etc. These systems are cognitively open but normatively closed.[9] Autopoietic social systems can use information from their environment but this external reference between the system and its environment does not affect the systems' operations.

Autopoiesis means that systems self-create their operations and their functioning is guaranteed by self-referential communication using the system's binary code, such as 'legal/illegal' in the legal system and 'government/opposition' in the political system.[10] The old image of specific subsystems contributing to the functioning of culturally integrated and hierarchically organised society, which was elaborated by Talcott Parsons, is replaced by the functionally differentiated and culturally a-centric heterarchical society of

6 This paradigmatic change precedes the current process of globalization and dates back to the first half of the twentieth century. See James Marshall, *Swords and Symbols: The Technique of Sovereignty* (Oxford: Oxford University Press, 1939).

7 Niklas Luhmann, *Law as a Social System* (Oxford: Oxford University Press, 2004), 487-488.

8 For the legal and political contextualization and critical elaboration of Luhmann's theory, see, for instance, Gunther Teubner, *Law as an Autopoietic System* (Oxford: Blackwell, 1993); Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Houndmills: Palgrave Macmillan, 2006); Andreas Philippopoulos-Mihalopoulos, *Niklas Luhmann: Law, Justice, Society* (Oxon: Routledge-Glasshouse, 2010); Jiří Přibáň and David Nelken, eds., *Law's New Boundaries: The Consequences of Legal Autopoiesis* (Aldershot: Ashgate, 2001).

9 Niklas Luhmann, *Social Systems* (Stanford, CA: Stanford University Press, 1995), 102.

10 See, for instance, William Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford, CA: Stanford University Press, 2000), 151.

specific subsystems. Systemic differences precede any notion of societal unity. Autopoietically organised society relies on self-organisation, self-production, self-description and self-reference of these subsystems and the levels of interdependence and interference between these systems also show the impossibility of their hierarchical ordering.

Luhmann's theory of autopoietic social systems draws on the distinction between social structures and semantics as two profoundly intertwined yet autonomous internal constructions of autopoietic social systems.[11] Specific systems, such as economy, law and politics, constitute their internal structures and semantics, which coevally change as part of general systemic changes and evolution. Semantics respond to the structural changes of a system and, similarly, structures respond to the changes in systems' self-descriptions and self-references. An example of semantic responses to the structural changes is the concept of comitology describing specific structures of European governance evolving in the post-Maastricht EU. An example of structural responses to the semantic changes is the proliferation of institutions and bodies in the realm of human rights, which became the prominent form of legitimation of national, international and transnational post-1989 law and politics.

Autopoietic systems self-construct their structures and semantics and thus maintain their external differentiation from each other. In the context of law and politics, the semantics of constitutional sovereignty, for instance, corresponds to the structural self-validation of law (legal monism as an example of the legal system's self-reference), which replaced early modern validations of positive law by external references to natural law and justice (the moral system) or the Benthamite command of a political sovereign (the political system).

Structural and semantic changes are commonly synchronised. For instance, the new semantics of individual liberties and political rights coincides with the structural transformation of modern politics into nation states. However, asymmetries in these semantic and structural constructions of modern law and politics also inform their evolution. Structural changes, therefore, might precede semantic changes and vice versa. An example of this is the persistence of the state-centred semantics of national democracy and political liberties in the global political system without state structures and nationally framed procedures of public accountability and democracy. Another example is the legal semantics of constitutional sovereignty and the duality of international and national law, which is still used to describe even supranational and transnational legal structures, such as the legal system of the EU.

11 Niklas Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft*, vol. 1 (Frankfurt: Suhrkamp, 1980); Niklas Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft*, vol. 2 (Frankfurt: Suhrkamp, 1981); Niklas Luhmann, *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft*, vol. 3 (Frankfurt: Suhrkamp, 1989).

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22.3 Sovereignty in Post-Sovereign Europe: Lessons from Central Europe

The persistence of the semantics of sovereignty in the systems of EU law and politics, therefore, should be explained against the background of the autopoietic social systems theory. It is best formulated as the difference between the semantics and structures of EU law and politics.

The semantics of sovereignty is typical of both modern national and international legal and political systems. Recent structural changes and the emergence of supranational and transnational regimes of law and politics expose limits of this semantics. Nevertheless, it continues to be the important self-description of legal and political operations even in the post-sovereign EU condition, especially as regards the relationship between the Union and its Member States and the self-description of the EU as a specific political and legal organisation without state-like structures, yet with political and legal aspirations and legitimation typically associated with the nation state and democratic politics.

Constitutional developments in former communist countries, such as the Czech Republic, Hungary and Poland, had been typical of a gradual shift from simple adoptions of the doctrine of shared or divided sovereignty to more complex jurisprudence of constitutional sovereignty of national statehood in the post-sovereign supranational EU condition. While early constitutional developments addressed the problems of rebuilding and legitimating the sovereign constitutional and democratic state, the second half of the 1990s and post-accession jurisprudence primarily had to respond to the issue of dividing and sharing state sovereignty at EU level. General problems of democratic legitimacy and accountability vis-à-vis supranational integration processes dominated both pre-accession and post-accession constitutional review and, following the German Constitutional Court's example and its Maastricht judgment, constitutional courts of those countries adopted the doctrine of divided sovereignty and *Kompetenz der Kompetenz* reflecting on the supremacy of democratically legitimised national legal systems.[12]

Constitutional ambivalence about the accession process and the problem of state sovereignty was addressed by the Constitutional Court of Hungary as early as 1998 – just five years after the Copenhagen summit formally defined conditions of EU membership for post-communist candidate states. The Court raised the question of legitimacy of the harmonisation process in its 'Europe Agreement Case' in which it reasserted constitutional sovereignty of the Republic of Hungary against the direct applicability of EU law and stated that a transfer of sovereignty to a foreign legal system needed to be explicitly authorised under the Hungarian constitutional rule.[13] Furthermore, the Court specified

12 Wojciech Sadurski, 'Solange, chapter 3': Constitutional Courts in Central Europe Democracy European Union' 14(1) *European Law Journal* (2008) 6-23.

13 Allan Tatham, 'Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court' 48 *International and Comparative Law Quarterly* (1999) 913-920.

that the constitutional amendment must follow the prescribed constitutional procedure rather than be stealthily enforced by means of parliamentary ratification of an international treaty.

The semantics of sovereignty in the post-sovereign EU legal and political structures may be detected in the *Sugar Quota III* judgement[14] of the Constitutional Court of the Czech Republic from March 2006. In their complaint, the conservative opposition MPs argued that the EU regulation of the sugar market amounted to the violation of the right to free commerce activities. The Court declared the national regulation void on procedural grounds and basically reiterated the position of the German Constitutional Court regarding the delegation of powers and the relationship between Member State constitutions and EU law in the following words:

> the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state.[15]

The Czech Court also acknowledged 'a definite principle of constitutional self-restraint'[16] regarding economic measures flowing from the EU policies and the case law of the ECJ. Due to this self-restraint in economic matters, the Court refused to review the EU law-based sugar quota regulations. Repeating the *so long as (Solange)* formula of the German Constitutional Court in the Czech context, it, nevertheless, specifically recalled Art. 9(2) of the Czech Constitution protecting the substantive core of the democratic state, which is considered unchangeable by any constitutional amendments and laws. According to the judgment, any transfer of national competences to the EU must comply with the very essence of the democratic republic and its laws founded on the rights and freedoms of citizens. These foundations protected by Art. 9(2) of the Constitution are unalterable and therefore impossible to transfer to another political and juridical entity, such as the supranational EU.

However, the most important contribution of the Constitutional Court of the Czech Republic to the jurisprudence of constitutional sovereignty is to be found in its landmark

14 The ÚS's judgment of 8 March 2006, Pl. ÚS 50/04 (the Sugar Quota III Case). Available at: <www.usoud.cz> [last accessed on 24 January 2014].

15 Ibid, part VI. B.

16 Ibid, part VI. A-3.

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Lisbon I[17] *and Lisbon II*[18] judgements.[19] In these judgments, the Court rejected the absolutist notion of sovereignty in the Europeanised and globalised polities and stated that 'today sovereignty can no longer be understood absolutely; sovereignty is more a practical matter'.[20] It is not an existential matter of the *either–or* choice. Sovereignty, rather, can be pooled, shared and divided and, therefore, exercised by participating in supranational, international and transnational global legal and political settings.

In the para. 104 of the *Lisbon I* judgement, the Court commented on the paradoxical semantics of state sovereignty in the post-sovereign EU constellation by stating:

> The European Union has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity sui generis, which is difficult to classify in classical political science categories. It is more a linguistic question whether to describe the integration process as a 'loss' of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., 'lending, ceding' of part of the competence of a sovereign. It may seem paradoxical that the key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences.[21]

According to the Court, the guaranteed constitutional review of the scope and the exercise of the transferred powers and the possibility of future changes means that the state's sovereignty is not weakened. Sovereignty, rather, signifies the state's dynamic legal status defined by European law which, nevertheless, is an outcome of close collaboration and participation of Member States of the EU including the Czech Republic. This collaboration evolves and the very meaning of state sovereignty, therefore, is subject of historical change.

The Court subsequently makes a lengthy comment on state sovereignty and globalisation in its judgements when it states:

17 The Czech Constitutional Court's judgement of 26 November 2008, Pl ÚS 19/08 (The Treaty of Lisbon I Case). Available at: <www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=484&cHash=621d8068f5e20ecadd84e0bae0527552> [last accessed on 22 December 2016].

18 The Czech Constitutional Court's judgement of 3 November 2009, Pl ÚS 26/06 (The Treaty of Lisbon II Case). Available at: <www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276> [last accessed on 22 December 2016].

19 I analyse these judgments in details in my article 'The semantics of constitutional sovereignty in post-sovereign "new" Europe: A case study of the Czech Constitutional Court's jurisprudence' 13(1) *International Journal of Constitutional Law* (2015) 180-199. The following section, therefore, is a brief summary of my general argument formulated in this article.

20 Supra n. 17, para. 4 of the introductory reasoning summary.

21 Ibid., para. 104.

> The global scene can no longer be seen only as a world of isolated states. It is generally accepted that the state and its sovereignty are undergoing change, and that no state is such a unitary, separate organization as classical theories assumed in the past. An international political system is being created in the global scale that lacks institutionalized rules of its own self-government, such as the international system created by sovereign states had until now. It is an existential interest of the integrating European civilization to appear in global competition as an important and respected force. These processes quite clearly demonstrate that the sovereign legitimate state power must necessarily observe the ongoing developmental trends and attempt to approach them, understand them, and gradually subject this spontaneous globalization process, lacking hierarchical organization, to the order of democratic legitimacy.[22]

However, the most important conclusion of the Court in the *Lisbon I* judgment is that fundamental constitutional *values* and their protection cannot be compromised even by the concept of *the people* as a source of all power in the state. Because these rights and values are protected at both the national and EU level, suspending the rights because of membership in the EU does not come into consideration and the Court concluded that this parallel protection of the rights and values at the EU and national level was evidence that reinforced 'the arguments that the two systems, domestic and Union, are mutually compatible and support each other in the most important area, concerning the very essence of law and justice'.[23]

The Court thus adopts the view of the EU as an avant-garde organisation reformulating the notion of sovereignty as both substantive value and formal legal constraints on the freedom of state actions beyond the common framework of international law. This institutional and conceptual layout is summarised as follows:

> in a modern, democratic state, governed by the rule of law, state sovereignty is not an aim in and of itself, in isolation, but is a means for fulfilling the fundamental values on which the construction of a constitutional state governed by the rule of law, stands.[24]

According to this view, the fundamental values of democracy and the rule of law take precedence over state sovereignty. The concept of sovereignty as independent exercise of the state power both internally and externally is obsolete in global society in which states enter multiple relationships and legal obligations or political commitments. Instead of simply contrasting national representative democracy to the supranational organisation

22 Ibid., para. 105.
23 Ibid.
24 Ibid., para. 14 of the introductory reasoning summary.

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of the EU, the Court called for scrutinising all forms and techniques of governing, whether local, national or supranational, in terms of their consistency with democratic values, which obviously cannot be limited by forms and techniques of political representation exclusively facilitated at the nation state level.

22.4 On Prospects and Theory of European Constitutionalism

Central European examples of constitutional doctrines and jurisprudence of sovereignty show the self-reference of current European politics and law and its unity of conceptual contradictions. Although the EU certainly transgresses its nation state segmentation, the concepts of sovereignty, statehood and democratic legitimacy continue to determine its legal and political semantics.

Reflecting on these developments, I believe that understanding the current processes of constitutionalisation of European society and the persisting semantics of sovereignty requires adopting Luhmann's well-known and widely discussed view of constitutions as organisations – subsystems of structural coupling between the systems of positive law and politics. As specific organisational subsystems, constitutions are not just political institutions of the nation state and can organise structural coupling between law and politics at local, subnational, supranational and transnational levels, too.

According to Luhmann, power is the political system's medium. Nevertheless, this power is the subject of a secondary coding by legality as the legal system's medium. Power is thus subject to the law and can amend the existing laws only through the legal process. From the sociological point of view, the rule of law means exactly this self-referential juridification of power, which is thus distinguishable from moral and ideological concepts of the rule of law as normative foundations of liberal and constitutional statehood.[25]

The self-referential juridification of power is not organisationally constrained to the modern state and stretches the self-constitution and self-inclusion of mutual coupling between the media of power and legality to the level of European and global society. The secondary coding of power by the medium of legality actually serves as a catalyst for the differentiation of politics and law of European and global society. European and global supranational and transnational constitutional theories including theories of sovereignty and post-sovereignty must address this structural coupling between politics and law and examine power structures evolving beyond the nation state and their various forms of constitutionalisation.

Post-Maastricht social, legal and political developments in the EU, the failure of its constitution-making process in 2005, the Eurozone crisis and other recent events illuminate profound structural changes in European politics and law. If the EU used to be

25 Niklas Luhmann, supra n. 7, 213.

described as a 'constitution without constitutionalism'[26] and a 'constitutionalism without constitution'[27] by some scholars, it also can be labelled as a polity in the state of exception and unprecedented crisis. For instance, Christian Joerges speaks of 'constitutional emergency'[28] and warns against the idea and practice of pushing the political Union 'through the back door' of crisis management techniques without democratic legitimacy and accountability. In light of the current crisis of the Union, Joerges argues that it is necessary to take seriously all aspects of European integration – the economic, legal and political – and focus on the political dimension of economy as well as the economic dimension of legal regulation. A nuanced critical approach highlighting the importance of mutual understanding between European economists, lawyers and politicians is preferable to the simplistic recipes of political mobilisation.

Indeed, EU law and politics studies introduced the concepts of European constitutional pluralism into legal theory decades ago. Multilevel governance-driven post-constituent constitutionalisations within and beyond the state have been explored and analysed in great detail by many political and legal theorists.[29] Structural links between the EU's governance and constitutionalisations of different domains of EU politics have been closely examined by others who have become much more sceptical about the common meaning of constitutionalism and invite their readers to consider contemporary complex society's administration 'beyond constitutionalism'.[30]

In this context, EU constitution-making efforts may retrospectively resemble a useless act of modern political and legal nostalgia doomed to be rejected by the peoples of Europe. However, the autopoietic social systems theory invites us to rethink the EU's unique constitutional condition beyond the political and juridical canon of constitutionalism and as part of general social theoretical conceptualisations.

The EU is in its deepest crisis, yet constitutionalisations of the different subsystems of European society often evolve beyond and independently of EU policy making. When

26 J.H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) 298.

27 Antonin Cohen, 'Constitutionalism without Constitution: Transnational Elites between Political Mobilization and Legal Expertise in the Making of a Constitution for Europe (1940s-1960s)', 32(1) *Law & Social Inquiry* (2007) 109-135.

28 Christian Joerges, 'Integration Through Law and the Crisis of Law in Europe's Emergency' In *The End of the Eurocrats' Dream: Adjusting to European Diversity*, edited by Damian Chalmers, Markus Jachtenfuchs and Christian Joerges (Cambridge: Cambridge University Press, 2016) 299-338 at 299.

29 Among many books and articles, see, for instance, Neil MacCormick, 'Beyond the Sovereign State', 56(1) *The Modern Law Review* (1993), 1-18; Richard Bellamy and Dario Castiglione (eds.) *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford: Blackwell Publishers, 1996); Ingolf Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited', 36 *Common Market Law Review* (1999), 703-750; Neil Walker, 'The Idea of Constitutional Pluralism', 65(3) *Modern Law Review* (2002), 317-359; Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism', 2(1) *European Journal of Legal Studies* (2007), 1-21; Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Oxford: Hart Publishing, 2012).

30 Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Constitutional Law* (Oxford: Oxford University Press, 2010).

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applying the autopoietic social systems theory, the Union's political constitution and self-constitutionalisation may be perceived as part of evolving European society and not as its ultimate normative settlement, existential precondition and value legitimation. Instead of perpetuating the popular fiction of a society constituted by political will and regulated by the body of legal norms expressing the shared way of life of the whole polity, the concept of European constitution can be reformulated as the self-constitution of the systems of European law and politics. In short, the constitution of Europe is not a metaphor for European unity but the concept reflecting on the functional differentiation and complexity of European society.

Furthermore, this process of Europe's self-constitution[31] avoids considering the concept of constitution as a political instrument combating the increasing risks of the EU's fragmentation and disintegration. These processes actually fit into the larger pattern of constitutionalism evolving through fragmentations as well as unifications. European constitutionalism, as one can see especially after Brexit, consists of both integration and disintegration and its fragmentations need to be studied by EU legal and political theorists.[32]

There is no chance of creating social harmony, normative stability and unity by some political constitution drafted by the EU for its peoples. The concept of constitutional pluralism adopted by scholars in the last two decades needs to be reformulated and reconceptualised vis-à-vis societal pluralism and the impossibility of limiting problems of legal pluralism to the dilemmas of normative validity and political authority. The process of European constitutionalisation actually describes multiple self-constitutionalisations of post-sovereign European society. Indeed, these self-constitutionalisations involve collisions and may lead to systemic asymmetries usually described as crises, such as the Eurozone and Schengen crises hitting the EU in the second decade of this century. The self-constitution of European society subsequently needs to be perceived as pluralistic processes of societal differentiation, part of which is the functional differentiation of the EU's politics and law described as a post-constituent constitutionalisation without a written legal constitution.

31 See, for instance, Jiří Přibáň (ed.), *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (London: Routledge, 2016).

32 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press, 2012).

23 Transnational Constitutionalism and Legal and Cultural Pluralism

Michel Rosenfeld[*]

23.1 Introduction

There is a vigorous and contested debate on whether global or transnational constitutionalism is meaningful, and even if it is, whether it is desirable. On the one hand, some claim that we are witnessing the simultaneous internationalization of constitutional law and constitutionalization of international law.[1] On the other hand, others argue that working democratic constitutions with their characteristic combination of limitations on the powers of the state, adherence to the rule of law, protection of fundamental rights and guarantees regarding maintenance of adequate levels of democracy, are effectively confined to the realm carved out by the nation-state.[2] Nation-state constitutions differ from existing and plausible legally pluralistic regimes operating at a global or transnational level in three crucial ways. National constitutions combine unity and hierarchy while enduring in a politically, socially, and culturally pluralistic environment through strong bonds of national identity and constitutional identity spreading through the citizenry. At the transnational level, there is neither unity nor hierarchy – as evinced by European Union (EU) member states constitutional courts assertions of supremacy of their national constitution over EU laws contrary to the Court Of Justice of the EU's (CJEU) claims of EU supremacy[3] and the CJEU itself asserting supremacy of EU fundamental rights protection over internationally binding UN Security Council issued legal obligations.[4] Moreover, at the global and transnational level, there is a lack of peoplehood and hence of an equivalent to thick bonds of national or constitutional identity.

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1 *See* Wen-Cheng Chang and Jiunn-Rong Yeh, *Internalization of Constitutional Law* and Erika de Wet, *The Constitutionalization of Public International Law* in *The Oxford Handbook of Comparative Law* (Michel Rosenfeld and Andras Sajo, eds., Oxford University Press 2012) at 1165 and 1209, respectively.

2 *See, e.g.*, Jeffrey Dunoff, *The Politics of International Constitutions*, in *Ruling the World? Constitutionalism, International Law, and Global Governance* 178, 199-202 (Jeffrey L. Dunoff and Joel Trachtman eds., Cambridge University Press 2009).

3 *See, e.g., Lisbon Treaty Case,* 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 (German Constitutional Court 2009).

4 *See P. Kadi v. Council and Commission*, [2008] E. C. R. I-6351 (CJEU).

Can a case be made for the possibility and desirability of transnational constitutionalism In spite of the above-noted differences? In what follows, l attempt to shed some light on whether the concept of global constitutionalism is altogether a meaningful one, and on whether it would be useful or desirable to pursue global constitutionalism in case its deployment were plausible or symbolically productive as a counterfactual ideal. In order to do so, it is necessary to address both prescriptive and descriptive issues and to assess both factual and counterfactual considerations. Part I focuses on certain key jurisprudential issues that confront constitutionalism as a concept above and beyond any particular context in which it may be operative, concentrating particularly on how constitutionalism may be suited to handle the dynamic between identity and difference which is bound to be encountered in any contemporary polity. Part II examines the features, functions, and elements of legitimacy that a nation-state constitution must possess in order to approximate the ideal of constitutionalism. Part III explores the possibilities and plausibility of global constitutionalism in terms of the insights concerning nation-state constitutionalism developed in Part II. Finally, Part IV addresses the issue of the desirability of global constitutionalism in the context of the dynamic at the level of the nation-state between liberal and illiberal constitutions.

23.2 Constitutionalism, Constitution, and the Dynamic between Identity and Difference

23.2.1 The Social Contract Metaphor, Liberal Constitutions, and Factual and Counterfactual Legitimation

The central purpose of a modern democratic constitution is to reconcile identity and difference sufficiently within the relevant polity so as to make self-government at once possible and (at least in principle) acceptable to all members of the said polity as legitimate. Accordingly, the concept of the modern democratic constitution is well captured in the metaphor of the social contract, which bears analogies to the legal contract.[5] The latter provides the legal means to reconcile identity and difference among the parties to it by affording them the means to reach a "meeting of the minds" that carves out a unity of purpose amidst differences in interests. Similarly, social contractors with a plurality of divergent interests, but united in their desire to live together in a fair and mutually acceptable political unit, manage to reconcile what unites them and what sets them apart through their agreement to be mutually bound by their social contract. Moreover, a con-

5 For an extensive discussion of the similarities and differences among the social contract, as conceived by Locke, Hobbes, Rousseau and Kant, and the legal contract, particularly as it emerged during the era of freedom of contract, *see* Michel Rosenfeld, *Contract and Justice: The Relation between Classical Contract Law and Social Contract Theory*, 70 Iowa L. Rev. 769 (1985).

stitution envisioned as social contract can thus be viewed as capable of reconciling the plurality of interests, values, ideologies, political visions, cultures, religions, etc., within the relevant arena of interaction and the identity underlying the commonly shared aspiration to cohere into a single political unit. And consistent with that, a liberal constitution is committed to account in some fashion for the differences among all those within the relevant arena of interaction.

The social contract serves as an apt metaphor for a liberal constitution's aspiration to combine a unity of the whole of all those subject to the constitutional order within a polity and its need, for purposes of legitimacy, to leave or make sufficient room for relevant differences among all those within its scope to find adequate expression. Adapting Habermas's criterion whereby laws are legitimate if they can be conceived as both self-imposed and binding,[6] a constitution could be deemed legitimate if it could be counterfactually reconstructed as a social contract-like arrangement that a person concerned would subscribe to and agree to be bound by. Liberal constitutions are thus supposed to be made by "We the People" for "We the People" and implemented by the latter as the product of its own will, or to borrow Rousseau's expression, as the expression of its "general will."[7] That, however, is *factually* impossible if for no other reason than that for any constitution applicable during the lifetime of several generations the "We the People" who make the constitution is not the same as those for whom it is made and who must accept it as (self) binding. Also, the factual impossibility at stake is the same whether a constitution is made for a city-state like Rousseau's Geneva, a nation-state like France or the US, a transnational polity like the EU, or a global political union that encompasses all human beings throughout the world. Moreover, turning to actual historical experiences such as that of the US, the "We the People" who made the country's 1787 Constitution excluded many of those contemporaries who became subject to its prescriptions, such as women or African American slaves.[8] In short, factual legitimacy is impossible not only because of the temporal dimension of multi-generational constitutions, but also because of inevitable shortfalls regarding democracy. The social contract requires the unanimous consensus of all those bound by it and no actual constitution-making or ratifying could possibly be unanimous or account for all relevant differences while maintaining a coincidence or full continuity between the constituent power (*pouvoir constituant*) and the constituted power (*pouvoir constitué*).

As constitutional legitimation cannot be factual, it must be *counterfactual.* But that poses a thorny theoretical problem to the extent that the validity of a contractual arrange-

6 *See* Juergen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (trans, W. Rehg, The MIT Press 1996), at 38-39.

7 *See* Jean-Jacques Rousseau, *The Social Contract* 18 (Charles Frankel, ed., Hafner Publishing Company 1947) (1762).

8 The Framers of the 1787 US Constitution were fifty-five white males and women and slaves could not vote at the ratifying conventions on which the Constitution depended for its final adoption. *See* Michel Rosenfeld, *The Identity of the Constitutional Subject* (Routledge 2010).

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ment depends not only on the *terms* of the contract but also on the *fact* that an agreement was reached among the parties to it. If two actual legal contracts for the sale of identical goods differ regarding their respective terms, they can still be equally valid and binding so long as each pair made up of a buyer and a seller has had an actual "meeting of the minds." As no social contract or constitution can count with the actual agreement of all those who are meant to be bound by it, the factual agreement requirement must be replaced by a counterfactual one. What would or should the relevant social contractors or citizens subject to a particular constitution have agreed to? Can there be any meaningful broadly acceptable criterion of the relevant "would" or "should"?

There seem to be essentially four possible answers to this last question. The first is suggested by theories such as Rawls's hypothetical social contract concluded behind "a veil of ignorance"[9] and Habermas's consensus-based discourse theory.[10] These theories combine a proceduralist approach with a deontological one and maintain that questions of justice and of the right can be answered independently of questions of the good. Accordingly, whatever differences regarding what constitutes the good may exist within a polity, constitutional essentials, to borrow Rawls's term,[11] consistent with the ideal of constitutionalism may be derived from universally applicable criteria of justice and of the right. Accordingly, the first answer to the question under consideration is that there is a universally applicable path to the ideal of constitutionalism based on a counterfactual procedure and on the availability of a justice-based universal means for the achievement of constitutional unity above all actual differences. The unity at stake finds specific expression in Habermas's concept of "constitutional patriotism,"[12] which is encapsulated in the notion that one can rise above all particular differences, be they sectarian, cultural, national, or ethnic, to commit to a common project of forging a unified polity resting on universally shared constitutional values. Moreover, it follows from this answer that constitutionalism and constitutional patriotism are equally conceivable at all levels of political interaction, spanning from the city to the globe.

The second answer to the question under consideration draws on critical theory to assert that there is no way to provide any comprehensive, universal, or fully persuasive counterfactual justification of why all those subjected to a constitution might or ought to feel legitimately bound by it. Underlying this answer is the conviction that constitutions must be historically contingent, as indicated by the US "We the People" example alluded to above, and that the constitutional institutions, values, and norms that are enshrined in any particular constitution are bound to be biased in favor of the agenda and conception of the

9 *See* John Rawls, *A Theory of Justice* (Harvard University Press 1971).

10 *See* Juergen Habermas, *Between Facts and Norms, supra*. Although Habermas's discourse theory is not strictly social contractarian, it certainly fits within that general tradition. *See* Michel Rosenfeld, *A Pluralist Critique of Contractarian Proceduralism*, 11 Ratio Juris 291-319 (1998).

11 *See* John Rawls, *Political Liberalism* 156 (Columbia University Press 1993).

12 *See* Juergen Habermas, *Between Facts and Norms*, at 118.

good of some of those subjected to that constitution to the exclusion or detriment of others who are similarly situated. A good illustration of this position is provided by the Critical Legal Studies (CLS) critique of rights to the effect that what purports to be universally applicable fundamental rights in the equal interests of all turn out to be fit to advance the interests and values of some to the exclusion of those of others.[13] Consistent with this critical perspective, there are neither factual nor plausible counterfactual reasons why *all* those subjected to a particular constitution would or should genuinely consent to be bound by it. Liberal constitutionalism includes all relevant perspectives *in principle*, but embraces *in fact* only the perspectives of some. Furthermore, because of its inability to incorporate or rise above the perspectives of all concerned, liberal constitutionalism fails to achieve overall legitimacy at all levels whether national, sub national, or transnational.

The third answer to the above question relies on the assumption that a coherent constitutional unit holds together only insofar as all those subject to it share a common identity. Leaving aside for the moment what particular identity might be at play, be it ethnic, national or constitutional in nature,[14] the idea is that all concerned would or should embrace the constitution to which they are subject as their own. In other words, from this perspective, there is a sufficiently defined commonly shared identity among all those subject to a given constitution in order for everyone concerned to factually or counterfactually[15] accept the prevailing constitutional order as part of who he or she is. Moreover, the common identity at stake would have to be a thick one rather than a thin one and it would have to be internalized rather than derived from abstract principles such as those put forth by Rawls or Habermas. From this perspective, the social contract would either be superfluous or it would be used to reinforce existing bonds of identity rather than to mediate between identities and differences. Moreover, it would appear that heavy emphasis on a common identity would be most compatible with a city-state or an ethnically homogeneous nation-state, but not with a transnational polity in which clusters of differences would seem bound to far outweigh clusters of identity. Adoption of this third answer does not necessarily preclude a transnational constitution, however, to the extent that national identity and the continuity of the nation-state depend on common projection of an "imagined community."[16] Indeed, as Anderson emphasizes, a nation, as opposed to a family or a tribe, is made up of strangers and it cannot cohere into a working unit unless it is propelled to imagine itself as a distinct community.[17] In view of this, if a

13 *See* Mark Tushnet, 'An Essay on Rights', 62 Texas L. Rev. 1363 (1984).

14 For a discussion of the distinction between national and constitutional identity, *see* Michel Rosenfeld, *The Identity of the Constitutional Subject*, Ch 1 (2010).

15 Counterfactual acceptance, in this context, refers to instances where a person factually rejects the legitimacy of the relevant constitutional order while actually sharing the same background and values with those who do accept the constitutional order in question as the legitimate reflection of their identity.

16 *See* Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).

17 *Id.*, at 7.

nation-state, including a multi-ethnic or multicultural one, can imagine itself as a community, then there seems to be no logical impediment for a transnational complex of interacting members to do likewise. It may be that the larger and more diverse the relevant unit may be, the more difficult it would become for it to imagine itself as a single community. But that would seem to be due to differences in degree rather than differences in kind.

Finally, the fourth answer to the question under consideration, which is the one endorsed in this chapter, relies on a dynamic approach that partially incorporates and redeploys the respective conceptions that inform the three previous answers. From this perspective, principles meant to bridge the gap between differences carved out in the confrontation among competing conceptions of the good without however transcending the latter combine with a common identity that is always under construction and subject to change. This leads to a two-level dialectic – one focused on justification, the other, on differentiated identification – pitting identity against difference that cannot evolve toward any definitive resolution and thus inevitably falls short of any comprehensive, definitive or all-encompassing legitimation of any prevailing constitutional order. In terms of the social contract metaphor, the dialectical perspective under consideration is perhaps best imagined as a social contract that is perpetually in the making without ever culminating into a final agreement. The contractors agree to continue negotiating and working to manage and accommodate their differences. This agreement to continue working toward an agreement constitutes the social contractors' pole of identity, which is set against an array of differences that are sufficiently accommodated to propel the contractors to continue dialoging and bargaining while at the same time remaining impervious to the degree of integration that would allow for consummation of the social contract. Furthermore, what this implies in terms of the corresponding constitution is an ongoing juxtaposition of the *pouvoir constituant* and the *pouvoir constitué*. In other words, the making of the constitution is endlessly ongoing and under debate and contestation, but at the same time the said constitution must be postulated as settled to the extent necessary to maintain the unity, order and cohesion that are required for the peaceful continuation of a joint search for a fully realized constitution that would strike the right balance between identity and difference.

From the perspective associated with the fourth answer, Rawlsian and Habermasian theories, which derive from Kant, fall short in as much as they overemphasize identity at the expense of difference by minimizing differences or underestimating their resilience.[18] On the other hand, critical approaches, such as those put forth by CLS, tend to overemphasize difference at the expense of identity, either by embracing relativism and thus foreclosing any bridges among competing conceptions of the good, or by reducing law, including the law

18 *See* Michel Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures: A Pluralist Account*, Ch. 1 (2011) for a detailed discussion of this point.

of the constitution, to power politics, thus setting insurmountable hierarchies among differences, which preclude any meaningful harmonization.[19] In addition, pinning constitutional unity on a full-blown common identity without more appears too unlikely and too fortuitous for purposes of securing a working account of constitutional legitimation. The constitutional model that comes closest to grounding the constitution on a thick pre-given common identity is the ethnocentric one, but even that model requires some mediation.[20] Indeed, a self-sufficient unmediated thick common identity is conceivable at the level of the family or the tribe, but not at that of any constitutional project among strangers. Accordingly, to the extent that a constitution is in the nature of a social contract among strangers, it does depend on a common identity, but it must be a constructed one along two distinct dimensions: the identity that unites all those whose constitution it is,[21] and the identity that shapes the particulars of the constitution. In other words, the dual identity in question concerns respectively the "who" and the "what" that demarcate the singularity of any actual constitution.

The latter "who" and "what" must be linked through a common identity, meaning that who is included depends on what is shared in common and conversely that the particulars of any commonly shared narrative depend on who is included and who is excluded. For example, the 1787 US Constitution, which accommodated slavery excluded slaves from becoming part of the "who," but the repeal of slavery after the US Civil War arguably allowed for integration of ex slave owners and ex slaves in a modified constitutional narrative boosted by the introduction for the first time of an equality right.[22] More generally, as I have argued at length elsewhere, constitutional identity, as distinguished from national identity, is better understood as amounting to *a lack* primed to reprocessing elements of national identity as well as of several extra-constitutional narratives in order to set forth the salient characteristics of an imagined constitutional community.[23] Furthermore, the reprocessing involved is principally carried out through three discursive devices: negation, metaphor and metonymy.[24] More specifically, to arrive at a workable constitutional identity, one must start with negation involving rejection of other identities, such as the national and other pre- and extra-constitutional ones, followed by a reconstruction (that includes incorporation of certain elements from the rejected identi-

19 For a discussion of CLS's tendency to reduce law to power politics, *see* Michel Rosenfeld, *Just Interpretations: Law Between Ethics and Politics*, 113, 333 and 338 (1998).

20 *See* Michel Rosenfeld, *The Identity of the Constitutional Subject*, at 152-156 (2010).

21 This identity can be that of an ethnic group or of all those persons who happen to reside in an existing (pre-constitutional) political unit. *See* Michel Rosenfeld, *The Identity of the Constitutional Subject*, at Ch 1.

22 *See* US Const. Am XIV (1868). Although it was impossible for slaves to belong to the constitutional "who," it is a matter of debate at what point the ex slaves may be reasonably considered to have signed on to a joint project. It seems of course plausible to argue that so long as official racial segregation was deemed constitutional, the ex-slaves would have had no reason to regard themselves as partners in a common constitutional project.

23 *See* Michel Rosenfeld, *The Identity of the Constitutional Subject*, at 64-65.

24 *Id.*

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ties) along an axis of synchronic unification (metaphor) and an axis of diachronic differentiation (metonymy).[25]

Still within the ambit of the path foreseen by the fourth answer, the process of identification achieved through the dynamic unfolding of a constitutional identity must be combined with a process of justification that comprises an attempted reconciliation of the normative imperatives deriving from the ideal of constitutionalism with the identity-based particulars elaborated through the work of negation, metaphor and metonymy. Accordingly, an acceptable instantiation of a working order sustaining a mutually reinforcing justification of a limitation of the powers of government, adherence to the rule of law, protection of fundamental rights and maintenance of an adequate level of democracy must be tailored to the particular "who" and "what" carved out by the deployment of the relevant corresponding constitutional identity. As both the constitutional "who" and "what" and the justification will inevitably remain contested and contestable in terms of an acceptable or optimal equilibrium between identity and difference, both identification and justification will be subject to an ongoing dialectic pursuant to which resolution of one conflict will lead, without exception, to another conflict characterized by a shift in poles of opposition and in the clash of perspectives. The dialectic in question will not lead to any final resolution allowing for a full harmonization of identity and difference with the consequence that all legitimation of a constitution will be incomplete and less than fully inclusive.

In sum, the dialectic involved will be Hegelian in nature, but without any continuous course of historical progress or any prospect of final resolution.[26] Moreover, in line with the idea discussed above of engagement in an ongoing social contract negotiation with a final meeting of the minds yet to be achieved, the pertinent counterfactual criterion of legitimation would address why one would or should continue her commitment to work as a would-be contractor in a social contract in the making. And such commitment would or should depend on articulation of a reasonable basis for sufficient identification with the current status of the "who" and "what" with the prospect of greater identification through further contractual negotiation within a plausible horizon of possibilities. In view of the plurality of considerations and the dialectical approach associated with this fourth answer, the latter does not – at least *ex ante* – favor or preclude constitutionalism for the city, the nation-state, the transnational region or the world.

25 *Id.*, at 58-65.

26 *See* Michel Rosenfeld, *Law, Justice, Democracy and the Clash of Cultures* (Cambridge University Press 2011) at 42-51 for an extended discussion of the kind of Hegelian approach presently suggested in the context of the handling of conflicts between identity and difference from the standpoint of comprehensive pluralism.

23.2.2 Aligning the "Constitution's Law" with Adherence to the Rule of Law

For a liberal constitution to be both practically viable and normatively defensible, it must combine what the constitution prescribes, which may be referred to as the "constitution's law,"[27] with a constitutional guarantee of adherence to the rule of law. On the one hand, the constitution's law is not the equivalent of the constitution as law, or in other words, what a constitution prescribes need not be reduced to law or be made legally enforceable in order to become functional or normatively adequate. Thus, for example, the French 1789 Declaration of the Rights of Man and the Citizen, incorporated in several of France's many constitutions, did not become judicially enforceable before adoption of France's current 1958 Constitution.[28] Consistent with this, the rights enumerated in the 1789 Declaration functioned as political rights rather than as legal rights for the most part of their history.[29] On the other hand, adherence to the rule of law – at least in the sense of commitment to a regime of prospective publicly proclaimed laws applied with consistency and integrity – need not be tied to a (liberal) constitution as evinced by the emergence of the positivistic *Rechtsstaat* in Germany in the aftermath of that country's failed 1848 *bourgeois* revolution.[30] Thus, for example, the positivistic *Rechtsstaat* would be perfectly compatible with parliamentary adoption and judicial application of a law that would violate fundamental rights routinely protected under all contemporary liberal constitutions.[31]

In the context of nation-states with a liberal constitution, there is generally sufficient congruity and continuity between the constitution's law and the constitution as law to provide a solid constitutional grounding to adherence to the rule of law. Ordinarily, the constitution's law, whether written or unwritten, provides for a sufficient body of (constitutional) law subject to judicial interpretation and application and to executive enforcement to guarantee limitation of powers, adherence to the rule of law, protection of fundamental rights and to maintain some acceptable level of democratic self-government.[32] How much constitutional law derives from the constitution's law varies from

27 The "constitution's law" should be distinguished from what Dicey termed the "law of the constitution," which only encompasses those prescriptions of the constitution that are judicially enforceable. *See* A. V. Dicey, *Introduction to the Study of the Law of the Constitution* 22-24 (3d Ed. 1889).

28 *See* Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', 74 S California L. Rev. 1307, 1330-1033 (2001).

29 *Id.*

30 *Id.*, at 1324-1326.

31 In contrast, under contemporary Germany's constitution, the *Basic Law*, the validity of parliamentary laws is subject to judicial invalidation by the Federal Constitutional Court for failure to comply with protection of constitutionally enshrined fundamental rights. Accordingly, the positivistic *Rechtsstaat* – which is best understood as meaning "state rule through law" – has been supplanted by the *Verfassungsstaat*, that is, "state rule through the constitution as law." *See* Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' at 1328-1330.

32 For an account of what amounts to "constitutional law" circumscribed by England's "unwritten", or more precisely uncodified, constitution, *see* A.V. Dicey, *supra*, at 21-24.

one liberal constitution to the next – for example, limitation of powers may be sustained exclusively through political deployment of checks and balances or primarily entrusted to judicial supervision – but in all cases constitutional law must be apt to mediate between the constitution's law and adherence to the rule of law for the constitution in question to remain viable and legitimate. At one end of the spectrum, all facets of the constitution's law may be made subject to authoritative judicial interpretation with the consequence that a complete overlap between the constitution's law, constitutional law and (adherence to) the rule of law would result. At the other end of the spectrum, in contrast, no judicial review of the constitution's law would be instituted or permissible. However, even in such an extreme case, so long as the constitution's law provided the means to determine whether a particular law is constitutional or unconstitutional, the body of laws that emerged as constitutional could be regarded as filling the function of constitutional law in the context of constitutionally assuring adherence to the rule of law. For instance, imagine that the relevant constitution's law vested all legislative power in a democratically elected national parliament and all judicial power in an independent judiciary charged with application of the parliament's laws to individual cases but prohibited from deciding whether the laws in question conformed in substance with the constitution. Assume further that the judiciary or another pertinent body could determine whether a law adopted by the parliament complied with the constitutional formalities established by the constitution's law – e.g., eligibility requirements for members of parliament and quorum necessary for passage of a law. Under such circumstances, the parliamentary laws meeting all formal constitutional requirements would collectively figure as a body of constitutionally pedigreed law and their judicial application with consistency and integrity would secure adherence to the rule of law.

