Rule of Law

Rule of Law

edited by Grzegorz Pastuszko

Wydawnictwo Instytutu Wymiaru Sprawiedliwości **Warszawa 2023**

Polsko-Węgierska Platforma Badawcza 2021
Lengyel-Magyar Kutato Platform 2021
Polish-Hungarian Research Platform 2021

REVIEWERS *dr hab. Katarzyna Zalasińska, prof. UW*
dr hab. Grzegorz Maroń, prof. UR

PROOFREADING *Małgorzata Przybyłowicz-Bandeira*

TYPESETTING AND COVER DESIGN *Tomasz Smołka*

ISBN 978-83-67149-27-3

WYDAWNICTWO INSTYTUTU WYMIARU SPRAWIEDLIWOŚCI
ul. Krakowskie Przedmieście 25, 00-071 Warszawa
SEKRETARIAT tel.: (22) 630 94 53, e-mail: wydawnictwo@iws.gov.pl

BOUND AND PRINTED BY *"Elpil", ul. Artyleryjska 11, 08-110 Siedlce*

Table of Contents

Introduction

The rule of law principle is deeply rooted in the European legal tradition and is considered one of the key achievements of legal thought. Nowadays, it is difficult to imagine a legislator in Europe which would disregard this principle and shape the legal order without taking into account its rudimentary assumptions. Everywhere, as far as the eye can see, we observe normative acts either directly referring to the idea of the rule of law, or at least imbued with its spirit. Therefore, it is certainly a principle that is characterized by a universal character and a very wide range of influence.

There are three main features of this principle. First, it is a principle with incompletely defined content that has no clearly defined normative boundaries. Being a kind of political philosophy of the functioning of public authorities of a state, although obviously included in the form of juridical declarations, it shows far-reaching flexibility and remains open to new interpretive trends. Its basic assumption that organs of public authority are bound by law and must operate within its limits is only the core of the normative content hidden in it and is the starting point for the formulation of further, derivative directives and rules. As a result, it is impossible to present the entirety of the normative components of this principle (in the sense that they cannot be listed exhaustively), or to outline its universal definition. In this respect, a state of permanent

uncertainty and indeterminacy persists, which makes it impossible to fully understand the issue. Secondly, the discussed principle is multidimensional and may be considered in the context of various areas of law. For this reason, one should speak of a principle characterized by far-reaching expansiveness, which imposes axiological standards for the entire legal system and at the same time sets the normative minima associated with them. Systemically, it plays the role of a "clamp" binding all existing legal regulations and setting the limits of their permissible content. Thanks to this, entities interpreting the law gain normative (in fact very vague) criteria for assessing specific solutions and on this basis they can determine whether the legislator creating them has maintained the discipline resulting from the regime of the principle in question. This certainly serves to maintain the coherence of the legal system and gives the system a holistic character. Thirdly, the rule of law principle, despite the existence of a common denominator, adopts a diverse content everywhere and is also characterized by local specificity everywhere. This is the result of individual legal traditions of individual countries and their separate path of historical development. Obviously, this state of affairs means that any attempts to determine the content of the principle in question require referring to the peculiarities and nuances that function in the culture and legal system of a given country. Without taking these elements into account, in many cases it becomes practically impossible to understand what the analyzed concept hides. This, moreover, contributes to the emergence of controversies and disputes in the framework of scientific and political discussions aimed at developing a minimum standard of the rule of law. There has been no agreement and there is no agreement in this respect, so it is still unknown what is definitely within this standard and what is outside of it.

Even these brief observations, showing the vague and undefined nature of the rule of law, are enough to realize how important it is to conduct scientific research aimed at explaining the intricacies of this issue. Undoubtedly, such research brings us closer to the phenomenon of the concept of the rule of law and allows us to remove any doubts that arise in this respect. The interest of the academic world in the rule of law should be seen as highly desirable.

For this reason, we considered it necessary and justified to take the initiative related to the preparation of this monograph. Being aware of the still existing gaps in the area of research, but also the controversies and polemics observed every step of the way, we decided to create a study that could deal with some research problems and present their original analysis. We are convinced that this gives us a chance to join the international discussion devoted to the rule of law.

This monograph is the result of cooperation between a Polish-Hungarian team of scientists established as part of the Polish-Hungarian Research Platform scientific project. Its main assumption is to present selected legal issues that are related to the subject of the rule of law and create a space for both the exchange of arguments and the proposition *de lege ferenda* of new solutions. Such a substantive formula of the study in question allows for a broad presentation of the analysis carried out, giving each author the opportunity to comment on matters falling within the sphere of his scientific specialty.

The monograph comprises six chapters in total. It opens with the chapter of prof. Csaba Varga "Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims", in which there are considerations aimed at explaining the concept of the rule of law. The author formulates here the thesis that the term is opaque, basically particular in nature, somewhat universalising in mutual learning process. He also notes that up until half a century ago, it was mainly discussed as part of the theory of *Staatsformenlehre*, while since its use in international relations for setting up criteria as elements of measurement and allegation for blackmailing, it has been taken as if it were a closed concept. Albeit, until it is enacted as an operational concept (defining the facts that constitute a case in the law [*Tatbestand*], it remains instead of so-called *Systembegriff*, only *Ordnungsbegriff*, that is, an essentially contested concept in the field of law.

Then we have the second chapter prepared by Prof. Barbara Janusz-Pohl titled "Mutual Recognition of Judicial Decisions in Criminal Matters in Relation to the Rule of Law Concepts – example of the EAW execution refusal". Its subject is the analysis of the impact

of the CJEU jurisprudence on the broad interpretation of the principle of judicial remedy as guaranteed by judicial body independence on the mutual recognition of judicial decisions connected to EAW execution. In this chapter, the author, looking from the perspective of criminal law, draws attention to the disturbing tendencies in the CJEU jurisprudence related to a very narrow interpretation of the category of judicial independence, and at the same time applying these interpretations only to selected states. She notes that the CJEU gives priority to the criterion of the independence of an authority over the criterion of legal certainty, including the stability of legally valid judgments, which contributes to weakening the concept of the rule of law in a given state and, at the same time, reducing the rights of an individual. In her opinion, in the long run, such a course of jurisprudence may cause the erosion of the challenged legal system and all the associated negative social effects.

Next comes the third chapter by prof. Ádáma Rixer titled "The legal aspects of the relationship between public administration and civil society in Hungary", which describes the relationship between public administration institutions and non-governmental organizations in Hungary. The author analyzes this issue in the context of the principle of separation of powers, assuming that in a democratic state it also applies in this area. In the presented argument, he outlines the special historical background of the Hungarian civil society, paying particular attention to the importance of the heritage of the communist state in shaping this society. He also deals with the forms and levels of the relationship between the state administration and the civil entities and relationship between the local governments and the civil entities. In both cases, it lists and discusses legal instruments aimed at activating civil society and influencing it by institutions of public authority. His considerations are crowned with detailed proposals to amend the existing legislation in this area.

The next is chapter four, written by prof. Csaba Cservák titled "Rule of Law and Constitutional Law", which deals with the problem of the influence of the rule of law on selected institutions and systemic structures defined in the provisions of the constitution. In the field of considerations there are comparative threads concerning, among others, president, constitutional court, local government,

prosecutor's office, political opposition and chambers of parliament. We are dealing here with a generally understood legal reflection, which shows the diversity of systemic solutions occurring in countries referring to the concept of the rule of law. The *de lege ferenda* conclusions formulated in this study are of particular interest.

The fifth chapter, developed by prof. Marzena Toumi, titled "The rule of law and the protection of marriage and family in Polish law presented on the basis of a comparative study". Its subject matter focuses on the problem of the legal nature of the institution of marriage in Poland seen from a legal and comparative perspective. The author of this chapter indicates various ways of regulating the family policy conducted by the state and at the same time different concepts of marriage ties. At the same time, when it comes to domestic solutions, it takes a conservative position, according to which the constitutional regulation of marriage should be interpreted as a lasting relationship, a bond between a man and a woman, focused on motherhood and responsible parenthood. According to her, the aim of the legal regulations defining the legal situation of the family is to impose on the state the obligation to implement measures that will strengthen the ties between persons setting up a family, in particular the ties existing between parents and children and between spouses.

The monograph ends with chapter six, written by prof. Grzegorz Pastuszko, titled "Influence of the EU dispute institutions on the Polish constitutional order in the context of the context over the rule of law". It contains an in-depth analysis of actions taken in recent years by EU bodies in relation to Poland in relation to emerging allegations of violation of the rule of law. The scope of consideration includes issues such as 1) meaning of the rule of law in the EU and Poland, 2) the problem of the relationship between Polish constitutional norms and norms of EU law, 3) EU mechanisms for enforcing the rule of law in the Member States, 4) limits of permissible EU interference in the decision-making processes related to establishing national legislation in Poland, 5) regulation on a general regime of conditionality for the protection of the Union budget. Taking up these threads, the author draws attention to the problem of exceeding the treaty powers by the European Union and

the resulting systemic consequences. At the same time, it shows possible, and at the same time within the framework of the treaties, directions of changes in EU legislation serving the so-called restoring the rule of law.

Authors

PROF. EM. CSABA VARGA
Péter Pázmány Catholic University (Budapest)

Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims

1. The Basic Idea and its Varieties

Seen from a historical perspective, the idea and the watchword of the Rule of Law (or *Rechtsstaat* or État de Droit and so on) have undergone a series of almost miraculous metamorphoses over the last century or two, which cannot be explained by the underlying idea alone, and thus cannot be understood or justified on the basis of the respective motives either. For the whole notion in fact appears to the lawyer to be laconic and redundant. It says no more than that, to put it in a very simplistic way, the law is there to be; that is, that if it is said to be obligatory, it ought to be really obligatory, and that in respect of anybody and under any circumstances. And it is the complexity of the State and of State action which has made possible, and sometimes even necessary, the changes, the evolution and, in fact, the so-called development of this not too broad concept. This has given the opportunity to link not only the formal requirement of legality based on rules, the core of the original meaning, but also the formal requirements of any procedure under the aegis of law, to the evolving notion of the rule of law, and finally, perhaps, to call to account within this term, and precisely by this term, the expectations expressed

in a political-ideological framework, which in fact includes, or just defines the vocation (or purpose and mission) of the State as a whole[1].

As regards this inherent core of meaning, professional literature argues that its development was primarily due to the laicisation of the state with a change of structure that made the creation of law itself the specific task of a normatively separate and strictly profiled branch of the exercise of power. It was then, and as a result of this, that it was gradually demanded and then practised that the entire spectrum of actions achieved in the name of the State should be included in the scope of the law, in addition to whatever civil subjects, that is, the machinery and procedures of the law itself, as well as the operation of any state body, i.e. all the procedures under the law as established, in their entirety and in all their cases and actions.

And in given circumstances, when for historical reasons the emphasis shifts from the legislator to the one who administers or applies the law – as it happened in the development of Anglo-Saxon law –, the rule of law requirement will have been formulated in relation to the latter's role who is to enforce the law and implant it in practice. Accordingly, "the kernel of the rule of law' lies precisely in that – expressed in non-legal terms – 'the public figure who is legitimised to settle disputes is the technocrat, on the basis of her specialised notions"[2].

As an abbreviated formulation and summary of all this, we can already state that if law is a basic form of social organisation[3], its realisation in the spirit of the Rule of Law is itself nothing other than one of the possible ways of organising the legal organisation

[1] The American approach now also distinguishes between formal, procedural and substantive aspects and/or requirements of the rule of law; cf. e.g. J. Waldron, *The Rule of Law*, [in:] *Stanford Encyclopedia of Philosophy* 2016, available at: https://plato.stanford.edu/entries/rule-of-law/#OppoRuleLaw [accessed on: 1 November 2022], para. 5.

[2] M. Bussani, *The Rule of Law in the Global Perspective*, "Italian Journal of Public Law" 2020, vol. 12, No. 2, pp. 146 & 145.

[3] According to J. Goody, *The Logic of Writing and the Organization of Society*, Cambridge University Press, Cambridge & New York 1986, p. 154, law represents a specific modality by which a society can organise its affairs, transforming the past into precedent and organising the future through legislation.

of society. It is one which, according to its adherents, provides the fullest possible guarantee of the fulfilment of the specific function of law, and it is therefore also, and with good reason, desirable that law should be constituted and function as such.

Since its birth, the very nature of the concepts of *Rechtsstaat* and the rule of law has undergone a fundamental transubstantiation. In the 18th to 19th centuries, when it was first formulated, it was largely descriptive, used as a designator for classification purposes within the theory of the form of the State (Germany) or to characterise an entire legal civilisation (England). A century later, in the confrontation of the Cold War, it was used as a symbolic expression of the West's superiority, as a name expressing the mark of their social and moral excellence in the face of Soviet domination. Its real career and academic exploration began just few decades later, through its political use, when the now unchecked globalisation of our single-power-dominated globe set it as the normative benchmark to be achieved in every corner of the world. It thus became the *sine qua non* quality standard of arrival and reception at the dominant centre, which at the same time began to be used for the purpose of stressing or even blackmailing such conformity[4].

2. Developments

The historical forms of what is called and referred to as the rule of law, superimposed upon one another, in the light of the circumstances can be convincing in themselves.

However, in the meantime, substantial changes have occurred which have generated further claims and the latter's criticisms in their subject matter. To see these, we need to expand our overall picture.

[4] The relevant development history is overviewed in details by Cs. Varga, *Rule of Law – Contesting and Contested*, "Central European Journal of Comparative Law" 2021, vol. 2, No. 1, pp. 245–267 available at: https://ojs3.mtak.hu/index.php/cejcl/article/view/6041/4723 [accessed on: 1 November 2022].

3. Name and Contents

Even the very vocabulary of the term, its linguistic visualisation, is not clear. The English and Germanic civilisations are no exception to the stream of imposing changing meanings and thus, in principle, different concepts, enriched by newer and newer layers, into their given and unchanging terms. Nevertheless, despite the variability of content, at least the term itself – "rule of law" resp. '*Rechtsstaat*' – has remained the same[5]. The French version, on the other hand, does not even have a common and consented verbal expression. For example, perhaps Europe's greatest legal historian, who has recently died, opined that the French equivalent of "the rule of law" should be "*le règne de la Loi*" rather than "*le règne du droit*"[6]. While this French version is officially called "État de Droit", the Council of Europe's clarification of the term (for France exclusively, of course) refers to it as "*la prééminance du droit*"[7]. The Canadian province of Québec (with almost the same population as Hungary), which also officially uses the French language, refers to it as "la primauté de droit"[8].

[5] The scholarly discourse made confused by using the same terms with differing understandings standing for distinct concepts is treated in case-studies by Cs. Varga, *Quelques questions méthodologiques de la formation des concepts en sciences juridiques*, "Archives de Philosophie du Droit" 1973, vol. XVIII, pp. 205–241 [reprinted in: http://mek.oszk.hu/15300/15333/#, pp. 7–33].

[6] R.C. van Caenegem, *Judges, Legislators & Professors. Chapters in European Legal History*, Cambridge University Press, Cambridge 1987, p. 4.

[7] E. Jurgens, *The Principle of the Rule of Law* [Committee on Legal Affairs and Human Rights Doc. 11343 Report, {Council of Europe} Parliamentary Assembly (July 6, 2007)], available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11593&lang=EN [accessed on: 1 November 2022], para. B-5 resp. Appendix I, para. I-b. Or, "*The rule of law is a legal, philosophical and political concept. It* – describes a keyword definition – *implies the pre-eminence of the law over political power in a state, as well as the obedience of all, rulers and ruled, to the law*", https://fr.wikipedia.org/wiki/État_de_droit ["*L'État de droit est un concept juridique, philosophique et politique. Il implique la prééminence du droit sur le pouvoir politique dans un État, ainsi que l'obéissance de tous, gouvernants et gouvernés, à la loi*"].

[8] D. Fairgrieve, É*tat de Droit and Rule of Law. Comparing Concepts. A Tribute to Roger Errera*, "Pubic Law" 2015, No. 1, pp. 40–59.

Half a century ago, it was said of two of the main forms of the rule of law, 'rule of law' proper and 'État de droit' that, unlike the Anglo-American type, which gave supremacy to the judiciary, the French version was based on the primacy given to the executive[9]. Today, however, a kind of reverse of the latter characterisation is already being established. Accordingly, the État de droit is indeed successful in creating and maintaining the internal legal cohesion within the operation of government hierarchy, but the ultimately decisive apex, the government centre, which is the starting point for any kind of legal supremacy and thus the turning point of the whole organisation, is not yet accountable for[10].

4. Formal Legalism

Or, the basic form is the formalism of legality. This is what has spread throughout the Civil Law systems of the European continent. It is considered to be the orderly way in which law has to function, because it is precisely in the spirit and hope of this that law was once generated. Consequently, the criterial essence of the claim that falls within the concept of the rule of law is precisely that it perceives value in that the law operates this way. This may also explain why the legality type understanding of the rule of law is neither necessarily nor often associated with any additional substantive demand. Accordingly, it is rather exceptional that it would also demand the extra service by any value outside the law. For it is precisely the above (and no other) criterion that reflects the very nature of law. And it is the same that gives law its specificity as well. As summed up in philosophical approaches to law, it is law itself that will, starting from itself and addressed to itself, finally define and also enforce

[9] W. Seagle, *The Quest for Law*, Knopf, New York 1941, p. 225.

[10] As J.-B. Auby, *The Rule of Law. The French Perspective*, "Italian Journal of Public Law" 2020, vol. 12, No. 2, p. 161 puts it, "*it knows rather well how to organize the internal discipline of the public apparatus, while it is less comfortable when it comes to make accountable the very center of the State which is the national executive power*".

its own system of fulfilment[11]. Hence the formal character of its conceptuality and the self-validity of the resulting separateness. The Oxford excellence of positivistic legal analysis, which made it world-famous, sums it up as follows: "Like other instruments, the law has a specific virtue which is morally neutral in being neutral as to the end to which the instrument is put"[12].

[11] This is 'Verfüllungssystem' in Lukács' posthumous ontology. Accordingly, "*the social task generally requires for its fulfilment a system whose criteria, at least in a formal sense, can neither be derived from the task itself nor from its material foundation, but must be specific, internal and immanent. What this means in our case means that a legal regulation of human social intercourse requires a specific and juridically homogenized ideal system of rules, etc., whose construction ultimately depends on the »incongruence« that Marx established between this realm of ideas and the economic reality*". G. Lukács, *The Ontology of Social Being. Marx's Basic Ontological Principles*, trans. David Fernbach, Merlin, London 1978, pp. 126–127. Cf. as well Cs. Varga, *The Place of Law in Lukács' World Concept*, [1985] 3rd [reprinted] ed. with Postface, Szent István Társulat, Budapest 2012, available at: http://mek.oszk.hu/14200/14249/ [accessed on: 1 November 2022], ch. 5.

Of course, Hans Kelsen's *pure theory of law*, which implements the conceptual-logical reconstruction of the Continental set-up and operation of law as consistently as possible, is no different in this respect – cf. e.g. Cs. Varga, *Kelsen's Theory of Law-application. Evolution, Ambiguities, Open Questions*, "Acta Juridica Hungarica" 1994, vol. 36, Nos. 1–2, http://real-j.mtak.hu/784/1/ACTAJURIDICA_36.pdf, pp. 3–27 – , and the *autopoietic* picture of legal processes naturally concludes to something similar by asserting the law's formally (and, as such, apparently) autotelic nature, too. Cf. N. Luhmann, *Essays on Self-reference*, Columbia University Press, New York 1990 and Cs. Varga, *On Judicial Ascertainment of Facts*, "Ratio Juris" 1991, vol. 4, No. 1, pp. 61–71, available at: https://booksc.org/book/9571753/a26400 [accessed on: 1 November 2022]; Cs. Varga, *The Paradigms of Legal Thinking*, [1996/1999] enlarged 2nd ed., Szent István Társulat, Budapest 2012, available at: http://mek.oszk.hu/14600/14657/ [accessed on: 1 November 2022].

[12] J. Raz, *The Rule of Law and Its Virtue*, [in:] J. Raz, *The Authority of Law*, Clarendon Press, Oxford 1979, pp. 225–226.

It is to be noted that on this point there seems to be agreement with another Oxford celebrity who, a quarter of a century on, is rethinking the issue. For, as R. Dworkin, *Hart's Postscript and the Character of Political Philosophy*, "Oxford Journal of Legal Studies" 2004, vol. 24, No. 1, p. 27 will opine, '*Any successful conception of legality must preserve the distinctness of that concept from other political values, including procedural fairness and substantive justice. If we believe that even quite unjust political arrangements may nevertheless display the virtue of legality, as most of us do, then our account of legality must permit and explain that judgment*'.

The basic requirement of the rule of law is that, in order to eliminate the chance of any arbitrariness, it requires that every legal act shall be legally patterned (i.e. it has to manifest a *patterned pattern* in case of any implementation of the law, be it application of the law or law enforcement in a strict sense, or whatever kind of administration of justice).

But in order to achieve or even approach this, it encourages ever-increasing and ever more complete *juridification*, and as a precondition for this, ever-increasing *norm production*. As a specific mass field of state intervention, this concerns first and foremost the exercise of executive power and, in this sense, the whole public administration within the state, with administrative law proper included. In this way, its urgent need leads to a worldwide proliferation of the already vast body of administrative law, which continues to swell from decade to decade, and thus to the inevitable inflation of norms. To such an extent that French public law literature has come to regard it as one of the dangers, or even the greatest threat, to their own constitutionality. And the chain of consequences thus conceived and carried out is at the same time, and by its very nature, a betrayal of everything that our social and legal sciences have hitherto affirmed about the nature of social order and the role of law in it. For behind such a realisation of the rule of law, there can be no other explanation than an "*idealised*" and "*illusory*" conception of the legal order, according to which the desirable guarantee of the primacy of law presupposes, as it were, the most comprehensive possible regulation of all life circumstances[13]. And where this is the way of thinking – and France is undoubtedly ahead –, the result is nothing more than a "*baroque edifice*", a "*legal cemetery*" (to use metaphors that are equally at home in academic and political discourse there), a "*normative jungle*", a city of the dead or a necropolis that faces the future helplessly, almost like a drifting "*clay-footed giant*"[14]. A future

[13] B. Luisin, *Le mythe de l'État de droit*, "Civitas Europa" 2016, vol. 2, No. 37, pp. 155–182, available at: https://www.cairn.info/revue-civitas-europa-2016-2-page-155.htm?contenu=article#re35no35 [accessed on: 1 November 2022].

[14] B. Jadot, *Élaborer la loi aujourd'hui, mission impossible? Le point de vue d'un fonctionnaire*, [in:] *Élaborer la loi aujourd'hui, mission impossible?*, eds. B. Jadot, F. Ost, Publications de la Faculté universitaire Saint-Louis, Bruxelles 1999,

that will not be able to avoid – the same critique continues – what it has itself brought about: instability, with the growing weakening of legal certainty. Moreover, the almost self-accumulating mass of rules is also crying out for ever-increasing changes to the law. And, in addition, and as a heavily burdening side-effect, because the need for complete regulation requires precise guidance for every imaginable situation, in the long term this also leads to *legal principles*, as a layer above the general and specific rules, becoming redundant and dying out, or at least becoming somewhat irrelevant; or, in other words, to the final loss of the very thing that was one of the great legacies of Roman law, bequeathed to us by the great edifices with lasting import of the *ius commune* and Napoleonic codification.

The implication, as such critical foresight takes account, is clear. Notably, whatever the outcome, the concrete value and impact of its blessing and/or curse (perhaps and presumably an improvement in some respects, but certainly dysfunctional or even counterproductive effect in others) will not matter, since it will have been prejustified from the outset, as all of it can at all be and will actually be done precisely in the spirit of and to enhance the very "rule of law"[15]. And, perhaps unexpectedly, the legitimate consequence of such a proliferation of norms[16] will be – as the French *Conseil d'État* itself pronounced in one of its official statements – that, as a result of all this, "the law itself will become a threat rather than a defence"[17].

At the same time, formalistic rule positivism – and this is now raised by a substantive criticism – remains mostly a direct servant

available at: https://books.openedition.org/pusl/12113 [accessed on: 1 November 2022], p. 159 ['*jungle normative*'/'édifice *baroque*'/'*nécropole juridique*'/'*colosse au pieds d'argile*'].

[15] B. Luisin, *op. cit.*

[16] For example, in a single ordinary issue of the French official gazette in 2002, 156 decrees and 336 ordinances were published on 424 pages. L. Favoreu, *L'inconstitutionnalité des quotas par sexe* (*sauf pour les élections politiques*), "Actualité juridique – Droit Administratif" 2003, No. 7, p. 314 ["*le dimanche 5 mai, en même temps que le décret précité, ont été publiés 155 autres décrets accompagnés de 336 arrêtés occupant 424 pages du* Journal officiel"].

[17] Conseil d'État, *De la sécurité juridique.* [*Rapport public annuel 1991*], [in:] "*Études et documents* (La Documentation française)" 1992, No. 43, p. 20 ["*le droit n'apparaît plus comme une protection mais comme une menace*"].

of the *state interest* embodied in regulation, instead of promoting the possible fulfilment of individual freedom as the basic ethos of the functioning of legal order now[18]. Because this demand and the preference condensed into this formalism of rules distances us from genuine and direct service to the people. The latter, i.e. the actual, ultimate vocation of law, remains without criteria, or even downright unnameable, since the one applying the law or administering justice has already been rendered insensitive and powerless in all further and possible directions by this requirement, as it were, into a paragraph-automaton puppet, who no longer has the chance of remedying individual situations. That is to say, the representation of law as a mere abstraction deduced from rules inevitably isolates the whole formation from real social processes. These processes are incessantly taking place in the stream of life, in the complexity of which law is not a daily part injected into it or a mediator within it, but only one of the subsystems of the social system as a whole, acting when called to and in the law's proper way exclusively. And in this totality, law is formally separated from the social complex as a whole as well as from the other components of the complex in question. However, only provided that the rule of law's formalism of rules becomes part of the ethos of everyday life – and what else could be the vocation of the rule of law or *Rechtsstaat* or État de droit but to become one of the main guides of social movements, growing into public morality, and being imposed and maintained by the latter, it can weaken the irreplaceable power of immediacy (unmediatedness, as termed by Georg Lukács) in the relationship between people, and contribute to the erosion of the necessary sense of being at home somewhere in our everyday lives[19]. For by idealising rules, it already forecast "tendency to over-formalize or

[18] B. Nurkic, *Legal Positivism. An Obstacle in the Process of Strengthening the Rule of Law in Bosnia and Herzegovina*, "Journal of Liberty and International Affairs" 2021, vol. 7, No. 1, available at: https://www.doi.org/10.47305/JLIA21170094n [accessed on: 1 November 2022], pp. 94–105.

[19] Cf. Cs. Varga, *Law as Culture?*, 2002, [in:] Cs. Varga, *Comparative Legal Cultures. On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism*, Szent István Társulat, Budapest 2012, available at: http://mek.oszk.hu/15300/15386 [accessed on: 1 November 2022], pp. 9–14 and,

over-bureaucratize relationships that are more healthily conceived in terms that are more informal"[20]. Moreover, the rule of law as thus conceived – continues the critic, whose credibility is supported by the long, massive, and precisely systemic practice behind it, and by the continuing debates that have been going on unabated in the United States for many decades[21], among others – "prevents power's benevolent exercise. It creates formal equality (…) but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes"[22]. Lastly, and especially if it becomes a cult for itself, it can contribute to a decline in individual initiative, to uniforming the ways of thinking, and ultimately to a kind of voluntary intellectual self-*Gleichschaltung*, simply by having standardised ways of reacting and acting, and thereby having contributed to "closing down the faculty of independent moral thought"[23].

5. Justiciability

And provided that the idea of the rule of law is based on the negotiability and final adjudicability of any dispute by an independent court

for a background, D. Baecker, *Wozu Kultur?* 2nd enl. ed. Kadmos Kulturverlag, Berlin 2001.

[20] J. Waldron, *op. cit.*, para. 7. In more details, cf. also W.H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, "Yale Law Journal" 1983, vol. 92, pp. 1198–1269, available at: https://digitalcommons.law.yale.edu/ylj/vol92/iss7/5/ [accessed on: 1 November 2022].

[21] See e.g. Cs. Varga, *Idol, Deduced from an Ideal? Rule of Law, Universalization, Degradation*, "Філософія права і загальна теорія права / Philosophy of Law and General Theory of Law" [Kharkiv] 2019, No. 2, pp. 192–214, available at: http://phtl.nlu.edu.ua/article/view/204724 [accessed on: 1 November 2022].

[22] M. Horwitz, *The Rule of Law. An Unqualified Human Good*?, "Yale Law Journal" 1977, vol. 86, available at: http://digitalcommons.law.yale.edu/ylj/vol86/iss3/4 [accessed on: 1 November 2022], p. 561.

[23] J. Waldron, *op. cit.*, para. 7. In the mirror of judicial case studies, cf. also R.M. Cover, *Justice Accused. Antislavery and the Judicial Process*, Yale University Press, New Haven 1975; L. Henderson, *Authoritarianism and the Rule of Law*, "Indiana Law Journal" 1991, vol. 66, pp. 379–456, available at https://www.repository.law.indiana.edu/ilj/vol66/iss2/2/ [accessed on: 1 November 2022].

as in the systems of the Common Law, it is sparklingly questionable how self-centred and ego-centred (in American terms: ethno-centric) is its conceptual basis, that is, inspired and also strictly defined by the random but historically evolved specific order of a particular place and time. Which is hardly more methodologically defensible a solution than, for instance, to declare myself the type standard of the prevalent human being, and my habits (both good and bad), together with whatever I am at home with, the normality to be followed by anyone/anything else. The philosopher turned classic political thinker pointed out, as "Dicey's unfortunate outburst of Anglo-Saxon parochialism", that this regression in space and time, i.e. the identification of a function by a particular historical manifestation, concrete and specific in terms of some given *hic et nunc*, instead of by way of representation or exemplification, inevitably reduces the function itself and renders it almost untraceable and unpassable on to others. "The Rule of Law – she wrote – was thus both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it"[24]. But in general – asks another American classical author who worked between the two world wars, but who nevertheless lived the real life of law as a practising lawyer all his time – how, why, and on what basis can the legality component of the rule of law be traced back to litigation as such? For, he asks, is it really, in our desirably institutionalised society, the ideal of law at all, to live with "the costly luxury of litigation, the delivery of the individual to the tender mercies of the judicial duel, the hegemony of judges who […] cannot free themselves from the limitations of their class and race and all the multitudinous prejudices of life?" And all this is to be done in the name of a legal equality that is itself "empty and illusory" because it is accompanied by economic inequality[25]?

[24] J.N. Shklar, *Political Theory and the Rule of Law*, [in:] J.N. Shklar, *Political Thought and Political Thinkers*, ed. S. Hoffmann, The University of Chicago Press, Chicago 1998, p. 26.

[25] In full quotation, "the tremendous exaltation of legality which is the basis of the rule of law is a great ideal (…) But in reality these mean all too often the costly luxury of litigation, the delivery of the individual to the tender mercies of

In addition, as others have pointed out in complementation of the above picture, Albert Venn Dicey's concept of the rule of law contains a not insignificant historical circumstance, which immediately presents Dicey's identification with the rule of law in a generalised and universalised way, the originator of which in no way mirrors its usual colour of today. For when he lived, created and drew his ideals, the role of judge was still of a *phronesis* character and determination. That is to say, the judicial discussion of a case was still, for all intents and purposes, an open-ended consideration of any circumstance that might be discussed. But that is a thing of the past already. "Once the emphasis on judging changes from deliberation to rule-application, the ancient idea of the rule of law as the rule of reason is superseded by a modern idea of the rule of law as the rule of rules"[26]. Meanwhile – and this is obviously not the last limiting argument – it must also be taken to be obvious from a sociology of organisations point of view that the judicial organisation and procedure cannot be – and, as the legal history shows, never has been – an exception to the institutional dilemma (or destiny or real performance) teetering between responsibility and irresponsibility[27].

---

the judicial duel, the hegemony of judges who […] cannot free themselves from the limitations of their class and race and all the multitudinous prejudices of life. The enjoyment of legal equality remains empty and illusory in the presence of economic inequality. At best the rule of law has never ensured more than the minimum of decency in the social struggle". W. Seagle, *op. cit.*, p. 227.

[26] M. Loughlin, *Swords and Scales. An Examination of the Relationship between Law and Politics*, Hart Publishing, Bloomsbury 2000, p. 78.

[27] As just one literary stand, see I. Jávor, *Korrupció az állam csapdájában: Felelőtlen szervezetek – korrupciós mechanizmusok* [*Corruption in the trap of the state: Irresponsible organisations – corruption mechanisms*], "Társadalomkutatás" 2014, vol. 32, pp. 201–234 and I. Jávor, *A bíróság mint felelőtlen szervezet: kínkeserves korrupció* [*The judiciary as an irresponsible organisation: torturous corruption*], "Társadalomkutatás" 2014, vol. 32, pp. 415–430. As the result of a case-study research on one of the scandals of our time, the undue penetration of NGOs into the autonomous working of law – for the background, cf. Cs. Varga, *Civil Society Associations vs. So-called Non-governmental Organizations*, "Civic Review" 2020, vol. 16, Special Issue, pp. 212–225, available at: https://eng.polgariszemle.hu/current-publication/157-excerpts-from-hungarian-history-and-scientific-life/981-civil-society-associations-vs-so-called-non-governmental-organisations

Moreover, indeed, in law as in everyday life, conflict can often arise from good intentions. As we have seen, it is precisely in its quest for the rule of law that law often seeks to further condense its own resources, often by adding new legal guarantees to the procedures it channels. Obviously, this increases the *procedural deadlock*, and it is precisely this that now, in a wide variety of circumstances, provides the opportunity to delay or even derail, or even to drive into a practical dead end, the situation which was originally destined and perhaps also intended to be decided on alone. And this can be so done as a kind of sacrifice to be made on the altar of the rule of law, since it can be so done indeed not only in a defensible way, but also in a way that is commendable in the light of the otherwise binding prudence by which to proceed on the field of law[28].

6. Politicisation with Instrumentalisation as a Political Project

Above all, it was the fact that, in our globalising world, as the Cold War confrontation slowly faded, the idea and demand for the rule of law itself became politicised and, as a result, took on an increasingly generalised and indeterminate form. In doing so, it has lost its intrinsic identifiability and, in fact, has become simultaneously

---

[accessed on: 1 November 2022] – , see e.g.: G. Puppinck, D. Loiseau *NGOs and the Judges of the ECHR. 2009–2019*, European Centre for Law and Justice, Strasbourg 2020; as well as G. Puppinck, *One year after the report on NGOs and Judges of the ECHR. Overview*, 2021, available at: https://eclj.org/geopolitics/echr/un-an-apres-le-rapport-sur-les-ong-et-les-juges-de-la-cedh--etat-des-lieux [accessed on: 1 November 2022].

[28] "We need to escape into the process." – this is a familiar example of unquestioningly correct delaying, standing for practical refusal, in this case, for example, by quoting the former Secretary-General of the League of Nations, Sir Eric Drummond, when their representative international body first had to condemn collegiately one of their member states for its aggression against another. Cited from G. Tabouis, *Elsodort diplomácia. Egy újságírónő megfigyelései* (*1919–1939*), *20 ans de suspense diplomatique*, Éditions Albin Michel, Paris 1958, Kossuth, Budapest 1967, p. 91.

empty[29]. But this did nothing to change its accompanying function. Namely, it has also become the single-approach measure of the law-related performance of any country in this world, transformed into an uncriticisable criterion by its adherents. As a French proponent has for instance declared, "the rule of law is posited as a value in itself, the validity of which cannot be questioned and on which no compromise is possible"[30]. In so doing, however, it has been forced to take on additional functions which it was clearly incapable of fulfilling on its own. All that notwithstanding, the historic caravan of all this is moving undisturbed and steadily along the road it has started all over the world. With such overall characteristics and with such overall performance that the situation today is beginning to look as if it were preparing itself for its own uselessness and, consequently, its own practical downfall.

Well, as we have seen, the formal versions of the rule of law that emphasise legality and are based on compliance and/or access to

[29] According to literary stands, "*everyone is for it, but there is no agreement on precisely what it is*" [B.Z. Tamanaha, *The Rule of Law for Everyone?*, "Oxford Journal of Legal Studies" 2002, vol. 22, No. 1, pp. 101], because "the meaning attributed to this expression shifts like the desert sand according to the individual whim of the exponent of one creed or another". [D. Godefridi, *État de droit, liberté et démocratie*, "Politique et Sociétés" 2004, vol. 23, No. 1, available at: https://www.erudit.org/en/journals/ps/1900-v1-n1-ps771/009510ar/, p. 143, Abstract]. And although "the concept of the rule of law is understood primarily as a prescriptive model of social organisation, with certainty no existing model can be pointed to as a reflection of it, and no one single political model it is attached to". É. Millard, *L'État de droit, idéologie contemporaine de la démocratie*, [in:] *Question de démocratie*, eds. J.M. Février, P. Cabanel, Presses Universitaires du Mirail, Paris 2001, pp. 415–443, "Boletín Mexicano de Derecho Comparado" 2004, vol. XXXVII, No. 109, p. 111 ["*le concept d'État de droit est appréhendé principalement comme modèle prescriptif d'organisation sociale, sans que l'on puisse pour autant avec certitude désigner un modèle existant dont il rendrait compte, ni un modèle politique unique auquel il serait attaché*"]. After all, "There are almost as many conceptions of the rule of law as there are people defending it". O. Taiwo, *The Rule of Law. The New Leviathan?*, "Canadian Journal of Law & Jurisprudence" 1999, vol. 12, No. 1, p. 154.

[30] J. Chevallier, *Les doctrines de l'État de droit*, "Cahiers français [La Documentation française]" 1998, No. 288, p. 8 ["*l'État de droit est posé comme une valeur en soi, dont le bien-fondé ne saurait être mis en doute et sur laquelle aucun compromis n'est possible*"].

judicial contestation are often enriched by the further requirements of authors and especially of institutions organised to shape global politics. Moreover, almost in competition with one another to see who could interpret the silent words of the age and the times, the *Zeitgeist*, with greater verve and imagination[31]. They add substance, as it were, and *substantive criteria*, when, as their critics point out, the call to the rule of law is no longer simply about itself, but about a *political project*, of which it is ultimately a mere disguise. And there was plenty of precedents for this after the bloodshed and the most destructive, indeed mass murdering acts of the Second World War – and certainly not without justification; although the appropriateness of a given response to a given challenge in a given form will always remain debatable in principle. With a certain cynicism, but in all fairness, we might add that this has always been the case, ever since and whenever politicians, diplomats or economic lobbyists have taken the cause of law (and, in our case, the rule of law) out of the hands of jurists in order to promote the well-being of humanity: with a globalising aspiration, of course, because they claim it to have universal validity in the whole world.

Already when, in the Cold War confrontation, America, as a testimony to the excellence of the West, had come up with the virtues and the care of the rule of law, and some years later was able to involve Asia in this, it was already declared in New Delhi in 1959 that "the rule of law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized"[32]. Well, with some further development, a similar effort was made at the London

[31] This is so because "Once we open up the possibility of the Rule of Law's having a substantive dimension, we inaugurate a sort of competition in which everyone clamours to have their favourite political ideal incorporated as a substantive dimension of the Rule of Law". J. Waldron, *op. cit.*, para. 5.

[32] *The Declaration of Delhi*, "Journal of the International Commission of Jurists" 1959, vol. 2, No. 1, p. 7 and available at: https://en.wikisource.org/wiki/Declaration_of_Delhi [accessed on: 1 November 2022].

summit of economic powers in 1984, when the first "*democratic value*" to be named was the rule of law in a completely new, lay form, which at the same time paved the way for international pressure; but now practically as if a specific legal definition, i.e. the formal juridical requirement of legality, had never been part of this thought process[33]. For they declared, as if left in a last will, that "We believe in a rule of law which respects and protects without fear or favor the rights and liberties of every citizen, and provides the setting in which the human spirit can develop in freedom and diversity".

7. Standing to the Cause of Democracy, Human Rights, and Liberalism

Coming to the present, one author, who considers the demand for the rule of law as a *democracy camouflage*, argues that by extending the claim of the rule of law, which is nowadays proclaimed by many to be universal, to the guarantee of democracy and human rights as well[34], in fact – and in the longer term certainly – they achieve no more than misunderstanding of the possibilities of law as a tool

[33] G7 London Summit, June 8, 1984, *Declaration on Democratic Values*, "Bulletin" [U.S. Department of State] (August) 1984, No. 2089, available at: http://www.g7.utoronto.ca/summit/1984london/democratic.html [accessed on: 1 November 2022], p. 2.

[34] Mutual support is strengthened by e.g. R. Peerenboom, *Human Rights and Rule of Law. What's the Relationship*, "Georgetown Journal of International Law" 2005, vol. 36, pp. 809–946; I. Trujillo, *Rule of Law and Human Rights Practice*, "Persona y Derecho" 2015, vol. 73, No. 2, pp. 161–180; P. Blokker, *The Democracy and Rule of Law Crises in the European Union and its Member States*, RECONNECT, [Leuven] 2021, available at: https://reconnect-europe.eu/publications/deliverables/ [accessed on: 1 November 2022]. Or, to use a nice analogy, '*The relationship between democracy and the rule of law is like a* (*good*) *marriage* […] *As a pair, they flourish, and if they fail, they do so together*'. A. Jakab, *What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law*, "Constitutional Studies" 2020, vol. 6, pp. 5–34, quoted as "Max Planck Institute for Comparative Public Law & International Law Research Paper" 2019, No. 15, available at: https://www.readcube.com/articles/10.2139%2Fssrn.3454649 [accessed on: 1 November 2022], p. 15.

and, by the idealisation that this implies, to make the political idea behind it frivolous. For – and here, covertly, this is to carry out a theoretical reconstruction of cardinal importance in political science as well – "The reference to the rule of law obscures the fact that the essential question is that of democracy: the question of its political definition, not that of the means, which comes only afterwards: under the guise of limiting the state, the concept of the rule of law founds, legitimises and preserves the real power behind the state"[35].

Nevertheless, this double link seems to be persisting[36], sometimes and increasingly in the official position of the European Union

[35] The quote in the text is introduced by a statement according to which "In the end, the hypothesis that the rule of law is the guarantee of democracy and human rights stumbles on the very mechanisms of the law it advocates: the ineffectiveness of a political affirmation that is not translated into positive law, the ineffectiveness of a legal construction that cannot guarantee individual freedoms and democracy at the same time and with certainty. But there is nothing surprising in this, unless we idealise the State and the law. The rule of law is not a legal means of realising a political project (more precisely, it is not a sufficient means of realising it); it is the political project itself. The democratic rule of law (re)states the democratic political project in legal terms, without providing the legal theory." É. Millard, *op. cit.*, para. 17, 137 resp. para. 18, 140 ["Au final, l'hypothèse selon laquelle l'État de droit est la garantie de la démocratie et des droits de l'Homme achoppe sur les mécanismes même du droit qu'elle prône: ineffectivité d'une affirmation politique qui ne serait pas traduite dans le droit positif, inefficacité d'une construction juridique qui ne peut garantir en même temps et de manière certaine les libertés individuelles et la démocratie. Mais il n'y a là rien d'étonnant, sauf à idéaliser l'État et le droit. L'État de droit n'est en rien un moyen juridique permettant de réaliser un projet politique (plus exactement, il n'est pas en tant que moyen suffisant à cette réalisation); il est le projet politique lui même. L'État de droit démocratique (re)dit en termes juridiques le projet politique démocratique, sans en fournir la théorie juridique." „La référence à l'État de droit occulte que la question essentielle est bien celle de la démocratie: la question de sa définition politique, et non celle des moyens, qui ne vient qu'après: sous couvert de limitation de l'État, le concept d'État de droit fonde, légitime, et conserve le pouvoir réel derrière l'État."].

[36] "The rule of law is closely linked to the idea of the autonomy and freedom of the individual. It conveys a set of values which it enables to be protected, whether it be democracy or human rights". É. Carpano, *La crise de l'État de droit en Europe: De quoi parle-t-on?*, "Revue des Droits et Libertés fondamentaux" 2019, Chron. No. 29, available at: http://www.revuedlf.com/droit-ue/la-crise-de-letat-de-droit-en-europe-de-quoi-parle-t-on/ [accessed on: 1 November 2022], para. II ["*L'État de droit est étroitement lié à l'idée d'autonomie et de liberté de l'individu.*

as a *sine qua non* of the components involved, i.e. the rule of law on the one hand, and democracy and fundamental rights on the other: "The rule of law is therefore a constitutional principle with both formal and substantive content. Thus, respect for the rule of law is intrinsically linked to respect for democracy and fundamental rights: the latter cannot exist without the former, and vice versa"[37]. Even though it is clear to the authors most sympathetic to this endeavour, too, that "Democracy and the rule of law are two distinct concepts. They do not mean the same thing. The notion of democracy refers to the question of the subject of legitimisation of political power. The notion of the rule of law concerns the procedural and substantive limits to the exercise of power"[38].

On a somewhat similar basis, others see the concept of the rule of law as a *mask for liberalism*[39], and argue in the same way for their inseparable unity in an intertwined duality[40].

Il véhicule un ensemble de valeurs dont il permet la protection, qu'il s'agisse de la démocratie ou des droits de l'homme"].

[37] *Communication de la Commission au Parlement européen et au Conseil, un nouveau cadre de l'UE pour renforcer l'État de droit*, COM(2014) 158 final, 5 ["*L'État de droit est donc un principe constitutionnel doté d'un contenu à la fois formel et matériel. Ainsi, le respect de l'État de droit est intrinsèquement lié à celui de la démocratie et des droits fondamentaux: les seconds ne sauraient exister sans le premier, et vice-versa*"].

[38] O. Jouanjan, *L'État de droit démocratique*, "Jus Politicum" juillet 2019, »Histoire constitutionnelle«, No. 22, available at: http://juspoliticum.com/article/L-Etat-de-droit-democratique-1284.html [accesed on: 1 November 2022], p. 14 ["*Démocratie et État de droit sont deux concepts distincts. Ils ne signifient pas la même chose. La notion de démocratie se rapporte à la question du sujet de légitimation du pouvoir politique. La notion d'État de droit concerne les limites procédurales et substantielles à l'exercice du pouvoir*"].

[39] This is '*one ideal in an array of values that dominates liberal political morality*' as claimed by J. Waldron, *op. cit.*, para. 2.

[40] E.g. N. Tavaglione, *Gare au Gorille. Plaidoyer pour l'État de droit*, Éditions Labor et Fides, Genève 2010.

8. Standing to the Extension of the Western Civilisation

Most, however, see today's global demand for the rule of law simply as a *cloak for the whole of Western civilisation*, and criticise it in its claim to universalism. But if it is "the whole of our legal civilization" that is represented in this concept[41] – that is, it is "not statutory language, but the values underlying the rule of law" that are interesting and truly relevant in all of its messages[42] – then what it actually encompasses is '*a fragment of a civilisation, part of an ideological whole*'. And what is actually no other but a single selected version of the past, the present, and all imaginable civilisations. In this sense – since, if it were to be regarded as a form alone, it could be freely abused here or there, now or at any other time, so to speak – its cultivation and protection will ultimately be nothing other than the cultivation and protection of "the ideals of freedom and human dignity"[43].

From this saturation of content, however, it follows directly that in the meantime it becomes – indeed, it has already become – an "oversized notion" with "oversized packaging". It is capable of absorbing and encompassing, as a series of "spongy notions" itself, everything that we ourselves ascribe to the West and are accustomed to calling it as such. But that is why it is its natural medium and

[41] '(…) *many authoritative definitions converging in overlapping it with the whole of our legal civilization.*' – writes M. Bussani, *op. cit.*, p. 138.

[42] Quote of 'Reitz 2003, 484' by C. May, *The Rule of Law. The Common Sense of Global Politics*, Edward Elgar, Cheltenham 2014, p. 100: "to concentrate on exporting, not statutory language, but the values underlying the rule of law".

[43] J. Rivéro, *L'État moderne peut-il être encore un État de droit?*, "Annales de la Faculté de droit de Liège" 1957, p. 101 states this as a life-work summary: "As far as the principle of legality is concerned, those who claim it must see it as it is, a fragment of a civilisation, part of an ideological whole; we will not save it alone; we will save it only to the extent that we know how to cultivate it within ourselves, and make those around us live it, i.e. the ideals of freedom and human dignity". ["*le principe de légalité, il faut que ceux qui s'en réclament le voient tel qu'il est, fragment d'une civilisation, pièce d'un ensemble idéologique; nous ne le sauverons pas seul; nous ne le sauverons que dans la mesure où nous saurons cultiver en nous, et faire vivre autour de nous, les idéaux de la liberté et de la dignité humaine*"].

nothing more or else. It follows directly from this that it cannot, in fact, be extended beyond its own borders as it "lacks the capacity of looking beyond the West"[44].

Because "Origins matter"[45], the subsequent identification of which, of course, will always remain just as debatable as the characterisation of the offs-spring evolved or transformed therefrom. Still, it is mostly from such origins that the sense of our being at home somewhere is derived. Moreover, it is mostly due to the preservation of the surroundings of origin that the phenomenon in question is free to develop, responding to the challenges of the moment with the optimal response to the circumstances of the then and there. And this insight only reinforces the thesis of the *historicity* of all forms of law, already formulated by Montesquieu in the eighteenth century and elaborated a century later by so-called *historische Rechtswissenschaft* and, then, as retaken by Marxism. This, of course, also implies a particularity which is part of the *hic et nunc*, or at least developed from it. And, moreover, which implies not only that the rule of law claims themselves are a reflection of the circumstances in which they arise, and are therefore specific to each place and time[46], but also that they cannot be arbitrary doings transposed to other places and times – not even from the point of view of the latter[47]. No one and, indeed, nothing at all can operate in an abstract medium, but under the determinations of a real space and time,

[44] M. Bussani, *op. cit.*, pp. 142–143, 148.

[45] Opening sentence in P. Burgess, *Neglecting the History of the Rule of Law.* (*Unintended*) *Conceptual Eugenics*, "The Hague Journal of the Rule of Law" 2017, vol. 9, No. 2, available at: https://doi.org/10.1007/s40803-017-0057-y [accessed on: 1 November 2022], p. 195.

[46] Cf. Cs. Varga, *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe*, Kráter, Pomáz 2008, available at: http://mek.oszk.hu/14800/14851 [accessed on: 1 November 2022].

[47] "[L]aw and institutions which effectively govern human behaviour and politics cannot simply be made by man. It is, rather, a matter of continuous growth or development in which people, particularly politicians and lawyers, do not so much make or invent the law, as find it, i.e., seek to formulate and codify what, in the given social and political circumstances at that moment, and as a result of continual struggle and debate, appears to be the law". J.K. de Vree, *The Rule of Law. Order and Disorder in Political Systems*, "Legal Issues of European Integration" 1983, vol. 10, No. 1, pp. 10–11.

interacting with the individual elements thereof. Accordingly, to extend it, or to project it to materialise elsewhere, would ultimately presuppose the transfer not only of legal technicality, and not only of a given legal culture, but of the entire social complexity, which would naturally presuppose the apparently impossible takeover of its entire history as well[48].

9. Universalisation and Transfer

Although the official position of the United States of America on the rule of law, which has remained basically unchanged for a decade and a half, and which has essentially been adopted and adapted from the one of the United Nations, is of an explicitly permissive

[48] To use a single foreign example, the American legal culture is characterised by '*voluminous legislation, a powerful judiciary, and a specially educated legal profession*', whose day-to-day functioning is, thanks to its lawyerly caste, complex, costly, and inaccessible from the outside. B. Dunlap, *Anyone Can Think Like a Lawyer. How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, "Fordham Law Review" 2014, vol. 82, p. 2820. As a waterhead, this overbearing power has already degraded American society – writes J.B. White, *The Invisible Discourse of the Law. Reflections on Legal Literacy and General Education*, "University of Colorado Law Review" 1983, vol. 54, available at: https://repository.law.umich.edu/articles/2113/ [accessed on: 1 November 2022], p. 144 – into an '*increasingly legalistic and litigious culture*'. For the real motive behind such a mentality, see e.g. P.F. Campos, *Jurismania. The Madness of American Law*, Oxford University Press, New York 1998. and, as further theorised by Cs. Varga, *Legal Mentality as a Component of Law: Rationality Driven into Anarchy in America*, "Curentul Juridic" [Tirgu Mures] 2013, vol. 16, No. 1(52), pp. 63–77 available at: http://www.upm.ro/facultati_departamente/ea/RePEc/curentul_juridic/rcj13/recjurid131_7F.pdf [accessed on: 1 November 2022] and *Failed Crusade: American Self-confidence, Russian Catastrophe*, "Central European Political Science Review" 2007, vol. 8, No. 28, pp. 71–87 reprinted in available at: http://mek.oszk.hu/14800/14851 [accessed on: 1 November 2022], pp. 199–219.

I am to note here that it is precisely these individual and group characteristics that the comparative study of legal cultures is meant to elaborate. Cf. e.g. *Comparative Legal Cultures*, ed. Cs. Varga, Dartmouth, Aldershot, etc. & The New York University Press, New York 1992. and especially Cs. Varga, *Jog, jogi kultúra és jogi hagyomány* [Law, legal culture and legal tradition], "Iustum Aequum Salutare" 2021, vol. XVII, No. 1, pp. 191–219.

nature – that is, it is essentially based on legality, and thus leaves little room for other substantive (politically or ideologically framed) content – [49], the criticism just quoted is, well, regardless of (or in spite of) all this, still of an annihilating conclusion. For this officialdom, however permissive it may be[50], nevertheless understands and attempts to assert only the West's ambition to rule the whole world, and with it the extension of the West's dominance over whatever legal regimes, in any approach that explicitly invokes the 'rule of law'. For – as a similar criticism continues – all of this is "almost like saying that not only is the West the lord of the rule of law, but that it should also be the lord of any law […]. Along this way, being »de-contextualised« and »naturalized«, the rule of law ends up either representing the foolish servant of Western opportunism, or feeding autarchic visions of the world, ill-equipped to understand, not to mention to solve, any of the others' problems"[51]. Well, at the

[49] The UN Secretary General's stand heard in the Security Council in 2004 on the rule of law – K. Annan, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General, Doc. S/2004/616, 23, §6 – is still summed up by the US administration four years later as "*a state in which citizens, corporations and the state itself obey the law, and the laws are derived from a democratic consensus*". While the same document adds with due caution that "States differ in terms of laws and the treaties they have signed with respect to human rights. Legal cultures differ depending upon history (…). Societies differ in terms of the values they ascribe to law versus other means of social organization, such as personal or family loyalty. Respect for specific laws and other norms varies depending upon cultures and circumstances". [USAID], *Guide to Rule of Law Country Analysis. The Rule of Law Strategic Framework.* (*A Guide to USAID Democracy and Governance Officers*), U.S. Agency of International Development, Washington 2008, p. 5.

[50] "[T]he rule of law is a universal principle, then supporting the rule of law is not necessarily imposing foreign ideas on a society. The challenge is to find ways in which a society may govern itself under the rule of law, using an approach that reflects the values and norms of that society. Indeed, countries which have successfully reformed their legal systems have owned their reforms by consciously borrowing from existing models, while introducing innovations where necessary". *Ibidem*.

[51] M. Bussani, *op. cit.*, pp. 149 & 150. On further reflection see also M. Bussani, *Deglobalizing Rule of Law and Democracy. Hunting Down Rhetoric through Comparative Law*, "The American Journal of Comparative Law" 2019, vol. 67, pp. 701–744.

same time by stripping the basic idea of the dimensions of space and time, and producing from their original elements a technology that seems to be assembled from purely procedural modalities, now out of their definitions, it will slowly appear to be so that it is seen and also treated now as nothing more than a *panacea*, a technology that is omniscient and omnipotent, a "technical equipment, social machinery, which can be transported and plugged in wherever the need for them arises"[52].

In the light of all this, the belief, hope, and unwavering ambition for a great power (which is also a pretext for wasting billions of dollars), known by its official US name as the *export of democracy*, seems even more bizarre. It is a frightening prospect when we consider that the term "rule of law" occurs 132 million times on the internet[53], but "export democracy" also occurs nearly half a million times and the almost synonymous specification "rule of law export/promotion" more than 200 000 times, while the latter's vocation, or profession, has become a giant *quasi-industry* in its own right in the United States, according to those who actually practice it[54].

There is also a long history and literary account of legal transfers, with volatile results that are still controversial today[55]. For, on the

[52] M. Krygier, *Institutional Optimism, Cultural Pessimism and the Rule of Law*, [in:] *The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, eds. M. Krygier, A. Czarnota, Routledge, London 1999, p. 82. Similarly, see as well C. May, A. Winchester, *Introduction. The Rule of Law in the Contemporary World*, [in:] *Handbook on the Rule of Law*, eds. C. May, A. Winchester, Edward Elgar, Northampton 2018, available at https://www.elgaronline.com/view/edcoll/9781786432438/9781786432438.00005.xml [accessed on: 1 November 2022], p. 3; J. Husa, *Developing Legal System, Legal Transplants, and Path Dependence. Reflections on the Rule of Law*, "Chinese Journal of Comparative Law" 2018, vol. 6, No. 2, pp. 129–158; G. della Cananea, *Due Process of Law beyond the State. Requirements of Administrative Procedure*, Oxford University Press, Oxford 2016, pp. 86–87, 198–204.

[53] At the time of preparing Cs. Varga, *Rule of Law...* in autumn 2020, this definitely huge figure was not more than 105 million!

[54] *Promoting the Rule of Law Abroad. In Search of Knowledge*, ed. T. Carothers, Carnegie Endowment for International Peace, Washington D.C. 2006. terms the above 'rule of law promotion industry'.

[55] Cf. e.g. Cs. Varga, *Reception of Legal Patterns in a Globalising Age*, [in:] *Globalization, Law and Economy/Globalización, Derecho y Economía. Proceedings*

one hand, the recently deceased Scottish-rooted legal historian is historically correct in his view that the history of law as a whole is essentially a series of interactions and interdependencies – or, according to his terminology, of legal borrowings[56]. At the same time and on the other hand, the post-colonial assessment that the forced external colonising efforts at making the legal systems of the target territories similar to their own have almost never been successful is also anthropologically and sociologically correct. Otherwise expressed, ambitions to fully implement the pattern offered and to resemble in practice the original functioning at home, creating a replica of it, have invariably failed. But they have always proved effective in disrupting and dismantling the delicate social fabric of the order that had once been the guarantee – and at the same time the product and active organising framework – of the historical survival of the communities in question (possibly previously undisturbed by such challenges and interference)[57]. And it is only the logical conclusion of this line of thought that, when they appear in critical masses, when the weakness of the transplantation effect is combined with the strength of the destruction of the ancestral tissue, the result will be the creation, as shadowy victims of the glory of the West, on the distant peripheries of the respective centres, of those social remnant entities which are now hardly initiable or influenceable to take a better course, which the same

of the 22nd IVR World Congress, vol. IV, ed. N. López Calera, Franz Steiner Verlag, Stuttgart 2007, pp. 85–96 [reprinted in http://mek.oszk.hu/15300/15386, pp. 181–207], [accessed on: 1 November 2022].

[56] A. Watson, *Legal Transplants. An Approach to Comparative Law*, Scottish Academic Press, Edinburgh 1974. and, as further theorised, by Cs. Varga, *Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező* [*Legal transplantation, or borrowing as a universal factor in the development of law*], "*Állam- és Jogtudomány*" *1980,* vol. XXIII, pp. 286–298 [reprinted in http://mek.oszk.hu/14500/14525/, pp. 191–203] [accessed on: 1 November 2022].

[57] J. Gaudemet, *Les transferts de droit*, "L'Année sociologique" 1976, vol. 27, pp. 29–59, available at: https://www.jstor.org/stable/27888889 [accessed on: 1 November 2022].

literature usually calls, practically almost with resignation, wicked societies with *wicked law*[58].

Historical research on legal transfers distinguishes two historical periods. For in the classical period, roughly until the development phase of capitalism, which Lenin called imperialism, the transfer of laws was purposeful, technical, embodied in the adoption/extension of mostly specific individual solutions, which could be expressed to a large extent in the category of mere practicality. Since then, however, it has increasingly and ever more boldly attempted a total transformation of society by transposing entire social settings, the entire world of thought and the entire organisational tools behind them, accompanied by the know-how of the underlying ideology. And this brings us close to the problem of what the above-mentioned "industry", with its euphemistic undertone, calls the promotion of the rule of law.