Even in cases where the overlap between the constitution's law and constitutional law is remarkably extensive, such as in the US where both structural and rights-based constitutional claims have been treated as legal claims and subjected to adjudication for over two centuries,[33] there are bound to be gaps and indeterminacies. The latter, moreover, are particularly important in relation to assessing the possibility of transnational constitutionalism in as much as upon first impression it may appear that nation-states promote a seamless continuum between the constitution's law, constitutional law and the rule of law that any conceivable transnational constitution would seemingly inevitably fail to match. Returning to the case of the US for purposes of illustration, the gaps and indeterminacies in question are paradoxically due to a combination of lapses in the ambit of judicial review of the constitution's law and of the extensive unchecked power of the courts, and in particular of the US Supreme Court, to elaborate a sweeping corpus of constitutional law that on several occasions has significantly altered the constitution's law without recourse

33 *See Marbury v. Madison, 5 U.S. 137*(1803) (characterizing the constitution as a hierarchically superior law and asserting that vindication of disputed constitutional claims is subject to adjudication).

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to the latter's formal amendment procedure. Indeed, on the one hand, through restrictions on justiciability[34] and through additional judicial tools, such as the "political question doctrine,"[35] US courts have refrained from adjudicating certain issues squarely within the ambit of the constitution's law or relegated some of the latter to resolution by the political branches of government. On the other hand, the combination of expansive common law judgemade law through judicial decision-making and of the virtual impossibility of successfully amending the constitution relating to any controversial subject due to the high formal hurdles imposed by the US Constitution's Article V render sweeping US Supreme Court decisions practically immune from correction or reversal. Accordingly, the US Supreme has become an unchecked check in the US Constitution's scheme of check and balances[36] as exemplified by its launching what amounts to a constitutional revolution through its rejection of racial apartheid as unconstitutional after decades of declaring consistent with constitutional equality rights[37] and by its much decried decision granting recognition to an unenumerated individual constitutional right to abortion.[38]

Consistent with the preceding discussion, the mere existence of gaps and indeterminacies in the context of transnational legal regimes does not preclude the possibility of transnational constitutionalism. May these gaps and indeterminacies be greater at the transnational than at the national level? Or, must they be more confined across national borders for a genuine transnational constitutional order to be viable? The answer would seem to depend on whether the gaps and indeterminacies at stake must be counterbalanced by a strong common identity or whether they may be profitably enlisted to accommodate greater differences in the face of relatively thin bonds of identity. Moreover, the answer under consideration would also depend on whether a transnational constitutional order would be more apt to succeed by emulating its national counterparts or whether it would more likely succeed by carving out a distinct, *sui generis*, configuration.

23.3 The Nation-State Constitution Compared to Transnational Ordering in Relation to the Ideal of Constitutionalism

There are two crucial distinctions between the constitutional order that inheres in a traditional nation-state and any constitutional order that may emerge in a supra-national or global setting. Although there are divergent interests in the (even mono-ethnic) nation-state, two major factors are always present regardless of the particular constitutional identity in-

34 *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 49-53 (3d Ed., Wolters Kluwer Law & Business 2006).

35 *Id.*, at 129-134.

36 *See* Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 I.CON 633(2004).

37 *Contrast Brown v. Board of Education*, 347 US 483 (1954) with *Plessy v. Ferguson*, 163 US 537 (1896).

38 *See* L. Tribe, *Abortion: The Clash of Absolutes* (2nd ed, W.W. Norton and Company 1992).

volved: First, there is a cohesive, unified, hierarchically ordered constitutional/legal system that maximizes formal convergence among all diverse elements and interests; and, second, there is a sufficient degree of perceived commonality or overlap among competing interests to secure sufficient material convergence to avoid unduly disruptive challenges to the constitution's or the law's legitimacy. In other words, in the context of nation-state constitutions, there is a formal institutional mechanism to resolve disputes about the meaning of the constitution – e.g., a constitutional court, the parliament – recognized by the polity as a whole as authoritative even if large numbers within it disagree with numerous substantive results. At the same time, material divergences are kept within manageable bounds through adherence to inter alia, a commonly shared national and constitutional identity.[39]

As illustrated by the EU, transnational legal regimes seemingly lack the means to secure the hierarchy and unity of legal norms that nation-state constitutions have managed to institutionalize.[40] Presumably a full-fledged truly global government could impose the kind of hierarchy and unity typical of nation-states, but leaving aside the feasibility of such government, its desirability has been highly questioned going back to Kant.[41] Could transnational constitutionalism thrive nevertheless without attaining a hierarchy or unity of norms comparable to those of the nation-state? Furthermore, even assuming an affirmative answer to this question, it would seem that constitutions on a transnational or global scale would confront daunting hurdles along the axis of justification as well as along that of identification. It is hard to see how they could carve out a workable and cogent account of the 'who' and of the 'what' that could circumscribe a working constitutional order with an adequately suited constitutional identity. Indeed, the 'who', the 'We the People', seem bound to be determined in part in terms of who they are not – e.g., the American People as opposed to the French or German one – and accordingly, the 'people' of the globe would presumably lack an 'other' against whom they could rally for purposes of delimiting for themselves a sufficiently defined and congruent 'self'. Furthermore, concerning the 'what', there are undoubtedly more differences that need to be harmonized at the transnational level – e.g., more cultures, religions, ethnic and linguistic groups – than at that of any single nation-state.

There are other looming difficulties that cumulatively appear to render the prospects of global constitutionalism singularly daunting. First, treaties, whether bilateral or multilateral, are still the backbone of all transnational legal regimes,[42] and even with all the

39 For a more extensive discussion of the contrast between the nation-state constitution and transnational legal ordering, *see* Rosenfeld, 'Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism', 6 I.CON 415, at 418-427 (2008).

40 *See Solange I*, 37 BVerfG 271 (1974); *Lisbon Treaty Case*, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09.

41 Consistently with his cosmopolitan vision, Kant advocated global *governance* rather than global government, which he thought would be unduly oppressive: *see* I. Kant, *Perpetual Peace: A Philosophical Sketch* (1795), reprinted in H. Reiss (ed.), *Kant's Political Writings* (Cambridge University Press 1970).

42 *See* Erika de Wet, *supra* note 1, at 1214-1215.

integration within the EU, they remain primarily agreements among sovereigns rather than constitutions plausibly construed as social contracts among equal citizens who cohere as a single people. Second, although national constitutional regimes cannot avoid fostering gaps and indeterminacies and international law is 'law', it seems bound to remain more 'political' than nation-state law in a constitutional democracy to the extent that, lacking the same kinds of 'checks and balances', sovereign players in an international arena can avoid entrusting the ultimate interpretation of their legal obligations into the hands of others. Thus, for example, independent constitutional courts or democratically accountable parliaments typically have the last word concerning the fundamental constitutional rights of nation-states' citizens, whereas often, and even more so in the case of the most powerful sovereign powers, state signatories to human right treaties refuse to acquiesce to any independent authoritative pronouncements of their obligations thereunder.[43] Third, consistent with the EU's supposed "democratic deficit,"[44] transnational regimes, let alone global ones, seem inherently unsuited for purposes of fulfilling the minimum requirements regarding democracy imposed by the ideal of constitutionalism. And fourth, focusing particularly on the highly integrated EU and on the unifying role played by its highest court, the CJEU, some have argued that the EU does not in substance have a constitution,[45] or that the EU is ultimately a transnational administrative regime that finds all the constitutional grounding it needs in the nation-state constitutions of its member states.[46]

From the respective perspectives of the four answers to the counterfactual conundrum discussed in Part I, however, the above seeming impediments to the *possibility* of EU or global constitutionalism are hardly conclusive. In the context of the debate regarding EU constitutionalism, Dieter Grimm and Juergen Habermas have disagreed, with Grimm adopting the perspective associated with the third answer arguing against it, and Habermas adopting that underlying the first answer making the case for it.[47] The perspective adopted here, which goes hand in hand with the fourth answer above, neither allows for the confidence that Habermas has in the possibility of an EU-wide identity overcoming differences among EU member states nor shares Grimm's conception of identity as a given unsuited

43 E.g., the US has signed but not ratified the American Convention on Human Rights: *see Organization of American States, Ratification Information on the American Convention on Human Rights (Pact of San Jose, Costa Rica)*, available at: <www.oas.org/juridico/english/Sigs/b-32.html>, and has hence not subjected itself to the jurisdiction of the Inter-American Human Rights Court.

44 *See* D. Marquand, *Parliament for Europe* 64 (Jonathan Cape Ltd. 1979).

45 *See* Joseph H.H. Weiler, *The Constitution of Europe: 'Do the New clothes have an Emperor?' and Other Essays on European Integration* 238 (Cambridge University Press 1999). *But see*, Koen Laenerts and Damien Gerard, *The Structure of the Union According to the Constitution for Europe: The Emperor is Getting Dressed*, 29 Eur. L. Rev. 289 (2004) and G. Federico Mancini, *Europe: The Case for Statehood*, 4 Eur. L. J. 29 (1998).

46 *See* Peter L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press 2010).

47 *Compare* Dieter Grimm, *Does Europe Need a Constitution?*, 1 Eur. L. J. 282 (1995) *with* Juergen Habermas, *Remarks on Dieter Grimm's "Does Europe Need a Constitution?"*, 1 Eur. L. J. 303 (1995).

for adaptation beyond national boundaries. What the perspective associated with the fourth answer does hold is that consistent with the proper counterfactual query articulated above, transnational constitutionalism is possible, but that it should not be conceived in terms of a mere expansion or adaptation of nation-state constitutionalism. With that in mind, I will now explore how global constitutionalism might be possible and why it might be preferable to have recourse to a transnational constitutional construct than to the main alternatives that have been invoked given the proliferation of transnational legal regimes, such as global administration or traditional treaty-based public international law.

Against the unity and hierarchy of the nation-state, the transnational legal universe is one characterized above all by layering and segmenting.[48] The EU, for example, amounts to a regional transnational comprehensive legal regime, with an elaborate separation of powers structure and a court, the CJEU, which brings unity within the relevant layer, but does not achieve unity or hierarchy all the way down to the extent that EU member state nations maintain the supremacy of their own constitution in case of conflict between the latter and EU law.[49] On the other hand, the WTO presides over a worldwide legal regime that is segmented to the extent that it is confined to the area of trade.[50] The question becomes then not whether every layered or segmented transnational legal regime need be constitutionalized – as some of these may be purely administrative whereas others, such as the EU, are most likely not[51] – but whether some ought to, and if so whether they could come within the ambit of constitutionalism. A further question assuming that certain layered and segmented regimes ought to be constitutionalized (or best regarded as such) is whether they ought to be considered on their own or in conjunction with other layers and segments.

In terms of the dialectic between identity and difference, layered and segmented regimes share in common with unified regimes with an established normative hierarchy the need to mediate between poles of convergence and poles of divergence. For example, within a nation-state, citizens may largely agree on social and economic issues, but strongly differ on religion and similarly in a segmented regime like that of the WTO, all may converge on certain trade goals but divide according to whether they are dominant or emerging economic powers.[52] Although it may appear at first that greater con-

48 For an extended discussion of this contrast, *see* Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 Intl. J. of Const. L. 415 (2008).

49 *See* note 3, *supra*.

50 *See* Marrakesh Agreement Establishing the World Trade Organization, April 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), available at <www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement>; Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, Art. 3.2, 33 I.L.M. 1125, 1199-1200 (1994), available at <www.wto.org/english/docs_e/legal_e/03-fa_e.htm>.

51 *See* Michel Rosenfeld, *Constitutional versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 Cardozo L. Rev. 2339 (2011).

52 *See* Richard B. Stewart and Michelle Ratton Sanchez Badin, *The World TradeOrganization: Multiple Dimensions of Global Administrative Law*, 9 Int J. Const. L. 556, 581 (2011) (asserting that the interests of the US and European members have traditionally dominated the WTO).

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vergence and lesser divergence would be typical of the nation-state than of transnational regimes, this need not necessarily be the case. Thus, differences between Catalans and Castilians may be significantly sharper within Spain than within the ambit of EU institutions. Moreover, segmented regimes whether they focus on trade, security or the environment may well have more convergence and less divergence than would most likely be the case in a multi-ethnic, multicultural, religiously diverse nation state with a constitution, legal and political system that must impact and account for all subjects relevant to the polity.

One segmented transnational regime that can be persuasively characterized as constitutional and consistent with the ideal of constitutionalism is the European Convention of Human Rights (ECHR) as judicially enforced by the European Court of Human Rights (ECtHR). Formally, the ECHR is a multiparty regional treaty, but functionally it operates with the participation of the ECtHR as a partial constitution focused on the protection of fundamental (human) rights. Moreover, if one combines the ECHR and the implementation of ECtHR decisions by countries parties to the ECHR in favor of their own citizens, then one can view the constitutional regime circumscribed by the ECHR and extending downward within each member of the Council of Europe as a multilayered segmented transnational regime. Consistent with this, the fact that the ECHR is formally a treaty does not appear to hamper the possibility that all individuals protected by the ECHR could have counterfactually agreed to its provisions in the same way as they could have thus agreed to their own country's constitution bill of rights.

The only serious remaining doubt concerning the counterfactual constitutionalization of the ECHR concerns the sufficiency of the requisite identitarian convergence among all countries and individuals under its aegis. Human rights, though in principle meant to extend to all of humankind (and in the case of the ECHR to all 47 member countries of the Council of Europe), are contested as to their content and interpretation.[53] Human rights are also distinct from constitutional rights.[54] The ECtHR accounts in fact for these differences through application of its "margin of appreciation" standard.[55] Ideally, through the margin of appreciation a core of convergence among all ECHR countries can be distilled from a periphery of national divergences. The margin of appreciation, however, is a double-edged sword. At its best, it allows for greater flexibility while preserving the requisite identitarian nexus linked to constitutionalism; at worst, it is a purely political tool that allows countries to evade ECHR precepts that they find politically or culturally unpalatable.[56] Be that as it may, the availability of such a judicial tool and its

53 *See, e.g., The East Asian Challenge for Human Rights* (Joanne R. Bauer & Daniel A. Bell eds., Cambridge University Press 1999).

54 *See* Michel Rosenfeld, *The Identity of the Constitutional Subject*, at 251-253.

55 *See Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976).

56 The ECtHR's use of the margin of appreciation has been soundly attacked by some as being toothless and purely political. *See, e.g.*, Paul Mahoney, *Marvelous Richness of Diversity or Invidious Cultural Relativism?* 19 Hum. Rts. L. J. 1 (1998).

potential, if properly used, point to a plausible counterfactual means to accommodate identity and difference in a transnational constitutional context.

In contrast to the ECHR, the EU is a full-fledged layered transnational regime and at least within its own layer it seems to at least counterfactually satisfy the fundamental requirements of constitutionalism save perhaps that of democracy. Indeed, the EU Council, Commission, Parliament and the CJEU added together allow for a separation of powers comparable to that of a well-functioning nation-state constitutional democracy. Adherence to the rule of law is also satisfied as the CJEU is the ultimate interpreter of EU law and adjudicator of EU separation of powers conflicts.[57] Based on the now enforceable EU Charter of Rights[58] and even arguably before it became legally enforceable,[59] the EU affords fundamental rights protection comparable to those guaranteed by nation-state bills of rights.

There seems to be little doubt that factually the EU, at least within the regime it carves out within its own layer, is afflicted by a "democratic deficit." That may not be fatal counterfactually, but when combined with the EU's identitarian difficulties, the deficit in question does pose a particularly vexing problem. In a nation-state with a single people and strong national identity, such as France or Germany, it may be obvious on certain matters how the vast majority of citizens would vote based on commonly shared thick common identity bonds. Therefore, the lack of voting or democratic power in such a nation-state may be up to a point counterfactually compensated for based on strong identitarian bonds. In the case of the EU, however, there is a lack of, or too thin, a common identity.[60] This not only fails to alleviate the EU's democratic deficit but it compounds it with an identitarian one. In a strong democracy with weak identitarian bonds, the latter may be somewhat counterfactually mitigated by the actual approval given on some matters by clear majorities. In the EU, in contrast, weak democracy and thin identity work in tandem to take the layer carved out by the Union further away from constitutionalism.

This latter problem would be alleviated if in spite of the resulting deficit in unity and hierarchy the EU layer would be added together with the member-states layer. Before indicating how that might work, let us briefly focus on whether adding layers in the EU

57 *See, e.g.*, Case 70/88, *European Parliament v. Council of the European Communities* [1990] ECR I-2041, at para. 27 (the European Parliament can sue the European Council or Commission to safeguard its prerogatives).

58 *See* Paul Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance', 36 Fordham Int L. J. (2013) 1114, at 1116 (the Lisbon Treaty made the EU Charter of Rights legally binding and stipulated that the EU should accede to the ECHR).

59 *Cf. The German CCt Decision in the Solange II Case in 1986*, 73 BVerfGE 339:
"[A] measure of protection of fundamental rights has been established within the sovereign jurisdiction of the [now EU] which in its conception, substance and manner of implementation is essentially comparable with the standards of fundamental rights provided for in the [German] Constitution."

60 *See* Grimm, note 55 *supra.*

case would be generally preferable in the context of constitutionalism than keeping them separate. The answer seems clearly in favor of combining layers given the direct effect and the many intrusive regulations issuing from the EU layer but also ever present within the member-state layer. In short, whereas in another type of transnational regime, such as NATO, separating the distinct layers may well be the best course, in the case of the EU the opposite seems by far better. Returning now to the particular problem at hand, combining the layers may certainly at least partly alleviate the double deficit encountered at the EU level. This is perhaps most obvious at the democratic level. As emphasized by the German Constitutional Court in its *Lisbon Treaty* decision, it is part of the (nation-state) constitutional function of the German legislature to participate in the elaboration of supra-national (EU) policy.[61] Accordingly, such national democratic input in fashioning the EU legal regime may certainly factually or counterfactually lessen the impact of the EU democratic deficit. The same does not appear to be the case in the context of identity as focus on one's thick national identity may exacerbate the extent to which one's EU identity pales in comparison. Viewed more closely, however, thicker identities afford greater opportunities to distill convergences from divergences and that could be used to project elements of one's nation-state national or constitutional identity unto the supranational stage. This is all the more plausible as identities are generally construed along negative as well as positive axes. Part of being European is not being American, and before the end of the Cold War not being in addition like those in polities (though geographically also for the most part European) belonging to the Soviet Bloc.

Supranational identity is thus plausible counterfactually and it may become possible depending on the particular circumstances involved (with whom and against whom or what does one develop identity bonds). That leaves the question of lack of unity or hierarchy among layers that bedevils the EU and other supranational regimes. Here again, the formalities should not be determinative. The key instead is whether there is a workable distribution of convergences and divergences among layers to allow them to harmonize their respective institutional regimes and political regimes. Inconsistencies among layers need not be constitutionally fatal so long as they do not degenerate into incompatibilities. The German Constitutional Court has said things that are inconsistent with EU supremacy, but has so far not invalidated EU law making so as to render it inapplicable in Germany, which would create an incompatibility and which if more than merely occasional would render the EU counterfactually constitutionally indefensible.

Finally, even if in the case of the EU constitutionalism is counterfactually possible, since the EU is *sui generis* in that it is neither a federation nor a confederation and in that it lacks the unity and hierarchy typical of nation-state constitutions, why not prefer emphasizing its *sui generis* nature rather than struggling to fit it within the ambit of constitutionalism? The answer depends on which of the two alternatives would be more useful

61 *See* the *Lisbon Treaty* case, *supra* note 3, at paras. 225-226, 244, 246-247.

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and productive and having concluded that the EU can be counterfactually included within the arena of constitutionalism consistent with the fourth answer described in Part I, justifies opting for the alternative involving constitutionalism. Moreover, a similar argument can be mounted in favor of a constitutional rather than an administrative framework.[62]

23.4 On the Desirability of Global Constitutionalism

Supranational and even eventually global constitutionalism is possible counterfactually, but is it thereby desirable? Take, for instance, the UN Charter, which some have proclaimed amounts to the embryo of a world constitution.[63] According to this Charter, binding decisions of the UN Security Council (SC) have supremacy over any conflicting international obligations of UN member-states.[64] This may well seem constitutional in form, but in fact comes close to being purely political as there is no court that has the power to review SC decisions and permanent members of the SC have veto powers, which they can, and often do, use purely strategically. It seems, therefore, that in the case of the UN, it would be more salutary to avoid the constitutional framework than to use it. But what should one do in the case of other transnational regimes, such as the EU, the ECHR, or the WTO?

In the case of supranational regimes, the label "constitution" is highly contested. Moreover, in the context of transnational or global constitutionalism, any justification or legitimation seems bound to be counterfactual. Counterfactuals are normatively useful in two different ways corresponding to two distinct functions that they are particularly suited to perform. Specifically, counterfactual reconstruction can be either critical or justificatory. This can be illustrated by reference to the construct of a perfect market economy along the lines envisaged by Adam Smith. Obviously, such a perfect market is a counterfactual and it can be invoked critically to point out that actual markets always fall short and that that requires supplementing or complementing markets with non-market regimes. But conversely, such counterfactual can be used to justify existing imperfectly functioning economic markets as the closest possible approximations to a desirable ideal.

It is by no means clear whether either the critical or the justificatory function of the counterfactual associated with the ideal of constitutionalism is ultimately appropriate or useful in the case of supranational regimes that are at best arguably constitutional in

62 *See* Michel Rosenfeld, *Constitutional versus Administrative Ordering in an Era of Globalization and Privatization: Reflections on Sources of Legitimation in the Post-Westphalian Polity*, 32 Cardozo L. Rev. 2339 (2011) for an extended discussion of this last point.

63 *See* Bardo Fassbender, *'The United Nations Charter as Constitution of the International Community'*, 36 Columbia J. Transnat. L. (1998) 529 (arguing that the UN Charter functions as a world constitution).

64 *See* Erika de Wet, *Handbook*, at 1218.

nature. As claimed above, transnational constitutionalism is in principle plausible, and it is likely to some extent to raise difficulties similar to those encountered within the ambit of nation-state and to some other extent problems unlike those encountered in the context of national liberal constitutions. Under these circumstances, the first question that must be addressed in the case of transnational legal ordering – which by all reasonable accounts does not fit neatly within the paradigms of international law, administrative law, or nation-state fitted constitutional law – is whether the counterfactual relating to constitutionalism, that relating to another existing established type of legal ordering, or a new one to be designed to address the *sui generis* salient aspects of prevailing transnational legal orders would be optimally suited to provide the best means to carry out the requisite critical and justificatory counterfactual functions. For present purposes, suffice it to reiterate that, as transnational constitutionalism is plausible, use of the constitutionalism counterfactual can be defended in both its critical and justificatory dimensions. Whether transnational regimes be segmented or layered and whether they be considered separate from nation-state constitutions or in some non-fully unified or hierarchically aligned configuration allowing for significant links between the national and transnational legal orders; and consistent with the dialectical perspective endorsed above; there seem to be ample grounds upon which to conclude that treating transnational legal orders in terms of the ideal of constitutionalism is not only desirable but also preferable to the alternatives previously alluded to. Moreover, in the case of transnational legal orders, it is crucial to combine the constitutionalism counterfactual's critical and justificatory functions. To the extent that, in spite of differences, a transnational order can approximate a liberal constitution's potential for advancing limitation of powers, adherence to the rule of law, protecting fundamental rights and fostering an adequate level of democracy; it ought to be justified as perfectable under the appropriate normative criteria. For example, if a transnational order could not factually duplicate the functioning democratic institutions of a nation-state, but could nonetheless counterfactually approximate them, then – all other things being equal – it would seem justified and in most cases desirable to invoke the counterfactual's justificatory function both to buttress legitimation and to urge greater approximation.

On the other hand, in as much as a transnational order were to fall short of its national counterpart, in spite of formal or institutional convergences or on account of an absence of the latter, the counterfactual's critical function could in all likelihood be put to good use. It would thus seem more profitable, for instance, to note the constitutional defects that the EU governance allocated among the Council, the Commission, and the EU Parliament in comparison with the allocation of powers in a well-functioning nation-state parliamentary democracy[65] from a critical constitutional standpoint than from a perspective that stipulates that the ideals of constitutionalism are inapposite when con-

65 *See* Pavlos Eleftheriades, 'The Idea of a European Constitution', 27 Oxford J. Leg. Stud. 1 (2007).

sidering the EU. From a critical constitutional standpoint, not only are the particular shortcomings in a given transnational order likely to emerge in a most useful light, but also any factual or counterfactual plausible remedy to the shortcomings in question would emerge in its full constitutional implications.

23.5 Conclusion

Although by no means as firmly anchored as its nation-state counterpart, transnational constitutionalism emerges as entirely plausible. This is all the more apparent if the nation-state's liberal constitution and its transnational counterpart are gauged from the perspective of the ideal of constitutionalism. From that perspective, notwithstanding seemingly unbridgeable factual differences, both the national and transnational constitutions find expression and justification as counterfactual dialectical processes in search of a working equilibrium between identity and difference aptly captured in the metaphor of an ongoing but never concluded social contract negotiation. Moreover, because of a typical lack of unity and of full hierarchical integration, transnational constitutions seem particularly prone to displaying gaps and indeterminacies. However, though perhaps less conspicuous, careful examination reveals that nation-state constitutions are also affected by gaps and indeterminacies. In view of this and of the dialectical perspective endorsed in this article, a good case can be made that the continuities between national and transnational constitutions predominate over the discontinuities between them. And accordingly, the argument in favor of the plausibility of global and transnational constitutionalism looms as being quite strong. In addition to being possible, transnational constitutionalism appears to be desirable, at least to the limited extent of being framed so as to come within the sweep of the constitutionalism counterfactual. In other words, even if a particular transnational legal order is not squarely constitutional in nature, it turns out to be preferable to assess its potential and shortcomings in terms of the constitutionalism counterfactual than to do so from the standpoint of other potentially pertinent counterfactuals such as those carved out by the administrative law or the international law paradigm. This leaves one further important question open, namely whether it would be desirable to stir all prevailing transnational legal orders toward as great conformity with genuine constitutionalism as possible. A detailed consideration of this question must be left for another day, but, intuitively at least, the appropriate answer for each case would have to be ultimately context-dependent. Where use of the constitutionalism counterfactual as justificatory would be warranted, the push toward a constitutional ordering would tend to be preferable. On the other hand, where the counterfactual's critical role would be called for, it may well be that constitutional ordering may not provide the best means to address existing failings and shortcomings.

24 The Principle of Effectiveness as Used in Interpreting, Applying and Implementing the European Convention on Human Rights (Its Nature, Mechanism and Significance)

Georghios A. Serghides[*]

24.1 Introduction

The principle of effectiveness ensures, in different ways, that the rights enshrined in the European Convention of Human Rights (from now on the "Convention") are fully effective. It underpins the Convention system in its totality and occupies an extremely significant place in the case-law of the European Court of Human Rights (from now on the "Court").

It is perhaps the most important principle of the Convention system and it could be said that it is the most defining element of the DNA of that system. This is because the principle of effectiveness is inherent in the Convention, being an integral part of the protection of human rights and guaranteeing the rule of law all the way, from the domestic level up to the international level and then – back again – to the domestic level, in all the aspects and manifestations of the system.

24.2 As Used in Interpreting and Applying the Convention Provisions

24.2.1 Two Aspects of the Effectiveness Principle and Article 31 § 1 of the VCLT

As an interpretative method, the principle of effectiveness may be of assistance in two directions:

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a. in guaranteeing that all provisions of the Convention are useful and necessary to convey the intended meaning (an aspect described by Berlia as "the rule of useful effect"),[1] and
b. in ensuring that the Convention as a whole, and each of its provisions, intends to give full weight and effect to their object and purpose, thus leaving no room for absurdity or impossibility (an aspect described by Berlia as the "rule of efficiency."[2] This aspect is usually defined by the Latin maxim *ut res magis valeat, quam pereat*,[3] literally meaning that "it is better for a thing to have effect than to perish."[4]

Both of these aspects of the principle of effectiveness are embodied in the general provision of Article 31 § 1 to the Vienna Convention on the Law of Treaties of 1969 (VCLT), to which the Court often refers, and which reads as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The International Law Commission, which drafted that provision, clearly said that the above maxim is embodied in the provision and that "when a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation be adopted."[5]

Aristotle pointed out[6] that a sentence must have a meaning, and that the words in a text should not be read in isolation, but in their context, for the text to be understood as a whole; thus, in essence, he conceived both aspects of the principle of effectiveness.

24.2.2 Convention Preamble and Provisions

The principle of effectiveness clearly follows the idea that the Convention was intended to be an effective instrument, actually the first real effective instrument securing human rights, aided by organs, such as the Court and the Committee of Ministers. The former has become the most genuine and authoritative guarantor for human rights to be given effect.

1 "La règle de l'effet utile." See G. Berlia, "Contribution à l'interprétation de traités", in *Collected Courses of the Hague Academy of International Law*, 114 (1965-I), pp. 396 ff.
2 "La règle de l'efficacité." See G. Berlia, *op. cit.*
3 Sir William Blackstone said that "[o]ne part of a statute must be so construed by another, that the whole may (if possible) stand: maxim *ut res magis valeat, quam pereat.*" (See Sir William Blackstone, *Commentaries on the Laws of England*, 10th edn., London MDCCLXXXVII, § 3, p. 89.)
4 The importance of the object and purpose of a treaty is reflected in Article 60 § 3(b) of the VCLT by virtue of which "[a] material breach of a treaty … consists in … [t]he violation of a provision essential to the accomplishment of the object or purpose of the treaty."
5 See the *Vienna Convention on the Law of Treaties – Travaux Préparatoires*, Frankfurt, 1978, at p. 251.
6 See Aristotle, *On Interpretation*, IV.

The preamble to the Convention acknowledges the principle of effectiveness, by referring to the determination of the Member States parties "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration," which "aims at securing the universal and effective recognition and observance of the Rights therein declared."

Besides, many of the general provisions of the Convention strengthen the idea that the Convention was intended to be effective. For example, Article 1 lays down the obligation for States to secure human rights to everyone within their jurisdiction, Article 13 deals with the right to an effective remedy, and Article 34 secures the right of individual application, also providing that the member States must "undertake not to hinder in any way the effective exercise of this right."

Article 47 of the Charter of the Fundamental Rights of the European Union also guarantees the right to an effective remedy and to a fair trial, and thus corresponds to the provisions of Articles 13 and 6 of the Convention, respectively.[7]

24.2.3 Case-Law Doctrines

By virtue of Article 32 of the Convention, the Court has jurisdiction to interpret and apply the Convention.[8]

In the case-law of the Court, the principle of effectiveness has been used in different ways, always taking into account the object and purpose of the Convention. These ways, which are described below as doctrines, could be considered as manifestations or illustrations of the principle of effectiveness, proving its global and indispensable application. All these interpretative doctrines are useful tools for a judge as the surgical instruments are for a surgeon.

24.2.3.1 The Doctrine of "Practical and Effective Guarantees"

One of the ways in which the principle of effectiveness is manifested is by the Court holding that the human rights safeguards guaranteed by the Convention must be practical and effective, not theoretical and illusory, thus rejecting any formalistic approach. When the Court applies this doctrine, it takes into account the special character, object and purpose of the Convention, and, of course, the requirement of the rule of law to protect human rights effectively.

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7 Along similar lines to Article 1 of the Convention, Article 4(3) of the Treaty of the European Union reads that Member States "shall take any appropriate measure general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union."

8 As decided in *Ireland v. the United Kingdom*, no. 5310/71, 18/01/1978, § 154, the task of the Court is not only to decide, but to "elucidate, safeguard and develop the rules instituted by the Convention."

A landmark judgment where the above doctrine was enunciated was *Soering v. the United Kingdom*.[9] In that case, the Court held that the extradition of a young German national to the United States to face charges of capital murder, violated Article 3 of the Convention, because otherwise the safeguards of this provision prohibiting torture would not be practical and effective.

One of the many other cases where this doctrine was applied is *Phinikaridou v. Cyprus*,[10] where the Court found a violation of Article 8 of the Convention, because the time-limit under the domestic law within which a child could institute proceedings for the judicial determination of paternity[11] was rigid and inflexible. And it was so, since it applied irrespective of the child's awareness of the circumstances surrounding its father's identity.

24.2.3.2 The Doctrine of Positive Obligations

Another way in which the principle of effectiveness has been applied in the case-law is through the development of positive obligations, both substantive and procedural. According to this doctrine, the States are required, through all their authorities, to take the necessary measures or actions in order to secure the effective protection of the Convention rights, in addition to their negative obligations to refrain from arbitrarily interfering with them.

The development of positive obligations, through the case-law, began in 1968,[12] and since then, it has been constant and covers a wide ambit of required actions, such as conduct of proper investigations into the circumstances of a suspicious death and effective respect for family life.[13]

A significant development in the area of the positive obligations was made in 1981, when the Court,[14] for the first time, decided, that these obligations include the taking of actions or measures to protect persons against interference from other private persons – and not only State agents.

24.2.3.3 The "Living Instrument" Doctrine and the Doctrine of Implying Secondary or Ancillary Rights – Dynamic and Evolutive Interpretation

Bernhardt pertinently said that the object and purpose of a treaty "plays … a central role in treaty interpretation," and that reference to them "can be understood as entry into a certain dynamism."[15]

9 No. 14038/88, 07/07/89, § 87.
10 No. 23890/02, 20/12/07.
11 I.e. a period of three years starting from the maturity of the child.
12 Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64. 23/07/1968.
13 See *Marckx v. Belgium*, no. 6833/74, 13/06/79, § 31.
14 See *Young, James and Webster v. the United Kingdom*, nos. 7601/76, 7806/77, 13/08/1981.
15 See Rudolf Bernhardt, "Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights", *German Yearbook of International Law*, 42 (1999), 11 at p. 16.

Sir Humphrey Waldock wisely observed that there are two approaches of "dynamic" interpretation as regards the provisions of the Convention. One is to give effect "to an evolution in European legal or social concepts in determining the meaning and scope of any particular right or freedom at any given time" and the other is to acknowledge "a secondary or ancillary right not referred to in the Convention," which is "'necessarily inherent' and therefore 'implied' in one of the rights" specifically mentioned in it.[16]

I consider both of these approaches to be manifestations of the principle of effectiveness.

Starting with the evolutive approach, Dupuy suitably compares the evolution of legal norms to the Darwinian theory of evolution, by saying that the survival of species and norms could be achieved if they adapt to their environment, thus enabling them to survive in changing circumstances.[17]

Almost a century ago Justice Oliver Wendell Holmes[18] dealing with certain words in the Constitution of the United States said that

> we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism …[19]

In another case,[20] he also said that

> [a] word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used.[21]

Similarly, in 1930, Lord Sankey in a Privy Council case[22] very vividly observed that the Constitution of Canada should be seen "as a living tree capable of growth and expansion within its natural limits."[23]

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16 See Sir Humphrey Waldock, "The Effectiveness of the System Set up by the European Convention on Human Rights", *HRLJ*, I (1980), Parts 1-4, 1 at p. 3.

17 See P.-M. Dupuy, "Evolutionary Interpretation of Treaties: Between Memory and Prophecy", in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, New York, Oxford University Press 2011, 123 at p. 123.

18 In *Missouri v. Holland*, (1920) 252 U.S. 416; 40 S. Ct. 382; (1920) 64 L. Ed. 641.

19 *Ibid.*, at p. 433.

20 See *Towne v. Eisner*, (1918) 245 U.S. 428.

21 *Ibid.*, at p. 425.

22 See *Edwards v. Attorney-General of Canada*, [1930] AC 124, at p. 136.

23 The question there was whether women were "persons" who could become members of the Senate, the upper house of the Canadian Parliament. The Rt. Hon. the Baroness Hale commenting on *Edwards*, said that "the image of a 'living tree' may be more helpful than the image of a 'living instrument'. A violin is an instrument, but it has no life of its own, only the life it is given by the violinist who plays it. A tree has a life of its own, but it can only grow and develop within its natural limits."

In 1978, for the first time, the Court in *Tyrer v. the United Kingdom*[24] held that the Convention is a living instrument to be interpreted in the light of present-day conditions.[25] The Court, being influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field, found that the judicial punishment inflicted on a 15-year-old boy, in the form of whipping, amounted to degrading punishment within the meaning of Article 3 of the Convention.

In the case-law of the Court since *Tyrer*, the idea that the Convention is a living instrument has become well established, and the Court has in many cases described this interpretation as evolutive and dynamic. In particular, the concept of family and private life has evolved steadily in the lifetime of the Convention, and continues to do so, taking into account the relevant technological and societal evolution.

In *Christine Goodwin v. the United Kingdom*[26] the Court said that any failure on its part "to maintain a dynamic and evolutive approach would indeed risk rendering it [i.e. the Convention] a bar to reform or improvement." Besides, the preamble to the Convention considers that the Council of Europe's aim is

> the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms.

This consideration embodies the requisite dynamism and cultivates the idea of advancing human rights by way of evolution.

Now, an example of dynamic interpretation implying an ancillary or secondary right, can be found in *Golder v. the United Kingdom*,[27] where the Court deduced from the right to a fair hearing that a secondary right obtained: the right of access to a court, by consulting a solicitor.

It may happen that a right under the Convention is given an interpretation, which, though evolutive, will have the effect of lowering its standard rather than advancing it. This setback has been characterized as a "devolution."[28] In my view, only a constant evolution of human rights directed towards a more advanced level of protection is desir-

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Baroness Hale, "Beanstalk or Living Instrument? How tall can the European Convention of Human Rights Grow?", *Gray's Inn Reading* (2011), June 16, 2011, p. 1.

24 No. 5856/72, 25/04/78.

25 *Ibid.*, §§ 31, 35.

26 [GC], no. 28957/95, 11/07/02.

27 No. 4451/70, 21/02/75 (Plenary).

28 See Christian Djeffal, *Static and Evolutive Treaty Interpretation – A Functional Reconstruction*, Cambridge, Cambridge University Press 2016, p. 309.

able, as anticipated in the preamble to the Convention. To this end will greatly contribute, if the Court takes into account human dignity when interpreting the Convention rights,[29] since human dignity is behind every human right and its notion is elastic and susceptible to further refinement and upgrading.

Though the living instrument doctrine assists existing rights not to be petrified, it, nevertheless, does not amount to the invention or creation of new rights, and for rights which were omitted from the Convention, the principle of effectiveness cannot be employed to fill the lacuna. Only by the enactment of a new protocol, new rights, as for example the right to health care or the right to social security and assistance, which are protected under the EU Charter of Fundamental Rights,[30] could be added to the protection system under the Convention.[31]

24.2.3.4 The Doctrine "in dubio in favorem pro libertate"

The principle of effectiveness requires that a right under the Convention be given its full weight and that any limitations or exceptions to it should be construed strictly and narrowly.[32]

Any restrictive interpretation contradicts the principle of effectiveness and is not part of international law.[33]

The meaning of this doctrine is that in the case of two equally valid or arguable interpretations of a provision of the Convention, the one which favours the right secured, according to the Latin maxim *in dubio in favorem pro libertate*,[34] should be preferred.

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29 See David Feldman, "Human Dignity as a Legal Value" – part II, *Public Law*, Spring 2000, p. 75. See also partly dissenting opinion of G. A. Serghides in *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15/12/16, § 52.

30 See Articles 35 and 34, respectively, under Chapter IV entitled "Solidarity."

31 Where a right claimed is found to have been intentionally omitted from one Article of the Convention, the Court cannot proceed and find that the right is nevertheless protected by another Article. For instance, in *Johnston v. Ireland* [GC], no. 9697/82, 18/12/86, the Court, having decided that no right to divorce could be derived from Article 12 of the Convention, which specifically dealt with the "right to marry" and not with dissolution of marriage, held that the Convention must be read as a whole, and that no right to divorce and remarriage could be read into the more general provision of Article 8 of the Convention, under any evolutive interpretation of the notion of "respect for family life."

32 An instance where the Court gave a broad interpretation to a right is *Niemietz v. Germany*, no. 13710/78, 16/12/92, § 29, in which it was held that the right to "respect for home and private life" in Article 8 includes professional premises and activities. An instance now where the Court gave a narrow interpretation to an exception to a right is *Sunday Times v. the United Kingdom* [GC], no. 6538/74, 26/04/79, § 65, in which it was held that the freedom of expression under Article 10 (1) and the reference to the public interests identified in paragraph (2) of the same Article, were not two conflicting principles, but only one principle, the freedom of expression, which is subject to a number of exceptions that must be narrowly interpreted.

33 See Hersch Lauterpacht, "Restrictive Interpretation and Effectiveness in the Interpretation of Treaties", *BYIL* (1949), Vol. XXVI, 48 at pp. 50-51, 69; Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law*, Oxford, Oxford University Press 2008, repr. 2013, at p. 414.

34 Professor Rudolf Bernhardt, a former President of the Court pertinently said: "These articles [31 and 32] of the Vienna Convention [on the Law of Treaties] are remarkable in several respects. Firstly, one principle of treaty interpretation, which was often invoked in older text books, is not even mentioned. Namely, the

24.2.3.5 The Doctrine of Internal and External Harmony

The principle of effectiveness is also significant in promoting an internal and external harmony, namely, respectively, harmony within the Convention, reading it as a whole,[35] and harmony with the rules of international law,[36] since the Convention "is part of a wider legal system."[37]

24.2.4 The Relationship of the Effectiveness Principle with Other Convention Principles

I will now examine briefly the relationship of the principle of effectiveness with some other Convention principles.

24.2.4.1 Relationship with the Principle of Subsidiarity and the Margin of Appreciation

The principle of effectiveness plays a significant role not only when the Court exercises its supervisory power as a guarantor, but also when the respondent State exercises its margin of appreciation and the principle of subsidiarity applies.

It is imperative that for the effective protection of human rights, the proceedings in a given case, at both national and European level, must be conducted speedily, because justice delayed may amount to a denial of justice.

24.2.4.2 Relationship with the Principle of Autonomous Concepts

The autonomous interpretation of some concepts or terms in the Convention, such as "criminal charge" in Article 6, and "private life" or "family life" in Article 8, is another

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principle that treaties should be interpreted restrictively and in favor of State sovereignty, *in dubio mitius*. This principle is no longer relevant, it is neither mentioned in the Vienna Convention nor has it ever been invoked in the recent jurisprudence of international courts and tribunals. Treaty obligations are in case of doubt and in principle not to be interpreted in favor of State sovereignty. It is obvious that this conclusion can have considerable consequences for human rights conventions. Every effective protection of individual freedoms restricts State sovereignty, and it is by no means State sovereignty which in case of doubt has priority. Quite to the contrary, the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on the one hand and restrictions on State activities on the other."
See Rudolf Bernhardt, *op. cit.*, at p. 14.

35 An instance of this is the case of *Johnston v. Ireland*, no. 9697, 18/12/96, § 57. See note 29 above.

36 See Article 31 § 3(c) of the VCLT.

37 See Daniel Rietiker, "The Principle of 'Effectiveness' in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public International Law – No Need for the Concept of Treaty *Sui Generis*", in *Nordic Journal of International Law*, vol. 79, no. 2 (2010), p. 271. See an example in the partly dissenting opinion of G. A. Serghides in *Khlaifia and Others v. Italy* [GC], no. 16483/12, 15/12/16, § 24.

manifestation of the principle of effectiveness.[38] The principle of autonomous interpretation works as a counterweight to the margin of appreciation, in cases where the Court considers that a given term, by its nature, cannot be left to the discretion of the States to be interpreted as they see fit.[39]

24.2.4.3 Relationship with the Principle of Proportionality

The principle of effectiveness is enshrined in all elements of the principle of proportionality, specifically in the balancing exercise itself and in the two sides to be balanced, namely the right and the restriction to it.[40] The principle of proportionality has thus been correctly described as "in a sense the *alter ego* of the principle of effective protection."[41]

24.3 As Used in Implementing the Court's Judgments

Regarding now the implementation of the judgments of the Court, the principle of effectiveness is extremely important, not only for the credibility and prestige of the Court and the Committee of Ministers, but also for the very existence of the Council of Europe's system for the protection of human rights, the rule of law, democratic stability and peace in the world.

As the Court has pointed out,[42] the mechanism for supervising the execution of its judgments, provided for in Article 46 of the Convention, "demonstrates the importance of effective implementation of judgments."[43]

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38 An instance of autonomous interpretation can be found in *Engel v. the Netherlands*, no. 5370/72, 08/06/76 where the Court interpreted the term "criminal charge" in Article 6 of the Convention as covering also a disciplinary offence, rejecting the contrary interpretation that the Government sought to argue. Another instance is *König v. Germany*, no. 6232/73, 28/06/78, where the Court held that the decision to remove the applicant's right to practise medicine, was a civil right under Article 6, that being "determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned." On this subject, see George Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR", *European Journal of International Law*, 15(2), (2004), pp. 279-305.

39 This is so, first, because the terms may not have the same meaning in the different national systems, and it is therefore necessary for the Court to ensure uniformity of treatment, and, second, and most importantly, in the Court's view they should be interpreted independently so as to give effect to the object and purpose of the Convention, preventing, at the same time, the application of human rights provisions from being subordinated to the will of the member States. See, for example, *Khlaifia and Others v. Italy*, cited above, §§ 243-44, on the autonomous meaning of "expulsion."

40 See the concurring opinion of G. A. Serghides in *El Ghatet v. Switzerland*, no. 56971/10, 08/10/16.

41 See Steven Greer, *The Margin of Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, Human Rights files No. 17, Strasbourg, 2000, at p. 20.

42 See *Verein gegen Tierfabriken Schweiz (Vgt) v. Switzerland (no. 2)*, no. 32772/02, 30/06/09, § 84.

43 It also pointed out that the States have a positive obligation to ensure the effective implementation of the Court's judgments and "a total or partial failure to execute a judgment of the Court can engage the State Party's international responsibility," see *Verein*, cited above, § 85.

It is to be noted, here, that the principle of effectiveness is reflected in the Latin maxim "*pacta sunt servanda*" (meaning "agreements must be kept"), embodied in Article 26 of the VCLT.[44] Besides, according to Article 27 of the VCLT, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty…."[45]

A fundamental premise of the Strasbourg system of the protection of human rights is that of a shared responsibility, a respectful relationship between Strasbourg and the national authorities. Article 46 of the Convention[46] is based on solidarity and reciprocity. By signing and ratifying the Convention, of their own free will, the member States have shown their intention to make the Convention provisions effective and it is clear that they accept the supervisory jurisdiction of the Court, and, thus, abandon part of their sovereignty by expressing their commitment to common values. A member State must, therefore, abide by all judgments of the Court in cases to which it is a party.

24.4 Conclusion

By way of conclusion, the principle of effectiveness follows, moulds and governs all steps of the Convention protection system.

The principle should always be kept in mind by all those in the hands of whom the protection of the Convention rights lies. As the Greek poet Constantinos P. Cavafy who was inspired by the Homeric return journey of Odysseus to his home island, said about Ithaka:[47] "Always keep Ithaka in your mind; to reach her is your destiny …"

Justice Oliver Wendell Holmes wisely said that "Greatness is not where we stand but in what direction we are moving." The same applies to the future of human rights. The Convention ship must move forward and not backwards. Every time a case comes before the Court, especially the Grand Chamber, a new voyage of the Convention ship begins, and the compass must always direct it effectively to its promised destination, and not leave it to stray off course at the mercy of any ill-wind.

44 Reading: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

45 The importance of this provision is that it gives no justification to a member State not to comply with the principle of effectiveness of the Convention and the judgments of the Court. See also Article 8 of the Statute of the Council of Europe (5.V.1949), which provides as follows: "Any member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7. If such member does not comply with this request, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine."

46 As amended by Protocol No. 14.

47 Poem entitled "Ithaka" after the home island of Odysseus.

25 "Intimate Citizenship" and Illiberal Democracy: Twilight or Rebirth of Constitutionalism?*

*Anna Śledzińska-Simon*** *and András L. Pap****

25.1 Populist Backlashes, Disenchantment and the Raise of Illiberalism

Populist rhetoric questioning the validity and the sustainability of the post-WW2 liberal consensus on human rights and constitutionalism seems to be on the rise in the Western world. The emergence of this New Populism follows the concept, ideology, and "Zeitgeist" of disenchantment that has both economic and cultural roots. On the one hand, growing economic inequality and instability, and on the other hand cultural backlash against modernity and progressive values may contribute to this phenomenon, which transforms the traditional division between left and right into an ideological cleavage between populists and cosmopolitan liberals.[1]

Although populism offers multiple operationalizing strategies both for right- and left-wing leaders in their contestation of the existing establishment, it primarily serves neo-conservative social movements to attack neoliberal policies or even state institutions such as constitutional courts. Characteristically, illiberal populism may be initiated by bottom-up civic groups, political elites, or the government. It can serve as a tool for political mobilization of nationalist groups against various "isms": multiculturalism, modernism, or even secularism. In Eastern and Central Europe it becomes a discursive framework for

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1 Roland Inglehart, Pippa Norris, "Trump, Brexit, and the rise of Populism: economic have-nots and cultural backlash," paper presented at the plenary panel "Legitimacy of political systems. System support for comparative perspective," 24th World Congress of the International Political Science Association, Poznan, July 24, 2016.

building constitutional identity and a model of illiberal democracy. What they share is a challenge to the legitimacy of liberal democracy.

Characteristically, the defining feature of populism motivated by disenchantment is that it is not accompanied by new grand narratives such as Marxism, Socialism, Communism, Fascism, or Nazism. Rather disenchanted illiberalism is very similar to how Eric Hobsbawm saw nationalism in the 20th century – it is a substitute, a placebo for disorientation, and a surrogate for integration in a disintegrating society; when society fails, the nation appears as an ultimate guarantee.[2]

Despite all superficial analogies with the 1930s concerning anti-Semitism, nationalism, and alike, new populist illiberal movements are actually quite different. Today anti-Semitism does not, and cannot, include the political, economic, and legal project of discrimination, exclusion, deportation, and annihilation of Jews. Similarly, contemporary nationalism is equally hollow. For example, in Hungary, the discourse of restoring pre-WW1 borders remains at the level of symbolic rhetoric, and actual revisionist policies are nowhere to be seen or called for. In Poland nationalism is not based on revisionist tendencies either. Instead, it presents itself as "modern nationalism," which promotes cooperation between sovereign nations in a Christian Europe.

In other words, the New Populism is hollow in the way that it does not provide any alternative ideology, only criticism of the current political and economic regimes (including the uniforming influence of foreign powers – transnational corporations, the WTO or the European Union). Apparently, no new "re-enchanting" ideology is needed for the New Populism to gain support since the rejection of a fatigued human rights discourse can be easily overridden by essentialism, spirituality, and religious fundamentalism.

This shallowness and emptiness is the unique and engaging feature of the potentially exportable Hungarian model of "illiberal democracy." In Hungary, the term has been coined by Viktor Orbán, a former liberal, now a missionary and Messiah for illiberalism, in his speech at the 25th Bálványos Summer Free University and Student Camp.[3] His government successfully built a state-funded (pseudo) NGO sector to support, alongside the existing racist and nationalist movements, anti-modernism and anti-cosmopolitanism/Europeanism as a viable alternative to neo-liberal democracy and the market economy.

In Poland, the turn toward illiberal democracy is less clear although Jarosław Kaczyński, a de facto leader of the government, has adopted most of Orbán's strategies to dismantle a liberal constitutional regime, and restore traditional Christian values and national sovereignty, yet still within the European Union. For the governing Law and

2 Eric J. Hobsbawm, *Nations and Nationalism Since 1780 Programme, Myth, Reality*, Cambridge University Press 1992. See Chapter 6. Nationalism in the late twentieth century, pp. 163-192.

3 For the official translation of the speech, see: <www.kormany.hu/hu/a-miniszterelnok/beszedek-publikaciok-interjuk/a-munkaalapu-allam-korszaka-kovetkezik>.

Justice party, the place of individuals is "nested in history, tradition, and culture, while the West is associated with moral nihilism."[4]

Although illiberalism is most often equated with the democratic backlash that surfaces first and foremost in the weakening of checks and balances through institutionalized government control over the media, the NGO sector, civil service, the prosecutor's office and the judiciary, the authors of this chapter argue that illiberal democracies also share certain value preferences concerning the model of individual and social life.[5]

While focusing on the concept of "intimate citizenship," the following sections identify common themes to which neoconservative leaders have used the constitution as a frame for populist rhetoric. In illiberal populist rhetoric, "gender" has become a proxy for diverse threats to national culture and is used against diverse political causes.[6] In some countries, one of the most significant barriers to the advancement of women's rights is the so-called "gender ideology" denoting all sorts of threats to traditional family model resulting from the transformation of gender roles, same-sex partnerships or marriages, the recognition of gender-variant persons, as well as new technologies in the area of reproductive health.

The aim of this analysis is to demonstrate the ways in which cultural (ideological) war is waged at the constitutional level, taking the form of constitutional interpretation, isolated constitutional amendments, or new constitutions. The chapter provides a comparison of two case studies, Hungary and Poland, where the illiberal concept of intimate citizenship has been elevated to the rank of constitutional identity.

25.2 The Concept of Intimate Citizenship

In the following analysis the concept of intimate citizenship is used as an analytical tool to describe the engagement of illiberal populist movements with the constitution. Illiberalism manifests itself in the ways of constitutional interpretation or design that fails to recognize individual autonomy as a constitutional principle. Moreover, illiberalism is also exposed in ideological commitments and constitutionally enshrined value preferences that may authorize future legislation inimical to individual autonomy.

The concept of intimate citizenship refers to the status of citizens defined by the level of protection of their rights and freedoms regarding gender, sexuality, intimate and pri-

4 James Traub, "The Party that Wants to Make Poland Great Again," *New York Times*, November 2, 2016.

5 Andras L. Pap, "Who Are 'We, the People'? Biases and Preferences in the Hungarian Fundamental Law" in: Zsuzsanna Fejes, Fanni Mandák, Zoltán Szente (Eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, Paris: L'Harmattan 2015, pp. 53-75.

6 Eszter Kováts, Maari Põim, Judit Tánczos, "Beyond Gender? Anti-Gender Mobilization and the Lessons for Progressives," *FEPS-FES Policy Brief*, June 11, 2015, pp. 4-5. See also Eszter Kováts, Maari Põim (Eds.), "Gender as Symbolic Glue: The Position and Role of Conservative and Far Right Parties Anti-Gender Mobilizations in Europe," *Foundation for European Progressive Studies and Friedrich-Ebert-Stiftung* 2015.

vate relationships, and family life. While citizenship has always been used to include and exclude, women and sexual minorities traditionally have additionally been positioned as secondary subjects of law.[7] For the purpose of this analysis, intimate citizenship will be used to assess whether certain groups within the political community who are formally citizens face stigmatization and marginalization based on their family status or choices and preferences in private life.[8] The chapter, thus, aims to evaluate whether constitutional value preferences may actually restrict access to certain political, economic, social, and cultural rights of some groups.[9]

Hungary enshrined illiberal value preferences in the new Constitution adopted on 18 April 2011, after FIDESZ, Orbán's party (running in a coalition with the Christian Democratic Party) gained a supermajority in the 2010 parliamentary elections.[10] The new social contract of the Orbán regime was neither solicited nor was it put up for a transparent democratic pre-approval or a referendum. More strikingly, its constitutionally framed and cemented value preferences regarding intimate citizenship are not evidently supported by values and life-style choices endorsed by Hungarians. Not only is freedom to make autonomous choices in private matters not declared or recognized in the Constitution as an explicitly endorsed value, the declaration of the principle of non-discrimination in regard to certain specific freedoms implied by intimate citizenship is also absent.

The Polish legal system is based on the Constitution of 1997 (written not immediately after the political transition) by the Constitutional Assembly dominated by members of the Left Democratic Alliance, with the majority of post-Solidarity, right-wing parties in extra-parliamentary opposition. In order to maintain the character of a social compromise and gain popular support in a nation-wide referendum, the Constitution did not

7 David T. Evans, *Sexual Citizenship: The Material Construction of Sexualities*, London: Routledge 1993; Diane Richardson, "Constructing Sexual Citizenship: Theorizing Sexual Rights," *Critical Social Policy* 20 (105) (2000); Carl Stychin, *Governing Sexuality: The Changing Politics of Citizenship and Law Reform*, Oxford: Hart Publishing 2003; Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*, Stanford, CA: Stanford University Press 2007; Uladzislau Belavusau, "EU Sexual Citizenship: Sex beyond the Market," in: Dimitry Kochenov (Ed.), *EU Citizenship and Federalism: The Role of Rights*, Cambridge University Press 2015.

8 Kenneth Plummer, *Intimate Citizenship: Private Decisions and Public Dialogues*, Seattle and Chesham: University of Washington Press and Combined Academic, 2003.

9 For more on the subject matter, see also George L. Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe*, Howard Fertig Pub 1985; Lisa Duggan, *Materializing Democracy. Towards a Revitalized Cultural Politics*. Duke University Press 2002; Sylvia Walby, "Is Citizenship Gendered?" *Sociology*, 28(2) (1994), pp. 379-395; Roman Kuhar, "Playing with Science: Sexual Citizenship and the Roman Catholic Church Counter-Narratives in Slovenia and Croatia," *Women's Studies International Forum*, 48 (2015).

10 Renata Uitz, "Can You Tell When an Illiberal Democracy Is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary," *International Journal of Constitutional Law*, 13(1) (2015), pp. 279-300.

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make strong value preferences and left the choice open to constitutional interpretation and renegotiation in the political process.

While in Hungary it is the new Constitution and adjacent legislation that sets forth several normatively formulated value preferences, which can be defined as illiberal in the sense that they either suggest the denial or at least the disregard of individual autonomy and liberty, and project a paternalistic, patriarchal, and heteronormative concept of society and the political community, in Poland this project has been implemented on the basis of the 1997 Constitution by the legislature and the Constitutional Tribunal. Whereas ideological commitments and constitutionally enshrined value preferences may authorize future legislation to restrict individual autonomy and freedom, a systematic abuse of fundamental rights and individual freedoms has not been part of the Hungarian storyline.

In Hungary the new political community reflects an image of ethnic Hungarians who belong to the middle-class, are active in the labor market and practicing Christians (or at least belong to a denomination that is recognized by the state). Moreover, the concept of intimate citizenship enshrined in the Constitution implies heteronormativity and monogamy. Thus, model-Hungarians are married, live with their spouses, and are naturally fertile. In Poland the Constitution did not determine strong ideological commitments to the Catholicism, but the majority religion has been the driving force of the legislature and the Constitutional Tribunal in cases concerning the protection of life, family, reproductive rights or the position of the Catholic Church ever since the democratic transition. While marriage, defined in the Polish Constitution as a union of a man and a woman, remains the only alternative for partners who live together, other forms of family life are not recognized by law. Yet, the majority of Poles are actually practicing Catholics and endorse marital unions as a preferable form of living together.

In the case of Hungary, pointing to the particular constitutional preferences and biases triggers the question whether the founding fathers (who actually were overwhelmingly men) actually built this construction on actually shared values and support by the Hungarian people. (This is not to imply that popular support for illiberal or oppressive political commitments would make them legitimate.) This chapter will argue that actual choices of Hungarians concerning marriage or church attendance do not appear to be in line with the constitutionally enshrined intimate citizenship concept, which makes Hungarian illiberalism even more scrupulous.

25.3 A Christian State

25.3.1 Hungary

The preamble of the Hungarian Constitution of 2011 characterizes the Nation as a Christian community. Not only was the Fundamental Law adopted by MPs who are "aware of their responsibility before God,"[11] but, according to the National Avowal,

> we, the members of the Hungarian nation, (…) recognize the role of Christianity in preserving nationhood. (…) We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love.

It is important to note that it is more than a festive declaration. Pursuant to Article R(3) of the Chapter entitled "Foundation," it is recognized that the preamble has a normative force as it serves as a basis for constitutional interpretation.[12]

The text of the Constitution does not presume an exclusive religious identity, but it does reserve a pre-eminent role for religion, specifically for Christianity. This preference is made explicit by Article 4 of Chapter VII, entitled Freedom and Responsibility, which states that

> the State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches. The State shall provide specific privileges to established churches with regard to their participation in the fulfillment of tasks that serve to achieve community goals.

Under Section 5 of the Constitution,

> the common rules relating to religious communities, as well as the conditions of cooperation, the established churches and the detailed rules relating to established churches shall be laid down in a cardinal Act.

11 In the next to last line in the Fundamental Law.

12 Article R(3) of the Hungarian Constitution, the Fundamental Law: "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution."

The legislature further limited the endorsement of religious communities to a specific kind. On 30 December 2011 the Act on Churches was passed,[13] which made the official recognition of a church or religious organization conditional on prior approval by a two-thirds majority in the Parliament.

The new requirement for state recognition include a documented 20 years of existence in Hungary, in which case a church or religious organization need to demonstrate membership of approximately 10,000 people (ca. 0.1 percent of the total population of Hungary) or at least 100 years of international existence, in which case its foreign affiliation needs to be certified by at least two other churches of "similar doctrine" recognized in foreign countries.[14] In practice, none of the statutory criteria binds the Parliament in practice as it may always refuse or "pocket veto" the official recognition.[15]

The new law distinguished between incorporated churches and other religious organizations, and granted privileges such as tax benefits and subsidies – including support for charitable activities – only to the former.[16] Subsequently, only 14 religious organizations became recognized religions and the rest was decertified.[17] In consequence, over 350 denominations lost their official status in Hungary – including tax exemptions and the authorization to run state-funded schools. In contrast, incorporated churches have maintained access to a range of state funding opportunities and enjoy financial autonomy. In particular, they are eligible for donations of 1 percent of personal income tax. Moreover, only the officially recognized church may be involved in the mandatory one-hour-per-week faith and ethics or ethics-only public education programs. While providing religious education churches may determine the curricula of the program and use their own textbooks, other religious organizations are not authorized to provide mandatory religious education in public schools, but they may offer extracurricular religious education if requested by students or parents. Furthermore, incorporated churches receive automatic authorization to provide pastoral services in hospitals and in the military, while other religious organizations must seek permission for providing such services.[18]

13 Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities.

14 See International Religious Freedom Report for 2015 (further as the US State Department Religious Freedom Report), available at: <www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>.

15 See a joint report by three leading Hungarian human rights NGOs, the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union, and the Eötvös Károly Institute, available at: <http://helsinki.hu/wp-content/uploads/Hungary_NGO_Fact_sheets_February2012.pdf>. See also Gábor Halmai, Kim Scheppele (Eds.), *Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws.*

16 Opinion of the Venice Commission No. 664/2012 (CDL-AD(2012)004) on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations, and religious communities of Hungary. The Venice Commission held that the law "falls short of international standards" on some key aspects.

17 While the number of recognized churches grew, the process of de- and re-recognition was accompanied by fierce legal debates. While some minority religious groups reached an agreement with the government on their compensations, other applied to the European Court of Human Rights.

18 The US State Department Religious Freedom Report, Sectioon II.

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Notably, the text of the Constitution does not require Parliament to take the universal guarantee of religious freedom into account when deciding on the status of a church or religious organization, as it is at full liberty to consider whether a particular church or religious organization "realizes the public objectives" when selecting its social partners. The above cited constitutional provision has been passed in reaction to the decision of the Hungarian Constitutional Court[19] striking down the contestable Act[20] and a judgment of the European Court of Human Rights[21] that found Hungary in violation of freedom of association and freedom of religion.

25.3.2 Poland

The Preamble of the Polish Constitution of 1997 proclaims that the Nation comprises

> all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources.

It also makes a reference to "the culture rooted in the Christian heritage of the Nation and in universal human values" and further refers both to the responsibility before God and our consciences. Overall, the text gives the impression of viewpoint neutrality and does not grant Catholicism any special position. While emphasizing both religious and universal underpinnings of the constitutional order, the framers of the Constitution avoided formulations that would discriminate or exclude any members of the community.

However, constitutional provisions regarding the autonomy of churches and religious organizations establish not only guarantees of religious freedom, but also lay down the foundation for cooperation between the state and churches and religious organizations for the individual and common good.[22] The strict separation between the state and religion under the 1952 Constitution was, nevertheless, turned into a "friendly cooperation" between the state and the Catholic Church in the post-1989 constitutional practice. As a result, the Catholic Church could not only reinforce its superior position vis-à-vis other

19 Decisions of the Hungarian Constitutional Court No. 6/2013. (III. 1.) and No. 23/2015 (VII. 7.).

20 See also Balázs Majtény, "Alaptörvény a nemzet akaratából," *Állam- és Jogtudomány*, 1(2014), pp. 91-92.

21 *Magyar Kereszteny Mennonita Egyhaz and Others v. Hungary*, App. No. 70945/11, judgment of June 28, 2016.

22 Article 25 of the Constitution of Poland. See, for example, Daniel Augenstein, "Europe's Constitutional Identity between Religious and Secular Values," Working Paper Series No. 2009/13, at 5. See also Lorenzo Zucca, "The Crisis of the Secular State – A Reply to Professor Sajó," *International Journal of Constitutional Law*, 7 (2009), p. 494; András Sajó, "The Crisis that Was Not There: Notes on A reply," *International Journal of Constitutional Law*, 7 (2009), p. 494; Joseph H.H. Weiler, "Lautsi: Crucifix in the Classroom Redux (Editorial)," *European Journal of International Law*, 21 (2010), p. 1.

churches and denominations, but also restore the place of religion in the public space. The latter was a matter of dealing with the legacy of the Communist regime, which purged religious symbols from public institutions and controlled religious cult and practices.[23]

Characteristically, the Polish Constitutional Tribunal approved of all legislative choices, which offered the Catholic Church special rights and privileges in recognition of the will of the majority. In 1991 the Tribunal upheld a ministerial instruction introducing religion in public schools notwithstanding the fact that it lacked a clear statutory basis and was contrary to the binding law on education.[24] The instruction was later replaced by a ministerial decree issued on the basis of the 1991 Education Act, but again without a specific statutory authorization.[25] These early judgments contradicted the constitutional hierarchy of legal norms and the requirement of statutory reservation by imposing limitations on freedom of religion. Still, the Tribunal relied on these judgments in its later decisions concerning religious teaching in public schools[26] which legitimized various legislative acts favoring the majority religion – for example by the public financing of denominational schools.[27]

It is quite remarkable that in the entire case law of the Constitutional Tribunal there is no single decision that would undermine the privileged place of religion in the public space or the position of the Catholic Church toward minority denominations.[28] The Constitutional Tribunal consistently upheld laws favorable to the Catholic Church and the moral standards accepted by the Catholic majority.[29] Conflating religious values with universal ethics[30] the Tribunal did actually attribute to "We, the people" a social identity that is less inclusive than the citizenry as a whole.[31]

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23 The Catholic Church in Poland had not been historically entangled in the authoritarian regime and could claim credit in the regime's peaceful overthrow.

24 Judgment of the Polish Constitutional Tribunal of January 30, 1991, Case No. K 11/90 (teaching religion in public schools).

25 Judgment of the Polish Constitutional Tribunal of April 20, 1993, Case No. U 12/92 (inclusion of a grade in religion to the student record).

26 Judgments of the Polish Constitutional Tribunal of December 2, 2009, Case No. U 10/07 (counting of the religion/ethics grade towards the average grade) and of May 5, 1998, Case no. K 35/97 (the right of minority churches and denominations to organize religion classes in public schools).

27 Judgment of the Polish Constitutional Tribunal of September 14, 2009, Case no. K 55/07 (public funding of denominational schools). Also see. Decision of the Polish Constitutional Tribunal February 6, 2007, Case No. K 16/06 (the Temple of Divine Providence), as well as decision of the Polish Constitutional Tribunal of June 8, 2011, Case No. K 3/09 (the Committee on Church Property). *ZNP v. Poland*, App. No. 42049/98, decision of September 21, 2004; *Polski Autokefaliczny Kosciol Prawoslawny v. Poland*, App. No. 31994/03, decision of April 27, 2010 and the decision of the Polish Constitutional Tribunal of April 2, 2003, Case No. K 13/02 (the Polish Autocephalous Orthodox Church).

28 Judgement of the Polish Constitutional Tribunal of October 6, 2015, Case no. SK 54/13 (public insult of religious feelings).

29 Judgments of the Polish Constitutional Tribunal of May 26, 1997, Case No. K 26/96 (abortion on social grounds) and of October 7, 2015, Case no. K 12/14 (conscience clause for medical professionals).

30 Decisions of the Polish Constitutional Court of March 2, 1994, Case No. W 3/93 (respect for the Christian system of values in public broadcasting) and of May 7, 1994, Case No. K 17/93 (prohibition of violation of religious feelings in public broadcasting).

31 János Kis, "The Principle of State Neutrality," in: Michel Rosenfeld, András Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford: Oxford University Press 2012, p. 332.

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25.3.3 Christian Identity in Hungary and Poland

Although the new Hungarian Constitution proclaims the Christian heritage of the Hungarian nation and expresses dedication for religion, such firm and selective religious commitment turns out to be not supported by census data and social research.

In the 2011 national census, 16.7 percent of the population indicated no religious affiliation, 1.5 percent indicated they were atheists, and 27.2 percent offered no response to the question on religion.[32] The fact that between 2001 and 2010 census data showed a substantial decline in the number of persons who claim to belong to the major Christian denominations is a significant addendum in evaluating the constitutional construction adopted by the legislator. Over a decade, the number of persons who self-identified as Catholic dropped from 5.5 million to 3.9 million, while the number of those who belong to the Calvinist and Lutheran churches also fell from 1.6 to 1.15 million and from 304,000 to 214,000, respectively. The number of those who did not indicate any affiliation with any organized religious community simultaneously rose to 2.7 million in 2010, up from a level of 1.1 million in 2001.[33] According to an earlier research, the number of those who regularly exercise their religion (at least once a month) dropped by around a third between 1998 and 2008, and now amounts to roughly 13 percent of the total population.[34]

In this context, it is also worth noting the results of a research surveying the national and European identity of Hungarians and other nationalities in the region in the two decades between 1992 and 2014. The project measured the personal construction of national identity through assessing eight constitutive elements of identity. In the survey, respondents were asked to rate the following propositions in accordance with the importance they assign to each in terms of its role in constituting a "real Hungarian": (1) birthplace; (2) citizenship; (3) place of residence (specifically that someone spends most of their time in Hungary); (4) knowledge of Hungarian language; (5) Christianity; (6) an acceptance of the democratic set of institutions; (7) self-identity (that is someone considering herself Hungarian); and, in the years 2003 and 2013, (8) Hungarian ancestry (the

32 See <www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>.

33 See <www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_10_2011.pdf>.

34 Tamás Keller, "Változás és folytonosság a vallásossággal kapcsolatban," Statisztikai Szemle 88(2) (2010), p. 144. <www.ksh.hu/statszemle_archive/2010/2010_02/2010_02_141.pdf>. The 2011 national census included an optional question on religious affiliation. Responses indicated 37.1 percent of the population self-identifies as Roman Catholic, 11.6 percent as Hungarian Reformed (Calvinist) Church, 2.2 percent as Lutheran, 1.8 percent as Greek Catholic, and less than 1 percent as Jewish. In the same census, 16.7 percent indicated no religious affiliation and 1.5 percent indicated they were atheists; 27.2 percent offered no response. Religious groups together constituting less than 5 percent of the population include Greek Orthodox, the Faith Congregation (a Pentecostal group), other Orthodox Christian groups, other Christian denominations, Buddhists, and Muslims. See <www.state.gov/j/drl/rls/irf/religiousfreedom/index.htm#wrapper>.

individual is of Hungarian descent/has Hungarian forebears). Hungarian respondents rated Christianity as the least important factor in defining Hungarianness.[35]

In Poland, the 2011 national census covered 38.5 million persons,[36] out of which 7.1 percent refused to declare their religious affiliation. 2.41 percent of the population indicated they were they were atheists, and 1.6 percent offered no answer to this question. Among people who declared their religious affiliation – 87.58 percent indicated they belong to the Catholic Church. The Polish Autocephalous Orthodox Church with 156,000 believers (0.41 percent of the population) ranked second. The third and fourth place belong to the Jehovah's Witnesses and the Evangelical Church of the Augsburg Confession with 129,270 (0.36 percent) and 71,000 (0.18 percent), respectively. According to the census, there are 33,000 Orthodox Catholics in Poland. Other religions in Poland include Judaism and Buddhism, but are not practiced by more than 1 percent of the population. In the light of this statistics the dominant position of the Catholic Church in Poland is unquestionable, although the number of believers who actually practice religion as regular church-goers (*domonicantes*) oscillates around 40 percent since the 2000s, with 17 percent those who partake of the Eucharist (*communicantes*).[37]

25.4 Protection of Marriage and Family

25.4.1 Hungary

The new Hungarian Constitution expresses clear, normative preferences toward conservative family values. The preamble holds that "the family and the nation constitute the principal framework of our coexistence and that our fundamental cohesive values are fidelity, faith and love." The preamble also declares that

> the basis of our legal order […,] shall be an alliance among Hungarians of the past, present, and future. It is a living framework which expresses the nation's will and the form in which we want to live.[38]

According to one interpretation, the term "fidelity" may apply both to patriotic duties and marriage.

35 Bori Simonovits, "Nemzeti identitás, kisebbségek és társadalmi konfliktusok – A magyar társadalom attitűdjeinek alakulása 1992 és 2014 között," in: Tamás Kolosi, István György Tóth (Eds.), *Társadalmi Riport 2014*, Budapest: Tárki 2014, p. 406.

36 See <http://stat.gov.pl/spisy-powszechne/nsp-2011/nsp-2011-wyniki/wybrane-tablice-dotyczace-przynalez-nosci-narodowo-etnicznej-jezyka-i-wyznania-nsp-2011,8,1.html>.

37 See the Statistical Institute of the Catholic Church – <www.iskk.pl/kosciolnaswiecie/231-dominicantes-2014.html>.

38 Pursuant to Article R (3) in the constitution's chapter entitled Foundation, "[t]he provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution."

The new Hungarian Constitution introduces a restrictive definition of marriage and the concept of a "natural" family based on marital and parent–children relationships. Article L provides that

> (1) Hungary shall protect the institution of marriage as a union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation.

It also establishes the state duty to encourage the commitment to have children and states that "family ties shall be based on marriage and/or the relationship between parents and children."[39] This formulation recognizes parent–child relations that have emerged outside of marriages, but not the relationship of the parents who remain unmarried or are in civil law partnership. This is a clear expression of a moral standard that denies the equal recognition of the plurality (freedom) of forms of private life, the neutrality of (and tolerance by) the state and respect for personal autonomy.[40]

In one of the first most comprehensive legal opinions on the new Hungarian Constitution, it has been pointed out that

> the 1989 Constitution was based on the equal recognition of individual and communal forms of life and a plurality of views regarding the good life. The Fundamental Law breaks with this tradition by including moral duties among the fundamental rights. It thereby selects those forms of the good life which it regards as morally valuable and worthy of constitutional protection.[41]

It is also worth noting that the constitutional affirmation of a "natural" family based on marriage as a union of a man and a women and their children is a reaction to the decision of the Constitutional Court adopted in 2012[42] in which the Court held that "family life" is a historically changing and evolving concept, a matter of factual rather than legal assess-

39 Article L of the Fundamental Law.

40 Gábor Halmai, Kim Scheppele (Eds.), Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary, available in English at: <http://halmaigabor.hu/dok/437_Amicus_Brief_on_the_Fourth_Amendment4.pdf>, p. 15.

41 Zoltán Fleck, et al., "Vélemény Magyarország Alaptörvényéről," *Fundamentum*, 15(1) (2011), available in English at: <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf> (the page numbers cited below refer to this document), p. 17–18.

42 Judgment of the Hungarian Constitutional Court of December 17, 2012, No. 43/2012. (XII. 20.) reviewing the Act No. CCXI of 2011, passed on 23rd December 2011. The Act provided that a heterosexual marriage is a privileged type of a family and being raised in such a family is more secure than other forms of upbringing. In pursuance of this Act, the definition of a family based on a marriage would apply to all other laws, regardless of their purpose, and exclude all other forms of family relationships, such as cohabitation and registered partnership.

ment, and that same-sex couples are entitled to the same right of respect for their family life as heterosexual couples.

It also needs to be noted that the restrictive definition of marriage rules out the possibility of expanding its scope to same-sex couples.

> By defining one man and one woman as the subjects of marriage (…) the Fundamental Law creates a long-term constitutional obstacle to individual demands for extending the plurality of forms of partnership.[43]

In this way, the Constitution limits autonomy of individuals who do not accept the normative model of a family and may result in ostracizing them from the political community.[44] Not only does it express a cis heterosexual and essentialist bias, but also denies recognition of homosexual relationships and partnerships, as well as childless citizens. Still, same-sex couples may register their union in pursuance to the Act on the registered partnership adopted by the former government in 2009, which remains in force.[45]

25.4.2 Poland

In the Polish Constitution the protection of marriage, family, motherhood, and parenthood gained the status of the core principle of the system of government. Article 18 of the Constitution provides that

> marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.

Notably, in the Accession Treaty decision, the Constitutional Tribunal held that

> marriage, being a union of a man and woman, has acquired a distinct constitutional status within the domestic law of the Republic of Poland (…) and any modification of this status would be possible only by the way of an amendment of the Constitution (according to Article 235 thereof); in no circumstances would it be possible by way of a ratified international agreement.[46]

43 Fleck et al., supra note, p. 15.
44 Fleck et al., supra note, p. 19.
45 Act XXIX of 2009.
46 Judgment of the Polish Constitutional Tribunal of May 11, 2005, Case no. K 18/04 (the Accession Treaty).

Nevertheless, before the ratification of the Lisbon Treaty the government sought additional reassurance that the Charter of Fundamental Rights would not introduce same-sex marriages in the Polish constitutional order. Therefore, it signed the British Protocol concerning the status of the Charter of Fundamental Rights under domestic law.[47] The decision to accede to the British Protocol was clearly motivated by the fear of a liberal legal tradition implying the liberalization of abortion law, the legalization of euthanasia and same-sex marriages, and the revival of German compensation claims for property left behind within Polish borders in 1945.[48]

The constitutional status of marriage as a union of a man and a woman has been affirmed in the judgment of the Constitutional Tribunal concerning income tax.[49] In this decision the Tribunal explained that

> in the light of the constitutional provisions for a "family" must be recognized any lasting union of two or more persons, consisting of at least one adult and a child, based on the emotional, legal, and usually also on blood ties. The family can be "full", including "large families", or "incomplete." A "full" family consists of two adults who remain in the shared household and bound by emotional ties and a joint child (children) who they raise. An "incomplete" family consists of one adult and a child (children) who she or he raises (….).

In the same decision the Tribunal stated that relationships in which children are raised do not fall in the concept of "marriage," but the Constitution grants them the social and economic protection specified in Article 71.[50]

Notably, in the same decision, the Tribunal went on to say that

> the family protection implemented by the public authorities must take into account the vision of family adopted by the Constitution as a lasting union of a man and a woman oriented towards motherhood and responsible parenthood (…).

47 Protocol No. 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, 2010 O.J. C 83/318, December 13, 2007. Although the British Protocol was typically understood as an opt-out from the Charter, excluding the jurisdiction of the Court of Justice of the European Union and domestic courts with regard to Charter rights, it was later explained that the Protocol had merely an interpretative nature. See Joined Cases C-411/10 Secretary of State for the Home Department and M. E. and others and C-493/10 Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.

48 Mirosław Wyrzykowski, "Wprowadzenie: granice władzy i granice interpretacji," in: Andrzej Wróbel (Ed.) *Ochrona praw podstawowych w Unii Europejskiej*, 2008, p. 25.

49 Judgment of the Polish Constitutional Tribunal of April 12, 2011, Case no. SK 62/08 (income tax).

50 Article 71 of the Polish Constitution:
"The State, in its social and economic policy, shall take into account the good of the family. Families, finding themselves in difficult material and social circumstances – particularly those with many children or a single parent – shall have the right to special assistance from public authorities."

It also reiterated that the state has the obligation to take such action that will "strengthen the ties between persons making up the family, and in particular the ties between parents and children and between spouses."[51] Furthermore, in the view of the Tribunal, tax regulations may not, even indirectly, weaken the family ties by giving preference to single parents or even both parents who are not in a marital relationship.[52]

The constitutional definition of marriage and the interpretation of the term "family" was at the heart of the parliamentary debates accompanying the bill on the registered partnership. In Poland bills on registered partnership, opening the possibility to legalize both same- and opposite-sex unions were submitted to Parliament in 2003, 2004, 2011, 2013, and 2015. Each of these bills was nevertheless voted down or not revisited after the end of the parliamentary term. According to the view opposing same-sex partnerships Article 18 of the Constitution prohibits institutionalization of any relationships alternative to marriage. Thus, the recognition of same-sex unions would be an attack on traditional family and the natural order affirmed in the Preamble of the Constitution. Opponents of same-sex unions also argued that many rights of cohabitating same-sex partners are recognized in court decisions.[53]

In contrast, the proponents of registered partnerships argued that the Constitution requires the regulation of other forms of family life than marriage. They also claimed that the Constitution does not prohibit or exclude the institutionalization of registered partnership that would remain distinct from marriage.[54] For the time being, the status of cohabitating partners of either sex has not been formally recognized. While marriage remains open only to different-sex couples, same-sex partners are outside the protection of law.[55]

25.4.3 Family Life Choices in Hungary and Poland

The life choices of Hungarian citizens do not reflect the value preferences expressed in the new Constitution. On the contrary, the traditional family model preferred by the Fundamental Law is not embedded in the social reality. In recent years, the number of persons who get married has steadily decreased. While in 1949 there were 11.7 marriages for 1,000 persons (107,820 weddings were held); in 1980 there were 7.5 (80,331); in 1990

51 Judgment of the Constitutional Tribunal of May 18, 2005, Case no. K 16/04 (supplements to family allowance for single parents).

52 Marek Zubik, "Podmioty konstytucyjnych wolności, praw i obowiązków," *Przegląd Legislacyjny* 2 (2007), p. 41.

53 See, for example, judgment of the Polish Supreme Court of November 28, 2012, No. III CZP 65/12 (the right of a surviving partner to enter into a tenancy agreement).

54 See the opinion of the Committee of the Legal Sciences of the Polish Academy of Sciences, available at: <www.knp.pan.pl/images/stories/KNP_PAN/Pismo_do_Prezesa_PAN_z_23_04_2012.pdf>.

55 Adam Bodnar, Anna Śledzińska-Simon, "Between Recognition and Homophobia: Same-Sex Couples in Eastern Europe," in: Daniele Gallo, Luca Paladini, Pietro Pustorino (Eds.), *Same-sex Couples before National, Supranational and International Jurisdictions*, Springer 2014, pp.211-247.

there were 6.4 (66,405); in 2001 there were 4.3 (43.583); in 2012, when the Fundamental Law entered into force, there were only 3.6 (36,161).[56]

In the same period the number of divorces has insignificantly changed because a rising trend is discernible. In 1949, 12,556 marriages were dissolved, leading to a figure of 1.4 per 1,000 residents. In 1980 there were 27,997, that is 2.6 per 1,000 persons. In 1990 this number dropped to 24,888 and a ratio of 2.4; and in 2001 it was 24,391 and 2.4, while in 2012 it stood at 21,830 and 2.2 per 1,000 residents. The divorce ratio was at 2.5 all throughout 2002, 2003 and between 2005 and 2008.[57]

Similarly significant changes took place in regard to personal relationships, with marriage losing ground and common law marriages emerging as the primary type of relationship.[58] Around the time of the political transition, three-fifths of women between 23 and 25 were married. By 2011, the marriage rate dropped below 40 percent even among women at the age of 40. When the new Constitution was adopted, fewer than a quarter of women of age 23-25 lived in long-term relationships, and fewer than every tenth were married. Furthermore, over a quarter of women in their thirties are not in any kind of relationship.[59]

The increased diversity of family types is thus an obvious trend. The ratio of people living in relationships that qualify as partnerships is clearly declining: dropping from 75 percent to 65 percent between 1970 and 2011.[60] The ratio of people living alone rose from 5 percent in 1960 to 14 percent in 2011, with a 5 percent increase between 1990 and 2011.[61] While the number of marriages decreased, common law marriages surged. In 1990, 5 percent of people in a relationship lived in common law marriages; by 2001 this percentage rose to 11 percent, and by 2011 it reached 18 percent. It has been also noted that

> the growth [of common marriage] was especially rapid among youths: In the age group 25-29, more persons were living in common law marriages than in marriage, while among 30-34-year-olds a third, and among 35-39-year-olds a quarter of all persons chose to live with their partner without getting married.[62]

56 KSH, STADAT: Idősoros éves adatok, 1.1. Népesség, népmozgalom (1941-), <www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnt001a.html>, <www.ksh.hu/docs/hun/xstadat/xstadat_eves/i_wnt001b.html>, and <www.ksh.hu/docs/hun/xftp/idoszaki/nepmozg/nepmoz13.pdf>.