This mechanism of action is now being confirmed by today's targeted research on the export of the rule of law: the informal instruments that have maintained the local and indigenous social order up to now are largely destroyed, but neither the imported order will be able to function with its original effectiveness – and even that will be done with unplanned and unintended side effects and their further side effects. In short: "Legal anarchy can result in a society that has a new, formal legal system but lacks the social capital, institutions, and discipline to make use of it"[59]. To take one example, the plastic depiction of the result is that of a recently serving cabinet minister in India. In the lawyer-turned-politician's authoritative assessment, "We have the choice to call ourselves

[58] As coincidentally, just as the manuscript was closing, I read on consequences in the domestic publicist: '*a series of dysfunctional, failed states instead of democracies*'. I. Dobozi, *A 9/11 manhattani füstgomolyai* [*The Manhattan smoke-bombs of 9/11*], "Élet és Irodalom" [Literary and political weekly] 17 September, 2021, No. 37, p. 12, while the credit goes to a right-wing commentary that says: '*Chaos, destabilisation, non-stop war and a worldwide migrant crisis*'. available at: https://mandiner.hu/cikk/20200116_demokraciaexport [accessed on: 1 November 2022].

[59] F. Upham, *Mythmaking in the Rule of Law Orthodoxy*, Democracy and Rule of Law Project Rule of Law Series Working Papers 30, Carnegie Endowment for International Peace, Washington D.C. 2002, pp. 32 & (quote) 33.

a functional anarchy or a dysfunctional democracy. Of one thing, I am certain, we have miles to go before we can call ourselves a civil society under the Rule of Law"[60]. And this disappointing albeit thought-provoking self-confession is to be heard from the official representative of a great and continent-sized ancient civilisation whose people have already known the blessings of the English civilisation for a quarter of a millennium, having experienced them by the millions, many of them now as once Commonwealth citizens of the United Kingdom.

Well, the number one monster figure of the communist dictatorship in Hungary, the otherwise educated, erudite and in his sense cosmopolitan Mátyás Rákosi, returning home from Moscow at the end of the Second World War, said: "I know very well that Anglo-Saxon culture has made such an unbelievable contribution to the development of our culture that modern life would be unimaginable without it. I also know that the Anglo-Saxon way of life will continue to stamp its mark on modern development for many decades, perhaps centuries to come. But I also know that a way of life, a culture, cannot be artificially transplanted from one country to another"[61]. Yet, more than sixty years later, the expectations of America as a world power can still only be seen as such by the contemporary observer: let us "to »pass good laws« and then expecting everyone to wake up the next morning and start acting like the people in the donor's or helper's own developed country"[62]. Well, the spectacular failure of the current two-decade-long pacifying enterprise in Afghanistan is not necessarily interesting in terms of the as yet unknown, albeit suspect, outcome, but rather in terms of the unconceived nature of the paths that led to it, the lack of both planning and any deeper, social theoretically grounded motivation

[60] P. Chidambaram, *The Citizen and the Rule of Law*, [in:] *Rule of Law in a Free Society*, ed. N.R. Madhava Menon, Oxford University Press, New Delhi 2008, p. 21. For a similar conclusion, see as well H. Narasappa, *Rule of Law in India. A Quest for Reason*, Oxford University Press, New Delhi 2018.

[61] M. Rákosi, *A magyar demokrácia kérdései* [*The questions of democracy in Hungary*], [in:] *Demokrácia. A Pázmány Péter Tudományegyetem Bölcsészettudományi Karának kiadása*, Egyetemi Nyomda, Budapest 1945, p. 162.

[62] Quote of 'Ellerman 2008, 175' by C. May, *The Rule of Law*, p. 101.

for the endeavour at all, hardly substituted by a mere arrogance of power engineering[63].

Because in similar situations[64], the academic literature considers the priority given to transposing/adopting of "the values underlying the rule of law" instead of pressing the reception of the textuality of normative rule formulations, i.e. its "*statutory language*"[65]. It is as if it were to recall, for example, the US Secretary of State during the Cold War years who, as early as in 1957, stressed the indispensable importance of "growth of mutual comprehension […and…] spread of confidence" the only way to maintain/advance the cause of an internationally developed rule of law[66]. Or, as others have said, "The rule of law does not reside in legislation but in souls and morals"[67], just because "Creating trust in law and legal institutions is not something that can be administered like a vaccine, but requires engagement with critical constituencies at the local level"[68].

---

[63] See, e.g., C. Whitock, *The Afghanistan Papers. A Secret History of the War*, Simon & Schuster, New York 2021; cf. available at: http://www.washingtonindependentreviewofbooks.com/index.php/bookreview/the-afghanistan-papers-the-secret-history-of-the-war [accessed on: 1 November 2022] as well.

[64] E.g. S. Wai Man, C. Yiu Wai, *Whose Rule of Law? Rethinking Post-Colonial Legal Culture in Hong Kong*, "Social & Legal Studies" 1998, vol. 7, No. 2, pp. 147–169; C.H. Stefes, *Clash of Institutions. Clientelism and Corruption v. Rule of Law*, [in:] *The State of Law in the South Caucasus*, ed. C.P.M. Waters, Palgrave Macmillan, New York 2005, pp. 3–19; K.E. Bravo, *Smoke, Mirrors, and the Joker in the Pack. On Transitioning to Democracy and the Rule of Law in Post-Soviet Armenia*, "Houston Journal of International Law" 2007, vol. 29, pp. 489–581; and, as a specific case, K. Blasek, *Rule of Law in China. A Comparative Approach*, Springer, Heidelberg, etc. 2015 with Chinese and western (German/French/English) parallel presentation.

[65] Cf. note 42.

[66] C.A. Herter, [in:] "Department of State Bulletin" 1957, vol. 37, p. 228, cited in W.W. Bishop, *The International Rule of Law*, "Michigan Law Review" 1961, vol. 59, available at: https://repository.law.umich.edu/mlr/vol59/iss4/7/ [accessed on: 1 November 2022], p. 572.

[67] Y. Gaudemet, [in:] *L'État de droit. Mélanges en l'honneur de Guy Braibant*, Dalloz, Paris 1996, p. 309 ["*L'État de droit n'est pas dans la législation; il est dans les esprits et dans les mœurs*"].

[68] K. Pistor, *Advancing the Rule of Law. Report on the International Rule of Law Symposium Convened by the American Bar Association November 10, 2005*, "Berkeley Journal of International Law" 2007, vol. 25, No. 1, p. 40.

It is a sad epilogue for our nations and for nearly half a century of our recent past in the Soviet-dominated region that – according to the contemporary term – in the era of "actually existing socialism", law and the morality behind it, which are indispensable for social integration, lost their support, and the former remained, as the direct achievement of Bolshevism, mere state coercion and thus violence from outside, but constantly interfering in all life circumstances and situations[69], and the latter, simply, broken down and fragmented hypocrisy[70]. For, as it was later put, "in Hungary […] the prestige of any kind of morality is minimal, as is that of law. Law has been deprived of one of its pillars"[71].

10. The Quest of the European Union

Turning finally to the question of the rule of law required in the European Union, on the one hand, there is the current quasi-hystericized atmosphere, which is created by fighting over this very term, by calling it to account, so that Member States that do not

[69] See e.g. by Cs. Varga, *Lenin and the Law. A Case-study on the Borders of Legal Normality*, "Central European Political Science Review" 2019, vol. 20, No. 75, pp. 131–179 and, in a shortened form, *Lenin, Vladimir I.*, [in:] *Encyclopedia of the Philosophy of Law and Social Philosophy*, eds. M. Sellers, S. Kirste, Springer Nature, Cham 2020, available at: https://doi.org/10.1007/978-94-007-6730-0_435-1 [accessed on: 1 November 2022].

[70] See e.g. as contemporary case studies of the predominant social disease with lengthy exemplification from the period of the socialist deterioration of the country, Cs. Varga, *Law as a Social Issue*, [in:] *Szkice z teorii prawa i szczegółowych nauk prawnych. Profesorowi Zygmuntowi Ziembinskiemu*, eds. S. Wronkowska, M. Zieliński, Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, Poznań 1990, pp. 239–255 [reprinted in http://mek.oszk.hu/15300/15333/#, accessed on: 1 November 2022, pp. 459–475] as well as Cs. Varga, *Liberty, Equality, and the Conceptual Minimum of Legal Mediation*, [in:] *Enlightenment, Rights and Revolution. Essays in Legal and Social Philosophy*, eds. N. MacCormick, Z. Bankowski, Aberdeen University Press, Aberdeen 1989, pp. 229–251, reprinted in http://mek.oszk.hu/14700/14760 [accessed on: 1 November 2022], pp. 38–61.

[71] A. Tamás, *Meditáció*, [in:] *Magister scientiae et rei publicae. Ünnepi tanulmányok Máthé Gábor 70. születésnapja alkalmából / Liber amicorum studia G. Máthé septuagenario dedicata*, Dialóg Campus, Budapest–Pécs 2011, p. 210.

follow the political agendas of the centre, the mainstream of the moment, are also herded into their own mainstream, and, on the other hand, the fact that, at the same time, the European Union is unable to produce a normative definition for itself by which to provide a genuinely legal basis for the imputation of responsibility they seek to impose.

In this respect, an assessment, looking back to the foundations, according to which the European Union's relationship with the rule of law has not necessarily been unproblematic from the very beginnings[72], may be a point of attention. According to this view, "The European Union (EU) is not driven by the Rule of Law as an institutional ideal. Instead, the Union deploys the »Rule of Law«, viewed to a large extent through the lens of the autonomy of the EU legal order, to shield its law from potential internal and external contestation. This is precisely the opposite of what the classical understanding of the Rule of Law would imply […] The Rule of Law is perversely interpreted as a tool to deactivate potential contestation – precisely the opposite of what a classical understanding of it would imply." For, as it is added, "Values are not the EU's founding ideas, or – to paraphrase Joseph Weiler[73] – not in the EU's DNA, […] democracy and the Rule of Law are and have always been left seemingly entirely to the Member States to care about"[74].

Interestingly enough, the fluid idea of the rule of law itself may have contributed to the legally indefensible situation in which the European Union is trying to impurely attach legal consequences to a claim called the rule of law, which, in the absence of an operational concept and definition applicable in law, can be neither debated nor

[72] The same allegation may result in stunning after-effect-like-conclusion as e.g. that "Ironically […] the EU as such is probably barely different from Hungary, as far as adherence to the Rule of Law is concerned." D. Kochenov, *EU Law without the Rule of Law. Is the Veneration of Autonomy Worth It?*, "Yearbook of European Law" 2015, vol. 34, No. 1, pp. 75–96, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642689, p. 3 [accessed on: 1 November 2022].

[73] Reference to J.H.H. Weiler, *The Schuman Declaration as a Manifesto of Political Messianism*, [in:] *Philosophical Foundations of European Union Law*, eds. J. Dickson, P. Eleftheriadis, Oxford University Press, Oxford 2012.

[74] D. Kochenov, *op. cit.*, pp. 22, 7.

applied in legal terms, but only as a political, i.e. not binding, but freely contestable claim or majority/minority expectation.

This is also due to the fact that, precisely because of its indeterminacy, it could serve as a simple rhetorical cliché, a *topos*, with something to say that may have proved agreeable to everyone in its own way. Thus, the use of the words "the rule of law" and "Rechtsstaat" – which happens to be a term that "slips readily off the tongue"[75] – is itself "a piece of rhetoric, deployed to commend what it stands for"[76]. And it can be done so because "The concept also has rhetorical force. The mere use of the term is often designed to lend weight to a particular claim without argument, even where it is in no sense clear what the relevance of it is to that claim"[77]. Which is almost to say that the more vague but suggestive the picture, the more directions and the more useful the weapon of actual choice. For, in practice, "to opt for different definitions of the rule of law […] is a convenient shorthand for addressing a number of features of a legal system"[78].

11. Rethinking the Basic Idea

So what is the rationale behind all these considerations, emanating from the basic idea and derived from it in one way or another? Well, it is none other than the same moral need that emerges from God-image man[79], which may be based on speculative reconstruction in natural law or sanctified by past long practice and tradition, to hold

[75] R. Cranston, *Human Rights and the Rule of Law*, "Justice Journal" 2006, vol. 3, No. 1, p. 8: "»the rule of law« is a phrase which slips readily off the tongue".

[76] Sir J. Laws, *The Rule of Law. Form or Substance*?, "Justice Journal" 2007, vol. 4, No. 1, p. 24.

[77] T. Rycroft, *The Compatibility of the Rule of Law with Evil Regimes*, "UCL Jurisprudence Review" 2009, vol. 15, p. 124.

[78] A. Bedner, *The Promise of a Thick View*, [in:] *Handbook on the Rule of Law*, eds. C. May, A. Winchester, Edward Elgar, Cheltelham & Northampton 2018, p. 47.

[79] 'And God said: "Let us make man in our image, after our likeness…" (Gen 1:26–28); cf. also available at: https://en.wikipedia.org/wiki/Image_of_God [accessed on: 1 November 2022].

that what is taken for granted, i.e. as part of the order inherent in the created world, is validly present, regardless of whether the particular legal system of a given place and time had or has a specific normative order for it. For me – although it may be a naked subjective intuition – this is something similar to what is meant by perhaps the most enigmatic line of the enigmatic poem by the twentieth-century Anglo-American poet W.H. Auden, written in 1939: "Law is The Law"[80]. And it is perhaps about this ambiguity, a dualism that is always implied and thus always intriguing, and always prompting us to consider a new answer, that the well-known expert on the question today, who happens to have Central European roots, once wrote that "the king was subject to the law that he had not made, indeed that made him king. For the king – for anyone – to ignore or override that law was to violate the rule of law"[81].

In the complexity of today's developments in the world since the end of World War II that has emerged from the political ramp-up of a limited-use concept of state theory (in the 18th to 19th centuries), via difficult confrontational times (during the Cold War), to its transformation – properly speaking: transmutation – into a tool of world-power globalising diplomatic and world-economic pressure (nowadays), two possibilities arise for the very idea of rule of law in the field of law. The present-day rule of law movement as characterised above can either continue on the path it began almost half a century ago, touring the world as a global village, which can only lead to its growing ineffectiveness, which has already occurred, but will inevitably reach also its apex soon, and which will also lead to its emptying out and thus to its becoming useless as a means of

[80] W.H. Auden, *Law Like Love*, available at: http://web.mit.edu/cordelia/www/Poems/law_like_love.html, [accessed on: 1 November 2022]. The said poem is interpreted by R. Goldfarb, *Is Law Like Love? W.H. Auden's report from 1600 Black Lives Matter Plaza*, June 11, 2020, available at: http://www.washingtonindependentreviewofbooks.com/index.php/features/is-law-like-love as just subjective understandings of the very word, and by N. Hussain, *Auden's Law Like Love*, "*Law, Culture and the Humanities*" 2021, vol. 17, No. 1, p. 147, as just one indefinitely extended list of the manifestations of '*tautologies of positive law*', i.e. as a poetic parable.

[81] M. Krygier, *Inside the Rule of Law*, "Rivista di filosofia del diritto" 2014, vol. III, No. 1, p. 84.

conveying any definite and legally operatable meaning. Or it takes back that which has been its own from the earliest times, from the very beginning of its mission as an ideal, and in which, if there was a political element, it has always been a part of the natural medium and surrounding of law, never rejected because it could not be rejected in the end. Because every involved in this business is aware that legal theorising "has the proper function of defining all concepts whose substratum is legal. […] But when political appropriation fails to recognise the legal essence of the concept, the legal theorist must be armed to show it'[82].

What, then, is the actual conclusion to be drawn from this panorama, from the series of changing developments, ethos, hopes, and their sometimes devastating criticisms? What can shed light on the facts of today and, above all, on the prospects for what may still be done?

First of all, if the idea of the rule of law, as it has been institutionalised, is a measure of something, it must be able to measure its item as given. That is to say, it must enable anyone to compare the object of his/her choice against this yardstick in order to ascertain, i.e. to verify or falsify, the existence of its desirable quality. In law, such a measurement, i.e. such a comparison between a case defined by an abstract rule [*casus iuris*] and an act, or state of affairs or situation to be judged in its legal status, is possible only by proving the prevalence or non-prevalence of some *facts*. This implies, in principle, that the case in and for the law can only be a case of something which has already been defined in advance as a set of facts representing (embodying or substituting to) it when the law concerned was issued. This also means that an act, state of affairs or situation that is perceived as bad or good for a given community can only be legally qualified (punished or rewarded, respectively) if we can go from its experience in direct impressions, via its ideal-typical formulation, to its definition as a fact, that is, to the definition of

[82] D. Godefridi, *op. cit.*, para. 101 ["Il lui [la réflexion théorique sur le droit] appartient en propre de définir tous les concepts dont le substrat est juridique. […] Mais lorsque l'appropriation politique méconnaît l'essence juridique du concept, le théoricien du droit doit être armé pour le montrer."].

those facts that may constitute a case in the law [*Tatbestand*]. For only then can we arrive at the point where we can demonstrate and even prove, through the individually identifiable concreteness of the most diverse occurrences, the realisation or exclusion of the quality defined in law in any given life situation. The ideal, however, which we know as the *Rechtsstaat* or the rule of law, can certainly be described with circumscriptions, i.e. as characterised in outlines, mostly with illustrative descriptions, but also using similes and parables, but it cannot be defined exhaustively, with boundaries delimited[83]. Consequently, if it cannot be transformed into (by reducing it to or transliterating into) facts that could constitute a legal case, it cannot become an operative concept in law. That is why scientific methodology calls it one of the "essentially contested concepts", and the logical classification of concepts used in scientific descriptions will qualify it as belonging to "concepts of order", describable by parables and other characterisations exclusively, as opposed to so-called "concepts of class", which can be defined with sharp clarity, unambiguously to the limits of human possibility[84].

And this quality alone does not only imply its indeterminacy, but also the evidence that it cannot, in the eventual need of appearing or being made to operate as determinate in spite of everything, become anything other than what its underlying nature allows it to be. That is to say, it will depend, in whatever circumstances, on the context in which those who, and with what interests/objectives, argue for clarifying or disambiguating its meaning[85]. And this undeterminedness is not, however, a burden, but a precondition for it to be able

[83] In more details, see again: Cs. Varga, *Rule of Law…* as well as Cs. Varga, *Rule of Law – Contesting and Contested*, Ferenc Mádl Institute of Comparative Law, Budapest 2022.

[84] Cf. W.B. Gallie, *Essentially Contested Concepts*, "Proceedings of the Aristotelian Society" 1955–1956, vol. 56, pp. 167–198 and, respectively, C.G. Hempel, P. Oppenheim, *Der Typusbegriff im Licht der neuen Logik*, A.W. Sijthoff, Leiden 1936. as well as G. Radbruch, *Klassenbegriffe und Ordnungsbegriffe im Rechtsdenken*, "Revue Internationale de la Théorie du Droit" 1938, vol. XII, No. 1, pp. 46–54.

[85] K. Traisbach, *Judicial Authority, Legitimacy and the* (*International*) *Rule of Law as Essentially Contested and Interpretive Concepts. Introduction to the Special Issue*, "Global Constitutionalism" 2021, vol. 10, No. 1, para. II ['actor- and

to fulfil its function at all[86] – in our case, the expression of *an ideal*. The possibility, or the real chance, of which would immediately cease to exist as soon as the meaning of the catchword "rule of law" were reduced to anything narrowly definable (i.e., in our terminology above, from a concept of order to a concept of class, with contestability eliminated). But if it is an ideal, which is thus neither entirely attainable nor fully realisable/implementable in real life, but instead only somewhat (more or less, and in this or that sense) approachable, it is *per definitionem* debatable and therefore always remains debatable[87]. And again: this is not its burden, but rather its particular strength, since it will secure a certain inner dynamism to its meanings, which are always conventionalising and eventually conventionalised in one way or another.

This explains why '"the 'rule of law', a term which may be used in various fields of discourse (…] is not often used by judges because it is a protean concept which provides little assistance in deciding specific cases"[88]. And therefore we may say that it is nothing genuinely more or else than an ideal, the object of which is law and the references to which are legal, but which is not in itself such that any concrete aspect of law, of whatever formation of law and of legal life could stand for it in establishing its completeness. For no real performance can be more than one given example of an effort to approach it[89].

---

context-dependent, historically contingent and (…) not normatively universal and neutral', with 'interest- and purpose-driven.' argumentation on it].

[86] '[*T*]*he contested nature of concepts is nothing to be »solved«, but it is essential to their purpose*'. *Idem*, para. III.

[87] '*A society ruled by laws, not men, is bound to be a society in which there is constant debate about what the Rule of Law means*.' J. Waldron, *Is the Rule of Law an Essentially Contested Concept* (*in Florida*)*?*, "Law and Philosophy" 2002, vol. 21, p. 164.

[88] J. Basten, *Human Rights and the Rule of Law*, "Newcastle Law Review" 2008–2009, vol. 11, No. 1, p. 33.

[89] As the expert on the subject put it, "Since the ideal of the rule of law is important, we should keep that ideal clearly in view, but we should avoid identifying it with, still less reducing it to, particular incarnations or institutional arrangements'. All that notwithstanding, at the same time it 'needs to have a special connection with law, lest the rule of law come to mean the rule of whatever is good, in which case we have no need for the concept'". M. Krygier, *Transitional*

12. End Conclusion

De lege lata, therefore, the first and second stages in the development history of the rule of law are conclusive, provable and in their own terms justifiable, in which the *Rechtsstaat* and, respectively, the rule of law were first used as descriptive designations of the concepts in question as objectives and results, and then, in the struggle between good and evil, as a perceived death struggle, as the name of the positive ideal, the legal path of human self-ennoblement as a civilisational progress. But the third stage and state of it, which the forces of globalisation have been striving to achieve for several decades, can no longer be successful, because it would be beyond itself in its demands, its methods, and its nature. For it is an attempt to formulate the ideal realisation of the underlying ideal as a legal normative, i.e. to demand an ideal's purely philosophical *descriptum* as a legal *prescriptum*. This, as we have tried to show, is opposed by the object itself[90].

Thus, *de lege ferenda*, only another path for the foreseeable future can be proposed. One in which, for the purposes of legal

---

Questions about the Rule of Law. Why, What and How?, "East Central Europe / L'Europe du Centre Est" 2001, vol. 28, No. 1, p. 32, available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/HHT66%22 [accessed on: 1 November 2022]; and, respectively, M. Krygier, *Inside the Rule of Law*, p. 81.

[90] According to the author having started as a specialist in sociology of law at the Institute for Legal Studies of the Hungarian Academy of Sciences to become an international constitutionalist at the Central European University and later a judge at the European Court of Human Rights, "It will be difficult to find a systemic violation of the RoL in smart illiberal democracies because: (1) The EU is short of clear common benchmarks, and even if ex post such benchmarks with teeth are agreed upon (a highly unlikely event), to apply this retrospectively is highly problematic for the RoL (which abhors natural law); (2) The legal concept of the RoL is uncertain even if it has enough consistency to find specific violations on formal grounds (e.g. a violation of the prohibition of retroactivity, a lack of authorization etc.)." A. Sajó, *The Rule of Law as Legal Despotism. Concerned Remarks on the Use of »Rule of Law« in Illiberal Democracies*, "The Hague Journal of the Rule Law" 2019, vol. 11, pp. 371–376, available at: https://doi.org/10.1007/s40803-019-00097-z, https://link.springer.com/article/10.1007/s40803-019-00097-z [accessed on: 1 November 2022].

accountability, the legal formulation of its content, which is deemed to be enforced during the process, does not cover the totality of the objectives and achievements desired of the State and its law, but only those elements of the minimum conditions for the desired progress which can be formulated in operational legal terms, because they can be formulated and also promulgated in factual terms.

Similar considerations may of course be raised in relation to the national legal orders as well. Not, certainly, as a timely task, but as a worthy response if and when the European Union's unabated onslaught of blaming and blackmailing would require it at just such a level, for example by expanding its content[91]. After all, the formulation of the "democratic rule of law" as a normative value, and thus a declaration by the nation concerned of its own moral and political mission, is part of both the Polish and the Hungarian constitutions[92]. And it is perhaps unnecessary to note that the future casual emergence or mainstreaming of new political movements, ideals and/or claims, is clearly not to be interpreted as a clause in the original document.

REFERENCES

Annan K., *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General, Doc. S/2004/616.

Auby J.-B., *The Rule of Law. The French Perspective*, "Italian Journal of Public Law" 2020, vol. 12, No. 2.

[91] I owe this further chance to a comment by Professor Ádám Rixer (Budapest).

[92] The Polish constitution (1997), § 2 identifies the State as "*demokratycznym państwem prawnym*" available at: http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970780483 [accessed on: 1 November 2022] *a democratic state ruled by law*'/"ein demokratischer Rechtsstaat"/"*un État démocratique de droit*" – https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, while the Hungarian fundamental law (2011) § B, (2) words in terms of "*független, demokratikus jogállam*" ('*independent, democratic rule-of-law State*'/"*unabhängiger, demokratischer Rechtsstaat*"/"*un État de droit souverain et démocratique*" – available at: https://njt.hu/forditasok/-:0002:-:-/1/10) [accessed on: 1 November 2022].

Auden W.H., *Law Like Love*, available at: http://web.mit.edu/cordelia/www/Poems/law_like_love.html.

Baecker D., *Wozu Kultur?* 2nd enl. ed. Kadmos Kulturverlag, Berlin 2001.

Basten J., *Human Rights and the Rule of Law*, "Newcastle Law Review" 2008–2009, vol. 11, No. 1.

Bedner A., *The Promise of a Thick View*, [in:] *Handbook on the Rule of Law*, eds. C. May, A. Winchester, Edward Elgar, Cheltelham & Northampton 2018.

Bishop W.W., *The International Rule of Law*, "Michigan Law Review" 1961, vol. 59, available at: https://repository.law.umich.edu/mlr/vol59/iss4/7/.

Blasek K., *Rule of Law in China. A Comparative Approach*, Springer, Heidelberg, etc. 2015.

Blokker P., *The Democracy and Rule of Law Crises in the European Union and its Member States*, RECONNECT, Leuven, 2021, available at: https://reconnect-europe.eu/publications/deliverables/.

Bravo K.E., *Smoke, Mirrors, and the Joker in the Pack. On Transitioning to Democracy and the Rule of Law in Post-Soviet Armenia*, "Houston Journal of International Law" 2007, vol. 29.

Burgess P., *Neglecting the History of the Rule of Law.* (*Unintended*) *Conceptual Eugenics*, "The Hague Journal of the Rule of Law" 2017, vol. 9, No. 2, available at: https://doi.org/10.1007/s40803-017-0057-y.

Bussani M., *Deglobalizing Rule of Law and Democracy. Hunting Down Rhetoric through Comparative Law*, "The American Journal of Comparative Law" 2019, vol. 67.

Bussani M., *The Rule of Law in the Global Perspective*, "Italian Journal of Public Law" 2020, vol. 12, No. 2.

Caenegem R.C. van, *Judges, Legislators & Professors. Chapters in European Legal History*, Cambridge University Press, Cambridge 1987.

Campos P.F., *Jurismania. The Madness of American Law*, Oxford University Press, New York 1998.

Cananea G. della, *Due Process of Law beyond the State. Requirements of Administrative Procedure*, Oxford University Press, Oxford 2016.

Carpano É., *La crise de l'État de droit en Europe: De quoi parle-t-on?*, "Revue des Droits et Libertés fondamentaux" 2019, Chron. No. 29, available at: http://www.revuedlf.com/droit-ue/la-crise-de-letat-de-droit-en-europe-de-quoi-parle-t-on/.

Chevallier J., *Les doctrines de l'État de droit*, "Cahiers français [La Documentation française]" 1998, No. 288.

Chidambaram P., *The Citizen and the Rule of Law*, [in:] *Rule of Law in a Free Society*, ed. Madhava Menon, N.R., Oxford University Press, New Delhi 2008.

Communication de la Commission au Parlement européen et au Conseil, un nouveau cadre de l'UE pour renforcer l'État de droit, COM(2014) 158 final.

Comparative Legal Cultures, ed. Varga Cs., Dartmouth, Aldershot, etc. & The New York University Press, New York 1992.

Conseil d'État, *De la sécurité juridique.* [*Rapport public annuel 1991*], [in:] "Études et documents (*La Documentation française*)" 1992, No. 43.

Cover R.M., Justice Accused. Antislavery and the Judicial Process, Yale University Press, New Haven 1975.

Cranston R., *Human Rights and the Rule of Law*, "Justice Journal" 2006, vol. 3, No. 1.

Declaration on Democratic Values, "Bulletin" U.S. Department of State, August 1984, No. 2089, available at: http://www.g7.utoronto.ca/summit/1984london/democratic.html.

Dobozi I., *A 9/11 manhattani füstgomolyai* [The Manhattan smoke-bombs of 9/11], "Élet és Irodalom" [*Literary and political weekly*] 17 September 2021, No. 37.

Dunlap B., *Anyone Can Think Like a Lawyer. How the Lawyers' Monopoly on Legal Understanding Undermines Democracy and the Rule of Law in the United States*, "Fordham Law Review" 2014, vol. 82.

Dworkin R., *Hart's Postscript and the Character of Political Philosophy*, "Oxford Journal of Legal Studies" 2004, vol. 24, No. 1.

Fairgrieve D., *État de Droit and Rule of Law. Comparing Concepts. A Tribute to Roger Errera*, "Pubic Law" 2015, No. 1.

Favoreu L., *L'inconstitutionnalité des quotas par sexe* (*sauf pour les élections politiques*), "Actualité juridique – Droit Administratif" 2003, No. 7. G7 London Summit, June 8, 1984,

Gallie W.B., *Essentially Contested Concepts*, "Proceedings of the Aristotelian Society" 1955–1956, vol. 56.

Gaudemet J., *Les transferts de droit*, "L'Année Sociologique" 1976, vol. 27, available at: https://www.jstor.org/stable/27888889.

Gaudemet Y., [in:] *L'État de droit. Mélanges en l'honneur de Guy Braibant*, Dalloz, Paris 1996.

Godefridi D., *État de droit, liberté et démocratie*, "Politique et Sociétés" 2004, vol. 23, No. 1, available at: https://www.erudit.org/en/journals/ps/1900-v1-n1-ps771/009510ar/.

Goldfarb R., *Is Law Like Love? W.H. Auden's report from 1600 Black Lives Matter Plaza*, June 11, 2020, available at: http://www.washingtonindependentreviewofbooks.com/index.php/features/is-law-like-love.

Goody J., *The Logic of Writing and the Organization of Society*, Cambridge University Press, Cambridge & New York 1986.

Hempel C.G., Oppenheim, G., *Der Typusbegriff im Licht der neuen Logik*, A.W. Sijthoff, Leiden 1936.

Henderson L., *Authoritarianism and the Rule of Law*, "Indiana Law Journal" 1991, vol. 66, available at: https://www.repository.law.indiana.edu/ilj/vol66/iss2/2/

Herter C.A., [in:] "Department of State Bulletin" 1957, vol. 37.

Horwitz M., *The Rule of Law. An Unqualified Human Good*?, "Yale Law Journal" 1977, vol. 86, available at: http://digitalcommons.law.yale.edu/ylj/vol86/iss3/4.

Hungarian Fundamental Law (2011), available at: https://njt.hu/forditasok/-:0002:-:-/1/10.

Husa J., *Developing Legal System, Legal Transplants, and Path Dependence. Reflections on the Rule of Law*, "Chinese Journal of Comparative Law" 2018, vol. 6, No. 2.

Hussain N., *Auden's Law Like Love*, "Law, Culture and the Humanities" 2021, vol. 17, No. 1.

Jadot B., *Élaborer la loi aujourd'hui, mission impossible? Le point de vue d'un fonctionnaire*, [in:] *Élaborer la loi aujourd'hui, mission impossible?*, eds. B. Jadot, F. Ost, Publications de la Faculté universitaire Saint-Louis, Bruxelles 1999, available at: https://books.openedition.org/pusl/12113.

Jakab A., *What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law*, "Constitutional Studies" 2020, vol. 6, quoted as "Max Planck Institute for Comparative Public Law & International Law Research Paper" 2019, No. 15, available at: https://www.readcube.com/articles/10.2139%2Fssrn.3454649.

Jávor I., *A bíróság mint felelőtlen szervezet: kínkeserves korrupció* [*The judiciary as an irresponsible organisation: torturous corruption*], "Társadalomkutatás" 2014, vol. 32.

Jávor I., *Korrupció az állam csapdájában: Felelőtlen szervezetek – korrupciós mechanizmusok* [*Corruption in the trap of the state: Irresponsible organisations – corruption mechanisms*], "Társadalomkutatás" 2014, vol. 32.

Jouanjan O., *L'État de droit démocratique*, "Jus Politicum" juillet 2019, »Histoire constitutionnelle«, No 22, available at: http://juspoliticum.com/article/L-Etat-de-droit-democratique-1284.html.

Jurgens E., *The Principle of the Rule of Law*. [Committee on Legal Affairs and Human Rights Doc. 11343 Report, Council of Europe, Parliamentary Assembly (July 6, 2007)], available at: https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11593&lang=EN.

Kochenov D., *EU Law without the Rule of Law. Is the Veneration of Autonomy Worth It?*, "Yearbook of European Law" 2015, vol. 34, No. 1, quoted from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642689.

Krygier M., *Institutional Optimism, Cultural Pessimism and the Rule of Law*, [in:] *The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, eds. Krygier, M., Czarnota, A., Routledge, London 1999.

Krygier M., *Transitional Questions about the Rule of Law. Why, What and How?*, "East Central Europe / L'Europe du Centre Est"

2001, vol. 28, No. 1, available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/HHT66%22.

Krygier M., *Inside the Rule of Law*, "Rivista di filosofia del diritto" 2014, vol. III, No. 1.

Laws Sir J., *The Rule of Law. Form or Substance*?, "Justice Journal" 2007, vol. 4, No. 1.

Loughlin M., *Swords and Scales. An Examination of the Relationship between Law and Politics*, Hart Publishing, Bloomsbury 2000.

Luhmann N., *Essays on Self-reference*, Columbia University Press, New York 1990.

Luisin B., *Le mythe de l'État de droit*, "Civitas Europa" 2016, vol. 2, No. 37, available at: https://www.cairn.info/revue-civitas-europa-2016-2-page-155.htm?contenu=article#re35no35.

Lukács G., *The Ontology of Social Being. Marx's Basic Ontological Principles*, trans. David Fernbach, Merlin, London 1978.

May C., *The Rule of Law. The Common Sense of Global Politics*, Edward Elgar, Cheltenham 2014.

May C., Winchester A., *Introduction. The Rule of Law in the Contemporary World*, [in:] *Handbook on the Rule of Law*, eds. C. May, A. Winchester, Edward Elgar, Northampton 2018, available at: https://www.elgaronline.com/view/edcoll/9781786432438/9781786432438.00005.xml.

Millard É., *L'État de droit, idéologie contemporaine de la démocratie*, [in:] *Question de démocratie*, éd. J.M. Février, P. Cabanel, Presses Universitaires du Mirail, Paris 2001, "Boletín Mexicano de Derecho Comparado" 2004, vol. XXXVII, No. 109.

Narasappa H., *Rule of Law in India. A Quest for Reason*, "Oxford University Press", New Delhi 2018.

Nurkic B., *Legal Positivism. An Obstacle in the Process of Strengthening the Rule of Law in Bosnia and Herzegovina*, "Journal of Liberty and International Affairs" 2021, vol. 7, No. 1, available at: https://www.doi.org/10.47305/JLIA21170094n.

Peerenboom R., *Human Rights and Rule of Law. What's the Relationship*, "Georgetown Journal of International Law" 2005, vol. 36.

Pistor K., *Advancing the Rule of Law. Report on the International Rule of Law Symposium Convened by the American Bar Association*

November 10, 2005, "Berkeley Journal of International Law" 2007, vol. 25, No. 1.

Polish Constitution (1997), http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU19970780483 & https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm.

Promoting the Rule of Law Abroad. In Search of Knowledge, ed. Carothers T., Carnegie Endowment for International Peace, Washington D.C. 2006.

Puppinck G., *One year after the report on NGOs and Judges of the ECHR. Overview*, 2021, available at: https://eclj.org/geopolitics/echr/un-an-apres-le-rapport-sur-les-ong-et-les-juges-de-la-cedh--etat-des-lieux.

Puppinck G., Loiseau D., NGOs and the Judges of the ECHR. *2009–2019*, European Centre for Law and Justice, Strasbourg 2020.

Radbruch R., *Klassenbegriffe und Ordnungsbegriffe im Rechtsdenken*, "Revue Internationale de la Théorie du Droit" 1938, vol. XII, No. 1.

Raz J., *The Rule of Law and Its Virtue*, [in:] J. Raz, *The Authority of Law*, Clarendon Press, Oxford 1979.

Rákosi M., *A magyar demokrácia kérdései* [The questions of democracy in Hungary], [in:] *Demokrácia. A Pázmány Péter Tudományegyetem Bölcsészettudományi Karának kiadása*, Egyetemi Nyomda, Budapest 1945.

Rivéro J., *L'État moderne peut-il être encore un État de droit?*, "Annales de la Faculté de droit de Liège" 1957.

Rycroft T., *The Compatibility of the Rule of Law with Evil Regimes*, "UCL Jurisprudence Review" 2009, vol. 15.

Sajó A., *The Rule of Law as Legal Despotism. Concerned Remarks on the Use of »Rule of Law« in Illiberal Democracies*, "The Hague Journal of the Rule Law" 2019, vol. 11, available at: https://doi.org/10.1007/s40803-019-00097-z, https://link.springer.com/article/10.1007/s40803-019-00097-z.

Seagle W., *The Quest for Law*, Knopf, New York 1941.

Shklar J.N., *Political Theory and the Rule of Law*, [in:] J.N. Shklar, *Political Thought and Political Thinkers*, ed. S. Hoffmann, The University of Chicago Press, Chicago 1998.

Simon W.H., *Legality, Bureaucracy, and Class in the Welfare System*, "Yale Law Journal" 1983, vol. *92,* available at: https://digitalcommons.law.yale.edu/ylj/vol92/iss7/5/.

Stefes C.H., *Clash of Institutions. Clientelism and Corruption v. Rule of Law*, [in:] *The State of Law in the South Caucasus*, ed. C.P.M. Waters, Palgrave Macmillan, New York 2005.

Tabouis G., *Elsodort diplomácia. Egy újságírónő megfigyelései* (*1919–1939*), *20 ans de suspense diplomatique*, Éditions Albin Michel, Paris 1958, Kossuth, Budapest 1967.

Taiwo O., *The Rule of Law. The New Leviathan?*, "Canadian Journal of Law & Jurisprudence" 1999, vol. 12, No. 1.

Tamanaha B.Z., *The Rule of Law for Everyone?* "Oxford Journal of Legal Studies" 2002, vol. 22, No. 1.

Tamás A., *Meditáció*, [in:] *Magister scientiae et rei publicae. Ünnepi tanulmányok Máthé Gábor 70. születésnapja alkalmából / Liber amicorum studia G. Máthé septuagenario dedicata*, Dialóg Campus, Budapest–Pécs 2011.

Tavaglione N., *Gare au Gorille. Plaidoyer pour l'État de droit*, Éditions Labor et Fides, Genève 2010.

The Declaration of Delhi, "Journal of the International Commission of Jurists" 1959, vol. 2, No. 1.

Traisbach K., *Judicial Authority, Legitimacy and the* (*International*) *Rule of Law as Essentially Contested and Interpretive Concepts. Introduction to the Special Issue*, "Global Constitutionalism" 2021, vol. 10, No. 1.

Trujillo I., *Rule of Law and Human Rights Practice*, "Persona y Derecho" 2015, vol. 73, No. 2.

Upham F., *Mythmaking in the Rule of Law Orthodoxy*, Democracy and Rule of Law Project Rule of Law Series Working Papers 30, Carnegie Endowment for International Peace, Washington D.C. 2002.

[USAID], *Guide to Rule of Law Country Analysis. The Rule of Law Strategic Framework.* (*A Guide to USAID Democracy and Governance Officers*), U.S. Agency of International Development, Washington 2008.

Varga Cs., *Civil Society Associations vs. So-called Non-governmental Organizations*, "Civic Review" 2020, vol. 16,

Special Issue, available at: https://eng.polgariszemle.hu/current-publication/157-excerpts-from-hungarian-history-and-scientific-life/981-civil-society-associations-vs-so-called-non-governmental-organisations.

Varga Cs., *Failed Crusade: American Self-confidence, Russian Catastrophe*, "Central European Political Science Review" 2007, vol. 8, No. 28 available at: http://mek.oszk.hu/14800/14851.

Varga Cs., *Idol, Deduced from an Ideal? Rule of Law, Universalization, Degradation*, "Філософія права і загальна теорія права / Philosophy of Law and General Theory of Law" [Kharkiv] 2019, No. 2, available at: http://phtl.nlu.edu.ua/article/view/204724.

Varga Cs., *Jog, jogi kultúra és jogi hagyomány* [*Law, legal culture and legal tradition*], "Iustum Aequum Salutare" 2021, vol. XVII, No. 1.

Varga Cs., *Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező* [*Legal transplantation, or borrowing as a universal factor in the development of law*], "*Állam- és Jogtudomány" 1980,* vol. XXIII, available at: http://mek.oszk.hu/14500/14525/.

Varga Cs., *Kelsen's Theory of Law-application. Evolution, Ambiguities, Open Questions*, "Acta Juridica Hungarica" 1994, vol. 36, Nos. 1–2, available at: http://real-j.mtak.hu/784/1/ACTA-JURIDICA_36.pdf.

Varga Cs., *Law as a Social Issue*, [in:] *Szkice z teorii prawa i szczegółowych nauk prawnych. Profesorowi Zygmuntowi Ziembinskiemu*, eds. S. Wronkowska, M. Zieliński, Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu, Poznań 1990, available at: http://mek.oszk.hu/15300/15333/#.

Varga Cs., *Law as Culture?*, [in:] Cs. Varga, *Comparative Legal Cultures. On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism*, Szent István Társulat, Budapest 2012, available at: http://mek.oszk.hu/15300/15386.

Varga Cs., *Legal Mentality as a Component of Law: Rationality Driven into Anarchy in America*, "Curentul Juridic" [Tirgu Mures] 2013, vol. 16, No. 1(52), pp. 63–77, available at: http://www.upm.ro/facultati_departamente/ea/RePEc/curentul_juridic/rcj13/recjurid131_7F.pdf.

Varga Cs., *Lenin and the Law. A Case-study on the Borders of Legal Normality*, "Central European Political Science Review" 2019, vol. 20, No. 75.

Varga Cs., *Lenin, Vladimir I.*, [in:] *Encyclopedia of the Philosophy of Law and Social Philosophy*, eds. M. Sellers, S. Kirste, Springer Nature, Cham 2020, available at: https://doi.org/10.1007/978-94-007-6730-0_435-1.

Varga Cs., *Liberty, Equality, and the Conceptual Minimum of Legal Mediation*, [in:] *Enlightenment, Rights and Revolution. Essays in Legal and Social Philosophy*, eds. N. MacCormick, Z. Bankowski, Aberdeen University Press, Aberdeen 1989, available at: http://mek.oszk.hu/14700/14760/.

Varga Cs., *On Judicial Ascertainment of Facts*, "Ratio Juris" 1991, vol. 4, No. 1, pp. 61–71, available at: https://booksc.org/book/9571753/a26400.

Varga Cs., *Quelques questions méthodologiques de la formation des concepts en sciences juridiques*, "Archives de Philosophie du Droit" 1973, vol. XVIII, pp. 205–241 available at: http://mek.oszk.hu/15300/15333/#.

Varga Cs., *Reception of Legal Patterns in a Globalising Age*, [in:] *Globalization, Law and Economy/Globalización, Derecho y Economía. Proceedings of the 22nd IVR World Congress*, vol. IV, eds. López Calera, N., Franz Steiner Verlag, Stuttgart 2007, available at: http://mek.oszk.hu/15300/15386.

Varga Cs., *Rule of Law – Contesting and Contested*, "Central European Journal of Comparative Law" 2021, vol. 2, No. 1, available at: https://ojs3.mtak.hu/index.php/cejcl/article/view/6041/4723.

Varga Cs., *Rule of Law – Contesting and Contested*, Ferenc Mádl Institute of Comparative Law, Budapest 2022.

Varga Cs., *The Paradigms of Legal Thinking*, [1996/1999] enlarged 2nd ed., Szent István Társulat, Budapest 2012, available at: http://mek.oszk.hu/14600/14657/.

Varga Cs., *The Place of Law in Lukács' World Concept*, [1985] 3rd [reprinted] ed. with Postface, Szent István Társulat, Budapest 2012, available at: http://mek.oszk.hu/14200/14249/.

Varga Cs., *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe*, Kráter, Pomáz 2008, available at: http://mek.oszk.hu/14800/14851.

Vree J.K. de, *The Rule of Law. Order and Disorder in Political Systems*, "Legal Issues of European Integration" 1983, vol. 10, No. 1.

Wai Man S., Yiu Wai C., *Whose Rule of Law? Rethinking Post-Colonial Legal Culture in Hong Kong*, "Social & Legal Studies" 1998, vol. 7, No. 2.

Waldron J., *Is the Rule of Law an Essentially Contested Concept* (*in Florida*)*?*, "Law and Philosophy" 2002, vol. 21.

Waldron J., *The Rule of Law*, [in:] *Stanford Encyclopedia of Philosophy* 2016, available at: https://plato.stanford.edu/entries/rule-of-law/#OppoRuleLaw.

Watson A., *Legal Transplants. An Approach to Comparative Law*, Scottish Academic Press, Edinburgh 1974.

Weiler J.H.H., *The Schuman Declaration as a Manifesto of Political Messianism*, [in:] *Philosophical Foundations of European Union Law*, eds. J. Dickson, P. Eleftheriadis, Oxford University Press, Oxford 2012.

White J.B., *The Invisible Discourse of the Law. Reflections on Legal Literacy and General Education*, "University of Colorado Law Review" 1983, vol. 54, available at: https://repository.law.umich.edu/articles/2113/.

Whitock C., *The Afghanistan Papers. A Secret History of the War*, Simon & Schuster, New York 2021.

DR HAB. BARBARA JANUSZ-POHL, PROF. UAM
Adam Mickiewicz University

Mutual Recognition of Judicial Decisions in Criminal Matters in Relation to the Rule of Law Concepts – example of the EAW execution refusal[1]

1. Introduction

The principle of mutual recognition of judicial decisions in criminal matters as illustrated by the procedure for the execution of the EAW and its connection to the Rule of Law in the issuing Member State shall be discussed in this chapter. In the last five years, this area has been witnessing peculiar twists and turns. The intensification and activation of the CJEU actions have undermined the automatism of the principle of mutual recognition of judicial decisions. Simultaneously, the increasing empowerment of the national courts of the EU Member States, perceived as EU courts and tribunals, not only as national entities, is leading to a denial of the initial assumptions of cooperation in the common area of security and justice in criminal matters[2]. André Klip accurately observed that: "It has raised the thresholds for cooperation between the Member States by creating more formalities, causing delay and without strengthening legal

[1] This study was submitted for publication on 15 October 2021, and as a consequence, its normative and jurisprudential framework is as on the given data.

[2] See more: A. Klip, *Eroding Mutual Trust in a European Criminal Justice Area without Added Value*, "European Journal of Crime, Criminal Law and Criminal Justice", 2020/28, pp. 109–119.

remedies for the citizen. On two rather important aspects, surrender among the Member States on the basis of the EAW is now more complicated than extradition was before 2004. Whereas Member States' authorities are confronted with more formalities, the citizen does not profit from it"[3]. What's more the basis for creating the 'judicial multicentre-authority-competences' idea (when national judicial bodies are supposed to *ad hoc* protect the EU law by refusing cooperation) is linked to the flexible and imprecise argument of Rule of Law infringements.

In order to highlight the essence of the problem, it is, therefore, necessary to outline methodological and theoretical assumptions underlying various *Rule of Law* concepts, to make them more specific – at least to some extent – and to limit their arbitrary interpretations. This is crucial in so far as some scholars have rightly accused the EU bodies of having torn the *Rule of Law* 'off its roots': "Above all, it was the fact that, in our globalising world, as the Cold War confrontation slowly faded, the idea and demand for the Rule of Law itself became politicised and, as a result, took on an increasingly, generalised and indeterminate form. In doing so, it has lost its intrinsic identifiability and, in fact, has become simultaneously empty"[4].

2. Rule of Law – methodological and theoretical approaches

It is rightly observed that the *Rule of Law, Rechtsstaat, État de droit* and *państwo praworządne* clauses carry postulates of a similar nature in juristic discussions. Hence, they are different ways, because they come from various languages and legal cultures, of organizing and denominating the same phenomena and problems[5]. Although any

[3] *Ibidem*, p. 109.

[4] C. Varga, *Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims*, p. 13, of this monography.

[5] Evolutionary impact presented by Cs. Varga, *Rule of Law – Contesting and Contested*, "Central European Journal of Comparative Law" 2021, vol. 2, No. 1, pp. 245 ff.

attempts to make conceptual distinctions between them are doomed to failure and are unavoidably arbitrary[6], a certain methodological systematization of these concepts is nevertheless necessary. Accordingly, the *Rule of Law* formula may be viewed from the perspective of individuals and bodies bound by it (in a narrow and broad range) and the characteristics of the law to be applied. Further, it may be treated either descriptively (concretely) or postulatively and directively (abstractly), as well as formally or substantively. To stress these various aspects – at the outset of further discussion – is important, as this makes clear that the operative concept of the Rule of Law developed in the supranational space, especially the European one, rather ignores them all. In fact, the latter uses instrumentally selected aspects of various approaches to the Rule of Law mostly for the purpose of restricting state sovereignty.

Providing the description of the Rule of Law, one may point out that in the most fundamental sense, it means the observance of the law. Thus, the requirement that the law be observed becomes a precondition in judging the Rule of Law, however, by no means the only one. Arguments about the Rule of Law revolve around the finding of which entities are to be judged by the Rule of Law criterion. What is more, calling a country as being ruled by law depends on how the conduct of a specific group of entities active in it is classified. In this context, there are two possibilities: a broad and narrow one. According to the first, the Rule of Law means strict observance of the law by all the addressees of legal norms: both institutional entities, including public authority bodies, and citizens. In this case, the Rule of Law is purely synonymous with 'observance of the law'. According to the strictly narrow approach, crucial for judging the Rule of Law in a given country (or more precisely when describing a law-observing legal order), it refers solely to the observance

[6] See: Cs. Varga, *Quelques questions méthodologiques de la formation des concepts en sciences juridiques*, Archives de Philosophie du Droit, 1973, vol. XVIII, pp. 205 ff.

of the law by public authority bodies[7]. Here, the narrow approach shall be used.

Another criterion organizing the discussion on the Rule of Law is an ontic one: do we, while speaking of the Rule of Law, mean it abstractly or concretely? Thus, the Rule of Law (in its specific sense) may be analysed descriptively (as part of objective reality). Such an analysis may be also called concrete. On the contrary an abstract analysis is also possible: it takes a directive-postulative form. While the descriptive (concrete) analysis allows for judgments concerning the Rule of Law, the directive-postulative one enumerates the postulates that the law and legal procedures as well as the system of public authority bodies are to be considered law observing. Thus, the enumeration is idealising by nature as it describes a certain model. It is rightly emphasized that a directive-postulative analysis holds the Rule of Law to be a general idea – a model to be striven for as against the social reality. Descriptive analyses, in turn, give distinguishing characteristics. Notwithstanding, they speak of 'principles' (in plural) and not of the 'principle' of the Rule of Law. By way of example, in the opinion of Robert S. Summers, the principles can be aggregated into three major groups[8]. The first comprises principles referring to law itself. It is expected to be duly enacted in conformity with the validity criteria that are clear, readily applicable and

[7] K. Opałek, *Formalne i materialne pojęcie praworządności*, [in:] W. Osuchowski, M. Sośniak, B. Walaszek (eds.), *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, Kraków–Warszawa 1964, pp. 201 ff. To compare: K. Opałek, *The Rule of Law and Natural Law*, [in:] K. Opałek, J. Woleński (eds.), *Selected Papers in Legal Philosophy,* Dordrecht 1999, pp. 91 ff. Opałek has argued that: 'At the same time it still more distinctly emphasizes its [formalistic conception] values when compared with the 'material' conception, which confounds the problem of the value of the adherence to law, regardless even of the contents of the latter, with the problem of value represented by the contents of the law in question. The formalistic concept is the proper starting-point for investigating such important problems as the relation of the so-called legality to purposefulness, of formalism to realism in the application of law, of the 'material', substantial values of law to the 'formal' ones as of a certain order. The 'material' conception, far from facilitating such reflections, still obscures all these issues'.

[8] R.S. Summers, *Principles of the Rule of Law*, "Notre Dame Law Review", 1999/74, issue 5, pp. 1693–1694.

provide for conflict resolution. Furthermore, law has to be uniform within state boundaries and readily accessible to all its addressees, use general and definite rules formulated in a clear and specific language and be applied without fear or favour to all. Moreover, law needs to look ahead rather than back, not be overly burdensome and should not be changed too often lest it hinders compliance. Nor should it have consequences for its addresses that cannot be predicted in advance. Any amendments to law or its interpretations ought to be made by authorised instittions in conformity with relevant procedures. The principles of the second group define the ideal system of courts that should be in place to resolve disputes as to what the law is, make findings of fact and apply relevant law to them. Importantly, the law-making power of courts should be limited to exceptional cases and circumscribed in rules to preserve the peremptoriness of enacted law. Finally, the third group of principles define the position of an individual in a court. He/she must be able to instigate criminal prosecution and seek redress before an impartial and independent court, have recourse to appellate review and, if need be, take advantage of legal advice and representation or receive legal aid.

A descriptive (concrete) analysis, meanwhile, must distinguish between the Rule of Law as related to a given state as a whole and the legality of actions by public authority bodies. In the former case, what is judged is the degree to which a given state over a specific period has satified the model criteria of the Rule of Law set out in a specific manner. In relation to public authority bodies, in turn, such a judgment considers the validity and legality of conventional actions by specific entities[9]. Importantly, the Rule of Law prevailing in a state and the Rule of Law adhered to by public authority bodies are two distinct, albeit interrelated, categories. The Rule of Law found in a state does not directly make the actions of state authority bodies lawful and vice versa: the Rule of Law adhered to by state authority bodies does not directly make the state a political entity

[9] See: B. Janusz-Pohl, *Definitions and Typologies of Legal Acts in Criminal Proceedings. Perspective of Conventionalisation and Formalisation*, Poznan 2017, *passim*.

ruled by law. This aspect is worth noting because in the operative concept of the Rule of Law, it is obliterated. However, for a country to be considered as not complying with the Rule of Law due directly to the unlawful actions of its state authority bodies, it is necessary that the unlawful actions be systematic, structural and concern an important area of the operations of the state as a whole. They must clearly and unambiguously undermine the organic structure of the state by, for instance, distorting the separation of powers and relationships between them.

To bring some order to the concept of the Rule of Law, it is important to discuss what it is applied to. Besides concrete and abstract approaches mentioned earlier, formal and substantive ones can be distinguished as well[10]. Formal rule-of-law conceptions stress the requirement to observe the law, regardless of what it says. Substantive conceptions, in turn, pivot on the distinction between 'just and unjust law' and assume that the requirement to adhere to the Rule of Law concerns just law, *ergo*, the law of a specific content. They maintain that the mere fact of the law being in force does not necessarily make it applicable. This is so because for the law to be applicable, it must have the quality of being just, which means that it must meet requirements that are external to itself[11]. In contrast, the formal conceptions emphasise the value of law observance alone. However, it must be stressed that in the case of both formal and substantive approaches to the Rule of Law, on the postulative (abstract) plane, they cover postulates, besides the postulate that state authority bodies operate on the basis of, and within the limits of, the law, concerning the characteristics that law in a state ruled by law should have. Thus, the formal approaches to the Rule of Law are not so much about the observance of the law as about the respect for the law that meets appropriate formal postulates, one of them being the

[10] See: K. Opałek, *Jeszcze raz o praworządności*, [in:] K. Działocha, M. Grzybowski, P. Sarnecki, E. Zwierzchowski (eds.), *Konstytucja w społeczeństwie obywatelskim. Księga pamiątkowa ku czci Prof. Witolda Zakrzewskiego.* Kraków 1989, pp. 143 ff; K. Opałek, *Formalne i materialne pojęcie…*, pp. 201 ff.

[11] K. Opałek, *Jeszcze raz o praworządności…*, pp. 143–153; K. Opałek, J. Wróblewski, *Sporne zagadnienia pojęć teoretycznoprawnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny", 1972/34(1), pp. 91 ff.

certainty of law[12]. In the substantive approaches, the law in force in a given country, next to formal postulates, should meet substantive ones as far as legal norms are concerned[13]. Actually, the formal and substantive rule-of-law concepts do not compete with each other in the sense that at least partially they concern different issues and, therefore, apply to different matters[14]. The pragmatic weight of the concept of substantive Rule of Law, however, is seen above all in the fact that it may influence the application and interpretation of law by courts. Under certain conditions, it may modify positive law norms in the spirit of equity; in statutory law systems, courts acquire then certain law-making powers to the detriment of the legislative branch. The formal rule-of-law conceptions seem thus more stable, but only in the legal dimension and not political one because in the latter case they, too, can be prone to instrumental treatment. It is seen in absolutising the formal aspects of law relatively to the content of norms. As C. Varga argues: "Well, as we have seen, the formal versions of the Rule of Law that emphasise legality and are based on compliance and/or access to judicial contestation are often enriched by the further requirements of authors and especially of institutions organised to shape global politics. […] With a certain cynicism, but in all fairness, we might add that this has always been the case, ever since and whenever politicians, diplomats or economic lobbyists have taken the cause of law (and, in our case, the Rule of Law) out of the hands of jurists in order to promote the well-being of humanity: with a globalising aspiration, of course, because they claim it to have universal validity in the whole world"[15].

---

[12] See: M. Kordela, *The principle of legal certainty as a fundamental element of the formal concept of the Rule of Law*, "Revue du Notariat", 2008/110/2, pp. 589 ff.

[13] J. Nowacki, *Rządy prawa. Dwa problemy*, Katowice 1995, pp. 9 ff.

[14] J. Nowacki, *Materialne i formalne pojęcie praworządności*, "Państwo i Prawo", 1968/4–5 pp. 658 ff.

[15] C. Varga, *Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims*, *loc. cit.* See also: P. Burgess, *Neglecting the History of the Rule of Law. (Unintended) Conceptual Eugenics*, "Hague Journal of the Rule of Law" 2017, vol. 9, No. 2, available at: https://doi.org/10.1007/s40803-017-0057-y, p. 195 [accessed on: 1 September 2021]. C. May, A. Winchester, *Introduction. The Rule of Law in the Contemporary World*, [in:] *Handbook on the Rule of Law*, eds. C. May, A. Winchester, Edward Elgar, Northampton 2018, available at https://

The formal and substantive aspects of the Rule of Law are in a sense connected (although indirectly) with the concepts of formal and substantive justice. Formal justice means that it has been administered by applying a legal, formalised and conventional procedure, with all its aspects, rights of participants, and legal steps taken having followed the rule-of-law standard. Whereas the crucial question that substantive justice asks is 'what' and not 'how' or 'in what mode'; or more precisely, the 'what' must reflect reality (objective truth) to the highest possible degree. When courts apply law, it is vital that they maintain balance between formal and substantive types of justice. Naturally, in various procedural models, this balance looks differently, but it is substantive justice that directs judges to make true findings of fact (according to objective reality) the basis of their decisions. This is why procedural-systematic formalism must not strike at the essence of substantive justice. Extreme formalism, giving precedence to procedural rules and rejecting true assertions, must be consistently rejected as instrumental formalism. Procedural justice and formalism are justified only when they serve specific values materialised in trial guarantees, while they may not be a value and goal in themselves. It is important to stress these issues for further discussion because when the concept of Rule of Law is applied to criminal matters, it is necessary to take into account both substantive and procedural types of justice[16].

---

www.elgaronline.com/view/edcoll/9781786432438/9781786432438.00005.xml, p. 3 [accessed on: 1 September 2021].