57 Ibid.

58 Zsolt Spéder, supra note, p. 65.

59 Ibid., p. 69-70.

60 István Harcsa, Judit Monostori, "Demográfiai folyamatok és a családformák pluralizációja Magyarországon" in: Tamás Kolosi, István György Tóth (Eds.): *Társadalmi Riport 2014*, Budapest: Tárki 2014, p. 86.

61 Ibid., p. 88.

62 Ibid., p. 94.

Furthermore, the popularity of common law marriages is not limited to patchwork families. It is also quite common for relationships where all the children have the same biological parents. While in 1989 only 12.4 percent of children were born to unmarried women; by 2013 this ratio increased to 46.2 percent. Thus, almost half of all births take place in common law marriages.[63] However, patchwork families are also common and there is a growing proportion of children who do not live with both their biological parents or live in single parent households.[64]

In Poland marriage is the dominant form of living together, while non-marital unions make – depending on the source – between 3 and 6 percent of all relationships.[65] Moreover, marriage is considered as a preferable form of living together and raising children. However, an increasing number of people cohabitate for a short period, usually transforming their cohabitation into marriage. In this context, cohabitation appears only as a temporary relationship and a test for a permanent commitment. Although the number of children conceived or born out-of-wedlock has recently increased, their parents usually decide to get married soon before or after the child is born. In the years 2006-2010 only 9 percent of children were born and raised by cohabiting parents up to the age of two. In practice, the decision to remain in an informal union is usually dictated by legal or other personal constraints.[66]

Not only is cohabitation less socially acceptable than marriage, it is also not recognized by law. In Poland cohabitating partners have very limited rights that stem from living together. Formally speaking, they are not recognized as a family. They may not use common tax declarations, inherit property, or claim social benefits as family members. Fathers of children born outside marriage need to declare their status in court upon the mother's consent. Moreover, cohabitating partners do not have any rights or obligations in case of death or separation. Furthermore, the same-sex marriages or civil unions concluded abroad do not have any legal significance in Poland.

Notably, the national census of 2011 did not consider cohabitating same-sex partners as families.[67] Instead it presented the situation of biological families based on marriage or cohabitation of men and women (living with or without children) and single-parents with children. It also does not reflect the situation of patchwork families. According to sociological research, there are 2 million gay or lesbians living in Poland and approximately 50,000 children are raised by same-sex couples.[68]

63 Ibid., pp. 69-70.

64 Ibid., pp. 100-104.

65 Monika Mynarska, Anna Baranowska-Rataj, Anna Matysiak, "Free to Stay, Free to Leave: Insights from Poland Into the Meaning of Cohabitation," *Demographical Research*, 31 (2014), pp. 1106-1136, 1112.

66 Ibid., 1113.

67 National census of population and housing 2011, <http://stat.gov.pl/en/national-census/national-census-of-population-and-housing-2011/>.

68 Marta Abramovicz (Ed.), *The Situation of Bisexual and Homosexual Persons in Poland*. Report for 2005 and 2006, Campaign Against Homophobia and Lambda Association, Warsaw 2007; Ireneusz Krzemiński (Ed.), *Naznaczeni. Mniejszości seksualne w Polsce*. Raport for 2008, Warsaw 2009.

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In this context, it is also worth noting that the majority of Poles remains skeptical about legalization of same-sex unions. 78 percent respondents are against same-sex marriage, while 47 percent oppose legislation that would enable same-sex partners to make joint tax declaration or inherit property from the deceased partner. 89 percent respondents declare their disapproval of laws permitting same-sex couples to adopt children.[69]

25.5 Reproductive Rights

25.5.1 Hungary

The new Hungarian Constitution also expresses an ideological bias with regard to reproductive rights. Article II of the Fundamental Law states that "every human being shall have the right to life and human dignity; embryotic and foetal life shall be protected from the moment of conception." The recognition of the right to life of a fetus endorses Christian values. Apart from the Irish Constitution of 1937, there is no other European constitution that protects embryonic and fetal life from the moment of conception.[70] The language of the Constitution, drawing a distinction between in utero and in vitro embryos not only imposes a limitation on women's right to self-determination, but may also lead to uncertainties regarding artificial reproduction procedures since in vitro fertilization methods usually involve destruction of several embryos either inside or outside of the womb.[71]

It has been argued that although the Constitution does not state explicitly that the embryo and fetus has the right to life, it implies such interpretation by incorporating the phrase "embryonic and fetal life shall be subject to protection from the moment of conception" into the same provision which guarantees the right to life to "every human being." This formulation not only opens the path for a restrictive legislative or judicial interpretation concerning abortion, but can easily be extended to limiting infertility treatments, and in particular in vitro fertilization and implantation.[72] It needs to be added that the conditions for the termination of pregnancy in Hungary are still quite liberal compared to Poland.

69 Opinion Poll No. BS/95/2010, CBOS, Warsaw July 2010.
70 Amicus to the Venice Commission, pp. 18-19.
71 Id.
72 Fleck et al., supra note, p. 19.

25.5.2 Poland

The Polish Constitution states in Article 38 that "the Republic of Poland shall ensure the legal protection of the life of every human being." In 2007 an amendment of this provision incorporating the phrase "from the moment of conception until the natural death" was proposed in the Parliament but it failed due to the lack of sufficient support. Although the Constitution does not explicitly recognize the right to life of a fetus, but the Constitutional Tribunal construed such right in the decision concerning the termination of pregnancy in case of difficult social or economic conditions. This decision was taken in May 1997 before the present Constitution came into force.[73]

In absence of a constitutional guarantee of the right to life in the 1952 Constitution, the Tribunal derived the notion from the principle of rule of law and extended it to a fetus. Since the decision was clearly contrary to the majoritarian choice of the day, Wojciech Sadurski called it "the most outrageous case, of all constitutional courts [cases] in CEE, of judicial usurpation of the law-making power."[74] Notably, the constitutional interpretation of the right to life as the right of every human being, including fetus, has been acknowledged in the scholarship as a matter of constitutional identity.[75]

At present the 1993 Act on family planning, legal protection of the human fetus, and conditions for termination of pregnancy provides three exceptions from the general prohibition of abortion. These include the situation "when the pregnancy results from a criminal activity"; "when the woman's life or health is endangered by the continuation of pregnancy"; and "when prenatal testing or other medical premises indicate high probability of serious and irreversible handicap of the fetus or other incurable illness threatening its life." The abortion law is not only restrictively formulated, but also applied in a very restrictive fashion. In practice, women face serious problems with access to reproductive health and legal abortion services.[76]

Most recently, the new government supported a bill that would introduce almost a total abortion ban even in case of rape or incest. An estimated 100,000 people demonstrated against this proposal that would have subjected doctors and women seeking abortions to potentially long prison sentences. Although the bill was presented as a citizen's

73 Judgment of the Polish Constitutional Tribunal of May 26, 1997, Case no. K 26/96 (abortion on social grounds).

74 Wojciech Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Springer 2005, p. 135.

75 Andrzej Piotrowski, The Rhetorics of Collective Identity in the Polish Political Discourse: A Case Study of Two Parliamentary Speeches, ZiF 1993. However, the context of parliamentary debates on abortion law, same-sex unions, or gender recognition law show two opposite images of the constitutional identity: one formulated in terms of national identity, and the other in terms of liberal values and a pluralist society.

76 *Alicja Tysiąc v. Poland*, App. No. 5410/03, judgment of March 20, 2007; *R.R. v. Poland*, App. No. 27617/04, judgment of May 26, 2011; *P. and S. v. Poland*, App. No. 57375/08, judgment of October 30, 2012.

initiative and strongly advocated by the Catholic Church, the government abruptly withdrew its support for the legislation.[77]

The abortion case in Poland shows that, in a fledgling democracy, conservative ideology may become a part of the national project, aiming to defend national sovereignty, the Catholic religion, the sanctity of marriage, and the traditional family model against foreign influences. In the early years of democratic transition, governments made a concession to the Episcopate in exchange for the support to the Polish accession to the European Union (so-called the abortion compromise).[78] This way, a new social contract between laymen in power and the clergy was made in Poland, as a result of which women were subjected to rules that restricted their choices and expanded protection for conscientious objectors.[79]

25.6 Prohibition of Discrimination

25.6.1 Hungary

In the new Hungarian Constitution the preamble does not mention equality as a fundamental value or principle of the constitutional order and the word only appears three time in the entire text.[80] While Article XV (3) guarantees equal rights of women and men, the provision concerning equal pay for equal work is absent in the Constitution.[81] As Lidia Balogh points out, the guarantee of "equal wages for work of equal value" was not only part of the 1989 Constitution, but it is also one of the fundamental principles of the European Union law, embedded in the Treaties since 1957.[82] Even though the new

77 Paweł Sobczak, Marcin Goettin, "Polish Parliament Rejects Near-Total Abortion Ban After Protests," *Reuters*, October 6, 2016, <www.reuters.com/article/us-poland-abortion-idUSKCN1260Q0>.

78 The lack of consensus regarding the status of human embryos prevented the ratification of the Oviedo Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine.

79 More recently, the Tribunal found the law on medical professions unconstitutional because it excluded the use of the conscience clause by doctors in other than life saving emergency situations (judgement of October 7, 2015, Case no. K 12/14). In the light of the above and the abortion decision women's autonomy has a lower status than the right to life of a fetus and freedom of conscience of medical doctors.

80 See also Krista Kovács, "Equality: The Missing Link," in: Gábor Attila Tóth (Ed.), *Constitution for a Disunited Nation On Hungary's 2011 Fundamental Law*, Budapest: Central European University Press 2012, p. 186.

81 See also Balázs Matényi, "Alaptörvény a nemzet akaratából," *Állam- és Jogtudomány* 1(2014), p. 90.

82 Lidia Balogh, "Az egyenjogúság értéke vagy a 'gender-ideológia' fenyegetése? A nemek közötti egyenlőség elve és a protestantizmus: viták és narratívák," *Állam-és Jogtudomány* 4 (2014), pp. 3-25. EU Gender Equality Recast Directive (2006/54/EC) on gender equality in the area of employment and occupation prohibits direct and indirect discrimination on grounds of sex in relation to pay. Also see, for example, Council Directive 75/117/EEC of February 10, 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women.

Labor Code[83] does endorse the principle of equal pay, in practice it is mostly applied to evening out regional differences in salary standards.

Furthermore, the constitutional prohibition of discrimination contained in Article XV does not list sexual orientation and gender identity among the grounds of prohibited discrimination. While the list is open-ended and sexual orientation and gender identity can be protected as one of the "other situations," it certainly does not involve an unequivocal commitment thereto. The European Parliament considered the formulation of the non-discrimination clause problematic.[84] Still, the Act CXXV of 2003 on Equal Treatment and the Promotion on Equal Opportunities offers a comprehensive framework of equality protection and covers all grounds of discrimination enumerated in Article 19 of the Treaty on the Functioning of the European Union.

25.6.2 Poland

The Constitution guarantees not only the principle of equal treatment and non-discrimination (Article 32), but also equal rights of men and women in all spheres of life (Article 33). The wording of the non-discrimination clause is the effect of difficult negotiations that resulted in an open-ended formulation rather than drawing a list of prohibited grounds. In result, the Constitution states that "no one shall be discriminated against in political, social or economic life for any reason whatsoever." This way, it avoided a controversy of mentioning the criterion of sexual orientation in the text of the Constitution. Notably, the prohibition of discrimination with regard to sexual orientation was for the first time introduced to the Polish legal system in the amendment of the Labour Code aimed to implement the EU directive.[85]

Article 33 of the Constitution stipulates equal rights of men and women. Yet, the literal meaning of this provision does not suggest that there is an obligation to implement de facto equality between men and women. In fact, the legal doctrine has accepted that compensatory privilege (positive discrimination) is permissible to benefit weaker social groups like women when it comes to social rights, but more restrictively in relation to personal and political rights. In result, social legislation not only petrified, but also deepened the existing inequalities between men and women, manifesting as a gender pay gap and the relegation of women to low-paid sectors and positions in industry. Also notable are patterns of systemic gender discrimination engrained in the law and reinforced by state institutions.

83 Act I of 2012 on the Labour Code.

84 European Parliament (2011) Resolution on the Revised Hungarian Constitution, P7_TA(2011)0315, *Brussels* July 5, 2011, available at: <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0315+0+DOC+XML+V0//EN>.

85 Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation. OJ L 303 of December 2, 2000.

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For example, the state pension system froze the status of women as carers. Clearly, different treatment of men and women with regard to the pensionable age and early retirement pushed women out of the labor market and further made them bear the financial consequences of this situation. In addition, women also were responsible for state obligations towards the needy (such as children and the elderly) because of the shortage of institutional care. The Constitutional Tribunal did not regard this double jeopardy as a disadvantage and upheld the different pensionable age for men and women as consistent with the principle of gender equality.[86]

25.7 Paternalism and Essentialism

25.7.1 Hungary

The new Hungarian Constitution entails numerous provisions that embody the paternalistic and essentialist approach to citizens.[87] With relevance to intimate citizenship, it assigns them model roles and rules of conduct in private relationships. One of clear examples of the paternalistic approach can be found in Article XVI (4), which posits that "adult children shall be obliged to take care of their parents if they are in need." This provision was further concretized in the amendment to the new Civil Code, specifying the details of this obligation. The new law even allows third parties, including institutions, to claim expenses from the children. Notably, this seemingly benevolent constitutional commitment not only imposes severe restrictions on individual decisions on how to conduct personal and family matters, but also permits the state to shift the burden of social obligations toward the elderly on citizens, and in practice on women and female offspring.

86 Judgment of the Polish Constitutional Tribunal of July 15, 2010, Case no. K 63/09 (women's pensionable age). The Tribunal found that a gradual equalization of the pensionable age for men and women is consistent with the Constitution (judgment of May 7, 2013, Case no. K 43/12), but signalled that the pension reform should have been accompanied by effective and comprehensive employment and family policy supporting activation of certain socially vulnerable categories, as well as family responsibilities of working persons towards children and the elderly (judgment of July 17, 2014, Case no. S 3/14).

87 See, for example, Herbert Küpper, "Between Collectivism and Liberal Individualism: The Normative Basis Underlying the Idea of the Person Enshrined in the New Hungarian Fundamental Law," in: Zoltán Csehi, Balázs Schanda and Pál Sonnevend (Eds.), *Viva vox iuris civilis: Tanulmányok Sólyom László tiszteletére 70. születésnapja alkalmából*, Budapest. It is an shortened version of Küpper's article entitled "Zwischen Staatspaternalismus, Kollektivismus und liberalem Individualismus: Normative Grundlagen des Menschenbilds im neuen ungarischen Grundgesetz".

25.7.2 Poland

Although in the new social contract enshrined in the Polish Constitution of 1997 women and men are guaranteed equal rights in all aspects of life, including politics, the constitutional interpretation of substantive equality emphasized the remedial and compensatory function of positive measures and preserved the image of women in need of special protection in the social and economic sphere, rather than promoting the concept of equal citizenship, autonomy, or parity democracy. Instead, the focus of constitutional jurisprudence on the reproductive role of women reinforced the sexual contract and the traditional understanding of gender roles and gender relationships.[88]

In fact, this essentialist approach to women permeated the understanding of the Constitutional Tribunal of the substantive equality clause enshrined in Article 33 of the Constitution. The Constitutional Tribunal consistently held that laws granting special or privileged economic or social rights to women are justified by biological differences and aim to compensate their role as caregivers.[89] In this vein, constitutional jurisprudence maintained the image of women as biologically determined and in need of special protection rather than promoted equal citizens' rights in all areas of life.[90] In the end, neither integration with EU nor the implementation of EU law could challenge the culturally entrenched model of power relations or discharge the existing "sexual contract."[91]

25.8 Conclusions

The Hungarian and Polish case studies offer important insights. The Polish Constitution does not officially endorse the concept of illiberal democracy, but constitutional jurisprudence regarding the position of the dominant religion, marriage, family, and gender roles adopted the conservative and traditionalist interpretation of individual rights pertaining to intimate and private life. In Hungary ideological commitments of the new Constitution to Christian values creates the risk that certain social groups (ethnic, religious, and sexual minorities, single-parent families, people living in civil partnerships and women) will be discriminated against. Arguably, by prescribing value preferences in private relationships, the new Fundamental Law restricts individual autonomy and excludes persons who take different normative choices concerning their private life.

88 Anna Śledzińska-Simon, "Gender Quotas and Women's Solidarity as a Challenge to the Gender Regime in Poland," in: Ruth Rubio Marin, Eléonore Lépinard (Eds.), *Transforming Gender Equality: The Irresistible Rise of Gender quotas in Europe*, Cambridge University Press 2017 (forthcoming).

89 Judgments of March 3, 1987, Case no. P 2/87 (limits to medical schools); of October 24, 1998, Case no. K 6/89 (pensions for coal miners and their families); of September 29, 1997, Case no. K 15/97 (early pensions in civil service) and of November 4, 2013, Case no. K 63/07 (pensionable age for men and women).

90 Hanna Dębska, *Władza, symbol, państwo*, Warszawa: Wydawnictwo Sejmowe 2014.

91 Carole Pateman, *The Sexual Contract*, Cambridge: Polity Press 1988.

The Venice Commission noted in the second report on the Fundamental Law that

> while it is not uncommon that the Preamble to a Constitution or the chapter on the general principles includes provisions on the values underlying the Constitution, a Constitution should avoid defining or establishing once and for all values of which there are different justifiable conceptions in society. Such values, as well as their legislative implications, should be left to the ethical debates within society and ordinary democratic procedures, respecting at the same time the country's human rights and other international commitments.[92]

Paternalistic, patriarchal, and heteronormative value preferences do not outlaw or prohibit non-traditional life styles, but the open endorsement disfavors these citizens, and by far not only symbolically. Furthermore, as this chapter showed, census data and statistical research does not support the firm and selective, normatively formulated ideological biases in the new Hungarian Constitution.[93] The constitutionally affirmed model of family, which excludes registered and non-registered partnerships, single-parent or patchwork families that do in fact constitute the majority of "families" in Hungary.

In Poland the constitutional interpretation of the concept of marriage, family, and parenthood does in fact recognize the societal choices of the majority, but leaves some minority groups outside the protection of law. These trends challenge the idea of universality of a normative conception of human rights, which requires the acceptance of the basic tenets of political liberalism. Traditionally, political liberalism implies skepticism about the objective moral truth (or at least, about resting legal prohibitions on moral truths as espoused by the majority), and in contrast rests upon a conception of the self as a self-guiding agent, and a legal framework that provides all citizens with opportunities to make autonomous and informed choices.[94]

In the global rise of populism what the challenge to liberal constitutionalism and the universal notion of human rights is the most worrying aspect. In a liberal democracy individual rights and freedoms define the framework of public morality, which rejects paternalism, at least in its extreme form. In contrast, in an illiberal polity the government is free to promote "a substantive vision of the good, informed by ethnicity, religion or communal morality."[95] Unsurprisingly, after years of being forced to accept "one truth"

92 Para 38.

93 See also Nóra Chronowski, "The New Hungarian Fundamental Law in the Light of the European Union's Normative Values," *Revue Est Europa – numéro spéciale*, 1 (2012), pp. 111-142; Timea Drinóczi, Nóra Chronowski, Miklós Kocsis, "What Questions of Interpretation May Be Raised by the New Hungarian Constitution?," *International Constitutional Law Online Journal*, 1 (2014), pp. 41-64.

94 Robert D. Sloane, "Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox," *Boston University Law Review*, 90 (2010), pp. 975, 978.

95 Lee-Ann Thio, "Constitutionalism in Illiberal Polities," in: Michel Rosenfeld, András Sajó (Eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press 2012, p. 136.

and "one ideology," post-Communist countries are reluctant to accept the value of pluralism. For the same reason, people appear to be inclined to support political leaders who promise to protect the nation against "evils" of the contemporary world (globalization, secularization, feminism, the LGBT movement, etc.) irrespective of whether the promise is made in the name of national sovereignty or traditional values.[96]

96 Aleksandra Gliszczyńska-Grabias, Anna Śledzińska-Simon, "Value Pluralism without the Value of Pluralism? 'Homosexual Propaganda' Bans as a Litmus Test for the Acceptance of Liberal and International Human Rights Norms in the Post-Communist States," *Baltic Journal of International Law*, 15 (2015), pp. 268-285, 284.

26 When *Fraternite* Trumps *Egalite*: Reflections on *SAS v. France*

Ruti Teitel[*]

26.1 Introduction

Not since the Mao jacket has a dress code been at the potential core of a cultural/legal revolution. Of late, a growing number of countries in Europe have not hesitated to impose bans on the wearing of religious garb and or symbols in public, and these laws have in some cases even been upheld by constitutional and human rights courts with a disparate impact on Muslims in Europe and especially Muslim women.

In the most recent example *SAS v. France*,[1] none other than the European Court of Human Rights upheld a restrictive ban on face-covering garb (e.g., niqab and burqa) worn anywhere in public in France – a ban that is already law in Belgium[2] and is being hotly debated in Norway, Denmark, Switzerland and even the UK.[3]

Just this last fall, the law was implemented at the Paris Opera, at a performance of *La Traviata*, where a burqa-attired woman was taken out by the staff of the Opera House with the threat of call to police. Ironically the next offering of the season was the Mozart's *Abduction of the Seraglio* where veiled women perform in a good portion of the opera.

Why these draconian regulations on women's garb?[4] What does the trend portend? I argue that there is a resurgence of a form of "militant democracy" that is gaining strength in Europe – and furthermore that this form of militant democracy, one that construes certain forms of religious expression, treating these as hate speech threatening to peaceful communal relations has a disproportionate impact on religious minorities, particularly

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1 *SAS v. France*, Application no 43835/11, upholding Law no 2010-1192 of 11 October 2010 (July 1, 2014) S, 2014 Eur. Ct. H.R., Judgment, pp. 28-29, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>.

2 See *SAS v. France*, paras 41-42 (discussing the Belgian law of June 1, 2011, A Law "to prohibit the wearing of any clothing entirely or substantially concealing the face").

3 Chris Pleasance, Australian to discuss banning the burka after European Court of Human Rights upholds French rules … and Norway and Denmark could follow suit, The Daily Mail (July 3, 2014), <www.dailymail.co.uk/news/article-2679160/Austrian-parliament-discuss-banning-burka-European-Court-Human-Rights-upholds-French-rules-Norway-Denmark-follow-suit.html#ixzz3GkSu9WC5>.

4 See supra n. 1. It is important to note that the law did allow a few exceptions that show, together with the memorandum accompanying the Bill who is the target of the legislation. These included where allowed by legislation for health or occupational reasons, as well as in the context of athletic, artistic, or traditional events, and festivals.

women, and is an overall threat to tolerance of pluralism in the region. As such it runs afoul of values at the core of liberal society. To what extent can courts, especially regional rights courts, offer meaningful judicial supervision?

26.2 Genealogies

Just how and when did this political and legal trend begin? With the end of the Cold War came the collapse of communism in Soviet bloc as well as its satellite countries, many of which would find their way into Europe; a new wave democratization underway in the shadow of the region's political and legal community.

Perhaps not surprisingly, after decades of repression brought with it a concomitant rise in religion in the region, including not just the long suppressed Christian churches but also different religions, new religions missionizing in Europe. These trends together with ongoing unfoldings of colonialism in North Africa and the Middle East have also meant an uptick in Muslim immigration and rise in religious practice.

In Europe, France is one of the countries where the migration trend has been most notable and equally where the struggle over religious garb and symbols in public has been intense over the last quarter century. In 1989, the headscarves or the "Foulard affair" as it became known began when three school girls were expelled from the public schools for wearing headscarves.[5] While the question of whether Muslim girls should be able to attend French public schools wearing such garb became a national debate nevertheless, the decision-making was seen as administrative and the issue seen as a local matter. Even where the Conseil d'Etat decided, the relevant test depended on local consequences of effect of such practices' "local divisiveness."[6]

About ten years later, the public school headscarves debate culminated in a 2004 ban signed by then president Chirac that prohibited in public institutions "the wearing of symbols or clothing by which students conspicuously manifest a religious affiliation" (specifically schools). The law appears to have been overwhelmingly supported by both legislators and the society.

Close to 15 years later, the school girls' headscarves ban in French public schools graduated: to an adult prohibition – this time to any clothing that covers the face in public – including roads, streets. On 11 April 2011, Law no. 2010-1192 came into force throughout the French Republic.[7] The ban is draconian – as it restricts face veiling garb in all "public spaces" throughout the country. Subject to very limited exceptions, the law prohibits any-

5 See Ruti Teitel, Looking through the Veil Darkly <www.findlaw.com> (February 16, 2004).

6 See Avis du Conseil d'État No. 346893 (November 27, 1989), available at <www.conseil-etat.fr/content/download/635/1933/version/1/file/346893.pdf>.

7 *SAS v. France*, paras 28-29 (reproducing the relevant provisions of Law no. 2010-1192 of October 11, 2010 "prohibiting the concealment of one's face in public places").

one from wearing any clothing that conceals their face when in public places, on pain of a 150 euro fine, and/or compulsory citizenship classes. The most obvious effect of the law, and its clear intention, given its legislative history and its exceptions for athletics and other activities is to ban the niqab (a veil that leaves only the eyes visible) and the burqa (a loose garment covering the entire body with a mesh screen over the face.

26.3 The Burqa Ban in the *Conseil Constitutionnel*: *Liberte, Egalite* and *Fraternite*?

In 2010 in a short opinion, France's Conseil Constitutionnel would uphold the law on the concealment of faces.[8] The judgment was entirely deferential to the government and the asserted legislative purposes of the law including ostensible concerns with security, equality and social cohesion.

Indeed, the Conseil appears to have only found one problem with the law as written: As to liberty, particularly the freedom of religious exercise, the Conseil observed that the limitation on the wearing of religious garb should have at least one reservation, namely that the law should not place restrictions on the exercise "of religious freedom in places of worship open to the public."[9] While providing that there must be a reservation on religious exercise grounds, the Conseil nevertheless reaffirmed the asserted legislative purposes for the law: security, society and equality[10] while hearkening back to the three core values associated with French republicanism.[11]

Just how did these asserted rationales play out in France's highest court? As to the challenge of equality, since on its face the law did not single out Islam or burqa, the law was seen as nondiscriminatory. Moreover, when it came to gender, the Conseil affirmed the legislative purpose for the law as not only not impacting negatively, but rather that the prohibition was intended to be a corrective to potential gender harm of wearing the veil: i.e., of women whether voluntarily or not, the wearing of the face veil, with consequences the legislature considered for their autonomy.[12] Here, the Court concluded that the face

8 See Conseil Constitutionnel, Decision No 2010-613 DC October 7, 2010, available at <www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010613DCen2010_613dc.pdf>.

9 See Conseil Constitutionnel Decision No 2010-613 DC October 7, 2010 Para 5, available at <www.conseil-constitutionnel.fr/decision/2010/2010-613-dc/decision-n-2010-613-dc-du-07-octobre-2010.49711.html> ("toutefois, l'interdiction de dissumeler son visage dans l'espace public ne saurait, sans porter une atteinte excessive à l'article 10 de la Déclaration de 1789, restreindre l'exercice de la liberté religieuse dans les lieux de culte ouverts au public….").

10 Id at paragraph 4.

11 See *SAS v. France*, para 24 (quoting the Resolution of the National Assembly "on attachment to respect for Republic values at a time when they are being undermined by the development of radical practices," unanimously adopted, May 11, 2010).

12 Conseil Constitutionnel Decision No 2010-613 DC, October 7, 2010 at para 4 "qu'il a également estimé que les femmes dissimulant leur visage, volontairement ou non, se trouvent placées dans une situation d'exclusion et d'infériorité manifestement incompatible avec les principes consitutionnels de liberté et d'egalité…".

covering was capable of creating a situation of "exclusion and inferiority that is demonstrably incompatible with constitutional principles of liberty and equality."[13]

As to the law's purposes insofar as the community, i.e., regarding the dimension of "living together: in French society."[14] As the Bill's explanatory memorandum stated, which the legislature reaffirmed, of the values of the Republic:

> liberty, equality, fraternity. Those values form the foundation stone of our social covenant … These are the values which have today been called into question by the development of the concealment of the face in public places…Negating the fact of belonging to society for the persons concerned, the concealment of the face in public places brings with it a symbolic and dehumanising violence, at odds with the social fabric…. The voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of "living together" in French society.[15]

Following on the heels of the Conseil's decision, the law on the visage went into effect. In France, the ban has been law since 2011. Where women leave their home, and wearing their face covering, they run the risk of a fine. As of 2012, 425 women had been fined and 66 had been warned.

Perhaps, one might have expected a ban of religious garb in a totalitarian country, say communism of old. Yet, what is the meaning of this post-Cold War development in France – a staunch constitutional democracy, in its Fifth Republic? Moreover, with the increase in Muslim immigration and the resulting changed demographics of France, there has been growing momentum for more restrictions on manifestly religious expressions.

The law allowing this prohibition of religious garb was recently upheld by Europe regional rights court in a case where Belgium filed amicus having similar legislation. Regrettably, the impact of the European Court of Human Right's decision has been to spur the demand for more restrictions. Austria is planning to vote on this; with Norway and Denmark and more countries likely to follow suit. Switzerland, some of its cantons have such legislation. There are already proposals in UK for such restrictions.

While France has had historically significant strict separation of church and state, in the light of the court's decision, other countries without similar history are too adopting. Belgium has a law banning full face veil in public since 2011, upheld by its high court.[16] Spain's municipalities have varying laws. In the Netherlands, there is an ongoing vital

13 Id.

14 Id.: "telles pratiques peuvent constituer un danger pour la sécurité publique et méconnaissent les exigences minimales de la vie en société…"

15 See *SAS v. France* at para 25, p 8.

16 See supra n. 2.

political debate about treatment of Islam in public. Germany has allowed regulation at the level of the laender which banned teachers from wearing headscarves. And, in Denmark since 2008, judges have been barred from wearing any religious garb or symbols in courtroom. In both Germany and Denmark there is call for broader restrictions. In the UK, at the time Home Office Minister Jerry Brown called for a "National Debate" on Islamic veils in public places such as schools.

American observers may wonder at this development, as though our courts have struck a different balance albeit a different constitutional scheme and history. Whatever regulation of religious garb has been confined to where the subject represents the state in some fashion, implicating the potential for the establishment of religion and usually involves a restricted setting, such as the Army.[17] Otherwise there is significant protection of individual religious exercise in the public sphere.

Yet, how is any of this even remotely imaginable in a country that prides itself on its constitutional tradition of civil liberties, as well as individual self-expression in fashion? One might think back to Montesquieu, and his observations about the importance of changeability in this realm.[18] France's law seems intended at Muslim dress, and religious expression[19] would seem to challenge the very values – including neutrality, secularism and equality – that the French claim to hold dear.

From the very beginning, the debates surrounding these issues seemed to pay very little attention to individual religion or other rights. Instead, the majority opinion in *SAS v. France* seemed to epitomize a theory of democracy, in particular of "militant democracy." Let's turn to the case and opinion, which may help us understand the most recent decision in *SAS v. France* in its context.

26.4 *SAS v. France* in the ECHR: Just Where Is Fraternity in Europe Heading?

In the European Convention rights scheme, which dates back to the postwar period in Europe, the rights convention doesn't just set out a scheme for rights protection but the Convention sets out a number of ostensibly legitimate justifications for rights infringement. Under Convention law, interference with a right does not necessarily amount to an unlawful infringement, provided the interference constitutes a *proportionate* interference in pursuit of a *legitimate aim*. Reflecting the postwar, and Cold War, context of the time, the aims are often broad, seen as legitimate relate to the maintaining of stability. Where they are qualified or limited, the Convention Articles each set out a list of broad aims,

17 See *Goldman v. Weinberger*, 475 U.S. 503 (1986) (uniformity upheld in military setting), but see *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish exempt from school attendance).

18 See Montesquieu, Persian Letters, Letter to …

19 See Bill Memorandum cited throughout the SAS judgment.

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such as maintaining public safety, the protection of public order, and the protection of rights and freedoms of others.[20]

The case challenging the Law of 10 October 2011 involved a number of different claims infringements that follow as a result of no longer being able to wear the full face veil in public.[21] A young French citizen of the Islamic faith challenged the law under a number of Convention Articles: 3, 8, 9, 10 and 11, alone and in conjunction with Art 14, which prohibits discrimination. She is a French national born in 1990 who states she is a devout Muslim of Sunni customs and wears the burqa – a full-body covering including a mesh over the face, and the niqab – a full-face veil leaving an opening only for the eyes in accordance with her religious faith, culture and personal convictions. She emphasizes that no one in her family puts pressure on her to dress in this manner and that she wears the burqa and niqab in public and in private, but not systematically.

While some of the challenges such as under Articles 3 (prohibition of torture, inhuman, degrading treatment) and 11 (freedom of association) were summarily dismissed, the Court did consider the challenges brought under Article 8 (protection of private life), Article 9 (freedom of thought, conscience and religion)[22] and Article 10 (freedom of expression). The arguments advanced regarding the various claims were similar, and the focus therefore was on Article 9. That made sense because one might imagine that the most acute impact of the law on facial covering would be on Muslim women, who choose to wear the niqab or the burqa as an expression of their faith.

Under Article 9, the applicant complained of a violation of her right to freedom of thought, conscience and religion. She said her inability to wear the full-face veil in public places was incompatible with the freedom to manifest her religion or belief individually or collectively, in public or in private, by worship, teaching, practice and observance of rites. Under Article 10,[23] she asserted a violation of her right to freedom of expression, because she is unable to wear in public a garment that expresses her faith and religious, cultural and personal identity.

Finally, she would challenge the burqa ban as discriminatory, under Article 14,[24] and that the prohibition on wearing a garment designed to conceal one's face in public gave rise to discrimination based on gender, religion and ethnic origin, to the detriment of women who, like herself, wear the full-face veil.

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20 See Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9, Section 2, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention], available at, <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

21 *SAS v. France*, paras 28-29 (reproducing the relevant provisions of Law no. 2010-1192 of October 11, 2010 "prohibiting the concealment of one's face in public places").

22 European Convention, Article 9.

23 European Convention, Article 10.

24 See European Convention, Article 14, Prohibition of discrimination.

Ultimately, however, the Grand Chamber of the European Court of Human Rights rejected these challenges to the French face veil law.[25] While the government identified three purposes or values the ban was intended to reflect, which were gender equality, human dignity and "respect for the minimum requirements of life in society," not all of these were accepted by the European Court of Human Rights.

Being somewhat less deferential to the French government than the Conseil Constitutionnel was, the ECHR didn't accept all the ostensible legislative purposes that were supposed to justify the ban. Nevertheless, in a lengthy opinion, the Court ultimately seems to accept that, as a matter of principle, government can legitimately interfere with the rights of individuals – in pursuit of social and cultural cohesion.[26] Thus, the ECHR would end up sustaining the advancement of "fraternity" value or "social cohesion."[27] Yet, as discussed farther on, this value is least determinate, most open ended, least associate historically with legal enforcement, and therefore most open to political manipulation in the service of intolerance of religious minorities in France.

As to the liberty challenge under Article 9, the Court conceded that the ban interfered with the applicant's rights because she was faced with the choice of either refraining from wearing the burqa or niqab in accordance with the dictates of her conscience and beliefs, or exposing herself to the risk of prosecution. Nevertheless, under Article 9, the following qualifications or legitimate aims are set out in the Convention: The need to protect public safety, protect public order; to protect public health or morals, and the need to protect the rights and freedoms of others. While the French government' first contention was that the law was aimed at protecting public safety, and the Court accepted that safety was a legitimate aim, nevertheless, it went on to find that the interference wasn't proportionate, since the ban was general in nature, and there was no evidence of a general threat posed by the wearing of clothing such as veil. Any specific security concerns could be allayed by simply requiring that the veil be temporarily removed.

26.5 Militating Democracy a la Carte

Furthermore, as to the first two values, equality and human dignity, particularly vis-à-vis the women concerned and the potential of duress in veiling, the Court quite quickly rejected these purposes stating that in its view the law was not aimed at this goal.[28] As to the asserted need to ensure "respect for the minimum set of values of an open and democratic society" a rationale for the burqa ban accepted by the regional rights court, this argument is remarkable since, as the Court conceded, this purpose was not provided

25 See SAS paras 106-163.

26 See *SAS v. France* paras 140-143.

27 Id.

28 See S.A.S. at para 137 "it was not the principal aim of the ban to protect women against a practice which was imposed on them or would be detrimental to them." See also id at para 25.

for in any of the qualification provisions in the Convention. The government said, however, that this objective formed a part of the broader aim, which is explicit in the Convention of "protecting the rights and freedoms of others."

Thus, the Court accepted that concealing the face could undermine the value of "living together" in society. At paragraph 122 of its judgment it said:

> The Court takes into account the respondent State's point that the face plays an important role in social interaction. It can understand the view that individuals who are present in places open to all may not wish to see practices or attitudes developing there which would fundamentally call into question the possibility of open interpersonal relationships, which, by virtue of an established consensus, forms an indispensable element of community life within the society in question. The Court is therefore able to accept that the barrier raised against others by a veil concealing the face is perceived by the respondent State as breaching the right of others to live in a space of socialisation which makes living together easier. *Consequently the Court finds that the impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of living together.*[29]

Next, having decided that the law did serve a legitimate aim, the Court then turned to whether or not the ban was proportionate to this aim. Here again, it would defer to the French government harking back to its usually deferential approach with respect to matters of religion and State. As the ECHR's doctrine reflects, in the area of religion and state, it grants governments a broad "margin of appreciation," which means essentially that the Court is less likely to interfere with the actions of a democratically elected government. Thus in discussing the relevant precedents, e.g., *Leyla Sahin v. Turkey*, upholding the regulation of headscarves in Turkish university, and in *Dahlab v. Switzerland*, involving the regulation of headscarves at school, the Court specifically observed the "subsidiary role of the Convention mechanism. The national authorities have direct democratic legitimation and are … in principle better placed than international court to evaluate local needs and conditions."[30] Swiss were within their margin of appreciation in limiting religious garb in the classroom, again with the ostensible aim of "preserving religious harmony." Still, in SAS, the ECHR attempted to distinguish *Ahmet Arslan v. Turkey*, also involving attempt to ban wearing of turban as part of ceremonial religious garb in public, yet where the Court nevertheless did recognize a violation of Article 9, on grounds that the measures involving an all-out ban, even if justified, were disproportionate.[31]

29 See S.A.S. at para 142.

30 See SAS para 129.

31 The ECHR saw the relevant distinction in that the clothing at issue in *Ahmet Arslan* did not involve a full-face Islamic veil, rather turban and other items of clothing. S.A.S. at para. 136. But this distinction seems specious.

26.6 Analysis: When *Fraternite* Trumps *Egalite*, Just Whose Fraternity Really Matters?

Consider the justification or rationalization based on "vivre ensemble," i.e., the idea of the right "to live in a space of socialization which makes living together easier." While this was mentioned in the Conseil, this legislative aim is not grounded in the text of the European Convention. Thus, the ECHR approach in *SAS v. France* arguably represents a significant extension to the meaning of the legitimate aim of protecting the "rights and freedoms of others."

Second, there is the judicial protection of such a social cohesion right precisely where someone's behavior is at odds with those values which form part of an "established consensus." What does this mean in terms of the protection of minorities, whose values and attitudes may be different in any number of ways, and at times may upset or irk the majority? This suggests that a political and cultural majority can operate to chill important human rights of a religious and/or cultural minority.

Essentially, this was a case about pluralism in France and in Europe with the Court accepting that in some cases, the rights of individuals can be made subject to "the goal of maintaining and improving societal cohesion." Indeed, the Court clearly concedes the diminishment of pluralism as a result of the legislation:

> … by prohibiting everyone from wearing clothing designed to conceal the face in public places, *the respondent State has to a certain extent restricted the reach of pluralism, since the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public.* However, for their part, the Government indicated that it was a question of responding to a practice that the State deemed incompatible, in French society, with the ground rules of social communication and more broadly the requirements of "living together."[32] From that perspective, the respondent State is seeking to protect a principle of interaction between individuals, which in its view is essential for the expression not only of pluralism, but also of tolerance and broadmindedness without which there is no democratic society. It can thus be said that the question whether or not it should be permitted to wear the full-face veil in public places constitutes a choice of society.[33]

32 Court constructs the face veil as construing a separatist expression.

33 See *S.A.S. v. France*.

26.7 Militating Democracy as Forced Integration

In the current case law, we can see the European Court of Human Rights rationalizing in terms of values of democracy to justify curtailment of rights of religious expression.

> In democratic societies in which several religions coexist within one and the same population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and insure that everyone's beliefs are respected.[34]

This is not new to the court's jurisprudence. Indeed, we have seen this before in militant democracy cases regarding Germany, i.e., as various forms of expression and assembly seen as dangerous,[35] also see *Sahin v. Turkey*, upholding a Turkish headscarves ban in the university, where invoking the margin of appreciation, the ECHR sustained the ban in the name of "necessity in a democratic society."[36] Indeed, in the *Refah Partisi* case, involving the Welfare party based on Islamic beliefs, the Court held that Islam ran counter to democracy, and upheld the then Turkish government limit on the party.[37] According to the European Court of Human Rights, "Sharia is incompatible with the fundamental principles of democracy."[38]

While, for now, countries still divide over whether or not to allow this garb. Indeed, the Court conceded this in asserting the absence of a European consensus on the matter.[39] (If anything the majority of the countries in Europe still allow religious dress in public, even if there may be a counter-trend brewing.) Yet, the European Human Rights Court seems to have endorsed judicial deference to a more militant view of democracy in the region, out of the seeming fear of a rise of illiberal practices. Moreover, as it operates as a regional rights court, the precedent set forth here risks consolidating throughout the region.

To what extent is this approach reflective of diminished protection of individual expression or association or more about the conceptualization of the public sphere and its relation to the State? Where such approaches have been deployed in the past, such as Turkey, for example, these decisions were more easily contextualized as they came out of

34 See *S.A S. v. France*, Para 126 at 50.

35 Grundgesetz [Constitution] [Basic Law], Arts. 18, 21, translation at <www.gesetze-im-internet.de/englisch_gg/index.html> (Ger.). For discussion of precedents see Ruti Teitel, "Militating Democracy: Comparative Constitutional Perspectives," 29 Michigan Journal of International Law 49, 57 (2007).

36 *Sahin v. Turkey*, Application No. 44774/98, Eur. Ct. H.R., Judgment (November 10, 2005), available at <http://hudoc.echr.coe.int/eng?i=001-70956>, case in the European court of human rights which involved the regulation of headscarves in Turkish universities. The court upheld an extreme view of secularism as "necessary to democratic society"; as in France, part of Turkey's past.

37 See Refah Partisi, no 2, 37 ECtHR 1.

38 Id.

39 See SAS, para 130.

long-standing struggle between church and state and "all or none" approaches of the public sphere.[40] Moreover, these could also be rationalized as potentially provisional transitional regulations of the public sphere.[41]

In a number of other cases of anti-religion hate speech when it came to Christianity, the Court has often upheld restrictions in the name of peace, yet the over-protection of speech involving religion when it involves Christianity seems hard to square with the current rulings.[42] Conversely, not only are these religious garb wearers not getting the benefit of the protection of their expression, but *au contraire* their expression is rather seen itself as divisive and disruptive of the prevailing understanding of the public sphere. Depicted as hate speech in the opinion, as standing for separatism even though this is not generally the view of adherents, nor the French citizen in the case. The court seems to be offering its own judicial construction drawing on chilling public sentiment about it. Consider the stand of the leadership in France: former president Sarkozy characterized the face veil as "not welcome and itself a sign of debasement," while Jacques Chirac at the time of the first ban called the headscarf "aggressive."[43] Nevertheless, there are many examples of women who utilize the face veil and don't put this construction on it.[44]

In referencing fraternite, the court was invoked a value that of course is one of the three in France's motto but has always had a less straightforward relationship with law of the republic. While values like liberte and egalite all date back to the revolution, fraternite, too, is part of the historical motto[45] but was traditionally less associated with law, and involved in mythic notions of connection capable of forging civic union – generally of militarism, as in "liberte, egalite, fraternite ou mort." Or, in other dimensions of its provenance, are also thought to derive from a notion of neutral or civic Christianity, which has somehow been shorn of its deism.

These derive from a civic Christianity that Rousseau identified in the social contract – a civic religion that, while seen as neutral by most French, involves a view of universal religion, which is antithetical to many other religions, such as Judaism and Islam.[46] Not surprisingly, these sorts of law guaranteeing laicite have been associated with the uptick in Muslim immigration. And also, not surprisingly, it is challenged by religious adherents; and now one can see with this line of precedents that this unusual use of law, to promote fraternite, which had been usually associated with voluntary communal connec-

40 Cite to older Turkey case in ECHR.

41 See Teitel, Militating Democracy.

42 See, e.g., Otto-Preminger-Institut v. Austria, Application No. 13470/87, Eur. Ct. H.R., Judgment (September 20, 1994), available at <http://hudoc.echr.coe.int/eng?i=001-57897>.

43 See Nicholas Sarkozy; Jacques Chirac statements cited in Bill Memorandum.

44 See Kim Willsher, French Muslim Women on Burqa Ban Ruling: 'All I want is to live in peace', The Guardian (July 1, 2014 14.26 EDT), <www.theguardian.com/world/2014/jul/01/french-muslim-women-burqa-ban-ruling>.

45 The motto is credited to Mormoro.

46 See, generally, Leo Strauss, Liberalism Ancient and Modern (University of Chicago Press: Chicago 1968) at Preface to the English Edition of Spinoza's Critique of Religion therein.

tions, has moved from the realm of the voluntary to the realm of coercion and law enforcement. Indeed, the history of the fraternite part of the motto is complicated precisely because its origins were seen as moral and not individualistic, indeed a view of a robust community, and literally of brotherhood.[47]

Unquestionably, there is live contestation of the nature of French democracy today, particularly on the issue of religious pluralism. And, the question this case raises is why should the ECHR majority's subjective interpretation of the veil prevail? To what extent should theirs be the baseline of the contemporary principle guiding fraternite? If the women who wear the face veil say that they wear it not as a message of separatism, but the reverse, to enable them to exit their private sphere to the public,[48] then what is the significance of a rights court placing that construction on the face veil? Indeed, there were related issues in ECHR precedents concerning militant democracy, such as the *Refah Partisi* case where the Court simply reaffirmed the state's conclusions of fear about the Islamic party,[49] indeed, as in *SAS* the Court failed to perform its role of judicial supervision.

26.8 Conclusion: The Republic Relativized

The question then becomes, in a milieu of ever-increasing militant democracy, what should the role of a regional rights judiciary be – given subsidiarity and other dimensions of the scheme – can simple deference to any articulated political purpose be adequate?

The nature of rights litigation today suggests that there is significant and ongoing contestation of the nature of French democracy, and likewise that there is room for acknowledgment of pluralism beyond the historical universalist French citizen without destabilizing the republic. Regrettably, the debates both politically and in the courts have been largely waged in terms of absolutes, i.e., in terms of a dichotomous or zero-sum analysis of the presence or absence of a European consensus. While it is undeniably true that there is diversity among countries regarding their history and religious traditions, a static/originalist view of identity risks significant rights deprivations, risking threat to core democratic values. Indeed, scholars of French politics recognize that there is contestation underway regarding the nature of the country's political identity. There is a normative question at present as to how the Republic should respond to an immigrant minority, which is often isolated politically and otherwise, and which identifies strongly

47 Indeed given the word, there was a historical feminist response to fraternite, which seems particularly relevant in light of the disparate impact of the instant legislation.

48 See, e.g., supra n. 42.

49 See Teitel, Militating Democracy, at 49, 66-67.

and publicly with a religious faith.[50] There may well be a continuum regarding the meaning of the neutrality of the public sphere and that these concepts have never been static. Invocations of mythic notions of continuous universalist identity could be manipulated but they themselves reflect anti-immigrant animus, as recent political and historical accounts show.[51]

It is worth noting that wherever these understandings of cultural identity have changed, they have involved decades of political, legal and even armed struggle. Consider the US evolution in this regard over the centuries: from the various constitutional schemes associated with the colonies, including their own establishments of religion,[52] to the constitutional scheme pre-incorporation, and then finally to the post-incorporation understanding of religion rights.[53] All of these changes involved struggle waged by religious minorities – at the turn of the century Catholicism and then other newer churches. The point is not that the American scheme is the one to emulate but rather that no matter the republic, for the claim to democracy and republic to be meaningful contemplates some space for change by ongoing generations of citizens. Hence, one might imagine that rights courts elsewhere could play a significant role in guiding these developments, particularly in considering the protection of collective identity of a living Republic as relativized by individual rights protections within a broader European rights community and its relevant judicial institutions.

50 See Jeremy Jennings, Citizenship, Republicanism and Multiculturalism in Contemporary France, 30 British Journal of Political Science 575-598. See also Christophe Bertossi, French republicanism and the problem of normative density, 10 Comparative European Politics 248 (2012).

51 For useful discussion see id at 581.

52 For a fascinating account of the US history, see Morton Borden, Jews, Turks, and Infidels (University of North Carolina Press 1984).

53 I discuss these periods at Ruti Teitel, Comparative Constitutionalism in a Global Age, 117 Harvard Law Review 2570 (2004).

27 What Is Next for Comparative Constitutional Scholarship?

Renáta Uitz[*]

27.1 Preliminary Considerations, Confessions and Excuses

András Sajó is among the founding fathers of comparative constitutional scholarship, as we know it today. He is the author and co-editor of such definitive volumes as *Comparative Constitutionalism* (2016) (with Norman Dorsen, Michel Rosenfeld, Susanne Baer and Susanna Mancini, now in its third edition) and *The Oxford Handbook of Comparative Constitutional Law* (2012) (with Michel Rosenfeld); he is the founding editor of key journals in the field as the *East European Constitutional Review* and more recently of the *International Journal of Constitutional Law* (ICON). He is the founding dean of world's first LLM program in comparative constitutional law at Central European University (CEU), Budapest, and was the convener of a bespoke conference series on *The Individual vs the State* for over twenty years. His *Limiting Government* (1999) and *Constitutional Sentiments* (2011) are defining contributions in the field, examples of how comparative constitutional scholarship is done when it is done best.

When Professor Sajó left CEU for the Court, handing over the comparative constitutional law program at CEU to me, he left a void and a legacy. Many of the initiatives he has launched could continue because they were built on brave, yet solid conceptual foundations. His ability to gather curious and committed people for these ventures from many disciplines and continents is unmatched. Few academics are driven by such civic passion as Professor Sajó: his role in the abolition of capital punishment in Hungary, in drafting constitutions and legislation are well known. Outside the classroom he has always pursued numerous projects (many innovative, some uplifting, others hopeless from the start) with unmatched commitment. Having known him for over two decades I have not ceased admiring his zeal for understanding the world and for viewing the law as a force shaping it, for better or for worse.

There is ample evidence that his passion is contagious: it is hard not to bump into a fellow traveler who does not hold dearly a "Sajó moment", which changed how his students and colleagues saw the world and their role in it. Having heard many such accounts I sincerely doubt Professor Sajó is fully aware of how high the bar he has set is. The consolation prize: he himself continues to live and work by the very same standards

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that many of us only hope to reach. What words of gratitude cannot capture, deeds may be able to. It is in this spirit that I posit: there is hardly a better moment to ask what is next in comparative constitutional scholarship than now, when Professor Sajó returns to academia after his remarkable tenure on the European Court of Human Rights. Whether I am the right person to answer this question remains to be seen.[1] I attempt in this essay to sketch the preliminaries of a response mostly to signal that we had reached an important turning point (maybe even a point of no return), which may well define the future of comparative constitutional scholarship.[2]

The premise of this inquiry is properly festive for this volume and sufficiently discomforting to suit its recipient: comparative constitutional scholarship is thriving. The only trouble is that its cherished subject of study, a constitution infused with constitutionalism, appears to be dismantled by its operators as we speak. The process is gradual and it happens right before our eyes. In some cases this is the result of a conscious political strategy of a mighty majority, while in other cases it may result from popular dissatisfaction with representative democracy and its elitist institutions that are out of touch with reality. Constitutional democracy has its critics and its competitors. It also has its defenders who note the abuse of the form of constitutionalism with deep concern[3] and also warn of the emergence of a new kind of illiberal, constrained or managed democracy. The jury is still out on the proper term of desperation. What is clear is that constitutionalism may well share the fate of its occasional sparring partner and trusted sidekick, democracy. The sense of democracy's decline in Europe is certainly exacerbated by the relatively week responses of the EU to member states (e.g. Hungary, Poland), which questioned the allegedly shared constitutional foundations of the Union to no apparent political or financial consequence. Difficulties with the constitutional architecture are also displayed in the Union's response to the refugee crisis. Compared to these structural shortcomings the referendum in the UK to leave the EU appears small change.

Scolding the political actors of today by holding them to the intellectual ideals of yesteryear appears to be a highly "academic" (and as such, futile) exercise. It tells us little about *what constitutions have had become* or *what constitutionalism stands for* today. For comparative constitutional scholarship to remain relevant to the study of constitutions

1 Ideas developed in this essay were inspired by a book project we undertook with Professor Sajó. Our book, The Constitution of Freedom: An Introduction to Legal Constitutionalism (Oxford University Press, forthcoming) draws on adventures of many constitutions, it is not a "comparative constitutional law" book *per se*. Several strains of the argument developed here were presented in a series of papers delivered at the Institute of Legal Studies at the Hungarian Academy of Sciences as well as at the SUN Course on Constitution-Building in Africa at CEU Budapest, co-directed by the ever-enthusiastic Markus Böckenförde and the ever-reliable Gedion T. Hessebon. I remain grateful for all discussions and the continuing support of many friends and colleagues, the mistakes, however, are entirely my own.

2 Ran Hirschl, *From Comparative Constitutional Law to Comparative Constitutional Studies*, 11 Int. J. Const. L. 1 (2013).

3 David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013).

and constitutionalism, it needs to be able to account for how constitutions work. And to be able to do so, the field needs to reinvent itself, and do so rapidly, before it is pushed to the sidelines by its sister disciplines that are better equipped at this exercise. At this point, as Günther Frankenberg argued recently, a lot more is needed than the "rehabilitation of detail".[4] This challenge may be labeled as "re-building the ship at open sea", a metaphor not unfamiliar for practitioners of the field. The only difference is that while in the 1990s the shipbuilders were the politicians of new democracies, today's navigators are scholars, the cargo is fragile and the waters are unfriendly. Succeeding at this venture will take not only knowing the weather and the currents, the ship and her crew, and being prepared for the best and the worst. This is not an exercise for the faint hearted. It takes wit, creativity and courage.

27.2 Comparative Constitutional Scholarship: The State of Play[5]

Since the 1990s the field of comparative constitutional scholarship changed considerably: from being a slightly neglected chapter of comparative law books, it founds its place and purpose, alongside comparative politics, political theory and intellectual history and, more recently, contemporary and comparative history, in explaining how constitutions shape power and governments. Drawing on sister-disciplines devoted to the study of ideas about political power and the operations of government, constitutional scholarship plunged into painting abstract models for the big picture on constitutional infrastructure.[6] The deep connections between constitutional models, legal cultures and their historical origins were instrumental for drawing these models up, and fueling the chase for a global constitution.[7] At the same time, lawyers paid little attention to how governments worked under constitutional frames. That was left for scholars of politics in the short to intermediate term, and to historians in the longer run.

The field was invigorated in the 1990s by transitions to democracy in post-communist countries in Central Europe and the former Soviet Union, in South Africa and Latin America. Instead of studying constitutions and governments themselves, scholars became interested (and involved) in how constitutions are made[8] and, to a lesser extent, in what

4 Günther Frankenberg, Comparative Law as Critique (Edward Elgar 2016) 228.

5 In the first part of this essay I draw on my *Can You Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary*, 13 Int. J. Const. L. 279 (2015).

6 On this phenomenon see e.g. Armin von Bogdandy, *National Legal Scholarship in the European Legal Area – A Manifesto* 10 Int. J. Const. L. 614 (2012); Mark Tushnet, *Comparative Constitutional Law*, 1225, *in* The Oxford Handbook of Comparative Law (Mathias Reiman & Reinhard Zimmerman ed., Oxford University Press 2006).

7 On theories of constitutional convergence see Rosalind Dixon and Eric Posner, *The Limits of Constitutional Convergence*, 11 Chicago J. Int. L. 399 (2011).

8 Mark Tushnet, *Comparative Constitutional Law*, 1225, 1226-1228 and 1234-1239, *in* The Oxford Handbook of Comparative Law (Mathias Reiman and Reinhard Zimmerman ed., 2006).

makes them matter for government in real life. In doing so, students of constitutions were made to interact more with scholars of transitional justice and democratization as they plunged into understanding the making (and breaking) of their main objects of study. After the initial enthusiasm about constitutional moments of creation subsided, interest in comparative constitutional law shifted (or in some cases shifted back) to exploring how ideas and models found in constitutions traveled across borders. Whether they migrated, were borrowed, got transplanted or diffused is secondary here.[9] What matters is that scholars started to draw connections between constitutions in ways that exceeded the intellectual confines of building highly abstract models on the basis of a select few constitutional texts.

The new questions included asking what explains the role the new court took in the constitutional regime and how do these factors fare in comparison with experiences in other new constitutional courts? Other aspects and problems of constitutions, such as the judicialization of politics, the ability of constitutions to constrain raw political power,[10] the intriguing relationship on national and constitutional identity[11] pushed comparative constitutional scholarship further across continents. In addition, the study of supra-national interrelations of constitutional systems developed almost as a separate sub-field,[12] as it brought together scholars of international law and supra-national organizations with those who study the mechanisms of national (domestic) constitutional systems. In these corners the fundamental questions revolve around sovereignty (its nature and conceptual limits) and the exchange tests not only the language of constitutional law and constitutionalism, but also the conceptual foundations of constitutional scholarship (whether comparative or theoretical).

Interest in the workings days of constitutions (as opposed to their architecture on paper) drove scholars to constitutional case law as a genuine first stop. This is a highly legitimate approach to the extent courts settle major constitutional disputes. At the same time, constitutional case law can only be one of many stops for scholarship, as not all constitutional conflicts get litigated, not to mention, that not all relevant constitutional operations result in open conflict and not all constitutional cultures are litigious.[13] Conventions and constitutionally relevant political practices develop as a result of agreement

9 Generally see Vlad Perju, *Constitutional Transplants, Borrowing and Migrations*, 1304, *in* Oxford Handbook of Comparative Constitutional Law (Michel Rosenfeld and András Sajó eds., Oxford University Press 2012).

10 On political constitutionalism in Central and Eastern Europe see Paul Blokker, New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia (Routledge 2013).

11 Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (Routledge 2009); Gary Jacobsohn, Constitutional Identity (Harvard University Press 2010).

12 Jiunn-Rong Yeh and Wen-Chen Chang, *The Emergence of Transnational Constitutionalism. Its Features, Challenges and Solutions*, 27 Penn State Int. L. Rev. 89 (2008).

13 Ran Hirschl, *The Nordic Counternarrative: Democracy, Human Development and Judicial Review*, 9 Int. J. Con. L. 449 (2011).

or acquiescence of political actors some of which may not even be mentioned in the constitution itself (e.g. political parties).

Regional systems of human rights protection and global inter- and trans-governmental networks continue to pose genuine riddles about the possibility of a global or universal constitution. The universality of human rights has in intrinsic appeal for comparative constitutional scholarship in search for the global constitution.[14] The highly abstract concepts of the art result from genuine intellectual engagement with the subject. The trouble is that abstract generalizations do not only overcome, but also easily mask key differences between national solutions on the ground. At the same time, regional human rights courts appear to impose limitations on the contents of national constitutions.[15] Therefore, the impact of regional constitutional integration has to be accounted for in comparative constitutional scholarship well beyond comparative studies on fundamental rights.

Large-N studies reveal reinvigorated comparative constitutional scholarship as they test (and often refute) basic theoretical assumptions about the field.[16] They confirmed that despite the myth of stability and longevity, constitutions (except for a few outliers) do not live that long: 19 years seems to be the standard life span.[17] They also suggest that strategic vagueness and flexibility may do more for the stability of constitutions than unforgiving amendment rules. Importantly, large-N studies ask not only what makes constitutions alike (if there is global constitution and a core to it) and what makes constitutions different from each other on the grand scale of things, but – possibly more importantly – what sets apart a genuine constitution from an authoritarian, an abusive or a sham one.[18] The answer is disheartening, as there appears to be very little difference on paper between democratic and authoritarian constitutions. This is a noteworthy discovery, especially knowing that authoritarian constitutions outnumber democratic ones.[19] Large-N studies are most helpful when supported by careful qualitative analysis. A quantitative project may tell what constitutional provisions say, but it remains for the

14 For empirical research questioning the general sense on constitutional convergence (on constitutional rights and the alleged rights creep) and its limits see David Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal. L. Rev. 1163 (2011).

15 Lech Garlicki and Zofia Garlicka, *External Review of Constitutional Amendments? International Law as Norm of Reference*, 44 Israel L. R. 343, esp. 359-365 (2011).

16 Anne Mauwsee and Mila Versteeg, *Quantitative Methods for Comparative Constitutional Law* 230, *in* Practice and Theory in Comparative Law (Maurice Adams and Jacco Bonhoff eds., Cambridge University Press 2014); David Law, *Constitutions* 376, 387 et seq. *in* The Oxford Handbook of Empirical Legal Research (Peter Cane and Herbert Kritzer eds. Oxford University Press 2010).

17 Zachary Elkins, Tom Ginsburg and James Melton, The Endurance of National Constitutions (Cambridge University Press 2009) Chapter 6.

18 Zachary Elkins, Tom Ginsburg and James Melton, *The Content of Authoritarian Constitutions*, 141-164, *in* Constitutions in Authoritarian Regimes (Tom Ginsburg and Alberto Simpser eds., Cambridge University Press 2014); David Law and Mila Versteeg, *Sham Constitutions*, 101 Cal. L. Rev. 863 (2013).

19 Elkins, Ginsburg and Melton, *supra* note 107, 145-146.

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qualitative layer of the analysis to explain the difference these constitutional words make in practice.

27.3 The Challenge

While it may seem that comparative constitutional scholarship is at its golden age, this golden age may not last that long. In recent years liberal democratic constitutions, and especially the ideal behind them, constitutionalism rooted in the intellectual legacy of the Enlightenment, have come under serious challenge from the users of constitutional rules. In the target markets of potential constitutional export, the product of liberal constitutional democracy is often not that successful: even when adopted, it does not seem to take root or is twisted to absurd effects. The original design of constitutional courts or ombudsmen certainly did not mean them to be lapdogs of mighty presidents. One may say that such failures of constitutional engineering had to be expected: the transplantation of constitutional rules in and of themselves could not reasonably be expected to hail in a democratic constitutional and political culture in a post-authoritarian setting overnight.

At this point it is worth noting that long before the constitutional transitions of the early 1990s took place scholarship on constitutions and political power dutifully recorded how respectable-looking constitutional designs turned into oppressive regimes in the early days of independence in post-colonial settings in Africa, while military governments took over well-considered constitutional designs in Latin America. Interestingly, these developments and the forces driving them found more interest among scholars of comparative politics than of comparative constitutional law. Interdisciplinary conversation was slow and rare, despite comparative constitutional scholarship drawing heavily on the wisdom of political science literature.[20] Findings from area studies often did not get the same warm welcome, especially when their subjects were "constitutions without constitutionalism."[21] After all, at the time comparative constitutional scholarship was much more interested in the search for the global constitution (or at least its core), a mission that made most scholars ride the waves of democratization instead of looking in the other direction.

It appears, however, that "constitutions with constitutionalism" may be somewhat out of vogue and in certain cases are even under attack in their intellectual and political homelands. The rise of the modern administrative state with its myriads of welfare functions and services resulted in the seemingly uncontrollable proliferation of the executive

20 Consider e.g. the adoption of Duverger's term for the 1958 French governmental arrangement, semi-presidentialism.

21 H. W. O. Okoth-Ogendo, *Constitutions without Constitutionalism: An African Political Paradox*, in Constitutionalism and Democracy: Transitions in the Contemporary World (Douglas Greenberg, S. N. Katz, B. Oliviero and S. C. Wheatley eds., Oxford University Press 1993).

branch (complete with many independent, quasi- and outright privatized tentacles). Furthermore, in the age of the war on terror diverse political forces find the existing constitutional infrastructure inadequate or at least feeble. Following the terrorist attacks of 9/11 global anti-terror law emerged rapidly,[22] bringing in cavalier legal solutions that had previously been associated with states of exception and were abhorred by friends of the rule of law. Many of the measures that were normalized into daily political practice in the name of combatting terrorism, markedly depart from previously permissible intrusions into individual liberties. If courts attempt to reassert constitutional constraints over the executive's appetite for counter-terror measures, they face serious criticism (as unelected traitors blinded by the comfort of their ivory tower), and even backlash from the executive. Thus, the problem is not only that the executive branch has expanded, but that its actors and activities fall largely outside the reach of control or oversight of the coordinate branches. Legislative oversight and judicial review cannot keep up with the sheer output of the most numerous branch, and even if they could, all the other two branches can do – as a matter of constitutional design – is issue warnings long *after* the fact of the encroachment.

Consider the time line of the recent UK inquiry ordered by Parliament from the Privy Council into the Iraq war. The inquiry focused on the period from the summer of 2001 to the end of July 2009. It was launched in 2009 and wrapped up in July 2016,[23] two elections later, under the government of the former opposition. On the use of weapons of mass destruction, its Report found that

> in situations where the policy response may involve military action and the evidence, at least in part, depends on inferential judgements drawn from necessarily incomplete intelligence, it may be more difficult to secure support for the Government's position and agreement to action.[24]

Not a particularly novel or helpful conclusion a decade after the fact. Of course not all parliamentary inquiries take a generation. The French legislative inquiry into the handling of the 2015-2016 terrorist attacks found in the summer of 2016 that the formal declaration of emergency and the emergency measures deployed made little difference in practice, due to the lack of cooperation between various security and anti-terror agencies.[25] This finding, however, did not prevent the French Parliament from continuing to

22 Kent Roach, ed. Comparative Counter-Terrorism Law (Cambridge University Press 2015).

23 <www.iraqinquiry.org.uk/the-inquiry/>.

24 HC 264, The Report of the Iraq Inquiry, Executive Summary (July 2016), <www.iraqinquiry.org.uk/media/247921/the-report-of-the-iraq-inquiry_executive-summary.pdf>, para 839.

25 Report of the Fenech commission, 5 July 2016. Proposition no. 32. <www.assemblee-nationale.fr/14/pdf/rap-enq/r3922-t1.pdf>, 254.

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extend the state of emergency (*l'état d'urgence*) and permitting the use of additional emergency measures upon the executive's request.[26]

Note that those who believe that such non-judicial oversight mechanisms remain suitable[27] (or even preferable[28]) ways to assert control over the executive[29] assume not only that institutional capacity and adequate procedures are in place. They also assume that a functional constitutional framework is complemented by an interested and engaged citizenry, which is willing to hold its elected and non-elected constitutional office holders responsible in the framework of a robust public discourse. Viewed from this perspective the success of populist political parties and movements is particularly alarming.[30] In addition to the resurgence of emotional politics,[31] populist parties were seen to succeed at the polls and subsequently attempted constitutional reform to remove constitutional constraints on executive powers in several countries. At times such attempts do not go beyond simply mocking constitutional language. However, where the requisite majority is available in the legislature, such political forces are eager to resort to procedures that turn the constitutional form into a farce, laughing in the face of the drafters of the constitution who once had held certain ideological or value commitments sincerely enough to put them in a document titled constitution. Comparative constitutional arguments turn out to be rather useful in creating a costume for this political performance.

To bring a familiar example: when the marriage-based definition of family was introduced to the text of the Fundamental Law with the Fourth Amendment (Article L(1)), the Hungarian Government supported this amendment with constitutional examples from Bulgaria, Estonia, Greece, Lithuania and Romania, to illustrate that "the constitution of many countries regards traditional marriage as the basis of the nation's survival and growth, and places it under state protection."[32] Thus, the constitution's craftsmen were clearly mindful of solutions in foreign constitutions and engaged in a systematic preparatory study of options.

The practical problem is not only much that such references to foreign examples or comparative arguments are mere facades used to hide efforts to undermine previously

26 La prolongation de l'état d'urgence jusqu'en janvier 2017 définitivement adoptée par le Parlement. Le Monde, July 20, 2016, <www.lemonde.fr/politique/article/2016/07/20/la-prolongation-de-l-etat-d-urgence-debattue-au-senat_4972466_823448.html#mou8gVecHipul5CX.99>.

27 Pierre Rosanvallon, Counter-Democracy: Politics in an Age of Distrust (Cambridge University Press 2008).

28 Mark Tushnet, *The Political Constitution of Emergency Powers: Parliamentary and Separation of Powers Regulation*, 3 International Journal of Law in Context 275 (2008).

29 For an informed critical account regarding anti-terror measures see Andrew Lynch, *Legislating Anti-terrorism: Observations on Form and Process*, 151 in Global Anti-terrorism Law and Policy (Victor V. Ramraj, Michael Hor, Kent Roach and George Williams, eds. Cambridge University Press 2012).

30 Jan-Werner Müller, What is Populism? (University of Pennsylvania Press 2016).

31 András Sajó, *Militant Democracy and Emotional Politics*, 19 Constellations 562 (2013).

32 Háttéranyag az Alaptörvény Negyedik Módosításához [Background to the Fourth Amendment of the Fundamental Law], available in Hungarian at <www.kormany.hu/download/0/09/d0000/VB%20-%20Alapt%C3%B6rv%C3%A9ny%20h%C3%A1tt%C3%A9r%20130411.pdf>.

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existing constitutional standards of protecting fundamental rights or limiting governmental powers. The more pressing problem is that such arguments are popular among political leaders who see the constitution as not more than a source of continuing annoyance. It should also be reason for concern that the techniques of raw political self-perpetuation masquerading as constitutional reform in Hungary were readily borrowed by the government of Poland elected in the fall of 2015 by overwhelming popular support. The independent media together with the Polish Constitutional Tribunal were among the early targets of the constitutional reform fervor. The next step in Poland (like in Hungary) was the preparation of a full-scale judicial reform.

It is certainly true that constitutions infused with constitutionalism were meant to constrain political power, to prevent its arbitrary use and concentration. As such constitutionalism means a constitution to inconvenience power-holders by definition. Accepting such inconveniences used to be the precondition of entering the stage of politics framed by a constitution (pre-commitment). Thus, while attempts of power holders to overstep the boundaries set by constitutions had to be anticipated, it appears that when such transgressions happen, comparative constitutional scholarship hands the offenders over to scholars of politics or history a tad bit too easily. This may have been the right reaction in the face of the occasional transgression, which was frowned upon even by fellow politicians. Yet, when departures from the norm become politics as usual, and as such, a visible trend, time has come for comparative constitutional scholarship to face a systemic shortcoming it has ignored for too long.

The challenge is that despite its many achievements comparative constitutional scholarship appears to be less than able to account for these developments on the ground. Currently prevailing methods and analytical frames are often not sensitive to such hostile dynamics or gradual developments that make distinct constitutional institutions, and ultimately, entire constitutions work, malfunction or even fail. The search for the big picture often deters attention from significant details, while the appeal of seeing contestation for power in terms of a dialogue prevents a more context-sensitive analysis of forces that drive constitutional change on the ground. Comparative constitutional scholarship certainly has resources to mobilize in its own quarters and broader intellectual networks. At the same time, it will need to face and surpass some of its self-imposed limitations and face its myths and demons in order to face up to the challenge.

27.4 On Missed Opportunities: Mobilizing Resources in Plain Sight

The current crisis is due largely to the fact that constitutional legal analysis works with snapshots of constitutions and prefers abstract models, instead of taking account of the gradual transformation of institutions and of constitutions over time and across space. Gradual developments usually involve multiple actors, and as such, are certainly not easy

to chase by social science methods. Still, comparative constitutional scholarship has considerable yet untapped resources, which it can mobilize to reinvent itself in order to meet the challenges it faces.

Instead of viewing its subject as the constitution of a particular country at a particular moment, constitutional scholarship has to start to embrace the otherwise undisputed fact that constitutions and their application are pragmatic responses to actual political and social conflict. And instead of seeing particular arrangements on presidential term limits or socioeconomic rights as the drafters' attempt to conform to a model or failing to do so, scholarship would benefit from seeing particular constitutional arrangements for what they meant for the drafters, e.g. as attempts at resolving a genuine disagreement, or instances of political compromise. Having a better grasp of the starting point certainly serves understanding the outcome, and ultimately the resulting model, better. Also, seeing constitutions as the product of power struggles and political bargaining would enable seeing their gradual transformation over time in the midst of such conflicts. A comparative take on the resulting picture would be the next genuine step from here toward a better understanding of constitutions at work.

To use a familiar example: it is well known that the Indian Constitution included a number of judicially non-enforceable commitments (many of them socioeconomic rights) in order to provide these important considerations constitutional recognition without making the government responsible for delivering on them within limited financial resources. It is also well known that the solution travelled to India from Ireland. The less well known part of the travelogue is that in 1937 the Irish solution of non-enforceable socioeconomic rights was adopted as a political compromise, partly to make sure that government funds were not committed to social welfare causes, and partly, to keep education and other welfare services in the hands of the Catholic Church even after the adoption of the Constitution.[33] In 2014 Ireland had to face the consequences of child abuse in such Catholic-operated schools before the European Court of Human Rights.[34] As constitutional compromises may backfire, it is not unhealthy to wish to learn about the most typical traps and the standard remedies (if available).

As an important further step along this path, comparative constitutional scholarship needs to move beyond simply tracing the migration of ideas and has to engage with what happens to transplants in their new contexts (asking questions like did the new solutions take hold and if yes, how).

On the eventful afterlife of constitutional transplants consider a simple example from Japan. The Japanese Constitution provides that "the Cabinet, in the exercise of executive power, shall be collectively responsible to the Diet" (Article 66). Although Japan was

33 Thomas Murray, *Socio-economic Rights and the Making of the 1937 Irish Constitution*, 31 Irish Political Studies 502 (2015).

34 *O. Keeffe v. Ireland [GC]*, Application no. 35810/09, Judgment of 28 January 2014.

characterized by dominant party rule between 1972 and 1982, the average Japanese prime minister served for 2 years. Starting with 1987 the actual term dropped closer to 18 months,[35] while the lower house of parliament has been dissolved in 2.5 years, on average, thus not serving till its constitutionally envisioned 4-year term.[36] The volatility of the Cabinet facilitated the development of competing factions in the leading party, which resulted in infighting and political instability. New parliamentary elections meant that the political majority of the parliament and the Cabinet would come from a different faction of the same party.

These dynamics are certainly not expected from a dominant party regime in a parliamentary system. This anomaly is the product of a historic accident: in Japan collective Cabinet responsibility is understood to require *unanimous* Cabinet decisions. For decades it was commonly accepted that the prime minister could not instruct individual ministers without a unanimous Cabinet decision. As a result, prime ministers routinely replaced dissenting ministers to ensure unanimity, with annual Cabinet reshuffles becoming the norm.[37] With ministers having little time to learn the ropes of their portfolios, career bureaucrats retained a strong influence over the Cabinet.[38] Even such a brief excursion tracing the meaning of a stock standard constitutional clause on cabinet responsibility demonstrates the impact of context on the application of a constitutional provision, and has considerable lessons for further comparative analysis.

Although scholarship on the transfer or migration of constitutional ideas has been interested in the fate of borrowed goods, many of the studies are either problem-specific (e.g. focusing on constitutional courts) or region-specific. In a recent contribution, Mark Tushnet and Madhav Khosla make an important observation on what makes constitutionalism "unstable" in South Asia:

> all participants in national politics appear to be sincerely committed to the idea of constitutionalism – if not always a fully liberal constitutionalism, then certainly one that hopes to establish reasonably permanent institutions with the capacity to address issues of daily governance – yet they struggle to settle on a stable institutional structure embodying a form of constitutionalism appropriate to their nation. … The instabilities can be described as arising from an *inability to achieve stable agreement on any single design choice because each is a plausible option*. (emphasis added)[39]

35 J.A.A. Stockwin, Dictionary of the Modern Politics of Japan (Routledge 2003) 292 ("Prime Minister").
36 Meryll Dean, Japanese Legal System: Text, Cases and Materials, 2nd ed. (Routledge – Cavendish 2003) 200.
37 J.A.A. Stockwin, Dictionary of the Modern Politics of Japan (Routledge 2003) 28-29 ("Cabinet").
38 Kazuyuki Takahashi, *Ongoing Changes in the Infrastructure of the Constitutional System*, 237, 244 *in* Law in Japan, A Turning Point (Daniel H. Foote, ed., University of Washington Press 2008).
39 Mark Tushnet and Madhav Khosla, *Unstable Constitutionalism* 3, 5, *in* Unstable Constitutionalism: Law and Politics in South Asia (Mark Tushnet and Madhav Khosla, eds. Cambridge University Press 2015).

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This premise for analysis suggests that there is considerable unexplored potential within existing comparative constitutional scholarship to draw connections across regions and eras, which are barely ever studied in light of each other. The new steps involve examining the imprint of colonial constitutions on post-independence constitutions (e.g. emergency powers of the executive), the impact of fresh off-the-shelf solutions in new contexts (e.g. a constitutional court or a judicial service commission) and the gradual transformation of transplants in their new environments over a longer period of time is only the beginning. Studying how transplanted or borrowed ideas are used and misused would permit better insight for constitutional design, which has practical applications for the drafting or assessment (including by monitoring bodies) of new constitutional provisions.

The looming decline of constitutionalism is marked by the rapid travel of power maximization efforts masquerading as constitutional reform. The snowballing of constitutional ideas and solutions within a region, however, is not a new phenomenon. The current illiberal wave in Europe may be noteworthy for its direction (i.e. cynicism toward constitutionalism), yet, it is not novel as a phenomenon of regional constitutional contagion. After all, the post-communist constitutional transition of the 1990s in Central Europe is usually described as one collapse marked by a series of Round Table talks, starting in Poland and ending at the southern edges of the Balkans. That local political elites are willing to learn from each other in the process is well documented.

Interestingly, what is barely ever used as a comparator in accounts on constitutional snowballing is the tale of the emergence and spread of the proverbial imperial presidency in Africa. As Kwasi Prempeh reminds, in Anglophone Africa Ghana's president Kwame Nkrumah was the first to replace a Westminster-type parliamentary regime in a post-independence constitution with a super-presidential regime. In 1960 Nkrumah argued that "Ghanaians have an indisputable right to think for themselves, to decide for themselves and to act for themselves."[40] (This language is painfully familiar in the era of backlash against globalization and "anything Europe.") Importantly, Nkrumah's political rhetoric had intrinsic appeal already in its day. The imperial presidential arrangement he preferred spread across constitutions in Africa like wildfire due to the support of like-minded political leaders. The phenomenon is well familiar: there is no shame in following a well-tested recipe, after all.

The morale of this story drawn by Prempeh is also of considerable consequence for comparative scholarship beyond the African continent. Prempeh argues that Nkrumah's legacy in constitution-making in the African context is that rulers who advocate for constitutional reform are in fact committed to a large-scale power maximization exercise

40 H. Kwasi Prempeh, *Constitutional Autochthony and the Invention and Survival of "Absolute Presidentialism" in Postcolonial Africa*, 209, 216-220, *in* Order from Transfer: Comparative Constitutional Design and Legal Culture (Günther Frankenberg, ed. Edward Elgar 2013).

(and not to preventing the abuse of political powers through improved constitutional design).[41] Opening up the political sphere for multiparty elections is a small price to pay for lasting comfort in office. If anything, multiparty elections provide convenient window dressing for incumbents who cannot be removed by challengers due to the advantages secured by constitutional rules. If these lessons sound strangely familiar, they should at least inspire comparative constitutional research to draw much more intensely and regularly on cross-regional comparisons.

It is not only for historians and political theorists to ask what makes political regimes (and not necessarily only democracies) travel in waves. These tidal waves appear to bring new constitutions with them: take the Arab Spring as a constitutional event the study of which has by now appears to have settled into its own comfortable geographic box, and – for the most part – beyond the reach of systemic large-scale comparison.[42] This means not only that scholars of the field will keep conversations to themselves. This means also that outside these elite circles few will know about the constitutional ideas that got tested and preserved or discarded before our eyes.

On account of these examples it is worth noting that comparative analysis benefits from time travel. There may well have been exceptional men among the American Founding Fathers and it may well be that the French Revolutionaries had to solve genuine dilemmas about drafting a constitution in a large assembly of 1,200 representatives, in one hall, without screens and microphones, but with an eager audience.[43] Yet the French Revolution was not the only one to devour its own children: history appears to teach that revolutionary sentiment is easier to ignite than to put to rest. Similarly, constitutional transformation appears to follow patterns: our fellow humans of the 1960s perhaps believed in different political creeds than those of the 1930s or the 2010s, still, despite a few stellar outliers, the range of constitutional solutions adopted, however, is surprisingly limited. Constitution-making does not appear to unleash of human creativity.

The vast depository of wisdom from the sister disciplines, especially from political science, comparative history and intellectual history, is often underused by constitutional lawyers. Political science should be a constant source of inspiration not only for its findings, but also for its research methods (or at the very least, for the questions it asks). Research in comparative politics often explores the deep underbelly of constitutions' daily lives using terms and categories that offer new insight on how constitutions work. Of course when political scientists talk about veto players, they may refer to particular constitutional mechanisms that do not have functional equivalents across constitutions. Still, the analysis offers new insight into how constitutions structure and frame the activities (and thus the powers) of constitutional actors.

41 Ibid.

42 Routledge Handbook of the Arab Spring (Larbi Sadiki, ed. Routledge 2014).

43 Jon Elster and Arnaud Le Pillouer, *Semi-public Voting in the* Constituante, 52, *in* Secrecy and Publicity in Votes and Debates (J. Elster, ed., Cambridge University Press 2015).

In this respect recent research comparing system of government to their constitutional incarnations is most revealing. The work of José Antonio Cheibub, Zachary Elkins and Tom Ginsburg finds somewhat counter-intuitively that constitutions of semi-presidential regimes are much more alike than parliamentary ones.[44] Indeed, research suggests that knowing the era, the content and the basics of the political regime will predict the arrangement of executive-legislative powers in a constitution better than the label "parliamentary" or else can.

27.5 The Task Ahead: Zooming in on Constitutional Actors

The next challenge for comparative constitutional scholarship is to capture and make better sense of constitutions at work. To do so, comparative constitutional analysis will need to pay more attention to those who make constitutions work: *constitutional actors*.

Constitutional actors come in many shapes and forms, and they differ across contexts. In addition to formal constitutional bodies or institutions, the set includes political parties, unions, churches, civil society organizations, human rights commissions (where they are not constitutionalized), to name a few. In addition to domestic constitutional actors there are several regional and international organizations that operate as constitutional actors on the regional and also on the domestic level. In Europe the ECtHR, the Venice Commission and several EU institutions are obvious examples, in the Americas the Inter-American Court and Commission come to mind.

That political parties fundamentally shape the operation of constitutions in practice is beyond doubt. Separation of powers as envisioned by Montesquieu but even the American Founding Fathers pretty much ceases when the legislative and executive branches are in the hands of the same political party in a modern democracy. This is why the most recent US elections are significant from a constitutional perspective. Madison could not imagine in his worst dreams that a branch of government will stop defending itself and support another branch simply because that other branch is also associated with the same political party.