[16] The dilemma of the balance between substantive and procedural justice is fully revealed in the case of Reczkowicz v. Poland (application No. 43447) where on 22 August 2021 the ECrHR delivered a judgment, finding that the right of the applicant to a tribunal established by law was impaired on account of the fact that in disciplinary proceedings against her the Disciplinary Chamber of the Polish Supreme Court was a reviewing body that upheld the applicant prior conviction in disciplinary proceedings held by the body of a professional corporation. Hence, the decision contents alone, which had undergone review in successive instances, was not considered wrong at any review stage, while only formal considerations decided the case in favour of the applicant. The Court has established that there was a manifest breach of the domestic law which adversely affected the fundamental rules of procedure for the appointment of judges to the Disciplinary Chamber of the Supreme Court, since the appointment was effected upon a recommendation of the NCJ, established under the

3. Operativeness of the Rule of Law Concept in the European Union

The main formulas of the *Rule of Law* presented above emphasize its multilayer theoretical character. Although the formulas seem to be quite clear, which does not mean that they are devoid of contentiousness in all their aspects, their practical application poses serious challenges. The fundamental problem with the application of the individual formulas results from their relatively high generality, and thus flexibility, allowing for instrumentalisation. Quite firmly, although not without reason, highlighting the indeterminacy of the concept of the Rule of Law, it is indicated that: "But if it is an ideal, which is thus neither entirely attainable nor fully realisable/ implementable in real life, but instead only somewhat (more or less, and in this or that sense) approachable, it is per definition debatable and therefore always remains debatable[17]. And again: this is not its burden, but rather its particular strength, since it will secure a certain inner dynamism to its meanings, which are always conventionalising and eventually conventionalised in one way or another"[18].

2017 Amending Act. The irregularities in the appointment process compromised the legitimacy of the Polish Supreme Court Disciplinary Chamber to the extent that, following an inherently deficient procedure for judicial appointments, it did lack and continues to lack the attributes of a "tribunal" which is "lawful" for the purposes of Article 6 § 1. The very essence of the right at issue has therefore been affected. Court's reasoning was connected with the *case of Xero Flor v. Poland* (No. 4907/18, § 277, 7 May 2021) but the three-step test devised in the judgment in Guðmundur Andri Ástráðsson v. Iceland [GC], No. 26374/18, 1 December 2020) as the crucial formula has been applied.

[17] As J. Waldron has stated: *A society ruled by laws, not men, is bound to be a society in which there is constant debate about what the Rule of Law means*.' – J. Waldron, *Is the Rule of Law an Essentially Contested Concept* (*in Florida*)*?*, "Law and Philosophy", 2002/ 21, p. 164.

[18] C. Varga, *Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims*, *loc. cit.* See: A. Sajó, *The Rule of Law as Legal Despotism. Concerned Remarks on the Use of »Rule of Law« in Illiberal Democracies*, "Hague Journal of the Rule Law", 2019/11, pp. 371–376, available at: https://doi.org/10.1007/s40803-019-00097-z> &<https://link.springer.com/article/10.1007/s40803-019-00097-z [accessed on: 1 September 2021]. '*It will be difficult to find a systemic*

An application variant of the Rule of Law formula, which may be called an Operative Formula, is developed in the all-European space with a significant participation of EU or Council of Europe bodies. Its inception can be traced to the Communication from the Commission to the European Parliament and the Council "A new EU Framework to strengthen the Rule of Law (Eropean Commission 2011)"[19]. As can be plainly seen the formula is highly flexible as it encompasses the principle of legality of legislative process (which implies a transparent, accountable, democratic and pluralistic process for enacting laws), legal certainty, transparency of rules for amending laws, the principle of *lex retro non agit*, prohibition of arbitrariness of the executive power, separation of powers, effective judicial review including respect for fundamental rights, independent and impartial courts and equality before the law. In greater detail, the principles are discussed in Annex I to the Communication: "The Rule of law as a foundational principle of the Union", although it is neither binding nor exhaustive (because it cannot be in the very nature of things). Moreover, the catalogue of directives it includes does not directly correspond to the criteria that the Venice Commission uses when assessing the Rule of Law prevailing in a given country[20]. More importantly, however, the Communication makes the reservation that the precise content of principles and standards stemming from the Rule of Law may vary at national level, which means that the adopted concept of the Rule of Law is merely synoptic and does not permit unambiguous standardisation. Outlining such a standardisation, K. Lenaerts, referring to the principle of mutual trust

violation of the RoL in smart illiberal democracies because: (1) *The EU is short of clear common benchmarks, and even if ex post such benchmarks with teeth are agreed upon* (*a highly unlikely event*), *to apply this retrospectively is highly problematic for the RoL* (*which abhors natural law*); (2) *The legal concept of the RoL is uncertain even if it has enough consistency to find specific violations on formal grounds* (*e.g. a violation of the prohibition of retroactivity,* a lack *of authorization etc.*)'.

[19] COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A new EU Framework to strengthen the Rule of Law, COM (2014) 158, final, Brussels.

[20] Venice Commission, Rule of Law Checklist, adopted on its 106th Plenary Session (11–12 March 2016), CDLAD (2016) 007.

between Member States, said: "Mutual trust … means that Member States may make different choices, but also that they must be able to trust each other because they share common values. For instance, behaviour that constitutes a criminal offence in Belgium may not be punishable under criminal law in the Netherlands, Poland, or Portugal. But the criminal proceedings in all Member States of the EU must be conducted before fully independent, impartial courts, according to fair trial rules, with the rights of the defence being respected and appropriate rules on the administration of evidence observed. There is thus a basket of rules that need to be respected in order for a judge in one Member State to put trust in proceedings before a court in another Member State, which are governed by rules reflecting different legislative choices made in that Member State. It is very important to distinguish this basic level of commonality of values and meta-constitutional principles from the choices that each State makes within this common framework"[21]. In a sense then, the operative concept of the Rule of Law may be described on the evolution plane as: "Once the emphasis on judging changes from deliberation to rule-application, the ancient idea of the Rule of Law as the rule of reason is superseded by a modern idea of the Rule of Law as the rule of rules"[22].

The essence of the operative concept of The Rule of Law in the European Union is based on the juxtaposition of two elements: the adoption of maximally flexible criteria for assessing the Rule of Law on the one hand, and the maximally specific and pertinent instruments of influence on the other. Regardless of this, such an approach creates a serious risk of instrumentalisation, which always arises when important competencies are actualized in undefined situations.

C. Varga, analysing the concept of the Rule of Law adopted in the European Union, expressed a firm judgment that: "Turning finally to the question of the Rule of Law required in the European Union, on the one hand, there is the current quasi-hystericized atmosphere,

[21] President of the Court of Justice, spoke about the principle of mutual trust in an interview for www.ruleoflaw.pl [accessed on: 1 September 2021].

[22] M. Loughlin, *Swords and Scales. An Examination of the Relationship between Law and Politics*, Hart Publishing, Bloomsbury 2000, pp. 75 ff.

which is created by fighting over this very term, by calling it to account, so that Member States that do not follow the political agendas of the centre, the mainstream of the moment, are also herded into their own mainstream, and, on the other hand, the fact that, at the same time, the European Union is unable to produce a normative definition for itself by which to provide a genuinely legal basis for the imputation of responsibility they seek to impose"[23]. According to this view, "The European Union (EU) is not driven by the Rule of Law as an institutional ideal. Instead, the Union deploys the »Rule of Law«, viewed to a large extent through the lens of the autonomy of the EU legal order, to shield its law from potential internal and external contestation. This is precisely the opposite of what the classical understanding of the Rule of Law would imply […]. The Rule of Law is perversely interpreted as a tool to deactivate potential contestation—precisely the opposite of what a classical understanding of it would imply." For, as it is added, "Values are not the EU's founding ideas"[24].

While the acceptance of a flexible framework for the Rule of Law (clearly corresponding to the formal approaches to the Rule of Law) has been extremely simple, 'finding' the competence to reinterpret the treaties to 'find out' a suitable instrument of action/reaction to backsliding in the Rule of Law, has posed a real problem. Undoubtedly, Articles 2 and 7 TEU[25] and the provisions of the Charter of Fundamental Rights form an impregnable basis for the protection of the Rule of Law in the EU. The procedure dedicated to violations of the Rule of Law in the Member States is laid down in Article 7 TEU, but its nature is strictly political. However, these normative

[23] C. Varga, *Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims*, *loc. cit.*

[24] Quoted after C. Varga, *Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims*, *loc. cit.* Reference to J.H.H. Weiler, *The Schuman Declaration as a Manifesto of Political Messianism*, [in:] *Philosophical Foundations of European Union Law*, eds. J. Dickson, P. Eleftheriadis, Oxford University Press, Oxford 2012, *passim*.

[25] Polish version of the Treaty: Journal of Laws of 2004, No. 90, item. 864/830 with amendments. Journal of Laws C 202/13 available at: treaty_on_european_union_en.pdf (europa.eu) [accessed on: 1 September 2021].

grounds do not allow for a conclusive and operative interpretation. Therefore, in the post-Lisbon period, interpretative instruments were searched for that would increase the involvement of the CJEU in the discourse on the Rule of Law across the EU[26].

Provisions allowing for the activation of this body at the procedural level included Articles 258 TFEU[27], 259 TFEU[28], 267 TFEU, and with respect to the interpretation on its merits – Article 19 TEU read jointly with Article 2 TEU, and Article 47 of the Charter of Fundamental Rights (CFR) as well[29].

Under Article 2 TEU, the European Union is founded on **values, such as the Rule of Law**, which are common to the Member States in the society in which, *inter alia*, justice prevails. In that regard, it should be noted that mutual trust between Member States and, in particular, their courts and tribunals is based on the fundamental premise that Member States share a set of common values on which the European Union is founded. The European Union is a union based on the Rule of Law[30] in which individuals have the right to challenge before the courts the legality of any decision or other national measure relating to the EU law[31]. Article 19 TEU puts on

[26] T. Lock, *Accession of the EU to the ECHR*, [in:] D. Ashiogbar, N. Countouris, I. Lionos (eds.), *The European Union After Treaty of Lisbon*, Cambridge Univ. Press, 2012, pp.109 ff.

[27] Consolidated version of the Treaty on the Functioning of the European Union, OJ O 326/47, 26.10.2012.

[28] D. Kochenov, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, "Jean Monnet Working Paper", 2011/15, *passim*.

[29] Charter of Fundamental Rights of the European Union, 26 October 2012, OJ C 326/02. See: P. Marcisz, M. Taborowski, *Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności. Krytyczna analiza analizy krytycznej* (*artykuł polemiczny*), "Państwo i Prawo", 2017/12, pp. 101 ff.

[30] See: the Preamble to the TUE: "CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the Rule of Law, DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions, DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them".

[31] See: D. Kochenov, *The EU and the Rule of Law – Naïveté or a Grand Design?*, [in:] M. Adams, E. Hirsch Ballin, A. Meuwese (eds.), *Constitutionalism and the*

a concrete interpretation of Article 2 TEU – hence on the Rule of Law value indicated therein – putting the responsibility for ensuring judicial review in the EU legal order not only on the CJEU, but also on national judicial bodies. Member States are obliged under the principle of sincere cooperation, provided in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of, and respect for, the EU law. In this regard, as stated in the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by the EU law. It is, therefore, for Member States to establish a system of legal remedies and procedures, ensuring effective judicial review in those fields. Following such an interpretation, the principle of the effective judicial protection of individuals' rights is a general principle of EU law, stemming from the constitutional traditions common to Member States. It has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[32] and now reaffirmed by Article 47 of the CFR, imposing an obligation on national authorities to ensure that their national courts meet the requirements essential to effective judicial protection[33]. Some authors directly argued that: "An enlarge-

Rule of Law. Bridging Idealism and Realism, Cambridge: CUP, 2017, pp. 424 ff.

[32] *Convention for the Protection of Human Rights and Fundamental Freedoms*. Rome, 4.11.1950, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf [accessed on: 1 September 2021]. See: A. Łazowski, *Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings*, "ERA Forum", 2013/14, pp. 573 ff.; P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, "Common Market Law Review", 2002/39, pp. 940 ff.

[33] See more e.g.: D. Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, D. Kochenov, "Yearbook of European Law" 2015, pp. 1 ff; D. Kochenov, *Biting Intergovernmentalism…*, *loc. cit.*; L. Pech, *Better late than never: On the European Commission's Rule of Law Framework and its first activation*, "Journal of Common Market Studies", 2016/54, pp. 1062 ff. K.L. Scheppele, D. Kochenov B. Grabowska-Moroz, *EU Values Are Law, after All*, "Yearbook of European Law", 2020/39, p. 3; P. Van Elsuwege, F. Grimmelprez, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, "European Constitutional Law Review", 2020/16, p. 8; C. Rizcallah, V. Davio, *L'article 19 du Traité sur l'Union européenne: sesame de l'Union de droit*, Revue

ment of the core of the Union competences with the CJEU creative reading post-Lisbon Article 19(1) TEU as imposing an obligation on national authorities to ensure that their national courts meet the requirements essential to effective judicial protection, that implies the competence for the EU bodies to proactively interpret the Rule of Law via infringement actions and all available other means including applications for interim measures"[34].

Briefly, regarding this approach, the Rule of Law in the EU essentially means that individuals have the right to judicially challenge the EU measures and national measures which relate to the EU law as well and that the effective judicial review designed to ensure compliance with EU law is seen as the essence of the Rule of Law. This point of view clearly stresses the operative nature of the concept of the Rule of Law. The right to an effective judicial remedy has a formal aspect and a substantive one. An effective remedy is one that, on the one hand, secures the essence of substantive-law fundamental rights, and, on the other, is based on the fair trial concept. Against its backdrop, the Rule of Law is therefore considered maximally broadly, although its formal formula moves to the fore. The interpretation of Article 19 in connection with Article 2 TEU seems to provide grounds, however, for the application of one of the substantive Rule of Law formulas. An effective means for protecting the rights guaranteed by the EU law must secure the very essence of these rights. This, in turn, provides grounds for eliminating national legal norms contravening the EU law in the course of its application. In this sense, therefore, foundations have been laid for formulating the principle of EU law primacy over national law.

Additionally, problems to be interpreted were connected with the relationship between Article 19(1) TEU and Article 267 TFEU. Since Article 19(1) TEU empowers the Court to review whether a national measure affects the independence of most national courts,

---

Trimestrielle des Droits de l'Homme 2020, pp. 122 ff; D. Kochenov, P. Bárd, *The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, "European Yearbook of Constitutional Law", 2019/1, pp. 243 ff.

[34] K.L. Scheppele, D. Kochenov, B. Grabowska-Moroz, *EU Values Are Law, after All*, "Yearbook of European Law", 2020/39, p. 3.

the question arises how Article 19(1) relates, if at all, to Article 267 (i.e. whether the body that made a request for a preliminary ruling could be perceived as a "court or tribunal"). This issue was challenged in *Banco Santander SA. Case*[35].

The competence foundations for legitimating Luxembourg Court actions called for a rather creative interpretation. Incidentally, various doubts were raised as for instance one concerning the competence of the European Commission to simultaneously trigger the procedure defined in Article 7 TEU and actions under Article 258 TFEU. In the opinion of some jurists the subject-matter scope of the two procedures is different: Article 258 TFEU allows to counter any EU law infringements, while Article 7 TEU concerns infringement of a qualified nature[36]. Among solutions proposed in the authoritative juristic literature, there are concepts based on politics rather than law. The so-called 'Rule of Law argument' would comprehensively or even creatively help gather all the elements of the EU legal system that permit some interpretation or decision freedom when entertaining the question whether there is a systematic threat to rule-of-law principles. The 'Rule of Law Argument' rests on the conviction that for an important reason, namely a systematic threat to rule-of-law principles, every element of the EU legal system, which could be related to the problem engendering the systematic threat, ought to be used to the disadvantage of the Member State perpetrating the infringement. The purpose of such an action supposedly is the weakening of the position of this Member State and exerting suitable pressure on it until the problem of rule-of-law infringement is resolved[37]. It is the concept of the Rule of Law Argument that cov-

[35] The Court developed the minimal standards of independence necessary to be considered a court or tribunal for the purposes of Article 267 TFEU. Case C-274/14 Banco de Santander SA, EU:C:2019:802; G. Butler, *Independence of non-judicial bodies and orders for a preliminary reference to the Court of Justice*, "European Law Review", 2020/45, *passim*.

[36] See: P. Bogdanowicz, M. Taborowski, *Brak niezależności sądów krajowych jako uchybienie zobowiązaniu w rozumieniu art. 258 TFUE* (*cz. I*), "Europejski Przegląd Sądowy", 2018/1, pp. 6 ff.

[37] Cf. W. Sadowski, *Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?*, "Common Market Law Review" 2018/55, pp.1020 ff.

ers the repudiation of the principle of mutual recognition of judicial decisions by national courts discussed below. Another, a relatively similar concept which directly challenges the principle of mutual recognition of judicial decisions by the Member States when the Rule of Law is threatened is the so-called horizontal Solange test[38]. It has two levels. The first assumes that cooperation between the Members States will continue as long as all states will observe EU values and fundamental rights. If it turns out that a state systematically infringes the EU values, other Member States should suspend cooperation. The second (institutional) level is the horizontal element and assumes that national courts from other Member States should watch if the EU values are observed by the other States and ascertain a possible infringement[39] .

The impact of the operative interpretation formula adopted in the CJEU case law shall be presented below. Its application to the mutual recognition of judicial decisions in criminal matters clearly leads to a certain priority of the variant of formal justice (in a sense built on slightly dubious foundations) over substantive justice.

B. Grabowska-Moroz, *The systemic implications of the vertical layering of the legal orders in the EU for the practice of the Rule of Law*, Reconnect Papers 2020, *passim*.

[38] See: D. Kochenov, *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed*, "Polish Yearbook of International Law", 2014/XXXIII, pp. 145 ff.

[39] See: S. Platon, *The 'Equivalent Protection Test': From European Union to United Nations, from Solange II to Solange I'*, "European Constitutional Law Review", 2014/10, Issue 2, September, pp. 226 ff.

4. CJEU case law – criterion of independent judicial authority

The CJEU is behind a recent enhancement of European constitutionalism, placing the Rule of Law, a long-established value and principle of the EU law, at the centre of debate[40]. Its judgments and orders have modified the meaning and scope of the Rule of Law principle, especially since 2018. In this respect, the CJEU has significantly expanded the criteria underlying the independence of the judiciary in response to preliminary questions formulated by national courts in connection with the reforms of the judiciary (in Hungary, Portugal, Poland, Malta and Romania)[41] or the initiative of the European Commission. It could be observed that: "the Court of Justice is building, brick-by-brick, a renewed set of principles and standards to help EU institutions and national courts more effectively defend the Rule of Law, primarily in its dimension of judicial independence'[42] and as stated, in the perspective of the growing trend of changes in the justice systems of some of the new Member States: 'In the absence of any forceful, sustained and effective reactions, either at domestic or European levels, the European Court of Justice has essentially been left with no choice but to come to the rescue of national courts and judges"[43] .

In regard to the motives of the Luxembourg Court, it is considered that: "given that the principle of judicial independence stems from the constitutional traditions common to the Member States as one of the founding tenets of any democratic system of governance, it was assumed that national governments would not threaten it.

---

[40] L. Pech, *A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, "European Constitutional Law Review", 2010/6, p. 359.

[41] See: O. Mader, *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, "Hague Journal of the Rule of Law", 2019/11, p. 133.

[42] D. Kochenov, L. Pach, *Respect for the Rule of Law in the Case Law of the European Court of Justice*: A Casebook Overview of Key Judgments since the Portuguese Judges Case SIEPS Report (Stockholm, 2021), p. 6.

[43] D. Kochenov, L. Pach, *Respect for the Rule of Law…*, p. 6.

That principle was "uncontested and incontestable.[…] It was taken as read that national governments would encourage citizens to trust the courts as the ultimate arbiters of any legal dispute, including in situations when a court ruling opposed the political majority of the day […] Recent developments show that this assumption cannot simply be taken for granted"[44]. Significantly, the first step in which the CJEU manifested its will to strengthen the ideas of independence of the judiciary has been *case C-64/16 Associação Sindical dos Juízes Portugueses*, 27 February 2018[45]. The Court established a general obligation for the Member States to guarantee and respect the independence of their national courts and tribunals on the basis of a joint interpretation of Article 19(1) TEU and Articles 2 and 4(3) TEU. In the instant case, the Court has essentially expressly stated the EU principle of effective judicial protection, including the principle of judicial independence, as a supranational standard of review that may be relied on before national courts in any situation where national measures target national judges[46]. As one could observe, the concept of judicial independence has an internal dimension (connected with impartiality) and an external one (connected with the protection against external interventions or pressures). This distinction was followed by the CJEU[47].

As to the CJEU interpretation, it finds general grounds in Article 2 TEU – the European Union is founded on values, such as the Rule of Law, which are common to Member States in a society in which, *inter alia*, justice prevails. In that regard, it should be noted that mutual trust between the Member States is based on the fundamental premise that they share a set of common values on which

[44] K. Lenaerts, *New Horizons for the Rule of Law Within the EU*, "German Law Journal", 2020/21, pp. 29–31; L. Pech, S. Platon, *Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case*, "Common Market Law Review", 2018/55, p. 1836.

[45] EU:C:2018:117.

[46] L. Pech, S. Platon, *Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case* "Common Market Law Review", 2018/55, pp. 1827 ff.; M. Bonelli, M. Claes, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary*, "European Constitutional Law Review", 2018/14, pp. 620 ff.

[47] See: D. Kochenov, L. Pach, *Respect for the Rule of Law…*, pp. 18–19.

the EU is founded. Against this background, the CJEU presents an operative interpretation of Article 19 TEU, advocating that the European Union is a union based on the Rule of Law in which individual parties enjoy the right to challenge before courts the legality of any decision or other national measure, relating to the application of EU law to them. Article 19 TEU, which gives a concrete expression to the value of the Rule of Law enshrined in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties, the law is observed. Member States are therefore obliged, by reason, *inter alia*, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of, and respect for, EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for Member States to establish a system of legal remedies and procedures, ensuring effective judicial review in those fields.

In effect, the principle of effective judicial protection of individuals' rights under the EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of the EU law, stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter. Regarding the landmark decision of the Court – the very existence of effective judicial review designed to ensure compliance with the EU law is of the essence for the Rule of Law. It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of the EU law, form part of its judicial system, in the fields covered by that law, meet the requirements of effective judicial protection. Most importantly, the independence of national courts and tribunals

is essential to the proper working of the EU judicial cooperation system and mutual recognition principle.

What needs to be said is that the CJEU has expanded the scope of application of the second subparagraph of Article 19(1) TEU and the second subparagraph of Article 47 CFR. Article 19(1) TEU refers to the notion of 'fields covered by Union law'. In contrast, Article 51 CFR refers to the idea of implementation of Union law as far as Member States are concerned. For the Court, the substantive scope of application of the obligation to protect judicial independence laid down in the second subparagraph of Article 19(1) TEU is broader than the right to an independent tribunal laid down in the second subparagraph of Article 47 CFR. The second subparagraph of Article 19(1) TEU covers any national court or tribunal which may rule on the application or interpretation of EU law.

Other rulings of the CJEU issued in 2018–2021 have widened and deepened the principle of judicial independence, which actually developed some subcomponents such as the irrevocability and irremovability of judges and the fundamental fair trial protection in respect of disciplinary proceedings against judges[48]. Most were connected with the reforms of Poland's justice system in 2017–2020[49].

The interpretation of the principle of effective judicial remedy, enriched by the concept of a fair trial, in the aspect of independent judiciary was insufficiently robust. Doubts were still raised about

[48] On 18 May 2021 the Grand Chamber of the CJEU issued a judgment in the case of the justice system reform in Rumania. *Asociația Forumul Judecătorilor din România, et al.* C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, EU:C:2021:393. With regard to the rules governing the disciplinary system, the requirement of independence requires, according to settled case-law, that the system provide the necessary safeguards to avoid any risk of it being used as a system of political control of the content of judicial decisions. The CJEU answered a question on the organization of disciplinary systems for judges and prosecutors in the EU Member States. The CJEU ruled that in EU MS there can be no doubt whether the body responsible for investigations and disciplinary actions against judges and prosecutors uses its prerogatives as an instrument of pressure or control.

[49] See: the collection presented (especially in respect to the Polish judicial system reforms) and critical analysis given by: D. Kochenov, L. Pach, *Respect for the Rule of Law…*), *passim*.

the character and profoundness of changes that could be perceived as targeting the essence of judicial independence, and if national sovereignty in this respect mattered.

Hence, the answer to these dilemmas was the promulgation of a new core principle. The CJEU explicitly announced **a principle of non-regression**, based on a joint reading of Articles 2 and 49 TEU, in its judgment of 20 April 2021, *Repubblika* (case C-896/19)[50]. The CJEU answering questions referred for a preliminary ruling by a Maltese court concerning national rules for judges' appointment, once again confirmed the CJEU competence to assess the rules for judges' appointment from the point of view of their compatibility with the EU law. More importantly, for the first time ever, the Court found that a Member State was not allowed to make amendments to its legislation which reduce the level of protection of judge independence and thereby infringe the Rule of Law aspect.

According to this approach, the principle of non-regression means that the EU is composed of countries which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU. After its accession, a Member State cannot adopt any rules undermining judicial independence as this would violate the second subparagraph of Article 19(1) TEU, which prohibits *inter alia* national authorities from adopting new legislation amounting to a regression in the protection of the Rule of Law in the Member State concerned; in particular, the EU guarantees relate to judicial independence. In the judgment itself, the Court did not devote a single word to the question of character and rank of national rules governing the appointment of judges in Malta, which have their origin in the constitution. For the CJEU this would have been an opportunity to confirm the principle of primacy of EU law, according to which the place of the legislation in question in the national legal order is irrelevant when the core values of the UE are

[50] EU:C:2021:311. In 2016, amendments to the Constitution of Malta came into force, under which a commission was created for the appointment of judges, participating in the process of nominating judges of higher courts. Nevertheless, in the absence of a recommendation of the candidate by the committee, in exceptional cases, the Prime Minister may himself propose to the Head of State the appointment of a person for the position of judge.

discussed. Significantly, some scholars advocate that by proclaiming an entirely new 'non-regression' principle in EU law, the Court of Justice achieved huge progress in addressing a well-known lacuna, undermining the EU legal order[51].

Undoubtedly by such an interpretation (principle of non-regression), the CJEU laid down new criteria for evaluating legal orders of the UE Member States and developed an instrument for differentiating the criteria of justice systems assessments. Considering the mechanism for appointing judges in Malta, the CJEU – for the first time in this context – drew attention to Article 49 TEU. According to this provision, any European state which respects the values referred to in Article 2 [TEU] and undertakes to promote them may submit an application for membership in the Union. Thus, the Union consists of countries that have freely and voluntarily adopted the EU values, respect them and committed themselves to support them. The Court concluded that MS could not modify their legislation in such a way as to weaken the protection of the Rule of Law as one of the values referred to in Article 2 TEU – and thus also the requirement of effective judicial protection, mentioned in the second subparagraph of Article 19(1) TEU. Since, as was pointed out, the independence of judges is essential for those requirements and the very value of the Rule of Law, in the opinion of the CJEU, the Member Sates have the obligation even to refrain from adopting provisions which could undermine that independence.

To that one could say that the CJEU is manifestly very active towards national legislative activities, concerning any enactments involving judicial systems. In this respect, some observations can be made. By recognizing that the issue of the constitution of judicial authorities in Member States is a key component of the right to effective remedy, the Court has broadened its powers, limiting the area of state sovereignty and national exclusive competencies guaranteed by the Treaties as well. Admittedly, every judicial system deals not only with matters governed by EU law (as in the case of criminal law), but when courts adjudicating in criminal cases are

[51] D. Kochenov, A. Dimitrovs, *Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice*, VerfBlog, 28 April 2021.

subjected to the conditions construed by the CJEU, the perception of the legality of their functioning is affected, which goes far beyond the sphere of mutual recognition of judicial decisions. The Court's stance makes for the absolute primacy of EU law over any national order. Notwithstanding the fact that the Member States are to share common values, in the light of the Treaties, they also have legislative sovereignty to a certain extent. However, by virtue of the interpretative rulings (judgements and orders) of the CJEU, the scope of the state's sovereignty is subject to limitations. However, it should also be stressed that such 'standardisation' of Member States' legislation on the independence of judicial bodies does not include the demand that the so-called 'old Member States' upgrade the standards of their judicial systems. This omission consequently leads to the widening of inequalities across the EU.

It is uncontroversial that independence of courts and balance between judicial, executive and legislative powers are the major postulates of the formal Rule of Law. However, any attempt at standardisation must assume the existence of a universal model that would have to be followed by all EU Member States and the Luxembourg Court as well. Meanwhile, the vision of standardisation being created by the CJEU is clearly dualistic. Leaving aside whether and to what extent the judicial system reforms in Poland have undermined the standard of judges' independence, resulting in the weakening of the judicial power, it must be firmly asserted that such assessments may not be made from 'outside' and thus they may not ignore the standardisation of other judicial systems in place in the EU. Moreover, some scholars have doubts about the title of the Luxembourg Court to pass judgment on the adequacy of a judicial body independence standard[52]. If only for the formal reason that the CJEU can be hardly considered a body that meets the standards set by itself for there are no sufficient grounds to assume

[52] Cf.H. Rasmussen, *On Law and Policy in the European Court of Justice: Comparative Study in Judicial Policymaking,* 1986, pp. 20 ff.; J.H.H. Weiler, *Epilogue: Judging the Judges – Apology and Critique*, [in:] M. Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of The European Court of Justice*, 2013, pp. 230 ff.

that it is independent of the executive power. Not only its structure and single-instance operation, but especially its composition, made up of judges appointed from among candidates presented by the governments of the EU Member States in a rather opaque procedure, do not meet the criteria the CJEU itself prescribes for others to employ in assessing the judicial bodies of the Members States. The functioning of the Court as the guardian of the Rule of Law gives rise to certain reservations as well. To give just one example: the dismissal of an Advocate-General before the end of her term of office, i.e. cutting the term short contrary to statute[53]. While the efforts undertaken within the EU to develop a uniform standard for administration of justice broadly understood in Member States are fully legitimate from the perspective of strengthening cooperation between judicial bodies on a decentralised level, building mutual trust and, consequently, implementing the principle of mutual recognition of judicial decisions, any uniform standard must apply equally to all the Member States. As is generally known, this postulate is extremely hard to accomplish. The CJEU case law, although it wins recognition of many legal scholars[54] and arouses enthusiasm among a considerable part of political life participants, is certainly characterised by excessive activism (sometimes called as *ultra vires* actions)[55]. In the post-Lisbon period, its role has been clearly overestimated. It is even called the last guardian of the Rule of Law; in the opinion of this author, it is also a 'self-created' guardian (in the sense that it itself redefines its role). In this context, the question arises if this activity by the CJEU may be unequivocally considered lawful. And above all, are there any limits to creativity in redefining

[53] See: D. Kochenov, G. Butler, *The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution*, "The Jean Monnet Working Paper Series", 2020/2, *passim*.

[54] D. Kochenov, P. Bard, *The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU*, "University of Groningen Faculty of Law Research Paper Series", 2019/5, *passim*.

[55] To confront see: J. Cornides, *The European Union: Rule of Law or Rule of Judges?* (2013) EJIL Analysis (blog) available at: http://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/ [accessed on: 1 September 2021].

one's own role? Obviously, there is no body that would be formally entitled to control the CJEU[56]. At most, a certain mutiny against it is fomented – and relatively infrequently for that matter – by the constitutional courts of the Member States.

As mentioned earlier, legal systems, including the judicial systems of the EU Member States, differ. To cooperate in harmony, it is thus necessary to preserve mutual trust; to trust that each system meets acceptable boundary conditions. The creation of – as it may seem – double standards following from the selective review of legislation from the post-accession period (in accordance with the non-regression principle) no doubt strains this trust. Faced with little prospects for a full standardisation of the EU judicial systems, a loss of mutual trust in a long perspective (in terms of the political calendar – over a period longer than one or two parliamentary terms) will lead to an irreversible erosion of cooperation and consequently erosion of the principle of mutual recognition of judicial decisions.

5. Polish judicial system reforms 2017–2020 – selected issues

As mentioned earlier, the evolution of CJEU case law, developing the concept of the Rule of Law in the context of one of its formal guarantee provided by the independence of judicial bodies, in many aspects directly concerned changes to the judicial system made in Poland in 2017–2020[57]. They followed a process too complicated to be outlined here[58]. However, the question of judges' independence will be dealt in this section from the perspective of the initial conditions necessary for mutual recognition of judicial decisions by the EU Member States. Below, only selected aspects of the Polish

[56] Cf. G. Davies, *Legislative control of the European Court of Justice*, "Common Market Law Review", 2014/51, pp. 1579 ff.

[57] See: D. Kochenov, L. Pach, *Respect for the Rule of Law…*, *passim*.

[58] Critical vision presented recently by: L. Pech, P. Wachowiec, D. Mazur, *Poland's Rule of Law Breakdown: A Five Year Assessment of EU's* (*In*)*Action*, "Hague Journal on the Rule of Law", 2021/3, *passim*.

reforms will be mentioned to give background for the CJEU and national court decisions that touch upon the central issue of their mutual recognition in criminal matters and concern its flagship instrument, that is, the EAW (in respect to LM-judgment and L-P judgment discussed below).

The reforms of ordinary courts and the Supreme Court in Poland began in 2017 when, as part of the general reorganization of the Polish judicial system, the Sejm enacted three new laws: the 12 July 2017 Law on Amendments to the Act on the NCJ [National Council of the Judiciary] and Certain Other Statutes (*Ustawa o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw*)[59]; the 12 July 2017 Law on Amendments to the Act on the Organisation of Ordinary Courts and Certain Other Statutes (*Ustawa o zmianie ustawy – Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw*)[60]; and the 20 July 2017 Act on the Supreme Court (*Ustawa o Sądzie Najwyższym*). The Law of the 12 July 2017 on Amendments to the Act on the Organisation of Ordinary Courts was signed by the President of Poland on 24 July 2017 and entered into force on 12 August 2017. On 31 July 2017, the President vetoed the other two Acts: the Act on the Supreme Court and the Amending Act on the NCJ. On 26 September 2017, the President submitted his proposal for amendments to both acts. The bills were passed by the Sejm on 8 December 2017 and by the Senate on 15 December 2017. They were signed by the President on 20 December 2017[61]. The Act on the Supreme Court of 8 December 2017 modified the organization of the Supreme Court, in particular, by creating two new Chambers: the Disciplinary Chamber (*Izba Dyscyplinarna*) and the Chamber of Extraordinary Review and Public Affairs (*Izba Kontroli Nadzwyczajnej i Spraw Publicznych*)[62]. The changes aroused

[59] Journal of Laws of 2018, item 1443.

[60] Journal of Laws of 2018, item 1443.

[61] Journal of Laws of 2018, item 5. The law entered into force on 3 April 2018.

[62] The Disciplinary Chamber of the Supreme Court became competent to rule on cases concerning the employment, social security and retirement of judges of the Supreme Court. The Disciplinary Chamber of the Supreme Court was composed of newly elected judges. The Chamber of Extraordinary Review and Public Affairs became competent to examine extraordinary appeals (*skarga*

a lot of controversy; they also met with a direct reaction from the European institutions, including several orders by the CJEU[63].

nadzwyczajna), electoral protests and protests against the validity of the national referendum, constitutional referendum and confirmation of the validity of elections and referendums, other public law matters, including cases concerning competition, regulation of energy, telecommunications and railway transport and cases in which an appeal has been lodged against a decision of the Chairman of the National Broadcasting Council (*Przewodniczący Krajowej Rady Radiofonii i Telewizji*), as well as complaints against the excessive length of proceedings before ordinary and military courts and the Supreme Court.

[63] The Constitutional Tribunal declared unconstitutional the provisions of the Act on the NCJ regulating the election of its members by judges and introducing an individual term of office of elected members of the NCJ. This judgment was a justification for the legislator to reshape the NCJ. At the same time, the argument was accepted that since some members of the NCJ were elected on the basis of an unconstitutional procedure, the way to heal this body is to shorten their term of office and appoint a new body on the basis of a new procedure. An argumentative error concerning the effects of the Constitutional Tribunal's ruling was also committed earlier (e.g. in relation to the claim that the Constitutional Tribunal itself is incorrectly appointed, as the Tribunal's ruling said that the provisions on the basis of which judges were elected were unconstitutional). Meanwhile, the Tribunal's ruling on the constitutionality of normative acts does not have a direct and automatic impact on the legal consequences of the application of an (unconstitutional) legal provision. It is one thing for the law to be binding, which can be influenced by the Tribunal (the Tribunal has the power to annul a normative act by virtue of its decision), and another for the application of the law mechanism and carrying its effect into the sphere of legal relations in objective reality. A situation where unconstitutional provisions have been applied creates various legal consequences. E.g. when a person is convicted of a crime under a law declared unconstitutional, this person can only apply for the resumption of criminal proceedings in his favour. If the constitutionality of procedural rules is challenged, the resulting legal effects (e.g. defective choices made) are not removed from the legal sphere, unless an appropriate healing procedure is provided for. It usually requires recognition (in a specific procedure) that an unconstitutional legal provision shaped a constitutive rule, the violation of which results in the legal sense in a nullity sanction – that could be described as: 'it was no conventional action'. To put it simply: the action in a legal sense was not performed (with respect to the procedure of appointing judges – because of the breach of a constitutional rule, there is a non-judge and non-existing judgment). However, the ruling of the Constitutional Tribunal itself does not have the power to produce a direct effect within the reality, i.e. the reality created by the application of previously binding legal provisions.

However, two issues had the greatest impact on the assessment of the independence of the Polish justice system in the long term: the creation of the Disciplinary Chamber in the Supreme Court and its legitimacy, as well as the composition of the New-National Council of the Judiciary (NCJ). In this context, it is worth pointing out that the NCJ had and still should have its normative basis in the 1997 Constitution of the Republic of Poland that provides that the NCJ is to safeguard the independence of courts and judges. Article 187(1) governs the composition of the NCJ. It is to be composed of 17 judges (two sitting *ex officio*: First President of the Supreme Court, President of the Supreme Administrative Court and 15 judges elected from among the judges of the Supreme Court, ordinary courts, administrative courts and military courts), 4 deputies chosen by the Sejm and 2 by the Senate, the Minister of Justice, and one person indicated by the President of the Republic of Poland. Under the Act of 12 May 2011 on the National Council of the Judiciary (*Ustawa o Krajowej Radzie Sądownictwa*[64] – in its wording prior to the core amendments of 2017) the NCJ judicial members were to be elected by the relevant assemblies of judges at different levels within the judiciary. Incidentally, the impulse to amend the 2011 Act on the NCJ came from the judgment of the Polish Constitutional Tribunal of 20 June 2017 (K 5/17)[65].

The NCJ Amending Act of 8 December 2017 entered into force on 17 January 2018. It granted to Sejm the competence to elect the

[64] Journal of Laws of 2011, No. 126, item 714.

[65] The Constitutional Tribunal stated that: "The legislator may fairly shape the system of the National Council of the Judiciary, as well as the scope of its operation, mode of work and the method of electing its members. However, the competence of the legislator is not unlimited. Its boundaries are defined by: firstly, the Council's task, (…) secondly, the constitutionally defined composition of the Council: while a law may regulate the manner in which the members of the Council are elected, it may not modify its personal substrate, as defined in Article 187(1) of the Constitution; shaping the composition of the National Council of the Judiciary in the statue may not violate the content of the Constitution, nor introduce additional, non-existent, criteria in the Constitution that would limit the passive electoral right of a given group, referred to in Article 187(1)(2) and (3) of the Constitution; thirdly, the requirement of term of office of elected members of the Council must be uniform.

judicial members of the NCJ for a joint four-year term of office. The terms of office of the NCJ judicial members who had been elected under the previous Act were discontinued at the beginning of the term of office of the new NCJ members. The election of new NCJ judicial members requires a majority of 3/5 of votes cast by at least half of the members of the Sejm[66]. The issue of shortening the term of office of the former NCJ members and the doubts about the election of the new NCJ had consequences that undermined the legality of the election of judges of the Polish Supreme Court and common courts as well. The turning point in this regard has occurred recently: in 2021 the CJEU and ECrHR have expressly held that the defectiveness of the NCJ affects the whole appointment procedure (cases discussed in the next section of this chapter).

With regard to the issue of the Disciplinary Chamber of the Supreme Court, an important role was played by CJEU rulings and orders rendered in 2019–2021[67]. The Luxembourg Court in the judgment of 19 November 2019 (Joined Cases C-585/18, C-624/18, C-625/18 – AK and the others case)[68] held that it was for the national court, i.e. the Supreme Court, to examine whether the Disciplinary Chamber of the Supreme Court was an impartial tribunal. The CJEU

[66] The candidates for the NCJ have to present a list of support from either 2,000 citizens or 25 judges. In the international context, it was mentioned that on 17 September 2018, the Extraordinary General Assembly of the European Network of Councils for the Judiciary (ENCJ) decided to suspend the membership of the Polish NCJ. The General Assembly found that the NCJ no longer met the requirements of being independent from the executive and the legislative branches in a manner which ensured the independence of the Polish judiciary. One could mention in this context the ECrHR Case *Grzęda v. Poland* (application no. 43572/18) brought by Jan Grzęda – a judge of the Supreme Administrative Court elected to the NCJ in 2016. His term of office should have lasted four years – the term of office of NCJ members is specified in the Constitution of the Republic of Poland (Article 187(3)). The applicant alleged that Poland had arbitrarily interrupted the mandate of a member of the NCJ and that it was not possible to challenge that measure in court, i.e. that this had infringed his right to have his case heard under the European Convention on Human Rights (Article 6(1) – ECHR) and his right to an effective remedy (Article 13 of the ECHR. A similar case is i.e. Żurek *v. Poland* (application No. 39650/18).

[67] See: D. Kochenov, L. Pach, *Respect for the Rule of Law…, passim*.

[68] EU:C:2019:982.

clarified the scope of requirements of independence and impartiality in the context of the establishment of the Disciplinary Chamber so that the national court itself could rule on the matter.

Despite this important and challenging statement by the CJEU, the reform of the Polish justice system was continued. On 19 December 2019, the Law on Amendments to the Act on the Organisation of Ordinary Courts, the Supreme Court and Specific Other Statutes was adopted and entered into force on 14 February 2020. Pejoratively called 'muzzle law', it laid down some rules on disciplinary proceeding[69]. The critical responses to the open formula of the judgment of 19 November 2019 included the reaction of the Polish Supreme Court (discussed below) and the reaction of the legislator to extend the disciplinary responsibility of judges and prosecutors by stipulating that – as the legislator declared – judges and prosecutors, in order to strengthen their independence and apoliticism, had to disclose: "acts or omissions likely to prevent or significantly impede the functioning of the judicial authority or acts challenging the existence of a professional relationship or the effectiveness of the appointment of another judge". This provision underpinned the pejorative denotation of this law as 'muzzle law'. Furthermore, it expressly prohibited questioning, on the basis of objections to appointment of a procedural nature, the legal status of a judge and his/her independence.

Even before the 'muzzle law' entered into force, the Supreme Court issued the first decision in response to the CJEU judgment of 19 Nov. 2019 (*case AK and the others*). In the judgment of 5 December 2019, the Supreme Court held (case no. III PO 7/180) that the NCJ was not an authority that was impartial or independent of legislative and executive branches of power and the Disciplinary Chamber of the Supreme Court could not be considered a court within the meaning of domestic law and the fair trail concept.

[69] Critical reviews have been presented by *inter alia*: M. Matczak, *The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defence* "Hague Journal on the Rule of Law", 2020/12, pp. 421 ff.; K. Gajda-Roszczynialska, K. Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, "Hague Journal on the Rule of Law", 2020/12, pp. 451 ff.

However, a dispute between the new old chambers of the Supreme Court arose on this issue as well. As a matter of fact, in the resolution of 8 January 2020, the Chamber of Extraordinary Review and Public Affairs of the Supreme Court interpreted the consequences of the CJEU judgment (I NOZP 3/19) as well as follows: the independence of the NCJ was to be examined only if raised on appeal and the appellant showed that the lack of independence of the NCJ had adversely affected the resolution adopted in his or her case. In the face of this inconsistency of opinion among the Supreme Court Chambers, a test of strength was performed, which resulted in a resolution of 23 January 2020 (BSA I – 4110 – 1/2020) of the three (old) joined Chambers of the Supreme Court (without contested Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs)[70], the adoption of which was preceded by the entry into force of the 'muzzle law'. The court agreed with the assessment given in the judgment of 5 December 2019 that the NCJ was not an independent and impartial body and that this had led to defects in the procedures for the appointment of judges carried out pursuant to the NCJ's recommendations. With respect to the Disciplinary Chamber, the Supreme Court took into account its organisation, structure and appointment procedure and concluded that it structurally failed to fulfil the criteria of an independent court. Accordingly, judgments rendered by the Disciplinary Chamber were not judgments given by a duly appointed court. In consequence, according to the resolution, court benches, including Supreme Court judges appointed in the procedure involving the NCJ, were unduly composed within the meaning of the relevant provisions of the domestic law, i.e. different in civil law and in criminal law. As a consequence, the Supreme Court did not nullify all judgments issued by judges appointed or promoted with the participation of the neo-NCJ, but upheld the judgments of ordinary courts issued up to January 23rd. While referring to the judgments of the ordinary courts passed after 23 January 2020 the Supreme Court decided that they would not be automatically annulled, but would

[70] It is necessary to mention that there were 6 dissenting opinions to this resolution.

be re-examined at the request of a party. In each specific case, it is necessary to assess if the procedure for choosing the judge who issued the decision in the first instance justifies the presumption that he/she is not an independent judge under Article 47 CFR and Article 6 ECHR. Whereas all judgments issued by the Disciplinary Chamber of the Supreme Court, regardless of the moment they were issued, were considered void as a consequence of denying the status of a judicial authority to that Chamber.

As mentioned earlier, the pressure of the CJEU on Poland in relation to both Disciplinary Chamber and new NCJ escalated in 2021[71]. On July 15th, the Grand Chamber of the CJEU (case C791/19)[72] held that the system of disciplinary responsibility of judges was incompatible with the EU law, and the Disciplinary Chamber "does not fully guarantee independence and impartiality, and in particular is not protected judiciary from direct or indirect influence of the Polish legislative and executive authorities". In the Court's opinion, the Republic of Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court, which is responsible for reviewing decisions issued in disciplinary proceedings against judges. Specifically, Poland allowed the content of judicial decisions to be classified as a disciplinary offence, involving judges of ordinary courts, it conferred on the President of the Disciplinary Chamber discretionary power to designate the disciplinary tribunal with first-instance jurisdiction in cases concerning judges of ordinary courts and, therefore, failed to guarantee that disciplinary cases be heard by a tribunal 'established by law' and it failed to "[…]guarantee that disciplinary cases against judges of ordinary courts be examined within a reasonable time". Moreover, by providing that actions relating to the appointment of defence counsel and the taking up of defence by that counsel do not have a suspensory effect on the course of disciplinary proceedings,

[71] On 14 July 2021, the CJEU, just before the judgment of the domestic Constitutional Tribunal, issued another interim measure, by which it suspended the operation of the contested Disciplinary Chamber of the Supreme Court.

[72] EU:C:2021:596.

Poland defaulted thereon as well. By providing that a disciplinary tribunal is to conduct proceedings despite the justified absence of the notified accused judge or his or her defence counsel, Poland failed to guarantee respect for the right of defence of accused judges of ordinary courts. Additionally, the Court held that Poland failed to fulfil its obligations under Article 267 TFEU, specifically its second and third subparagraphs, by restricting the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice of the European Union. The restriction took the form of possible disciplinary proceedings against judges exercising this right.

At precisely the same time, the Polish Constitutional Tribunal pronounced the judgment of 14 July 2021 (P 7/20) and argued that Article 4(3) TEU in conjunction with Article 279 TFEU, to the extent in which the CJEU, acting *ultra vires,* imposes obligations on the Republic of Poland as a Member State of the European Union by issuing interim measures, relating to the system and jurisdiction of Polish courts and the procedure before Polish courts, are inconsistent with Article 2, Article 7, Article 8(1) and Article 90(1) in conjunction with Article 4(1) of the Constitution of the Republic of Poland and in this respect are not covered by the principles of priority and direct application set out in Article 91(1)–(3) of the Polish Constitution.

Previously in March, the CJEU in its judgment of 2 March 2021 (*Case C-824/18 A.B., C.D., E.F., G.H., I.J. v. National Council of the Judiciary, shortly AB and the others*)[73], held that Article 267 TFEU and Article 4(3) TEU had to be interpreted as precluding such amendments where it is apparent – a matter which is for the referring court to assess on the basis of all relevant factors – that those amendments have had the specific effects of preventing the Court from ruling on questions referred for a preliminary ruling such as those put to it by that court and of precluding any possibility of a national court repeating in the future questions similar to those questions; that the second subparagraph of Article 19(1) TEU had to be interpreted as precluding such amendments where it is apparent – a matter which is for the referring court to assess on the basis

[73] EU:C:2021:153.

of all relevant factors – that those amendments are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges appointed by the President of the Republic of Poland, pursuant to NCJ recommendations, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests laid before them. Thus, such judges may not be seen as independent or impartial with the consequence of prejudicing the trust which justice in a democratic society ruled by law must inspire in subjects of the law. In the Court's opinion, where it is proven that those articles have been infringed, the principle of primacy of the EU law must be interpreted as requiring the referring court to disapply the amendments at issue, whether they are of a legislative or constitutional origin, and, consequently, to continue to assume the jurisdiction previously vested in it to hear disputes referred to it before those amendments were made. As follow-up decisions to the judgment in the case *AB and the others*, the Polish Supreme Administrative Court (SAC) made several significant rulings, i.e. five decisions of 6 May 2021[74]. The SAC, after considering appeals against the NCJ resolution of 28 August 2018, No. 330/2018, regarding the presentation (failure to present) applications for appointment to the office of a judge of the Supreme Court in the Civil Chamber (file no. II GOK 2/18, II GOK 3/18 and II GOK 5/18), as well as the NCJ resolution of 24 August 2018, No. 318/2018 regarding the presentation (failure to present) applications for appointment to the office of a judge of the Supreme Court in the Criminal Chamber (file no. II GOK 6/18 and II GOK 7/18), by judgments of 6 May 2021, overturned the contested resolutions. On 13 May 2021, the SAC heard another appeal against the NCJ resolution of 28 August 2018, No. 330/2018 regarding the presentation (failure to present) of an application for appointment to the office of a judge of the Supreme Court in the Civil Chamber (file no. II GOK 4/18) and overturned point 2 of the contested resolution in relation to the appellant. Finally,

[74] II GOK 2/18; II GOK 3/18 – link II GOK 5/18 – link II GOK 6/18 – link II GOK 7/18 – link) and 1 judgment of 13 May 2021 (II GOK 4/18) [accessed on: 24 September 2021].

in the same manner, on 21 September 2021, the SAC ruled on the repeal against the NCJ resolution regarding the presentation (failure to present) of an application for appointment to the office of a judge in the Supreme Court in the Chamber of Extraordinary Control and Public Affairs (file no. II GOK 8/18; II GOK 10/18, II GOK 11/18, II GOK 12/18, II GOK 13/18, II GOK 14/18)[75].

The Luxembourg Court's successive judgment was even tougher. Rendered on 6 October 2021 (case-487/19)[76], it coincided, presumably intentionally, with the decision of the Polish Constitutional Tribunal of 7 October 2021 (K 3/21), finding the TEU to partially contravene the Polish Constitution[77]. In the judgment of 6 October

[75] See: www.nsa.gov.pl [accessed on: 24 September 2021].

[76] EU:C: 2021: 798.

[77] Trybunał Konstytucyjny: Ocena zgodności z Konstytucją RP wybranych przepisów Traktatu o Unii Europejskiej (trybunal.gov.pl) [accessed on: 7 October 2021]. The Tribunal issued an interpretative ruling in which it declared Article 1(1) (2) in conjunction with Article 4 (TEU) incompatible with certain constitutional models in so far as the European Union, established by equal and sovereign states, creating an 'ever closer union between the peoples of Europe', whose integration – taking place on the basis of EU law and through its interpretation by the CJEU – reaches a 'new stage', in which: (a) the bodies of the European Union act outside the limits of the competences recognized by the Treaties, (b) the Constitution is not the supreme law of the Republic of Poland with priority of application, (c) the Republic of Poland cannot function as a sovereign and democratic state. It also considered the second subparagraph of Article 19(1) TEU to be inadequate to constitutional models in so far as, in order to ensure effective legal protection in the fields covered by EU law, it confers on national courts the power to: (a) disregard provisions of the Constitution in the adjudication process, (b) adjudicate on the basis of provisions which are not in force, which have been repealed by the Sejm or which the Constitutional Tribunal has declared unconstitutional; in addition, the Constitutional Tribunal has held that the second subparagraph of Article 19(1) and Article 2 TEU are incompatible with the constitutional provisions in so far as, in order to ensure effective legal protection in the areas covered by EU law and to ensure judicial independence, they confer on national courts the power to: (a) review the legality of the procedure for appointing judges, including the examination of the lawfulness of the act of appointment of a judge by the President of the Republic of Poland, (b) review the legality of the NCJ containing a request to the President for the appointment of a judge, (c) ascertain the defectiveness of the process of appointing a judge and, as a result, refuse to recognise as a judge a person appointed to a judicial office in accordance with Article 179 of the Polish Constitution.

2021, the CJEU held that the second subparagraph of Article 19(1) TEU and the principle of the primacy of the EU law must be interpreted as meaning that a national court seized of an application for recusal, filed in connection to an appeal by which a judge holding office in a court that is authorised to interpret and apply the EU law challenges a decision to transfer him/her without his/her consent, must – where such a consequence is essential in view of the procedural situation at issue in order to ensure the primacy of EU law – declare the order null and void by which a body, ruling at last instance and comprising a single judge, has dismissed that appeal, if it follows from all the conditions and circumstances that the process of the appointment of that single judge has clearly breached fundamental rules which form an integral part of the establishment and functioning of the judicial system concerned. Moreover, the integrity of the outcome of that procedure is undermined, giving rise to reasonable doubt in the minds of individuals as to the independence and impartiality of the judge concerned. Therefore, the order may not be regarded as being made by an independent and impartial tribunal previously established by law, within the meaning of the second subparagraph of Article 19(1) TEU.

The analysis of the judgment, similar to earlier March and July judgments, reveals a sharper tone and greater conclusiveness. In the Court's opinion, specific defects infringing judges' independence or non-transferability are so grave procedural infringements so as to render a judgment null and void. Thus, it can be acknowledged that in the Court's opinion these are constitutive rules, or rules that in a legal sense determine the existence and validity of a conventional action. This opinion is inconsistent with the manner that constitutive rules, or, more generally, rules for the validity of legal actions have been viewed so far. It has been previously believed that such rules are merely of a 'boundary' nature and that their status depends on whether a given system provides for a sanction of nullity or a disqualification procedure[78].

[78] See: B. Janusz-Pohl, *Formalizacja i konwencjonalizacja jako instrumenty czynności karnoprocesowych w prawie polskim,* Poznań 2017, pp. 47 ff.; B. Janusz-Pohl, *Definitions and Typologies*…, pp. 41 ff.

The ever harsher tone adopted by the CJEU and no concessions on the part of the Polish executive branch as well a confrontational stance of the Polish Constitutional Tribunal, supposedly defending Polish constitutional identity, are inconducive to further cooperation in criminal matters. Moreover, these unfavourable circumstances make the pessimistic prospect of suspending the principle of mutual recognition of judicial decisions loom ever larger. The suspension may affect all instruments of judicial cooperation, not only the EAW execution. Without a will to compromise and a sober look ahead, the formula of cooperation between the judicial bodies of EU Member States making use of dedicated instruments will be exhausted.

6. Mutual Recognition of Judicial Decisions – example of the EAW execution refusals with respect to the principle of independence of the judiciary: LM-judgment of the CJEU

Mutual recognition of judicial decisions in criminal matters is, since the Lisbon Treaty, the most important principle within the area of freedom, security and justice (AFSJ). Its main objective is the effectiveness and recognition of foreign judicial decisions in the same way as national ones[79]. The contribution of this principle is that judicial decisions move freely within the AFSJ. The legislative competencies on cooperation in criminal matters "shall be based on the principle of mutual recognition of judgments and judicial decisions" (art. 82(1) TFEU) and the Union is to ensure a high level of security through different measures combating crime and also through cooperation based on mutual recognition (art. 67(3) TFEU). In order to prevent criminals from escaping prosecution and punishment by the mere use of their right to free movement, powers have been conferred upon the EU to enhance cross-border cooperation by implementing the principle of mutual recognition, in which the EAW mechanism is the primary instrument.

[79] See: A. Klip, *European Criminal Law, an Interpretative Approach. Intersentia*, Cambridge–Antwerp–Portland 2016, pp. 354 ff.

Mutual recognition, however, may be limited by the rules and principles of the EU. Crucial in this respect is Article 82 TFEU, laying down principal conditions for mutual recognition: rules and procedures for ensuring mutual recognition throughout the EU of all forms of judgments and judicial decisions. Furthermore, Article 82(2) says that minimum rules for facilitating mutual recognition are to be established. The EU legislator further limits mutual recognition, on the one hand, by the principles of proportionality (Article 5 TEU) and subsidiarity (Articles 5 and 6(3) TEU), and on the other hand, by the principles of loyal cooperation between the Member States and solidarity[80]. The latter restricts Member States when implementing and applying mutual recognition instruments. In effect, Member States should cooperate loyally and include the objectives of the EU legislator in relation to instruments of mutual recognition. The last element serves to limit the excessive use of grounds for refusal[81].

In the CJEU's opinion, the principle of mutual recognition, which underpins the Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States[82], also means that, in accordance with Article 1(2) of the Framework Decision, Member States are in principle obliged to act upon an EAW. They must or may refuse to execute a warrant only in the cases listed in Articles 3, 4, 4a and 5[83]. So, in effect, the fact that judicial cooperation in criminal matters in the EU is based on the principles of mutual trust and recognition implies

[80] Cf. A. Suominem, *Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts*, "European Criminal Law Review", December 2014, pp. 218 ff.

[81] *Ibidem*, pp. 218 ff.

[82] *O.J.* L 190, 18.7.2002, 1.

[83] Case C-388/08 PPU Leymann and Pustovarov; Case C-261/09 Mantello. Case C-396/11 Radu EU: C:2012:648 Case C-399/11 Melloni (EU:C:2013:107) Eurojust Case law by the Court of Justice of the EU on the European Arrest Warrant (October 2018), available at: http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/casedsdlawanalysis/Case%20Law%20by%20the%20Court%20of%20Justice%20of%20the%20European%20Union%20on%20the% 20European%20Arrest%20Warrant%20%28October%202018%29/2018-10_EAW-case-law_EN.pdf [accessed on: 1 September 2021].

a general presumption that all the EU Member States comply with the fundamental rights recognised by the EU law. The Court indicated that invoking grounds for refusal outside of those listed in the relevant EU instrument was acceptable only upon the condition that "exceptional circumstances" occurred, showing disregard for fundamental rights. These encompass general fundamental rights specified in Article 1(3) FD EAW, and others listed in Article 4 CFR and Article 47(2) CFR. Their breach is enough for any executing authority to refrain from executing an EAW[84].

For the purpose of this analysis, it is essential to mention that one of the limits of mutual recognition is related to the preservation of the national identities of Member States. Article 4(2) TEU says that the EU is to respect Member States' "national identities, inherent in their fundamental structures, political and constitutional", and the state functions in "maintaining law and order and safeguarding national security". National security remains the responsibility of each Member State and limits to mutual recognition are justified by the core of state sovereignty and constitutional identities[85].

More controversially, the issue of the limitation of the mutual recognition principle is linked with "the human rights exception/clause". The question to answer is whether or to what extent a request for the execution of an EAW can be denied by the authorities of the requested State if certain fundamental rights standards as the fair trial standards (the right to be tried before an independent and impartial judge, right to be heard, right to be present at trial, right not to incriminate oneself, right to an effective legal remedy, right to access to legal counsel) are not upheld in the requesting State[86]. Is it allowed for a judicial authority responsible for executing an EAW, to refuse its execution if fundamental rights are not guaranteed in

[84] See: M. Wendel, *Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM*, "European Constitutional Law Review", 2019/15, pp. 17 ff.

[85] This approach is presented by A. Suominem, *Limits of mutual recognition*…, p. 222.

[86] See more: T. Wahl, *CJEU Strives to Balance Human Rights and Mutual Recognition*, "Eucrim", 2016/1, pp. 16 ff. T. Wahl, *CJEU: Refusal of EAW in Case of Fair Trial Infringements Possible as Exception*, News. Eucrim 2018, *passim*.

the issuing state? This question was posed by the Higher Regional Court of Bremen for a preliminary ruling by the CJEU (Joint Cases C-404/15 and C-659/15 – Aranyosi and Căldăraru). The *Aranyosi and Căldăraru case*[87] involved acceptable fundamental rights refusals of EAW due to infringements of the absolute prohibition of torture and inhuman or degrading treatment or punishment (due to poor detention conditions)[88]. So, in fact, with the *Aranyosi* case, the CJEU has changed the previous line of interpretation taken in the *Melloni* case[89], in which it held that the FD EAW enumerated grounds for refusal and said that executing judicial authorities might postpone surrender to another Member State in case there is a risk of being subjected to prison conditions violating Article 4 Charter (prohibition of torture). As a result, the prevention of absolute rights violations has been seen as a legitimate reason to undermine mutual recognition[90]. In *Aranyosi*[91], the Court held for the first time in the mutual recognition era that the assumed level of trust was rebuttable in exceptional cases. What must be noted is that recital 10 of the FD EAW says that the procedure of execution of an EAW may be suspended only in the case of a serious and persistent breach by

[87] EU: C:2016:198. See: S. Gaspar-Szilagyi, *Joined Cases Aranyosi and Caldararu: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant*, "European Journal of Crime Criminal Law and Criminal Justice", 2016/2–3, pp. 197 ff.