Among the constitutional actors civil society organizations are worth special attention, as they shape the fates of constitutions in a manner that is often not accounted for in comparative constitutional scholarship. It is true that civil society organizations are often credited for bringing down entire political regimes from post-communist Europe to Latin America and North Africa. Those in the human rights world are also aware that civil society organizations are vulnerable to harassment and intimidation by regulatory means. Civil society organizations are worthy of special attention as constitutional actors because more often than not they use constitutional channels to challenge the government. In

44 José Antonio Cheibub, Zachary Elkins and Tom Ginsburg, *Beyond Presidentialism and Parliamentarism*, 44 (3) British Journal of Political Science 515 (2014).

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doing so they use legal tools that are accessible to all citizens, even if they are used rarely by others (e.g. freedom of information requests). It is this unique constitutional function that made the ECtHR – similarly to the UN Human Rights Committee – highlight that civil society organizations are "one of society's 'watchdogs,' in the public debate on matters of legitimate public concern."[45]

This watchdog function of civil society organizations goes way beyond representing clients and bringing strategically litigated public interest cases before courts. Courts around the world have explored the idea of involving civil society organizations in implementing complex remedies, especially in socioeconomic rights cases. In the Council of Europe civil society organizations actively participate in monitoring the execution of ECtHR judgments.[46]

On the domestic constitutional level permissive rules of access to court may transform civil society organizations into important players reminding the government to act within its constitutional powers. In Israel civil society organizations tried to prevent the appointment of a cabinet minister against whom criminal charges were pending,[47] and successfully sued for stopping the creation of private prisons.[48] In South Africa civil society organizations turned to the Constitutional Court directly, with a special discretionary petition in the interest of justice in several important constitutional instances such as to prevent the president from unconstitutionally extending the terms of office of the sitting chief justice[49] or to ensure that the president complies with the order of the public prosecutor in a case where she found that the president mismanaged public funds for personal benefit.[50] In explaining the significance of these cases brought by civil society litigators in South Africa an eminent commentator argued that

> the Court has developed new ways, unforeseen by the Constitution's framers, of enforcing democratic rights in a context where the major threat to democracy is the absence of any credible political alternative to the ANC.[51]

45 See e.g. in *Társaság a Szabadságjogokért v. Hungary*, Application no., Judgment of April 14, 2009, para. 26 and more recently in *Magyar Helsinki Bizottság v. Hungary* [GC], Application no. 18030/11, Judgment of November 8, 2016.

46 Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights, 9th annual report of the Committee of Ministers, 2015, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fe2d>, 74.

47 HC 4267/93 *Amitai, Citizens for the Integrity of Government v. Prime Minister* (1993) 47(5) PD 441.

48 HCJ 2605/05, *Academic Center of Law and Business v. Minister of Finance, Israeli High Court of Justice* (November 19, 2009).

49 *Justice Alliance of South Africa v. President of Republic of South Africa and Others, Freedom Under Law v. President of Republic of South Africa and Others, Centre for Applied Legal Studies and Another v. President of Republic of South Africa and Others* (CCT 53/11, CCT 54/11, CCT 62/11) (July 29, 2011).

50 *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* (CCT 143/15; CCT 171/15) [2016] ZACC 11 (March 31, 2016).

51 Theunis Roux, *Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years*, 42 Journal of Southern African Studies 5, 6 (2016).

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Focusing on constitutional actors would permit further reflection not only on the gaps of the constitutional text, but also on the opportunities the existing constitutional architecture holds for addressing new constitutional challenges. A closer look at civil society organizations suggests a way for reinvigorating accountability mechanisms to curb the powers of the ever-expanding executive branch. In this respect access to information may be an important tool, as the Grand Chamber of the ECtHR reminded recently:

> 139. … a broad consensus exists within the Council of Europe member States on the need to recognise an individual right of access to State-held information so as to enable the public to scrutinise and form an opinion on any matters of public interest, including on the manner of functioning of public authorities in a democratic society.
> …
> 162. … the definition of what might constitute a subject of public interest will depend on the circumstances of each case. The public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism. In order to ascertain whether a publication relates to a subject of general importance, it is necessary to assess the publication as a whole, having regard to the context in which it appears.[52]

Access to information in the public interest is a tool of transparency and accountability in learned hands: asking for relevant information from the right source at the right time takes great familiarity with how government operates. Without such skill we would know a lot less on how governments manage the war on terror. In the US the American Civil Liberties Union (ACLU) has been particularly successful in seeking access to information concerning the treatment of prisoners in Afghanistan, Iraq, Guantanamo and in secret CIA prisons.[53] Freedom of information litigation by the ACLU was also instrumental in making the Obama administration release the drone playbook (formally known as the Presidential Policy Guidance on Procedures for Approving Direct Action Against Ter-

52 *Magyar Helsinki Bizottság v. Hungary* [GC], Application no. 18030/11, Judgment of November 8, 2016.

53 The database built from documents obtained through litigation which commenced in 2004 is available at <https://www.thetorturedatabase.org/about>.

rorist Targets Located Outside the US and Areas of Hostilities[54]) in the summer of 2016. The ACLU's access to information litigation retrieved the US government's official numbers on killings by drones for the first time in the summer of 2016.

Admittedly, access to information is first and foremost an *ex post* mechanism, which permits the scrutiny of governmental operations after the fact. To the extent the mere fact of accessibility of government records makes civil servants and elected officials rethink how they approach particular problems to solve and become more conscious of the constitutional dimensions of their decisions, access to information contributes to limiting the powers of the executive via constitutional means.

As even this brief account on the role of constitutional actors in the daily operations of the constitutional framework suggests, a more informed comparative analysis on diverse constitutional actors would be much needed to understand how constitutions channel (and how they exclude) voices that matter for politics. Going beyond the classic institutions and officials listed in the constitution and expanding constitutional analysis to those players that use the constitutional framework for interest representation, to hold government accountable, to stop the government from trampling liberties and to make it respond better to its citizens' needs would ultimately give a more comprehensive picture on the daily operation of constitutions.

27.6 Accounting for Factors Shaping Constitutional Designs: Ideology, Ambition and Luck

In order to make the most of its comparative dimension, comparative constitutional scholarship would need to account for several external factors that shape constitutional designs. When reading biographies of constitutions, the forces shaping the form and fate of constitutions turn out to be much more diverse than what is usually reflected in constitutional scholarship. Some of these factors are appealing, while others are more unfortunate. Ignoring these forces, however, results in removing important sources of explanation behind constitutional architecture and constitutional change. While constitutions are the products of political bargaining (complete with reasoned judgment, opportunism, ignorance and compromise) they are also shaped by ideology, ambitions and luck on the way.

Although political ideology is a powerful guiding force behind constitutional change, comparative constitutional analysis often attributes less credit to it than it would deserve. Without going into detail on the impact of political ideologies on constitutional design in detail, it is worth noting that grand ideas often result in technical solutions that are useful to unpack – at least in the name of informed consent – before such solutions are borrowed. For instance, although the free mandate is regarded as an important precondition

54 <https://www.aclu.org/sites/default/files/field_document/presidential_policy_guidance.pdf>.

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for deliberation in a representative legislative assembly, numerous constitutions retain mechanisms that permit the recall of deputies. The existing mechanisms fall roughly in two families: the variant in South Africa and more recently in the UK permits the recall of deputies who had committed a serious crime. In contrast, the purpose of recall in several states in the US, in Canada's British Columbia, in several Swiss cantons and in some Latin American countries such as Colombia, Ecuador and Venezuela is markedly different. These are surgical instruments of direct democracy meant to correct the ways of representative institutions precisely in the logic of the binding (imperative) mandate. Thus, these latter mechanisms work as instruments for extra-parliamentary powers to destabilize established constitutional government.

That ambitions matter for constitutional design is not news for students of constitutions. Comparative constitutional scholarship owes a lot to political science and social science literature in decoding ambitions that drive constitution-makers in establishing or undoing particular constitutional institutions at the moment of founding. The aspirations to bring about regime change or to seek insurance against future maltreatment have been well recognized in the literature.[55]

Exactly due to the explanatory force of the aspirations of political actors it is most important to keep this extra-constitutional factor in mind for the analysis of the continuing operation on constitutional regimes in and outside democracies. Take judicial independence: while an independent and impartial judiciary is the bulwark of the rule of law, less than democratic regimes also pride themselves in their independent courts. It is well known that a well-functioning judiciary makes the application of the law predictable, therefore it is good for business (including for foreign investment). A well-functioning judiciary is also a useful means of expressing and channeling dissent in a not-so-democratic regime. If so, a comparative study of less-than-democratic regimes should account for the judiciary and litigation as a forum for tracing the fate of dissent under constitutions beyond the standard means of censorship, fellow limitations on political rights and controlled elections.

Among the forces that shape the fate of constitutional design is often neglected, or its significance is relegated to amusing side notes. This is a little surprising, knowing how some early thinkers, especially Machiavelli, relied on the power of *fortuna* (forune)

> as the enemy of political order, the ultimate threat to the safety and security of the state. … Machiavelli's fortune is a malevolent and uncompromising fount of human misery, affliction, and disaster.[56]

55 E.g. T. Ginsburg and Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 Journal of Law Economics and Organization 587 (2014).

56 For an introduction see Cary Nederman, *Niccolò Machiavelli*, Stanford Encyclopedia of Philosophy, October 20, 2000, <http://plato.stanford.edu/entries/machiavelli/>.

If *fortuna* affects constitutional design and operations, she should certainly be accounted for when getting a better sense of constitutions at work. Anecdotes are dime a dozen. That it made a difference for the design of the office of the president in the US that their preferred candidate for the job, George Washington, did not have offspring. That in 1988 the pro-democracy protesters in South Korea got farther than their predecessors because the government was not ready to resort to violence at the doorstep of the Seoul Olympics. Or that the nature and structure of the *amparo* complaint as we know it today owes as much to Manuel Crescencio Rejón and Mariano Otero as to Alexis de Tocqueville. Their unlikely interaction is responsible not only for the creation of the *amparo* mechanism, but also to one of its weaknesses, i.e. that by default it does not have *erga omnes* effect.

The drafters of Mexico's many constitutions were much influenced by the US Constitution. When Mexico introduced a special complaint dedicated to the protection of fundamental rights (*amparo*) on the federal level in 1847, it did not mean to restrict the suit to one court. Instead, as an adaptation of the US model, all federal courts got the power to invalidate unconstitutional executive and judicial action (but not legislation) upon the initiative of the federal or state legislature and executive power. The founding fathers of *amparo*, Manuel Crescencio Rejón and Mariano Otero, based their proposal for this dedicated constitutional suit on the work of Alexis de Tocqueville, a French Catholic who they trusted with making sense of the world of protestant Americans. This somewhat roundabout course of reception of the US model, combined with respect for the will of the people's representatives that by design *amparo* petitions only affect the rights of the parties in the case, and not the validity of the legislative measure in general. For the constitutional review of legislation the 1847 Mexican constitutional arrangement retained a review mechanism in parliament. In practice despite the availability of *amparo* in courts, the federal legislature took the lead in constitutional review (mostly in the form of invalidating state-level legislation).[57] At the start in did not improve the reputation of the *amparo* suit that most early cases came from military officials who were contesting their transfers (i.e. were in fact engaging in insubordination), or that Congress did not pass the law on the procedural framework of amparo until 1861.[58] Much later the resulting flood of individual petitions led to the reform of *amparo* in 2011.[59]

There is more to account for luck than excavating amusing anecdotes from the treasure trove of constitutional history. Fickle *Fortuna* and forces assisting her make many constitutional projects fail. Some of these may be rather worthy of further attention, as a lot of effort goes into their preparation and losing a vote in parliament does not mean that the idea loses its appeal for its initial sponsors. Although the Hungarian government's attempt to pass a constitutional amendment in defense of national constitutional

57 José María Serna de la Graza, The Constitution of Mexico (2013) 114.

58 Linda Arnold, *Vulgar and Elegant: Politics and Procedure in Early Modern Mexico*, 50 The Americas 481, 492-494 (1994).

59 J. K. Staton, Judicial Power and Strategic Communication in Mexico (2010) 105-106.

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identity failed in November 2016 due to a lack of support in Parliament,[60] the amendment itself was crafted in terms that very much resonated with the prevailing sentiment and vocabulary of EU skepticism so fashionable in some member states. Lack of support in one corner does not mean that the idea does not follow supporters. Instead of ignoring *Fortuna* and her dabbling in constitutional politics, her work is worth much closer attention when studying constitutions in their natural habitats.

27.7 Confronting Myths and Demons

The discussion on the reasons and resources of reinventing constitutional scholarship focused so far on looking at constitutions in a different light. This last section calls for self-reflection as a precondition of taking further steps. It is not only that comparative constitutional scholarship is prone to working at a high level of abstraction, but also that it often relies on highly abstract concepts and unspoken assumptions (its very own myths and demons) without further reflection.

Myth sounds like a catchy misnomer at first. The term here stands for unspoken assertions and premises that shape comparative projects at their very foundations. As they are deeply embedded in thinking about constitutions, they often remain beyond critical inquiry (or even doubt) and are seamlessly carried from one project to the next. In practice these unspoken premises screen out important data (i.e. potential triggers for inquiry) and make comparative constitutional analysis blind to phenomena that shape the operation (and fate) of constitutions on the ground. As an example: the intellectual bias in constitutional scholarship leans toward reaching the ideals of constitutionalism, thus steering its practitioners away from noticing pointers suggesting smaller deviations from allegedly shared norms, and as such, prevent the detection of backsliding.

The rule of law, separation of powers or the judiciary as the most dangerous branch are among the most influential myths of comparative constitutional scholarship. The problem is that once these much-revered abstract concepts are operationalized without much further thinking, they are likely to harden into expectations about constitutional design. At that point they become boxes to tick, often inhibiting meaningful constitutional engagements (analysis) with real-time developments on the ground, and essentially undermine comparative scholarship. As an example it is sufficient to consider how the rule of law has been degraded into a score sheet on institutional features to the point where constitutional scholars would resort to consulting a score to conclude that constitutional developments in country "X" are not that alarming, as the rule of law score did not drop that much. Long gone are the days when the rule of law was a teleological and

60 See my National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades, November 4, 2016, at <http://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/>.

not an anatomical concept, to allude to Martin Krygier's helpful distinction.[61] In those times constitutional scholarship benefitted a lot from being able to tell aspirations from empty institutional shells. Comparative constitutional scholarship needs to revisit its more contemplative heritage to be able to reinvent itself.

It is pointless to deny that constitutional scholarship is inhabited by demons. Among them the fear of tyranny and anarchy, chaos and deadlock are most prominent. Tyranny is the ill constitutions were meant to eradicate (or at least to keep at bay). Liberal constitutional scholarship continues to chase tyrants and despots even under seemingly democratic constitutions. This quest is not misguided, yet, it needs to be adjusted to the conditions of the modern regulatory state. Tyranny is adaptable: it predates written constitutions. When thinking about constitutions, constitutional scholars have to keep their eyes and minds open to see its new iterations for what they are, and also, for what they are not – otherwise comparative scholarship will not even be able to see what constitutions look like, much less reflect on how they work. As a starting point some of the above examples illustrated that in contemporary constitutional democracies written constitutional provisions are often used to mask power concentration, and not to curb it. It is the application of these rules in political practice that enables (or inhibits) opportunistic power maximization.

Being mindful of its demons and myths does not mean that constitutional scholarship is not meant to abandon them automatically. These myths, after all, stem from the founding premises of thought on constitutionalism. Instead, it means to be aware of how these invisible forces shape constitutional scholarship, and to account for them early on, when research questions are only in a nascent phase.

27.8 What's Law Got to Do with All This?

So far I argued that comparative constitutional scholarship would need to reinvent itself in order to keep up with its subject, i.e. constitutions at work. Admittedly, my discussion did not offer a critique of the existing methods of the field, nor did it provide an alternative for a methodological renaissance.[62] The above analysis certainly has a soft spot for interdisciplinary analysis. It presupposes that comparative constitutional scholarship will continue to draw on its sister disciplines of comparative politics, political theory and intellectual history and, more recently, contemporary and comparative history, as well as the social sciences, prominently legal and constitutional anthropology among them.

61 Martin Krygier, *Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?*, 64, 68, *in* Getting to the Rule of Law, Nomos L (James E. Fleming, ed. 2011).

62 In this spirit recently see e.g. Ran Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law (2014); also Marie-Claire Ponthoreau, Droit(s) constitutionnel(s) comparé(s) (2010).

Inter-disciplinarily should mean more than merely using the results of the sister disciplines, though. Instead, it will require a more active engagement among observers of constitutions at work, resulting in reciprocal interaction. In addition, comparative constitutional projects will need to embrace the global constitutional experience, and will need to engage with a time horizon across several regimes, to get a better picture and a better understanding of constitutional transformations beyond the snapshots of grand moments. Research like this will by definition require collaboration due to its scope and scale. Importantly, comparative research projects will need to focus not on textual similarities (or the lack thereof) in constitutions based on a standard checklist, but on making sense of constitutional experiences beyond constitutional provisions. As such, comparative projects will need to move toward conceptual comparisons, taking their base line not only from constitutional provisions, but also from scholarship on the operation of constitutions.

At this point the question that many comparative constitutional lawyers are prompted to pose is to what extent does constitutional legal analysis matter for comparative constitutional scholarship?[63] The answer is that to a great extent, as the legal dimension helps clarify the relevance of particular constitutional provisions in practice. Even very similar clauses are used to a different effect across constitutions, and similar practical consequences may be reached by using very different constitutional solutions. To use another example from Japan as an illustration: the Constitution of Japan includes a confidence mechanism (Constitution, Article 69). Nonetheless, prime ministers tend to advise the Emperor to dissolve the lower house of parliament (*Diet*) without losing a confidence vote, via invoking another constitutional provision that empowers the Emperor to dissolve the Diet with the advise and approval of the Cabinet (Constitution, Article 7). Although criticized for its dubious constitutionality, turning to the Emperor directly is a way in which Japanese prime ministers discipline their political opposition in the legislature.[64]

The list of similar examples could be continued for long. The important point is that the legal dimension of comparative constitutional analysis adds a perspective to the study of constitutions at work, which is often not appreciated by other disciplines for the very reason of being a technical legal point. Yet, to the extent constitutions as technical rules are instruments that are meant to limit the powers of political office holders, maintaining an interest in the technical (legal) solutions as such remains a relevant and legitimate dimension of comparative constitutional analysis. Legal analysis can add important insight and can even anchor comparative projects in highlighting the significance of particular constitutional provisions for the lived political experience framed by constitutions

63 I am grateful to Günther Teubner and Otto Pfersmann for making me embrace this concern. Above I understand "legal reasoning" as an instance of pratical reasoning.

64 H. Abe, M. Shindo, and S. Kawato, The Government and Politics of Japan (1994) 28-32 on quote in Meryll Dean, Japanese Legal System, 2nd ed. (2002) 241-242.

on the grounds. Whether legal scholarship has a prominent role in comparative constitutional scholarship will largely depend on whether it will be able to ask relevant questions and offer relevant insights on the operation of constitutions at work. It clearly has the potential to shape the research agenda of comparative constitutional scholarship, and its continuing impact will depend on whether it can contribute meaningfully to the reinvention of the field.

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28 European Union Human Rights Law: A Very Particular Internationalization of Constitutional Rights

Marton Varju[*]

28.1 Introduction

The aim of this chapter is to analyse the development of human rights law in the European Union as a particular process of internationalization of constitutional rights. The protection of human rights, which originally lacked a distinct basis as a source of law in the EU, is now part of the standard operation of EU law before the courts of the European Union and also in the EU legislative process. The main distinguishing feature of the law, as developed in what could be regarded as a process of internationalization of law by the EU Court of Justice and now embodied in the EU Charter of Fundamental Rights – a key international instrument for the protection of fundamental rights, is that it has been exposed to multiple, sometimes overlapping objectives dictated by the politico-constitutional context of European integration. Fundamentally, the law, beyond and in parallel with the aim of providing legal protection to the rights of individuals against EU legislative and administrative action and the action of the Member States under the scope of EU law – thus, subjecting the use of public powers in the EU to legal controls, has always been associated with the particular legal, constitutional and governance considerations of the Union. This was made evident in the judicial development of the law through interpretation, which recognized, in particular, that the protection of human rights in the EU is a crucial precondition and instrument for the political and constitutional consolidation of the EU polity.

This anchoring of the protection of human rights in the EU legal and political arena, as evidenced in the relevant EU jurisprudence, emphasized predominantly the functionality of law in the process of European integration. Functionality, which is a traditional feature of EU law in general, provided the basis of the foundational jurisprudence of the EU Court of Justice establishing the EU human rights principle, which was introduced in the in the context of laying down the core principles of the autonomous EU legal order and of protecting its autonomy from external challenges coming from both the national and the international level. In this process, the protection of human rights, which was a significant legal

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achievement on its own right relevant from the perspective of securing the rule of law in the operation of the EU, became, as a result, inseparable from the 'motives' pursued in the jurisprudence concerning parallel constitutional and governance issues in EU integration. The protection of human rights became entangled with the interest of effective implementation and enforcement of EU legal obligations at the national level, became connected with the roles assigned to individuals in the EU legal order and with EU citizenship, and found itself at the centre of relations between the different constitutional authorities overlapping and colliding within the EU framework. In this sense, the constitutional rights discovered and elevated to the European level by the EU institutions gained characteristics as autonomous and particular as those of the EU legal order.

This chapter is structured as follows. First, it analyses the character of EU human rights as it emerged from judicial interpretation. It addresses especially the exposure of the interpretation of human rights law in general and of individual human rights to considerations provided by the particular EU constitutional and governance context. This is then followed by the analysis of the different contexts identifiable on the basis of the jurisprudence, which define appreciably the interpretation of human rights by the courts of the EU. The article closes with a rigorous analysis of a recent manifestation of the interpretative practices pursued and the interpretative considerations used by the EU Court of Justice. The opinion delivered in 2015 as regards the accession of the European Union to the European Convention on Human Rights demonstrates clearly the acquired particularities of protecting constitutional rights at the European Union level. Paradoxically, the characteristics developed in judicial interpretation halted an attempt at its further consolidation by linking it more directly to the parallel international system for the protection of human rights in Europe, the law of the ECHR.

28.2 The Character of EU Human Rights Law

The internationalization of constitutional rights, which we now understand as EU human rights law, is, and remains to be, predominantly, the product of judicial interpretation as exercised by the EU Court of Justice.[1] Reacting to internal and external constitutional,

1 See the traditional general formula that the application and interpretation of human rights, as general principles of EU law, by the EU Court of Justice draw 'inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories', Judgment of 18 June 1991 in *Case 260/89, ERT*, EU:C:1991:254, para. 44 and Opinion of 28 March 1996 – *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/94*, ECLI:EU:C:1996:140, para. 33. Weiler argued that the formula asking for 'ideas' common to the constitutions of the Member States, instead of asking for a comparative examination and a reliance on national law, enables the EU Court of Justice to develop an autonomous body of human rights law, J.H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries', in N.A. Neuwhal and A. Rosas (Eds.), *The European Union and Human Rights*, The Hague, Kluwer Law, 1995, pp. 113-114.

and presumably political, pressures, the Court embarked upon a journey which started from the recognition of the principle that, despite the silence of the Treaties, human rights must be protected within the EU framework, primarily in regards the conduct of the EU, which then led to the development of a complex body of law covering a broad range of rights, including the right to human dignity in a biotechnological context, the protection of privacy and personal data in the context of the operation of the internet, and the right to a fair procedure in the context of EU and Member State administrative and judicial procedures conducted under the scope of EU law.[2] The anchoring of the EU human rights principle, which is now recognized among the values of the Union in Article 6 TEU, was as much the result of teleological interpretation by the Court giving priority to the functionality of law, including human rights law, and of the emerging legal order in the European integration process as of the judicial expansion of the rule of law principle, as recognized in EU law, which requires in particular that legal protection is provided against the use of public powers. In this process of lifting rights and fundamental freedoms protected in national constitutions to the European level, the body of law as engineered judicially became entangled with the legal, constitutional and governance considerations arising from the context of provided by the evolving EU polity.[3]

The need to interpret the character of EU human rights law, as it emerged from decades of judicial development, in this manner was recognized in academic commentary from relatively early on. The argument was made most comprehensively by de Búrca who claimed that the role of human rights within the EU cannot be assessed without reference to the complexity of the emerging body of law which follows, among others, from the character of the different rights protected, the actual context in which human rights are invoked and their different features, and the actual place and impact of the rights claimed in that particular environment.[4] In this light, particular legal developments, as overseen by the EU Court of Justice, such as the definition of the scope of human rights protection in the EU, the calibration of judicial deference – towards EU policy and legislation, the EU administration, Member State policy and legislation and towards Member State administrations and judiciaries – in human rights cases, the judicial balancing between competing human rights and between human rights and competing interests, and the

2 Their invention in EU law as general principles was – the EU Court of Justice lacked other legal options – a '*solution de dépannage*', which according to the late Pierre Pescatore, one of the founding fathers of the EU legal order and EU human rights law, enabled the EU judiciary to fulfil its functions with a 'broad view of its mission', P. Pescatore, 'Written Communication "The Protection of Human Rights in the European Communities"', *CMLRev* 9, 1972, p. 79.

3 Protecting the autonomy and supremacy of the EU legal order vis-à-vis national and international locations of constitutional (and political) authority was one of the main rationales followed, which, however, provides only a partial explanation for the judicial protection of human rights in the EU suggesting that the aim of protecting individuals and controlling the use of public powers was also of relevance, see G. de Búrca, 'The Language of Rights and European Integration', in J. Shaw and G. More (Eds.), *New Legal Dynamics of European Union*, Oxford, Clarendon Press, 1995, p. 39.

4 Ibid, at p. 53.

general positioning of EU human rights vis-à-vis constitutional rights as protected at the national level and international human rights law, must be examined, even by lawyers, having regard to the considerations and agendas, as they emerge from the context of EU integration, influencing the interpretative practices of the EU Court.

Human rights law in the EU, despite the adoption of the Charter as a catalogue of fundamental rights in the EU and its ever-increasing legal influence[5] and despite the growing importance of human rights protection as provided by EU legislation,[6] is shaped and defined predominantly by judicial interpretation as exercised by the courts of the European Union with reference to the broader and narrower constitutional and governance context of the EU itself.[7] The body of law, thus created, pursues a busy, multi-tiered agenda governed partially by functional and instrumental impulses, by constitutional considerations specific to the EU as a polity, and, in part, by principles requiring the effective as well as the lawful operation and development of the EU and its legal order.[8] Even the original judicial recognition of the core constitutional principle that EU legislation and administrative action must be subjected to human rights requirements, which was later extended to cover the conduct of the Member States under the scope of EU law, can be associated with multiple agendas. On the one hand, it ensured that the EU operates, just as its Member States, subject to the rule of law and to human rights requirements, which development in effect mended the incomplete EU constitutional architecture as established by the original Treaties. On the other, the anchoring the rule of law and the protection of human rights as the core principles of the EU legal order enabled the further, constitutionally more robustly underpinned pursuing of the ambitious aim that the implementation and enforcement of common EU policies, and the process of European integration itself, are secured by the use of the machinery of law both at the EU and the Member State level under principles requiring the effective fulfilment of EU legal

5 See A. J. Menendez, *Chartering Europe: The Charter of Fundamental Rights for the European Union*, Oslo, ARENA, 2001, at IV.3 and M.P. Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', in S. Peers and A. Ward (Eds.), *The EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2004, pp. 271-272, 281.

6 See M. Varju, *European Union Human Rights Law*, Cheltenham, Edward Elgar, 2014, Ch. 4.

7 The EU Court of Justice could rely on broad judicial competences, regulated under what is now Article 19 TEU, which was interpreted as providing a central position for judicial power in the constitutional arrangements under the Treaties which, then, allowed the Court to make the 'judicial leap' of developing a human rights law for the EU polity, see J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal Order of the European Communities', *Wash. L. Rev.*, 61, 1986, p. 1118. Criticized as enabling what was called as controversial retrospective 'myth building' practices which advocated that the EU 'is and always has been founded' on the protection of human rights and human rights protection has always been embedded in the Treaties, A. Williams, *EU Human Rights Policies*, Oxford, OUP, 2004, Ch. 6, especially p. 139 and p. 160. See also, I. Ward, *A Critical Introduction to European Law*, London, Butterworths, 1996, p. 25. See especially, Judgment of 3 September 2008 in *Joined Cases C-402/05 P and C-415/05 P, Kadi*, EU:C:2008:461, para. 282.

8 The recognition of human rights as a condition of the validity of EU measures was crucial in the politically highly significant process of 'authenticating' the EU as a site of governance, Williams 2004, p. 129.

obligations and the effective protection of the corresponding individual rights provided by EU law.[9]

From the perspective of the EU legal order and the protection of human rights therein, the anchoring of the EU human rights principle in the early formative jurisprudence and its application in later constitutionally significant cases, such as *Kadi* or *Opinion 2/13*,[10] also meant its entrenchment as an autonomous regime capable of self-definition. The first judgments, which addressed the protection of human rights in the EU, raised this issue in the broader constitutional context of securing the autonomy of the EU legal order and defeating the claims for competing authority as raised by domestic constitutional orders.[11] The judicial responses were framed with reference to the earlier mentioned functional considerations of ensuring the effectiveness of common policies and securing, as a related priority, effective compliance with EU legal obligations by the Member States in the national arena. In these rulings, the protection of human rights was, thus, used – beyond its immediate application in adjudicating challenges against EU action or against the conduct of the Member States – as an instrument – as an 'existential requirement'[12] – in the much larger scheme of developing the EU into a polity which is different in constitutional and political terms from any previous system established to manage transnational relations. The protection of human rights was meant to stand for more than offering legal protection to individuals and subjecting public powers to legal restraints; it was essential for securing the unimpeded effectiveness of governing and administering the EU at the national level and, in parallel, it contributed to reinforcing the constitutional qualities of the EU legal order put in the service of implementing common policies and also the legitimacy of EU action.

With the EU's rule of law principle overburdened with multiple constitutional, governance and political demands and considerations,[13] it is hardly surprising that the protection and enforcement of human rights in the EU, primarily as regards the EU institutions, could not remain within the narrow confines of the task of ensuring the legality of EU legislative and administrative action. The rule of law and the EU human rights prin-

9 Human rights became part of a constitutional trinity for the EU in this period of constitution-building consisting of the principles of supremacy and direct effect and the EU human rights principle, which were recognized in the jurisprudence with the purpose of supporting the autonomy of the emerging constitutional order.

10 *Joined Cases C-402/05 P and C-415/05 P, Kadi* and Opinion of 18 December 2014 – *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/13*, EU:C:2014:2475.

11 See Judgment of 17 December 1970 in *Case 11/70, Internationale Handelsgesellschaft*, EU:C:1970:114.

12 Cited from Opinion of 12 September 2007 of A.G. Maduro in *Case C-380/05, Centro Europa 7*, EU:C:2007:505, para. 19.

13 See, *inter alia*, A. Williams, *The Ethos of Europe* Cambridge, CUP, 2010, Ch. 3; N. Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', in N. Walker and G. Palombella (Eds.), *Relocating the Rule of Law*, Oxford, Hart Publishing, 2009; E.O. Wennerström, *The Rule of Law and the European Union*, Uppsala, Iustus Förlag. 2007; L. Pech, 'The Rule of Law as a Constitutional Principle of the EU', *EConstLR*, 6, 2010, p. 359.

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ciple, which are necessarily interrelated as one being the specific manifestation of the other, responded in judicial interpretation to the same considerations arising from the EU legal, constitutional and governance context and face similar limitations as to their influence and as to the related judicial functions.[14] They also interact intensively. The rule of law, interpreted with the purpose of emphasizing its own functionality and functional use in the European integration process, was responsible for the earlier mentioned functional interpretation and application of human rights in the EU. Human rights law also influenced the rule of law principle in the EU. The interpretation of human rights in a particular EU interpretative context, for instance in the context of the multi-layered EU judicial system where the EU's particular right to effective judicial protection is interpreted and enforced by the EU Court having regard to the particularities of that context, stretched the meaning of the rule of law by forcing the principle to endorse the particular governance agenda – that national courts operate as regular courts of EU law – pursued in that particular EU setting.[15]

The original exposure in judicial interpretation of the protection of human rights in the EU to the functional considerations dictated by the context provided by the European integration process,[16] which outside of the EU framework may not emerge as relevant, and the ensuing instrumental use of human rights within the legal order in pursuance of the interest of European integration led the way to a further opening of the texture of EU human rights law to considerations following from its broader constitutional and political environment. Some of these considerations support the functional reading of human rights in the EU which emphasizes that they form integral part of the broader legal mechanism put in place to ensure the effective development of common policies and the effective enforcement of EU legal obligations. Enhancing the quality of EU law, especially in order to meet requirements under the rule of law, and ensuring that the values protected by human rights are recognized and safeguarded by law in the EU, although not entirely independently from the earlier mentioned functional objective pursued, were, however, also given relevance in interpretative developments before the EU courts.[17] Overall, the main considerations arising from the EU constitutional and governance context influencing the EU human rights jurisprudence include ensuring the effectiveness of EU governance and administration, including in particular the effective enforcement of EU law, entrusting national courts with roles in the application of EU law and designating, in parallel, their position in the multi-layered EU judicial system, secur-

14 See Varju 2014, Ch 2.

15 See Judgment of 25 July 2002 in *Case C-50/00 P, UPA,* EU:C:2002:462.

16 This is just one consequence of the interpretative approach followed by the EU Court of Justice, at least in the early decades. Clearly, there is coherence among the principles developed by judicial interpretation, which pursued the objective of securing a central position for law in the governance of common policies, which was to be achieved in a manner that legal rights and obligations can penetrate directly and deeply into national legal orders, see J.H.H. Weiler, 'The Transformation of Europe', *YLJ*, 100, 1991, p. 2403.

17 See, T. Tridimas, *The General Principles of EU Law*, Oxford, OUP, 2006, p. 301.

ing the integrity of EU legislation and the corresponding governance structures with special attention paid to the balances achieved in EU instruments between their human rights objectives and the competing regulatory objectives, and developing a balanced relationship with the parallel constitutional authorities, both internal and external and both national and European, in particular with the ECHR system and its law.

Academic commentary has by and large recognized this complexity and context-dependence of EU human rights law as developed in the jurisprudence of the EU Court of Justice. In examining the origins of the judicial protection of human rights in the EU, the protection of human rights was interpreted predominantly as an instrument introduced to secure the acceptance of the supremacy of EU law in the Member States and also as a function-driven response to the challenges relaying on domestic constitutional principles posed against the autonomy and the core principles of the EU legal order.[18] Protecting human rights in the EU was argued to be a judicially engineered solution so as to relieve the constitutional, and presumably political, pressures arising from the system of 'divided sovereignty'[19] stablished between the EU polity and the Member States and also an 'act of self-preservation'[20] for the emerging supranational sovereign that we now call the European Union. It was claimed that it serves the broader agenda of furthering legal integration in Europe[21] and it was held to be inspired, in part, by concerns for the effectiveness of the EU legal order and, in part, by other pragmatic considerations of governance at the European level.[22] Miguel Maduro, writing on human rights as general principles of EU law, made the highly relevant claim that human rights in the EU have a 'double constitutional life'.[23] In his interpretation, this means that, on the one hand, human rights were used to enable the consolidation of the EU constitutional order by offering stability and restraint, in particular, by way of introducing a rights language and an avenue for controlling EU legislative and administrative action. On the other, their application was kept flexible with intention with the purpose in mind that they contribute to the construction and development of the EU polity and accommodate demands arising in the process of European integration.

In Douglas-Scott's more critical interpretation, the jurisprudence of the EU Court of Justice has been manipulating human rights for purposes other than their protection[24]

18 *Inter alia*, Weiler 1995, pp. 107-108; A. Stone Sweet, 'Constitutional Dialogues in the European Community', in A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (Eds.), *The European Court and National Courts*, Oxford, Hart Publishing, 1998, pp. 317-319. See also Pescatore 1972, pp. 74-75.

19 T.C. Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community', *AJCL*, 34, 1986, p. 243.

20 M.H. Mendelson, 'The European Court of Justice and Human Rights', *YEL*, 1, 1981, p. 130.

21 J. Coppel and A. O'Neil, 'The European Court of Justice: Taking Rights Seriously?', *CMLRev*, 29, 1992, p. 670.

22 F.G. Jacobs, 'The Evolution of the European Legal Order', *CMLRev*, 41, 2004, p. 309.

23 Maduro 2004, pp. 271-272.

24 S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', *HRLR*, 11, 2011, p. 650.

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and has been introducing 'ulterior agendas'[25] into their judicial interpretation, which led to the result that, ultimately, human rights law has been exploited in the interest of expanding EU governance into new areas.[26] She argued that the protection of human rights in the EU (human rights as protected in the EU) is a 'floating concept', which is open to all application and interpretation that may follow from its context.[27] Similar claims were put forward by Ian Ward who criticized the minimalism of the early, foundational case law,[28] which had the consequence that the recognition of the EU human rights principle was not an act of unqualified judicial embrace of a human rights agenda, but rather a calculated judicial response that regarded the commitment to the protection of human rights as an instrument capable of contributing to the overall constitutional consolidation of the EU polity. A similar character of EU human rights law was pointed out in Toth's much less critical work, which argued that the Court enjoyed the best of two worlds: human rights were available to consolidate the EU constitutional order and they could be interpreted and applied flexibly 'in the best interest of the Community'.[29] The context-dependence and context-driven flexibility of EU human rights law, when criticisms that judicial administration of human rights in the EU left the law insufficient, ill-defined, ancillary, and dependent upon the intake of cases[30] are taken seriously, indicate major flaws in the development and state of the system.

The critical literature also pointed out that the openness of the jurisprudence to considerations arising from the broader context resulted in an often ambiguous and uneven jurisprudence,[31] which left only a residual role for the protection of rights[32] and which failed to locate the place of human rights in the EU polity.[33] The early critiques of the jurisprudence, disillusioned by the pragmatic ambitions of the Court, reprehended especially the instrumental use (the 'manipulation') of human rights 'so as to accelerate the

25 Borrowed from S. Douglas-Scott, 'Fundamental Rights in the EU: the Ambiguity of Judicial Review', in T. Campbell, K.D. Ewing and A. Tomkins (Eds.), *The Legal Protection of Human Rights*, Oxford, OUP, 2011, p. 289.

26 Ibid.

27 S. Douglas-Scott, *Constitutional Law of the European Union*, London, Pearson, 2002, p. 434.

28 Ward 1996, p. 140.

29 A.G. Toth, 'The European Union and Human Rights: the Way Forward', *CMLRev*, 34, 1997, p. 492.

30 See P. Alston and J.H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights', in P. Alston (Ed.), *The EU and Human Rights*, Oxford, OUP, 1999, pp. 22-23 and A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', *OJLS*, 29, 2009, pp. 551-552.

31 Ibid. See also the claim that EU human rights law, as a judicially developed body of law, will be contingent by definition, B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in P. Alston (Ed.), *The EU and Human Rights*, Oxford, 1999, p. 870, and that the multiple and complex rationales for the judicial protection of human rights in the EU polity and the context influenced diversity of interpretative streams in the jurisprudence inevitably lend a sense of incompleteness, incoherence and inconsistency to the law, see L.F.M. Besselink, 'Entrapped by the Maximum Standard', *CMLRev*, 35, 1998 pp. 670-678.

32 See A. Williams, 'Promoting Justice after Lisbon: Groundwork for a New Philosophy of EU Law', *OJLS*, 30, 2010, p. 663; Douglas-Scott 2011 (n. 24), p. 649.

33 See Douglas-Scott 2011 (n. 25), pp. 289-290.

process of legal integration', and they maintained that human rights are not protected 'for their own sake' and that the jurisprudence had failed to accord them a 'pre-eminent status'.[34] The rebuttal of the latter criticism, which argued that human rights indeed receive adequate protection in the EU, could not avoid admitting that the human rights jurisprudence of the EU may only develop from what is available in the law and what was available as a matter of values and ideology at the different stages of European integration.[35] This latter assessment has many things in common with the criticism that argued that EU human rights law lacks a solid orientation and held that the EU human rights principle has unclear parameters and equally unstable constitutional and conceptual foundations leaving much uncertainty regarding the actual legal and political limitations imposed by human rights in the EU.[36] These meant that the causes of the shortcomings of the system of human rights protection in the EU must be found inside the EU polity, which is responsible for creating a distorted system of human rights protection where the institutional priorities of the EU are given more weight than the substantive, value-generating aspects of protecting human rights.[37]

Securing the autonomy of the EU legal order was recognized as the central motivation for the judicial protection of human rights in the EU in the famous passage in *Internationale Handelsgesellschaft*, which contended that EU law may only be subjected to its own legality requirements and taking into account constitutional requirements established at the national level would jeopardize its integrity.[38] *Opinion 2/94* formulated the same arguments – this time in relation to the ECHR – in a more delicate manner and placed emphasis primarily on the constitutional significance and implications of introducing substantial changes from outside to the system of human rights protection in the EU.[39] The constitutionally defining choice between EU and international human rights law as the standard of protection under EU law in *Kadi* was also made with reference to the considerations of maintaining the autonomy of the EU legal order and securing the integrity of the core constitutional principles of the EU.[40] The autonomy of the EU legal order was also a central component in the Strasbourg court's assessment of the protection of human rights in the EU in *Bosphorus*, which regarded sustaining the legal and other

34 Coppel and O'Neill 1992, pp. 685-686.

35 See J.H.H. Weiler and N.J.S Lockhart, '"Taking Rights Seriously" Seriously: the European Court and its Fundamental Rights Jurisprudence – Part I', *CMLRev*, 32, 1995, pp. 69-72.

36 Williams 2010, p. 115 and p. 267.

37 Ibid., at pp. 152-153. See also Williams 2004, p. 160 and I. Ward, *The Margins of European Law*, London, Palgrave 1996, p. 151.

38 *Case 11/70, Internationale Handelsgesellschaft*, para. 3. It hinted at this specifically when stating that the protection of human rights 'must be ensured within the framework of the structure and objectives of the Community', ibid, para. 4. For a more dramatic expression, see Judgment of 13 December 1979 in *Case 44/79, Hauer*, EU:C:1979:290, paras. 13-14. According to Tridimas, this followed from the Treaties and enabled the EU Court of Justice to assure the Member States that the Treaty they had signed complied with the rule of law, Tridimas 2006, p. 302.