[88] T. Wahl, *Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe*, "Eucrim", 2020/4, pp. 321 ff.

[89] Initially, the CJEU gave the same answer. It confirmed that the execution of an EAW may only be refused on the grounds mentioned in the FD EAW. In the *Radu* case, the CJEU held that a breach of a fundamental right is not included in the FD EAW and thus could not justify non-execution. The same stance was upheld in *Melloni* case. See: V. Mitsilegas, *The Symbiotic Relationship between Mutual trust and Fundamental Rights in Europe's Area of Criminal Justice*, "New Journal of European Criminal Law", 2015/7, pp. 457–481.

[90] It may lead to double standards or dual criminal justice systems. See: M. João Costa, *Extradition Law. Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, "European Criminal Justice Series", Brill Leiden 2020, pp. 567 ff.

[91] See: G. Anagnostaras, *Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu*, "Common Market Law Review", 2016/53, pp. 1675 ff.

Member States of the principles referred to in Article 2 TEU when the final step of the procedure provided for in Article 7 TEU is reached[92]. The CJEU has maintained that the aim of the FD EAW is to improve the effectiveness of criminal processes. By establishing a simplified and more effective system for the surrender of convicted persons or suspects, the area of freedom, security, and justice is created.

Such an impact was invoked by the CJEU later in the LM judgment – crucial for this study – when it devised a double-check test for the potential infringements of the CFR. The CJEU, in the judgment of 25 July 2018 (case Celmer/ LM case)[93] reiterated the cornerstones of its previous case law on the meaning of fundamental rights in the context of grounds for the refusal of EAW execution by improving a double-step-check test[94]. The LM judgment can be considered as a new milestone leading to a turning point in the mutual recognition of judicial decisions. It has been issued upon a request for a preliminary ruling from an Irish court. The CJEU indicated explicitly the circumstances in which the executing authority was allowed to make an exception to the principle of mutual recognition (if there is a real risk of a breach of the fundamental right of the person sought under the EAW to independent court or tribunal and as a consequence to a fair trial). Still, the final decision to do so was placed in the hands of the national executing body.

A national executing body, when a potential breach of the right to a fair trial arises, must perform a double-step test[95].

---

[92] The CJEU 5 April 2016, Joined Cases C-404/15 and C-659/15 ppu, in proceedings relating to the execution of European arrest warrants issued in respect of Pál Aranyosi (C-404/15), Robert Căldăraru (C-659/15).

[93] The case Celmer – concerning *Artur Celemer* (Polish citizen) in the EAW procedure for conducting criminal prosecutions of trafficking in narcotics and psychotropic substances.

[94] See: S. Mirandola, *European arrest warrant and judicial independence in Poland: where can mutual trust end?* (*Opinion of the AG in C-216/18 PPU L.M.*), *passim* [accessed on: 1 September 2021].

[95] See: F-G. Ruiz Yamuza, *LM case, a new horizon in shielding fundamental rights within cooperation based on mutual recognition. Flying in the coffin corner*, "ERA Forum", 2020/20, pp. 371 ff.

a) The first step of assessment, *in abstracto,* is based on objective and properly updated material concerning the operation of the justice system in the issuing Member State. During this step, the executing authority must assess whether there is a real risk of the fundamental right to a fair trial being breached that is connected to a lack of independence of the courts, on account of systematic or generalised deficiencies – (Art. 47(2) CFR). According to the Court interpretation, the judicial authority must function autonomously without being subject to any hierarchical constraint or subordination to any other body, thus being protected against external interventions or pressure. The judicial authority must be impartial and objective as well. To guarantee the independence of judicial power, the CJEU requires that the disciplinary system for judges comprise safeguards, preventing any potential risk of political control over adjudication.
b) The second step of assessment – *in concreto* – occurs when the executing authority must specifically and accurately assess whether there are substantial grounds for believing that the requested suspect will run a real risk of the essence of his fundamental right to a fair trial being breached. In the *Aranyosi & Căldăraru* case, the CJEU only required that the presence of an individualised risk be ascertained, whereas the test in the *LM* case required that all the individual circumstances of the case be considered, adding two sub-steps whereby it should be assessed: (a) whether the risk ascertained in the first step affects the court having jurisdiction over the criminal proceedings against the requested person; b) whether the risk exists in the case of the requested person, having regard to his/her personal situation, as well as the nature of the crime[96].

As set out in *Aranyosi & Căldăraru,* the CJEU further established the necessity of dialogue between the executing State and the issuing State. Pursuant to Article 15(2) FD EAW, the executing

[96] See: T. Wahl, *Refusal of European Arrest…*, *loc. cit.*

judicial authority must request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk. The issuing authority should provide objective material on any changes to the safeguards of judicial independence that could be linked to the personal situation of the individual concerned. Importantly, the clue for an assessment is changed to the safeguards of judicial independence which are evaluated from the perspective of the previous standard of protection in the requested State. The CJEU has created a dualistic optic to view the independence of judicial power. The key was the modification made by the EU Member States concerned, not the nature of changes compared to the other judicial systems of EU Member States (While on the general issue of judicial independence as a formal aspect of the Rule of Law principle, *the Maltese Judges case* is an example of a clear proclamation of the principle of non-regression. Indeed, we could observe the very first version of this principle sooner, i.e. in the *LM- case*).

At the same time, the CJEU, on the legitimate assumption that the independence of the judiciary is the cornerstone of the Rule of Law principle in a formal sense, adopts (1) on the one hand, the idea of the particularity of the judicial systems of EU Member States and therefore the different standards for the formation of judicial powers and, (2) on the other hand, the universality of the Rule of Law concept in the EU. As a result, Member States may experience disparities in standards (relating to the independence of the judiciary) set by the CJEU and, even more Member States are not allowed to make post-accession changes to their own judicial systems without the approval of the EU bodies.

The CJEU has explicitly admitted that also the rights that are not absolute in nature are capable of limiting the operativeness of mutual recognition. According to the Court's argumentation: "Article 1(3) of Framework Decision 2002/584 must be interpreted as meaning that, where the executing judicial authority, called upon to decide whether a person in respect of whom a EAW has been issued for the purposes of conducting a criminal prosecution is to be surrendered, has material, such as that set out in a reasoned proposal of the Commission adopted pursuant to Article 7(1) TEU, indicating that

there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter, on account of systemic or generalized deficiencies so far as concerns the independence of the issuing Member State's judiciary, that authority must determine, specifically and precisely, whether, having regard to his personal situation, as well as to the nature of the offence for which he is being prosecuted and the factual context that form the basis of the EAW, and in the light of the information provided by the issuing Member State pursuant to Article 15(2) of the FD EAW, there are substantial grounds for believing that that person will run such a risk if he is surrendered to that State". Clearly, the FD EAW anticipated a possible conflict between general rule-of-law deficiencies in an EU country and the application of the EAW. In Recital 10 of the FD EAW, the sanctioning mechanism from Article 7 TEU could be used if an EU country is at risk of breaching the bloc's core values, but only the second step from Article 7 should affect the EAW procedure. Generally, the procedure can be suspended if the European Council determines a *serious and persistent breach* by a Member State of the principles set out in Article 2 TEU with its consequences set out in Article 7(2) TEU.

7. Follow-Up to the *LM* Judgment by National Courts and *L-P* – Judgment of the CJEU

The judgment in the LM case seems to have been variously received in the jurisdictions of the EU Member States. In some countries, it did not cause any reaction, while several others, including Germany and the Netherlands, have been advocating a gradual freeze in cooperation in criminal matters with Poland. The flagship examples of follow-up decisions were those issued by the Irish courts (in pursuance of the preliminary ruling in the *LM* case made at the request of an Irish court), Welsh, English, Danish and German courts as well, with the most hush reactions of the last-mentioned ones[97].

[97] Similar statement as: T. Wahl, *Refusal of European Arrest Warrants…*, *loc. cit.*

In Ireland, the Irish High Court (which, as the referring court, was the main addressee of the LM judgment) rendered its follow-up decision on the surrender of *Celmer* on 19 November 2018[98]. The judgment of the High Court of Justice of England and Wales in the extradition proceedings of *Lis, Lange and Chmielewski* was given on 31 October 2018[99]. This court resumed extradition proceedings in which the defence moved that the defendant's surrender to Poland be discontinued in the light of the preliminary ruling made by the Irish court[100]. In Scotland, a fundamental decision was taken by the Sheriff Court of Lothian and Borders in Edinburgh in the case of *Maciejec*[101], who was also sought by Polish authorities employing an EAW. The requested persons referred to changes at ordinary courts, which had been brought about by the judicial reforms, and to the disciplinary power of the Polish Minister of Justice over the presidents of courts. The requested persons referred to statements against them made by Polish justice officials in the media; evidence given by witnesses (by Polish judges, NGO lawyers) was in the defendants' favour in voicing serious concerns over the independence of Polish judges. But then again their testimonies pointed out that judges tried to perform their obligations to the best of their ability and administer justice impartially and free from pressure. The Court did not consider the position of the representatives of the Ministry of Justice and ministerial experts to be objective. The path taken by the CJEU in the LM case is to draw generalised conclusions on the universalised concept of the Rule of Law (via the fair trial concept) on the basis of a country-specific assessment of judiciary reforms (without comparison with the judicial systems in other EU MS). This can lead to paradoxes when the standard set by the *LM* case is followed by national courts in the context of EAW procedures, in particular, when the judicial system of the executing Member State is similar to the contested one (of the issuing MS).

---

98 2018: EWHC: 2018.

99 2018: EWHC: 2848.

100 See more: N. Šubic, *Executing a European Arrest Warrant in the Middle of the Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality* (*LM/Celmer*), "Irish Journal of European Law", 2018/21, pp. 97 ff.

101 2019: SC EDIN:37.

The furthest-reaching consequences resulted from German and Dutch court follow-up decisions.

There is no central authority in Germany for extradition cases; several decisions have been handed down by various Higher Regional Courts (*Oberlandesgerichte*). Decisions in Germany that could be considered post-*LM* judgments are: HRC of Brandenburg, Decision of 18 August 2020 – 2 AR 16/20; HRC of Berlin, Decision of 3 April 2020 – (4) 151 AuslA 201/19 (234/19); HRC of Düsseldorf, Decision of 14 June 2019 – 4 AR 38/19; HRC of Cologne, Decision of 15 January 2019 – 6 AuslA 115/18–80; HRC of Bremen, Decision of 7 September 2018 – 1 Ausl. A 31/18. The following discussion shall concern decisions by the Higher Regional Court of Karlsruhe[102]. A breakthrough was made by the HRC of Karlsruhe in the decisions of 17 February 2020, Ausl 301 AR 156/19[103] and 27 November 2020, Ausl 301 AR 104/19, BeckRS 2020, 36266 refusing a surrender. The HRC of Karlsruhe, as a EU national court, denied extradition for the first time because of possible fair trial infringements in another EU country. Until then courts in Europe consistently refused to accept non-extradition arguments because the conditions set (regarding the second step of the check-test) by the CJEU in the *LM case* could not be met. Courts were not convinced that the requested person would run a real risk of a fair trial infringement in Poland. The HRC of Karlsruhe justified its change of opinion by the 'gag law' that made such risk real. In the court's opinion, it was no longer an abstract danger to the requested person because the new disciplinary regime had impacted the entire judiciary, including even judges of competent criminal courts of the first instance.

Following the path taken by the CJEU in the *LM* judgment in which judicial independence formed part of the right to a fair trial, the HRC of Karlsruhe developed a further element of the

[102] Cf. T. Wahl, *Refusal of European Arrest Warrants…*, *loc. cit.*

[103] Cf. Comments by A. Oehmichen available at https://www.linkedin.com/pulse/after-cjeus-decision-lm-25072018-c21618-ppu-german-court-oehmichen?trk=portfolio_article-card_title. HRC of Karlsruhe, Decision of 17 February 2020, Ausl 301 AR 156/19. This decision is summarised in English by T. Wahl, 'Fair Trial Concerns: German Court Suspends Execution of Polish EAW', News Eurcrime, 2020, *passim*.

"independent judicial body concept". The Court had doubts as to the independence and impartiality of the new Disciplinary Chamber at the Polish Supreme Court and was concerned by the other (pending) infringement actions against the reform that had been referred to the CJEU by the European Commission. One involved the 'gag law' adopted in Poland in December 2019. By its decision of 17 February 2020, the HRC of Karlsruhe set aside an extradition arrest warrant against a Polish national who was to be surrendered to Poland via an EAW issued for the purpose of criminal prosecution. The court argued that a fair trial for the requested person was not guaranteed in Poland following the recent reforms that had an impact on the disciplinary regime of the judiciary in Poland. Scrutinising the Polish reforms, which in the Court's opinion further restricted the independence of judges by introducing new rules on the disciplinary regime applicable to the Polish judiciary, such as the 'gag law' that came into force on 14 February 2020 (three days before the commented judgment), the Karlsruhe HRC took into account further developments in the CJEU case law – especially the judgment of 19 November 2019 in *AK and the Others*. The Karlsruhe HRC examined the real risk of a breach of the fundamental right to a fair trial – the second step required by the CJEU in the *LM* judgment. In its opinion, the real risk could not be ruled out so it sent a catalogue of questions to the Polish Ministry of Justice, asking for further clarifications on the 'muzzle law' and its impact on specific criminal proceedings, including possible disciplinary measures against sitting judges[104]. In conclusion, the court has stated that the man had to be released, especially since there was no longer any risk

[104] Reference was made to previous judgments by courts in Karlsruhe (HRC Karlsruhe, 07.01.2019, Ausl 301 AR 95/18) and Düsseldorf HRC Düsseldorf, 14.06.2019, 4 AR 38/19), in which the same findings were made when these German courts examined whether the accused should be sent back to Poland under EAW procedures. When the HRC in Karlsruhe proceeded to the second part of the test to assess whether there are serious, proven circumstances that make it likely that a person sent back to Poland will not have a fair trial, it confirmed in its judgment of 17 February 2020 that the defendant's right to a fair trial would no longer be respected. In earlier cases pending before the courts in Karlsruhe and Düsseldorf in 2019, it was held at that stage that this right would nevertheless be respected See: Wahl, *Refusal of European Arrest Warrants…*, *loc. cit.*

of absconding because he had a permanent residence in Germany and, due to the political developments in Poland, he no longer had to expect his extradition[105].

Doubts about the certainty of a fair trial following an EAW procedure in respect of Poland were also expressed by courts in the Netherlands, where extradition decisions have been suspended in several cases. The *LM* judgment was invoked in a number of cases before the Rechtbank Amsterdam, to mention one. The Regional Court in Amsterdam is the only one in the Netherlands that considers EAW cases[106]. In line with the *LM* judgment, the Amsterdam Court places the burden of proof on the requested person, who needs to substantiate that the right to a fair trial would be breached if the EAW is executed. Significantly, the burden of proof sets a very high threshold for the requested person, one that is very hard to reach in practice as detailed information on the organisation of the judiciary may be challenging to collect for the defence. This procedural rule also makes it extremely hard for the Amsterdam Court to formally postpone the proceedings on the basis of Step 2B. The absence of evidence, which may not be gathered *ex officio*, has led the court to execute most of the EAWs received from Poland[107]. In a decision on a Polish EAW issued for the purposes of criminal prosecution in March 2020, the Amsterdam Court adjourned the hearing in order to further investigate the situation regarding the Rule of Law. In the follow-up decision adopted in June 2020, the Amsterdam Court found that recent legislative changes put such pressure on the independence of the judiciary that they could no longer be disregarded for the purposes of a decision on surrender.

---

[105] P. Bárd, J. Morijn, *Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings* (*Part II*), VerfBlog, 19 April 2020, available at: https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-ruleof-law-in-the-eu [accessed on: 1 September 2021].

[106] This part is based on A. Martufi, D. Gigengack, *Exploring mutual trust through the lens of an executing authority: The practice of the Court of Amsterdam in EAW proceedings*, "New Journal of European Criminal Law" 2020/11, p. 282, An overview of the Amsterdam Court decisions issued from June 2016 (post Aranyosi-cases) to June 2020.

[107] *Ibidem*, p. 296

The Rechtbank Amsterdam took leading decisions on 16 August 2018[108] and 4 October 2018 (13/751441–18 RK 18/3804)[109], by which it stopped the surrender of a Polish national to Poland (for the time being) because of "major doubts about the independence of the Polish judiciary"[110]. On 31 July 2020, the Rechtbank Amsterdam again decided to refer two EAW cases to the CJEU. The second preliminary reference question to the CJEU was made on 3 August 2020[111]. In it, the Amsterdam Court asked the CJEU with regard to the recent developments in the Polish judiciary if the second step of examination of the LM-case test should be still performed to support the refusal of EAWs issued by Polish courts or was not required anymore since the further changes to the Polish judiciary introduced after 2019. Most importantly, the Rechtbank of Amsterdam has frozen the entire procedure of EAW execution until the CJEU issues a new decision. In the Dutch court opinion: "The Netherlands will stop extraditing suspects or convicts to Poland over concerns that the country's courts are no longer independent"; "the independence of Polish courts and thus the right to a fair trial have come under increasing pressure". The Dutch court informed that it had sent additional questions to

[108] ECLI:NL:RBAMS:2018:5925.

[109] ECLI:NL:RBAMS:2018:7032; referred by: T. Wahl, *Fair Trial Violation: Amsterdam Court Refuses Surrender to Poland*, News Eucrim, 16 January 2019.

[110] *Ibidem*, p. 296. Amsterdam Court 24 March 2020, ECLI: NL: RBAMS:2020:1896. In Amsterdam Court 12 June 2020, ECLI: NL: RBAMS:2020:2936, the Amsterdam Court allowed the execution of a Polish EAW issued for the purposes of executing a detention order without taking step 2B, since most recent developments in Poland took place at the end of 2019 and the judgment underlying the detention order had been pronounced in April 2019.

[111] Joined Cases C-354/20 PPU and C-412/20 PPU, "*L and P*"/*Openbaar Ministerie*. 31 July 2020 (interlocutory judgment), ECLI: NL:RBMS:2020:3776, par. 26 The Dutch court asked whether it could drop the requirement to examine the personal situations of the persons whose surrender was sought by the Polish authorities. The latter were convinced that the Court should indeed drop this requirement, for instance, because the systematic and fundamental nature of the established shortcomings would automatically imply that the right to an independent tribunal in Poland was denied. See: J.W. Ouwerkerk, *Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area*, "Journal of Crime, Criminal Law, Criminal Justice", 2021/29, p. 89.

the CJEU to be sure that "the lack of sufficient guarantees for the independence of Polish judges has any consequences" for requests under the European Arrest Warrant system. It added that because of these rulings, "it is clear that no more people will be handed over to Poland for the time being"[112].

The asymmetrical practice of national courts in response to the *LM*-judgment and the pressure exerted by certain national courts (in particular German and Dutch) led to another judgment by the Luxembourg Court. On 17 December 2020, the CJEU upheld its opinion previously expressed in the *LM* case. In the so-called *L-P* case[113], it confirmed that EU Member States might not impose a general ban on surrender, despite growing doubts about the independence of the Polish judiciary. Upon the request of the Rechtbank Amsterdam, the CJEU ruled on 17 December 2020 that the execution of a European Arrest Warrant (EAW) might still be refused only if the person concerned ran a real risk of being subjected to an unfair trial. This risk must be examined on a case-by-case basis. In this, the CJEU followed the opinion of Advocate-General Campos Sánchez-Bordona. In its reply of 17 December 2020, the CJEU ultimately upheld its approach taken in the *LM* case. National courts must pay regard to the individual situation of the person concerned and be convinced that the substantial risk of deficiencies is likely to be realised in the proceedings against that person. Denial of the status of 'issuing judicial authorities' to all the courts of the Member State in question, due to the presumption of systematic and generalised deficiencies in the independence of judges (even if the deficiencies worsen), would lead to a general exclusion of the Member State from the mutual recognition instrument. The existence of or increase in the systematic and generalised deficiencies

[112] Statewatch | European Arrest Warrant: Dutch court seeks answers from CJEU over extradition to Poland. Response of Polish courts: The District Court in Warsaw did not agree to hand over the parents of the autistic boy to the Dutch authorities. Thus, the European Arrest Warrant issued by the Dutch court was not recognized. *The District Court in Warsaw did not release Ekaterina den Hertog, for whom the Netherlands issued an EAW. The mother of the autistic Martin.*

[113] Joined Cases C-354/20 PPU and C-412/20 PPU, *"L and P"/Openbaar Ministerie.*

can only be indicative of a problem. Furthermore, dispensing with a specific and precise assessment would mean a general suspension of the EAW mechanism, which would blur the lines of the procedure provided for in Article 7(2) TEU. Taking into consideration developments after the EAW concerned has been issued – the obligation of the executing judicial authority to determine – specifically and precisely – whether there are substantial grounds for believing that the extradited will run a real risk of breach of his/her rights to a fair trial when surrendered[114]. The CJEU has invoked the 'non-impunity argument' as the main reason for its decision. By claiming that the EAW mechanism aims essentially at combating the impunity of persons who are not present on the territory of the Member State in which they had allegedly committed an offence. For this reason, 'the skipping of the second-step of assessment procedure' would entail a high risk of impunity for persons who attempt to flee from justice after having been convicted of, or after they have been suspected of committing, an offence (the duty to prevent impunity argument)[115]. As a result, numerous criminal offences would go unpunished and, what worries most, it could, moreover, undermine the rights of victims of crime[116].

[114] After the Rechtbank of Amsterdam judgment: in case P – whose surrender was sought for the purpose of execution of an EAW – has eventually been surrendered to Poland, the execution of the EAW against L has been refused by the District Court of Amsterdam, leading to his immediate release. District court of Amsterdam, 27 January 2021, ecli:nl:rbams:2021:179. Segments of this verdict have been translated into English, see: https://www.rechtspraak.nl/SiteCollectionDocuments/4501679623-zaak-kop-tbv-vertaling.pdf. 24 District court of Amsterdam, 10 February 2021, ecli:nl:rbams:2021:420. Segments of this verdict have been translated into English, see: https://www.rechtspraak.nl/SiteCollectionDocuments/4501679623-zaak-ml-tbv-vertaling.pdf.

[115] J.W. Ouwerkerk, *Fundamental Rights-Oriented Repression in the EU? Exploring the Potential and Limits of an Impunity Rationale to Justify Criminalisation in the EU Legal Order*, [in:] Marin & Montaldo 2020, Supra Note 17, pp. 51–52; J.W. Ouwerkerk, *Criminal Justice beyond National Sovereignty. An Alternative Perspective on the Europeanisation of Criminal Law*, "European Journal of Crime, Criminal Law and Criminal Justice", 2015/23, pp. 11–31.

[116] Opinion of Advocate-General Campos Sánchez-Bordona delivered on 12 November 2020 in the joined cases C-354/20 ppu (L) and C-412/20 ppu (P), EU:C:2020:925.

The CJEU argued that relevant articles of the Council Framework Decision of 13 June 2002 on the EAW and the surrender procedures as amended by the Council Framework Decision of 26 February 2009 make the executing judicial authority responsible for specifically and precisely verifying any evidence of systematic and generalised deficiencies concerning the independence of the judiciary in the Member State issuing the arrest warrant prior to denying the status of issuing judicial authority to the court in question in that State. Furthermore, the executing judicial authority may not presume that there are grounds for believing that the person to be surrendered will run a real risk of breach of his or her fundamental right to a fair trial without carefully verifying this person's personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled.

In fact, in the *L-P* judgment, the CJEU has upheld case law established in the *LM-case*, where a two-step test has been proposed, according to which courts in the executing state may reject EAWs because of violations of the right to a fair trial in the issuing state. One reason for the Court not to drop the requirement of the individual assessment (the second element of the two-step test) is that it would run counter the objective of the European Arrest Warrant mechanism to combat the impunity of fugitives[117]. In view of the reforms of the Polish judicial system, the CJEU said that there was a risk that a requested person would not receive a fair trial in Poland due to the lack of judicial body independence. However, an abstract-general examination was not sufficient. After evaluating whether systematic and generalised deficiencies exist affecting the autonomy of the judicial body, the authorized judicial authority of the executing MS is strictly obliged to determine to what extent such a lack of independence affects the situation of the person under

[117] To confront critical approach to this part, see: J. Ouwerkerk, *Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area,* "Journal of Crime, Criminal Law, Criminal Justice", 2021/29, pp. 87 ff.

request to be surrendered. The concept of systematic or generalised deficiencies affecting the independence of the judiciary may not trigger the automatic conclusion that all the courts of the issuing MS or each decision of these courts are not autonomous. What needs to be said is that a denial of the 'issuing judicial authority' status to every court of the Member States in question would lead to its general exclusion from the mutual recognition area. Hence, this would create perilous consequences *pro future*, i.e. if the courts of the issuing MS in question are – no longer – 'independent judicial bodies', they will not be authorised to submit further requests for preliminary rulings to the CJEU since the independence of courts and tribunals is inherent in the concept of Article 267 TFEU.

Hence, following the L-P judgment reasons, an increase in systematic and generalised deficiencies affecting the independence of the judiciary in the issuing State is indicative of a real risk of breach of the right to a fair trial and the executing judicial authority should exercise vigilance. However, it may not dispense of a specific and precise assessment of this risk. Failure to carry it out would amount to a general suspension of the EAW mechanism and interfere with the procedure provided for in Article 7(2) TEU, creating an obstacle to mutual recognition in general.

To sum up, the jurisprudence of the CJEU in the presented area is in some manner inspired by the jurisprudence of the ECrHR. At the same time, while the case law of the latter has a corrective dimension in particular cases because it concerns cases that have been finally concluded at the national stage, the CJEU's rulings on cooperation in criminal matters also apply to pending cases i.e. mutual recognition interim decisions. Thus, from the perspective of the CJEU, the aspect of the effectiveness of national procedures should be treated in a particular and unique way. When discussing the importance of the 'human rights exception', the criteria of formal justice (such as the guarantee of the independence of judicial authorities) should not lead to the destruction of the effectiveness of prosecution. André Klip has rightly observed that: "The Court's case law treats human rights values as a variety of the ECHR, not as rights with a different specific protection deriving from the Area of Freedom Security

and Justice"[118]. Judicial cooperation in criminal matters in the EU is still a very limited form of activity in comparison to the entirety and complexity of national judicial systems. Most criminal proceedings are ordinary national proceedings without any international dimension. To better protect individuals in the EU, the CJEU could change its focus from the Member State cooperation area to regular criminal proceedings[119].

Obviously, the case law of the CJEU has undermined judicial cooperation in criminal matters in the recent years by creating more formalities and causing delay, without strengthening legal remedies for the citizen. This is a paradox because the reason of its actions was the effective judicial remedy principle. In particular, its decisions have trampled mutual trust and may lead to impunity[120]. Whereas Member States' authorities are confronted with more formalities, the societies are not protected, and the protection of individuals is rather an arena where political concerns are at play than a proper due-guarantees domain. To promote better protection of individuals and create a common judicial area, it would be necessary to abolish the formalities setting up legal boundaries instead of upholding them by the Court[121]. Meanwhile, among scholars from the EU Member States a representative opinion is rather to restrict collaboration in a formal sense, with 'the prevention-of-impunity argument' invoked by the CJEU in *Aranoysi, LM and LP* cases being strongly contested[122]. In this alternative, an idea of 'a true and comprehensive European concept of impunity' is promoted. This means that the Member States should step back from direct judicial cooperation and try to apply some of the classical cross-border policies or alternative ways, e.g. a transfer of proceedings and transfer of sentences in the classical version[123]. The EAW is by no means the sole p. mechanism to do

[118] Cf A. Klip, *Eroding Mutual Trust*..., p. 118.
[119] *Ibidem*, p. 119.
[120] The same opinion A. Klip expressed in: *Eroding Mutual Trust*..., p. 110.
[121] *Ibidem*, p. 110.
[122] J.W. Ouwerkerk, *Are Alternatives to the European Arrest*..., pp. 87 ff.
[123] As J.W. Ouwerkerk argued: 'However, it has hopefully been clarified that the mere existence of these other options deserves explicit attention in the ongoing discussion on the limits of mutual recognition in EAW cases, and hence in

justice across borders. Such alternatives require a willing attitude of both Member States involved. Still, they could satisfy both the wish to avoid impunity and the requirement to adequately protect fundamental rights in the cases in which surrender would not be able to satisfy both interests[124]. However, classical instruments of collaboration reek of governmental involvement and are not in any sense a form of pure judicial cooperation. When the refusal to cooperate is based on doubts as to the independence of a court in a Member State, following from judicial reforms carried out in this Member State, it is the lack of trust in this State (which carries out doubtful reforms) that is an indirect reason for refusing to cooperate in judicial matters. In this context, the classic methods of cooperation in criminal matters (i.e. cooperation involving a political factor – a competent ministerial body) seem to be even less appropriate.

Studying the mutual recognition issue, one more question should be added. Presented in this chapter, the example of the EAW procedure is not the only one that promotes judicial cooperation. In view of this the question is still on whether the exceptions to mutual recognition, admitted in the EAW cases mentioned, should be seen as a guide for applying the other instruments, among them the transfer of prisoners, European Investigation Order, or orders on preventive measures. Therefore, all the tools of cooperation are questioned. It can be expected that the suspension of EAW execution will also spread to the other instruments of judicial cooperation.

---

the use of the prevention-of-impunity argument. Consequently, in an attempt to help shape **a true and comprehensive European concept of impunity**, this contribution favours an integrative approach towards cross-border cooperation in the EU criminal justice area – i.e. an approach in which mutual recognition instruments and judicial cooperation mechanisms provide a coherent series of possibilities from which the most appropriate one should be used in each individual case'. See: J.W. Ouwerkerk, *Are Alternatives to the European Arrest Warrant…*, pp. 99–100.

[124] *Ibidem*, p. 101.

8. Final Conclusion

This essay presents the impact of the CJEU case law related the broad interpretation of the principle of judicial remedy as guaranteed by judicial body independence on the mutual recognition of judicial decisions connected to EAW execution. The case law of the Luxembourg Court in this area is linked to the development of the 'Rule of Law operative concept', which as a result has also covered the sphere of security and cooperation in criminal matters.

On the one hand the CJEU has developed a strict standard of 'judicial body independence', adopting an extreme version of the formal Rule of Law, in which formal justice has priority over substantive justice, while on the other, the CJEU has not considered this standard to be universal in the pragmatic sense. Owing to the principle of non-regression, the standard is applied only to post-accession changes of law in a specific EU Member State. This interpretation tactic gives a short-term support to efforts by the European Commission in its struggle against the States that are described as 'backsliding in terms of the Rule of Law'. In a long-term perspective, however, it strikes at the very foundations of the mutual recognition of judicial decisions. The CJEU, going beyond its conventional role of the guardian of law in areas coming under the competences of the European Union and moving towards those that have been reserved in the treaties to sovereign decisions of Member States, such as the organisation of criminal justice, does not take into account the key aspect of this area, namely, the necessity to maintain balance between the formal and substantive types of justice.

In the context of discussion on the formal Rule of Law, one must not lose sight of the fact that this concept – as indicated earlier – crucially covers, apart from guarantees such as the judicial body independence criterion, stability and certainty of law. What is more, it seems that a far more evaluative criterion of internal and external independence of a body, when prioritised against other criteria of the formal Rule of Law, ranks behind the criterion of certainty of law. In this sense, therefore, giving priority to the criterion of body independence over the criterion of certainty of law, including the stability of final and valid judicial decisions, does not strengthen the

Rule of Law in a given State but rather destroys it especially from the point of view of the citizen. What kind of Rule of Law can we speak of in a country in which basically all final judicial decisions can be challenged, ergo, a country in which the principle of stability of judicial decisions is not observed? In the Polish procedural criminal law, the principle has been crucially important until now both when enacting law and applying it. It was this principle that made the Polish system leave little space for challenging final decisions and only for very limited reasons. Nor does it provide for the institution of decision invalidity. Consequently, this means that even a seriously defective decision for formal reasons is capable of becoming final and valid. Moreover, it cannot be altered to a defendant's disadvantage after a year from it becoming final and valid[125].

Any changes to the administration of justice in Member States, especially when they raise doubts as to its design vis-à-vis the separation of powers, should be subject to assessment. Under the European treaties, an adequate assessment procedure is one provided for in Article 7 TEU. A dangerous shift of competences to the CJEU, although it may seem advantageous over a short term from an instrumental perspective (influencing legislation in a given State), over a longer term may cause inestimable social effects. They may not be limited to the exclusion from the mutual cooperation area and include further erosion of the legal system called into question. Then, indeed, there will be no choice but to consider the country involved unlawful. Excessive involvement of the judicial branch in arguments with political overtones makes it lose its legitimacy. The fact is that the democratic legitimacy of the judicial branch raises obvious doubts. Hence, it should be very careful with the 'capital of social trust' it has been granted so to speak. The CJEU, joining a game where its competences are stretched to the extreme, exposes itself to challenges to its decisions, regardless of whether the challenges are justifiable or not. Through this very fact, however, a detrimental precedent of disobedience to judicial decisions is formed.

[125] B. Janusz-Pohl, *Formalizacja…*, pp. 403 ff.

REFERENCES

Anagnostaras G., *Mutual Confidence is not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Caldararu*, "Common Market Law Review", 2016/53.

Bárd P., Morijn J., *Domestic Courts Pushing for a Workable Test to Protect the Rule of Law in the EU: Decoding the Amsterdam and Karlsruhe Courts' post-LM Rulings* (*Part II*), VerfBlog, 19 April 2020, available at: https://verfassungsblog.de/domestic-courts-pushing-for-a-workable-test-to-protect-the-ruleof-law-in-the-eu [accessed on: 1 September 2021].

Bogdanowicz P., Taborowski M., *Brak niezależności sądów krajowych jako uchybienie zobowiązaniu w rozumieniu art. 258 TFUE* (*cz. I*), "Europejski Przegląd Sądowy", 2018/1.

Bonelli M., Claes M., *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary*, "European Constitutional Law Review", 2018/14.

Burgess P., *Neglecting the History of the Rule of Law*. (*Unintended*) *Conceptual Eugenics*, "Hague Journal of the Rule of Law" 2017, vol. 9, No. 2, available at: https://doi.org/10.1007/s40803-017-0057-y, p. 195 [accessed on: 1 September 2021].

Butler G., *Independence of non-judicial bodies and orders for a preliminary reference to the Court of Justice*, "European Law Review", 2020/45.

Cornides J., *The European Union: Rule of Law or Rule of Judges?* (2013) EJIL Analysis (blog) available at: http://www.ejiltalk.org/the-european-union-rule-of-law-or-rule-of-judges/ [accessed on: 1 September 2021].

Davies G., *Legislative control of the European Court of Justice*, "Common Market Law Review", 2014/51.

Eeckhout P., *The EU Charter of Fundamental Rights and the Federal Question*, "Common Market Law Review", 2002/39.

Freedom, Security and Justice after LM, "European Constitutional Law Review", 2019/15.

Gajda-Roszczynialska K., Markiewicz K., *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, "Hague Journal on the Rule of Law", 2020/12.

Gaspar-Szilagyi S., *Joined Cases Aranyosi and Caldararu: Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant*, "European Journal of Crime Criminal Law and Criminal Justice", 2016/2–3.

Grabowska-Moroz B., *The systemic implications of the vertical layering of the legal orders in the EU for the practice of the Rule of Law*, Reconnect Papers 2020.

Janusz-Pohl B., *Definitions and Typologies of Legal Acts in Criminal Proceedings. Perspective of Conventionalisation and Formalisation*, Poznan 2017.

Janusz-Pohl B., *Formalizacja i konwencjonalizacja jako instrumenty czynności karnoprocesowych w prawie polskim*, Poznań 2017.

João Costa M., *Extradition Law. Reviewing Grounds for Refusal from the Classic Paradigm to Mutual Recognition and Beyond*, "European Criminal Justice Series", Brill Leiden 2020.

Klip A., *Eroding Mutual Trust in a European Criminal Justice Area without Added Value*, "European Journal of Crime, Criminal Law and Criminal Justice", 2020/28.

Klip A., *European Criminal Law, an Interpretative Approach. Intersentia*, Cambridge–Antwerp–Portland 2016.

Kochenov D., *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, "Jean Monnet Working Paper", 2011/15.

Kochenov D., *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, D. Kochenov, "Yearbook of European Law", 2015/1.

Kochenov D., *On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Anayzed*, "Polish Yearbook of International Law", 2014/XXXIII.

Kochenov D., *The EU and the Rule of Law – Naïveté or a Grand Design?*, [in:] M. Adams, E. Hirsch Ballin, A. Meuwese (eds.), *Constitutionalism and the Rule of Law. Bridging Idealism and Realism*, Cambridge: CUP, 2017.

Kochenov D., Bárd P., *The Last Soldier Standing? Courts versus Politicians and the Rule of Law Crisis in the New Member States of the EU*, "European Yearbook of Constitutional Law", 2019/1.

Kochenov D., Bard P., *The Last Soldier Standing? Courts vs. Politicians and the Rule of Law Crisis in the New Member States of the EU*, "University of Groningen Faculty of Law Research Paper Series", 2019/5.

Kochenov D., Butler G., *The Independence and Lawful Composition of the Court of Justice of the European Union: Replacement of Advocate General Sharpston and the Battle for the Integrity of the Institution*, "The Jean Monnet Working Paper Series" 2020, No. 20/2.

Kochenov D., Dimitrovs A., *Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice*, VerfBlog, 28 April 2021.

Kochenov D., Pach L., *Respect for the Rule of Law in the Case Law of the European Court of Justice*: A Casebook Overview of Key Judgments since the Portuguese Judges Case SIEPS Report (Stockholm, 2021).

Kordela M., *The principle of legal certainty as a fundamental element of the formal concept of the Rule of Law*, "Revue du Notariat" 2008, vol. 110, No.2.

Łazowski A., *Decoding a Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings*, ERA Forum 2013/14.

Lenaerts K., *New Horizons for the Rule of Law Within the EU*, "German Law Journal", 2020/21.

Lock T., *Accesion of the EU to the ECHR*, [in:] D. Ashiogbar, N. Countouris, I. Lionos (eds.), *The European Union After Treaty of Lisbon*, Cambridge Univ. Press 2012.

Loughlin M., *Swords and Scales. An Examination of the Relationship between Law and Politics*, Hart Publishing, Bloomsbury 2000.

Mader O., *Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law*, "Hague Journal of the Rule of Law", 2019/11.

Marcisz P., Taborowski M., *Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności. Krytyczna analiza analizy krytycznej* (*artykuł polemiczny*), "Państwo i Prawo" 2017/12.

Martufi A., Gigengack D., *Exploring mutual trust through the lens of an executing authority: The practice of the Court of Amsterdam in EAW proceedings*, "New Journal of European Criminal Law", 2020/11.

Matczak M., *The Clash of Powers in Poland's Rule of Law Crisis: Tools of Attack and Self-Defence* "Hague Journal on the Rule of Law", 2020/12, pp. 421 ff.

May C., Winchester A., *Introduction. The Rule of Law in the Contemporary World*, [in:] *Handbook on the Rule of Law*, eds. C. May, A. Winchester, Edward Elgar, Northampton 2018, available at https://www.elgaronline.com/view/edcoll/9781786432438/9781786432438.00005.xml, p. 3 [accessed on: 1 September 2021].

Mirandola S., *European arrest warrant and judicial independence in Poland: where can mutual trust end?* (*Opinion of the AG in C-216/18 PPU L.M.*) [accessed: 1 September 2021].

Mitsilegas V., *The Symbiotic Relationship between Mutual trust and Fundamental Rights in Europe's Area of Criminal Justice*, "New Journal of European Criminal Law", 2015/7.

Nowacki J., *Materialne i formalne pojęcie praworządności*, "Państwo i Prawo", 1968/4–5.

Nowacki J., *Rządy prawa. Dwa problemy*, Katowice 1995.

Opałek K., *Formalne i materialne pojęcie praworządności*, [in:] W. Osuchowski, M. Sośniak, B. Walaszek (eds.), *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, Kraków–Warszawa 1964.

Opałek K., *Jeszcze raz o praworządności*, [in:] K. Działocha, M. Grzybowski, P. Sarnecki, E. Zwierzchowski (eds.), *Konstytucja w społeczeństwie obywatelskim. Księga pamiątkowa ku czci Prof. Witolda Zakrzewskiego*, Kraków 1989.

Opałek K., *The Rule of Law and Natural Law*, [in:] K. Opałek, J. Woleński (eds.), *Selected Papers in Legal Philosophy*, Dordrecht 1999.

Opałek K., Wróblewski J., *Sporne zagadnienia pojęć teoretyczno-prawnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny", 1972/34(1).

Ouwerkerk J.W., *Are Alternatives to the European Arrest Warrant Underused? The Case for an Integrative Approach to Judicial Cooperation Mechanisms in the EU Criminal Justice Area*, "European Journal of Crime, Criminal Law, Criminal Justice", 2021/29.

Ouwerkerk J.W., *Criminal Justice beyond National Sovereignty. An Alternative Perspective on the Europeanisation of Criminal Law*, "European Journal of Crime, Criminal Law and Criminal Justice", 2015/23.

Ouwerkerk J.W., *Fundamental Rights-Oriented Repression in the EU? Exploring the Potential and Limits of an Impunity Rationale to Justify Criminalisation in the EU Legal Order*, [in:] Marin & Montaldo 2020, Supra Note 17.

Pech L., *A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, "European Constitutional Law Review", 2010/6.

Pech L., *Better late than never: On the European Commission's Rule of Law Framework and its first activation*, "Journal of Common Market Studies", 2016/54.

Pech L., Platon S., *Judicial Independence under Threat: The Court of Justice to the Rescue in the ASJP Case*, "Common Market Law Review", 2018/55.

Pech L., Wachowiec P., Mazur D., *Poland's Rule of Law Breakdown: A Five Year Assessment of EU's (In)Action* (2021), "Hague Journal on the Rule of Law", 2021/3.

Platon S., The 'Equivalent Protection Test': From European Union to United Nations, from *Solange II* to *Solange I*', "European Constitutional Law Review" 2014, vol. 10, Issue 2, September.

Rasmussen H., *On Law and Policy in the European Court of Justice: Comparative Study in Judicial Policymaking*, 1986.

Rizcallah C., Davio V., *L'article 19 du Traité sur l'Union européenne: sesame de l'Union de droit*, Revue Trimestrielle des Droits de l'Homme 2020.

Ruiz Yamuza F-G, *LM case, a new horizon in shielding fundamental rights within cooperation based on mutual recognition. Flying in the coffin corner*, "ERA Forum", 2020/20.

Sadowski W., *Protection of the Rule of Law in the European Union through Investment Treaty Arbitration: Is Judicial Monopolism the Right Response to Illiberal Tendencies in Europe?*, "Common Market Law Review", 2018/55.

Sajó A., *The Rule of Law as Legal Despotism. Concerned Remarks on the Use of »Rule of Law« in Illiberal Democracies*, "Hague Journal of the Rule Law" 2019, vol. 11, pp. 371–376, available at: https://doi.org/10.1007/s40803-019-00097-z, https://link.springer.com/article/10.1007/s40803-019-00097-z [accessed on: 1 September 2021].

Scheppele K.L., Kochenov D., Grabowska-Moroz B., *EU Values Are Law, after All*, "Yearbook of European Law", 2020/39.

Šubic N., *Executing a European Arrest Warrant in the Middle of the Rule of Law Crisis: Case C-216/18 PPU Minister for Justice and Equality* (*LM/Celmer*), "Irish Journal of European Law", 2018/21.

Summers R.S., *Principles of the Rule of Law*, "Notre Dame Law Review" 1999, vol. 74, issue 5.

Suominem A., *Limits of mutual recognition in cooperation in criminal matters within the EU – especially in light of recent judgments of both European Courts*, "European Criminal Law Review", 2014/12.

Van Elsuwege P., Grimmelprez F., *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, "European Constitutional Law Review", 2020/16.

Varga C., *Rechtsstaat, Rule of Law – Expectations, criticisms, and the nature of claims*, [in:] *Rule of Law*, The Institute of Justice, Warsaw 2023.

Varga C., *Quelques questions méthodologiques de la formation des concepts en sciences juridiques*, "Archives de Philosophie du Droit", 1973, Vol. XVIII.

Varga C., *Rule of Law – Contesting and Contested*, "Central European Journal of Comparative Law" 2021, vol. 2, No. 1.

Wahl T., *CJEU Strives to Balance Human Rights and Mutual Recognition*, "Eucrim", 2016/1.

Wahl T., *CJEU: Refusal of EAW in Case of Fair Trial Infringements Possible as Exception*, News. Eucrim 2018.

Wahl T., *Fair Trial Concerns: German Court Suspends Execution of Polish EAW*, News. Eurcrim 2020.

Wahl T., *Fair Trial Violation: Amsterdam Court Refuses Surrender to Poland*, News. Eucrim, 16 January 2019.

Wahl T., Refusal of European Arrest Warrants Due to Fair Trial Infringements. Review of the CJEU's Judgment in "LM" by National Courts in Europe, "Eucrim" 2020/4.

Waldron J., *Is the Rule of Law an Essentially Contested Concept* (*in Florida*)*?* "Law and Philosophy" 2002, vol. 21.

Weiler J.H.H., *Epilogue: Judging the Judges – Apology and Critique*, [in:] M. Adams et al. (eds.), *Judging Europe's Judges: The Legitimacy of the Case Law of The European Court of Justice*, 2013.

Weiler J.H.H., *The Schuman Declaration as a Manifesto of Political Messianism*, [in:] *Philosophical Foundations of European Union Law*, eds. J. Dickson, P. Eleftheriadis, Oxford University Press, Oxford 2012.

Wendel M., *Mutual Trust, Essence and Federalism – Between Consolidating and Fragmenting the Area of Freedom, Security and Justice after LM*, "European Constitutional Law Review", 2019/15.

PROF. DR. ÁDÁM RIXER
Károli Gáspár University of the Reformed Church in Hungary, Budapest

The legal aspects of the relationship between public administration and civil society in Hungary

1. Introduction

Before going into further details, a question must be asked: why is this relationship, mentioned in the title of the current paper, so important? There are at least two prompt answers: first, this is the field or aspect because of which Hungary is criticised most even internationally. Second, even though several problems are raised within the scientific literature, there is still a lack or shortage of a complete catalogue of the forms (and levels) of the given relationship.

Although civil society is – to some extent – independent of the state, it is certainly not an area outside the law. The framework of civil society is the *rule of law*[1]. the democratic principles of respect for private life, freedom of expression and freedom of association

[1] According to Choi *Rule of law* is "[T]he mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law, secures a non-arbitrary form of government, and more generally prevents the arbitrary use of power. (…) In general, the rule of law implies that the creation of laws, their enforcement, and the relationships among legal rules are themselves legally regulated, so that no one – including the most highly placed official – is above the law". N. Choi, *Rule of law*, [in:] *Encyclopedia Britannica*, available at: https://www.britannica.com/topic/rule-of-law [accessed on: 14 May 2021].

provide the normative framework of civil society. The starting point of my paper is that the *separation of powers* – as one of the main principles of the rule of law – can also be demonstrated through the legal relationship between governmental bodies and civil society, especially through the relationship between the entities of public administration and those of civil society. The separation of powers mainly refers to the division of a state's government into branches[2], but beyond this horizontal approach – among many other approaches – the separation of powers can also be introduced through this relationship. This *decisive or social type of separation of powers* refers to the fact that the state (government) is not the only place where collective goals are set and citizens are represented: civil society organisations also play an important role in implementing the same goals as 'intermediaries' between the individuals and the state. Moreover, "[c]ivil society and the state must become the condition of each other's democratization…"[3].

My personal research and my chapter is going to highlight the forms and the levels of this relationship focusing both on the state administration and on the local governments, presenting several examples and introducing *de lege ferenda* suggestions as well.

To be honest, my aforementioned topic is too broad to be workable, so I have to narrow the focus of my paper. We can explore at least three possible dimensions of the examination of this relationship in detail: the ideological dimension, the institutional arrangements, and the street-level strategies[4]. All these dimensions can be further operationalised within another research project, but *within my current research I concentrate only on the institutional aspects*:

[2] The original doctrine of the separation of powers gives each of the three *traditional* branches of government independence from the others, and "[T]he doctrine of checks and balances provides each branch with weapons to fight off encroachment by the other two branches", available at: http://law2.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm [accessed on: 14 May 2021].

[3] J. Keane, *Democracy and Civil Society*, Verso, London 1988, p. 15.

[4] R. Pauly, F. De Rynck, B. Verschuere, *The relationship between government and civil society. A neo-Gramscian framework for analysis*, Ghent 2017, pp. 16–24, available at: https://core.ac.uk/download/pdf/55740683.pdf [accessed on: 14 May 2021].

my study does not attempt to define and outline, *for example*, the Hungarian or international meaning (of the current concept) of such phenomena as "illiberalism", "populism" or "soft rule of law"[5], which have been researched extensively in the contemporary political science, jurisprudence and other social sciences. It would be hard – *using an ideological point of view* – to detect a stage or a particular point beyond which "[…] constitutional democracy still exists but its formal implementation outweighs its substantial realization [in Hungary and Poland]"[6], so the usage of all those three aspects mentioned above would go beyond the opportunities of the current research. This is why my paper is primarily concerned with the description and examination of phenomena which – belonging to the relationship of public administration and civil society – *appear directly as institutions* that are made up of the interplay of three components: formal rules, actual legal practices, and narratives attached to the law (encompassing everything from the *raison d'être* and the goal of the institution, its symbolism, the public discourse surrounding it, to social attitudes toward the institution)[7].

Consequently, the primary method to approach the topic is *the review of the relevant primary legal sources* (actual law in the form of constitution, court cases, statutes, and administrative rules and regulations) and *secondary legal sources* (Hungarian and international scientific literature explaining the primary sources and the legal practice) through which we may define relevant scientific problems, create our own definitions and prepare a catalogue of practical problems, specifically for Hungarian issues regarding the

[5] See more: M.R. Reátegui, S.A. Oscar, *Rule* of *Law versus soft Rule* of *Law*, "Revista de Derecho Político" 2020/3, No. 109, pp. 373–400.

[6] T. Drinóczi, A. Bień-Kacała, *The DNA of Illiberal Constitutionalism: Failure of Public Law Mechanisms and an Emotionally Unstable Identity – A Hungarian and Polish Insight*, "Percorsi Costituzionali" 2019, 12(2), p. 1.

[7] See more: A. Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, "The American Journal of Comparative Law" 2020, 68(4), pp. 760–800, https://doi.org/10.1093/ajcl/avaa031, and also V. Lowndes, M. Roberts, *Why Institutions Matter: The New Institutionalism in Political Science*, Palgrave Macmillan, London 2013.

topic[8]. I hope the latter can serve as a useful addition to public policy and legal and other debates which might take place in various European and domestic public arenas and will predictably re-emerge in the period following the COVID-19 pandemic.

Related to this methodology mentioned above, we have to take into account that jurisprudence does not consist of mere formal dogmatic approaches. According to Jakab and Menyhárd, "Although traditionally the heart of legal framework is a conceptual clarification (legal dogmatic) analysis of the law in force, legal science does not only conduct legal dogmatic research.[…] We also consider legal history […], as well as *de lege ferenda*, empirical, and political philosophical questions of law as jurisprudence"[9]. This statement is also valid when applied to the present research: jurisprudential considerations should provide more complex results than those coming from the study of normative legal materials belonging to the so called *not-for-profit law*.

Besides the methods of jurisprudence I will rely on the methods and findings of other social sciences too, but certain – objectively

[8] The scientific antecedents of the present work in English are Á. Rixer, *Religion and Law*, KRE, Budapest 2010; A. Rixer, *Features of the Hungarian Legal System after 2010*, Patrocinium, Budapest 2012; and Á. Rixer, *Civil Society in Hungary. A Legal Perspective*, Schenk Verlag, Passau 2015; Á. Rixer, *General and Legal Meaning of Civil Society in Hungary from the Beginning till 1989*, "Journal on European History of Law" 2015, 6(2), pp. 38–47; Á. Rixer, *The relationship between civil organisations and public administration in Hungary, with special regard to their participation in legislation*, [in:] *Hungarian Public Administration and Administrative Law*, eds. A. Patyi, Á. Rixer, Schenk Verlag, Passau 2014, pp. 252–283, Á. Rixer, *Attempts of the Good State in Hungary – New Contents of Norms Created by the State*, Iustum Aequum Salutare 2013, 9(2), pp. 129–139; Á. Rixer, *Historical Background of the Relationship between the State and Churches in Hungary*, [in:] *Religions and Churches in a Common Europe*, ed. J. Wildmann, Europäischer Hochschulverlag GmbH, Bremen 2012, pp. 112–120; Á. Rixer, N. Sasvári, *Civil Society*, [in:] *Corruption risks in Hungary*, eds. E. Kósa, N. Alexa, Nyitott Könyvműhely Kiadó, Budapest 2007, pp. 147–156.

[9] A. Jakab, A. Menyhárd, *A magyar jogtudomány helyzete és kilátásai* [*The situation and perspectives of the Hungarian jurisprudence*], [in:] *A jog tudománya. Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal* [*The Science of Law. Papers on the history of science and on the theory of science with practical advices*], eds. A. Jakab, A. Menyhárd, HVG ORAC, Budapest 2015, pp. 25–26.

existing – social phenomena will not be analyzed in detail due to the lack of direct legal regulation. Thus, for example social movements will be dealt with only if they choose a form of organization offered by the law: I will restrict my examination related to the given topic *mainly* to associations, foundations and civil companies. In respect of the internationally most cited authors we can distinguish the so-called generalists and the minimalists, the former group operating with a broader conceptual system by which civil society is actually a kind of political culture. In contrast to this perspective, the minimalists narrow the concept defining the civil society as a particular totality of civil organizations and movements – both formal and informal ones – and consider it as a separate sphere of the society – specifically, the section of non-governmental and non-economic institutions[10]. The latter approach improves – of course – significantly the possibility of research having a mere jurisprudential nature. Moreover, the second concept can be narrowed down further by excluding all the informal types of civil entities (movements etc.) concentrating only on associations (not including political parties, trade unions and mutual insurance associations), foundations (not including public foundations and foundations established by political parties) and civil companies in accordance with the point 6of Section 2 of the Act CLXXV of 2011 on the freedom of association, non-profit status and the operation and support of civil organizations (Civil Act), which refers to those as three exclusive forms of *civil organization* (*civil szervezet*)[11].

As Uphoff and Krishna states "Measuring civil society strength has become entangled in competing definitions of civil society.

[10] Diamond, Linz and Lipset define civil society most broadly and inclusively as "[T]he realm of organized social life that is voluntary, self-generating, (largely) self-supporting, autonomous from the state, and bound by a legal order or set of shared rules. It consists of a vast array of organizations, both formal and informal: interest groups, cultural and religious organizations, civic and developmental associations, issue-oriented movements, the mass media, research and educational institutions, and similar organizations". L. Diamond, J.J. Linz, S.M. Lipset, *Politics in Developing Countries: Comparing Experiences with Democracy*, Lynne Rienner, Boulder 1995, 27. See more in Á. Rixer, *Civil society*…, pp. 24–25.

[11] Not including political parties and mutual insurance associations.

A more productive approach begins by considering civil society from the perspective not of what it is but what it does. […] We believe that more progress can be made in assessing and scaling 'civil society' by considering it in relation to state institutions"[12].

Summarizing the method of our current research we should state that though there are several approaches to the *Rule of Law* concept, each of them is based to some extent on the position and situation of the given civil society. We are narrowing down the scope of our research to the forms of civil organizations set up by the Hungarian laws, mainly because of the fact that without this restriction – i.e. taking into account also ideological aspects – the evaluation of the quality of the relations of administrative and civil organizations will not be easy. So, the *quantitative* aspects of those relations – regarding the law-making processes and the realization of those laws – can be researched more accurately, moreover legal viewpoints also provide fact-based general allegations and usable suggestions.

The last question of this introductory part is what the main parts of my research and also of my current chapter are?

First, some of the main historical aspects of the Hungarian civil society and of the traditional features of Hungarian public politics will be introduced, because without the facts of our legal history even some current processes can be misunderstood.

Second, some contemporary features of the Hungarian civil society will be shown and evaluated from a legal perspective; mainly those that are even internationally well known. To illustrate this point Hungary's Parliament repealed a 2017 law slammed by the European Court of Justice as discriminating against foreign non-governmental organizations, and in May of 2021 it enacted a new regulation that imposes new restrictions on some civil organizations …and it means that there are important developments to be examined[13].

---

[12] N. Uphoff, A. Krishna, *Civil society and public sector institutions: more than a zero-sum relationship*, "Public Administration and Development" 2004, 24(4), pp. 357–372.

[13] The Court of Justice of the European Union (CJEU) also ruled in June 2020 that Hungarian legislation requiring NGOs to make full disclosure of foreign funding over a certain threshold violates EU rules on the free movement of

Third, levels and forms of the legal relationship between public administration and civil society organizations in Hungary are catalogued, mainly by the enumeration of the roles of those organizations. My starting point is that the cooperation between the state and the non-profit sector has historically had four very important areas, namely the establishment of social policy, the financing of welfare services, specific service provider activities and the establishment of regulatory frameworks.

Fourth, *de lege ferenda* suggestions are introduced on the public administration-civil society relations in Hungary, both in those fields where certain institutions are missing and on those where functional disorders of the existing institutions can be detected. Mainly the *involvement* of citizens and their organizations in the legislative decision-making processes and the advantages/disadvantages of the financial support of the non-profit sphere will be addressed.

2. Specific features of the Hungarian civil society: some historical aspects

If we try to understand any particular state – or even a given human being – without serious efforts to understand those facts that can be reasons for the differences between the given entity and the elements of its broader – international or human – environment, our conclusion will not be well-grounded. Moreover, our suggestions would be infirm, too. It is visible, it can be detected that the analyzation of the current legal processes in Hungary, in many cases, happens without the knowledge of the particularities, the special historical and cultural background. So, the development of the civil or non-profit sector in recent times, since the transition (since the fall of the Iron Curtain in 1989), has been strongly influenced by behavioural patterns established during the previous decades, or

capital as well as the fundamental rights to protection of personal data and freedom of association enshrined in the EU Charter of Fundamental Rights [ECLI:EU:C:2020:476.].

even centuries[14]. It is possible to understand the present processes only if we manage to discover those elements of historical experiences which are still present in the collective memory, i.e. "[S]eem to have outstanding importance from the aspect of today's problems and development perspectives"[15].

Within this subchapter I try to introduce those elements and processes of the Hungarian political-legal environment that are continual and invariable ones existing for longer periods of time, or are re-entering periodically. Without those particularities the dominant directions of public politics and the constellations of legal development can be accessed and properly construed only to a limited extent. For example, Hesova – referring to the '10s – states that "The question is therefore why conservative issues and conservative values have started to matter, and what explains their relative success in CEE?"[16], and such a question might not be answered without detailed knowledge of the historical antecedents.

In order to be able to evaluate the strength and the quality of civil society in any given region, it is helpful – if not crucial – to begin with a larger comparative perspective. Beyond comparisons made between the West and the East[17], the common characteristics and also the differences of the countries belonging to the former Soviet bloc must be examined as well. In *The Weakness of Civil Society in Post-Communist Europe*, Marc Morjé Howard provides an empirical baseline that shows that post-communist citizens have extremely low levels of membership and participation in voluntary organizations[18].

---

[14] Á. Rixer, *Civil society…*, p. 50.

[15] É. Kuti, *Hívjuk talán nonprofitnak…* [*Let's call it non-profit…*], Nonprofit Kutatócsoport, Budapest 1998, p. 53.

[16] Z. Hesova, *New Politics of Morality in Central and Eastern Europe Actors, Discourse, and Context*, "Intersections – East European Journal of Society and Politics" 2021, 7(1), p. 60.

[17] T. Fritz, *Civilitika – A civil társadalom kialakulása Nyugat- és Közép-Európában, illetve Magyarországon*, "Polgári Szemle" 2019, 15(1–3), pp. 284–297.