39 *Opinion 2/94*, paras. 32-35. See also the discussion later on *Opinion 2/13*.

40 *Joined Cases C-402/05 P and C-415/05 P, Kadi*, especially para. 285.

achievements of the EU as an important form of regional integration of states as capable of supporting the leeway granted for the EU institutions in the protection of Convention rights (the '*Bosphorus*-principle').[41]

The introduction of a human rights principle in the process of constructing a constitutional identity and a legal order suited for the ambitious supranational polity, nevertheless, entailed – inevitably – developing and pursuing a genuine human rights agenda – no matter how limited – for the European Union. The new constitutional principles generated legal changes within the polity, which required a response from the EU Court of Justice – the self-appointed architect of the new legal order – to keep the newly empowered polity under control.[42] It was suggested that the EU human rights principle was prompted by the 'arrogation of power' to the EU, which resulted from the judicial creation of power-shifting doctrines, such as supremacy, direct effect and implied powers, which development clearly indicated that the use of powers acquired by the EU will not be limitless and should, thus, be subjected to controls.[43] The necessity for the legal containment of newly found EU powers, as a rationale for the protection of human rights, was recognized explicitly in the judgments in *Nold* and *Hauer*[44] in the judicial principle, which was also reiterated in *Opinion 2/94*, that respect for human rights is a condition for the legality of EU measures and that their observance must be enforced.[45] The political endorsement of the principle was achieved in the 1977 Joint Declaration laying down a commitment for the institutions of the then European Communities to respect human rights in the exercise of their powers and in pursuance of the aims of the EU in general.[46] The principle was later elevated to a constitutional status by virtue of ex Article 6 TEU (now Article 6 TEU) furnishing the EU institutions with binding constitutional boundaries for their conduct and offering a constitutional basis for the jurisdiction of the EU courts to control them through the enforcement of human rights.

The EU human rights principle was, thus, presented as a consolidating principle for the emerging EU polity and it, thus, offered an institutional recognition of the rule of law as a foundational principle for the new legal order. It allowed the jurisprudence to interpret human rights as instruments capable of supporting the constitutional foundations of the new legal order as well as containing the new legal order by formulating institutional duties and institutional constraints for European governance. The Court in *Kadi* made it particularly clear that the judicial protection of human rights is a constitutional fact, a

41 *Bosphorus v. Ireland*, ECHR 2005-VI, paras. 150-151 and 155-156.

42 See Alston and Weiler 1999, pp. 22-23.

43 Weiler 1991, p. 2417. Tridimas saw the EU human rights principle as a concession granted to national sovereignty on the road to secure the legitimacy of the EU polity which kept the EU Court of Justice in control over the constitutional qualities of the EU legal order, Tridimas 2006, 304.

44 Judgment of 14 may 1974 in *Case 4/73, Nold*, EU:C:1974:51, para. 13; *Case 44/79, Hauer*, para. 15.

45 *Opinion 2/94*, paras. 33-34; *Joined Cases C-402/05 P and C-415/05 P, Kadi*, para. 285.

46 Joint Declaration of 5 April 1977 concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ 1977 C 103/1, para. 2.

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cornerstone of EU constitutionalism, which must not be compromised.[47] The jurisprudence of the Court made the protection of human rights 'integral, inherent, transverse' in the functioning of the EU polity, which should form part of all objectives, functions and powers of the EU,[48] and opened the gate for general constitutional changes affecting accountability and responsibility in the EU and anchored judicial review on the legal and institutional map of the EU. EU human rights law, together with other components of the rule of law in the EU, gave shape to the EU legal order and also to European governance. This was seen, ultimately, as human rights providing a certain, limited public morality for the EU.[49]

The character of EU human rights law was also shaped by the limitations arising in connection with the jurisdiction and the judicial role assumed by the EU Court of Justice in human rights matters. Fundamentally, the judicial protection of human rights is subject to constraints imposed by what may be called as parallel constitutional authorities operating in the EU legal space. The constraint may come from internally – from the constitutional authority of the Founding Treaties, the EU legislature and the EU administration, or from externally – from the constitutional authority of the Member States and of directly or indirectly binding international commitments.[50] In general, the jurisprudence duly recognizes these limitations and, as a main characteristic of the relevant EU judicial practice, exercises deference to these parallel constitutional authorities.[51] Mainly, this entails accepting that the assessment of the matter raised in individual cases involving human rights either falls to a different constitutional authority or it needs to be carried out having regard to considerations given effect by a parallel constitutional authority. The EU Court of Justice would, thus, refuse to interfere with policy choices reflected in EU legislation, with the balances struck between human rights and competing interests and rights in EU instruments, with decisions serving the effective conduct of EU procedures, or would express trust towards the assessment carried out by national authorities under national law and towards national courts, which may be given the task of making the final assessment under EU law of interferences with human rights. Reliance in the EU jurisprudence on legal authorities in national law or, much more frequently, in the law of the ECHR is another important manifestation of this practice.[52]

47 *Joined Cases C-402/05 P and C-415/05 P, Kadi*, para. 322.

48 J.H.H. Weiler and S.C. Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences', P. Alston (Ed.), *The EU and Human Rights*, Oxford, OUP, 1999, pp. 155-156.

49 See I. Ward, 'Beyond Constitutionalism: The Search for a European Political Imagination', *ELJ*, 7, 2001, p. 25.

50 The protection of national constitutional identities, as recognized under Article 4(2) TEU, is a constitutional 'counter-limit' for EU law and for EU courts expressly recognized in the Treaties, L.F.M. Besselink, 'The Protection of Fundamental Rights post-Lisbon', <http://fide2012.eu/index.php?doc_id=94> (accessed 10 May 2013), p. 47.

51 See, *inter alia*, Judgment of 8 December 2011 in *Case C-386/10 P Chalkor*, EU:C:2011:815, paras. 61-63; Judgment of 8 December 2011 in *Case C-272/09 P, KME*, EU:C:2011:810, paras. 101-103.

52 See, *inter alia*, *Case 44/79, Hauer*, paras. 17-20.

This relevance of parallel constitutional authorities, both internal and external, for the jurisprudence has had the important consequence of EU human rights law being interpreted and applied in a multi-layered setting where national constitutional laws and international human rights law continue to seek to influence the law produced and applied in the EU. This became evident as early as the judgment in *Internationale Handelsgesellshaft* where the challenge from the constitutional protection of rights at the national level was repelled and the primacy enjoyed by EU law over national constitutional provisions, including constitutional rights, was confirmed.[53] The judgment in *Kadi*, *Opinion 2/94* and, ultimately, *Opinion 2/13*, analysed later, provide further examples of this interpretative development particular to EU human rights law, which is under pressure, mainly in order to protect its self-proclaimed autonomy, to seek approval from, or, at least, to coexist in a harmonious relationship with, other constitutional actors, such as national constitutional courts or the European Court of Human Rights, in the form of exercising deference towards national constitutional requirements, or of borrowing regularly from the ECHR jurisprudence.[54] This character of EU human rights law, whereby its relations with parallel bodies of human rights law influence its interpretation, is markedly reflected in the legal commentary discussing the requisite standard for the protection of human rights in the EU, which would satisfy the European as well as the diverse national constitutional requirements.[55]

Other commentators addressed this multi-layered, 'relational' character of EU human rights law more directly. In their interpretation, the EU constitutional order, including the protection of human rights emerged as a result of a discursive relationship between the EU and national legal orders based on a dialogue between the EU and the national courts.[56] Wedged between parallel constitutional orders at the European and national levels, EU human rights law was analysed as the product of judicial practices that recognize the demands of the parallel constitutional orders and that provide appropriate responses to those demands. It was never convincingly established, however, that the EU Court of Justice was ever equipped with a toolkit that enabled it to carry out the task of generating human rights law in a 'reciprocal relationship' with parallel constitutional orders, and that the interpretative tools that were actually available to the Court, especially the comparative approach,[57] were suitable to create a human rights law, which is

53 *Case 11/70, Internationale Handelsgesellschaft*, paras. 3-4.

54 For example, Judgment of 14 October 2004 in *Case C-36/02, Omega Spielhallen*, EU:C:2004:162, paras. 39-40. See also, Judgment of 14 February 2008 in *Case C-244/06, Dynamic Medien*, EU:C:2008:85, paras. 44-52.

55 See, *inter alia*, the contrasting opinions of Weiler and Besselink, Weiler 1995, p. 106 and pp. 109-110 and Besselink 1998, pp. 670-678.

56 See A.T. Perez, *Conflicts of Rights in the European Union*, Oxford, OUP, 2009, pp. 92-93. Describing it as a bottom-up, 'permanent learning process' which was inspired by national constitutions, Maduro 2004, pp. 297-298.

57 It must not be overlooked that the 'comparative method' has its own weaknesses, and it is unclear what outcomes it would produce and whether those outcomes would be suitable for the EU. A purely functionalist comparison will not do justice to the task of exploring common constitutional traditions, and a genuinely

not simply 'parasitic' or 'purely derivative' but which was created successfully by means of a genuine constitutional dialogue.[58] Despite these empirical shortcomings, Perez's detailed analysis of judicial dialogue as a model for the evolution of EU human rights law was right to make the claim that this way the 'normative authority' and the legitimacy of the EU Court of Justice's involvement with the protection of human rights can be ensured.[59]

28.3 The Interpretative Contexts of EU Human Rights Law

EU human rights law was characterized above as a product of the interpretative practices of the EU Court of Justice which, beyond the immediate need to ensure the lawful operation of the EU polity through the protection of human rights, responded to the demands emerging in the context of the EU's constitutional and political construction and of the specific legal and governance considerations of the EU polity. It, thus, seems that reservation in *Internationale Handelsgesellschaft* that the protection of human rights must be ensured having regard to the structure and objectives of the EU[60] had the direct consequence that the interpretation of human rights in the EU is exposed to the impact of its narrower and broader context. As already raised, many of the interpretative considerations arising from these different contexts are linked to the functional agenda of ensuring the effectiveness of EU legal obligations and of the related governance structures. Others relate mainly to the EU judiciary determining the boundaries of its human rights jurisdiction vis-à-vis the different internal and external constitutional authorities in the European constitutional space. Their influence on judicial interpretation amounts to two major interpretative reactions: judicial deference to parallel constitutional authorities and judicial balancing between the imperative of legal control and the interest of effective legislative and administrative action.[61]

The primary consideration influencing the interpretation of EU human rights law, which follows from its particular legal, political and governance context, is the EU's own context-driven rule of law principle. As already discussed, the protection of human rights must be seen as a manifestation of the rule of law in the EU which also finds its conceptual

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contextual approach may render the comparison unfeasible, especially when the original recommendation by the Advocate General in *Internationale Handelsgesellschaft* to investigate the 'philosophical, political and legal substratum common to the Member States' is considered.

58 Terms borrowed from G. de Búrca, 'Convergence and Divergence in European Public Law: the Case of Human Rights', in P.R. Beaumont, C. Lyons and N. Walker (Eds.), *Convergence and Divergence in European Public Law*, Oxford, Hart, 2002, p. 132.

59 Perez 2009, p. 97 and pp. 109-110.

60 *Supra* note 38.

61 These judicial reactions are direct consequences of the application of the interpretative principle at the heart of the jurisprudence, the principle of proportionality.

basis in the EU's rule of law principle. The interpretative relevance of the rule of law is manifold. Its formal aspects find expression in the EU Court of Justice interpreting and applying human rights with the aim of controlling the legality of EU action and holding actors accountable for the breach of the law.[62] The rule of law is also responsible for the unconventional usages of human rights in the EU. Under the general effectiveness requirement of the EU, the rule of law pursues multiple, often contradictory agendas in the construction of the EU as a polity and this circumstance is channelled into EU human rights law which is called to appreciate the functional demands of EU law and governance.[63] The conflicts between the conventional constraining and unconventional constitutive aspects of the rule of law in the EU are matched by the corresponding tensions between the different – constraining and constitutive – uses of human rights in the EU arena.[64]

In the context of EU economic regulation and the law of the Single Market, EU human rights law is interpreted predominantly with reference to the fundamental question of what may constitute appropriate economic, social and other regulation from the EU and from the Member States when they act under the scope of EU law. In this context, human rights are applied by the EU Court of Justice with a view to determining the margin of policy and regulatory discretion reserved for the EU legislator and, in the relevant cases, for the Member States.[65] In majority, judicial interpretation focusing on the complex and often contradicting policy priorities pursued by the legal measures under scrutiny practiced near complete deference to the political and policy discretion of the legislator and treated the corresponding human rights claims accordingly.[66] The relevant judgments reveal that the Court was clearly aware of the necessity of preserving the integrity of complex legislative and regulatory arrangements and was preoccupied with the issue of determining the legitimacy and the scope of judicial assessment in enforcing the requirements, which follow from the application of human rights law, regarding the design and quality of regulation.[67]

The increasing regulatory activity in the EU in the field of human rights protection presents another distinct interpretative context for EU human rights law. The relevant

62 See, *inter alia*, *Case C-50/00 P, UPA*, para. 38; Judgment of 27 February 2007 in *Case C-355/04 P, Segi*, EU:C:2007116, para. 51; Judgment of 20 April 2010 in *Case C-265/08, Federutility*, EU:C:2010205.

63 See, *inter alia*, *Joined Cases C-402/05 P and C-415/05 P, Kadi*, paras. 281-282 and 285. See the discussion concerning the true purpose of the so called *ERT*-scenario in EU human rights law in Weiler 1995, pp. 121-125.

64 See, *inter alia*, Judgment 26 February 2013 in *Case C-399/11, Melloni*, EU:C:2013:107, para. 60 and Judgment of 26 February 2013 in *Case C-617/10, Fransson*, EU:C:2013:105, para. 44.

65 See, *inter alia*, *Case 11/70, Internationale Handelsgesellschaft*, paras. 14-20 and Judgment of 26 June 1997 in *Case C-368/95, Familiapress*, EU:C:1997:325, para. 26.

66 J. Usher, *General Principles of EC Law*, London, Longman, 1998, Ch. 6 and G. Davies, 'The European Union Legislature as an Agent of the European Court of Justice', *JCMS*, 54, 2016, pp. 846-861.

67 See, *inter alia*, *Case 4/73, Nold*, para. 14; Judgment of 12 July 2005 in *Joined Cases C-154/04 and C-155/04, ANH*, EU:C:2005:449, paras. 125-126; Judgment of 28 January 2007 in *Case C-370/05 Festersen*, EU:C:2007:59., para. 37.

EU measures regulate the scope and substance of human rights, identify the rights and public interest considerations that compete with human rights, and lay down boundaries for public and private action by establishing balances between competing rights and interests.[68] The judgments, which most often dealt with legal challenges against the particular balance struck between the protection of human rights and the competing interests and rights, and less frequently with the implementation of human rights requirements in the measures in question, were dominated by the EU Court of Justice deferring heavily to the EU legislator's original determination of the relevant human rights issue as represented by the provisions of the legal measure under challenge.[69] Judicial interpretation, thus, dutifully followed the general scheme and structure adopted in those measures for the human rights regulated, or it accepted the specific provisions determining the relevant human rights requirements as adequate. Judicial assessment stayed within the framework provided in the relevant instruments for the balancing exercise between human rights and the competing interests and rights and respected the compromises established by the EU legislator between the policy (regulatory) and human rights objectives of the measure in question. Paradoxically, human rights law, as applied by the EU Court of Justice, on the whole tends to give way to the intent of the EU legislator as regards the protection of human rights in the particular policy context. The few instances, when the Court assumed jurisdiction to assess and correct the human rights arrangements laid down in EU legislation,[70] do not

68 See, *inter alia*, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31; Regulation 45/2001/EC of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2000 L 8/1; Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ 2006 L 105/54; Regulation 1049/2001/EC of the of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43; the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 1262 UNTS 153; Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2000 L 12/1; Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1; Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, OJ 2003 L 50/1; Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13.

69 See, *inter alia*, Judgment of 20 May 2003 in *Joined Cases C-465/00, C-138/01 and C-139/01, ORF*, EU:C:2003:294, para. 70; Judgment of 6 November 2003 in *Case C-101/01, Lindqvist*, EU:C:2003:596, para. 79; Judgment of 17 June 1998 in *Case T-174/95, Svenska Journalistförbundet*, EU:T:1998:127, paras. 111-114; Judgment of 28 March 2000 in *Case C-7/98, Krombach*, EU:C:2000:164, para. 19; Judgment of 14 December 2006 in *Case C-283/05, ASML*, EU:C:2006:787, para. 24; Judgment of 2 April 2009 in *Case C-394/07, Gambazzi*, EU:C:2009:219, para. 28; Judgment of 21 January 2010 in *Case C-444/07, MG Probud*, EU:C:2010:24, para. 34; Judgment of 3 May 2007 in *Case C-303/05, Advocaten voor der Wereld*, EU:C:2007:261, paras. 28 and 31; Judgment of 17 July 2008 in *Case C-66/08, Kozłowski*, EU:C:2008:437, paras. 31 and 43; Judgment of 18 October 2011 in *Case C-34/10, Brüstle*, EU:C:2011:669, paras. 27 and 32.

70 Judgment of 21 December 2011 in *Joined Cases C-411/10 and C-493/10, N.S.*, EU:C:2011:865, paras. 15 and 56.

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challenge this trend as the aim of judicial intervention in those cases was to ensure that the EU instrument in question and the related governance system, following some minor interpretative adjustments, can be maintained as lawful.

The EU's multi-layered judicial system combining the EU courts and courts at the Member State level in a 'complete system of judicial protection' had a profound impact on the interpretation of the EU's rather peculiar[71] right to effective judicial protection and effective remedies. The complex interpretative considerations arising from this context, made particularly complicated by the complementary relationship between the rule of law principle and the fair trial rights encapsulated by the right to effective judicial protection, resulted in interpretative practices which rely on conceptualizing the multi-layered judicial system of the EU as a single[72] and coherent system. On the one hand, this meant that the shortcomings of judicial protection before EU courts were sought to be remedied in judicial interpretation by seeking alternative avenues of redress, primarily before national courts.[73] On the other, it entailed an anxious scrutiny, as regards the participation of national courts in the EU judicial system, of solutions that could reconcile the interest of the effective enforcement of EU law with the autonomy available at the national level for regulating and administering the domestic justice system.[74] The operation of national courts and their participation in the EU judicial system, thus, became central to the interpretation of the right to effective judicial protection and effective remedies, which, then, focused on the issue of the deference owed towards the Member States and on their responsibilities and obligations in the EU judicial system.[75]

EU administrative procedures and infringement procedures, conducted before the European Commission, are responsible for very peculiar developments in the interpretation of otherwise fairly standard procedural rights and guarantees by the EU courts.[76] In EU competition enforcement procedures, the effective conduct of these procedures and the effective use of the discretion made available to the Commission to achieve the effective enforcement of EU competition law dominated the judicial framing of the relevant

71 See *Case C-50/00 P, UPA*, para. 39; Judgment of 15 May 1986 in *Case 222/84, Johnston*, EU:C:1986:206, para. 18; Judgment of 6 November 2012 in *Case C-199/11, Europese Gemeenschap*, EU:C:2012:684, paras. 47-48.

72 See, *inter alia*, Judgment of 23 April 1986 in *Case 294/83, Les Verts*, EU:C:1986:166, para. 23; Judgment of 22 October 1987 in *Case 314/85, Foto-Frost*, EU:C:1987:452. See also *Michaud v. France*, ECHR 2012, paras. 110-111.

73 *Case C-50/00 P, UPA*, para. 45 and Opinion of 8 March 2011 – *European and Community Patents Court. Opinion 1/09*, EU:C:2011:123, paras. 80 and 84. See the development of this idea in Judgment of 21 May 1987 in *Joined Cases 133 to 136/85, Walter Rau*, EU:C:1987:244; Judgment of 2 April 1998 in *Case C-321/95 P, Greenpeace*, EU:C:1998:153.

74 See, *inter alia*, *Case C-50/00 P, UPA*, para. 41; Judgment of 13 March 2007 in *Case C-432/05, Unibet*, EU:C:2007:163, Judgment of 10 April 1984 in *Case 14/83, Von Colson*, EU:C:1984:153, para. 26.

75 See, *inter alia*, *Case C-432/05, Unibet*, para. 54; Judgment of 29 October 2009 in *Case C-63/08, Pontin*, EU:C:2009:666, para. 47; Judgment of 10 April 2003 in *Case C-276/01, Steffensen*, EU:C:2003:228, para. 66.

76 See C. Harding and J. Joshua, *Regulating Cartels in Europe*, Oxford, OUP, 2010, Ch. 7; J. Schwarze, 'Tendencies towards a Common Administrative Law in Europe', *ELRev*, 16, 1991, p. 5.

rights and guarantees, especially the rights of the defence, and their enforcement.[77] Similar considerations played a role, although in a very different context, in the interpretation of the defence rights of the Member States as participants in infringement procedures, which were quite readily subsumed to considerations of administrative and broader policy effectiveness which define the conduct of these particular procedures.[78]

As raised earlier, human rights are often interpreted by the EU Court of Justice in a multi-layered environment whereby the existence of parallel constitutional authorities – at the national, the European and at the international level – is allowed to have a defining impact on the protection of human rights in the EU.[79] Also, the Court have been pressed to interpret and apply human rights in various specific multi-layered legal and governance constructions established within the EU,[80] for example in the context of the EU judicial system consisting of the EU courts and the courts of the Member States. Regarding the impact of parallel constitutional authorities, they are responsible for an understanding of human rights in the EU as having a 'relational' character which manifests in interpretative practices of borrowing law from other constitutional locations or in judicial deference to their authority and to the autonomy and discretion of actors located there.[81] In the second interpretative context, the main issues are whether all relevant actors should be allowed jurisdiction to control the operation of the system and what institutions and processes are available to maintain the integrity of the system affected.[82] As mentioned earlier, in the EU's multi-layered judicial system the place of and the role played by national courts serve as the fundamental interpretative consideration in the jurisprudence.

The relationship of EU human rights law with ECHR law provides a highly significant, yet extremely peculiar multi-layered interpretative context for the EU jurisprudence. Although the EU is not a contacting party to the ECHR, the two legal orders have been joined in a relationship of mutual observation which manifests predominantly in following interpretative approaches which are informed of developments in the other

77 See, *inter alia*, Judgment of 23 October 1974 in *Case 17/74, Transocean Marine Paint*, EU:C:1974:106, para. 15; Judgment of 13 February 1979 in *Case 85/76, Hoffman-La Roche*, EU:C:1979:36, para. 9; Judgment of 9 November 1983 in *Case 322/8,1 Michelin*, EU:C:1983:313, para. 7; Judgment of 21 September 1989 in *Joined Cases 46/87 and 227/88, Hoechst*, EU:C:1989:337, paras. 14-15; Judgment of 14 September 2010 in *Case C-550/07 P, Akzo Nobel*, EU:C:2010:512, para. 92; Judgment of 22 October 2002 in *Case C-94/00, Roquette Frères*, EU:C:2002:603, paras. 30-32 and 34-30.

78 See, *inter alia*, Judgment of 27 November 2003 in *Case C-185/00, Commission v. Finland*, EU:C:2003:639, para. 79; Judgment of 15 January 2002 in *Case C-439/99, Commission v. Italy* EU:C:2002:14, para. 10; Judgment of 26 April 2005 in *Case C-494/01, Commission v. Ireland*, EU:C:2005:250, paras. 42-47.

79 *Supra* notes 53-54.

80 See, for example, Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1; Regulation 1151/2012/EU of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ 2012 L 343/1.

81 See Judgment of 25 March 2004 in *Case C-71/02, Karner*, EU:C:2004:181; Judgment of 12 June 2003 in *Case C-112/00, Schmidberger*, EU:C:2003:333; *Case C-244/06, Dynamic Medien*; *Case C-36/02, Omega Spielhallen*.

82 See, *inter alia*, *Joined Cases C-402/05 P and C-415/05 P, Kadi*, paras. 286-289, 291-309, 316-317.

legal order.[83] The interpretative considerations arising from the parallel existence of EU and ECHR law affect the entire EU jurisprudence, although not in a uniform manner. They include the interpretative pressure of divergence from ECHR law, which is responsible for the interpretative reaction of alignment, and the interpretative consideration of flexibility enabling particular developments in the law of human rights as available under the margin of appreciation doctrine in ECHR law, which together shape EU human rights law.[84] Alignment to ECHR law, under the pressure of potential divergences between the parallel legal orders, manifests in frequent direct borrowing from the jurisprudence of the European Court of Human rights and in other less explicit practices of legal alignment.[85] The jurisprudence also seems to be aware of the circumstance that alignment is a necessary precondition for EU human rights law being able to exploit the autonomy provided for the development and application of human rights under the flexible ECHR framework, as indicated especially under the ECHR's earlier mentioned '*Bosphorus*-principle'.[86]

28.4 The Character of EU Human Rights Law as an Impediment to Its Consolidation

Apart from the earlier mentioned criticisms, the character developed for EU human rights law in judicial interpretation, which entails foremost that the law is exposed to considerations arising from the broader EU context, for instance to the consideration of consolidating the EU legal and constitutional order, may be criticized for impeding the further consolidation of the legal protection of human rights in the EU. This issue is intrinsically connected with the earlier mentioned hiatuses and particularities of EU human rights law, namely the lack of a commitment to a genuine human rights agenda and its involvement in the internal closure of the EU legal order, and the protection of human rights within, as an autonomous, externally unchallengeable system. It emerged most

83 S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis', *CMLRev*, 43, 2006, p. 629; J. Rideau, 'La coexistence des systèmes de protection des droits fondamentaux dans la CE et ses états membres', *Annuaire Internationale de Justice Constitutionnelle*, 7, 1991, p. 11; J. Limbach, 'Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe', *HRLJ*, 21, 2000, p. 333.

84 Varju 2014, Ch 8. See also F. Zampini, 'La CJCE, gardienne des droits fondamentaux "dans le cadre du droit communautaire"', *Revue trimestrielle de droit européen*, 35, 1999, p. 680 and p. 688.

85 See, *inter alia*, *Case C-112/00, Schmidberger*, para. 79; Judgment of 14 February 2008 in *Case C-450/06, Varec*, EU:C:2008:91, para. 48; Judgment of 28 June 2005 in *Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, Dansk Rørindustri*, EU:C:2005:408, paras. 214-219.

86 See, *inter alia*, Judgment of 17 February 2009 in *Case C-465/0,7 Elgafaji*, EU:C:2009:94; Judgment of 1 July 2008 in *Joined Cases C-341/06 P and C-342/06 P, Chronopost*, EU:C:2008:375, paras. 44-60; *Case C-199/11, Europese Gemeenshap*, paras. 71-76.

recently in the EU Court of Justice's controversial legal obstruction of the Union's accession to the European Convention on Human Rights.[87]

Paradoxically, the Court, which had pursued a consolidation agenda in relation to the EU legal order as a whole aiming to protect its core constitutional principles, shied away from the further consolidation of EU human rights law by bringing it under binding legal commitments under the scope of the parallel international system for the protection of constitutional rights in Europe, the law of the ECHR.[88] Equally paradoxically, increasing the legitimacy of EU human rights law, by way of allowing the EU's accession to the ECHR, seeking which was regulated as a distinct aim for the Union in Article 6(2) TEU, was rejected on account of the threat posed to the integrity and autonomy of the EU constitutional order[89] by its legally ordered exposure to ECHR law[90] *Opinion 2/13* also identified a deep rift between the different interpretative considerations believed to be influencing EU human rights law and, thus, between its different uses in the EU context, namely between the commitment to uphold the rule of law and protect human rights and the interest of securing the effective operation of common policies and the effective enforcement of EU legal obligations. Without settling this systemic dilemma first, which dates back to the origins of the EU human rights principle, the consolidation of human rights law in the EU cannot be achieved.

The opinion was not the first occasion when the EU legal order, including EU human rights law, was confronted with the contradictions affecting its system of commitments. As already discussed, the earlier, *Opinion 2/94* rejected, having regard to the constitutional and political state of the Union (then, the EC) at that time, that accession to the ECHR could take place lawfully under EU law.[91] When declining that the European Community had the competence to make that move, the Court argued in essence that accession would challenge the integrity of the EC legal system and subject its operation directly to a 'distinct international institutional system' and to the rules enforced by that system.[92] The constitutional setting for the protection of human rights in the EU had changed considerably since then. Firstly, Article 6(2) TEU imposed a constitutional ob-

87 *Opinion 2/13*.

88 The opinion did not bring about a final or irreversible separation of the two regimes, as they continue to coexist and borrow from each other under the framework provided under the '*Bosphorus*-principle'.

89 Effective enforcement, which was central to the EU law's claim for authority, was rejected as constitutionally impossible.

90 See Kumm's criticism of the similar effect of the *Kadi* judgment in M. Kumm, 'Constitutionalism and the Moral Point of Constitutional Pluralism: Institutional Civil Disobedience and Conscientious Objection', in J. Dickson and P. Eleftheriadis (Eds.), *Philosophical Foundations of European Union Law*, Oxford, OUP, 2012, pp. 220-222.

91 The EU Court of Justice made it clear that controlling accession to the ECHR under EC law was equally important for the Member States having regard to the 'institutional implications' it may entail not only for the EC but also for them, *Opinion 2/94*, para. 35.

92 *Opinion 2/94*, para. 34. It would entail a 'substantial change' in the current system of human rights protection in the EC and, thus, in the system available to ensure the lawful operation of the EC (the protection of human rights is a 'condition of the lawfulness of Community acts').

ligation on the Union to seek, without affecting the Union's competences as defined in the Treaties, accession to the ECHR. Although formulated with a strong component of conditionality, this Treaty provision seems to imply in contradiction with the position formulated in *Opinion 2/94* that being exposed to controls as exercised by a parallel international system for the protection of human rights and being subject to its rules cannot alone prevent the EU's accession to the ECHR. Secondly, with the adoption and the entry into force of the EU Charter of Fundamental Rights the protection of human rights in the EU acquired an even more solid and autonomous constitutional footing within the EU legal order. In parallel, the relevant jurisprudence of EU courts, which as a norm has regard to and borrows from the jurisprudence of the European Court of Human Rights, matured considerably.[93] Finally, rulings, such as those delivered in *Kadi*,[94] continuing with the approach represented in *Opinion 2/94* indicated a reinforced autonomy of and a marked internal closure in the law of human rights in the EU.[95]

In *Opinion 2/13*, the Court again rejected that accession to the ECHR would be possible under EU law. The opinion, which highlighted a number of legal shortcomings which were left unaddressed or were inadequately addressed in the legal preparation of the accession process, established much more assertively than *Opinion 2/94* that the accession as prepared by the EU institutions following the requirement of Article 6 TEU failed to show due respect to the fundamental principles of the EU legal order in general and of EU human rights law in particular, and that it was not ensured that these internal legal principles constituting the legal order of the Union would not be jeopardized upon accession by virtue of its direct legal consequences.[96] It was made evident that the protection of human rights in the EU may only be provided lawfully and constitutionally when the legal and constitutional framework developed by the EU Court of Justice in its jurisprudence and by the Treaties is respected and maintained. Transgressing those internally determined boundaries by way of exposing EU law and EU human rights law directly to the obligations of the ECHR and the jurisdiction of the European Court of Human Rights may only become permissible under EU law in case the current framework is abandoned, or is duly amended, or when the peculiarities of that framework are duly catered for, if that is possible, in the legal regulation of the accession.

The opinion largely relied on the interpretative framework established in the judgment in *Kadi*. That ruling, which in effect contradicted the arguments supporting the position the EU Court of Justice hoped to secure for EU law vis-à-vis national law and

93 See, for example, s*upra* note 69. The *Bosphorus* ruling of the European Court of Human Rights made it clear that EU human rights law, in general, satisfies ECHR benchmarks, see *Bosphorus v. Ireland*, paras. 159-165.

94 *Joined Cases C-402/05 P and C-415/05 P, Kadi.*

95 See also, the judgment in *Fransson* where the Court, having recognized the Treaty provisions regulating the current role of the ECHR in EU human rights law, rejected that the ECHR, 'as long as the European Union has not acceded to it', would constitute a legal instrument formally incorporated into EU law, *Case C-617/10, Fransson*, para. 44.

96 *Opinion 2/13*, paras. 179-200.

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national constitution law in *Costa* and *Simmethal*,[97] constructed a relationship between international law and the EU legal order that rejected the openness of the latter towards considerations or pressures raised externally.[98] The opinion, based on these premises, declared the unquestionable autonomy and inviolability of the EU legal order and the system for the protection of human rights therein. Autonomy and inviolability also provided the principled basis of the legal assessment of the legal particulars of the accession process. It was held that the undertaking of obligations under the ECHR through accession may only be realized legitimately under EU law, in case the autonomy of the EU legal order and the inviolability of the related principles governing the effective enforcement of EU law were adequately secured.[99] The Court made it particularly clear that the Treaty-required accession to the ECHR, which is expected to secure broader constitutional benefits for the EU legal order, may go ahead only when the original fundamental interpretative context of EU human rights law – that the protection of human rights plays a significant role as a system-constituting instrument in the establishment and the subsequent consolidation of the EU polity – is given sufficient recognition.[100]

The reference to *Kadi* as the most relevant authority and the ensuing legal reasoning clearly meant that the opinion refused to reconsider the constitutional and, thus, the legal interpretative foundations of the EU legal order and the protection of human rights therein. While it is difficult to contest that the protection of human rights bears direct relevance for the lawful operation and the overall legitimacy of any legal order and that exposure to an international body of human rights law and an institutional system established for the enforcement of those rights would place the integrity of any legal order under pressure, the internal enclosure of a legal order on these grounds fails to recognize the positive implications of opening up that legal order to international (human rights) law essentially in pursuance of the same constitutional considerations. Arguably, as intended by the makers of the new Treaties, although Article 6(2) TEU does not make this explicit, accession to the ECHR will have the effect of enhancing the lawful operation and the legitimacy of the EU legal order and the filtering of human rights violations with the help of the ECHR by the European Court of Human Rights will enable the EU legal order to restore its integrity undermined by such violations. Obviously, the EU Court of Justice did not reject these latter considerations in its opinion as being irrelevant; it expressed concerns instead that EU human rights law will lose its connection with its very own context and be governed, instead of the complexity of considerations arising from that context, by a more reduced formal legal arrangement under the single constitutional clause provided by Article 6 TEU.

97 Judgment of 15 July 1964 in *Case 6/64, Costa*, EU:C:1964:66 and Judgment of 9 March 1978 in *Case 106/77, Simmenthal*, EU:C:1978:49.

98 See *Joined Cases C-402/05 P and C-415/05 P, Kadi*, paras. 282-285.

99 *Opinion 2/13*, para. 199.

100 Ibid, paras. 159-177.

The threat posed by accession to the ECHR to the current system of human rights protection as operated by the EU courts must not be underestimated. There is no guarantee that the EU jurisprudence and the body of law thus created would not be placed under pressure from a less context-driven interpretation of rights by an external institutional actor operating at the international level. The EU human rights principle itself, as developed in the founding jurisprudence, could attract legally established criticisms under the ECHR framework on account of the obvious linking of the protection of human rights to the legal consolidation of the constitutional principles, which, in effect, claim an absolute priority for the effective enforcement of EU legal obligations and, thus, for the effective operation of law in the EU's multi-layered governance system. The position carved out for effectiveness in EU law may not be completely compatible with a more balanced approach followed under the law of the ECHR where the interest of effectiveness in law and in its enforcement may be measured more closely to competing rights claims. EU human rights law may also struggle with protecting the judicial deference exercised towards parallel constitutional authorities in the EU legal space. While the ECHR system has its own principle – the margin of appreciation doctrine – and practice governing judicial deference under the Convention, there is no guarantee that EU and Member State regulation and governance would receive the same deferential judicial treatment when exposed to obligations under ECHR law.[101] Much depends on the actual application of the '*Bosphorus*-principle', which recognized international cooperation among States and the setting up of regional systems of inter-State cooperation as an interest that needs to be given consideration in the context of protecting human rights.[102]

For the EU Court of Justice's arguments to be really convincing, the opinion should have concretized the risks and effects that would follow from accession to the ECHR and which are capable of destabilizing the EU legal order and challenging its identity and integrity.[103] In light of the current treatment available to the protection of human rights in the EU under the '*Bosphorus*-principle', which recognizes a conditional autonomy for the EU legal order and EU human rights law therein, it is not particularly clear how opening of the EU legal order to direct influence and control by the ECHR as a source of international human rights law would actually jeopardize the fundamental, essentially

101 See the discussion concerning the threat of divergence and the pressure of alignment, already indicating that differing intensities of judicial scrutiny could cause tensions between the systems, *supra* note 84.

102 Arguably, the '*Bosphorus*-principle' provides a much similar flexible boundary to that available under the margin of appreciation doctrine determining the autonomy available to the ECHR Contracting States.

103 In case the level of general principles is left behind, the opinion implies that membership in the ECHR weakens the effective enforcement of EU obligations against the Member States at the national level and, thus, undermines the effective realization of EU common policies. This is where the opinion is the weakest as the Court should have provided a more exacting treatment of these claims.

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functional premises of the EU legal order.[104] As suggested earlier, the opinion did not consider whether the EU legal order would benefit from ECHR accession complementing, potentially with values, its core functional approach to law and the protection of rights.[105] Furthermore, the opinion, despite the example given by the '*Bosphorus*-principle', failed to permit the same preliminary trust towards the operation of the ECHR system as that provided towards the protection of human rights in the EU under the Convention. The EU Court did not consider allowing the ECHR system to promote its own interpretative considerations as regards the protection of human rights in the same way as the European Court of Human Rights recognized the ability of the EU Court of Justice to develop its human rights jurisprudence autonomously in the particular context of the EU polity. This choice has particular relevance in the accession process as without permitting in law that ECHR law imposes its interpretative considerations on EU human rights law it is difficult to imagine under what conditions may accession to the ECHR be legally permissible under EU law.[106]

28.5 Conclusions

The development of EU human rights law under the interpretative involvement of the EU Court of Justice provides an example for the internationalization of constitutional rights under a busy, multi-component agenda. It took place in a very particular constitutional, political and governance context and in a very particular time period, which were responsible for the subjecting of the interpretation and application of rights to considerations peculiar to that context. The exposure of the law in judicial interpretation to a variety of context-driven considerations meant that human rights law in the EU became responsible, beyond the protection of individuals and the controlling in law of the use of public powers, for matters of broader relevance, such as the constitutional construction and consolidation of the EU polity, or the maintaining of common governance frameworks and the related systems of legal regulation. The characteristics developed in judicial interpretation for EU human rights law now seem to be preventing its further consolidation through its more comprehensive integration into the parallel international system for the protection of human rights in Europe, the law of the ECHR.

104 See the interpretation by Tridimas of the '*Bosphorus*-principle' that it represents the same conditional and reversible endorsement of EU human rights law under the ECHR as that granted by national courts under the respective national constitutional orders, Tridimas 2006, p. 352.

105 See the criticisms *supra* notes 7, 30, 32, 36, 37.

106 A clause in the accession treaty concerning the inviolability of the autonomy and the principles of the EU legal order may offer a solution, but that alone cannot remedy a refusal in the EU jurisprudence of opening EU human rights law to external influences and controls.

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29 International and European Standards of State Organization

Krzysztof Wojtyczek[*]

For many decades, the international law has emphasized the freedom of States to choose the political system. However, since the collapse of the communist regimes there is a growing trend for devising and promoting universal democratic standards that touch upon matters regulated by domestic constitutional law.[1] International (hard and soft) law impacts national Constitutions and national constitutional law in different ways.[2] The most visible is the impact on the status of the individual. International law imposes the protection of certain fundamental rights irrespective of the level of protection provided for in the national constitution. It also enshrines certain general principles limiting the State power such as legality, non-retroactivity and proportionality. It further has an influence on the sources of domestic law because the States have the obligation to take measures necessary for implementing the binding rules of international law. In this context, many States decide to grant direct effect and direct applicability to international treaties.

Much less known is the impact of international law on State organization and the limitations placed on what may be called the organizational autonomy of the States. The purpose of this study is to present briefly – and without aiming at exhaustivity – the content and the impact of the main universal and pan-European standards set up in international treaties and soft law instruments that directly restrict the way States can organize their apparatus. The indirect constraints on State organization as well as standards set forth in the EU law remain out of the scope of the present study.

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1 See, for instance, L.-A. Sicilianos, *L'ONU et la démocratisation de l'Etat. Systèmes régionaux et ordre juridique universel*, Pedone, Paris 2000.

2 On this issue, see, for instance, S. Torcol, *L'«internationalisation» des constitutions nationales, 8e congrès français de droit constitutionnel*, <www.droitconstitutionnel.org/congresmtp/textes3/TORCOL.pdf> (retrieved February 22, 2017); H. Qazbir, *L'internationalisation du droit constitutionnel*, Dalloz, Paris 2015; For a theoretical perspective, see J. Combacau, "Sources internationales et européennes du droit constitutionnel" in *Traité international de droit constitutionnel*, t. 1 *Théorie de la Constitution*, M. Troper, D. Chagnollaud (eds), Dalloz, Paris 2012.

29.1 The Evolution of International Law

The international law has traditionally protected what is called today the constitutional autonomy of the States, which is an important element of States' sovereignty.[3] The freedom of States to choose the political system has a legal basis in art. 2 par. 7 of the Charter of the United Nations, which recognized the existence of a sphere consisting matters that are essentially within the domestic jurisdiction of any state and free from external intervention.[4]

When addressing issues of States' constitutional autonomy, the International Court of Justice stated that

> no rule of international law, in the view of the Court, requires of a State to follow any particular patter, as is evident from the diversity of the forms State found in the World today.[5]

Moreover, more than a decade later the ICJ expressed the view that

> (…) adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.[6]

Thus the constitutional autonomy has a strong rooting in international law and enjoys its protection.[7] The traditional approach in this respect was connected between the East–West divide and the fact than an important part of States adopted the communist totalitarian regime or opted for authoritarian rule. The main preoccupation in this context was to preserve peace in relations between States. Nonetheless the first democratic standards (especially the 1949 Universal Declaration of Human Rights and the two 1966 Covenants on human rights) were developed at that time.

Democratic Western European States adopted, however, a different approach in this domain after World War II. They created an international organization (the Council of Europe) to actively promote democracy and the rule of law. During the following dec-

3 See, for instance, V. Huet, "L'autonomie constitutionnelle de l'État: déclin ou renouveau," *Revue française de droit constitutionnel*, 2008, no. 1, p. 67-74.

4 *Ibidem*, p. 68.

5 Advisory Opinion of October 16, 1975, Western Sahara, para. 94.

6 Judgment of June 27, 1986 (Merits) in the case in the case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), para. 263.

7 V. Huet, *op. cit.*, p. 77.

ades, the European States, which underwent transition from authoritarianism or totalitarianism to democracy, joined this organization, whereas the density of democratic standards has intensified considerably.[8] The different organs of the Council of Europe (in particular the Committee of Ministers and the Parliamentary Assembly) have adopted numerous instruments setting unbinding guidelines on certain matters of State organization. After the collapse of the communist regimes in 1989-1990, this activity intensified. A particular role is currently played by the Venice Commission, which elaborates the most detailed set of guidelines pertaining to the constitutional organization of the States.[9]

The collapse of communist regimes triggered another development in Europe. The Conference on Security and Cooperation in Europe was transformed into the Organization on Security and Cooperation in Europe, which also started to elaborate democratic standards for the member States.[10]

Similarly the Organization of United Nations changed its initial attitude and began to develop standards of democracy and the rule of law. The United Nations have adopted in particular guidelines concerning free elections,[11] judicial independence[12] and national human rights institutions.[13] Other international organization – governmental and non-governmental – followed the same path. In particular, matters concerning national parliaments are addressed in documents adopted by the Inter-Parliamentary Union.[14]

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8 See Y. Lécuyer, *L'européanisation des standards démocratiques*, Presses universitaires de Rennes, Rennes 2010.

9 For a critical appraisal, see M. de Visser, "A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform," *American Journal of Comparative Law*, vol. 63 (2015), p. 963-1008.

10 *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Copenhagen, June 29, 1990; *Charter of Paris for a new Europe* of November 21, 1990.

11 See, in particular, United Nations General Assembly Resolution of the December 17, 1991 *Enhancing the effectiveness of the principle of periodic and genuine elections*, A/RES/46/137.

12 *Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 to September 6, 1985 and endorsed by General Assembly resolutions 40/32 of November 29, 1985 and 40/146 of December 13, 1985; see also *The Bangalore Principles of Judicial Conduct* adopted by the Judicial Group on Strengthening Judicial Integrity, referred to by the Human Rights Commission of the resolution 2003/43 of April 23, 2003.

13 General Assembly Resolution of December 20, 1993, *Principles relating to the Status of National Institutions (The Paris Principles)*, A/RES/48/134; General Assembly Resolution of December 18, 2008, *The role of the Ombudsman, mediator and other national human rights institutions in the promotion and protection of human rights, A/RES/63/169*; General Assembly Resolution of December 18, 2008, *National institutions for the promotion and protection of human rights*, A/RES/63/172; General Assembly Resolution of December 17, 2015, *National institutions for the promotion and protection of human rights*, A/RES/70/163.

14 *Declaration on Criteria for Free and Fair Elections* adopted by the Inter-Parliamentary Council in Paris on March 26, 1994; *Ensuring Lasting Democracy by Forging Close Links Between Parliament and the People*, Resolution adopted by Inter-Parliamentary Conference in Cairo on September 15, 1997); *Universal Declaration On Democracy* adopted by the Inter-Parliamentary Council in Cairo, September 16, 1997); *Parliaments' Role in Strengthening Democratic Institutions and Human Development in a Fragmented World*, Resolution adopted by the Inter-Parliamentary Conference in Santiago de Chile on April 11, 2003); *Guidelines On The Rights and Duties of the Opposition in Parliament* adopted by the participants at the Parliamentary Seminar on Relations Between Majority and Minority Parties in African Parliaments, Libreville, Gabon, May 17-19, 1999.

Although constitutional autonomy of States is still the point of departure in international law, the exceptions and limitations on it become more and more numerous and scope of the autonomy gets narrower. These limitations are particularly developed at the regional European level. As a result, European States are limited not only by universal standards but also by a more comprehensive corpus of detailed regional standards that deserve special consideration.

29.2 The Nature of the International Law Influence on National Constitutional Law

The influence of international – hard and soft – law on State organization appears to be two-fold. On one hand, there are indirect constraints on State organization. The capacity to act in the international community and to conduct an effective foreign policy requires a properly organized State apparatus. Similarly, the general obligation of compliance with international law imposes the necessity to define the State structure in a way that enables an effective and prompt implementation of the various rules of international law. Moreover, additional constraints stem from membership in international organizations. The States may have to adapt their apparatus in order to draw maximum political or economic profits from this membership. Legal scholarship has studied in particular the influence of the European Union upon the constitutional systems of member States.[15]

On the other hand, as mentioned above, the international community has also started to develop certain standards pertaining directly to internal State organization and restricting the organizational aspect of the States' constitutional autonomy ("the organizational autonomy"). The present article deals only with the latter.

The international standards pertaining to State organization have different legal nature. First, international treaties contain certain legal rules that pertain to State organization. In particular certain issues of State organization are regulated by human rights treaties. Moreover, local self-government has been regulated in a detailed way in the European Charter of Local Self-Government.

Second, there are different instruments of soft law adopted by international intergovernmental organizations as well as international organizations grouping State organs.

Third, numerous international bodies refer to certain very general unwritten principles of law pertaining to State structure. One can name here in particular the principle of

15 On the question of indirect influence of the European Communities on the national constitutions, see, for instance: *Les États Membres de l'Union Europeenne: Adaptations, Mutations, Resistances*, J. Rideau (ed.), L.G.D.J, Paris 1997; *Staatsrechtliche Auswirkungen der Mitgliedschaft in den Europäischen Gemeinschaften*, B. Cottier, (ed.), Schulthess, Zürich 1991.

separation of powers,[16] accountability,[17] democratic legitimacy, pluralism and parliamentary democracy. Such principles are widely recognized in democratic States not only in Europe but also on other continents. They are referred to as obvious without any specific textual basis being invoked. In other words they are considered as standards not because they are invoked or recognized in hard or soft law but because of their wide acceptance. They may enter the category of general principles of law recognized by civilized nations referred to in Article 37 of Statute of the International Court of Justice.

29.3 The Principle of Democracy

When the United Nations started to promote – through different tools – standards of democracy, after the collapse of communist regimes, some scholars started to ask the question whether there is a right to democratic governance in international law.[18] There is no doubt that democracy has gained growing international recognition not only in documents of soft law but also in international treaties, mainly in the international human rights law. It is possible to say that there is a general principle of democracy recognized in international law. The principle has, however, a very general nature, which may lead to difficulties in its application.

The principle of democracy has been enshrined in the Universal Declaration of Human Rights in Article 21 par. 3 which says:

> The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The UNHR recognizes the people as the source of power. Democracy is not only a matter of individual participation but also the way of pursuing collective goals that may go well beyond the observance and implementation of individual rights. In this perspective, the elections serve mainly to express the will of the people and constitute a tool of collective self-determination.

16 See, for instance, the ECHR judgment of June 23, 2016 in the case of *Baka v. Hungary*, application no. 20261/12, para. 165.

17 See, for instance, the ECHR judgment of February 18, 1999 in the case of *Matthews v. The United Kingdom*, application no. 24833/94, para. 52.

18 See, in particular, Th.M. Franck, "The Emerging Right to Democratic Governance," *The American Journal of International Law*, vol. 86 (1992), no. 1, pp. 46-91; for a more sceptical approach, see J. D'Aspremont, "The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks," *European Journal of International Law*, vol. 22 (2011), no 2, pp. 549-570; see also and D. Kokoroko, "Souveraineté étatique et principe de légitimité démocratique," *Revue québécoise de droit interrnational*, vol. 16 (2003), pp. 37-59.

The principle of democracy has also been expressed in the International Covenant on Civic and Political Rights, especially in article 25, guaranteeing electoral rights. It is also important to note that Article 1 par. 1 of the ICCPR grants the following right: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." An identical provision was included in Article 1 par. 1 of the ICESCR. The two UN covenants recognize therefore the people as a collective actor vested with human rights. Self-determination entails popular sovereignty. The people may by way of self-determination decide to hold and exercise sovereignty. However, under the prevailing interpretation, the scope of the right to self-determination is limited to peoples already organized in states or peoples living in colonies. Moreover, in international practice emphasis has been placed on external self-determination (the choice of the international status) rather than on its internal aspects (the choice of constitutional structure and popular sovereignty),[19] although the Committee on the Elimination of Racial Discrimination stresses that the right to self-determination has an internal aspect and is linked with the right to take part in the conduct of public affairs.[20]

Under the ECHR, the ECtHR expressed the view that "democracy […] appears the only political model contemplated by the Convention and the only compatible with it."[21] It is interesting to note in this context that in the ECHR the political community (the polis) formed by the citizens is mentioned only in Article 3 of Protocol no 1: the aim of the elections is to ensure the free expression of the opinion of the people. At the same time, the Nation is mentioned in par. 15 allowing derogations when the life of the Nation in threatened in time of war or another public emergency. Otherwise, the limitation clauses in Articles 8-11 refer to the notion of "democratic society." In this perspective, enhanced by the case-law of the ECtHR, the citizens form a democratic society rather than a political community (a people) and democracy is more a matter of individual participation than of collective determination.[22]

The notion of democracy in international law has a relatively well-defined core.[23] On one hand, the principle of democracy is precise and specific enough to assess and disqualify certain constitutional systems and certain more specific constitutional solutions and institutions that cannot be reconciled with the idea of democracy. For instance, neither the so-called "popular democracies" nor the Salazar's or Franco's regimes were democracies.

19 See, for instance, L.-A. Sicilianos, *op. cit.*, pp. 33-39.

20 *General Recommendation XXI on the right to self-determination*; see however the sceptical comments of J. D'Aspremont, p. 568.

21 The judgment of January 30, 1998 in the case of United Communist *Party of Turkey and others v. Turkey*, application no 133/1996/752/951, para. 45.

22 See on this matter X. Souvignet, "Le modèle politique de la Cour européenne des droits de l'homme: du pouvoir du peuple à la souveraineté du sujet," *Jurisdoctoria*, no 5 (2010).

23 An opposite point of view has been expressed among others by V. Huet, *op. cit.*, p. 86.

On the other hand, the principle of democracy is too broad to determine a specific constitutional structure and leaves a wide choice to the States. The idea of constitutional democracy may be implemented in very different constitutional systems. There is no doubt that a democracy may have the more specific form of parliamentary, presidential, directorial or assembly regime. The principle of democracy does not *per se* organize the State and requires implementation through specific rules of constitutional organization. In other words, while limiting constitutional autonomy of the States, a broad framework is set for a free choice of a specific constitutional system.

At the same time the notion of democracy is vague enough to create uncertainty about the classification of certain constitutional regimes at the fringes. The question whether certain constitutional systems fulfil or not the minimum requirements to be classified as democratic may be disputed.

One has also to remember the clause of democratic state enshrined in State Constitutions may be used as the basis for inference by the constitutional courts of more specific unwritten constitutional principles that regulate State organization.[24] Such unwritten principles may – on certain specific points – complement explicit constitutional provisions but cannot replace them. Similarly, international bodies may also infer from the general principle of democracy certain more specific standards pertaining to State organization.

29.4 The "Political" Branches

The most important standards from the political viewpoint concern the organization of the legislative and executive branches and their interactions.

The ICCPR Pact is quite ambiguous on questions of State structure. The most important provision in this respect, Article 26 of the Covenant, is worded in the following way:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors […].

24 See, for instance, the judgment of the Polish Constitutional Court of March 23, 2006, *An action of the legislator entailing the interruption in the functioning of a constitutional State organ constitutes a violation of the principle of democratic State ruled by law and the principle of legality* (Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy [Judgments of the Constitutional Court. Official Collection], 2006, no, 3A, item. 32, para. III.3.1, translation – K. Wojtyczek).

It is true that this provision guarantees the right to participate in public affairs directly or through elections but does not define the nature nor the level of government of the bodies to be elected. The Human Rights Committee has not clarified the precise scope of elections required by this article. However, it applies this provision to elections provided for in domestic law, including local elections. It may nonetheless be assumed that the strict minimum required by the Covenant is the election of first chamber of the parliament. Moreover, the provision under consideration places yet another limitation on State structure: according to the HRC,

> an independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.[25]

It seems that the most far-reaching hard law regulation pertaining to the two political branches was inserted to the ECHR and the Protocols thereto. Article 3 of Protocol No 1 says:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinion of the people in the choice of the legislature.

This provision deals primarily with free elections but has also, par ricochet, an impact on the constitutional structure of the High Contracting Parties.[26] A legislature is a State organ that exercises legislative power, i.e. enacts statutes containing legal rules, which are the primary source of domestic law. Statutes regulate in particular the status of the citizen and the powers of State organ are determined; Secondary legislation regulates matters of minor importance and has to in conformity with statutes.

Under Article 3 of the Convention, a legislature (*corps législatif* in the French version) is a necessary element of the constitutional structure. The democratic State has to have an elected organ vested with broad legislative powers. Legislation adopted by the legislature has to be the primary source of domestic law. The wording of the Convention does not exclude vesting the executive branch with certain norm-making powers but certainly excludes vesting unelected executive organs with too broad norm-making powers.

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25 *General comment No. 25 – The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), CCPR/C/21/Rev.1/Add.7*, August 27, 1996, para. 20.

26 See, in particular, L. Garlicki, "Prawo parlamentarne w orzecznictwie Europejskiego Trybunału Praw Człowieka" [Parliamentary law in the case-law of the European Court of Human Rights] in: *Zagadnienia prawa parlamentarnego. Materiały z XLVIII Ogólnopolskiego Zjazdu Katedr i Zakładów Prawa Konstytucyjnego. Serock, 1-3 czerwca 2006 r.*, M. Granat (ed.), Wydawnictwo Sejmowe, Warszawa 2007.

The term *legislature* also presupposes certain scrutiny powers vis-à-vis the executive branch although the French term *corps législatif* may seem more ambiguous in this respect. In any event, it is not possible to determine the minimum scope of oversight powers a parliament has to enjoy under Article 3 of the Convention. The determination of the scope and instruments of oversight powers of legislative bodies belongs to the States.

The Court had the examine the applicability of Article 3 of Protocol 1 to the executive branch. It took the following position on this issue:

> The Court does not exclude, however, the possibility of applying Article 3 of Protocol No. 1 to presidential elections. (…) Should it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a "legislature" within the meaning of Article 3 of Protocol No 1.[27]

In this respect the question may arise whether the provisions of the 1958 French Constitution are compatible with the Convention. The French Constitution, unlike most other European Constitutions, grants particularly broad norm-making powers to the executive. The parliament is competent to legislate on matters enumerated in the Constitution. Even if the case-law of the Constitutional council and of the Council of State have broadened the scope of the legislative powers of the parliament, this scope remains narrower than in many other European States. However, both the governmental autonomous decrees based upon a general constitutional empowerment and the ordinances based upon a delegation of legislative power by the parliament require the signature of the President of the Republic. The latter is elected by universal suffrage. If head of State is to be considered as a "legislature" of the Convention then it would be logical to apply to guarantees of Article 3 to the presidential election.

The wording of the Convention suggests the existence of one legislature. However, the Convention does not prohibit the creation of two or more legislatures at different levels of a multilevel constitutional system. In particular, the Convention does not oppose that legislative power be delegated to regional parliaments or to federated entities in a federal State. Nor does it oppose that broad legislative power be transferred to a supranational body. The legislative power can be divided between different levels of government provided that at each level with substantial legislative powers there is an elected legislative body.

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27 Decision of September 2, 2004 as to the admissibility of application no. 11676/04 by Ljube Boškoski against the former Yugoslav Republic of Macedonia; see also decision of May 22, 2007 as to the admissibility of application no. 9103/04 by the Georgian Labour Party against Georgia.

The legislature may be a monocameral or a bicameral one. In case of a bicameral parliament, the first chamber has to be elected by universal suffrage. The question of the status of the second chamber arises. So far as the first chamber has a prevailing position, the second chamber may be unelected or include unelected members.[28] However, if the second chamber has an equal position in legislative matters, Article 3 is applicable.[29]

According to the views expressed by the Venice Commission, too broad powers granted to autonomous regulatory bodies may curtail parliament's powers.[30] It may be inferred from this view, that Article 3 of the ECHR set certain limits on creation of unelected autonomous regulatory bodies. Entrusting such bodies with too broad regulatory powers may infringe this provision of the Convention.

The Convention requires that elections are hold at reasonable intervals. It means that term of office can neither be too short nor too long.[31] In interpreting Article 3 the ECtHR resorts to soft law such as the Venice Commission *Code of Good Practices in Electoral Matters*. Thus changes of electoral law before elections become suspect and require a more thorough scrutiny.[32]

Free elections also presuppose impartial State organs that carry out the elections. Article 13 coupled with Article 3 of Protocol One requires an effective remedy, which means the creation of an impartial domestic body competent to adjudicate on electoral reclamations or a judicial review of decisions taken in electoral matters. According to the Court,

> the principle that rights must be effective requires the finding that this or that candidate has failed to satisfy them to comply with a number of criteria framed to prevent arbitrary decisions. In particular, such a finding must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for ruling a candidate ineligible must be such as to guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority.[33]

28 Judgment of December 22, 2009 in the case of *Sejdić and Finci v. Bosnia and Herzegovina*, applications nos. 27996/06 and 34836/06), para. 40.

29 *Ibidem*, para. 42.

30 *Opinion on the New Constitution of Hungary*, CDL-AD(2011)016, para. 90.

31 Decision of the European Commission of Human Rights of September 11, 1995 in the case of *Timke v. Germany*, Application No. 27311/95.

32 Judgment of April 27, 2010 in the case of *Tănase v. Moldova*, application no. 7/08, para. 168.

33 Judgment of April 9, 2002, case of *Podkolzina v. Latvia*, application no. 46726/99, para. 35.

In another judgment the Court stated the following:

> The Court has emphasised that it is important for the authorities in charge of electoral administration to function in a transparent manner and to maintain impartiality and independence from political manipulation (…), that the proceedings conducted by them be accompanied by minimum safeguards against arbitrariness and that their decisions are sufficiently reasoned (…).[34]

The Convention does not regulate the relations between the legislative and the executive branches. It allows both the separation and the unity of powers as long as the legislative powers of the legislature(s) are observed. The latter system may consist of *régime d'assemblée* or strong presidential powers, especially if the president is elected directly by universal suffrage. The Convention neither excludes the right of the executive branch to dissolve the parliament nor imposes that the Government enjoys the confidence of the parliament or its first chamber.

On the other hand, the separation of powers is a value protected by the Convention and may therefore justify restrictions on rights:

> the parliamentary immunity enjoyed by the MP in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.[35]

Similarly, the role of the parliament may justify broad investigative powers of its committees. At the same time the Court recognizes the autonomy of the parliament as a value protected under the Convention.

Article 3 of Protocol 1 "guarantees the individual's right to stand for election and, once elected, to sit as a member of parliament (…)."[36] The holders of a parliamentary mandate cannot be deprived of their seat arbitrarily. Any such interference has to be justified by a pressing social need.[37]

The case-law on the ECtHR sets strict limits on sanctioning powers of the parliament vis-à-vis the citizens. Sanctions have to be imposed by a tribunal in the meaning of Article 6.[38] Although the Court refers the specific circumstances of the Demicoli case in which a sanction for criticizing two MPs was imposed by the parliament with the participation of the two MPs in the vote, it is difficult to imagine how any judicial power of the parliament can

34 Judgment of September 30, 2010 in the case of *Kerimova v. Azerbaijan*, application no. 20799/06, para. 45.
35 Judgment of December 17, 2002 case of *A. v. the United Kingdom*, application no. 35373/97, para. 77.
36 Judgment of February 7, 2008 in the case of *Kovach v. Ukraine*, application no. 39424/02, para. 48.
37 Judgment June 15, 2006 in the case of *Lykourezos v. Greece*, application no. 33554/03, para. 56-57.
38 Judgment of August 27, 1991 in the case of *Demicoli v. Malta*, application no. 13057/87.

be compatible with the Convention. This remark pertains to the power of the second chamber to judge ministers in an impeachment procedure if criminal sanctions are to be imposed.

The case-law of the ECtHR enters into the matters of internal functioning of national parliaments. Activities of parliamentarians are protected under Article 10 as forms of expression. This pertains for instance to the occupation of the meeting hall[39] as well to speeches and interpellations.[40] An interference with the activities of parliamentarians requires a justification whereas the sanctions have to be imposed in a procedure in which the right to be heard is ensured. Moreover, an effective remedy has to be provided. The scope of the freedom of the parliamentarians has to be assed in the light of the principle that

> in a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion (…).[41]

The Court also expressed the view that

> in a democratic State committed to the rule of law and respect for fundamental rights and freedoms, it is clear that the very role of MPs, and in particular those members from opposition parties, is to represent the electorate by ensuring the accountability of the government in power and assessing their policies.[42]

If the ECHR leaves a broad margin of appreciation to the States in respect of their organization, the soft law of the Council of Europe enters into many detailed question of State organization. It is interesting to note that although the official documents do not take an explicit stance on the choice of a constitutional structure, they implicitly strongly favor the parliamentary government and recommend constitutional solutions incompatible with the presidential regime according the US pattern. For instance, the PACE expresses the view that "the government must command the confidence of the Chamber elected by universal suffrage."[43] The more specific standards formulated explicitly or stemming implicitly from PACE resolutions include:

- the principle of free mandate of parliamentarians;
- parliamentary autonomy;

39 Judgment of April 18, 2006 in the case of *Karácsonyi v. Hungary*, application no. 37494/02.
40 Judgment of November 8, 2016 in the case of *Szanyi v. Hungary*, application no. 35493/13.
41 Judgment of April 9, 2002 in the case of *Yazar and Others v. Turkey*, applications nos. 22723/93, 22724/93 and 22725/93, para. 59.
42 Judgment of April 27, 2010 in the case of *Tănase v. Moldova*, application no. 7/08, para. 166.
43 *Resolution 1154 (1998) Democratic functioning of national parliaments*, para. 1.

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- the introduction of the following tools of parliamentary scrutiny: the right to information, written and oral questions, interpellations, the right to table a motion of no confidence as well as the right to ask for a debate;
- abstract review of constitutionality of legislation initiated by a group of MPs;
- rights of the opposition such as proportional allocation of committee presidencies, proportional representation as the basis for committees composition, access to posts of vice-president, right to append a dissenting opinion to a parliamentary report.[44]

The Venice Commission also sets certain standards pertaining to political powers. For instance it opposes granting the legislative initiative to courts[45] and criticizes the parallel initiative of the President of the government.[46] It advocates a free and imperative mandate and opposes depravation of mandate in case of change in party affiliation.[47] Constitutional amendments should be adopted by the parliament by a qualified majority.[48] The Venice Commission expresses reservations vis-à-vis constitutional referenda.[49] According to this body,

> constitutional amendments strengthening the position of the executive should be subject to special scrutiny, and changes allowing for longer periods of high office should preferably only have effect for future incumbents[50]

whereas "'unamendable' provisions and principles should be interpreted and applied narrowly."[51]

The Venice Commission has also formulated detailed guidelines on constitutional referenda. Thus, questions submitted to a referendum must respect unity of form, content and hierarchical level[52] and texts submitted to the referendum must not be contrary to international law or the Council of Europe's statutory principles (democracy, human

44 See *Resolution 1154 (1998)* quoted above and *Resolution 1601 (2008) on* "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament".

45 *Report on Legislative Initiative adopted by the Venice Commission at its 77th Plenary Session (Venice, December 12-13, 2008), CDL-AD(2008)035-e*, para. 144.

46 *Ibidem*, para. 148.

47 *Report on the Imperative Mandate and Similar Practices adopted by the Council for Democratic Elections at its 28th meeting (Venice, March 14, 2009) and by the Venice Commission at its 79th Plenary Session (Venice, June 12-13, 2009) CDL-AD(2009)027-e*, para. 39.

48 *Report on Constitutional Amendment adopted by the Venice Commission at its 81st Plenary Session (Venice, December 11-12, 2009), CDL-AD(2010)001-e*, para. 241.

49 *Ibidem*, para. 242.

50 *Ibidem*, para. 249.

51 *Ibidem*, para. 250.

52 *Code of good practice on Referendums adopted by the Council for Democratic Elections at its 19th meeting (Venice, December 16, 2006) and the Venice Commission at its 70th plenary session (Venice, March 16-17, 2007), CDL-AD(2007)008rev-e*, para. 27-31.

rights and the rule of law).[53] Referendums on questions of principle or other generally worded proposals should be consultative only because "while some countries recognise that such referendums may bind parliament in principle, this leads to difficulties of implementation and entails a high risk of political conflicts."[54]

29.5 The Judicial Power

The most detailed human rights standards pertain to the judicial power. The most important instruments in this field are the ICCPR and the ECHR. The judicial power in the scope of matters defined by the ICCPR or the ECHR is to be exercised by tribunals which are: (1) independent, (2) impartial and (3) established by law. The ICCPR adds that the tribunal that adjudicates in a specific case has to be a *competent* one.

The State organs exercising judicial power have to fulfil the criteria established in those instruments. These criteria were substantiated in the case-law of the competent treaty bodies. The HRC expressed the following view in respect of requirement of independence:

> 19. (…) The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature. (…) A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. (…)
> 20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary.[55]

53 *Ibidem*, para. 33.

54 *Guidelines for Constitutional Referendums at National Level Adopted by the Venice Commission at its 47th Plenary Meeting (Venice, July 6-7, 2001)*, point N.

55 *General Comment No. 32 Article 14: Right to equality before courts and tribunals and to a fair trial. August, 23, 2007, CCPR/C/GC/32.*

It is interesting to note that the HRC also expressed concerns about the system of election of judges by the citizens.[56]

The richest case-law pertaining to the judicial power has been developed by the ECtHR. It defines a tribunal in the following terms:

> According to the Court's case-law, a "tribunal" is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner (…). It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members' terms of office; guarantees afforded by its procedure – several of which appear in the text of Article 6 § 1 (art. 6-1) itself (…).[57]

In another judgment the ECtHR clarifies further that

> in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence.[58]

The ECtHR verifies whether a body entrusted with judicial power enjoys sufficient guarantees of independence.

It is widely assumed that irremovability of members is a *conditio sine que non* of independence of a body. The Court, however, did not erect this condition as an absolute requirement:

> It is true that the irremovability of judges by the executive during their term of office must in general be considered as a corollary of their independence and thus included in the guarantees of Article 6 para. 1 (art. 6-1). However, the absence of a formal recognition of this irremovability in the law does not in itself imply lack of independence provided that it is recognised in fact and that the other necessary guarantees are present (…).[59]

56 *Comments of the Human Rights Committee on the United States, April 7, 1995, CCPR/C/79/Add.50*, para. 23.
57 Judgment of April 29, 1988 in the case of *Belilos v. Switzerland*, application no. 10328/83, para. 64.
58 Judgment May 6, 2003 in the case of *Kleyn and Others v. the Netherlands*, applications nos. 39343/98, 39651/98, 43147/98 and 46664/99, para. 190.
59 Judgment of June 28, 1984 in the case of *Campbell and Fell v. The United Kingdom*, applications No. 7819/77; 7878/77, para. 80.

The ECtHR scrutinizes the procedure of appointment of judges. "Appointment of judges by the executive or the legislature is permissible, provided the appointees are free from influence or pressure when carrying out their adjudicatory role (…)."[60] Judicial independence excludes interference by other State organs with the exercise of judicial function. In particular, according to the ECtHR,

> the power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal", as is confirmed by the word "determination" ("qui décidera") (…). This power can also be seen as a component of the "independence" required by Article 6 para. 1 (art. 6-1).[61]

It is true that the ECtHR rejects any theory of separation of powers:

> although the notion of the separation of powers between the executive and the judiciary has assumed growing importance in the Court's case-law (…), neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the interaction between the two branches. The Court must clarify whether in each particular case the requirements of the Convention are met (…).[62]

On the other hand, the Court nonetheless does not hesitate to give certain guidelines in this field:

> The scope of the State's obligation to ensure a trial by an "independent and impartial tribunal" under Article 6 § 1 of the Convention is not limited to the judiciary. It also implies obligations on the executive, the legislature and any other State authority, regardless of its level, to respect and abide by the judgments and decisions of the courts, even when they do not agree with them. Thus, the State's respecting the authority of the courts is an indispensable precondition for public confidence in the courts and, more broadly, for the rule of law. For this to be the case, the constitutional safeguards of the independence and impartiality of the judiciary do not suffice. They must be effectively incorporated into everyday administrative attitudes and practices.[63]

60 Judgment July 3, 2007, in the case of *Flux (No. 2) v. Moldova*, application No. 31001/03, para. 27.
61 Judgment of April 19, 1994 in the case of *Van De Hurk v. The Netherlands*, application No. 16034/90, para. 45.
62 Judgment of May 6, 2003 in the case of *Kleyn and Others v. The Netherlands* quoted above, para. 193; judgment October 6, 2011 in the case of *Agrokompleks v. Ukraine*, application No. 23465/03, para. 131.
63 Judgment October 6, 2011 in the case of *Agrokompleks v. Ukraine*, quoted above, para. 136.

Any tribunal has to be established by law.

> The object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament" (…).[64]

In other words the legislative competence of the parliament shall encompass questions of judicial organization. All important matters have to be determined directly in the statute and cannot be delegated to the executive branch.

The Convention allows a broad margin of appreciation in respect of the structure of the judiciary:

> for the purposes of Article 6 para. 1 (art. 6-1) a tribunal need not be a court of law integrated within the standard judicial machinery. It may (…) be set up to deal with a specific subject matter which can be appropriately administered outside the ordinary court system.[65]

Moreover, the Convention does not exclude cumulating different state functions:

> The Council of the Ordre des avocats performs many functions – administrative, regulatory, adjudicative, advisory and disciplinary. (…) This kind of plurality of powers cannot in itself preclude an institution from being a "tribunal" in respect of some of them.[66]

It should be noted that the Convention does not explicitly guarantee the right to appeal in civil matters. On the other hand, under Article 2 of Protocol 7 in criminal matters there should be at least two levels of jurisdiction.

The ECHR and case-law of the Strasbourg Court clearly reinforce the position of the judiciary vis-à-vis the executive and legislative powers. Under the Convention, adjudication in criminal and civil matters belongs to tribunals in the meaning of Article 6 and it excludes the exercise of judicial power or inference therewith by the executive. The Court stressed for instance that in the United Kingdom,

> the continuing role of the Secretary of State in fixing the tariff and in deciding on a prisoner's release following its expiry has become increasingly difficult to

64 Judgment of July 11, 2006 in the case of *Gurov v. Moldova*, application no. 36455/02, para. 34. @
65 Judgment of July 1, 1997 in the case of *Rolf Gustafson v. Sweden*, application no. 23196/94, para. 45.
66 Judgment of November 30, 1987 in the case of *H. v. Belgium*, application no. 8950/80, para. 50.

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> reconcile with the notion of separation of powers between the executive and the judiciary, a notion which has assumed growing importance in the case-law of the Court (…).[67]

If a matter is decided by a non-judicial body, a remedy against the decision that enables its examination by the court has to be provided. In a particular, the Convention imposes the judicial review of administration in matters concerning civil rights.

> The Court points out that under Article 6 para. 1 (art. 6-1) of the Convention it is necessary that decisions of administrative authorities which do not themselves satisfy the requirements of that Article should be subject to subsequent control by a "judicial body that has full jurisdiction."[68]

Article 13 of the Convention guarantees the right to an effective remedy before a national authority to persons whose rights and freedoms set forth in the Convention were violated. This may *prima facie* mean that if rights are violated by the legislator there should be a remedy enabling the individuals to challenge the compatibility of legislation with the Convention. However, the ECtHR says that this provision

> does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (…), likewise cannot require the provision of a remedy allowing a constitutional precedent with statutory force to be challenged.[69]

On the other hand, once a constitutional court entrusted with the power of concrete review of legislation has been created, the procedure before the court has to observe the standards of procedural justice set forth in article 6. Thus the parties to a procedure in which a request for a ruling on constitutionality of legislation has been lodged by the competent court, have the right to heard before the constitutional court.[70] Moreover, the ECtHR is the guardian of execution of judgments of national constitutional courts, which recognizes specific rights belonging to scope of rights protected under the Convention. A refusal to execute such a judgment is a violation of the Convention.[71] Hence

67 Judgment of May 28, 2002 in the case of *Stafford v. The United Kingdom*, application no. 46295/99, para. 78.
68 Judgment of October 25, 1994 in the case of *Ortenberg v. Austria*, application no 33/1993/428/507, para. 31.
69 Judgment of January 6, 2011 in the case of *Paksas v. Lithuania*, application no. 34932/04, para. 114.
70 Judgment of June 23, 1993 in the case of *Ruiz-Mateos v. Spain*, application no. 12952/87, para. 59 and 60.
71 See, for instance, the judgment of June 22, 2004 in the case of *Broniowski v. Poland*, application no. 31443/96, para. 131 and 175; Judgment of July 21, 2015 in the case of *Oliari and Others v. Italy*, applications nos. 18766/11 and 36030/11, para. 180-184.

the Convention creates an additional mechanism for ensuring the implementation of domestic constitutional courts judgments.

The ECHR, as interpreted by the ECtHR, also contains certain principles pertaining to the organization of the prosecuting authorities. Certain provisions of the Convention (in particular Article 2, 3 and 4 as well as – to a certain extent article 8) require that in case of breaches of those provisions the State carries out an effective investigation capable of leading to the prosecution and punishment of the persons responsible. The State has to put in place prosecuting authorities vested with a certain degree of independence and able to carry out effective investigations:

> Article 2 does not require that the persons and bodies responsible for the investigation enjoy absolute independence, but rather that they are sufficiently independent of the persons and structures whose responsibility is likely to be engaged (…). The adequacy of the degree of independence is assessed in the light of all the circumstances, which are necessarily specific to each case.[72]

As explained by the Court:

> the persons responsible for the investigations should be independent of anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (…).[73]

Furthermore, art. 5 and 6 exclude a confusion between the functions of prosecutor and judge (…).[74]

There is also a very rich and relatively detailed soft law on judicial independence enacted by the United Nations,[75] the Council of Europe[76] and the OSCE. International standards have also been devised by nongovernmental organizations[77] and groups of experts.[78] Given the limited scope of the present article, it is impossible to present those rules in detail.

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72 The judgment of April 14, 2015 in the case of *Mustafa Tunç and Fecire Tunç v. Turkey*, application no 24014/05, para. 233.

73 *Ibidem*, para. 177.

74 Judgment of December 15, 2005 in the case of *Kyprianou v. Cyprus*, application no. 73797/01, para. 126.

75 See note 12.

76 *Recommendation No R (94) 12 of the Committee of Ministers to member states on the independence, efficiency and role of judges*; *Recommendation CM Rec (2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities*; *the Magna Carta of Judges (Fundamental Principles)* adopted by the Consultative Council of European Judges in November 2010.

77 *Universal Charter of the Judge* approved by the International Association of Judges on November 17, 1999; *International Bar Association's Minimum Standards of Judicial Independence* (1982).

78 *European Charter on the Statute for Judges* adopted by participants from European countries at a meeting in Strasbourg on July 8-10, 1998 organized under the auspices of the Council of Europe; *Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia* adopted on June 23-25, 2010.

29.6 Local Government

The most detailed international rules pertaining to State organization set forth in treaties concern local government. The relevant instruments are the European Charter of Local Self-Government and the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.

The European Charter of Local Self-Government set forth in particular the following principles:

- the requirement of constitutional or legal recognition of the principle of local self-government;
- the presumption of competence in favor or the local government;
- the principle of subsidiarity;
- full and exclusive powers of local authorities in local matters;
- the power of local authorities to determine their own structure;
- the limitation of administrative supervision to the criterion of legality;
- the entitlement to adequate financial resources;
- the judicial protection of local self-government entities.

Under Article 2 par. 2 of the Charter the right of local authorities to regulate and manage a substantial share of public affairs is exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. It may also be exercised by the way assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute (Article 2 par. 3). It stems from these provisions that the council elected by universal suffrage is the main holder of local power. The local executive has to be responsible to the council.

Whereas the states are free to determine the number of levels of local government and the size of local self-government entities, the Charter contains a quite precise sketch of the structure and functioning of the local self-government. The implementation of the Charter is monitored by the Congress of Local and Regional Authorities; moreover, the provisions of the Charter may be the legal basis for the judicial review of legislation at domestic level.[79]

79 See, for instance, the judgment of the Polish Constitutional Court of July 18, 2003, K 24/02, *Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy* 2003 no 2A, item 11, declaring certain provisions of a statute regulating the organization of local government in Warsaw contrary to the Charter.

29.7 The Ombudsman and National Human Rights Institutions

International and European standards enter also the sphere of domestic institutions guarding the rule of law. Whereas there are no universal or European treaty rules pertaining to Ombudsman and other so-called national human rights institutions, there are quite detailed provisions shaping the recommended structure and powers of those institutions.

As mentioned above, the General Assembly of United Nations has adopted the "Principles relating to the Status of National Institutions (The Paris Principles)."[80] The principles stipulate that "a national institution shall be vested with competence to promote and protect human rights."[81] According to the principles,

> the composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the protection and promotion of human rights.[82]

Under the principles, a national institution shall have *inter alia* the following powers:

- to submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights;[83]
- to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation.[84]

It may also be authorized to hear and consider complaints and petitions concerning individual situations.

The UN General Assembly resolution of 18 December 2008, A/RES/63/169 encourages the member States to consider the creation or the strengthening of independent and autonomous Ombudsman, mediator and other national human rights institutions and to give serious consideration to implementing the recommendations and proposals

80 See note 13.
81 Chapter *Competence and responsibilities*, para. 1.
82 Chapter *Composition and guarantees of independence and pluralism*, para. 1.
83 Chapter *Competence and responsibilities*, para. 3 lit. a *in principe*.
84 Chapter *Competence and responsibilities*, para. 3 lit. b.

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of these institutions, with the aim of addressing claims of the complainants, consistent with the principles of justice, equality and rule of law.

Much more detailed standards are set forth by the Parliamentary Assembly of the Council of Europe in the Recommendation 1615 (2003) The institution of Ombudsman. The Assembly recommends the creation of an institution bearing a title similar to that of "parliamentary (/regional/ local government) ombudsman," preferably by incorporation into the constitution. The ombudsman should enjoy independence in respect of the subject of investigations, including in particular as regards receipt of complaints, decisions on whether or not to accept complaints as admissible or to launch own-initiative investigations, decisions on when and how to pursue investigations, consideration of evidence, drawing of conclusions, preparation and presentation of recommendations and reports, and publicity. Legislation should provide for exclusive and transparent procedures for appointment and dismissal by parliament by a qualified majority of votes sufficiently large as to imply support from parties outside government, for renewable mandates at least equal in duration to the parliamentary term of office.

Therefore, issues such as creation of the Ombudsman, procedures for its appointment, its relations with other State organs as well as the scope of its powers belong to the international constitutional law.

29.8 Conclusion

The international community has developed a rich corpus of rules pertaining to State organization, and restricting the organizational autonomy of the States. These developments lead the creation of an "international constitutional law" understood not as the constitutional law of the international community[85] but as international standards pertaining to matters previously regulated by national constitutional law. Most of those rules are not precise enough to directly regulate the structure of State organs but they considerably narrow the freedom of the constituent or legislative power. Moreover, they do not form a comprehensive set and their density varies considerably from one area to another. They concern certain issues, leaving other ones unaddressed. Nonetheless, international constitutional law invites itself to almost every chapter of textbooks of domestic constitutional law.

Certain standards belong to treaty law whereas most standards constitute soft law. Certain treaty rules are justiciable and enforced by competent international treaty bodies. Justiciability for the purpose of human rights protection has to be distinguished, however, from direct applicability for the purpose of organizing the state apparatus. The fact that a

85 On international constitutional law in the sense, see: A. Peters, "The Merits of Global Constitutionalism," *Indiana Journal of Global Legal Studies*, vol. 16 (2009) no. 2, pp. 397-411; E de Wit, "The International Constitutional Order," *International and Comparative Law Quarterly*, vol. 55 (2006), pp. 51-76.

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legal rule is precise enough to limit the State organs in relations to the individual does not mean that the same rule is precise enough to regulate the State structure and relations between State organs. In the latter domain, the international rule has to be implemented by appropriate constitutional or legislative rules enacted at domestic level.

The soft law standards are not binding *per se*; however, their impact should not be underestimated. First, they are of utmost importance if a State wants to join an international organization (such as the Council of Europe or the European Union) imposing requirements concerning State organization. The compliance with the general criteria of membership is assessed in the light of numerous soft law instruments.

Second, compliance with soft law standards may be important for the purpose of maintaining membership in an international organization. The fact that a State ceases to fulfil certain criteria may trigger monitoring and sanctioning procedures and eventually lead to the suspension of membership or even to the exclusion from the organization. One example may illustrate this. The Venice Commission refers to soft law standards in its opinions concerning national constitutions. A negative opinion may then be used by political organs of the Council of Europe such as the Committee of Ministers and the Parliamentary Assembly to put political pressure against States non-complying with the standards.

Third, soft law is relevant for the interpretation and application of hard law. International bodies entrusted with the monitoring of treaties implementation often resort to soft law in order to interpret vague clauses in the treaties and give them a more precise content.[86] Similarly, constitutional courts may refer to the international soft law for the purpose of interpretation of national constitutions.[87] The soft law may also identify values that have to be duly taken into account in the process of balancing for the purpose of application of the principle of proportionality.

The practical impact of European and international standards of State organization is therefore probably much stronger than it *prima facie* appears.

86 See, for instance, the ECHR judgment in the case of *Baka v. Hungary*, quoted above, referring to numerous soft law documents on judicial independence.

87 See, for instance, the judgment of the Polish Constitutional Court of July 20, 2011, K 9/11, *Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy* 2011, no 6A, item. 61 on the constitutionality of the 2011 Electoral Code and referring to the *Code of Good Practice in Electoral Matters*.

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