[18] M.M. Howard, *Civil Society in Post-Communist Europe*, [in:] *The Oxford Handbook of Civil Society*, ed. M. Edwards, Oxford University Press, Oxford 2011, p. 135; and M.M. Howard, *The Weakness of Civil Society in Post-Communist Europe*, Cambridge University Press, Cambridge 2003.

Due to its instructive results we must refer to the international comparative research that took place between 2008 and 2011 including seven countries (Poland, the Czech Republic, Slovakia, Slovenia, Hungary, Bulgaria and Romania), which examined the social embeddedness of NGOs (the research work was entitled "Has our Dream Come True?"). According to findings included in the research report, the open problems related to the civil society in Hungary appear primarily as historical, sociological and socio-psychological issues, while the laws and regulations governing civil society respect international standards: the legal environment is highly developed, the rights are provided and the institutions are established. The report highlights the threats of the analysis solely based on the examination of the domestic legal documents mentioned above. "However, [in relation to the contents of the legislation], practice shows a different picture: in addition to the intense self-organization the Hungarian civil society is characterized by an accentuated dependence on the state, the low level of institutional trust[19], the weakness of channels suitable for lobby, and the low level of participation in decision making processes. In particular, civil control and influence is low, the large number of civil society organizations does not provide adequate social participation"[20]. The importance of developmental differences cannot be overrated.

While the development of civil society organisations in Hungary has been impressive in terms of number and diversity, its influence has remained limited to policy-making. Administrative attempts to draw civil society under tight regulation and control have produced a blurring of the boundaries between the civil and the public spheres that, in turn, has impaired the independent voice and the criticism of civil society[21]. "We documented a low level of political participation and social trust in politics, and low interest in the involvement in politics. The main findings support the view that the reconstruction

[19] Most global crisis phenomena are closely related to the *loss or lack of trust* and accordingly, the introduction and implementation of institutional solutions that can enhance confidence in all directions towards the public administration.

[20] Á. Rixer, *Civil society*..., pp. 23–24.

[21] J. Szalai, S. Svensson, *On civil society and the social economy in Hungary*, "Intersections" 2018, 4(4), pp. 107–124.

process of civil society occurred through irregular, cyclic changes in which strengthening mixed with weakening. The changes led to a formation of civil society of greater extensity, but relatively low intensity. The further development of civic culture in Hungary will require more time"[22].

So, what are the explanations for the weaknesses of the current Hungarian civil society?

2.1. REGULAR INTERRUPTION OF DEVELOPMENT

The starting point of our research related to this question should be the fact that the development of the Hungarian civil/non-profit sector – as we interpret it today – was historically characterised by intermissions[23] and a partly organic institutionalisation. It means more than the application of the "Punctuated Equilibrium Theory" used for the interpretation of the economic and political instability within democratic states[24, 25], because the frequency and incalcu-

[22] J. Simon, *Non-Participative Political Culture in Hungary – Why are the Participatory Pillars of Democratic Political Culture Weak in Hungary?*, "Central European Papers" 2014/2, pp. 167–188.

[23] The example for Hungary was always the "West", and when we had been in a "catch up phase", the distance (whatever it meant) shortened. *"In the middle of the 19th century all the types of associations already existing in Vienna were followed by similar associations in Pest* (*Hungary*) *within 5–15 years"*. Á. Tóth, *Civil szerveződés és polgári társadalom Magyarországon a 19. század első felében*, "Szellem és Tudomány" 2020, 11(Special issue), pp. 662–671. Moreover, the question of interrupted development is applied for contemporary situations as well: see e.g. L. Kákai, *Visszarendeződés? Civil szervezetek a közszolgáltatásokban a közigazgatási reform után*, "Civil Szemle" 2018, 15(2), pp. 51–72.

[24] P. Sabatier, *The need for better theories*, [in:] *Theories of the Policy Process*, 2nd ed., ed. P. Sabatier, Westview Press, Boulder and Oxford 2007, pp. 3–20.

[25] Zs. Boda, *A közpolitikai változás elméletei és a megszakított egyensúly*, [in:] *A magyar közpolitikai napirend: Elméleti alapok, empirikus eredmények*, eds. Zs. Boda, M. Sebők, Budapest, MTA TK Politikatudományi Intézet, Budapest 2018, pp. 15–22.

lability of those interruptions of the Hungarian past make those uncertainties systemic ones[26].

Furthermore, in the opinion of one of the most important Hungarian authors, Éva Kuti one of the most durable tendencies is the occasional, incoherent nature of the all-time regulations: "[It] seems that the lack of truly customised and comprehensive regulation is the chronic illness of the Hungarian non-profit sector. Transparent, permanently and consistently enforced rules applicable for all organisations have been missing for a long time, and have not been established until today. It is a question whether such 'ideal' situation can be established at all, ever"[27]. We can also add that – even though the lack of consistency and clarity has been a problem of the legal environment of the Hungarian civil organizations and the churches – between 1990 and 2011 the legal regulation was quite stable…

2.2. GENERAL FEATURES OF HUNGARIAN PUBLIC POLICY AND LEGAL POLICY

"In 1989, round-table discussions were established following the Polish example. However, given the prevailing circumstances in Hungary – a demobilized and apolitical society – the debates remained exclusive and resulted in a compromise negotiated by the elites. The compromise consisted of an agreement to hold free elections in 1990 and to implement constitutional amendments necessary for this process. In the years that followed, Hungary was able to establish a stable democratic political system in accordance with reforms implemented in all areas of public policy and society necessary to achieve democracy: public administration, the judicial system, the media, the non-governmental sector, education and social affairs"[28].

[26] See also I. Bibó, *A kelet-európai kisállamok nyomorúsága* [*The Misery of the Small East European States*], Argumentum, Budapest 2011.

[27] É. Kuti, *Hívjuk talán nonprofitnak…* [*Let's call it non-profit…*] Nonprofit Kutatócsoport, Budapest 1998, p. 6.

[28] BTI 2010. Hungary Country Report. p. 3, available at: https://bti-project.org/content/en/downloads/reports/country_report_2010_HUN.pdf 3 [accessed on: 22 August 2021].

A starting point of this subchapter is that new Central-Eastern European democracies established after 1989 did not build the political system on layered, sophisticated consultation procedures and institutional systems based on wide scale social participation, but – almost exclusively – on the Parliament-centred politic formation structures operating on the principle of representation. Many believe that one of the greatest problems of the societies getting out from under a dictatorship is that due to the lack of the civil society filling in the gap between individuals and the state during their socialisation, the members of these societies could never actually learn to incorporate the identification of problems, to formulate their interests, to exchange their thoughts, to harmonise different opinions, and as a result the various problem-handling methods were not developed, either. From the side of the public it may be stated that in Hungary the legal and institutional requirements of representative democracy were fulfilled after 1990, but since then no material change has occurred in order to establish participative democracy; this means that the Hungarian democracy "has frozen into the level of representative democracy"[29].

A promising process of bottom-up democratization remained stuck: several intellectual and political results of the '80s were not continued by the new elite of the transition[30]. "A peaceful revolution had been taking place but there was no change of paradigm"[31]. Instead of horizontal networks, strong autonomies, self-governments, solidarity and civil society, the formal institutions of the nation state and procedural democracy took place after 1990.

[29] Gy. Jenei, *Adalékok az állami szerepvállalás közpolitika-elméleti hátteréről* [*Supplements to the public policy – theoretical background of state participation*], [in:] *Államszerep válság idején* [*State role in crisis*], eds. H. Hosszú, M. Gellén, Complex, Budapest 2010, p. 95.

[30] F. Miszlivetz, *Mérlegen az elmúlt évtized – Posztliberális civil demokrácia felé?* "Civil Szemle" 2019, 16(3), pp. 8–9.

[31] *Ibidem*, p. 9.

2.3. CIVIL SOCIETY AS A PROBLEM OF NARROW SOCIAL ELITES

During their research Anheier and Seibel concluded that during the political transition the relationship of state and society was characterised by cooperative segmentation, its basis was provided by intellectuals, it was voluntary and the typical organisations of the sector were service provider foundations[32].

2.4. LEANING ON THE STATE AND REQUIRING AUTONOMY AT THE SAME TIME

No matter which historical period is under examination, the strange duality (double pressure) of striving for independence (autonomy) and the need for external financial tools – indirectly or directly provided by the state – has always been observable regarding the examined organisations[33].

2.5. STATE AS A SUBSTITUTE FOR CIVIL SOCIETY

A further tendency, a feature which may be hardly separated from the one mentioned earlier is that the all-time state – formed after the transition – imitates, reconstructs and replaces the civil sector through its conscious efforts, by this making it weaker and eventually hampering the connection between political decision-making mechanisms and the actual fragmentation of the interests of society[34]. State administration (and the whole government) in our region traditionally acts instead of civil society, as a substitute. This tendency, at least partly, is the inheritance of the era of state socialism. Past experience shows that in contrast to stable, old democracies, in the case of new democracies the state is still a more prominent player

[32] H. Anheier, W. Seibel, *A non-profit szektor és a társadalmi átalakulás* [*Non-profit sector and social transition*], "Európa Fórum" 1993/3, p. 27.
[33] Á. Rixer, *Civil society*..., p. 51.
[34] *Ibidem*, p. 59.

in the civil sphere, through its "*half-state-semi-civil*" institutions, by its old-type distribution mechanisms, etc[35]. This environment, however, had a weakening effect on organised civil society, upholding its – unnecessarily strong – dependent status.

Based on the main features of the public policy/administrative environment it must be stated in advance about Hungary that:

a) due to the traditional 'from top-to down' system, a general – and tendency-like – weakness is the lack of democratic control, accountability and transparency;
b) due to the politicised and instable practice of the reconciliation of interests[36], the quality of the decisions made in the public sector is often inadequate, as is their execution. We have to appreciate what has been already reached, nevertheless, it is not a civil society yet [here in Hungary] – at least in its classical meaning. It is just a result of its antecedents, still far from its optimal status[37]. It is captured by political parties, accordingly civil society does not have its own voice and even general issues of the whole nation evolve in connection with some political presuppositions[38];
c) public policy has balance problems; the weight and coordination of the relevant players is disproportionate and incalculable due to the extreme politicisation, and to the fact that political predominance characterises the relationship of the political administrative system and society;
d) the final phase of public policy is missing; public policy processes begin but they often do not get to the end. There is no evaluation phase and closure[39].

---

[35] T. Sárközy, *Kormányzás, civil társadalom, jog* [*Government, civil society and law*], Kossuth Kiadó, Budapest 2004, p. 5.

[36] M. Gerő, Á. Kopper, *Fake and Dishonest: Pathologies of Differentiation of the Civil and the Political Sphere in Hungary*, "Journal of Civil Society" 2013, 9(4), pp. 361–374.

[37] Cs. Varga, *Civil szerveződések – állami politikák: egymásmellettiségek, kapcsolatok, lehetséges torzulások*, "Iustum aequum salutare" 2018, 14(1), p. 135.

[38] *Ibidem.*

[39] S. Pesti, *Közpolitika szöveggyűjtemény*, Rejtjel, Budapest 2011, p. 206.

It is inseparable from the latter facts that the traditional features of the Hungarian political culture are paternalism, intolerance and the transformation of personal relations into political ones[40], and last but not least the presence of corruption phenomena, which may be observed at a degree exceeding the average of the surrounding area[41]. Among the classic governmental failure phenomena – which is not traditionally Hungarian, but may definitely be observed here as well – the theoretical difficulties of setting and measuring public policy goals may be mentioned, as well as the influence of strong interest groups[42].

It is also important that in Hungary "[The] all-time present stands out by the strong and unreasonable delegitimizing of the all-time past, instead of putting forward its own performance"[43].

2.6. IMPORTANCE OF THE IDENTITY DEBATE[44]

We should mention the issue of *identity* as an emerging contemporary problem, too. A particularly lively and acute question in Central and Eastern Europe (but certainly not only here) is how to create and stimulate a modern community that is easy to identify with and yet relies on stable values of local, national and other identities. The most obvious form of this is restoration, calling on and reactivating models that have worked in the past: rebuilding the empty concept of identity, for example in Hungary, with the help of such elements as the historical constitution, the Christian culture,

[40] K. Kulcsár, *Politika és jogszociológia* [*Politics and legal sociology*], Akadémiai Kiadó, Budapest 1995, p. 336.

[41] http://www.ey.com/HU/hu/Newsroom/News-releases/global_fraud_survey_2010_pr [accessed on: 10 July 2021].

[42] Gy. Hajnal, *Adalékok a magyar közpolitika kudarcaihoz* [*Supplements to the failures of Hungarian public politics*], KszK ROP 3.1.1. Programigazgatóság, Budapest 2008, p. 33.

[43] P. Szigeti, *A Magyar Köztársaság jogrendszerének állapota 1989–2006* [*The state of the legal system of the Hungarian Republic 1989–2006*], Akadémiai Kiadó, Budapest 2008, p. 17.

[44] For details, see: Á. Rixer, *Az identitás-vita újabb fejleményei Magyarországon*, "Glossa Iuridica" 2017, 4(1–2), pp. 147–171.

the traditional family model and other elements of past identity. It can be stated that these phenomena are not elements of mere mnemonic constitutionalism…[45] But why has this issue of identity become so important now, 30 years after the collapse of the Soviet bloc? As Erikson states there are stages of personal psychosocial development. Erik Erikson's stages of psychosocial development, as articulated in the second half of the 20th century by Erik Erikson in collaboration with Joan Erikson, is a comprehensive psychoanalytic theory that identifies a series of eight stages that a healthy developing individual should pass through from infancy to late adulthood. Just to mention two of these stages:

- Age 5–12: "The child now feels the need to win approval by demonstrating specific competencies that are valued by society". They work hard at "*being responsible, being good and doing it right*"[46]. The main questions during this period are: "Am I good enough, am I acceptable? What should I do?"
- Age 12–18: the period of life of role confusion or identity crisis as a critical part of development in which an adolescent or youth develops a sense of self. Identity crisis involves the integration of the physical self, personality, potential roles and occupations. It is influenced by culture and historical

[45] In his article Belavusau examines the rise of memory laws and the wider practice of using simplistic historical narratives within constitutional law in countries with serious democratic decline. The mushrooming of memory laws in Central and Eastern Europe (CEE) throughout the 2010s, which went hand-in-hand with democratic backsliding in the region, is now well documented. In particular, Hungary has recently been at the epicentre of the EU's critique for violation of the rule of law standards. In the last decade, both countries (Hungary and Russia) have promulgated – via referenda – new constitutional projects with embedded populist historical narratives therein. In Hungary, Fidesz pushed the adoption of a new Basic Law in 2010. In Russia, Putin safeguarded constitutional amendments in 2020. The article concludes that both of these projects perceive mnemonic constitutionalism not only as an ideological basis for an entire governance of historical memory but also as an ontological foundation to justify "illiberal democracies". U. Belavusau, *Mnemonic Constitutionalism and Rule of Law in Hungary and Russia*, 2020, "The Interdisciplinary Journal of Populism" 2020, 1(1), pp. 16–29.

[46] E.H. Erikson, *Reflections on the Dissent of Contemporary Youth*, "Daedalus" 1970, 99(1), pp. 154–176.

trends. This stage is necessary for the successful development of future stages[47]. Adolescents "are confronted by the need to re-establish boundaries for themselves and to do this in the face of an often potentially hostile world"[48]. The questions change to "Who am I?" These life periods or stages refer to persons, to human beings, but using this model as a parallel, we can predict that even a whole society, a particular state is also able to go through these stages of this psychosocial development. So, what were the main questions in Hungary in the '90s and '00s? When will Hungary catch up with Austria? When will Hungary receive a full membership in the EU? What should we do? And what are the main questions now: Who am I? What are my main values? What should I do to defend them? The latter are the questions of an entity which goes through its own *and natural* identity crisis… So, to sum up, a kind of young adult's identity crisis is evident in Hungary. After 17 years of the EU membership, following the first adaptation period several questions arise in connection with the awakening external and internal crises, such as Who am I? What are my own values? and How can I enforce them?

2.7. FURTHER FEATURES OF THE IDENTITY PHENOMENA IN HUNGARY

An overwiew of the existing and dominant values within different societies can also demonstrate that even huge differences can be detected: e.g. "[S]ome Americans see diversity as what Schuck calls an 'independent social value', that is, as a good in itself. For most Americans, however, the principal value of diversity is as a means for rectifying wrongs. If certain groups have been excluded from key institutions and sectors of society, and if society comes to believe that this exclusion is wrongful, then the principle of diversity can be

[47] E.H. Erikson, *Autobiographic Notes on the Identity Crisis*, "Daedalus", 1970, 99(4), pp. 730–759.
[48] *Ibidem*.

used to promote inclusion"[49]. There is nothing similar in Hungary, i.e. there is no "official" need to prove that kind of diversity.

We have to take into account that some institutions showing relative autonomy of the society from the state, such as civil disobedience, street violence or even strike are not dominant or traditional parts of Hungarian political life. For two decades we thought that the only "price" of the peaceful revolution in 1989 was that some representatives of the former communist regime were not punished, but nowadays it has become clear that there are some further consequences also: false self-image, survival of core socialist values and insensitivity towards injustice. Actually, beyond weaknesses some strengths can also be detected.

2.8. WHAT ARE THE EXACT CAUSES OF THESE FACTS?

- The change of the regime after 1989 is mainly a result of a democracy-export – even though some intrinsic political antecedents might also be mentioned. It means that political and legal structures were not built up in an organic way, through "natural" processes launched mainly from inside. A strong state based on the rule of law requires plenty of "self-made" different social norms providing (backing) the realization of legal norms, and, unfortunately, at least partly we still lack this type of healthy "congruent" development of different norms of the current society. As a consequence, we can state that the contested concept of the rule of law can be interpreted not only as a "western and liberal model" and as a "Hungarian illiberal model", but also as a working "export item model".
- We are speaking about a society that has not finished dealing with its own past yet: having strong images of our enemies and also a self-image of a revolutionary nation at the same time…

[49] A.G. William, *Liberal Government, Civil Society, and the Rule of Law*, "Yale Law & Policy Review" 2005, 23(1), p. 17.

- Measures taken after the financial, migration and other crises after *2008–2009* were centered on the increasing involvement of national governments, moreover, "Since Europe is not able to give fast and successful answers on global megatrends […], the European Dream is falling to the ground."
- The state of legal culture and legal consciousness within Hungarian society. Some elements can be derived from the abovementioned facts, but there are some further things to construe[50], as Fekete states, Marina Kurkchiyan is an important scholar who examines the illegitimacy of law in post-Soviet societies. Using a social-constructionist approach, her theory suggests that those societies have established a negative myth of the rule of law[51]. In accordance with Fekete's summary, by the end of the first decade of transition most people had come to believe that everybody around them was routinely disobeying the law, so it was rational for them to join in whether they wanted to or not. This scepticism prompts people to rely on informal practices as substitutes for law. Kurkchiyan's study traces the origins of the negative myth of the rule of law back to the Soviet legacy, arguing that it has been reinforced by the destabilizing logic of post-1990 transition. Earlier András Sajó also pointed out in his masterpiece entitled Illusion and Reality in Law (1986)[52] that the legal culture of the Socialist Hungary was strongly determined by the fact that legal arguments, especially references to rights, played only a limited role in the conflict management strategies of citizens[53]. Sajó named this phenomenon as the lack of rights consciousness. In later pieces, Sajó argued that this

[50] B. Fekete, *Some Specific Central European Experiences May Help to Increase Understanding of the Legal Reality in The Western Countries*, "Droit et société" 2020/1, pp. 149–157.

[51] M. Kurkchiyan, *The Illegitimacy of Law in Post-Soviet Societies*, [in:] *Law and Informal Practices. The Post-Communist Experience*, eds. D.J. Galligan, M. Kurkchiyan, Oxford, Oxford University Press 2003, pp. 25–47.

[52] A. Sajó, *Látszat és valóság a jogban* [*Illusion and Reality in Law*], Közgazdasági és Jogi Könyvkiadó, Budapest 1986, p. 11.

[53] B. Fekete, *op. cit*., p. 150.

phenomenon still persists in the post-transitory Hungarian legal culture due to the distortions of market economy transition and the general lack of trust[54].

2.9. SUMMARY

My conclusion is that the organic development of a legal and political system cannot be spared: it is not possible to catch up with the Western democracies by one huge jump…, even if almost the whole legal system is harmonized. The reason behind this fact is that the legal system consists also of non-legal norms, attitudes, beliefs, desires and even behaviour patterns of the last centuries.

3. Specific features of the Hungarian civil society: some contemporary aspects

Within the previous subchapter I mentioned some long term effects forming the current Hungarian civil society. I introduced those political and cultural habits or even traditions that were inherited from our past, and are still influencing our contemporary social, political and legal life. Now I am going to collect and sort the areas peculiar to the contemporary Hungarian civil society, introducing also fields of increasing importance.

I've split those important, currently existing areas into five groups, and I created a sixth one for the forthcoming ones as well.

The very first aspect is the spatial or geographical aspect. The appearance of new spatial (territorial) dimensions can be detected by:

a) the birth of the gated communities, which is real novelty, a platform of civil society that did not exist before. Briefly we may state that we have a new type of regional and geographical unit having several civil/non-profit organizations/formations with some relatively special functions

[54] *Ibidem.*

(maintaining and operating its infrastructure, acting as a mutual defence organization – protecting legitimate interests of the owners[55]). In fact, based on certain characteristics (for example volunteering, the presence of self-activity) a gated community itself can be described as a quasi-civil society organization (in addition to the civil/non-profit formations established within them). It is important to stress that although the concept of a gated community is present in the public discourse not only as a colloquial expression, the science of law and administration has not yet dealt with the topic. In Hungary there is no independent, separate legislation regarding gated communities – while the rapidly increasing number of such residential areas would justify it[56].

b) regional, cross-border civil partnerships[57];

c) the civil organizations of the Hungarian communities living outside Hungary. This aspect also refers to the fact that the notion of Hungarian public administration has been broadened by politics and certain policies related to those ethnic Hungarians across the current boarders of Hungary. According to the provisions of Act LXII of 2011 on Hungarians living in the neighbouring countries and according to some other laws those ethnic Hungarians may receive educational, cultural, health care, travel and other allowances, benefits and services[58]. A change of paradigmatic impor-

[55] G. Hegedűs, *A szegedi lakóparkok társadalomföldrajzi vizsgálata* [*Human Geographical Analysis of the Residential Parks in Szeged*], p. 3, available at: http://www.human.geo.u-szeged.hu/files/c/hegedus/KEK_2009.pdf [accessed on: 2 June 2014].

[56] Á. Rixer, *Civil Society*…, pp. 147–149.

[57] The Volunteer Project was dreamed up and implemented between September 2017 and April 2019 by Budapest-based Subjective Values Foundation, Corvinus University of Budapest, and Slovakian TAMDEM, n.o. The aim of the partners was to develop cross-border cooperations between individuals and organizations employing volunteers available at: https://www.skhu.eu/funded-projects/strengthening-cross-border-civil-society-through-the-development-of-a-joint-volunteer-exchange-system [accessed on: 12 September 2021].

[58] A. Morauszki, *Határon túli magyar szervezetek nyílt pályázati támogatása – a Bethlen Gábor Alap magyarkultúráért és oktatásért pályázatainak elemzése*

tance is that from the resources of the National Cooperation Fund (NEA) operating as the main financial resource of Hungarian civil associations not only domestic organisations, but – if they meet basic requirements – also (Hungarian) civil associations operating abroad may benefit[59]. The efforts of the local ethnic Hungarian communities and their non-profit organizations, especially of those operating in Romania and Slovakia, are intensively researched within the Hungarian scientific literature;

d) legal restrictions on those associations and foundations that were financed from abroad[60].

The second, dynamically growing, aspect is the economic one. Among others:

a) the number of community foundations has increased. These are registered not-for-profit organizations (foundations) that serve the community living in a certain geographic area (district, small region, county, etc.) and the most important segments and actors of the community concerned are represented in the leadership of the community foundation. This form is not a unique legal form but a new type of operation in practice. The Hungarian foundations were basically of two types earlier: programme-oriented and fundraising or donating foundations, in both cases with a relatively close circle of founders, and in the vast majority of cases connected to one or two people, so the appearance and the anticipated expansion of the so-called community foundations is a new phenomenon;

b) there is also a brand new legal form of foundations, called *foundation trust* (or asset management foundation) (*vagyonkezelő alapítvány*). This new form of foundation is intended to enable families to preserve the value of their *estates* for generations. The Hungarian Parliament passed

(*2012–2019*), available at: https://bgazrt.hu/wp-content/uploads/2020/12/3.Morauszki.pdf [accessed on: 23 July 2021].

[59] Á. Rixer, *Civil society*…, pp. 154–155.

[60] See n. 13.

the Act on Foundation Trusts on 5 March 2019. This legal concept has had a long and successful history in German-speaking countries. The main purpose of lawmakers in introducing this concept is to provide a legal framework – in addition to the already operating trusts – to manage, preserve and enlarge private equities owned by families for future generations. The introduction of this new foundation model in Hungary is justified since the Civil Code strictly restricts economic activities of foundations to the point where they can only carry out activities that are directly related to the achievement of the foundation's objectives. In contrast, a foundation trust may, as its principal activity, manage assets regarding its own portfolio[61]. This new form of foundation is intended to enable families to preserve the value of their estates for generations and would also help public bodies finance educational, cultural, sports or health-related activities.

Moreover, several universities and other entities have been transformed from state-funded institutions into private foundations governed by a board of trustees in 2021: the law transferred various state assets to public interest asset management foundation performing public duty (*közfeladatot ellátó közérdekű vagyonkezelő alapítvány*), removing the state's oversight of hundreds of billions in public funds. The government's official reasoning is to raise competitiveness and efficiency;

c) *besides classical foundations* important actors of the Hungarian social economy are the non-profit enterprises[62] and social cooperatives – even though neither form fulfils the formal requirements of a civil organization. The emergence of the new civil and "borderline" types of organizations (community foundations, asset management foundations,

[61] https://www.kinstellar.com/locations/news-deals-insights/detail/budapest-hungary/869/foundation-trusts-set-for-introduction-in-hungary [accessed on: 30 August 2021].

[62] Á. Rixer, *Civil society*…, p. 139.

social cooperatives), and the weight of their economic aspects have been constantly growing parallelly with the different crises since 2008;

d) we must also mention the new phenomenon of sharing economy that involves civil organizations in several ways in Hungary – also as partners of local self-governments[63]; and

e) it is also important that the constant change of the legal background of the whole sphere makes it unavoidable for civil entities to hire also legal experts, not only accountants.

Nevertheless, Szalai and Svensson do warn us: "[E]conomic acts based on solidarity and originating from civil society do not automatically form or increase a 'social economy' but become as contested by and as intermingled with political developments as other acts of civil society. This development has also affected the profile of civil activities: against the earlier impressive weight of anti-poverty, anti-racist and human rights engagements, the 'non-risky' activities of sports and leisure services have come to domination. A turn toward declining participation is a warning sign of the decreasing contribution of civil society to everyday democracy"[64]. The Hungarian scientific literature confirms this statement, alleging that the "winners" of the last decade were sports organizations in Hungary[65].

The third relatively independent group of new aspects related to the civil organizations is inevitably digitalization[66]. Not only the foundation and the operation of these organizations is – at least partly – transferred to the digital space, but several new – mainly

[63] K. Czakó, et al., *Differences, Constraints and Key Elements of Providing Local Sharing Economy Services in Different-Sized Cities: A Hungarian Case*, "Resources" 2019, 8(3), p. 147, available at: https://doi.org/10.3390/resources8030147 [accessed on: 30 August 2021].

[64] J. Szalai, S. Svensson, *op. cit*., p. 108.

[65] Zs. Gősi, Zs. Bukta, *A sport civil szervezetei mint az elmúlt évtized nyertesei*, "Civil Szemle" 2020, 17(2), 59–68; A. Borbély, T. Madarász, É. Bácsné Bába, *Sportgazdaság, civil szervezetek*, "Magyar Sporttudományi Szemle" 2020/3, pp. 40–41.

[66] A. Borzán, B. Szekeres, *Digitalizációs kihívások a civil szektorban*, "Civil Szemle" 2020, 17(1), pp. 73–88.

legal – problems do evolve at the same time: e.g. the GDPR requirements[67]. "Speaking about the civil society in the era of digitalization, it should be understood that this is, first of all, a network society, and without understanding this type of society it is pointless to talk about new forms of civil society. The network society was considered a well-studied object of research by the early 2000s, however today the radical acceleration of ICT and other processes is connected with digital information-network revolution involving artificial intelligence"[68]. It's important though in the frame of urban civic activism the voluntary cooperation in many cases takes place without creating and maintaining sustained organizations in Hungary, as well. "It has become almost a cliché to argue that the COVID-19 pandemic has greatly accelerated the existing trends within numerous, sometimes unrelated fields. And yet, it is true that the unrelenting push towards the digitalisation and the digitisation of almost all aspects of life has exponentially increased due to the pandemic"[69] – and such questions as serious health issues have also been transferred to the digital space, requiring also the involvement of responsible civil actors (non-profit organizations).

The fourth aspect is that the relation to party politics has been changed: deeper involvement in direct politicization can be detected on both 'sides' in Hungary. During and after the regime change in 1989 the political role of civil organizations had been declined: newly created political parties occupied the whole sphere of politics. And this situation has been slightly changing recently: on the one hand pre-selection (primary) has become a new political tool in Hungary: an opposition primary election is planned to select the candidate for Prime Minister and candidates for single-member districts in 2022 and the primary election is organised not only by the six opposition parties running together in the 2022 Hungarian

[67] T. Szabó, *Civil szervezetek GDPR kötelezettségei*, "Önadózó" 2018, 30(7–8), pp. 45–47.

[68] I. Aseeva, V. Budanov, *Digitalization: potential risks for civil society*, "Economic Annals-XXI" 2020, 186(11–12), pp. 36–47.

[69] C.M. Flavius, R. Munteanu, J. Akhunova, *Digitalisation and Civil Society. Evolutions Post-Coronavirus*, Middle East Political and Economic Institute, Bucharest 2020, p. 6.

parliamentary election but also by some associations as well, e.g. by aHang[70]. On the other hand, on the other political side, some other 'civilian' movements such as Civil Cooperation Forum (Civil Összefogás Fórum)[71] arose, emerging anti-left-liberal politics and organised political rallies alongside Fidesz as the governing party[72].

The fifth aspect is that some brand new issues have been also evolved, undertaken by some civil organizations and strongly debated by other social actors, changing the accents within the whole civil sphere. Amongst others such fields (topics) are the gender issue[73], the rights of sexual minorities, the involvement of LGBT organizations into organized sex education[74], national identity – legal identity, the Rule of Law[75] and also the COVID-pandemic. A few years ago the migration issue had the same importance…[76]

The sixth aspect refers to the paths to the future.

There are some further aspects also, becoming important only within a few years or decades. If we had to determine what the core characteristic of 'civil society' is, we could say that it is the

---

[70] Á. Rixer, *Az előválasztás jogi evolúciója Magyarországon*, "MTA Law Working Papers" 2021, 8(14), pp. 1–17.

[71] Financially supported by Civil Összefogás Közhasznú Alapítvány (Civil Cooperation Public Benefit Foundation).

[72] Á. Rixer, *A civil társadalom helyzete Magyarországon, különös tekintettel a populizmus térnyerésére*, "Glossa Iuridica" 2019, 6(3–4), pp. 43–72.

[73] A. Fejős, M. Neményi, *Család, munka és a női test: Nőkkel és családokkal foglalkozó civil szervezetek egy változó társadalmi-politikai környezetben*, [in:] *Támogatás és támadás. Női civil szervezetek az illiberális demokráciában*, eds. A. Fejős, D. Szikra, MTA TK, Budapest 2020, pp. 77–106.

[74] See the new Hungarian anti-pedophilia and child protection bill (Act LXXIX of 2021).

[75] The European Commission has published the second EU-wide Report on the Rule of Law with a Communication looking at the situation in the EU as a whole and dedicated country chapters on each Member State on the 20th of July 2021. The Hungarian Chapter points to serious concerns also related to the organized civil society, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_3761 [accessed on: 20 September 2021]; S. Hegedős, *A jogállamiság fogalmának teoretikai problémái az Európai Unió jogfelfogásának vonatkozásában* [*Theoretical Problems of the Rule of Law in Relation to the Legal Conception of the European Union*], "Külügyi Műhely" 2020, 1(2), pp. 5–24.

[76] Á. Rixer (ed.), *Migrants and Refugees in Hungary: A Legal Perspective*, KRE, Budapest 2016.

ability to reflect on real social problems[77]. It is a pre-question in the examination of the effectiveness of public administration and the performance of civil society that at what degree they will provide answers to the urging questions of the coming years and decades. Regarding Hungary, such questions are demography problems, the Roma issue and the possible effects of climate change[78]. It is indubitable that in Hungary the Roma issue is one of the most urgent, and in practice, the least handled problems. The latter is true also because in public spheres – including the state/public administration sectors of the public – it is still not well-settled which the legitimate and constructive forms, the frameworks and the wordings of raising the issue are[79].

Why do we tackle the Roma-question within the context of Hungarian civil society, why is it such an important issue? The answer is tragically simple: besides their low socio-economic status, the Roma (called *cigány* or *roma* in Hungarian) in Hungary undoubtedly suffer from the lack of resources and the institutional means to articulate their needs and to obtain recognition for their claims. We have to emphasize that the ability of the Roma to participate in social and community life in an organized manner is a critical issue[80]. The most important question is whether the Roma could establish their own civil organizations or not, and if not, what the tasks of the majority of the society are[81].

Turning to the environmental issues: within a few decades a serious rise in average temperatures, erratic rainfall distribution, and long-term water shortages will occur in some areas of Hungary [the regional climate model downscaled at the Hungarian Meteorological Service (OMSZ) predicts more than 3 °C mean temperature increase in every season in Hungary in the last third of the 21st century (http://met.hu)]. For example, in 2003 FAO already classified the territory between the two major rivers (Danube and Tisza) as 'semi

[77] Á. Rixer, *Civil society*..., p. 175.
[78] Á. Rixer, *The relationship between*..., p. 171.
[79] *Ibidem.*
[80] Á. Rixer, *Civil society*..., p. 162.
[81] See more: Á. Rixer, *Roma civil society in Hungary*, "Journal of Constitutionalism and Human Rights" 2013, 1(3), pp. 4–32.

desert' and called for action to prevent further desiccation. These issues will bring an even greater challenge for the civil/non-profit organisations.

4. Levels and forms of the relationship between public administration and civil society organizations in Hungary

So, as it was already mentioned earlier, within the next chapter, I am going to summarize the forms of the relationship between state administration and civil society organizations, and – right after that – also the forms of the relationship between local governments and civil entities here, in Hungary.

Though the primary method of this research is the comprehensive collection of formal institutional facilities provided by Hungarian laws, facts deducible from the texts of laws must be – to some extent – compared also with reality, with the factual practices of administrative organs[82]. This leads to some supplementary remarks – providing results of some social sciences beyond legal science.

4.1. LEVELS AND FORMS OF THE RELATIONSHIP BETWEEN STATE ADMINISTRATION AND CIVIL SOCIETY ORGANIZATIONS

The relationship of the civil or not-for-profit sector and state administration may be examined from several specific aspects[83], but in my opinion these relations may be put into six – relatively – well distinguishable groups. Therefore, the relationship of civil organisations with administrative organs (organs of state administration) may be identified

- first, in the creation of administrative programs and participation in legislation;

[82] Á. Rixer, *Civil Organisations' Participation in Legislative Processes in Hungary*, "Pro Publico Bono – Magyar Közigazgatás" 2014, 2(3), p. 6.

[83] Á. Rixer, *The relationship between*…, p. 254.

- second, in the protection of rights and in the watchdog function;
- third, in the provision of public services (for example, running primary schools or providing basic community health care services);
- fourth, regarding the provision of different sources of finance (which is non separable from the previous three fields)[84];
- fifthly, in activities performed not for third parties, but only for themselves (e.g. official duties concerning real estate acquisitions, with the obligations relating to the declaration and the payment of taxes or obtaining authorisations;
- and sixthly, there are some special, mixed forms, as well – in which the administrative and the civil features are all present at the same time. For example, many of the prominent local politicians are invited for the positions of local civil organisations as members of an advisory board[85], or – choosing another example – there are several associations founded by civil servants…

We should set up a seventh one also – proving that the relationship in question can be detected also in mixed activities containing some activities from above at the same time.

Let me explain the first three points in a little more detail!

[84] See more about the possible types of incomes of civil organisations in Section 20 of Act CLXXV of 2013. Most of those types are inseparable from state administrative organs or local self-governments, i.e. they require their active role (e.g. related to the amount of a determined portion of the personal income tax disbursed at the taxpayers' discretion; support received without a reimbursement obligation to compensate the costs and expenditures of the targeted (public benefit) activity; and other incomes from services and/or goods supplied within the framework of core (public benefit) activities. There are several specific legal forms ensuring these forms of cooperation, e.g. public service contracts (2. § 21.) or grant contracts [53. § (1)].

[85] J. Bocz, *Újraválasztott polgármesterek, avagy kiket és miért választanak meg ismét a szavazópolgárok?* "Századvég" 2004, 9(33), pp. 99–118

4.1.1. Creation of administrative programs and participation in legislation

Related to my first point, that is participation in programme-making and legislation, one of the key questions is, once again, that of how far civil society can go in the participation of (political) decision making? According to the general view, the presence is desirable and subservient only in the decision preparation phase that presents both informal and institutionalised forms. The popularity of the presently emerging ideas of good governance, as well as their increased legitimacy is due not only to governmental effectiveness, but also to the closely related participatory governance. Plural, participative democracy provides for the participation of society and economic players, thus civil/non-profit organisations play a part in satisfying common social needs – beyond periodic elections and referenda – within the framework of the right to make recommendations, to be informed and to object, as well as in several ways within task provision possibilities[86]. Moreover, the open government paradigm implies that public processes are becoming more transparent, public information is available online, and citizens and non-governmental organizations are encouraged to interact with public administration through old-type and new platform-based forms of participation and collaboration[87]. This starting point – at least for the present – has not been significantly changed by approaches that refer to the increasing role of the state or to the newly created needs and demands arising from different crises[88]. What is more, the more a government shows openness to dialogue, the more influence of civil entities can be detected[89].

---

[86] Á. Rixer, *Civil Organisations' Participation*…, pp. 5–6.

[87] L. Schmidthuber, A. Ingrams, D. Hilgers, *Government Openness and Public Trust: The Mediating Role of Democratic Capacity*, "Public Administration Review" 2020, 81(1), pp. 91–109.

[88] Á. Rixer, *Civil Organisations' Participation*…, p. 6.

[89] M. Gerő et al., *Strategies for Survival: Human Rights Organizations' Responses to the Closing of Political Opportunity Structures in Hungary*, "Czech Journal of Political Science" 2020, 27(2), pp. 119–139.

The forms of participation in programme making and legislation by civil entities can be grouped into two main categories: participation without membership in bodies and participation through membership in bodies.

a) Participation in programme making and legislation without membership in bodies

I. Organisation of a national referendum proposal

Act CCXXXVIII of 2013 on Referendum Proposal, European Citizens' Initiative and Referendum Procedure states that the proposal of constituents on setting the date of national referenda may be organised – among others – by associations as well, if the given question is connected with the scope of activities set forth in their articles of association[90]. Those proposals are managed by the National Election Commission and the National Election Office, which are both central administrative organs.

II. Making complaints and public interest disclosures

According to the Act CLXV of 2013 on Complaints and Public Interest Disclosures public bodies and local government bodies shall manage complaints and public interest disclosures[91]. Associations and foundations – through their representatives – are also entitled to make complaints and public interest disclosures ("Anybody may make a complaint or a public interest disclosure to the body entitled to proceed in matters relating to complaints and public interest disclosures"[92]). Both complaints and public interest disclosures may also contain a proposal.

---

[90] Section 2 (1) c).

[91] Act CLXV of 2013 on Complaints and Public Interest Disclosures, Section 1 paragraph (1)–(4).

[92] Act CLXV of 2013 on Complaints and Public Interest Disclosures, Section 1 paragraph (4), available at: http://www.ajbh.hu/documents/14315/130159/Act_CLXV_of_2013_.pdf/faa3e557-8e16-473f-1fa9-539e7cdb0f22 [accessed on: 30 August 2021].

III. Participation in social negotiation (in preparation of laws)

The two basic forms of social participation in the preparation of laws, i.e., *general negotiation* and *direct negotiation* appear in Section 7 of Act CXXXI of 2010 on social participation. The scope of the act covers opinion making by natural persons and non-state and non-local governmental bodies, organisations about draft laws and concepts of regulations grounding draft laws prepared by ministers. [Section 1 paragraph (1)] With some exceptions (e.g. draft law on the establishment of organisations or institutions) social negotiation shall be initiated about the draft and reasoning of a) acts, b) decrees of government and c) decrees of ministers. General negotiation provides for the possibility of giving opinion through the website of the body publishing the concepts or drafts[93], while the direct negotiation allows the relevant minister to request opinion directly from persons and organisations[94]. The primary legal form of direct negotiation is the institution of strategic partnership – creating obligations also on the side of the minister – the framework of which is provided by an agreement determining several elements.

b) Participation in programme making and legislation through membership in bodies

(Social) consultation is a source of the rule of law that facilitates the reaching of the goal of high quality legislation[95]. In Hungary, specifically, the notion of consultation has at least three meanings: first, the broader concept of consultation includes all the forms of social negotiation and review, even those that do not have a legal foundation (background), e.g. the 'National consultation' (*nemzeti konzultáció*); second, there is a narrower meaning including exclusively the enacted forms of consultation named in legal sources that are in effect (also those that were mentioned in this subchapter previously, e.g. forms of social negotiation), and third, there is a narrowest concept of the given notion limiting its meaning only

[93] Section 7 (1) a).

[94] Section 7 (1) b).

[95] T. Drinóczi, *A részvétel és a konzultáció elmélete és gyakorlata*, "JURA" 2013, 19(1), p. 7.

to those enacted forms that require membership of civil entities (or their representatives) within consultative bodies. Within this subchapter we will lean only on the third concept.

It is an important preliminary question that – in accordance with Vadál – we may distinguish between *internal consultative bodies of governmental activities* and *external consultative bodies of governmental activities*. Related to the first one, she lists those institutions and procedures (e.g. government commissions, cabinets and interministerial commissions) in which only state bodies participate and the representatives of civil society (non-state bodies) are usually not present among the members. Into the latter grouping she lists those bodies within which, in addition to the representatives of governmental bodies, the institutions of the widest range of civil society are present, such as social organisations, representatives of interests, professional and expert organisations, representatives of science, professional chambers, etc. Within this grouping it is important that "[T]hrough these bodies, the interconnection between governmental activities and the activities of organisations interested in and concerned about decisions may be established. Through these bodies, the presentation of interests, their collision, striving for consensus, and the professional and scientific grounding of decisions may be realised"[96]. So, here we will concentrate on those external bodies that do have a stable and substantive participation of civil organisations.

The importance of this phenomenon is also underlined by the fact that "By today a complex system of governmental consultative bodies has been established in all modern public administrative systems"[97].

B1) Participation of civil organizations within external consultative bodies set up by state administration

In accordance with Section 10 of Act CXXV of 2018 on governmental administration the Government may establish [external consultative] bodies to perform advisory, proposing or consultative activities.

[96] Á. Rixer, *Civil Organisations' Participation*..., p. 19.

[97] I. Vadál, *A kormányzati döntések konzultációs mechanizmusai* [*Consultation mechanisms of governmental decisions*], Complex, Budapest 2011, p. 17.

Board members may receive an honorarium for their activities. Under the 1158/2011. (V. 23). Government decision on the review of bodies set up by laws or legal instruments of state administration, those bodies that are set up by governmental Government decision shall be councils, inter-ministerial committees, working groups or committees; bodies set up by orders of ministers (secretaries) shall be working groups or committees; and bodies set up by orders of other leaders of organs of state administration shall be committees.

These bodies – involving also civil organizations and their representatives – are mainly competent to carry out specific sectoral tasks defined in its mandate which refers to the tasks of the administrative organ that launched the given body.

B2) Participation of civil organizations within consultative mechanism of social dialogue

A separate field of consultative mechanisms may also be detected in Hungary, devoted specifically to the economic and social dialogue. The most important goal of social dialogue is the promotion of labour relations[98]. The importance and distinctiveness of these particular mechanisms of social dialogue is underlined by the fact that both the main macro-level and intermediate-level institutions are set up by acts of the Parliament (and not by the Government or other organs of state administration).

Related to the macro-level the Parliament adopted the Act XCIII of 2011 on the National Economic and Social Council (abbreviated NESC in English, and NGTT in Hungarian) in recognition of the role of economic and social dialogue, in order to discuss strategies of national economy and social policy and to promote a consensus among various interest groups of society. The NESC is a consultative, proposal-making and advisory body independent of Parliament and the Government. The NESC has 32 members[99], representing the broader Hungarian civil society, creating – among others – the Side of Representatives of Economy (advocacy groups and organizations

[98] G. Mélypataki, *A szociális párbeszéd lehetőségei a közszolgálat területén*, "Pro Publico Bono – Magyar Közigazgatás" 2019, 7(1), p. 22.

[99] The mandate of NESC members is valid for four years.

of employers, national business chambers), the Side of Employees (advocacy groups and organizations of employees) and also the Side of civil organizations implementing also those that are active in the field of national policy.

There is also another group of macro-level consultative forums which consists of those that work within the field of civil service. Within this field macro-level forums for reconciliation in the area of labour are the Interest Reconciliation Council (*Országos Érdekegyeztető Tanács, OKÉT*), the Reconciliation Forum of Civil Service (*Közszolgálati Érdekegyeztető Fórum, KÉF*), and the National Labour Council of Public Servants (*Közalkalmazottak Országos Munkaügyi Tanácsa*).

Related to the micro-level the independent forms (and forums) of social dialogue are the sectoral (social) dialogue committees (*ágazati párbeszéd bizottságok*). Act LXXIV of 2009 on sectoral dialogue committees and on some issues of intermediate-level social dialogue regulates this issue. According to this act, interest representation organisation and interest representation alliance is an association set up under the provisions of the Act CLXXV of 2011 on the Freedom of association, non-profit status and the operation and support of civil organizations (Civil Act). Beyond sectoral (social) dialogue committees the Council of the Sectoral (Social) Dialogue Committees must also be mentioned; this tripartite forum consists of the minister in charge, the representatives of the employers and of the representatives of the employees (which are mainly interest representation organisations and alliances).

There are some further forms of social dialogue (consultation), having some practical importance as well, but those entities do not have a legal background within laws (VKF, KVKF)[100].

[100] Consultative Forum for the Private Sector and the Government (*Versenyszféra és a Kormány Állandó Konzultációs Fóruma*) and Consultative Forum for the Enterprises Providing Public Services (*Közszolgáltató Vállalkozások Konzultációs Fóruma*).

4.1.2. Protection of rights

Related to my second point, to the protection of rights, civil society organizations help to ensure that people's and their communities' interests, rights and needs are not suppressed and are, instead, fulfilled. They can provide it by many activities such as lobbying governments, monitoring government compliance with the current laws, building active citizenship (for example, motivating civic engagement at the local level and engagement with local, regional and national governance and also increasing legal awareness), bringing actions before the courts, providing legal advice and other legal services, and also by such tools as making a request to access data of public interest to a given state organ[101].

A) Section 10 (1) of Act CL of 2016 on General Public Administration Procedures – defining the *general* meaning of the notion *client* – states that "Client means any natural or legal person, other entity whose rights or legitimate interests are directly affected by a case, who is the subject of any data contained in official records and registers, or who is subjected to regulatory inspection", but in its (2) subsection it adds that "An act or government decree may define the persons and entities who can be treated as clients – in connection with certain specific types of cases – by operation of law". For example, Section 98 (1) of Act LIII of 1995 on the General Rules of Environmental Protection prescribes that "Associations formed by the citizens for the representation of their environmental interests and other social organizations not qualifying as political parties or interest representations – and active in the impact area – […] shall be entitled in their area to the legal status of being a party to the case in environmental protection state administration procedures".

B) It is also important that according to Section 17 d)–e) of Act I of 2017 on the Code of Administrative Court

[101] The Act CXII of 2011 on the right to informational self-determination and on the freedom of information states that "*Anyone may make a request to access data of public interest to the state organ or organization in question*".

Procedure beyond the person whose right or legitimate interest is directly affected by the administrative activity, associations and foundations shall be eligible to bring an action (before the court as the plaintiff): "in the cases specified by Acts or government decrees, the non-governmental organisation which has carried out its registered activity to protect a fundamental right or to enforce a public interest for at least a year in the geographical area affected by the administrative activity, if the administrative activity affects its registered activity, […] in cases specified by an Act, an interest representation organisation or a statutory professional body, the registered activity or the activity stipulated in its deed of foundation of which is affected by the administrative activity if the legitimate interest of the members or group represented by it is directly infringed or jeopardised".

C) In accordance with the Section 64 (1) of Act LXXX of 2003 on Legal Aid legal aid providers shall provide extrajudicial legal services and act as litigation friends. The activities of a legal aid provider shall be authorized by the legal assistance service by way of admission into the register. Section 66 (1) says that – among others – non-governmental organizations and foundations engaged in activities related to the provision of legal protection shall be entered in the register set up by the Act.

D) Section 2:38 (1) of Act V of 2013 on the Civil Code states that "Where a person of legal age is in need of assistance due to the partial loss of his/her discretionary ability in certain matters, the guardian authority shall appoint an advocate upon his/her request with a view to avoiding conservatorship invoking limited legal competency". Section 7 (3) c) of Act CLV of 2013 on supported decision-making prescribes that the guardian authority shall appoint – among others – a legal person (i.e. association or foundation also) dealing with those who suffer from mental illnesses.

Naturally, beyond these roles (providers of legal aid or legal assistance, etc.), specified in certain laws, it is also possible to provide

further legal services on market grounds or pro bono for those who are in need – e.g. by making contracts with law firms.

The most important role of civil organizations is undoubtedly their monitoring role, i.e. the democratic control in general[102], and the greatest weapon of civil society is turning to the public, but several legal barriers persist (even) in a democratic state: among others obstacles created by the penal law. For example, Act C of 2012 on the Criminal Code regulates Incitement Against a Decree of Authority (Section 336) and Scaremongering (Section 337). These criminal offences may be committed only by individuals but Act CIV of 2001 on measures applicable to legal entities under criminal law tries to handle this problem by penalizing the legal entities if the act committed by its representative was aimed at or has resulted in the legal entity gaining benefit [see details in Section 2 (1)].

4.1.3. Provision of public services

Our third aspect is the outsourcing of public sector tasks to the civil (not-for-profit) sector. It mainly results in the planning, the organisation and the delivery of several public services by civil entities. Not-for-profit entities may also take part in the allocation of public funds and also in the exercise of some transferred public authority tasks.

The management of certain public services or other public tasks by civil entities should be classified in groups according to the relation to the state organ responsible for that service:

A) cases where the civil organisation takes over the public service as a whole belong to the first group;
B) we can separate from these the cases where the civil organisation is involved only to some extent, taking over only certain elements or functions of the given service;

[102] E. Balás, *Ma is aktuális 13 évvel ezelőtti gondolatok: A civil társadalom szerepe a demokratikus jogállam intézményeinek ellenőrzésében, 2006*, "Civil Szemle" 2019, 16(3), pp. 15–26.

C) the third group consists of those cases where the civil organisation only supports the provision of the given service "from outside", not taking it over;
D) the fourth one refers to those cases where the civil organisation informs the public in order that consumers are informed about the different services provided by the public administration;
E) and lastly, there are cases where the civil organisation monitors the quality of the service, providing some social control, giving some feedback to the public administration.

These five categories are not legal ones, but in most of the cases the substance of the content of the given legal relation, enacted in laws may easily be derived from one of these forms – and that is why they are useful.

4.2. LEVELS AND FORMS OF THE RELATIONSHIP BETWEEN LOCAL GOVERNMENTS AND CIVIL SOCIETY ORGANIZATIONS

According to Article 31 (1) of the Fundamental Law of Hungary "*In Hungary local governments shall function to manage local public affairs and exercise local public power*". Act CLXXXIX of 2011 on Local Governments of Hungary (hereinafter referred to as LG) states that "The right to local self-government is the right of the communities of the voters of settlements and counties in which the sense of responsibility of citizens is expressed and the creative cooperation unfolds within local communities"[103].

We can also read there that "The local self-government shall express and realise the local public will in local public affairs in a democratic manner, creating a wide publicity"[104] and that "In performing its duties, the local municipality shall support the self-organised communities of the population, cooperate with these

[103] LG Section 2 (1).
[104] LG Section 2 (2).

communities and provide for the wide-range participation of citizens in local public affairs"[105].

Beyond these general provisions – that create both rights and obligations on the side of the local self-governments (municipalities) – the lawmaker enacted a general obligation also for the members of the community (and for their organizations): "The members of the local community, as subjects of the local self-government, shall […] mitigate the loads burdening the community by self-support, and contribute to the fulfilment of public duties according to their capabilities and possibilities […]"[106].

Related to the situation of the self-government system in Hungary we must emphasize that legislation brought a lot of radical changes after 2012: municipalities were stripped of their most important tasks in the field of public education, health care, social, cultural and public utility services, together with their property rights over the necessary infrastructure. Local governments have also become highly dependent financially on the central government making their successful operation conditional on their political relationship with the governing parties[107]. Moreover, parallelly with that strong centralization, the constitutional protection, the competences and the financial autonomy of municipalities, and consequently their ability to act as a counterbalance to the power of the central government has been reduced to a significant extent during the last decade[108].

So, after putting these legal and political preliminary questions in perspective, within this subchapter I am going to catalogue the contemporary forms of the relationship between local self-governments and civil organizations, here in Hungary. With some simplification all the forms (types) of that relation will be put in one of two main categories: either in the category of participation in programme making and legislation or in the provision of public services.

---

[105] LG Section 6 a).

[106] LG Section 8 (1) a).

[107] V.Z. Kazai, *Local Elections in Hungary: the Results in Context*, available at: https://verfassungsblog.de/local-elections-in-hungary-the-results-in-context/ [accessed on: 29 September 2021].

[108] *Ibidem*.

A) LEGAL INSTITUTIONS ENSURING DIRECT OR INDIRECT CIVIL PARTICIPATION IN LOCAL PROGRAMME MAKING AND LEGISLATION – TOOLS OF INVOLVEMENT IN THE PREPARATION OF IMPORTANT DECISIONS.

A1) Nominating organisations

With regards to the election of the representatives and the mayors of municipalities, nominating organisations – among others – shall be parties and associations (except for trade unions) listed with final effect in the court register of non-governmental organizations when the election is called[109]. These nominating organisations are entitled to put forward single candidates and/or lists, too[110].

A2) Organizers of electors' initiatives

Under Section 32 (1) of Act CCXXXVIII of 2013 on Initiating Referenda, the European Citizens' Initiative and Referendum Procedure, "The body of representatives of a local government may order a local referendum in subject-matters falling within the competence of that body of representatives". In spite of the fact that a local referendum may be initiated only a) by one quarter of the members of the body of representatives, b) by the body of representatives' committee, or c) by electors whose number shall not be less than ten per cent of the electors[111] *'the organiser of an electors' initiative* for calling a local referendum can be – among others – also an association as regards any question in connection with the purpose set out in the deed of foundation of that association[112].

[109] Act XXXVI of 2013 on Electoral Procedure, Section 3, point 3 c).

[110] Act L of 2010 on the Election of Municipal Representatives and Mayors.

[111] Act CCXXXVIII of 2013, Section 34 (1).

[112] Act CCXXXVIII of 2013, Section 35 (1). Before commencing the collection of signatures the organiser shall submit – on a template of the signature sheet – the question proposed for local referendum to the local election commission for certification of that question. [Section 36 (1)].

A3) Non-Representative Members of Committees of the Representative Body

The representative body shall determine its committees, the number of members of these committees, the functions and spheres of authority of the committees and the fundamental rules of their operation in its rules of organization and operation[113]. On the one hand in many cases bigger municipalities do set up a committee which is responsible especially for non-profit/civil questions, and on the other hand each committee can involve non-representative members (members outside of the representative body). These non-representative members are quite often members or volunteers of certain civil organizations – so the "civil courage" can be canalized by them as well.

A4) Councillors

The representative body may elect councillors from among the municipal representatives upon the suggestion of the mayor or of any municipal representative. The councillor shall supervise the fulfilment of municipal duties specified by the representative body[114]. In many cases those councillors are in charge of the "wellbeing" of the local civil organizations and of their constant and close relations with the organs of the municipality.

A5) Publicity and public hearing

There are some obligatory rules for the representative bodies of the municipalities that do not refer only to the treatment of the (local) civil organizations, but also to all the individual members of the community and other organizations. One of these general rules is the obligation that the representative body shall provide provisions on ensuring publicity in the decree on the rules of organization and operation[115]. Another institution which ensures the involvement of all the individuals and organizations, i.e. provides citizen participation in public affairs, is public hearing. "The representative body shall

[113] LG Section 57 (1).
[114] LG Section 34.
[115] LG Section 53 (1) e).

hold a public hearing at least once a year, which is announced in advance where the population and the representatives of locally interested organizations may ask questions and make proposals in issues related to local public affairs. Responses to the proposals and questions raised at the public hearing shall be given within fifteen days at the latest"[116].

A6) Right of consultation and further rules of local forums

Another set of rules refers exclusively – or at least mainly – to formal civil organisations and other self-organizing entities. In the rules of organization and operation, the representative body shall specify – both the officially registered and non-registered – self-organizing communities that shall have the right of consultation at the meetings of the representative body and its committees as well as the rules of forums (village policy forums, urban policy forums, city quarter meetings, village meetings etc.) serving direct information and involvement of the population and associations in the preparation of important decisions[117]. In addition, the representative body shall be informed on their standpoint and on minority opinions arisen in these forums.

A7) Public planning

Public planning (urban planning, in Hungarian: *közösségi tervezés*) is a new phenomenon in Central-Eastern Europe. Local development planning within these region is, traditionally, over politicized, elitist, using top-down approaches[118], i.e. urban planning has not become a frequently used tool yet[119]. Nevertheless, some local initiatives, and some legal sources related to certain local affairs do also contain important rules that might be examples for other fields of community life. Gov. Decree 314/2012. (XI. 8.) on the settlement development concept, the integrated settlement development

[116] LG Section 54.
[117] LG Section 53 (3).
[118] M.B. Erdős, É. Knyihár, *Pécs Partnerség: Lépések a közösségi tervezés felé*, "Civil Szemle" 2015, 12(1), p. 27.
[119] L. Kákai, *Az önkormányzatok és lehetséges partnerei közti együttműködés szintjei és gyakorlata*, "Comitatus" 2019, 29(2–3), p. 19.

strategy and on settlement (spatial) planning tools prescribes a detailed reconciliation partnership (*partnerségi egyeztetés*) with several rules on the involvement of civil organizations within joint planning for settlement development[120].

Related to this issue we should also mention the slowly spreading practice of participative budgeting (*részvételi költségvetés*) on local levels[121].

b) provision of public services

According to the provisions of the LG the representative body may found budgetary entities, business organizations, non-profit organizations and other organizations (hereinafter referred to as institution) as well as may make contracts with physical persons, legal entities or organizations without legal personality as specified by law to provide for the public services belonging to its functions[122].

The lawmaker set forth also some specific provisions in the Act, providing the financial background of those services:

a) The ownership right of the national assets in the ownership of the local government may be transferred free of charge – among others – in favour of a public benefit organisation, in order to facilitate the fulfilment of a state or a municipality task assumed by it[123]. Naturally, in these cases the assignment of property free of charge shall not jeopardise the fulfilment of the tasks of the local government to be obligatorily performed.
b) The representative body may establish asset manager's right over the national assets in the ownership of the local government, in accordance with the provisions of the Act on

[120] Section 28 (1).
[121] M.M. Merényi, *A részvételi költségvetés esélyei a magyar önkormányzatokban*, Friedrich-Ebert-Stiftung, Budapest 2020, p. 11. Participative budgeting is a process under which individuals and organizations impacted by a budget are actively involved in the budget creation process.
[122] LG Section 41 (6).
[123] LG Section 108 (2) c).

National Assets in connection with the assignment of the municipality's public duty[124].

Related to the specific legal forms of those entities that provide local public services, we should say that there is a line between the classical civil organisations (associations and foundations) and other non-profit organizations, such as non-profit business organizations[125]. Examining the numbers it becomes clear that the two third of the income (subsidies given by municipalities) of those entities which provide local public services goes to the non-profit business associations[126] and this proportion has been constantly increasing in the last 20 years (!)[127]. It is also visible that when they outsource any public service municipalities mainly recline upon those entities that were founded by them[128].

5. *De lege ferenda* suggestions

1.

Within the analysis of regulations related to legislation, it may be observed that the regulation – especially with regard to the issue before us – is still very much diverse. Before 1 January 2011, there was no comprehensive act which could have attempted to provide unified regulation for the possibilities and procedures of the

[124] LG Section 109 (1).

[125] A business association shall be recognized as a non-profit business association, and as such shall be authorized to use the designation "non-profit" in its corporate name, if the instrument of constitution specifically indicates that the profit from the business association's operations may not be distributed among the members, for it shall be retained by the company's purposes. Section 9/F (2) of Act V of 2006 on the publicity of companies, court registration proceedings and final settlement It is important that these non-profit business associations may be established and operated in any corporate form. [Section 9/F (3)].

[126] Gy. Jenei, É. Kuti, *Duality in the Third Sector: the Hungarian Case*, "Asia Pacific Journal of Public Administration" 2003, 25(1), p. 134.

[127] L. Kákai, Kettős szorításban a magyar civil szervezetek, "Pólusok" 2020, 1(2), p. 12.

[128] L. Kákai, *Visszarendeződés? Civil szervezetek a közszolgáltatásokban a közigazgatási reform után*, "Civil Szemle" 2018, 15(2), p. 58.

enforcement of social interests in governmental decision-making mechanisms[129].

Related to this topic Domaniczky had expressed his thoughts already as early as 2008, saying that "[A] separate law should be enacted on the relationship of the public administration and civil society […], introducing and regulating all the main tasks of the different levels of state administration and self-governments, the forms of interest representation, the legal forms of agreements on partnership and cooperation, the details of the grant system, etc."[130].

There have been some new acts (adopted) since then which concentrate on one or a few of the possible aspects (such as Act CXXXI of 2010 on social participation in the preparation of laws, Act CLXV of 2013 on complaints and public interest disclosures or Act CLXXV of 2011 on the freedom of association, non-profit status and the operation and support of civil organizations), but a single act (a unified set of regulations about social participation) which includes all the most important aspects of the relation in question would emphasize the growing importance of the field and would provide the clarity and the transparency of the legal provisions, making their usage easier, as well. This may facilitate the growing number of those consensuses and formal decisions – both on local and state levels – that are reached by wide-ranging debates, etc.[131] Open legislation may become counterproductive if "[T]he processing of opinions and the feedback procedure are not regulated and managed properly" – says Vadál.

II.

Under the provisions of the LG the counties' competences are reduced to territorial development, rural development, land-use planning and coordination activities, but in most of the cases they

[129] Á. Rixer, *Civil Organisations' Participation*…, p. 10.

[130] E. Domaniczky, *A jogállam és a civil szektor Magyarországon, különös tekintettel a helyi önkormányzatokra*, Doctoral thesis, PTE ÁJK, Pécs 2008, p. 18.

[131] V. Tamás, *Az önkormányzatok és a helyi társadalom integrációja*, [in:] *Integrációs mechanizmusok a magyar társadalomban*, ed. I. Kovách, Argumentum – MTA TK, Budapest 2020, pp. 167–194.

do not have a key position in decision making processes[132]: e.g. the managing authority of the Territorial and Settlement Development Operative Program (Terület- és Településfejlesztési Operatív Program, TOP) is integrated into the central state administration's superstructure, which means that the content of the different community-led local Development programs is *mainly* determined by authorities, politicians and experts above the county level[133], narrowing the scope of community planning as well[134]. The Managing Authority of Regional Development Operational Programs (*Regionális Fejlesztési Operatív Programok Irányító Hatósága*) should involve the counties not only within the preparation-phase, but some more substantive competences should be given to them by the Parliament. Moreover, counties should also receive some further scopes of authority related to the coordination of the operation of civil organisations within their territory, and also to some own financial sources for enhancing those entities directly[135] – *providing effective spatial integration and reducing territorial inequalities*[136].

III.

The current law on the National Cooperation Fund (*Nemzeti Együttműködési Alap, NEA*) calls for a two-tier structure made up of a Council and of five Collegiums each of which consist of nine members. Three of those nine members are elected directly by civil society organizations through an election process, but the other six 'places' are appointed by the minister in charge and by the Parliament's Committee on Justice (in which the governing parties do have a majority). We suggest supplementing this structure with three further members delegated by the 19 counties and with one member delegated by the General Assembly of Budapest.

---

[132] I. Pálné Kovács, *A kormányzás területi* (*közép*) *szintjének integrációs szerepe*, [in:] *Integrációs mechanizmusok a magyar társadalomban*, ed. I. Kovách, Argumentum – MTA TK, Budapest 2020, p. 158.

[133] M.B. Erdős, É. Knyihár, *op. cit*., 27. The authors call this model 'elitist'.

[134] L. Kákai, *Az önkormányzatok és lehetséges partnerei*…, p. 20.

[135] I. Pálné Kovács, *op. cit*., p. 163.; K. Hendrik, *A megyei közgyűlések jövője Magyarországon*, OTDK-paper, KRE ÁJK, Budapest 2020, p. 44.

[136] I. Pálné Kovács, *op. cit*., p. 163.

IV.

Section 119 (3) of LG states that the clerk of the local self-government – in accordance with the laws – is obliged to operate an internal control mechanism which provides the legitimate, economic and effective usage of the financial sources. Within the audit reports of the State Audit Office (*Állami Számvevőszék*)[137] it is emphasized quite frequently that such control mechanisms related to those amounts that are given to associations or foundations (as financial support or as a consideration for the provision of human public services) are not set up or do not work properly. In most of such cases the problems mentioned are closely connected with the verifications of compliances, accordingly, some new *legal obligations should* be tackled in priority, i.e. provisions that serve a more transparent process, used for informing the general public.

V.

Section 7 (3) of Act XCIII of 2011 on National Economic and Social Council states that the operation of the Council is supported by a Secretariat. Moreover, it says that the minister responsible for civil relations shall provide personnel and material conditions for the operation of the Secretariat. This rule captures the whole Council, and – as it can be seen in the last decade – makes the processes hardly plannable and pliant. The members' influence on the agenda is week and the frequency of meetings is also strongly incalculable. Section 2 (1) of the Act says that the Council shall be independent of the Government, and it should be expressed by setting up a separate Secretariat outside of the ministry in charge, directed by the current President of the Council.

VI.

Since the fall of the Iron Curtain the annual average number of local referenda has been continually declining[138], and this facts also requires a general revision of the provisions on all the types

[137] I. Felföldi (ed.), *Elemzés. A nem állami humánszolgáltatók ellenőrzési tapasztalatai*, ÁSZ, Budapest 2020, pp. 18–20.

[138] http://www.valasztas.hu [accessed on: 14 September 2021].

of elections and referenda, mainly by inventing and regulating the usage of new digital technologies[139].

VII.

The real legal nature of a broadly interpreted social review is shown by certain constitutional requirements related to the social players of the preparation of laws[140]. According to the statement of the Constitutional Court made in its decision 469/b/1990 CC, if the organisations drafting the laws do not comply with the obligations set forth in the (former) Act on Legislation, this violation of obligations in itself shall not be a sufficient reason for assessing the unconstitutionality of the enacted laws. Such violation of legal regulations about the preparation of laws may only ground the state administrative or political responsibility of the legislator. As the Constitutional Court expressed in its decision 30/2000 (X. 11.) CC, only those organisations are unavoidable for the legislator which are expressly and specifically named in law, which bear consensual or review rights and – due to their role in the democratic decision-making process, with regard to the negotiation obligations – they possess public power. If the act does not define expressly and specifically those organisations with review rights, but only regulates the review rights of the interested national interest-representative organisations in general, the Constitutional Court did not consider the lack of review procedure a violation of the rule of law [as later decision 20/2001 (IV. 12.) CC referred back to this decision]. This practice has not changed significantly after the approval of the Fundamental Law and the new Act on Legislation[141], and a radical shift is needed related to this topic: a new provision shall be incorporated, ordering that the absolute ignorance of interest-representative (civil) organisations within the preparation phase of the law-making processes leads to unconstitutionality.

[139] See more: N. Kersting et al. (eds.), *European E-Democracy in Practice*, Springer Open, 2020.
[140] Á. Rixer, *The relationship between*…, pp. 260–261.
[141] See 44/2012. (XII. 20.) CC.

REFERENCES

Anheier H., Seibel W., *A non-profit szektor és a társadalmi átalakulás* [*Non-profit sector and social transition*], "Európa Fórum" 1993/3.

Aseeva I., Budanov V., *Digitalization: potential risks for civil society*, "Economic Annals-XXI" 2020, 186(11–12).

Balás E., *Ma is aktuális 13 évvel ezelőtti gondolatok: A civil társadalom szerepe a demokratikus jogállam intézményeinek ellenőrzésében, 2006,* "Civil Szemle" 2019, 16(3).

Belavusau U., *Mnemonic Constitutionalism and Rule of Law in Hungary and Russia*, "The Interdisciplinary Journal of Populism" 2020, 1(1).

Bibó I., *A kelet-európai kisállamok nyomorúsága* [*The Misery of the Small East European States*], Argumentum, Budapest 2011.

Bocz J., *Újraválasztott polgármesterek, avagy kiket és miért választanak meg ismét a szavazópolgárok?* "Századvég" 2004, 9(33).

Boda Zs., *A közpolitikai változás elméletei és a megszakított egyensúly*, [in:] *A magyar közpolitikai napirend: Elméleti alapok, empirikus eredmények*, eds. Boda Zs., Sebők M., Budapest, MTA TK Politikatudományi Intézet, Budapest 2018.

Borbély A., Madarász T., Bácsné Bába É., *Sportgazdaság, civil szervezetek*, "Magyar Sporttudományi Szemle" 2020/3.

Borzán A., Szekeres B., *Digitalizációs kihívások a civil szektorban*, "Civil Szemle" 2020, 17(1).

BTI 2010. Hungary Country Report, available at: https://bti-project.org/content/en/downloads/reports/country_report_2010_HUN.pdf 3.

Choi N., *Rule of law*, [in:] *Encyclopedia Britannica*, available at: https://www.britannica.com/topic/rule-of-law.

Czakó K. et al., *Differences, Constraints and Key Elements of Providing Local Sharing Economy Services in Different-Sized Cities: A Hungarian Case*, "Resources" 2019, 8(3), available at: https://doi.org/10.3390/resources8030147.

Diamond L., Linz J.J., Lipset S.M., *Politics in Developing Countries: Comparing Experiences with Democracy*, Lynne Rienner, Boulder 1995.

Domaniczky E., *A jogállam és a civil szektor Magyarországon, különös tekintettel a helyi önkormányzatokra*, Doctoral thesis, PTE ÁJK, Pécs 2008.

Drinóczi T., *A részvétel és a konzultáció elmélete és gyakorlata*, "JURA" 2013, 19(1).

Drinóczi T., Bień-Kacała A., *The DNA of Illiberal Constitutionalism: Failure of Public Law Mechanisms and an Emotionally Unstable Identity – A Hungarian and Polish Insight*, "Percorsi Costituzionali" 2019, 12(2).

Erdős M.B., Knyihár É., *Pécs Partnerség: Lépések a közösségi tervezés felé*, "Civil Szemle" 2015, 12(1).

Erikson E.H., *Autobiographic Notes on the Identity Crisis*, "Daedalus" 1970, 99(4).

Erikson E.H., *Reflections on the Dissent of Contemporary Youth*, "Daedalus" 1970, 99(1).

Fejős A., Neményi M., *Család, munka és a női test: Nőkkel és családokkal foglalkozó civil szervezetek egy változó társadalmi-politikai környezetben*, [in:] *Támogatás és támadás. Női civil szervezetek az illiberális demokráciában*, eds. Fejős A., Szikra D., MTA TK, Budapest 2020.

Fekete B., *Some Specific Central European Experiences May Help to Increase Understanding of the Legal Reality in The Western Countries*, "Droit et société" 2020/1.

Felföldi I. (ed.), *Elemzés. A nem állami humánszolgáltatók ellenőrzési tapasztalatai*, ÁSZ, Budapest 2020.

Flavius C.M., Munteanu R., Akhunova J., *Digitalisation and Civil Society. Evolutions Post-Coronavirus*, Middle East Political and Economic Institute, Bucharest 2020.

Fritz T., *Civilitika – A civil társadalom kialakulása Nyugat- és Közép-Európában, illetve Magyarországon*, "Polgári Szemle" 2019, 15(1–3).

Gerő M., et al., *Strategies for Survival: Human Rights Organizations' Responses to the Closing of Political Opportunity Structures in Hungary*, "Czech Journal of Political Science" 2020, 27(2).

Gerő M., Kopper Á., *Fake and Dishonest: Pathologies of Differentiation of the Civil and the Political Sphere in Hungary*, "Journal of Civil Society" 2013, 9(4).

Gősi Zs., Bukta Zs., *A sport civil szervezetei, mint az elmúlt évtized nyertesei*, "Civil Szemle" 2020, 17(2).

Hajnal Gy., *Adalékok a magyar közpolitika kudarcaihoz* [*Supplements to the failures of Hungarian public politics*], KszK ROP 3.1.1. Programigazgatóság, Budapest 2008.

Hegedős S., *A jogállamiság fogalmának teoretikai problémái az Európai Unió jogfelfogásának vonatkozásában* [*Theoretical Problems of the Rule of Law in Relation to the Legal Conception of the European Union*], "Külügyi Műhely" 2020, 1(2).

Hegedűs G., *A szegedi lakóparkok társadalomföldrajzi vizsgálata* [*Human Geographical Analysis of the Residential Parks in Szeged*], available at: http://www.human.geo.u-szeged.hu/files/c/hegedus/KEK_2009.pdf.

Hendrik K., *A megyei közgyűlések jövője Magyarországon*, OTDK-paper, KRE ÁJK, Budapest 2020.

Hesova Z., *New Politics of Morality in Central and Eastern Europe Actors, Discourse, and Context*, "Intersections – East European Journal of Society and Politics" 2021, 7(1).

Howard M.M., *Civil Society in Post-Communist Europe*, [in:] *The Oxford Handbook of Civil Society*, ed. Edwards M., Oxford University Press, Oxford 2011.

Howard M.M., *The Weakness of Civil Society in Post-Communist Europe*, Cambridge University Press, Cambridge 2003.

Jakab A., *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, "The American Journal of Comparative Law" 2020, 68(4), available at: https://doi.org/10.1093/ajcl/avaa031.

Jakab A., Menyhárd A., *A magyar jogtudomány helyzete és kilátásai* (The situation and perspectives of the Hungarian jurisprudence), [in:] *A jog tudománya. Tudománytörténeti és tudományelméleti írások, gyakorlati tanácsokkal* [*The Science of Law. Papers on the history of science and on the theory of science with practical advices*], eds. Jakab A., Menyhárd A., HVG ORAC, Budapest 2015.

Jenei Gy., *Adalékok az állami szerepvállalás közpolitika-elméleti hátteréről* [*Supplements to the public policy – theoretical*

background of state participation], [in:] *Államszerep válság idején* [*State role in crisis*], eds. Hosszú H., Gellén M., Complex, Budapest 2010.

Jenei Gy., Kuti É., *Duality in the Third Sector: the Hungarian Case*, "Asia Pacific Journal of Public Administration" 2003, 25(1).

Kákai L., *Az önkormányzatok és lehetséges partnerei közti együttműködés szintjei és gyakorlata*, "Comitatus" 2019, 29(2–3).

Kákai L., Kettős szorításban a magyar civil szervezetek, "Pólusok" 2020, 1(2).

Kákai L., *Visszarendeződés? Civil szervezetek a közszolgáltatásokban a közigazgatási reform után*, "Civil Szemle" 2018, 15(2).

Kazai V.Z., *Local Elections in Hungary: the Results in Context*, available at: https://verfassungsblog.de/local-elections-in-hungary-the-results-in-context/.

Keane J., *Democracy and Civil Society*, Verso, London 1988.

Kersting N., et al. (eds.), *European E-Democracy in Practice*, SpringerOpen, 2020.

Kulcsár K., *Politika és jogszociológia* [*Politics and legal sociology*], Akadémiai Kiadó, Budapest 1995.

Kurkchiyan M., *The Illegitimacy of Law in Post-Soviet Societies*, [in:] *Law and Informal Practices. The Post-Communist Experience*, eds. Galligan D.J., Kurkchiyan M., Oxford, Oxford University Press 2003.

Kuti É., *Hívjuk talán nonprofitnak…* [*Let's call it non-profit…*], Nonprofit Kutatócsoport, Budapest 1998.

Lowndes V., Roberts M., *Why Institutions Matter: The New Institutionalism in Political Science*, Palgrave Macmillan, London 2013.

Mélypataki G., *A szociális párbeszéd lehetőségei a közszolgálat területén*, "Pro Publico Bono – Magyar Közigazgatás" 2019, 7(1).

Merényi M.M., *A részvételi költségvetés esélyei a magyar önkormányzatokban*, Friedrich-Ebert-Stiftung, Budapest 2020.

Miszlivetz F., *Mérlegen az elmúlt évtized – Posztliberális civil demokrácia felé?*, "Civil Szemle" 2019, 16(3).

Morauszki A., *Határon túli magyar szervezetek nyílt pályázati támogatása – a Bethlen Gábor Alap magyarkultúráért és oktatásért*

pályázatainak elemzése (*2012–2019*), available at: https://bgazrt.hu/wp-content/uploads/2020/12/3.Morauszki.pdf.

Pálné Kovács I., *A kormányzás területi* (*közép*) *szintjének integrációs szerepe*, [in:] *Integrációs mechanizmusok a magyar társadalomban*, ed. Kovách I., Argumentum – MTA TK, Budapest 2020.

Pauly R., De Rynck F., Verschuere B., *The relationship between government and civil society. A neo-Gramscian framework for analysis*, Ghent 2017, available at: https://core.ac.uk/download/pdf/55740683.pdf.

Pesti S., *Közpolitika szöveggyűjtemény*, Rejtjel, Budapest 2011.

Reátegui M.R., Oscar S.A., *Rule* of *Law versus soft Rule* of *Law*, "Revista de Derecho Político" 2020/3, No. 109.

Rixer Á., *Attempts of the Good State in Hungary – New Contents of Norms Created by the State*, "Iustum Aequum Salutare" 2013, 9(2).

Rixer Á., *A civil társadalom helyzete Magyarországon, különös tekintettel a populizmus térnyerésére*, "Glossa Iuridica" 2019, 6(3–4).

Rixer Á., *Az előválasztás jogi evolúciója Magyarországon*, "MTA Law Working Papers" 2021.

Rixer Á., *Az identitás-vita újabb fejleményei Magyarországon*, "Glossa Iuridica" 2017, 4(1–2).

Rixer Á., *Civil Organisations' Participation in Legislative Processes in Hungary*, "Pro Publico Bono – Magyar Közigazgatás" 2014, 2(3).

Rixer Á., *Civil Society in Hungary. A Legal Perspective*, Schenk Verlag, Passau 2015.

Rixer A., *Features of the Hungarian Legal System after 2010*, Patrocinium, Budapest 2012.

Rixer Á., *General and Legal Meaning of Civil Society in Hungary from the Beginning till 1989*, "Journal on European History of Law" 2015, 6(2).

Rixer Á., *Historical Background of the Relationship between the State and Churches in Hungary*, [in:] *Religions and Churches in a Common Europe*, ed. J. Wildmann, Europäischer Hochschulverlag GmbH, Bremen 2012.

Rixer Á., *Religion and Law*, KRE, Budapest 2010.

Rixer Á., *Roma civil Society in Hungary*, "Journal of Constitutionalism and Human Rights" 2013, 1(3).

Rixer Á., *The relationship between civil organisations and public administration in Hungary, with special regard to their participation in legislation*, [in:] *Hungarian Public Administration and Administrative Law*, eds. A. Patyi, A. Rixer, Schenk Verlag, Passau 2014.

Rixer Á. (ed.), *Migrants and Refugees in Hungary: A Legal Perspective*, KRE, Budapest 2016.

Rixer Á., Sasvári N., *Civil Society*, [in:] *Corruption risks in Hungary*, eds. E. Kósa, N. Alexa, Nyitott Könyvműhely Kiadó, Budapest 2007.

Sabatier P., *The need for better theories*, [in:] *Theories of the Policy Process*, 2nd ed., ed. P. Sabatier, Westview Press, Boulder and Oxford 2007.

Sajó A., *Látszat és valóság a jogban* [*Illusion and Reality in Law*], Közgazdasági és Jogi Könyvkiadó, Budapest 1986.

Sárközy T., *Kormányzás, civil társadalom, jog* [*Government, civil society and law*], Kossuth Kiadó, Budapest 2004.

Schmidthuber L., Ingrams A., Hilgers D., *Government Openness and Public Trust: The Mediating Role of Democratic Capacity*, "Public Administration Review" 2020, 81(1).

Simon J., *Non-Participative Political Culture in Hungary – Why are the Particpatory Pillars of Democratic Political Culture Weak in Hungary?* "Central European Papers" 2014/2.

Szabó T., *Civil szervezetek GDPR kötelezettségei*, "Önadózó" 2018, 30(7–8).

Szalai J., Svensson S., *On civil society and the social economy in Hungary*, "Intersections" 2018, 4(4).

Szigeti P., *A Magyar Köztársaság jogrendszerének állapota 1989–2006* [*The state of the legal system of the Hungarian Republic 1989–2006*], Akadémiai Kiadó, Budapest 2008.

Tamás V., *Az önkormányzatok és a helyi társadalom integrációja*, [in:] *Integrációs mechanizmusok a magyar társadalomban*, ed. I. Kovách, Argumentum – MTA TK, Budapest 2020.

Tóth Á., *Civil szerveződés és polgári társadalom Magyarországon a 19. század első felében*, "Szellem és Tudomány" 2020, 11 (Special issue).

Uphoff N., Krishna A., *Civil society and public sector institutions: more than a zero-sum relationship*, "Public Administration and Development" 2004, 24(4).

Vadál I., *A kormányzati döntések konzultációs mechanizmusai* [*Consultation mechanisms of governmental decisions*], Complex, Budapest 2011.

Varga Cs., *Civil szerveződések – állami politikák: egymásmellettiségek, kapcsolatok, lehetséges torzulások*, "Iustum aequum salutare" 2018, 14(1).

William A.G., *Liberal Government, Civil Society, and the Rule of Law*, "Yale Law & Policy Review" 2005, 23(10).

CSABA CSERVÁK

Head of Department | University Professor | Department of Constitutional Law and Ecclesiastical Law | Faculty of Law of the Károli Gáspár University of the Reformed Church in Hungary

Rule of Law and Constitutional Law

1. Preface (Law: social will or a self-regulating set of rules?)

The term "rule of law" is often translated in Hungarian law as "*Rechtsstraat*"[1], which is the German word for a "state, based on law abidance". (A mirror translation in Hungarian would be "lawstate"). This certainly suggests a close connection between the law and state. "Law" in the function of adjective defines the state. The whole functioning of the constitutional state is governed by law. (The hallmark of the concept of law, in relation to all norms, is that it can be enforced by the state[2]). There is therefore an inseparable unity between the two. "There is a dual requirement that law must both correspond to the

[1] For the content of the two concepts see. Péter Szigeti. Bíbor Publishers, Miskolc 1997, pp. 152–169 and 162–168.

[2] The now-evident thesis that law is an abstract rule is rooted in the European "people's conception of law". Even in casuistic Roman law, the written law, e.g. the laws of Table XII, was applied to the particularities of the case according to the praetorian evaluation (and jurisprudential opinion). It was only from the imperial period that law became an abstract norm, and from then on the fiction of the continuity of law was used. Since then, the distinguishing features of law have been authority, the intention of universal application, obligation (i.e. the bilateral nature of the relationship) and sanction. See Csaba Varga, *The Law as a Process*, Osiris Publishing House, Budapest 1999, p. 150.

interests and will of society (this is the external context on the part of the state) and correspond to its own internal context, because this is also in the long-term interest of society"[3]. The literal translation of the term "rule of law" is "the supreme power of law". This means, by applying some indirect logic, that the law rules and not the people. People, in whatever office they hold, are equal. A person can decide a matter not because they are "superior" but because they hold the power in the particular case. (Hence the prohibition of the taking away competency, which is also linked to the issue of separation of powers).

According to certain views, it is human rights that constitute the true fundaments of law, overriding in their importance every other consideration.

Contesting such sentiments is the opinion that an "elitist" circle being able to ignore the decisions of the parliament, itself the most legitimate and most direct manifestation of popular sovereignty is worrisome, to say the least.

In the author's view, a healthy compromise can be reached between these theories, as antagonistic as they might appear at first glance, depending on the specific legal dilemma and life situation at hand. One must tread carefully when balancing such fundamental interests.

The constitution of a country is the primary bearer of popular sovereignty and as such, it must have very prominent legitimacy. It is no mere legislation; it is the highest norm of society. During their development, law and state alike had an essential impact on one another and neither can truly exist without the other. Society needed a set of rules to prosper and endure. Law is exactly these rules, without which there is only chaos. As a system, law also has its intricate internal framework and properties, in whose absence a norm cannot be considered law. Jurists themselves have a very

[3] The former aspect is manifested in the system of popular representation and the corresponding state legislation and is therefore more tangible. The latter content filter is more subjective and can be approached objectively through constitutionalism. For the overall context of the subject, see. Zoltán Tóth, *Democracy, the rule of law and constitutionalism*, Patrocinium, Budapest 2020, pp. 104–117.

significant role in upholding this system, however, they cannot go against the will of society for long. (Whether society can be protected from itself is a rhetorical question at best. In a way, this is exactly the function of representative democracy, as well as the reason that certain subjects are ineligible to call a referendum on). Though it might seem evident these days, we still ought to ask the question: why is representative democracy a necessity? Technical infeasibility is already a major point against direct democracy, as well as the fact that certain issues requiring professional knowledge would be beyond the scope of regular citizens to weigh and judge with due wisdom. Would not this lead to the necessary conclusion, however, that there should be strict educational requirements for parliamentary representatives?

Considerations of lawfulness and expediency are, unfortunately, often blended together. Decisions on the latter cannot be taken away from the people, and the panel they elected and legitimised. Matters of lawfulness, however, require specific professional knowledge. Without making this acknowledgement, we would be questioning the legal nature of law itself. The constitution, though part of the legal system, is fundamentally a product of decisions made along evaluations of expediency. The same can be said about legislation. And yet, all of these must be kept within the professional confines of law: their specific terms and internal logics must adhere to the paradigms of jurisprudence. To ensure this is the task of constitutional courts, their proper application being guaranteed by professional and independent regular courts.

The consolidation of organised society and the coalescence of the state required its inhabitants to resign their former, arbitrary ways of conflict resolution, such as revenge killings, and task an independent entity – the state – with carrying out justice. But they preserved certain other rights, rights which cling closely to the human condition. In other words, their human rights. These rights become fundamental the moment they are enshrined in a country's constitution. Their true legal nature, however, is granted by the ability to vindicate and enforce them, which is, in essence, what constitutional courts do. From the above, it also follows that the protection of human rights cannot harm society as a whole. To expand,

a human rights "movement" can be deemed extreme whenever its actual practice in significantly great numbers would endanger the very existence of society. An example would be gay marriage, or the adoption rights of homosexual couples, but a more significant matter here is the prevention of effective and efficient countermeasures against the perpetrators of willful and serious criminal offences, under the guise of human rights protection.

Either a constitution is legitimized by the will of the people as a whole, or by the legal continuity[4]. (The former would ideally mean that all the people would vote for every paragraph of the constitution). The latter is related to the formal rule of law. But how far back can that be traced? For example, in most of the states in Central and Eastern Europe, the change of regime took place on the basis of legality and legal continuity. Rrhetorical question here are how far can the rule of law be formally traced back? What is the legal basis if the starting point was a system that was substantively a very questionable one?… Because the predecessors of any state that developed on the basis of the continuity of law were undemocratic from today's point of view. In the face of these problems of the formal rule of law, the rule of law in its substance could be seen as an etalon, but its subjectivity could be a problem[5]. The rule of law is not a goal, but a tool. It is a tool to ensure that society should continue to exist, and its will shall be carried out (this is the basis of the state), including the guarantee of human rights (this serves as the basis of law).

We must ask the question of principle: What is the interest or will of the society[6]? What is wanted by 51% but opposed by

[4] Because then the will of society can be traced back to the creation of the state itself. On the continuity of law see. Zoltán József Tóth, *Some Observations on the Interpretation of the Fundamental Law*, Polgári Szemle, 2013/1–2, pp. 13–40.

[5] According to some approaches, some people can explain their own subjective will into the malleable concept of the rule of law at will. Cf. Zs. András Varga, *From an idol to an idol? – The dogmatics of the rule of law*, Századvég Kiadó, 2015.

[6] Measuring this from a party-political perspective is also very difficult. Some voters have a strong attachment to certain parties. Others struggle to choose between 2. Some voters may be sympathetic to one candidate, but on a list (if there is one) they would vote for a completely different political community. It is not unprecedented for a voter to decide only which party should not win. (The

49%? Or what is that something that 67% (i.e. 2/3) agree upon, but totally against the basic interests of the 10%? It is hard to calculate such an "aggregate index" in social science, but in my view, this is roughly the limit complying with the human rights. Enforcement of fundamental rights means that the most basic interests of all people are taken into account.

Of course, the perception of the situation also depends on how abstractly the interests are formulated. However, the cardinal question is whether in specific cases this is not overwritten by individual interests. This is why legislation must be separated from lawmaking. Legislation is not case-specific, but normative and forward-looking. And here we would like to refer to the difference between decisions on legality and expediency[7], which is also the basis for the division of powers.

---

latter, of course, requires an extraordinary degree of civic awareness, information and intelligence).

The ideal electoral system is sociologically adapted to the electorate. Of course, the political composition of society, the "macro" behavior of the electorate, changes from cycle to cycle, even from month to month. Even a single major event can have a major impact on people's attitudes towards political parties. (It would therefore be justified, ad absurdum, to introduce a different electoral system for each electoral period. But this would be an extreme violation of the rule of law, and it is hardly realistic for the parliamentary majority of the time to change the electoral system for the 'common good' rather than to promote its own victory). For example, a system of relative majorities (based on single-member districts) is not a very objective measure of public will in a state where the rejection of one of the parties of choice is extremely high (it may be possible to win with 30% support in a relative majority model, with 70% of society expressly rejecting that particular political force). For more on this, see Csaba Cservák, *Categorical and Ordinal Electoral Systems*, Iustum Aequum Salutare, vol. XIII, 2017/3, pp. 27–40.

[7] Of course, rigid demarcation is not always easy. According to some views, the Montesquieuian notion of the law enforcer, i.e. that the law enforcer is a quasi-automatic machine, just the "mouth of the law", does not apply to the law enforcement activity of public administrations. Decisions made by discretion can (also) be qualified as expediency, and if we deny it, if we admit it, the decision-maker makes the gap between the framework of the law by his autonomous decision Cf. Péter Kántás, *The dilemmas of discretion*, Jogelméleti szemle, No. 3, 2001, p. 1. This problematic indeed concerns mainly the lawmaking activity of public administration, and as far as the state/legal decisions as a whole are concerned, in my opinion, it has received less attention than it deserves. Professionalism is also important for public administrations (e.g. the

Of course, people's interest, and their perception of their own interest can change from time to time; this is manifested in the elections (usually) held in every four years.

In legislation two competing trends can be identified. The exemplary one, a principled model and the casuistic one, an enumerated model of regulation. Their appropriateness varies from one area of law to another, and is quite different in criminal law, in administrative law, which also imposes sanctions, and also in civil law[8]. (The choice of regulatory style is not only a question of legality but also of expediency, but the decision should be made by consulting a legal expert. The legal profession is important, but the system must not become a "juristocracy"[9]. A risk of subjectivity arises if some people want to use the internal context of the law to question the legitimate state legislation or the application of the law. For a remedy, we would recommend that the most important legal principles should be enshrined in a constitution having strong legitimacy).

How directly can we apply human rights or constitutional norms? In the author's approach, the application of the law has two main types: hierarchical and norm controlling. In the former case, taking into account the established hierarchy of legal norms, the regulations closest to the events of the actual case – the *lege specialis* – are to be employed. According to the latter category, as seen under the aegis of the Supreme Court of the United States,

---

required higher education qualifications of civil servants), but the professional dominance of the legal profession is most pronounced in the courts and other 'independent law enforcement bodies'. (In some 'mixed-function bodies', such as media authorities or data protection authorities, the professionalism of other relevant disciplines, such as info-communications, deserves attention in addition to legal professionalism).

[8] Furthermore, if the legislator regulates in an area using only abstract standards, then the legislators themselves will start to fill in the gaps with more precise rules. Béla Pokol, *The Juristocratic State*, Dialóg Campus Kiadó, Budapest 2017, p. 117.

[9] The essence of juristocracy is the "rule of jurisprudence" instead of democracy, i.e. legislative activity wrapped up in a dysfunctional way in the application of law. In other words, making unauthorised (subjective) expediency decisions instead of lawfulness decisions. See Béla Pokol, *The Juristocratic State*, Dialóg Campus Kiadó, Budapest 2017, p. 160.

legislation contrary to higher-level norms (such as the constitution) is to be put aside without application, placing norm control in the hands of individual judges. Such a view used to be wholly alien to European legal practice, but the direct usage of the European Union's certain norms brought a change into this paradigm. The author considers the most permissible compromise for the direct application of fundamental rights, is that they be employed only in the case of a legal vacuum. Therefore, the constitution itself is to be used *in lieu* of an explicit *lex specialis* only. In every other case, fundamental rights are the fundaments of legal interpretation only; one of the many possible methods, their weight and importance depending on a case-by-case basis. Other, important means of interpretation operate according to the plausible intention of legal norms or the general principles of law.

In conclusion, there is a number of things to lay down. There is a resounding need for a constitution with great legitimacy, compiled with the highest degree of professional aptitude. There must also be a parliament reinforced by full popular sovereignty and made as efficient as it is possible within the principles outlined above. The parliament's main consideration must be expediency, while the constitutional court remains the judge of what is constitutional and what is not. It is entitled only to interpret, but not to create or modify a constitution. Admittedly, clear-cut differentiation between the two areas isn't always possible. There is always the odd grey area, especially regarding whether or not the creation of legal norms derived from the constitution, but not expressly present in it before is an act of constitutional codification.

Popular sovereignty possesses three layers. The most visible of these is the election of the parliament, the legislative body that is the popular will made manifest.

Even more important is the legitimacy of the constitution, which must also stem from the popular will.

Lastly, we must harken back to the creation of organised society itself. The mere transformation of primitive local communities into societies (and the creation of the state) was an act of popular sovereignty as well. Likewise, popular sovereignty also governed the fact that a particular type of norm, law became the principal tool in

the organisation of early society. A significant question here is how far can law distance itself – citing its unique and abstract internal logic and the requirement of a "long-term rule of law" – from the masses that created it and their popular will?

The literature on the internal logic of law (even legal doctrine), the professional criteria that determine the training of staff are often universal. It is precisely the non- contradictory dogmatics of constitutional law that is lacking in some literature, in comparison with civil or criminal law[10]. In other words, the legitimacy of the jurist-professional expectations that supersede the substantive law may be called into question on several occasions. Especially if it is of international origin and diverges from the will of the electorate of the country concerned. A legal thesis can only be regarded as uncontroversial if it is presented in the same way in all relevant textbooks and monographs and if there is no authoritative professional opinion to the contrary. (In case of doubt, of course, the authoritative character would be disputed by some…)

Democratic elections are of paramount importance for the legitimacy of law. This includes the prevention of frauds and a proper electoral system. States have considerable leeway in designing the latter. However, I believe that we must say this: the minority must not win against the majority. This is ensured partly by a sound electoral model and partly by a system of legal remedies with guaranteed elements. Otherwise, we can only talk about democracy in a formal sense. We also have to formulate further constitutional requirements, such as the fact that it counts to be a violation of legal certainty if the electoral system is changed immediately before elections without sufficient preparation time[11].

It is essential that the general rules set out by law shall be the best possible ones for the society. But this has its individual victims. In legislative terms: as a result of loopholes. We talk about a legal

[10] See: Béla Pokol, *Theory of Law*, Századvég Publishing House, Budapest 2005, p. 80.

[11] Obviously, this raises the issue of adequate preparation time. For an excellent general discussion of the latter, see: Péter Tilk, Kovács Ildikó Tilk, *Gondolatok a kellő felkészülési idő számításának kezdőpontjáról*, Jogtudományi Közlöny 70:(11), pp. 549–555.

loophole when there is no rule on something, but there should be one because of some higher principle or norm. We can understand by a hidden legal loophole, – according to Larenz – a situation where there is a rule about something, but a higher-level provision or legal principle would justify the existence of a lex specialis; the subsumption of a general rule may be considered a matter of concern. "The loophole here consists in the absence of the imposition of a limitation"[12]. The legitimate interests of these aggrieved persons must also be protected by law. Nor can we ignore the fact that legislation can be "flawed". (Whether through a typo or through bad drafting, we can think of a legal effect other than the intended purpose – we do not wish to deal with "deliberate mistakes" arising from personal interests. Of course, it is not always easy to determine whether it is a "mistake" or whether it is a deliberate legislative act that disregards the interests of some). This may be:

- the fault of legislators,
- or even the fault of the codification of the legislation. It is a sociological fact that, especially in the case of a law with several hundred paragraphs, it is the drafters who become the quasi decision-makers.
- And loopholes can also arise. These can be both original and ex post, depending on the time when they were created. In the former case, the legal loophole had already existed at the time when the legislation was drafted, the latter occurs when social, technical, or scientific developments make it necessary to regulate an area which did not previously require regulation. This was the case when criminal codes still usually punished the counterfeiting of coins; when paper money suddenly became widespread in Europe and began to have a high value, the principle of "*nullum crimen sine lege*" meant that the most serious offenders could not be punished. (It is less common for a rule to be repealed in an area that was originally regulated. This is most conceivable in the case of a detailed rule in a complex legal relationship. One long law

[12] Béla Pokol, *Theory of Law*, Századvég Publishing House, Budapest 2005, p. 143.

is replaced by another long law – and one legal relationship is not thought of). For this reason, there is a constant need for correction.

- This is primarily the purpose of the creation of "lex specialis", the creation of specific rules alongside the general ones. And in this context, feedback from the citizens concerned, the practitioners and the profession become particularly important. (In addition to the strict legality review, the ombudsman's legal protection is also a form of correction for legality. This is most relevant to our subject in relation to administrative acts. The ombudsman investigates abuses of fundamental rights; he can draw attention not only to unlawful but also to "unfair and objectionable" rules).
- Constitutional review, and in particular the genuine constitutional complaint, also serves to protect the victims of legal loopholes.
- In a certain sense, the protection of the interests of individual cases is also a means of control by the head of state, such as the right of veto and the right for pardon[13].

It should be pointed out that democracy is not just the rule of the majority, but the rule of the majority – with the protection of the interests of the minority. The interests of minorities are indirectly protected by attentive legislation, but the most powerful instrument for the national minorities is autonomy. And the motto of all this should be: law for the people, not the people for the law! A very big problem can be caused by democratic deficits, which the literature tends to mention mainly in the context of the European Union[14]. However, in my view, the concept can also be of great importance for individual states.

[13] Presidents of the republic may have a number of such powers by international standards, for example to release irrecoverable state claims and (in a quasi-extension of the right to pardon to other areas of law) to grant derogations from the general application of the law. See: Géza Kilényi, *The Office of the President of the Republic in the Light of International Comparative Law*, Hungarian Public Administration, 10/1994; pp. 577–584, 11/1994; pp. 577–584, pp. 641–648.

[14] See for example: András Körösényi, *Democracy deficit, federalism, sovereignty*, "Political Science Review" 2004/3, pp. 143–161.

We must also stress that the rule of law means that the law cannot leave people unprotected. Where necessary, it must intervene in social relations. Otherwise, some people could maintain some dysfunctional 'rule' on society and not the law. Here we must refer to the many infringements freely committed on the Internet as a pressing problem of our time.

"Laboratory-level clean" rule of law exists only in theory, in legal literature. Compared to the ideal, it is possible to pick at the norms of any state, both as an outsider and as a suffering citizen. Furthermore, it must be said that ideas of constitutional law "independent of time and space" are very difficult to adapt to concrete situations[15].

[15] Below, we are going to illustrate a possible solution, which is, naturally, an abstraction free of the constraints of time and space, but in any concrete case, it is imperative that legislators fully take into account the specific and unique circumstances of the country and society they aim to craft a better model for.

First, an extremely proportional national vote would elect a constituent assembly, which would contain the finest experts the country has to offer, seeing about the creation, and later the modification of the constitution. Holding a referendum on the final product would also reinforce its legitimacy, while doing so on certain, greatly important constitutional questions prior to finalisation would lend it even more force.

An absolute necessity is a constitutional court with a significant scope of authority. Its judges must be held to the strictest possible educational requirements. It is imperative that they also possess high legitimacy. To that end, a multichannel nomination process would be desirable, with the constituent assembly voting on each new member. While evident, it must be pointed out again that the court must only interpret, and not modify the constitution. In case of such a dysfunctionality, it would be far more elegant for the constituent assembly to step in, rather than a parliamentary majority having to overrule the court's decision, appearing arbitrary, perhaps, to the outside world. To annul legislation must follow the violation of specific constitutional paragraphs.

Electing the parliament could happen through a voting system incorporating majoritarian elements. In a rather twisted and inaccurate manner, most approaches typify electoral law as a struggle between parties, or between the political left and right, with less attention given to its constitutional aspects. There is almost no word on the consideration of actual voter influence when analysing various electoral systems. In the author's view, contrary to popular belief, a preferential list system imbues the electorate with a wider scope of choice than traditional, (single-member district) plurality systems. In the latter cases, people with a firm and distinct party preference have virtually no choice at all. The sole candidate they "have to" vote for is already given. Certainly, overt proportionality would create a fragmented parliament. There must be a balance between

The legal continuity of a country, i.e. its existing rules and legal culture largely determines the direction of any reforms. Moreover, law is very difficult to separate from its social context, from specific sociological conditions and from the political situation. (A quite interesting question of principle: if a people's culture is based on the idea of a 'strong leader', can this be overridden by the principle of the rule of law, even if it is defined abroad? If, for example, the mandate of a strong president of a republic were to be changed to a lifetime mandate by a referendum in a state, the EU would obviously object. But of course, challenging the monarchical system of some countries is unthinkable…)

To sum up, we can conclude that we must categorically distinguish between decisions of expediency and decisions of legality. The former must be legitimized, and this can only be done at the highest level of the state based on popular sovereignty. In this spirit, general norms are created in the interests of society as a whole – with the interests of the minority being protected. The primary means of protection are human rights. (This does not include, for example, regulations within the framework of laws as "detailed rules of expediency". The framework for this is, however, freely defined by Parliament). Here, the internal logic of the law and the personnel of the legal profession are particularly important[16]. The application of the law must not be biased, especially when it has to be decided between opposing parties. However, the above-mentioned corrective mechanism can (also) play a role here if a "legal error" occurs. In a broad sense, this could also include cases where the legislator did not take into account the legal interests of the persons concerned

factors of governability and legitimacy. Pursuing a proportional legislature is a noble goal, but having too many actors of power-sharing present, especially with a bicameral parliament, can easily paralyse the government. There are, naturally, two sides to every coin: a non-party based second chamber can also serve as a professional filter of sorts with regards to lawmaking. Thwarting an act from passing here would be far less likely to stem from political obstruction, and more from an expert opinion. In preventing the popular will from shifting too dramatically, a president with fewer administrative roles and more passive and control duties might serve as a viable solution.

[16] For this see: Béla Pokol, Jogászság és jogrendszer, Jogelméleti szemle, 2011/4, p. 3.

in a specific situation. In this case, there is an ad absurdum possibility of what is, very worrying in the application in continental law: namely, the application of the law in a contra-legem manner. (The Constitutional Court may use this instrument when ruling on a constitutional complaint).

The cornerstones of what we have outlined are:

- the separation of powers, which guarantees that decisions are taken in accordance with the rule of law, separately from legislation.
- To achieve the former, the judiciary branch must be independent and unbiased.
- As well as a broad constitutional judiciary, but a one, that does not become dysfunctional. In other words, it does not create the possibility – because of the lack of social legitimacy – of making expediency decisions instead of lawful decisions.

And all of this is based on an electoral system that validates the real popular will.

The binding force of law does not only derive from the fact that it is formally expressed as law (as a law, as a decree, in the usual form, with the legal concepts that are regularly used). This support can, of course, only be challenged – in the spirit of the rule of law – through the appropriate procedure. The law speaks to the people, so they need to be able to recognize that they need sufficient preparation time and clear, unambiguous language. On the other hand, law is for the people, so it must also meet the abstract standards of human rights that have evolved organically over centuries.

As democratic deficit – in my opinion – the following can be seen:

- If the person who wins the election is not the one the majority voted for. (Whether because of the electoral system, but mainly because of fraud).
- It is also a matter of concern when parliament is years away from the will of the people and there is no mechanism for correction. We might add that, as a general rule, this is sanctioned by the voters not to elect the relevant MPs/parties to the people's representative body in the next term. The case for a correction is strong especially if (1) the deviation of the

parliament's position from the popular will is significant and (2) the period of deviation is quite lengthy.
- But it is also a deficit if the decisions taken in accordance with the will of the majority are applied (1) contra legem. (This is completely alien to the spirit of continental law). (2) or it is annulled without constitutional justification. (In this context, we mentioned "juristocracy").
- "The deficit of deficit" when the popular will cannot be imposed because of external forces (EU).

The latter one is a particularly interesting issue; the lack of democratic legitimacy of the European Union (or international organizations) at the expense of sovereign nation states also calls into question the social support for the right[17]. In many places, it is a hackneyed phrase that international law, or EU law, takes precedence over domestic law. This statement is meaningless and almost empty. Why can we say this? Partly because the issue of hierarchy (primacy) arises in only a small part of the impact of international law on domestic law. Priority in the application of the law means something different. It has a completely different meaning in lawmaking. Consequently, it means something different from the perspective of the Constitutional Court or before an ordinary court. Moreover, it may have different legal consequences in a procedure for ex post control of a rule and in a procedure for the examination of an infringement of an international treaty (it means different things from the point of view of international law and from the point of view of domestic law). Moreover, there are several types of primacy. László Blutman's outstanding academic doctoral dissertation provides an extremely

[17] This is not contradicted – according to the correct understanding – by the thesis we have mentioned earlier that the internal logic and dogmatics of law, and thus by extension jurisprudence and legal education, are partly supranational, international. It is only a tool; the legal profession provides a framework for sovereign national legislation, for the application of the law in accordance with the relevant legislation and, ultimately, for constitutional law. It plays a role in the openness of legislation and in the choice between several acceptable methods of interpretation. (Of course, methods of legal analysis are also a product of the development of universal jurisprudence).

thorough critical analysis of the practice and the doctrinal problems involved.

In contrast to the above meaningless topos, the actual exact solution is nuanced by the nature of the normative relationship in question. Three basic forms of norm relations can be distinguished. This is based on the fact that a legal norm can produce legal effects together with another legal norm, in the direction of another legal norm, and against another legal norm. Thus, in this sense, a norm relationship can be: the (complementary) application of two laws together, the interpretation of one law by means of another law, a conflict of laws[18].

It should be added that the question of precedence and hierarchy is primarily a problem of domestic law (constitutional law), and not so much of international law. In general, international law does not think in terms of hierarchy and primacy, but along the lines of pacta sunt servanda[19].

To get closer to an objective analysis of the issue, we need to look at the three levels of priority. The first category is the priority of overriding. Invalidation precedence is subject to jurisdictional and procedural conditions and can therefore manifest itself almost exclusively in proceedings before the Constitutional Court (or the Curia in the case of a regulation that is contrary to the law). The second circle is the application (or enforcement) priority. The EU law has this general primacy of application over national law. This extends, according to some controversial approaches, to national constitutional norms[20] (see the precedent set by Costa, Interna-

[18] See. Blutman László, *A nemzetközi jog* érvényesülése *a magyar jogban: fogalmi keretek*, MTA doktori értekezés, Szeged 2015, pp. 67–68.

[19] Blutman László, *A nemzetközi jog* érvényesülése *a magyar jogban: fogalmi keretek*, MTA doktori értekezés, Szeged 2015, p. 78.

[20] This brings us to the problem of constitutional identity. To put it simply, there is an essential part of the constitutions of the Member States, an inviolable core, without which the state would not be the state it is. If not the constitution of the whole country, this constitutional identity is quasi supreme over EU legislation. See: László Trócsányi, *The dilemmas of drafting the Hungarian fundamental law: constitutional identity and European integration*, Schenk Verlag, Passau 2016, p. 250. Zsuzsa Szakály, *The historical Constitution and constitutional identity in the light of the Fundamental Law*, Pro publico bono, 2015/2, Jenő Szmodis, *The*

tionale Handelsgesellschaft and Simmenthal (II)). The Hungarian courts enforce the primacy of EU law in relation to Hungarian legislation when a conflict of laws arises. (The Fundamental Law is not a law!). Interpretative precedence (a norm as a binding interpretative reference) is the third level. It is interesting that in practice, in the case of interpretative primacy, it is not usually clear exactly which competing norm is excluded by the international legal norm. The conflict of norms remains almost hidden, because the relevant (constitutional) court decisions almost never reveal which interpretative alternatives are in conflict[21].

In case of deficits, the legitimacy of legislation is weak. (And then one can hardly accuse of "juristocracy", for example, constitutional courts that act in an activist way and use expansive interpretations).

2. Distribution of powers and Checks and Balances

2.1. THE THEORY OF THE DISTRIBUTION OF POWERS AND ITS PRACTICAL IMPLEMENTATION

There are two major forms of the democratical excercise of powers: the direct and the indirect democracy. The entire system of the separation of powers can be classified within the scope of the indirect excercise of democracy, although in a broad sense methods of the direct excercise of the democracy can make up such division of powers, which can be used as a balance against the machine of power structures, which relies too much on the binary code of the government – opposition, and distances itself too far from the people. Here I would like refer to the legal instrument of the referendums, within which, it is possible to talk about a significant direct excercise of democracy, in case if the people can force the assignment of the referendum as well. (Such as like in Hungary, where 200.000, or in

core of the constitution and its defence, "Legal Theory Review", 2013/2, p. 2, and Dániel Csaba Lukácsi, *Constitutional Identity*, KRE-Dit, 2018/2, pp. 1–9.

[21] Blutman László, *A nemzetközi jog* érvényesülése *a magyar jogban: fogalmi keretek*, MTA doktori értekezés, Szeged 2015, pp. 86–88.

Lithuania, where 300.000, or in Slovenia where 40.000 signatures are required for the intitiation to have so). Hereinafter we are going to focus on the indirect form of excercising of the democracy.

The distribution of power, the separation of powers and checks and balances are closely related concepts deriving from a coherent theoretical basis. However, their usage is often inconsistent and mixed up frequently in the legal jargon. Therefore, it is necessary to clarify their meanings.

Although the theory of the distribution of power is a product of the Age of Enlightenment, its practical manifestation has been in existence for centuries. The divided power is necessarily restricted which is a prevention of the abuse of power and an institutionalized form of the protection against autocracy. Therefore it is unequivocal that the real implementation of the distribution of power had been in the center of efforts, much before it was defined.

Contrary to popular belief, Montesquieu did not establish the classic three branches of powers, but Aristotle did so. He mentioned deliberative body of public affairs, magistrates and judiciary which – considering the complex role of the parliament – is completely equal to the trinity of legislative, executive and judicial powers. Politeia was declared as the appropriate structure of power which is a mixture of democracy and oligarchy.

Cicero, in his work The State, committed himself to such type of it inwhich there is an intermediate structure among the monarchy, the rule of aristocracy and the democracy. These two theories can be confidently regarded as a preliminary concept of the distribution of power, because the mixed state can only exist through the precise delimination of the authority of various factors by involving them into the power in sociology-political sense[22]. Polübiosz went even further. His theories came up to the conclusions of the "classical greek philosophers". According to his point of view, the different social forces must check and restrict each other, which adumbrates the system of "checks and balances"[23].

[22] See: Sári, János, *A hatalommegosztás*, Osiris Kiadó, Budapest 1995, pp. 19–21.

[23] Sári János mentioned that after, Sabine és Louis Fisher insights. See. Sari János, *A hatalommegosztás*, Osiris Kiadó, Budapest 1995, p. 18.

Beside the legislative and the executive powers John Locke mentions a third-one, the federal power. It can be regarded as the equivalent of the head of state power which is considered a factor of the government system and posses a role of foreign policy as well[24].

The great visionary Montesquieu distinguishes the legislative power, the power which falls within the scope of international law and executive power related to civil law issues. The latter mentioned is the judicial power and the second mentioned is referring to the monarch/head of state power, which is eventually equal to the trinity-system of Locke's. (It should be noted that in this era the depositary of the executive power was the monarch or the administration appointed by him. In the absence of the welfare state, the principal executive tasks tended to the foreign policy). As an affirmation Montesquieu separates the legislative power into a bicameral National Assembly[25].

For several aspect in the theory of the distribution of power, it may be more appropriate to use the concept of the separation of the functions of power instead of the concept of the separation of powers. Because on one hand these patrons of the idea practically envisaged the separation of the function of legislative, executive and judicial powers among different bodies. They fought against the concentration of these three functions in one node, so that their aim was not the abolition of the relation of powers.

On the other hand, this proposed concept is more compatible to the system of checks and balances. Latter mentioned can not only be achieved through the rigid separation of constitutional factors, but also by their legally institutionalized relationship-system. The theory of Montesquieu underlying the distribution of powers is also based on this principle. An important factor of the balance is that the individual branches of power, is that one branch should not overpower the other ones, which is guaranteed by the system of authorities of the various bodies controlled by each other. For

[24] See: Sári, János, *A hatalommegosztás*, Osiris Kiadó, Budapest 1995, pp. 30–34; Gábor Máthé, *Die Problematik der Gewaltentrennung*, Gondolat Verl., Budapest 2004, p. 15–64.

[25] See. Sári János, *A hatalommegosztás*, Osiris Kiadó, Budapest 1995, pp. 37–40.

instance the dismissal of the government and the potential of the dissolution of parliament. (By the motion of censure in the Hungarian government system and the exclusion of the dissolution of parliament could be mentioned as the distribution of powers, but it is not possible, because of the political identity in between the two concepts).

It is more appropriate to talk about the separation of the functions of powers because the number of branches of powers depends on the certain constitutional systems of the states, but organically only these three functions of power can exist. (Therefore the individual functions can be implemented into several branches, mainly the diffuse system of the executive power can be divided among several centers).

The American theory, the "checks and balances" shall be equal to the concept mentioned above. Usually that concept named as a synonym of it, nevertheless according to some opinions that is considered to be different from it. According to this, the various factors of power are in an interdependace with and mutually dependent from each other. The theory also distinguishes the functions of power from the branches of power. Not the decisions manifested in the resolutions of individual bodies which regarded as a whole, but all the decisions on the case which are taken into a unit by its procedure laid down[26]. According to Neustadt the US Constitution declares the distribution of power, but not the separation of functions. Moreover – and this is really different from the continental theory – the same functions should be distributed among several organisations. J. Merry says this based on a different principle from the principle of the distribution of power, because it declares the necessity of balancing out the political power with political power[27]. By the system of the 'checks and balances', an authority can recieves a variety of powers at the same time. This essentially different indeed from the classic distribution of power and regarded as a counterpart of the model of the rigid separation of the functions of power and

[26] Sári János, *A hatalommegosztás*, Osiris Kiadó, Budapest 1995, pp. 46–47.

[27] This is no different than any of the separation of powers doctrine in my opinion.

establishing an institutionalized connection between the individual branches. In a certain sense the system of "checks and balances" goes even further in the aspect of setting up of guarantees. In addition to the distribution of power – with its institutional system entiteled with the prevention from overpower – it prevents the functions from being expropriated by the individual branches of power. For my part I support to categorize the branches of power different from the principle of the balance of parlamentary system which falls in the wide scope of the term of the distribution of power[28].

According to the theory in question – and of course its practice – the legislative and the executive power organizationally do not depend from each other. They come into being in different ways, the president is unremovable and the Parliament also cannot be dissoluted by the executive power. The personal concentration is also precluded between the two bodies. Nevertheless the president can become the part of the legislative process with the right of veto, the members of the Supreme Court are appointed by the consent of the Senate. (The latter can be disputable that this kind of distribution of power is not the implementation of the non-reciprocal control of the bodies, but can be the separation of the judicial function itself).

It is obligatory to distinguish in between the "de facto" and the "de iure" branches of powers. In the narrow sense only the latter ones are considered to be a seperate branch of powers. The legal ground of it, is that only tohose bodies are entitled to exercise the legally binding, enforcable, and official scopes of authorities of the states. (For instance neither the economy, nor the press is entitled to do so. The only reason why we can consider them to be so, is that because from the aspect of the entire society they can put a significant effect on human behaviour, and therefore they can practically force the

[28] Lijphart mainly political science (and not constitutional) categorization distinguishes the separation of powers between the majority and the minority, the distribution of power (between the executive and legislative power, the Chambers – what constitutional law this call up the most power sharing!), a fair distribution of power (proportional representation) and formal restriction on the power (by the minority veto power). This highlights, see: Sartori Giovanni, *Comparative Constitutional Engineering*, (translated by Elizabeth Soltesz), Academic Press, Budapest 2003, p. 96.

obedience of the norms. The level of significance of these "de facto" braches of powers are mostly dependent from the customs of the local political culture[29].

The branches of powers can be distinguished to those branches which do transfer powers, and to those ones which does not do so (merely exercising the power). The previous ones participate in the formation (through nominations and appointments) of other bodies exercising certain scopes of authority. The President of the State is typically such a participant (especially in Hungary). Moreover the Head of the State has almost more significant powers in evolving the other braches of powers, than exercising its own scopers of authorities.

In the Hungarian governmental system, the President with his suspensive veto becomes a part of the legislation which is reminiscent of the model of "checks and balances". (As the Constitutional Court – that just mentioned a special branch of power – implements the legislative function). The judicial branch of power is independent, shall not be bound by any instructions, entirely separated from the executive power by creating the organization of the National Council (recently: National Judicial Office). However, it can be neutralized by the President's autonomous decision: the institution of pardon and with the countersign of the Minister of Justice. Thereby the executive power and the power of the head of state take over the function of judicial power thus the judiciary can be removed. The head of state has significant powers with regard to the appointments of certain officials of the executive power.

The classic parlamentary system realizes the concentration of the branches of power instead of separation, while it can be noticed the separation of functions between the branches of power. In the Hungarian model the institutional separation has a greater presence despite the personal concentration, while the separation of functions between the branches of power resembles the American theory.

[29] About the concept see: Simon János, *A politika* értékválságban – *a demokratikus politikai kultúra keresése*, L'Harmattan CEPoliti Press, Budapest 2013, pp. 7–17.

It should be noted that the (former) Hungarian Constitution did not even mention the concept of the distribution of power with a word, nevertheless it is present as almost an evidence in the practice of the Constitutional Court (hereinafter AB). It is interesting that one AB 31/1990 decision on the issue of interest rates of housing loan, which is irrelevant in our topic, concluded "The Hungarian state organization is based on the distribution of power." However, one of the later dissent of Géza Kilényi regard the head of state as a part of the system of "checks and balances" by his powers, namely Kilényi discerns the American organizing principle in the Hungarian form of government. (It is not entirely clear whether he uses the latter concept in relative or different meaning in relation to the concept of the distribution of power). Altought the in the new Constitution (AKA: Foundational Statute) it is explicitly written in Article C) paragraph (1) "The operation of the State of Hungary is based on the separaton of powers". The two classifications can be made parallel[30]. In other words the law can exlude the concentration of certain bodies (for example the unilateral dependence of the government from the parliament, the judiciary from the executive power) or that some people can be members of two branches of power at the same time. (The latter will be mentioned at the analysis of the relation of the parliament and the government).

The actual political situation can make empty the legal distribution of power (besides the lack of personal distribution of power also can alsp empty the institutional one) , or vice versa, certain constitutionally non-existing branches of power can be made existing ones.

The modern distribution of power shall be tested in the lights of these new dimensions, because instead of the traditional separation of branches of power – depleted by the evolution of the classic distribution of power especially after the horrors of dictatorships – the

[30] The organizational division of power in political terms means that a party dominated by an interest group at the same time in two different branches of power, position. However, only the probability can be reduced, for example, otherwise, selection of different periods (cf. Presidential systems, Israeli Prime Minister's choice). Personal power-sharing in a political sense, however, hardly be tested scientifically category, because of the dependence of a person so much due to the way that almost uncontrollable, opaque.

need is increased again and this to create new power-sharing factors. Let us line up these factors with schematic panels. (The in-depth analysis of the constituent power is justified, because despite of its importance it is neglected in the legal literature and essential to the foundation of the whole system of govrenment).

2.2. THE CONSTITUTIONAL POWER

The demand of mentioning the constitutional power as a separate factor can be arised after the question of creating the classic branches of power is transferred from theory to practice. Namely when not just scientific foundation but social legitimacy inevitably arise. Its importance is justified in the whole framework of the system of the exercise of power is specified by the constitution, which cannot be only the ultimatum of the ruler or a particular social group, layer, class in a constitutional democracy. As Bibó concisely said: "It shall be a separated power from the legislative, specifying the distribution of competence of the other powers".

First the English Civil War created the constitutional power institutionally, afterwards the U.S.A. and France followed it. Sieyés emphasized: "The constitution can't be any part of the bodies which was created by itself"[31].

Numerous eminent members of the legal literature highlight the importance of separation of the constitutional power[32]. Claus Offe highlights this with a lifelike way: "Not the players themselves should dictate the rules of the game that who is allowed to play"[33].

---

[31] Samu Mihály, *Alkotmányozás, alkotmány, alkotmányosság*, Korona Press, Budapest 1997, p. 45. Theoretical problem is that this formulation, we do not have the constitution to legitimize itself, on the other hand is not possible amendment of the Constitution.

[32] See: Cservak Csaba, *A hatalommegosztás elmélete* és *gyakorlati megvalósulása*, Jogelméleti Szemle, 2002/1.

[33] Referred by Samu Mihály, see for example: Samu Mihály, *Az alkotmányozás jellege* és *követelményei*, [in:] *Társadalmi szerződés*, Csizmadia László, Nemeth Miklós Attila, Kemeny András, Püski Press, Budapest 2010, p. 71.

It is not quite often but examples exist presently for separated constitutional power in the world's constitutional systems[34]. In Hungary, there is no a separate constitutional power[35], the Parliament can amend the Constitution with a two-thirds majority. Numerous opportunities were brought up for the adoption of the new scheme of the constitution. The accepted text – maybe amended with a two-third majority – should be reinforced by the next parliament. The possibility of a confirmatory referendum was brought up. The preliminary conceptual issues would be worth making it subject to a consultative referendum ensuring the success of the confirmatory referendum.

Because of the Constitution's constantly involved necessary renewal[36] consideration could be given to establish a constituent assembly which can be convened at anytime if it is necessary[37]. Instead of the two-thirds law, the possibility of a declaration of fundamental rights or a two-tier constitution[38] has already arosen. It could play its role more suitable by an individual institution, because of the high political dissension namely of the binary code of the government and opposition[39].

---

[34] I mention as an example the Taiwanese Constitution, which calls up a special Constituent RMB in order to create and modify the Constitution (in essence, similar to the role of the Bulgarian People's Congress High).

[35] In 1848, the Constituent Assembly created the laws, then gave way to the Legislative Assembly. See: István Stipta, *Die Geschichte der Verwaltungsgerichtsbarkeit in Ungarn und die internationalen Modelle*, "Journal on European History of Law" 2014 (2) , vol. 5, pp. 73–79.

[36] The requirements for the constitution of permanent control. The 1791 French constitution would have given only the fourth cycle, the adjustment mode.

[37] The scope of the originators of course, should be regulated in depth. Thus, a specific number of representatives of the government, the president, what percentage of all the members of the Constituent Assembly, or a specified number of voters could be the subject of rights.

[38] Kukorelli István, *Az alkotmányozás* évtizede, Korona Kiadó, Budapest 1995, p. 46.

[39] The second chamber is a way out. It could be that the constitution itself, possibly supplemented with other elements, non-governmental organizations, local government delegates.

2.3. THE HEAD OF STATE

In the presidential systems the Head of State is in charge of the Executive Branch. In the semi-presidential systems it is the most appropriate to talk about a "two-headed" law enforcement), where the President of the Republic also belongs to the Executive Branch.

The head of state appeared as a special branch of power in the theory of the government systems, because previously it was the depositary of the executive branch of power, but with the fulfilment of the parlamentarism, its importance was diminished first, afterwards it got a new role. Actually it is not a seperate branch of powers but a part of the system of checks and balances, which controls the operation of the traditional branches of power or benefits the exercise of functions of power to some extent. It is possible to talk about its definitive functionning by having the knowledge of the substantive law[40]. Benjamin Constant illustrates the role of the head of state with a fair metaphor. The three (original) branches of power, each is like a train, which might collide, leave their rails and there must be a power that leads them back to their original ways. János Sári points out that afterwards the constitutional courts have been created, the head of state doesn't conduct activities in accordance in law, but decides ont he basis of political discretion. The theory of Constant describes the latter as a justice-logic activity.

In my view with regards to the power of the Head of the State a special level could be observed amidst the President of the parliamental democracy and the semi-presidential system. So what kind of scopes of authority could come up to strenghten the merely nominal powers of the President in the parliamental democracies?

In my opinion, it is noticeable that in certain parliamentary states during the recent years some significant controlling powers has been deployed to the heads of the states. (Sometimes it is not easy to distinguish from the semi-presidential states. According to my viewpoint from the aspect of the scope of authority the active head of state is considered as a form of the semi-presidential system,

[40] See: Cservák Csaba,: *Milyen a magyar kormányzati rendszer? – A kormányforma fejlődése és problémái*, Jogelméleti Szemle, 2001/4.

while the plethora of powers among the passive/controlling roles features is a specific mean of the system previously discussed.

What kind of scopes of authority may arise in connection with confirmation of the head of state?

In Latvia, the president of the republic could declare a referendum about it, whether it be early elections. This double filtering does not allow the head of the state for the arbitral dissolution of parliament which is representing sovereignty, but in case of a huge shifting in people's will it means a great controlling possibility. At the same time the President of the Republic shall be entitled (required third of the Members of Parliament) to suspend the enactment of any new laws for a period of two months. If during this timeperiod, more than 10% of enfranchised people sign the application, an abrogative referendum must be held. The validity and effectivty threshold is very high.

In Lithuania, the head of state may raise the unconstitutionality of any valid and operative acts, and entitled to turn to the constitutional court, where the plenum could suspend the application of the law. This is an almost unique way of constitutional review, because *ad absurdum* the effectiveness of an act created 10-years ago could be suspended by the head of the state. It came up in professional circles that in case the prime minister is voted out in Parliament or through the course of a constructive vote of censure the President of the Republic should have some discretion.

The head of state may have stronger scope of authority than average in case of appointing. In Slovakia, the members of the Constitutional Court are appointed by the head of state and 10 judges are selected by the Parliament out of the 20 candidates. In France, the third of the plenum are appointed by the President of the Republic, and in Turkey all the members nominated by professional and judicial bodies.

2.4. THE CONSTITUTIONAL COURT

After the Austrian implementation in 1920, the continental system structured constitutional litigation, based on a separated organization, spread like a river backwash, mainly after the Second World

War. Mentioning it as a separated factor of power is only possible in case of having a strong scope of authority. In such case it is a part of the legislative, so we can consider it as an element of the system of "checks and balances". Actually, it performs law enforcement activity, it does not just compare the facts with the law, but the law with the constitution also. The courts do not take part in the developement of the relationship between the legislative and executive, nor in the normative settlement of living conditions. From the aspect of the governmental systems as a whole, the judicial system is typically not used to be analyzed. The courts do not take part in managing the living conditions in longterm either, while the greater autonomy and freedom of the constitutional courts and the possibility of complete and general annulation of rules can put this type of body to the edge of politics[41]. The politicalization of the judges in Constitutional courts strongly depends on the set-up of it, and also from the method of their election.

What is the Constitutional Court? Can the question be raised, that it is an evidence for many? In general terms we could respond, it is a norm controling board, which looks at legal norms and state laws on constitutional grounds. In international comparison two basic constitutional models are known. In one of the models the traditional courts – headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately push aside the statute in concern. So, in this scheme, quasi all courts implement constitutional judicature, but due to appeals, and legal remedies the Supreme Court of the country is the authentic and principal organ of the interpretation of the Constitution. Therefore constitutional judicature is called decentralised in countries of the above range.

The Greek form of constitutional type judiciary is also a curiosity; among members of the Supreme Court of the State and law professors, judges are appointed by drawing of lots. The judiciary only has the jurisdiction to control the acts, there is no authority for lower-level legislation, such as statutes. Also, it should be pointed

[41] This evolution of the conditions, see the chapter on this below.

out that other courts in their scope of discretion consider the constitutionality of the statutes.

Such peolple are excluded from the membership of the Constitutional Court whom were members of the government, or were senior party officials within four years prior to the date of the election, or held state leadership positions. At least nine, and no more than fifteen Members of Parliament that form a nomination committee make a proposal for Members of the Constitutional Court. The committee must provide a seat for each representative of the parliamentary parties.

2.5. MUNICIPALITIES

Some kind of self-government of the municipalities can not only be fitted into the classic original theory of distribution of powers, but it was exactly contradictory to that. On one hand the aversions against the feudalistic privileges of the cities, on the other hand the connection between the concept of the distribution of power and sovereignty might be the main reason for this. The self-governance is in accordance with the voluntary restrict of sovereign contrary to the national sovereignty. Nevertheless it can be noted that the main branches of powers get their own authority by defining the sovereign, there is no obligatory legal basis for their independent existence. The trend representing the whole society broke away with the conception of liberalism according to which declares that individuals unify to a whole on the highest level of the state and they began to respect the individual in the self-governance as a protecting system based on the constitution against the state[42]. From the aspect of the society the autonomy of government is very important, but it is difficult to take into consideration at the analysis of the

[42] Sari János, i.m. p. 237; István Stipta, *Die Versuche zur bürgerlichen Umgestaltung der Komitate*, Vorschläge, Entwürfe, Gesetze 1844–1877. *Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös nominatae.* (ed. Horváth Pál) Separatum Sectio Iuridica Tom. XXXV. Budapest 1995, pp.167–176.

government systems, because it has so many parts, that a unified conclusion can't be drawn for the entire state[43].

2.6. THE PROSECUTOR'S OFFICE, THE ADMINISTRATION

As the judiciary is an independent branch of power, usually the independence of courts is meant to be, nevertheless the Prosecutor's Office is also an important part of the judiciary system. However, the Prosecutor's Office is independent from the courts. It is also independent from the government thus it can be regarded as an individual branch of power, despite it functions in a hierarchical system, the appointment of the General Prosecutor usually depends on the government or the legislature.

The organizational autonomy of the administration is justified by the separation of the political and social subsystem[44]. The top leadership of ministries belong to the world of politics but the apparatus is concerned with the legislation of civil service, the change of government is not necessarily associated with their dismissal. In the Hungarian legal system for instance the prohibition of withdrawing the authorities and the right for giving instructions in only procedural issues are beside the independence of the organization. Nevertheless we know at the time of switching of the cycle there is usually fluctuation in the apparatus in a huge percentage, in practice the instructions of the leaders determine the activity of the subordinate personnel. It is a rightful suggestion that the autonomous bodies can be regarded in a certain sense as a separated factors of power, because – though their functions are government related – rights for giving instructions doesn't apply for them. Their establishment are in relation to other branches of power (parliament, government, head of state), but – and this is the basis of their autonomy – they are non dismissible. Their judgement is similar to the prosecutor's

[43] In other words, as many political composition may occur relative to the government's attitude globally undetectable.

[44] In Hungary NMHH, The Economy Competition Office, and certain point of view the NVB.

office in this case, because generally they reflect the actual political combination. However, from the reason of their non-dismissibility they can be autonomous. This is especially true if the mandates of the persons who were appointed by the former government will be valid in the next cycle[45].

2.7. THE OPPOSITION

The concentration of the government and the majority in the parliament increasingly refers to the opposition like the counterweight of the executive. The range of two-thirds legislative items are the result of the involvement of the opposition into the legislative whereby a new factor of distribution of power is born. The all-time confrontation of the opposition and the government, which is a necessary corollary, makes this distribution of power to dysfunctional, because the opposition takes control over the professional control with an eternal and autotelic confrontation[46].

2.8. THE SECOND CHAMBERS

Although this element had been featured in the theory of Montesquieu its renaissance is owed to the interlacement of parliament-government mentioned above. The federal-type second chamber namely a priori symbolize the independence of the member states, (as individual factors of distribution of powers) having their own sovereignty, which are manifesting in the role of their federal legislature and in the Member States' legislative subjects delimited by the constitution. The second chambers, involving corporate elements in themselves, are the expression of interests of the civil society,

[45] The above is not a state administrative body can be said as the National Bank, which works the same way, but plays some power with the power of the central bank through mandatory provision.

[46] Solving the Danish Constitution, however, offers a smart solution: 30% of the MPs propose referendum.

which are also remedy aginst the popular representation-based concentration of powers.

2.9. THE PEOPLE'S PARTICIPATION

The entire system of distribution of powers can be classified into the institutional system of indirect democracy, while the instruments of indirect democracy can create distribution of powers against the power machine, which is sceded from the people and functioning too much accordingly to the binary code.

2.10. DISTRIBUTION OF POWERS BETWEEN STATES

János Sári propounds the possibility of analyzing the distribution of powers between states and although here and now we are dealing with the governance within states, due to the junction to the European Union we also have to mention this in here.

In the integrational organizations, the authorities of the Member States and the EU, the judiciary system intended to enforce the community law, and paralell co-existence of the intitutions of the Community and the Member States existing can mean the basis of distribution of power.

2.11. OTHER SOCIAL FACTORS

"The media is the fourth branch of power!" "The economy is the fourth branch of power!" It can be heard frequently in the political journalism jargon. There is a little truth in the constitutionally naturally rejectable views, because the factors mentioned have impact to the power-political system. For example the media can significantly influence the results of the elections and this has a huge impact on the legislative power and on its composition. The independent functionning of the economy can specify the real margin of the executive. Nevertheless these factors are not part of the state, do

not have the usage of monopoly of the legitimate violence, namely their will are not enforcable in the world of the constitutional law[47].

2.12. THE BRANCHES OF POWER IN OUR COUNTRY

Now let us see how the classic triad of powers are formed in Hungary as there is no chance to form an overall picture from the reason of the diversity of national legislation. I have already pointed this question out in details in my study on the Hungarian governmental system. Here and now I am only demonstrating the outline of my deduced chain of thought. The three classic branches of power certainly is alive, furthermore the head of state with a slightly wider authority than ceremonial is also regarded as an individual factor, however he is not purely the depositary of the political power, but considered as a neutral intermediary branch of power. His authorisations are either independent, rather interferal (e.g. appointments, signature of ministerial countersign, the signature of the laws… etc.). The principle of "checks and balances" does not prevail because of our country's parlamentary system, the parliament overcome the other branches of power: it elects and dismisses the government, lays down the budget, which significantly specifies and gives limitations of the scope of the executive. Its legislative power extend to all, which is a controversial element of the Hungarian legal system, therefore it can distract the government's power of regulation of. The election of the Head of State and the Constitutional Court are also the tasks of the Parliament. The Constitutional Court with its specific activity reminiscent of the deliberation, does not expand the classic triad.

The whole system is based on the Constitution, the Constitution is the cornerstone of sovereignty. Imaging intuitively, the Constitutional Court is not derived from it, but it is a supporting factor. The classic baranches of the triad are not located paralel to each other but practically all grow out from the legislative. The head

[47] This may justify the institutionalized separation and real factors, even in the name of dominance and power lines.

of state, based on the form of government, even points outside of the constitution, because he is the carrier and the bearer of the external sovereignty towards the publicity[48]. The separate analysis of the prosecution is not a common practice in the legal literature. However, due to its exclusion of being instructed, in vain the election of the Prosecutor General is an authority of the Parliament, it can be risked to mention, that it could be such an individual factor in the distribution of powers like the Constitutional Court. Lets have a brief look what kind of stages of development the peresent arrangement went through in our country.

The greater the separation of powers (especially as regards bodies independent of the government), the more the rule of law is guaranteed[49]. From the point of view of our topic, the more independent bodies are established in a state, the more certain that no dysfunction, i.e. no operation outside the internal logic of law, will occur. It is easy for a body, or in particular a single leader, to "go astray" and fall under the influence of certain political forces. If power is shared between several bodies, there is a greater guarantee of independence. However, the wider the division of power, the less effective its operation. As in constitutional law in general, the instruments of effectiveness (the strengthening factors) compete with the guarantees (the weakening factors). The two aspects must be balanced, and this is a free choice for the state concerned. Since in many cases there is no separation of powers between government and parliament, and in many states the ordinary courts are constitutional judges, I believe that the following should be stated as a minimum international requirement. The greatest danger is the subjective decision of exact legal questions by political influence. The separation of powers between political power

[48] Starting from the brake system of checks and balances, however, the Constitutional Court with regard to the legislative function of the power-sharing factor, because of negative legislation participate in the exercise. May be subject to similar terms of implementation.

[49] Some experts analyse independent bodies in the executive branch, such as the Media Council. And although they have both a dispute adjudication and a legislative function, they do indeed have the functions originally attributed to the executive. See: Lóránt Csink, *Mozaikok a hatalommegosztáshoz*, Pázmány Press, Budapest 2014, especially pp. 72–80.

and judicial power must be upheld. In other words, let us separate the bodies at the highest level that decide on expediency and legality! And within the judiciary branch, the independence and being unbiased of the individual judges should be guaranteed!

3. Judicial independence

The categories of impartiality and independence are often invoked in an inaccurate manner in the body of academic literature available on the topic. They are sometimes deemed synonyms, sometimes jointly defined as "twin principles"[50]. According to the six-pack theory, the attributes necessary for judges to fulfill the moral obligations of their profession are the appropriate perception of their roles, courage, impartiality, independence, the pursuit of justice[51] and temperance[52].

Possessing the virtue of "impartiality", judges are able to distance their own personal lives and opinions from the case at hand. Impartial judges are able to detect and ignore their interests, prejudices, anger and various subjective entanglements. "Independence" is closely connected to courage, referring to the independence of judges from external factors and pressure. This attribute gains especial importance when a case falls under heavy moral judgment from society, or when its parties are considerably powerful[53]. Therefore, judicial independence is a right and obligation of judges to rule according to the law only, without the fear of criticism or reprisals, no matter the difficulty or the sensitivity of the case[54]. Impartiality,

[50] According to Article XXVIII (1) of the Fundamental Law of Hungary: Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an *independent and impartial court* established by an Act.

[51] Cf.: Varga Attila, *Az igazságtól az igazságszolgáltatásig*, *KORUNK* (KOLOZSVÁR) 2012:7, pp. 102–110.

[52] Iris Domselaar, *Moral Quality*, [in:] *Adjudication: On Judicial Virtues and Civic Friendship*, "Netherlands Journal of Legal Philosophy" 2015, 1, pp. 24–46.

[53] Above-quoted.

[54] Lili Barna, Dorottya Juhász, *Soma Márok: Milyen a jó bíró?*, Miskolci Jogi szemle, 2018/1, pp. 84–98.

on the other hand, means that the basis of judicial rulings can only be objective circumstances. Rulings that are biased, prejudiced or deliberately favouring the interests of one of the parties are to be avoided. In Hungary, Act CLXII of 2011 on the legal status and remuneration of judges mandates a general psychiatric and psychological assessment of judge aspirants. This law defines twenty different attributes and competencies – such as decision-making ability, integrity, independence, objectivity, etc. – that must be taken into account when evaluating such applications[55].

Guided by the practice of the European Court of Human Rights, the Constitutional Court of Hungary elaborated its views on the constitutional requirements of impartiality in CC Resolution 3154/2017. (VI. 21). In a general sense, it declared that impartiality means the absence of prejudice and bias[56]. It emphasised that impartiality possesses both a subjective and an objective aspect. The subjective consideration demands the scrutiny of potential private biases and opinions of the judges presiding over a case, while the objective side of impartiality calls for the general prevention of situations which may call impartiality into question. Even if it does not factually occur, the external perception of judicial impartiality can lead to the erosion of the public trust in the workings and rulings of the courts. This can be especially damaging if the law provides one of the parties in the case at hand with additional rights. The subjective criterium of impartiality also demands judges that they be impartial regarding both the individual parties and the entire case itself[57]. The actual realisation of the principle of impartiality is made manifest through the exclusion regulations of procedural laws[58]. Such regulations do not only facilitate the creation of a truly impartial judiciary, but also the public perception of an impartial rule of law, reinforcing the public trust in the state's function to provide legal protection against partial judges, if necessary.

---

55 Above-quoted.

56 Ágnes Czine, *Tükörkép a bírói függetlenségről és pártatlanságról az Alkotmánybíróság gyakorlatában*. Alkotmánybírósági Szemle, 2018/2, pp. 2–8.

57 Above-quoted.

58 Confer, for example, with CC Resolution 3154/2017. (VI. 21).

In the author's view, it must be emphasised that subjective impartiality is not only violated by the judge's bias towards the parties themselves, but also by an unreasonably rigorous, stubborn and maniacal attitude toward certain legal questions. A typical example would be a divorced judge presiding over a divorce lawsuit; a male judge, for example, might feel solidarity with the husband and thus be influenced to award him custody of his children. Likewise, a judge with many children could just as well rule in favour of litigating parties with large families themselves. In situations such as these, the judge has a strong personal opinion in a certain professional area, independent of the exact parties at hand, which is still liable to influence decisions. Such a judge cannot always be trusted to objectively evaluate a case, as certain procedural elements may be given unreasonable degrees of importance; for example, by a constant presumption of the delivery of legal documents, ignoring arguments to the contrary. Not even constitutional court justices are immune to this. They could, for example, admit a case from the regular courts for constitutional scrutiny despite the lack of an official request from a lower-level judge.

Judicial independence lies on two pillars: the structural independence of the courts and the personal independence of individual judges. In the author's view, this latter independence is even more important than the former. There are various democratic states, imbued with the rule of law[59] where the administrative leadership of the court system is placed in the hands of the minister of justice. In post-Communist Hungary[60], this used to be the case until 1997, when the National Council of Justice[61] was created for this role.

[59] András Zs. Varga, *Eszményből bálvány? A joguralom dogmatikája*, Századvég, Budapest 2015, pp. 11–25.

[60] Béla Révész, *Az igazságszolgáltatás átalakításának vitái a rendszerváltás időszakában*, *FORUM: ACTA JURIDICA ET POLITICA* 8. (2018), pp. 323–367.

[61] See more: Fleck Zoltán, *A bírói hatalom alakulása az elmúlt két* évtizedben, [in:] *Magyarország politikai* évkönyve – *Kormányzati rendszer a parlamenti demokráciában 1988–2008*, Sándor Péter, Stumpf Anna, Vass László (eds.), Budapest, Magyarország, *Demokrácia Kutatások Magyar Központja Közhasznú Alapítvány* (DKMKKA), 2009.

Since the incubation of the new constitution in 2011[62], the court system is overseen by the National Office for the Judiciary[63]. True judicial independence is impossible without the personal independence of judges, whose components are a) legal guarantees surrounding the exact rules of the appointment and resignation of judges, b) immunity from prosecution and c) the regulation of conflicts of interest[64].

It is to be underlined that the independence of the judicial branch of power does not, in itself, guarantee the independence of individual judges within the system. Their personal independence can only be achieved if they are free from not only external, but also internal pressure and influence, when presiding over a case[65]. The right of the NOJ's president to issue orders to regular judges with no possibility for appeal is an indirect violation of judicial independence[66].

The recent revision of the constitutional complaint procedure in Hungary necessitated codification similar to the procedural laws governing civil lawsuits[67]. Section 62 of Act CLI of 2011 on the Constitutional Court lays down the following regulations. Constitutional Court justices who are related to the applicant of a constitutional complaint, or who previously participated in the legal procedure contested in said complaint – either as a litigating party

---

[62] Cf.: Erdei Árpád, *Az* új *alkotmánytervezetnek a büntető igazságszolgáltatásra vonatkozó rendelkezései* pp. 73–80. Paper: EA/2011, [in:] *Az* új *Alaptörvényről*, Kubovicsné Borbély Anett, Téglási András,; Virányi András (eds.) Budapest, Hungary: Magyar Országgyűlés, 2011, p. 263.

[63] Varga Zs. András, *Az igazságszolgáltatás* átalakítása, [in:] Állam és *jog: kodifikációs kihívások napjainkban*, Fejes Zsuzsanna, Kovács Endre Miklós, Paczolay Péter, Tóth J. Zoltán (eds.) Budapest, Hungary, Szeged, Hungary: Gondolat, Magyar Jog- és Államtudományi Társaság, 2013, pp. 41–61; p. 21.

[64] Petrétei József, Tilk Péter, *Magyarország alkotmányjogának alapjai*, Kodifikátor Alapítvány, Pécs 2014, A bíróságok, p. 3.

[65] See: László Ravasz, *Bírói függetlenség* és *a tisztességes eljáráshoz való jog*, Debreceni jogi műhely, Issues 3–4 of 2015, vol. XII. (December 2015).

[66] See: Tamás Sulyok, *Helyzetjelentés az Alkotmánybíróság alapjogvédelmi tevékenységéről*, Alkotmánybírósági Szemle, 2017/2, p. 99.

[67] Juhász, Imre, *Az Alkotmányjogi panasz eljárásjogi vetületének néhány aspektusa*, [in:] *Codificatio processualis civilis: Studia in Honorem Németh* János II., Varga István (ed.), Budapest, Hungary: ELTE Eötvös Kiadó, (2013) pp. 119–132; p. 14.

or a judge – are excluded from the case. Furthermore, a Constitutional Court justice who, for direct personal reasons, cannot be expected to judge the case with complete impartiality and objectivity is also to be excluded. Members of the Consitutional Court are expected to self-report the existence of such circumstances to the president of the organisation.

In freshly democratised countries, there is a strong impetus to create a complete system of autonomous judiciary self-government, which minimises accountability. Let us take a look at the most typical systems of judicial administration currently in operation, particularly at their placement of central judicial administration within the various branches of power. On the European continent, the textbook examples of external judicial administration are Germany and Austria. While organs of self-governance are still to be found, the entirety of the central administrative workload is in the hands of a minister overseeing the justice system. Self-governing offices are restricted to matters of personnel, as well as determining the responsibility of judges during disciplinary procedures. Ordering the judges or trying to influence the proceedings which they preside over is entirely outside the jurisdiction of the executive branch, which means that here, the principle of judicial independence is primarily made manifest through the person of the individual judge, rather than on an organisational level[68]. This independence is constitutionally protected here, illegitimising any attempts at material or procedural intervention.

Federal-level judges in Germany constitute around five percent of all the judges[69]. It is undeniable that politics plays a marked role during their recruitment, as the committee tasked with their selection (*Richterwahlausschuss*) is made up of ministers from the

[68] Dietrich Deiseroth, Lichtenstein József (Translator), *Bírói függetlenség* és *pártatlanság a jogállamban: A bírák pártokban való politikai tevékenységéről*, *BÍRÁK LAPJA* 3, 1993, pp. 3–4; pp. 18–32; p. 15.

[69] See: Riedel James: Recruitment, *Professional Evaluation and Career of Judges and Prosecutors in Germany*, [in:] Federico, Giuseppe di: *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain*. Editrice: Lo Scarabeo. Bologna 2005, pp. 69–90.

member states and members of parliament who are proportional to the representation of each party in the legislature. It is evident, then, that aside from professional considerations, the ideology of the parties and the personal connections of appointers and appointees alike also play a part in the selection of federal judges[70]. On the level of member states, significant differences can be observed. In certain areas, decisions are made with the inclusion of judiciary organisations, to one degree or another. In other states, the appointment of judges resembles the federal level, with committees of politicians possessing the right of decision[71]. Unlike in the federal committee, however, judges themselves are also represented in these state committees[72]. In eight member states, a judicial organ for the election of new judges also takes part in the process, its mandate provided by the state parliament and, in some places, appointed by legal experts' organisations[73]. In many of the provinces, the final examination scores of aspirant judges are also taken into account[74]. While the system in Germany does not provide independence on the organisational level, it does realise the automatisation of case distribution, something the author is planning to cover in later studies.

In France, the executive branch and judicial self-governance organs – Conseil Supérieur de la Magistrature – attend to the tasks of judicial administration together. In the ministry, there are specialised officials exercising these competencies, but, similarly to

[70] Badó Attila, Márki Dávid, *A német bírósági igazgatás alapjai*: *COMPARATIVE LAW WORKING PAPERS* 4: 1 available at: https://www.ojji.u-szeged.hu/images/dokumentumok/CLWP/03_nmetclwp.pdf [accesesd in 2020]. At the time of this document's writing, the appointing committee is composted of sixteen federal MPs and the justice ministers of the sixteen member states.

[71] The same system operates in the provinces of Baden-Württemberg, Berlin and Brandenburg. See: the dissertation of Attila Badó, p. 22.

[72] There are lobby attempts to involve judges in federal-level appointment, too. Cf.: T. Edinger, *Die Justiz muss eine Stimme bekommen*, [in:] *Deutsche Richtrzeitung*, 2003, p. 188.

[73] See also: Attila Badó's academic dissertation, pp. 23–25.

[74] Riedel James, *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Germany*, [in:] Federico, Giuseppe di: *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain*. Editrice: Lo Scarabeo. Bologna 2005, pp. 69–90.

the German and Austrian models, disciplinary matters and judge appointment fall under the purview of of the judiciary. Naturally, the effectiveness of this system is not immune to criticism, but it rests upon the foundation of long-standing social traditions, which do not recognise the judiciary as a fully separate establishment, but rather one situated close to the executive branch. Parallel to this, the principle of individual judicial independence enjoys significant attention, and the Constitutional Council – Conseil Constitutionel – constantly monitors the system and incoming legislation for elements endangering individual independence[75]. The *Belgian* and *Dutch* systems are similar to that of France, their organs attending judiciary functions imbued with a certain duality. A judiciary council representing self-governance and a system of administration attached to the executive branch are simultaneously present. These councils are more akin to forces of external counterbalance to ministerial administration, attempting to complement it.

Therefore, judicial councils do not truly belong to either the executive or the judicial branch of power. Sweden and Estonia also operate mixed systems of judicial administration. Having taken a glance at judicial administrative systems where central functions belong in the hands of the executive branch, as well as mixed systems, let us now look at models where judicial self-governance is the rule of the day. In Italy, there is a committee for judicial self-governance which – overseen by the ministry of justice – is the primary institution responsible for judicial administration[76]. This oversight is conducted by four departments of the ministry, whose competence also entails the appointment of high-level judges, creating budget plans and tending to the disciplinary procedures of the judiciary. Judges working in the minsitry conduct the lion's share of the workload. Thus, it can be confidently stated that there is a strong presence of judicial independence here both on the individual and

[75] Further notes on the French system: József Lichtenstein, *Az igazságszolgáltatás rendszere Franciaországban*, *MAGYAR JOG* 43:4, 1996, pp. 232–243.

[76] Badó Attila, Márki Dávid, *A bírósági igazgatás Olaszországban*, *COMPARATIVE LAW WOR KING PAPERS* 4:1, available at: https://www.ojji.u-szeged.hu/images/dokumentumok/CLWP/OlaszorszgCLWP.pdf [accesed in 2020].

organisational levels. The High Council of the Judiciary is also responsible for commenting on related legislation, as well as creating and executing the central strategy for legal education. Much like in Italy, the model currently employed in Spain provides the General Council of the Judiciary – Consejo General del Poder Judicial – with near complete power over judicial administration, but the executive branch is once again given the task of overseeing the system. Due to high degrees of autonomy, such models bear the disadvantage of inefficient organisation, and accountability is also inherently more limited. The membership of this twenty-one-member institution, of which twelve are judges, is selected by the parliament from a list of thirty-six persons, assembled by the courts. Even though the General Council is headed by the president of the Supreme Court, it is also the Supreme Court where its decisions may be appealed. The disproportionate power of the General Council and questions of its accountability are constantly recurring talking points in the public discourse[77]. In post-Communist countries, the tendency is to delegate the entirety of the juducial administrative structure to judicial councils, which generates considerable social tension, owing to the lack of political accountability of these councils. In the interest of optimal efficiency, accountability and independence must remain in a state of balance, lest the system be damaged as a result. During the transitioning period from Communism, these countries construed these two values as opposites, because the old regimes used a wide array of administrative measures to violate the independence of the courts.

In the author's classification, central judicial administration, judicial self-governance and mixed administration are all features of indirect democracy. Contrary to these methods, it is a form of direct democracy to elect judges through popular vote, much like parliamental or municipal representatives. This is practiced

[77] Cf.: V. Moreno-Catena, J. Pintos-Ager, H. Soleto-Munoz, *Espagne/Spain*, [in:] *L'administration de la justice en Europe et l'évaluation de sa qualité*, Fabri Marco, Jean Jean-Paul, Langbroek Philip M., Pauliat Hélène (eds.), Montchrestien, Paris 2005, pp. 207–225.

in certain areas of the United States of America and Switzerland[78]. In the USA, the judge election systems of the member states are differentiated based on whether they are partisan or non-partisan, and whether or not the name of the organisation appointing a judge is displayed[79]. If this is not disclosed, it is still entirely possible, of course, that the aspiring judge is supported by this party or the other. This method certainly enjoys more legitimacy than executive appointment, increasing the judges' sense of responsibility[80]. On the other hand, it can also damage their independence[81].

A "softer" variant of judge election is the so-called retention election, where citizens are called upon only to provide their judgment over a judge's work who was previously appointed by the state governor. There are no contestants to the same office here[82].

Conflicts of interest constitute a topic that is closely interlinked with judicial independence. As a rule of thumb, judges may not fulfill other main jobs; this is especially the case with the justices of constitutional courts. In certain states, this limitation is reserved to positions in "other branches of power". In Bulgaria, in addition to providing a taxative list of positions a Constitutional Court justice may not fulfill, the constitution also forbids "the practicing of a free, commercial, or any other paid occupation"[83]. In Ireland, Italy, Spain, Croatia and Canada, rules regulating conflicts of interest are similarly severe[84]. Certain states designate education (like Germany),

[78] Attila Badó, *Az igazságszolgáltató hatalom alkotmányos helyzetének* és *egyes alapelveinek* összehasonlító *vizsgálata*, [in:] Összehasonlító *alkotmányjog*, Tóth Judit, Legény Krisztián (eds.), CompLex Kiadó Jogi és Üzleti Társadalomszolgáltató Kft., Budapest 2006, p. 183.

[79] Further reading on the creation of judicial mandates: Badó Attila, *The selection of judges: a comparative analysis*, [in:] *Studies in the fields of comparative law and comparative constitutional law*, Badó Attila (ed.), Szeged, Hungary: Pro Talentis Universitatis Alapítvány, 2012, pp. 90–108.

[80] Carp Robert, Stidham Roland, *Judicial Process in America*. CQ Press, Washington, D.C.,1998, pp. 405–410.

[81] Shackelford Kelly, Butterfield Justin, *The Light of Accountability: Why Partisan Elections are the Best Method of Judicial Selection*, [in:] *The Advocate*, Texas 2010, pp. 72–74.

[82] Badó's dissertation, pp. 32–33.

[83] Constitution of the Republic of Bulgaria, Article 147 (5).

[84] Legény, p. 235.

academic research (Estonia) or both (Czechia, Slovakia, Portugal, Slovenia) as exceptions. Artistic endeavours are also sometimes exempted[85]. In Japan, members of the Supreme Court may only pursue other paid occupations with explicit permission from the Supreme Court itself[86]. This is not without its risks, as it may well jeopardise the independence of the justices vis-a-vis their own court.

Conflicts of interest are also interlinked with judicial impartiality[87]. A judge holding multiple offices runs a higher risk of becoming personally invested in any court case.

The topics of judicial age limits and legal immunity are also related, but this study only makes mentions of them in passing, to be dissected more elaborately in future research.

4. Constitutional Courts around the World

In Hungary Prior to the regime change there was a general and significant uncertainty. The emerging political powers were just about finding their own position, the elite of the Single-party state was afraid of the consequences of new regime. Thanks to that fact and the spectacular declaration of the rule of law these promoted the coming into being of a Constitutional Court which possessed one of the broadest authorities in the world. Is that the way it is indeed? The question can be raised up, since the constitutional challenge was not implemented by the relevant statutory instrument from its' benchmark, the German system. The new Foundation Act enacted in 2012 filled in that gap.

[85] Such as in Lithuania, the Ukraine and Armenia.

[86] Court Organization Law, Article 52 (Japan).

[87] According to Paragraph (1) of Section 40 in Act CLXII of 2011 on the legal status and remuneration of judges: "Beside their offices, judges may only perform scientific and educational, training, referee, artistic, copyright, as well as proof-reading, language editing, and technical creation work as paid activities, but this may not jeopardise or give the impression of jeopardising their independence and impartiality, and may not prevent them from fulfilling their official responsibilities." Once again, we can see independence and impartiality in a "twin values" light.

After all let us have a look what does that difference mean, and what kind of constitutional courts exist in the world. In the light of these we shall be able to locate the meaning of the Hungarian reform.

In international comparison two basic constitutional models are known. In one of the models the traditional courts – headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately overrule the statute in concern. So, in this scheme practically all courts implement constitutional judicature, but due to appeals, and legal remedies the Supreme Court of the country is the authentic and principal body of the interpretation of the Constitution. Therefore constitutional judicature is called decentralised in countries of the above range.

The other model is where, an individual body is set up to review legal acts, statutes in the light of the constitution. (Only in the latter, it is possible literally, and in the classical sense, to speak about constitutional court). Obviously, beside this, there could be other scope of authority, of bodies above mentioned[88].

There is no separate constitutional court classically in the *UK, US, Australia, Canada, Denmark, Norway, Sweden, Japan.* Article 120 of the Dutch Constitution is a peculiarity: the courts – so that there is no separate constitutional court – do not rule on the constitutionality of a law!

As far as Switzerland is concerned, we might say, a particular mix of the classical European and American models incorporates. Each court has the right – except the federal level – to examine the constitutionality of the laws. The Federal Court has the power to participate in individual constitutional complaints; however, it is authorised to overrule legal regulations on cantonal level.

[88] We focused on the protection of the four freedoms noting that the characteristics of individual constitutional courts, focal points can be judged only on the grounds of all their jurisdiction. We may add, that not only the constitutional complaint and the normative control are related with fundamental rights, but the same could pertain to international treaties, as well as for consideration of the referendumsand election issues. If we refer to the name of the specific bodies, apparently as specific property names they should be entered uppercase; however as abstract doctrinal concepts, we specify these bodies as constitutional courts.

The Greek form of constitutional judiciary is also a curiosity; among members of the Supreme Court of the State and law professors, judges are appointed by drawing of lots. The judiciary only has the jurisdiction to control the acts, there is no authority for lower-level legislation, such as statutes. Also, it should be pointed out that other courts in their scope of discretion consider the constitutionality of the statutes.

In Hungary the mandate period of a member of the Constitutional Court is a twelve years term. Member of the Court cannot be re-elected. This represents a significant change compared to the previous law, under which, beside a nine-year term mandate, there was a one-time opportunity to re-election[89]. However, this created a chance ,at least in theory, that the mebmers of the constitutioal court at least towards the end of their mandate), with their "behaviour", and their votes are trying to promote their re-election. In several states the mandate ends at the time of retirement. (e.g. Austria, Bosnia and Herzegovina, Turkey, etc.). In Azerbaijan the first mandate period is a term of fifteen years! A one-time re-election is possible, but the second cycle can last only for 10 years.

Such people are excluded from the membership of the Constitutional Court whom were members of the government, or were senior party officials within four years prior to the date of the election, or held state leadership positions.

At least nine, and no more than fifteen Members of Parliament that form a nomination committee make a proposal for Members of the Constitutional Court. The committee must provide a seat for each representative of the parliamentary parties.

Another concern is the election of the judges. International practice usually splits the right of election. In many countries the head of state also has the option to delegate members. Bicameral parliaments also provide complex opportunities from this point of view.

[89] In some states term of office lasts until retirement. (e.g., Austria, Bosnia and Herzegovina, Turkey etc.). In Azerbaijan for the first period it is a 15-year mandate! A one-time re-election is possible, but the second period lasts only 10 years. *Az alkotmánybíráskodás modelljei* (Összehasonlító *alkotmányjog*), eds. Judit Tóth, Krisztián Legény, Complex, Budapest 2006, p. 235.

In France, for example, the President of the Republic, the president of the National Assembly, and the President of the Senate shall appoint 3-3 members out of the possible 9.

A third of the 15 members of the Italian Constitutional Court are delegated by the parliament, another third by the head of state, three colleges authorized through certain collegiums of the Supreme Court, one by the Council of State and the State Audit Office. This model is inherently provides that persons with a professional judicial experience could became a member of the body.

In Austria the president, the vice-president, the 12 ordinary members and half of the six alternates appointed by the President of the government designation. The Federal Council and the National Council recommends regular 9-9 and 3 or 6 alternates. One-third of whom also appointed by the President of the Republic.

In Slovakia it is also the President of the Republic who appoints the 10 constitutional judges recommended by the National Council of 20 persons. The particularity of these two latter models is the plural designation system, that is, a few finally gain the membership, but there will be some disappointed, who are being considered, – would take the mandate, but do will not be initiated to office. On the one hand it partly reduces the prestige of candidacy, and the other hand results in the fact that the most appropriate persons probably will not undertake candidacy.

In Spain, the judges are appointed by the King. Four of them by the lower, another four, by the upper house are appointed based on a two-thirds majority, another four (2-2) are appointed by designation of government and the Judicial Supreme Council.

Three members out of whole thirteen of the Portuguese Constitutional Court are already co-opted by the already elected ten individual. In my view this particular solution is welcomed, because, from inside candidates' expertise can be judged more objectively, on the other hand is more perceivable, what kind of expertise and skills are needed to get a better distribution of cases.

Very specific the Belgian model. Judges are appointed by the King with two-thirds majority of the Senate, from two different circles of candidates. Members of one of the groups have at least a five years of previous mandates in the high positions at the Court

of Cassation, at the Council of State, at the Constitutional Court, or at least university teachers for at least five years. The second group, however, are formed by persons who were members of the Senate or the House of Representatives at least for 8 years, so here politics specifically channelled in, in stark contrast with the model that kept away majority of robed bodies from the world of politics![90] This solution, specifically makes the Constitutional Court a part of the system of checks and balances.

The Turkish model is highly specific. It is complete authority of the head of state to appoint the 11 regular members and four deputy members. It is the specificity of the model, that public institutions/ organizations appoint judges. (These are higher courts, the State Council, the Higher Education Board, administrative professionals' organizations and bar associations)[91].

We could consider as a discrepancy from the classic "binary code" the solution – that is applied in Bosnia and Herzegovina – and what prevents from the inevitable comparison with the duality of government/and opposition. President of the European Court of Human Rights appoints 3 from the 9 members of the Constitutional Court Further exception that these members can not be citizens of neither the given state nor the those of neighbouring countries[92].

Costa Rica's constitutional structure is outstandingly interesting. The normative task is implemented by the Sala Courta, an individual plenum of the Constitutional Court. (The two bodies – with a relative autonomy – interlocks). The members are elected by a two-thirds majority in parliament for an eight-year term. Inasmuch the legislature with a two-thirds decision had not replaced the judges

[90] Specific requirement that Dutch and French language groups give the same number of judges in each group.

[91] Legény Krisztián, *Az alkotmánybíráskodás modelljei* (Összehasonlító *alkotmányjog*), eds. Judit Tóth, Krisztián Legény, Complex, Budapest 2006, p. 232.

[92] Legény Krisztián, *Az alkotmánybíráskodás modelljei* (Összehasonlító *alkotmányjog*), eds. Judit Tóth, Krisztián Legény, Complex, Budapest 2006, p. 235. Analogous rule, that in Liechtenstein from the six members only the president, the deputy and two other members must be citizens, while the others may be foreigners.

so mandates automatically extends. In my opinion, this model provides simultaneous manifestations of independence and control[93].

In Hungary, judges of the Constitutional Court are elected by the Parliament by a two-thirds majority. The entire origination of the post from parliament is a substantial nexus between the policy and the body. If one political side has a two-thirds support, then even the most prominent jurists could be stigmatised as "party soldiers". If, however, the proportion of two-thirds is divided among several political power, the situation is also subject of concern. In general, for the interest of consensus in the commission both sides mutually agree to one other's candidate, so it can be traced back, who recommended the individuals. That is why it would be appropriate to introduce multi-channel nomination of the members.

The new Constitution and the ACC. created the legal ground of identical nomination method that is identical with nomination of members. The parliament elects the chairperson among the members already in position. Previously, rules of procedure specified number of member designation, in several rounds and in an absolute-absolute majority system. Chairperson was elected by the members from among themselves (The deputy chairman as well).

The presidential term of office covers the president member's mandate time. That is to say, it could be almost 12 years or even 12 years. (Not evident that in the selection process it is tactical aspect to take into consideration the years of term of office. The current rules, notwithstanding foster this).

Both models have arguments for and against. Members probably know better who is the best, most prestigious professional, under whose leadership, they could work best. However, election by members could determine and foster negative factors such as overly patriarchal internal relationships, personal conflict or cooperation, personal concentrations may dominate in this model. Mandate attributable to parliament ensures greater legitimacy, for the decision indirectly traced back to the people's will.

[93] Furthermore in respect of specific constitutional complaints judges have a great freedom of movement. Béla Pokol, *A bírói hatalom, Századvég*, Budapest 2003, pp. 39–40.

In Lithuania the judicial power of constitutional court is very much like that of the Hungarian constitutional court. Parliament elects the president, but with the designation of the head of state. In Germany and Switzerland it is also the representative body of the people that elects the president, but coming from inside, after a proposal by the members[94]. (In Germany by voting in both houses separately, In Switzerland by a joint meeting).

The presidential cycle lasts 2 years in Portugal, 3 in in Bulgaria, Spain, Slovenia, and four years in Croatia. The edge of scale is France, where mandate time is nine years.

The German Constitutional Court was not by chance the role model when creating the Hungarian institution[95]. Its spheres of authority – in international comparison – are quite wide. Land of origin of the real constitutional complaint– recently introduced in our country – is Germany, furthermore, beside scopes of powers known in Hungary, we have to emphasize the institution of electional judging. (It should also be mentioned, that constitutional courts operate at member state level as well!) The body went into operation in 1951. Until 1999, it is estimated to had decided in more than 100000 cases. 96% of them were individual constitutional complaint![96]

An outstandingly important authority of the German committee that until the annulled act replaced (by a body with jurisdiction) this plenum has the right to release provisions regulating temporarily unsettled life situations[97].This is actually a positive legislation, instead of the traditionally negative legislative competence of constitutional courts.

So the constitutional complaint is applicable against specific judicial decisions or statutes can be applied as well. Criteria in the

[94] Cservák Csaba, *Az alapjogokat érvényesítő intézményrendszer*, Lícium-Art, Debrecen 2018, pp. 37–51.

[95] In contrast with the Austrian model – as generally regarded – the first centralised Constitutional Court, many see the origin of the institution in the Paulskirche court, set up according to the Constitution adopted in 1848. See: Adam, *op. cit*., p. 185.

[96] Legeny, *op. cit*., p. 225.

[97] Adam, *op. cit*., p. 188.

former case are exhaustion of other remedies and one month of submission deadline. The latter may be enlisted within one year the legal norm becomes effective[98]. The Federal Constitutional Court with "constitutionally conforming interpretation" may determines the correct meaning of a legal norm on constitutional grounds[99].

The decentralized constitutional courts deal with the tasks of the traditional jurisdictional litigation, investigation of international treaties, the dignitaries special impeachment, or the election of arbitration. But most important is to emphasize the institution of the scope of the review of the legal norms. In my view, the conceptual basis for the decentralized constitutional courts, the possibility of ex post constitutional review.

The biggest problem of decentralized model that blends with the practice of the courts dogmatic consistency professional branches of law (civil law, criminal law, etc) and practice abstract view of constitutional law, because every court constitutional justiciary too. While providing greater protection against gaps. The centralized model has the advantage that separates the interpretation of the law and the specific interpretation of the Constitution. The fact has in its favour that the decisions are deployed to a specific body which is an expert of the subject in the field of constitutional law.

It is clear from the above discussed that the most practical solution for a centralized model I, where the Constitutional Court has the right to constitutionally overrule the decisions of ordinary courts. (Perhaps some may complement the constitutional complaint the Ombudsman's investigation basic rights insulting activities of individual acts).

After the collapse of the socialist system in Central Europe – despite the American intellectual influence – almost all centralized constitutional courts have been established. So this kind of body work in Poland, Hungary, the Czech Republic, Slovakia, Croatia, Slovenia, Serbia, Romania. Exemplary development is the one of the Baltic states. This may be due to the replacement of radical socialism socialized traditional court personnel already heavily gone,

[98] Adam, *op. cit*., p. 188.
[99] Adam, *op. cit*., p. 185.

so at least in the Constitutional Court had to build from scratch. Interestingly, Lithuania and Latvia have established decentralized Constitutional Court. (Moreover, Lithuania adopted the German model of classical constitutional claim). In Estonia, there is no separate body for this purpose. Hungary in 2011, the new Constitution created the new Constitutional Court Act also contains detailed provisions. In 2012 both entered into force.

Latvia operates under the Constitution, the Constitutional Court, which examines the impact within the scope prescribed by law in cases concerning the constitutionality of the law, as well as other matters that are referred to the competence of the law. The Constitutional Court is entitled to laws and other acts declared invalid[100].

Judges of the Constitutional originates from many bodies, namely the parliament, government and high courts[101]. The seven judges were 2-2 and 3 were designated above. They were all confirmed by the absolute majority in the parliament. The mandate is for 10 years and can not be revoked[102].

The Board has jurisdiction, inter alia, to examine the constitutionality of laws and international treaties prior and subsequent control of norms , pronouncing the lawlessness of decisions of lower-level administrative establisments and also considering constitutional complaints[103]. (Thus, the introduction of the German model Indivual constitutional complaint and concrete norm control).

The Lithuanian Constitutional Court will decide whether they act in accordance with the laws adopted by Parliament and the Constitution, and that the President of the Republic and the Government acts violate the Constitution and the laws. In relation to these issues the Government, or at least one-fifth of the deputies, and the courts may apply to the Constitutional Court.

---

[100] See: Article 85 of the Constitution. The legal aid system is a strong connotation, the mere fact that the Constitution is very laconic density these terms.

[101] Legény Krisztián, *Az alkotmánybíráskodás modelljei* (Összehasonlító *alkotmányjog*), eds. Judit Tóth, Krisztián Legény, Complex, Budapest, 2006, p. 232.

[102] Chronowski Nora, Drinóczi Tímea, *Európai kormányformák rendszertana*, Orac Kiadó, Budapest 2007, p. 302.

[103] *Ibid*.

Why does the expansion of the institution of a constitutional complaint is a significant development for Hungary?

This created a significant loophole, because it becomes somehow solicitous c (but not unconstitutional) act somewhat rigid, inflexible interpretation in many cases violateed the fundamental rights of the party, so that neither of our Constitutional Court, not the traditional court system could not create legal grounds for a review. So, as he puts it earlier, some "vacuum" ruled the legal protection of a narrow field.

Although we are somewhat skeptical about courts with the function of the – American-style constitution interpretation – against a system, we must add, even *ad absurdum* may also be a potentially better solution than the model with the "vacuum" where certain matters are regulated neither by ordinary courts nor by separate control panel conducting the legal norms.

An act, which is not unconstitutional in itself could still result in offendinng the fundamental rights of someone very seriously even if the interpretation itself is not erroneous either. If an insufficiently reasoned legislation is interpreted by the courts in a far too inflexible way, than it is most likely the rights of the involved ones will might be violated. So it was an instructive case in Hungary at the time of the previous Constitution, even when there was no real possibility of the "real" constitutional complaint. For instance a testament was invalid because at the time when the previous Civil Code was in effect it was compulsory to number both sides of each pages. The computer word processing program automatically does not print the first page number. The heirs have attempted to broad interpretation to the meaning of the title page of the first number. The Supreme Court rejected this interpretation with its rigidly textualist interpretation. They only strictly complied with the words of the law. The law itself is not unconstitutional, as the significance of the Page numbering guarantees that the pages could not be replaced. Therefore, the Constitutional Court could not give a remedy the problem. So overall, the fundamental rights of the heirs were seriously violated. Real constitutional complaint under the new Constitution would allow the effective protection of fundamental rights at similar cases.

In a number of similar legal cases of victims of the wrongly choosen exercise of rights ended up on a "no man's land"[104]. Neither the inflexible textualist courts, nor the Constitutional Court, which was tendentionally refusing individual cases was lacking the scope of authority to protect our fundamental rights. Due to such problems the new system was considered to be a significant step forward away from this aspect.

The real difficulty is in making decisions in those cases, where there are many ways of interpretation , and one of them is unconstitutional, or (also in case of the possibility of multiple interpretation) the application of all of them results in such an outcome, where there is only one which in comlpiance with the Constitution.

These latter cases can affect the division of the scope of authority effectively in between the Supreme Court and the Constitutional court. Insofar as the Constitutional Court establishes its own jurisdiction even in case of "regular" illegality on the top of unconstitutionality than it and essentilly becomes a "Super Court" and actually rises above any specific case country's highest judicial forum. With such a function it would exceed its originally designated scope of power and it would cause a significant instability of the legal system, practically transforming the entire judiciary system to be a five-grade one.

This risk could be overcome through constitutional provisions relating to the complaint is accurate, casuistic regulation or a very wise and diplomatic practice of interpretation. The standard for being a very laconic in Hungary, there is a chanche for a second solution. That is a very strong separation of the "anti-Constitutionality" and illegality, through a thoroughly reasoned and fine-tuned strategic partnership of the Constitutional Court and the Supreme Court through strategic partnerships. This evolution is still the big issue of the future.

[104] In a related case law at the end of the will not included the location next to the date: Budapest, but it was included in the text.. The court refused the basic legal reasoning and declared invalid, so the lady who carried her father alone is not that inherited the property 1/1 (only half), but because of the lawsuit years of pulling of the court additional user fees ordered another ½ as regards, so even she became indebted to the sister who ignored their parent for years!

5. Electoral systems

There exist a number of well-known and widely employed electoral systems. The most defining principle of plurality systems is individual competition between candidates. Such systems can be broken down into two different types: the relative- and absolute majority vote. The latter of these requires more than half of all votes cast in any given constituency in order for a mandate to be won. In proportional voting systems, citizens cast their ballots on party lists instead, while mixed systems simultaneously encompass the aforementioned characteristics[105].

Let us take a look at more specific categories now, as they are found in both theory and practice.

Absolute majority of electoral systems were created to remedy the shortcomings of the relative majority vote. (Refer to the chapter on voting systems, including the issues of wasted vote and "Condorcet winners"). According to *Borda*[106], objectivity and justice would be best served if voters were allowed to rank all of a district's candidates in their order of preference, with such an order determining the winner after the appropriate calculations. Given the sheer number of candidates, this method, itself never tested at parliamentary elections, might appear difficult to implement; however, it lends great importance to secondary votes, potentially bringing about a "just" form of popular representation based on compromise. The *alternative vote* particular to Australia stands on a similar principal footing, also requiring the ranking of candidates[107]. If the primary preferences fail to yield an absolute winner, the secondary

[105] Dezso Márta, *Képviselet* és *választás a parlamenti jogban*, Közgazdasági és Jogi Könyvkiadó, Budapest 1998, p. 35.

[106] Dezso Márta, i.m., p. 41, (Hungarian).

[107] Interestingly, the matter of prioritisation never truly emerged in party-list voting systems. The author perceives its significance in two ways. First, the secondary preference of voters could come into play in case a party would prove unable to pass the parliamentary threshhold by primary votes alone. Second, if, by one of the existing vote distribution methods (the highest average method in particular), two parties would enter a tie, preference could be given to the party with more secondary votes.

preferences on the ballots cast for the least popular candidate are added to the primary votes, repeated, if necessary, by tertiary and lesser preferences until such time that the first candidate passes the fifty percent mark[108]. This method bears a certain resemblance to the single transferable vote, distinguished, however, by its lack of proportionality, since alternative voting only awards a single mandate per district.

It must be highlighted that in theory, alternative voting is more than just absolute majority methods, because the latter only take into account secondary preferences on the two (or more) candidates already having passed into the second round via primary preference votes. By contrast, alternative voting allows for the weighing of *all* preferences, including tertiary or even more distant expressions of support. *Ad absurdum*, in an absolute-simple majority system, similar to the one previously employed in Hungary, a less rejected candidate eventually claiming victory through secondary and tertiary votes would not even have made it to the second round with just fifteen percent of primary votes!

What this would mean is that a reserved and less maverick candidate hated by fewer voters than the frontrunners would not even get to the second round in an absolute majority system, even though such a candidate, given all the secondary and tertiary votes received, would be the overall most popular choice[109]. This ties in well with the argument that a government is not only the government of the

[108] In case no one managed to acquire the absolute majority of primary preferences, the process continues with the candidate possessing the least amount of ballots dropping out, their votes collected into bundles, this time with the secondary preferences in mind, adding these bundles to the ballots of remaining candidates. In the event that an absolute majority winner is still not found, the next-to-last candidate's vote-bundles are similarly distributed among remaining candidates, and so on and so forth until somebody reaches the absolute majority threshhold.

[109] A similar mathemathical dilemma could arise the following way: while even in the second round, the absolute majority method only gives relevance to secondary preferences, it is entirely possible that a candidate would become a representative under the alternative voting system only through tertiary or lower votes – in other words, purely out of a lack of rejection by their opponents.

voters actively electing it, but of all citizens of the country. Therefore, other than its popularity, its unpopularity is also a relevant factor.

5.1. TYPES OF ABSOLUTE MAJORITY VOTING

The aforementioned absolute majority voting systems can be placed into two categories. In one of these, the first and the second place candidate from the first round are entitled to run in the second round, requiring fifty percent of votes plus one to gain a mandate. This method is known as the **absolute-absolute majority** system, restricted, for the most part, to direct presidential elections. Under the rules of **absolute-simple majority**, acquiring a simple majority in the second round is sufficient, naturally allowing more than two candidates to run, although deals struck by the political parties involved often cause such additions to drop out, reducing the actual number of candidates to just the two most popular. The Hungarian voting system previously in effect followed this method[110]. The procedure particular to France is placed under scrutiny in the final chapter dealing with the French system of government and electoral system.

Experience dictates that due to voter abstention, candidates having attained at least forty percent of the vote during the first round will tend to retain their advantage in the second, while those in the lead with thirty percent or less stand on a more shaky ground: the chief factor in whether or not they will also emerge victorious in the second round is secondary preferences[111].

---

[110] Compared to the previous Hungarian system, the current French model presents a peculiar case. In single-member constituencies, if the first round yields no absolute winner, the second round is played out between the winner and the runner-up of the first round, as well as anyone else with at least 12.5% of votes. (This model could be deemed more just than the Hungarian system, because a third candidate – and any additional ones – only "interrupt" the race if they possess substantial support and backing from the population; instead of merely gaining a bargaining position against the "big shots". By principle, it is an absolute-absolute majority system, only becoming absolute-simple in exceptional cases).

[111] Korosenyi András, *A magyar politikai rendszer*, Osiris, Budapest 1998, pp. 153–154, bra (Hungarian).

The nuances of the relative majority system have already been discussed, the implementation of which would force existing political parties to join forces and run joint candidates together, thereby making factional alliances more transparent and evident to the voter. This factor, given the system's single-round, party-list nature, would be more equitable to citizens, granting them a clear picture of just who else they are about to support alongside their own favourite parties. Because of this, an argument could be made for the implementation of relative majority single-member districts in Hungary[112].

Current legislation also allows for the running of joint candidates[113].

On a related note, the second round also allows voters to pass their judgements on any coalitions that might have been formed, taking into account party declarations and communications. This is their only way of doing so, given the indirect nature of the prime minister's selection – with the exception of the Israeli system.

5.2. BLOCK VOTING

As evident as it may sound, it is nevertheless important to point out that one district equals one mandate (therefore, the district magnitude is one). On the other hand, this is by no means a necessity in plurality voting; the classical English system typically allocated two

[112] Naturally, the fact that the single-round relative majority system produces disproportionate results remains an argument against it. Another of its drawbacks is that even though an election carries its consequences over the next four years, its outcome is determined in but a single day; comparatively a very short time period. Two rounds mean at least two days, thereby decreasing the "random" factor so heavily present in single-round voting. For example, weather may discourage certain voter demographics from casting their ballots and a single piece of sensationalist news may captivate and manipulate voters for just enough time. (Fair weather often incentivises farmers to work their land, families to go hiking, etc.).

[113] Unlike in the case of joint- and affiliated lists, the current Hungarian electoral statute gives no allusion as to where fractional votes cast on joint candidates are allocated.

mandates per district, allowing citizens to vote for two candidates[114]. Even as far as the mid-twentieth century, certain countries (such as the UK, India, Canada and the USA) featured a few (!) multiple mandate constituencies, while the rest of the country could only send one representative to parliament; or congress. This solution – even though certain sources disagree – is a form of plurality voting, rather than constituting a proportional model.

The same can be said of the **singe-list system**, formerly known as the **small-list system**, which is currently employed in Hungary during municipal elections and which also featured in the draft of a number of French electoral legislation proposals. Also called **block voting**, the essence of this model lies in the relative majoritarian distribution of mandates. Each citizen has as many votes as there are mandates to acquire in any given district.

The **cumulative single-list system** differs from the single-list system in that it allows voters to cumulate all their votes for a single candidate. The cumulative party-list system, detailed later, can itself be differentiated from its single variant by the fact that its distribution of mandates is based upon the ratio of votes cast on the various party lists. Therefore, cumulation only enters the fray in determining the order of candidates on any concrete list. It is considered a semi-proportional model[115].

[114] In 1967, Mauritius converted from a relative majority system with forty single mandates to a relative majority system with twenty triple mandates. Later, they also implemented ten balancing mandates. The Seychelles employed seven double mandate- and one single mandate districts.

[115] Fabian György, Kovacs László Imre, *Voksok* és *mandátumok*, Villányi úti könyvek, Budapest 1998, p. 43.

5.3. PREFERENTIAL SYSTEMS

According to the time-honoured view, in a proportional/party-list system, citizens are only entitled to vote on party-created lists, with no ability to influence who their vote personally benefits. Is this truly the case, even today?

The question of vote structuring determines **how many** votes a single citizen is allowed to cast, and **how**. There exist **single-vote** and **multiple-vote** systems. The latter can be broken down further into preferential models, models that enable the cumulation of votes and models that allow for vote splitting. In the first case, voters are entitled to make modifications on the party list, swaying them towards their preferred candidate. In the second case, it is possible to reinforce the position of one candidate by allocating them extra votes, further increasing their chance to gain a mandate. Lastly, the third model opens up the aforementioned possibilities in the case of lists as well.

In terms of the right of voters to bring about such modifications, the various **preferential systems** paint a colourful picture worldwide. Only one preferred candidate can be designated in Austria, while the same number is four in Italy. It is possible to split votes in Switzerland and Luxemburg, giving each voter as many votes as there are mandates to gain in a district, which can be cast for different parties. By now, in most Western European countries, allowing citizens to influence party list compositions has become common practice. In Belgium, the influence of preferential votes determines almost fifty percent of the order of candidates on party lists. The German system remains almost the only one disallowing this practice, its single districts purporting to substitute for the lack of choice between individual persons.

Since the fall of Communism, a number of Central-Eastern European countries also implemented ways to create more flexible party lists. In Poland, citizens must select a name from a regional party list, an act with which they also cast their vote for that candidate's party itself. Similarly, the Slovene model divides electoral districts into single-member constituencies, in which single candidates are also the nominees of their respective party lists. Again, voting

for a candidate is also voting for a party list[116]. Mandate distribution is based on the proportion of ballots cast for each party list, giving successfully acquired mandates to candidates having won the greatest number of votes on their respective lists. Czechia and Slovakia also allow their voters to influence the prearranged order of party lists. Each citizen may designate four candidates they have especial preference for. Such preferential votes will result in the acquisition of a mandate in the event that at least ten percent of voters in the district cast such a vote, and the candidate in question managed to seise at least ten percent of all the preferential votes his party received. Austria operates similarly, except it requires an amount of preferential votes equal to at least half of what is necessary for a single district mandate, or one-sixth their total number cast in their party's favour.

Finland's "flexible list" enables party list rankings to be molded entirely by voter will; on each ballot, the candidates of parties are merely displayed in alphabetical order.

European practice indicates that party list rankings provided by the parties themselves will seldom be altered by preferential votes. Still, it is a matter of principle to allow a modicum of choice between the individuals running on the same platform, preventing the "secondary recruitment" within the parties to be the sole decider of who gets into parliament. In our view, such methods unite the best of both worlds from single-district and party-list voting systems, aiming for an equitable solution in mandate distribution, acceptable both in terms of directness and proportionality[117].

[116] In our view, given that it disallows selection between different candidates of any given party, this model isn't a preferential-proportional system. Instead, it shows more similarity with the kind of personalised PR systems currently in use in Germany.

[117] Further reading on the various methods of mandate distribution: Arend Lijphart, *Választási rendszerek: típusok, formák, fejlődésvonalak*, [in:] Fabian György, Kovacs László Imre, *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1999, pp. 69–71, (Hungarian).

5.4. PREMIUM LIST SYSTEMS

In Hungary, Act XXII of 1947 (along with creating discriminative rules for nominations and disqualifications) introduced the premium system. In it, attaining 60% of the vote automatically awarded 80% of the seats in parliament, while gaining 75% would land that faction all (!) mandates. The quotient was raised to 14,000 and national lists to 60 candidates.

Premium systems similar to the above are still in use today. For instance, the electoral system of Paraguay allocates two-thirds of all mandates by default to the party standing victorious in the elections, distributing the rest proportionally. In South Korea, 244 representatives are directly elected, 38 by the winners themselves and 37 by the other parties. The winner in Malta is granted an additional four premium mandates. It is a popular misconception in Hungary that under the rules of the current system, the party carrying an election is given the mandates of its rivals that failed to meet the minimum electoral treshold.

The limited voting (LV) previously employed during Japanese and Spanish regional elections can be considered a unique[118], semi-proportional voting system. Similarly to block voting systems, this method essentially enables participants to select *multiple* single candidates. However, citizens have fewer votes than there are mandates distributed in any single district. (For example, there used to be two single constituency votes allocated to Japanese citizens, with four to ten attainable mandates). Why would this method be more proportionate than block voting itself, widely classified as a majority system? The answer is made apparent through a simple deduction. In the latter system, whenever a party or a fraction enjoys overwhelming popularity in any given district, all its supporters tend to throw their whole weight (votes) behind this group. This is made especially likely in today's party-centred political atmosphere. In such a case, a candidate with 25% popularity will always defeat another with 20%. By contrast, the LV system distributes more mandates than the amount up for grabs by the most popular candidates,

[118] Lijphart Arend, i.m., p. 85.

thereby allowing some form of representation for their opposition as well. (Under a two-vote model, this tends to lead to the first and second place belonging to Party A, with the third and fourth going to Party B. In such systems, parties usually run as many candidates as there are votes, otherwise, said candidates would also compete against each other). The SNTV system, also formerly employed in Japan, is considered a subtype of LV, giving each voter one vote in a district with multiple mandates to win. However, it is necessary not to mesh them together, seeing as multiple votes enable the option of vote splitting, thereby constituting a factor of primary importance when classifying voting systems. In this sense, one- and two-vote systems can be sharply differentiated. Therefore, there is a far greater distance between one and two than between two and three. (Japan has since converted to a mixed voting system).

SNTV carries a large risk factor for parties, especially major ones, necessitating thorough surveying to determine their electoral support. If they run fewer candidates than it would be justified by their popularity, then a great many votes cast for them will end up wasted, not contributing towards the acquisition of mandates. If, on the other hand, they stand too many candidates, they run the risk of having the vote splintered among them, decreasing each other's chances and potentially allowing outsiders to have the last laugh and snatch mandates, leading to results worse than the party's electoral support would suggest[119].

5.5. THE VOTE-TRANSFER SYSTEM

The virtues of proportionality and choice between individuals are organically conjoined in the vote-transfer system, currently employed in Ireland and Malta. In multiple mandate electoral districts, citizens are expected to vote for and rank as many candidates as there are potential mandates in the district.

[119] Fabian Gy., Kovacs L.I., i.m., p. 44, (Hungarian).

1. After the ballots have been cast, the *Droop quota*[120] serving as the basis for mandate distribution is calculated. It is arrived at by dividing all valid votes cast in the constituency by the total number of allocated mandates plus one, and then adding one again to the quotient thus gained. Any candidate whose number of primary votes reach the Droop formula is elected.
2. If all mandates cannot be distributed using the above method (which, given trends of vote division, is rather likely), a new calculation is necessary. The votes of candidates already elected are divided again, based on the secondary preferences indicated on each ballot, but the votes of secondary candidates are only increased by a single rate. This rate is: the number of votes of an elected candidate – Droop quota.

Whoever manages to reach the quota by adding this number to the number of his votes acquires a mandate.

3. If all seats allocated to this district are still not filled, the votes of the candidate receiving the least amount of primary votes are annulled, distributing the candidate's ballots based on the secondary preference written on each, between the candidates still lacking a mandate. Those reaching the Droop quota are elected.
4. If even after this step, there remain unclaimed mandates, the ballots of those who gained a seat according to points 2 and

[120] This is sometimes confused with the Hagenbach-Bischoff quota. The difference lies, first and foremost, in that the latter method works only with whole numbers gained through the quotient, instead of rounding up and adding one in case of fractions, as seen in Ireland. (Naturally, when working with a multitude of votes, the above amounts only to a very minor difference between the two quotas). In addition, the Hagenbach-Bischoff formula is known not only as a quota system, but also as a mandate distribution method employed, among others, in Hungary. It breaks the distribution of mandates down to two phases; in the second one, unallocated mandates are meted out to the parties using the highest averages method. (In Hungary, a similar technique – the D'Hondt method – is employed as the second stage of a two-level system, rather than merely the distributory phase of a single-level formula. Therefore, even here, we can observe nuances of difference). On the differentiation of specific terminology, see: Fabian Gy., Kovacs L.I., i.m., pp. 37–38.

3 are redistributed along secondary and tertiary preferences following the above method. Again, candidates arriving at the Droop quota gain a mandate.

5. In case the mandates are still not fully distributed, the entire process continues as long as necessary.

In order to guarantee proportionality, multiple layers of voter preference must be taken into account. In spite of it being a single-winner vote, party candidates – in fact, candidates in general – tend to inform the electorate about whose backing they would find desirable after their own. (It is expedient for parties to weigh their own popularity and run only an optimal number of candidates in order not to affect each other's chances negatively). In Ireland, for example, the district magnitude is 3.7, therefore, their lower-preferences candidates matter less. Placing less burden on voters, lower magnitudes are certainly more advisable under the aegis of such systems.

I. HOW CAN WE CLASSIFY THE SINGLE TRANSFERRABLE VOTE? "Is the single transferrable vote proportional?" A question we can rightfully ask, despite academic literature categorising it as such more or less unanimously. The answer is far from being simple[121].

The essence of proportionality is that the composition of parliament be as close to the overall will of the voting citizen as possible. However, the determination of such is possible only when there is a way to properly survey that will, on the national level. This is only achievable with categoric voting, for in the case of ordinal balloting, a uniformal treatment of primary, secondary and tertiary votes is problematic.

The issue is further complicated by the fact that in a proportional voting system, the requirement of proportionality pertains to political parties – under the transferrable voting system, parties gain no form of compensation whatsoever. "Proportionalisation" is usually construed as an act of taking into account alternative voter preferences. The chief factor effecting such a proportionalisation could

[121] See: Rae Douglas W., *Political Democracy as a Property of Political Institutions*, [in:] Fabian Gy., Kovacs László Imre (rev): *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1997, p. 63, (Hungarian).

therefore be the electorate supporting the candidates of a *single* political force. If this does not occur, parties will gain no compensation for surplus votes.

A candidate with relatively numerous primary votes, but without a sizable amount of secondary and tertiary votes will not gain a mandate, also depriving his party of compensations. In a reversed scenario, a candidate with fewer primary, but all the more secondary and tertiary votes might also find it insufficient to succeed. (At most, votes cast for such candidates can only benefit their parties in terms of them being cast for candidates with the fewest primary votes). On the other hand, secondary, etc. votes cast for candidates who have, in an earlier stage of calculation, already seised a mandate will not be utilised; the principle of proportionality does not apply here. Therefore, "leading" candidates certain to receive a great many primary votes should not be given an overt amount of secondary votes in order not to waste them. Under this system, a 20–20% breakdown of primary and secondary votes of two candidates does not equal a 40–0%, or a 0–40% result between the same two candidates. (The latter being more useful, since the first round of calculation only takes into account the more prominent preferences; only in later stages do the rest get accounted for, allowing other parties to seise mandates beforehand. This also makes the lack of a crystallised hierarchy within political factions a liability. In such a voting system, announcing, or at least signalling the order in which supporters should vote for a party's candidates is advised).

We can see that STV is not merely a proportional system, but rather a unique, complex and weighted methodology taking into consideration multiple layers of voter preference. It is worth pointing out that in a proportional system, a candidate reaching 10% might potentially be opposed by 90%. On the other hand, a party attaining 4% – itself below the current parliamentary treshhold in Hungary – could still be somewhat sympathetic to 80% of the electorate. In a single-member district, a candidate acquiring 45% of the vote may defeat a 40% opponent, while it is entirely possible that the remaining 15% would rather support the latter.

Even though we have mostly been discussing party candidates here, it is to be noted that independents are also afforded a lot of

opportunity under this model. Candidates of small parties and those who run "independently" might see more secondary ballots cast for them than additional (second, third, etc.) candidates of larger factions would; especially if these factions have strong front-runners. Favourable tertiary and lower preferences are also beneficial[122]. Even voters with a strong conviction might be more inclined to support independents or candidates of smaller parties on the lower echelons of preference. Certain persons of note – locally reputable candidates especially – are able to collect a decent amount of votes from multiple angles of the political spectrum.

Conversely, front-runners of big parties also need at least a degree of acceptance from supporters of smaller or no parties in order to gain the necessary edge. Under this system, even the largest political factions are advised to run their candidates as independents – such a disassociation can yield them more secondary and tertiary votes, but there not being a compensational list, there is also nothing to lose this way.

We can clearly see from the analysis provided above that the vote-transfer system carries a variety of new elements into an overly polarising political system operating under a "binary code". The presence of secondary preferences and the improved chances of independent candidates both help representing society along different lines of association, thereby – in the author's view – serving as an excellent tool especially in the selection of a second chamber of parliament.

With regards to the government, we can add that the purpose of traditional majority systems is to create the means for any given political faction to govern by way of a majority in parliament. It is possible that a government enjoying the support of the 51% is

[122] Even in a district with nine mandates, more than 10% of the vote is required to pass the post in the first round of calculations, which does not favour minor candidates. However, if they receive a significant enough number of secondary and tertiary votes on ballots cast for those who gained a mandate with an overwhelming majority of primary votes, they might significantly benefit. The same holds true in the case of secondary votes they receive on ballots cast for candidates with the *least* amount of primary votes. This way, minor players unwittingly support each other.

strongly opposed and even obstructed by the remaining 49%. In contrast, by taking into consideration secondary preferences, the Irish (and, to a lesser degree, the Australian) electoral system imbues its victors with a legitimacy that does not merely indicate the greatest support, but also the lowest disapproval. The government's efficiency is thus reinforced through a more constructive social approach.

5.6. THE PERSONALISED PR-SYSTEM OF GERMANY

Given German influence on the Hungarian constitution, the voting system of Hungary is often compared to the one currently in effect in Germany. This makes it especially worthwhile to place its rules under scrutiny. Strictly speaking, the German method is not a mixed system, but rather the so-called personalised PR-system. It is also proportional; its disproportionality remains around 1%. Its proportional (party-list) nature is further reinforced by its distribution of mandates based exclusively on party-list votes the following way:

1. Eligible citizens possess two votes: one of them to be cast for a single district candidate, the other for a provincial list. Candidates attaining *relative* majority in one of the 299 single-member districts are already guaranteed a seat in parliament.
2. The parliament operates with a total of 598 members, which is therefore the number of mandates to be distributed. This process only takes into consideration ballots cast for party lists. Parties failing to achieve a 5% national total of votes, or winning at least three single-member constituencies are disqualified, with votes cast in their favour ignored thereafter.
3. Using the Hare-Niemeyer method, the first stage of allocating the 598 mandates is the national level. Afterwards – using the aforementioned algorithm –, the number of mandates thus arrived at are distributed between the *territorial* party-lists.
4. In every given province, the number of single district mandates won is subtracted from the total number of mandates

allocated to the same party. Any remaining mandates are subsequently distributed according to territorial lists.

5. In case the number of mandates a party receives is higher than the number awarded to them in step three – itself made possible by the guaranteed seat of single district winners –, then the party is entitled to keep such surplus mandates (Überhangmandate). Not only do the other parties receive no compensation for this, this act also increases the base number of seats in parliament[123]. This phenomenon remained a rarity in earlier decades, while the number of surplus mandates has seen a steep rise in recent years[124].

5.7. THE FIRST HUNGARIAN ELECTORAL MODEL AFTER THE FALL OF COMMUNISM

The previous electoral system in Hungary (1989–2010) remains, by all accounts, an archetype of mixed voting systems: in it, it is possible to gain a mandate both in a single district and through party lists. Parliament operates with 386 representatives. The party lists themselves manifest on two levels: regional (52 seats) and national (58 seats). Therefore, the struggle for mandates is waged on three fronts, while the citizens themselves are only allowed to vote for

[123] Kaase Max, *Personalized Proportional Representation: The "Model" of the West German Electoral System*, [in:] Fabian Gy., Kovacs László Imre (rev), *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1997, p. 162, (Hungarian).

[124] In February 2013, legislation pertaining to the aforementioned legal norms effected certain modifications. Accordingly, each surplus mandate is now equalised by a so-called balancing mandate, granted to every other party that attained parliamentary representation.

The institution of surplus mandates used to be a benefactor of big parties. During the latest Bundestag elections of 2009, there had been 24 surplus mandates, all of them acquired by the conservatives. This legislative change now forfeits this advantage, thus favouring the smaller parties. (It was the country's constitutional court that annulled the rules of mandate distribution. The ruling body's reasoning was that previous legislation violated the principles of the equality of voting power and that of political parties. Among others, this had been the reason for subsequent changes).

a single district candidate and a regional list (corresponding to a county or the capital). In a peculiar way more or less unprecedented in international practice, mandates acquired through the national list are determined by the fractional votes of regional lists and single constituencies. The national list thus harmonises the two "branches", creating a mixed system based on compensation and standing in stark contrast with the so-called "trench system"[125], which ignores mandates acquired through majorities when determining mandate distribution through party lists.

The **previous Hungarian** electoral system employed a method not yet seen elsewhere in determining mandate allocation on the regional party list level[126]. (With the national list, it followed the D'Hondt method). Accordingly, the basis of distribution in the first round is the Hagenbach-Bischoff quota. However, in the second round, attaining just two-thirds of the quota can also result in winning a mandate. If they are still not all accounted for, the remaining mandates are transferred to the national list, eliminating the significance of the largest remainder. Therefore, the Hungarian system is not an LR (largest remainder) system. Under this method, "the scope of support itself does not matter, instead, what matters is whether the number of votes attained by the parties who have not yet acquired a mandate is greater than the remainder votes of those who have"[127]. We could perhaps dub this technique the **"partial LR method"**, given

[125] Kasapovic Mirjana, Nohlen Dieter, *Választási rendszerek* és *rendszerváltás Kelet-Európában*, [in:] Fabian Gy., Kovacs László Imre, *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1997, (Hungarian). Accordingly, Albania, Lithuania, Croatia and Russia all operate with a "trench system".

[126] Although the system in place in Belgium shares some similarities with it.

[127] See: Fabian Gy., Kovacs László Imre, *Voksok* és *mandátumok*. Villányi úti könyvek, Budapest 1998, p. 90, (Hungarian). The author duo highlight the difference between remainder- and fractional votes. Remainder votes are the ballots unutilised during the primary round of mandate distribution while fractional votes represent the sum carried on from the counties after the final process. In our view, the quote above can be somewhat misleading, since even according to the largest remainder method, party strength would not be the main deciding factor. Here too, what matters is whether the remainder votes of the party that already attained a mandate are more numerous than the vote count of those that did not.

that the "remainder" here is still the basis of mandate allocation in the second round, except the minimum value of this remainder is only two-thirds of the quota[128].

This solution was thus especially disadvantageous for lesser parties unable to meet the requirements, since a lot of counties with five or six mandates set the aforementioned minimum at ten percent. Given the significantly smaller number of mandates inherent to the national list, the distribution method above proved to be one of the greatest wellsprings of disproportionality.

5.8. THE NEW HUNGARIAN ELECTORAL SYSTEM

The new voting system that saw its baptism of fire in 2014 can also, without a doubt, be classified as a mixed system[129]. Since it provides compensation after the votes cast in single districts, it is also, essentially, a compensational system[130]. Vote structuring remained intact in that citizens are still given two different types of vote. When it comes to the number of ways mandates are attainable, the previous three is now also two only: 106 in relative majority single constituencies and 93 on a national list. The latter encompasses party list votes and compensation alike; regional/county-based lists were abolished. Single districts were transformed from absolute to relative majority.

---

[128] Traditional **Hare methods** first determine the number of votes required for the acquisition of a mandate, and then begin to distribute them. The quota equals the total count of valid votes cast per district divided by the number of mandates up for grabs there. The number of mandates acquired by each party corresponds to the number of times this quota is found in the total amount of votes they received. When employing an **LR-Hare system (largest remainder)**, all mandates are handed out; if the first round fails to accomplish this, then the rest of the mandates are allocated according to the number of remainder votes left for each party.

[129] Cserny Ákos, Teglasi András, *Certain Elements of the Transformed Hungarian Electoral System in the Light of the Experience of the 2014 Elections*, Osteuropa Recht, 2015/3, pp. 338–339.

[130] Given that it also compensates district winners (see above), we could just as well deem it one of the "trench systems".

After such a brief summary, let us take a more thorough look at the available paths to mandate acquisition under Hungarian legislation both the old and the new one[131].

According to the new electoral law, the mandates provided by the national party list are to be allocated through the following procedure:

a) the number of party list votes must be combined with the fractional votes received by the same party (hereinafter: the number of party list votes),
b) all party list votes must be added together,
c) all party list votes and minority list votes must be added together (hereinafter: national list votes),
d) the number of national list votes must be divided by four; the quotient thereby arrived at is the preferential quota,
e) in the event that the number of ballots cast on a minority list is equal to or greater than the preferential quota, the minority list in question receives a preferential mandate; one such list can only acquire one preferential mandate; and the number of obtainable mandates on the national list must be reduced by the amount of preferential mandates thus meted out.

It has to be emphasised that rather than reaching one-fourth of the treshold, minority lists need to reach one-fourth of the quota instead[132]. This is ultimately far lower than the treshold. Even if a given list could manage to acquire a mandate under regular rules (without the one-fourth benefit), its chances to gain entry to parliament would gravitate towards zero, most likely being well under the five percent treshold currently required. Abolishing this demand would, in itself, be a tremendous boon. In conclusion: from a standpoint of electoral mathematics, it is extremely viable to create a minority list. Each vote cast here carries much more power than it would in the case of ordinary lists.

[131] See also: Smuk Péter, *Választójogunkról csak pontosan, szépen…*, Közjogi szemle, 2014/3, pp. 67–68, (Hungarian).
[132] Farkas György Tamás, *Többség és kisebbség a hatalommegosztás rendszerében*, p. 2, (Hungarian).

Any remaining mandates after *this* are distributed following the procedure below:

1. A table must be created with its first line containing the number of votes cast on both party lists and – after subtracting the preferential quota – minority lists (hereinafter: votes); afterwards, a numerical column is made under the votes of every party- and minority list, whose first number is to be half of the votes cast for that list, the second number one-third, and so on.
2. Mandates are allotted via this table: wherever its largest number is found, that list must be given a mandate; afterwards, the second largest number must be found and a mandate allocated to the corresponding list; this is to be continued accordingly until all mandates have been handed out.
3. If the table features identical numbers for multiple lists, and these numbers would normally yield a mandate, but the count of leftover mandates is fewer than the lists thus locked in a tie, then the ranking order of lists determines the order in which mandates are distributed.

In essence, these rules create an allocation system analogous to the D'Hondt method, much like the compensational mandate distribution of the previous electoral law of Hungary[133].

Compensation is merited through fractional votes. In a single district, fractional votes are:

a) each vote cast for a candidate that failed to win a mandate, and
b) the tally of votes received by the victorious candidate, minus the vote count of the runner-up, minus one.

The provision above is a novelty of the new electoral law. It remains virtually unprecedented that the victor of a single district would also be compensated in this particular manner[134].

[133] Mathematically speaking, the table's first dividend not being 1 favours the stronger parties.

[134] It certainly is not without its justifications either. This system effectively differentiates "winning small" and "winning big". Even when a district race is practically in the bag, candidates are still incentivised to campaign and present an even better case to their voters.

6. The Legal Status of Ethnic Minorities Around the World, Particularly in Hungary

6.1. INTRODUCTION TO NATIONAL AND ETHNIC MINORITY RIGHTS

The new Fundamental Law of Hungary has received numerous attacks from the political landscape of Europe, partly from legal professionals, but mainly from politicians. This begs an important question. Given that Hungary is a sovereign and independent nation, with no other polity possessing a right to influence its internal affairs, objections from other nations would only be justified if our country would infringe upon the rights of their own compatriots. Taking into account the number of grievances, Hungarians living outside the country's borders are subject to the treatment of national minorities within Hungary itself could be deemed exemplary. The historical constitution[135] of Hungary already carried significant traditions of minority protection[136], such as the privileges issued to

[135] Part of our historical constitution is a collection of lessons written by Saint Stephen, the first king of Hungary to his son, Prince Imre; the sixth of which highlights the role played by national minorities, as well as their correct treatment from the part of the state.

[136] Further reading on minority regulations in a historical context (in Hungarian): Buza László, *A kisebbségek jogi helyzete*, 1930; *A magyar* állam és *a nemzetiségek – A magyarországi nemzetiségi kérdés történetének jogforrásai 1848–1993*, ed. Balogh Sándor, Napvilág Kiadó, Budapest 2002; Bindorffer Györgyi, *Kisebbség, politika, kisebbségpolitika – Nemzeti* és *etnikai közösségek kisebbségi* önkormányzati *autonómiája Magyarországon* Gondolat Kiadó, 2011.

the Jassic and Cuman peoples[137], as well as the special legal status of the Saxons[138] in Transylvania[139].

Act CLXXIX of 2011, the legislation currently in effect on national and ethnic minority rights states that "cultural and linguistic diversity are wellsprings of prosperity, rather than division, and Hungary considers the cultural feats of its national minorities an organic part of its cultural heritage"[140].

According to international legal classifications, national and ethnic minorities may be granted personal rights, collective rights and – the greatest benefit – autonomy[141].

---

[137] The Cumans received their privileges in 1279 and the Jassics in 1323. They lost these privileges during the Habsburg era in 1702, but purchased them back from Queen Maria Theresa in 1745. This is called *redemptio*, or self-redemption. Their administrative privileges endured as long as the administrative reform of 1876. In 2014, the Hungarian parliament designated May 6 – the day Maria Theresa signed the document affirming the *redemptio* in 1745 – the memorial day of Jassic-Cuman self-redemption (Resolution 4/2014. (II. 7.)).

[138] The Transylvanian Saxons settled in Transylvania during the reign of Géza II (r. 1141–1161). The *Andreanum*, their document of privileges originates from 1224, the reign of Andrew II. Also called *Goldener Freibrief* by the Saxons, the *Andreanum* granted all land between Szászváros (current-day Orăștie) and Barót (current-day Baraolt) to the Saxons and designated the Hungarian king and the count of Szeben (current-day Sibiu) their principal judges. The ruler was not allowed to give out the lands of the Saxons to anyone else and also granted the Saxons the right to select their own priests and judges. In exchange, they were required to pay a monetary tax, provide quarters and create a significant (around 500-strong) military force, when necessary. (See: *Erdély és népei*. Bp., 1941. (Maksay Ferenc: *A szászság megtelepülése*) – Hanzo Lajos: *Az erdélyi szász* önkormányzat *kialakulása*. Szeged, 1941.

[139] It is to be noted that Hungarian legislation bore a pioneer role in an international context regarding minority protection, especially with its 16th-17th century policies guaranteeing the rights of religious minorities. See: Farkas György Tamás, *A nemzetiségek alkotmányos jogállása Magyarországon, különös tekintettel a nemzetközi jog Hazánk szempontjából releváns jogforrásaira*, Kézirat, Budapest 2014, pp. 15–16.

[140] See the preamble of Act CLXXIX of 2011. The text of the law here harkens back to the lessons of Saint Stephen referring to national minorities as an enrichment to our country and its culture.

[141] Although there used to be historical periods when the collective aspects of national minority law were completely marginalised. See: Fabian Gyula, Otvos Patrícia, *Kisebbségi jog I. kötet* Komp-press korunk baráti társaság Kolozsvár, 2003, p. 35.

Autonomy itself can range from territorial to personal[142]. The legitimacy of the former arises especially where members of an ethnic minority are living together in a territorial block, forming the majority population there. While countries tend to show less reluctance in granting personal autonomy, the notion of territorial autonomy often causes strong aversion.

Examples for personal autonomy can be found in the legal status of Lapps in Sweden, of Danes, Sorbs and Frisians in Germany, of Russians in Latvia and Lithuania and – soon to be detailed – in the case of Hungary's minorities[143].

Regarding territorial autonomy, further differentiation can be made based on whether this autonomy is embedded into the administrative framework of the state itself. If this isn't the case, success requires a great deal of flexibility and active tolerance on the county's part. For the first category, examples include the *Åland* Islands in Finland, Corsica in France, as well as Catalonia and the Basque Country in Spain. The second case entails, among many others, the Feröer-Islands in Denmark and 225 Native American communities in the USA[144].

The new law in Hungary replaces the former terminology of "minority" with "national minority", due to previous resentment about the Roma community being referred to as an ethnic minority group, as opposed to national minorities with nations of their own. "National minority" intends to signify that the group in question receives its privileges not only because it constitutes a numerically inferior group within society, but also because it is valuable to the nation. This value is something unique and distinct from the majority population; the cultural nuances embodied by the identity, the language and the historical traditions of national minorities[145]. That being said, any potential measures of positive discrimination are

[142] See: Domonkos Endre, *Nemzetközi autonómia-modellek és kisebbségi kérdés A katalán regionális autonómia és tapasztalatai Ph.D.* ***értekezés*** 2010, pp. 24–25.
[143] Domonkos Endre, *Nemzetközi autonómia-modellek és kisebbségi kérdés A katalán regionális autonómia és tapasztalatai Ph.D.* ***értekezés*** 2010, pp. 34–37.
[144] Domonkos Endre, *Nemzetközi autonómia-modellek* **és** *kisebbségi kérdés A katalán regionális autonómia és tapasztalatai Ph.D.* ***értekezés*** 2010, pp. 31–33.
[145] See: Act CLXXIX of 2011, Section 1, Subsection (1).

justified exactly by their low numbers. The disenfranchisement of the majority population, on the other hand, is thankfully almost nonexistent in our time. The very thought is frighteningly alien to the spirit of modern democracy and the rule of law; such as the cases of ancient Sparta and the South African Republic of last century.

Although it rarely surfaces in public speech, international jurisprudence usually distinguishes three types of minorities:

- those originally having belonged under the jurisdiction of one state, but annexation or border changes forced them under another,
- the inhabitants of a given area before the state of the current majority was founded there, and lastly,
- those who attained their citizenship after immigrating into the country[146].

It goes without saying that in terms of personal rights, there can be no differentiation between individuals across these groups. When it comes to collective rights, however, further protection is necessary in the order of the list above, as justified by the more solidly formed identities of the former groups, not to mention their potential historical grievances, such as those of the Hungarians who found themselves outside the country's current borders. While under a democratic rule of law, nobody may be discriminated against based on their ethnic origins, it is important to note that a state's decision on which groups it favours with what benefits, particularly autonomy itself, remains a matter of efficiency and viability. Jurisprudence could further diversify these categories, such as whether or not the home country of a national minority itself hosts a minority consisting of the other country's compatriots. Under these terms, Hungarians and Romanians are effectively mutual minorities. It is also an important consideration whether a minority possesses a mother country at all, the lack of which necessitates even steadier protection[147].

---

[146] Szabadfalvi József, *Nemzetállam* és *szuverenitás*, [in:] Államelmélet, Takacs Péter, Bíbor Kiadó, Miskolc 1997, p. 137.

[147] The external support of national minorities can naturally be amplified by way of heavy cooperation with their mother country. This is at its most efficient

Regarding national minority rights, the author classifies them as either positive or negative rights. In this context, negative rights are understood as a lack of prohibition on the support a minority group can receive from its mother country. In the 21st century, it is unacceptable that possessing, for example, Hungarian citizenship would forfeit its bearer's citizenship in the country of their residence. It should be a given, at least, that states refrain from restricting the ability of their national minorities in maintaining contact with their brethren. We are given an interesting synthesis between the issuing of citizenship to compatriots living abroad and the protection of national minorities in a recent Spanish proposal that endeavours to grant favourable citizenship acquisition procedures to the descendants of Sephardic Jews expelled during the 16th century[148].

Although it remains exceedingly hard to vindicate minority rights in an international context[149], a state's willingness to provide and reinforce these rights beyond the bare minimum on its own initiative is a hallmark of its progressiveness.

The former Minority Act of Hungary stood on legal principles roughly identical to the current one. Accordingly, national minorities are "all groups of people who have lived in the territory of

when the two countries border each other. See: Fejes Zsuzsanna, *Határok nélkül? A határon* átnyúló *együttműködések jogi* és *közigazgatási környezete Európában* és *Magyarországon*, Akadémiai Kiadó, Budapest 2013, p. 239 and Fejes Zsuzsanna, *Határtalan lehetőségek: az együttműködés jogi feltételei a magyar-román-szerb hármashatár mentén*, [in:] Soos Edit, Fejes Zsuzsanna, *Régió a hármashatár mentén*, p. 158, 2010, Szeged, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, pp. 103–118.

[148] This proposal ended up being active legislation. See: http://www.hirado.hu/2014/02/09/szefard-zsidok-leszarmazottai-spanyol-allampolgarok-lehetnek/.

[149] At the universal level, the only positive source of international law, i.e. enforceable nationality law, is Article 27 of the 1966 International Covenant on Civil and Political Rights, promulgated in Hungary by Decree No.8 of 1976, which states that: in states where national, religious or linguistic minorities live, persons belonging to such minorities shall not be denied the right to have their own culture, to profess and practise their own religion or to use their own language together with other members of their group. Farkas György Tamás, A választási rendszer egy speciális ága – a kisebbségek parlamenti képviseletére vonatkozó választójogi szabályozás Magyarországon és külföldön, Doktori értekezés, KRE-ÁJK Budapest 2022, p. 19.

Hungary for at least one century, who represent a numerical minority in the country's population, whose members are Hungarian citizens, who are distinguished from the rest of the population by their own languages, cultures and traditions, who demonstrate a sense of belonging together that is aimed at preserving all of these and at expressing and protecting the interests of their historical communities"[150]. The new legislation preserved the previously existing list of thirteen official minorites in its entirety, composed of the Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma, Romanian, Ruthenian, Serb, Slovak, Slovene and Ukrainian communities[151]. These national minorities enjoy full legal equality[152]. On the other hand, international treaties also created a group of so-called "chartal minorities" in Hungary. This group includes the Croatian, German, Romanian, Serb, Slovak and Slovene minorities, as well as Gypsies speaking Romani or Boyash as their first language; their legal protection[153] being a result of the signing of the European Charter for Regional or Minority Languages[154]. This was extended in 2008 to include the Romani and Boyash languages[155].

The current law lists Bulgarian, Greek, Croatian, Polish, German, Armenian, Roma/Gypsy (Romani and Boyash, hereinafter: Roma), Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian as national minority languages. Within the Roma and the Armenian communities, the Hungarian language is also counted as such[156].

---

150 See: Act CLXXIX of 2011, Section 1, Subsection (1).

151 See: Act CLXXIX of 2011, Appendix 1.

152 As a curiosity, a Ministry of Interior draft in 1992 – while leaving the rest of them in a status similar to the current one – intended to classify Gypsies, Armenians and Jews as ethnic, rather than national minorities, with less numerous privileges. This was met with great outrage and the Jewish community – upon its own request – ended up being deemed a religious, rather than a national minority. (See: multiple chapters of Binforffer id. mű).

153 Further reading on the role of the European Charter for Regional or Minority Languages in the international system of minority protection: Szalayne Sandor, Erzsébet – *A kisebbségvédelem nemzetközi jogi intézményrendszere a 20. században* Gondolat kiadói kör Budapest, 2003.

154 See: Act XL of 1999, Section 3.

155 See: Act XLIII of 2008, Section 3.

156 See: Act CLXXIX of 2011, Section 22, Subsection (1).

Consequently – even though practice on the matter is less than consistent – we can distinguish between the protection of national minorities, and that of their languages. The law takes note of the fact that for many Roma and Armenians, Hungarian is their true mother language. The question begs itself whether the possession of a distinct language can even be a requirement to being categorised as a national minority.

The list is, of course, a relative one, but it certainly stands to reason that these thirteen national minority groups preserved the rights they formerly acquired. The inclusion of additional national minority groups is also a possibility. Taking into account our common historical traditions and values, one could rightfully ponder why Italians were ranked below the other thirteen in importance. Certain organisations – arguing for the general sympathy felt towards Hungary in many Turkic countries – suggested the possible inclusion of Turks as well. As it is natural after a 150-year period of occupation, there are Hungarians with recognised Turkish ancestry. The previous law already allowed an ethnic group with at least a hundred-year presence and a thousand signatories to petition for official recognition as a national minority[157]. This was taken up on, for example, by the Italians[158], the Aegean Greeks and the Russians[159], and one group even purported to be Huns while issuing the request[160]. Realisation was met with difficulties, however; illustrating the point that the popular initiation of the process isn't nearly as effective as outright legal codification through parliament. In the absence of this hundred-year requirement, even the Chinese

[157] See: Act LXXVII of 1993, Section 148, Subsection (3).

[158] Although the Italians were granted the National Electoral Commission's (OVB) permission in January 2008, they were unable to collect the minimum amount of signatures necessary on time. See: http://www.nvi.hu/nepszavo8/ovb/hu/osszefoglalok/20080825.pdf [accessed on: 16 September 2014].

[159] The Russian request foundered on formalities, because despite being mandated to do so by law, the National Electoral Commission neglected to formally request the opinion of the Hungarian Academy of Sciences (MTA). Majtényi Balázs, *Nemzeti* és *etnikai kisebbségi jogok*, [in:] *Az Alkotmány kommentárja*, Jakab András, Századvég Kiadó, Budapest 2009, pp. 2408–2412.

[160] See: Resolution 32/2005. (IV. 27).

could step up with a claim[161]. The question is: where do we draw the line in the name of efficiency?

The choice of which ethnic group to imbue with the recognition and protection of the law is a difficult one. To illustrate that, let us put forth a number of rhetorical questions. What is the main distinguishing factor between the already recognised national minorities and the rest of them listed above? What is the number of citizens identifying themselves with them? It is worth noting here that in this regard, different cultures present different attitudes. For instance, whether it is important for someone to be German, or it is merely a case of possessing a German surname. Are we only to study the number of indigenous Poles, or do we also count those who immigrated in the past fifty years? Can we discriminate against Italians and Turks whose original populations are low, but recently received a significant boost[162]? For some, it is perhaps only their names (or a family legend) that reminds them of their origins[163], and even in the "Thirteen", many might only have responded positively for the sake of the benefits provided by the national minority status. These questions all highlight the relative and nuanced nature of these categories.

To continue with the questions, can it be a deciding factor whether the mother country of a given ethnicity is/was bordering Hungary? Despite many centuries of neighbourhood, Poland no

[161] Interestingly, after helping to crush the Boxer Rebellion in 1901, the Austro-Hungarian Empire managed to acquire a concession of roughly a hundred hectares in the city of Tianjin, thus creating a "quasi-colony" with about 25,000 Chinese locals.

[162] It is even less justified to exclude the Turkish and Italian people from the list of beneficiaries based on population data. Taking into account recent arrivals, some of the established national minorities already fall into comparative numerical inferiority, see: http://www.ksh.hu/docs/hun/xftp/idoszaki/nepsz2011/nepsz_09_2011.pdf [accessed on: 15 September 2014].

[163] There are many Hungarians with Italian names, including notable jurists and composers. A few families also cultivate their Turkish roots from Ottoman times. The family of light cavalry lieutenant general Ferenc Czungenberg, originating from Csonka Bey, is but one of the many examples See: Barcy Zoltán, Somogyi Győző, *Magyar huszárok*, Móra Ferenc Könyvkiadó, Budapest 1987, p. 26), available at: http://www.kislexikon.hu/olaszok_hazankban.html.

longer falls into this category, and even Italy was once bordering the western reaches of the Kingdom of Hungary, with many joint rulers down the line[164]. Not only was Turkey a neighbour, it even annexed our current capital under Suleiman I. Which brings us to our next point: can it possess any relevance whether the role of a given people has been positive in our history? Can we distinguish based on this? This is also a highly relative matter, especially since contemporary foreign affairs may suddenly boost the importance of any country significantly. Let us add that the role of our current neighbours also wasn't always a positive one, but we must look forward, not backward. To summarise: based on the above, it is the claims of Italians and Turks that would especially merit acknowledgement.

After the fall of Communism, the participation of minorites in public affairs, as guaranteed by the Constitution, was intended to be realised in the form of a collective ombudsman, into which all thirteen minorities were to delegate one representative. Later, political speech effectively washed together representation in public affairs with political representation, constantly stressing its need and

[164] "Almost immediately after the birth of the Kingdom of Hungary, settlers (called *hospes* in Latin) started pouring in from the west continuously. A testament to their early presence is 35 settlement names with the Németi- prefix (meaning German) and 8 with Olaszi- (Italian), originating from the 11th and 12th centuries. They were dispersed around the country, depending on when they arrived and where they were needed. The newcomers were Germans, Italians (which, under medieval terminology, also included Walloons) Czechs, Poles and other neighbouring peoples. Most of them were farmers, but merchants also arrived in plentiful numbers. It was the latter group that came to form the core of the newly founded cities.

Among the more minor groups were those Italians that came to the Kingdom of Hungary to participate in trade and other financial matters during the 14th and 15th centuries. (During this era, Italians were living in virtually every country in Europe). In 1402, the Italian community in Buda supported Ladislaus of Naples over Sigismund of Luxemburg during their succession conflict, for which the victorious Sigismund cast many of them into prison. Local Germans exploited the opportunity and largely took over their chamber offices, allowing them to control the mining operations of gold, silver and copper. The Italians soon regained these posts, and from that point forward, these two groups alternately controlled the mines of Hungary." See: Draskoczy István, *Kisebbségek az* Árpád-kori *Magyarországon*, Draskóczy, available at: http://epa.oszk.hu/00400/00462/00007/4.htm [accessed on: 16 September 2014].

importance. Parallel to this, an ombudsman responsible for minority affairs was created[165]. The holder of this office was nominated by the president and confirmed by a two-thirds majority in parliament. In practice, however, different interpretations on certain fundamental rights kept occurring between the general ombudsman and the minority affairs ombudsman regarding grievances issued by minority citizens. It is difficult enough to ascertain whether these offences even happened due to their ethnic origins. Under the aegis of the new Fundamental Law, the office of the ombudsman became monocratic ("one-headed")[166]. This brings it under a unified direction, with the role of a separate minority affairs ombudsman being taken over by a deputy nominated by the singular ombudsman himself and confirmed, as before, through a two-thirds parliamentary vote. This deputy commissioner of fundamental rights is responsible for the legal protection of national minorities living in Hungary, monitoring their situation, guaranteeing their rights and taking all measures prescribed by law. In the event that the deputy possesses a degree of independence – the Hungarian law currently in effect allows for this – this model is well-suited to provide efficient legal protection for national minorites. We can add here that even though the situation of Hungarians living there would strongly justify it, neither the Slovakian, nor the Romanian constitution has yet created such an institution[167].

In one of his previous publications, the author of this work suggested the inclusion of minorities in a theoretical second chamber of parliament, with a serious role to play there[168].

---

[165] The office of the ombudsman of minority affairs was created by the Act on the Rights of National and Ethnic Minorities in 1993 (Act LXXVII of 1993). According to this, the ombudsman of minority affairs was essentially subject to the same regulations as the general ombudsman (Act LIX of 1993). Because the election of the first minority affairs ombudsman required a two-thirds majority in parliament, it only came about in 1995, for various political reasons.

[166] See: The Fundamental Law of Hungary, Article 30, Section (1).

[167] See: Cservak Csaba, *Az ombudsmantól az Alkotmánybíróságig – Az alapvető jogok védelmének rendszere*, Budapest, Licium-Art, 2013, pp. 45–48; p. 241.

[168] See: Cservak Csaba, PhD dissertation 2010, pp. 89–90.

6.2. CURRENT LEGISLATION ON NATIONAL MINORITY RIGHTS IN HUNGARY

Observing the individual aspect of national minority law, it is clear that the right of the individual to identify with a national minority is exclusive and inalienable. No one can be forced to make a statement regarding their identification with national minorities, although certain legislation may require such definitive statements in order for the citizen to exercise certain national minority rights.

Personal national minority rights are the following. The right of national identification and the right to declare oneself belonging to a national minority – with certain exceptions explicitly stated by the law – do not prevent the recognition of dual or multiple national identities. Any person belonging to a national minority has the right to:

- use their mother language in both spoken and written word, to discover, preserve, cultivate and pass on their history, culture and traditions;
- learn their mother language, to participate in public education and cultural events held in that language;
- equal opportunity in education and cultural services, which the state is obligated to provide for with efficient measures;
- special protection of their personal data regarding their national minority status, as detailed in provisions laid down in a specific law[169].

Members of a national minority are entitled to use their family- and personal names according to the rules of their mother language, which entails naming and registering their children the same way. In addition, members of a national minority must have their national family traditions respected, and be allowed to cultivate their familial

[169] Regarding information privacy rights, the current minority act allows citizens to voluntarily and anonymously identify as members of a national minority during official acts of data collection. According to Act CXII of 2011 on Informational Self-Determination and the Freedom of Information, this data can be used when determining the amount of government support granted to national minorities and during the process of supervising the proper allocation these resources.

connections, conduct their family celebrations in their own language and organise any religious ceremonies pertaining to the above. Their participation in public life – based on their national identity – may not be restricted. Finally, within the appropriate legal boundaries, they are allowed to form associations and political parties in order to express and defend their collective interests.

We can effectively proclaim with a certain sense of pride that Hungarian legislation practically realises cultural autonomy. The current law names the following **communal (collective) national minority rights**. To preserve, cultivate, strengthen and pass on their identity, to safeguard and advance their historical traditions and their language, and to protect and prolificate the material and spiritual aspects of their culture are all inalienable rights of national minorities.

While practicing their naming rights, national minorities are also entitled to use historical settlement names, street names and geographical markers. It is also within their right to create and direct certain institutions, or to take them over from other administrative units, as well as to organise national minority kindergartens, primary schools, secondary- and high schools, specialised schools and higher education. In addition to this, their respective national self-governments may initiate and participate in the organisation of supplementary national minority education.

Within the limits of its laws, Hungary guarantees the rights of national minorities to hold undisturbed public events and celebrations, to maintain and preserve their architectural, cultural, funerary and religious traditions, and to use their various symbols. National minority organisations may also establish and maintain extensive and direct international connections.

National minorities have the right to access and relay information in their own language, whether it be through traditional press or modern mass-communication and media services. The state is obligated to provide access for recurring national minority-language broadcasts in both radio and audiovisual format in a way that enables full access to such services in all relevant regions inhabited by the respective national minority.

Local national minority self-governments – under the principle of cultural autonomy – have, among others, the following matters in their jurisdiction:

- the creation of national minority institutions,
- the creation of awards and the determination of the requirements and rules of their issuing,
- the creation of national minority scholarships and contests.

In addition to the above and excepting matters purely within the purview of central authorities, local national minority self-governments may take on voluntary tasks pertaining to educational and cultural administration, local traditional and electronic media, the cultivation of traditions, the dissemination of information, social integration, cultural-, social- and youth activity administration, public employment programmes, urban planning and other areas.

The new electoral law of Hungary has managed to settle an old debt[170] in creating the possibility of preferential parliamentary representation[171, 172]. National self-governments may run a national minority list, allowing voters to cast their ballots here, instead of

[170] See: Farkas György Tamás, *A nemzetiségek parlamenti képviselete Hazánkban és a környező országokban*, (Erik Stenpien, Miskolczi Bodnár Péter) Jog és Állam X. Jogász Doktoranduszok Országos Szakmai Találkozója 2015/20. szám KRE-ÁJK Budapest 2015, pp. 16–18.

[171] Section 68, Subsection (1) of the Constitution of Hungary, modified by Act XXXI of 1989, defined national minorities as constituent elements of the Hungarian state (this terminology was later copied by the Fundamental Law replacing the Constitution). From this wording, in Resolution 35/1992 (VI. 10), the Constitutional Court of Hungary (AB) ruled that national minorities are entitled to parliamentary representation and found the legislature's neglect in providing for it unconstitutional. This was only recently remedied, when an electoral law (Act CCIII of 2011) made it possible to create national minority lists during general elections. This already underwent "live testing" during the parliamentary elections of 2014.

[172] Immediately after the fall of Communism, a law was enacted that (would have) provided national minorities with parliamentary representation, but it was repealed before it could be realised. See: Farkas György Tamás, A választási rendszer egy speciális ága – a kisebbségek parlamenti képviseletére vonatkozó választójogi szabályozás Magyarországon és külföldön, Doktori értekezés, KRE-ÁJK Budapest, pp. 63–64.

traditional party lists[173]. With a little simplification[174], the process can be summarised in that a preferential mandate is acquired when a national minority list manages to attain one-fourth of the proportional quota (calculated from the number of votes per mandate)[175]. This presents an extraordinary opportunity. One of the great questions of elections to come will be the extent to which national minorities will be able to influence public life thanks to this policy.

Our country can be proud of its legislation on national minority protection. This, of course, does not mean that the system – according to the needs of national minorities and without going against the will of the majority – cannot be improved even further. Cooperation with national minorities is not purely a matter of law, but also diplomacy. In treating them well enough, the state will be able to utilise its national minorities in international mediation[176].

As a conclusion, we can consider the level of national minority protection more than sufficient and in tune with our historical traditions in this regard. Consensus on the need to preserve this protection is wide-scale. It goes against the values of every decent person to offend minorities. The problem begins only when certain people use their national (minority) status as a shield against completely legal procedures. This custom can potentially erode said consensus on minority protection. From this point forward, however, it is their personal behaviour, and not their origins that falls subject to rightful criticism.

---

[173] See: Act CCIII of 2011, Section 12, Subsection (2).

[174] See in greater detail: Cservák Csaba, *Választási rendszerek – és az új magyar megoldás*, [in:] Rixer Ádám, *Válogatott közjogi tanulmányok Magyarország Alaptörvénye tiszteletére*, KRE-ÁJK, Budapest 2012, pp. 291–307.

[175] See: Act CCIII of 2011, Section 16/D.

[176] This may well occur in the Ramil Safarov case, which caused a diplomatic gaffe between Hungary and Armenia.

7. Summary

In summary, I will make the following "*de lege ferenda*" proposals.

In international comparison, I would consider the controlling powers of heads of state of parliamentary states to be stronger. This is due to the "democratic deficit" on the one hand, and the general normative scope of the law on the other. Parliaments, as we have seen, are more often than not at variance with the will of the people. For these cases, I would codify the Latvian solution. That is, the head of state should have the power to call for a referendum on whether there should be early elections or not. Where a state does not have a constituent assembly, I would also give the president of the republic a stronger veto power over constitutional-level norms enacted by parliament, instead of a simple right of return. For example: legislation can only be adopted definitively by an even larger majority, or only in the next (vetoed) session. In the case of legal loopholes and matters that need to be decided immediately, I would also allow the head of state to issue a decree as a temporary measure, which could be enacted by the next parliamentary session (especially if the constitutional court has found an unconstitutionality by omission and the parliament has not passed a law by the deadline).

As I have said at several conferences, if there were a Nobel Prize in Law, it would go to a person who could distinguish, in a completely clear-cut way, between a violation of a fundamental right and only a violation of right. The extremely difficult area to define is the objective admissibility filter for constitutional complaints and the precise delimitation of the competences of the Constitutional Courts and the ordinary courts of last instance. The above statement should make me wary of proposing a *de lege ferenda* in this direction, but the aims of the Polish-Hungarian Platform require me to make a cautious attempt. In my view, it is a violation of a fundamental right (and a constitutional jurisdiction) if a fundamental right lacks a legal expression providing a full guaranteed system, so that there is a legal vacuum and the fundamental right itself must be applied. But it is also a violation of a fundamental right (in addition to the infringement!) if a legal rule which constitutes the essential content

of a fundamental right is completely ignored in the application of the law.

Those many border changes, migration and integrations make it worth reflecting on the reconsideration of the status of nationalities, i.e. the extension of the scope of beneficiaries. (As this is a question of positive discrimination, not of denying entitlements, reciprocity and the positive historical role of the people concerned in the history of the country granting the benefit could certainly play a role). Because of the significance of the Hungarian people in the past and their soul-affirming mission, the Polish people should definitely be the most supported nationality in our country.

REFERENCES

Csaba Varga, *The Law as a Process*, Osiris Publishing House, Budapest 1999.

Zoltán Tóth, *Democracy, the rule of law and constitutionalism*, Patrocinium, Budapest 2020.

Zoltán József Tóth, *Some Observations on the Interpretation of the Fundamental Law*, Polgári Szemle, 2013/1–2.

Szigeti Péter, *A jogállam társadalomtörténeti változatai*, [in:] *Államelmélet*, Takács Péter (ed.), Bíbor Kiadó, Miskolc 1997.

Varga András Zs., *From an idol to an idol? – The dogmatics of the rule of law*, Századvég Kiadó, 2015.

Varga András Zs., *Eszményből bálvány? A joguralom dogmatikája*, Századvég, Budapest 2015.

Béla Pokol, *The Juristocratic State*, Dialóg Campus Kiadó, Budapest 2017.

Béla Pokol, *Theory of Law*, Századvég Publishing House, Budapest 2005.

Péter Tilk, Kovács Ildikó Tilk, Gondolatok a kellő felkészülési idő számításának kezdőpontjáról, Jogtudományi Közlöny, 70:(11).

Géza Kilényi, *The Office of the President of the Republic in the Light of International Comparative Law*, Hungarian Public Administration, 10/1994; 11/1994.

András Körösényi, *Democracy deficit, federalism, sovereignty*, "Political Science Review" 2004/3.
Béla Pokol, Jogászság és jogrendszer, Jogelméleti szemle, 2011/4.
Blutman László, *A nemzetközi jog* érvényesülése *a magyar jogban: fogalmi keretek*, MTA doktori értekezés, Szeged 2015.
László Trócsányi, *The dilemmas of drafting the Hungarian fundamental law: constitutional identity and European integration*, Schenk Verlag, Passau 2016.
Zsuzsa Szakály, *The historical Constitution and constitutional identity in the light of the Fundamental Law*, Pro publico bono, 2015/2.
Jenő Szmodis, *The core of the constitution and its defence*, "Legal Theory Review" 2013/2.
Dániel Csaba Lukácsi, *Constitutional Identity*, KRE-Dit, 2018/2.
Sári János, *A hatalommegosztás*, Osiris Kiadó, Budapest 1995.
Sartori Giovanni, *Comparative Constitutional Engineering*, (translated by Elizabeth Soltesz), Academic Press, Budapest 2003.
Simon János, *A politika* értékválságban – *a demokratikus politikai kultúra keresése*, L'Harmattan CEPoliti Press, Budapest 2013.
Samu Mihály, *Alkotmányozás, alkotmány, alkotmányosság*, Korona Press, Budapest 1997.
Samu Mihály, *Az alkotmányozás jellege* és *követelményei*, [in:] *Társadalmi szerződés*, Csizmadia László, Nemeth Miklós Attila, Kemeny András, Püski Press, Budapest 2010.
István Stipta, *Die Geschichte der Verwaltungsgerichtsbarkeit in Ungarn und die internationalen Modelle*, "Journal on European History of Law" 2014 (2), vol. 5.
István Stipta, *Die Versuche zur bürgerlichen Umgestaltung der Komitate.* Vorschläge, Entwürfe, Gesetze 1844–1877. *Annales Universitatis Scientiarum Budapestiensis de Rolando Eötvös nominatae*, (ed. Horváth Pál) Separatum Sectio Iuridica Tom. XXXV, Budapest 1995.
Lóránt Csink, *Mozaikok a hatalommegosztáshoz*, Pázmány Press, Budapest 2014.
Varga Attila, *Az igazságtól az igazságszolgáltatásig*, *KORUNK* (KOLOZSVÁR) 2012:7.

Iris Domselaar, *Moral Quality*, [in:] *Adjudication: On Judicial Virtues and Civic Friendship*, "Netherlands Journal of Legal Philosophy" 2015, 1.

Lili Barna, Dorottya Juhász, *Soma Márok: Milyen a jó bíró?*, Miskolci Jogi szemle, 2018/1.

Czine Ágnes, *Tükörkép a bírói függetlenségről* és *pártatlanságról az Alkotmánybíróság gyakorlatában*, Alkotmánybírósági Szemle, 2018/2.

Béla Révész, *Az igazságszolgáltatás átalakításának vitái a rendszerváltás időszakában*, *FORUM: ACTA JURIDICA ET POLITICA* 8. (2018).

Kukorelli István, *Az alkotmányozás* évtizede, Korona Kiadó, Budapest 1995.

Cseporán Zsolt, *Divergens intézményi modell* és *alulról* építkező *kormányzás: a magyar kulturális szféra közpolitikai* és *közigazgatási tendenciái*, Budapest, Nemzeti Közszolgálati Egyetem, Államtudományi és Közigazgatási Kar, 2020.

Fleck Zoltán, *A bírói hatalom alakulása az elmúlt két* évtizedben, [in:] *Magyarország politikai* évkönyve – *Kormányzati rendszer a parlamenti demokráciában 1988–2008*, Sándor Péter, Stumpf Anna, Vass László (eds.), Budapest, Magyarország, *Demokrácia Kutatások Magyar Központja Közhasznú Alapítvány* (DKM-KKA), 2009.

Erdei Árpád, *Az* új *alkotmánytervezetnek a büntető igazságszolgáltatásra vonatkozó rendelkezései* pp. 73–80. Paper: EA/2011, [in:] *Az* új *Alaptörvényről*, Kubovicsné, Borbély Anett; Téglási, András; Virányi, András (eds.), Budapest, Hungary: Magyar Országgyűlés, 2011.

Varga András Zs., *Az igazságszolgáltatás* átalakítása, [in:] Állam és *jog: kodifikációs kihívások napjainkban*, Fejes Zsuzsanna, Kovács Endre Miklós, Paczolay Péter, Tóth J. Zoltán (eds.), Budapest, Hungary, Szeged, Hungary: Gondolat, Magyar Jog- és Államtudományi Társaság, 2013.

Petrétei József, Tilk Péter, *Magyarország alkotmányjogának alapjai*, Kodifikátor Alapítvány, Pécs 2014.

László Ravasz, *Bírói függetlenség* és *a tisztességes eljáráshoz való jog*, Debreceni jogi műhely, Issues 3–4 of 2015, vol. XII. (December 2015).

Tamás Sulyok, *Helyzetjelentés az Alkotmánybíróság alapjogvédelmi tevékenységéről*, Alkotmánybírósági Szemle, 2017/2.

Juhász Imre, *Az Alkotmányjogi panasz eljárásjogi vetületének néhány aspektusa*, [in:] *Codificatio processualis civilis: Studia in Honorem Németh János II*., Varga István (ed.), Budapest, Hungary: ELTE Eötvös Kiadó, (2013).

Dietrich Deiseroth, Lichtenstein József (Translator), *Bírói függetlenség* és *pártatlanság a jogállamban: A bírák pártokban való politikai tevékenységéről*, *BÍRÁK LAPJA* 3, 1993.

Riedel James: Recruitment, *Professional Evaluation and Career of Judges and Prosecutors in Germany*, [in:] Federico, Giuseppe di: *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, the Netherlands and Spain*, Editrice: Lo Scarabeo, Bologna 2005.

Badó Attila, Márki Dávid, *A német bírósági igazgatás alapjai*: *COMPARATIVE LAW WORKING PAPERS* 4.

József Lichtenstein, *Az igazságszolgáltatás rendszere Franciaországban*, *MAGYAR JOG* 43:4, 1996.

Badó Attila, Márki Dávid, *A bírósági igazgatás Olaszországban*, *COMPARATIVE LAW WOR KING PAPERS* 4:1.

Moreno-Catena V., Pintos-Ager J., Soleto-Munoz H., *Espagne/Spain*, [in:] *L'administration de la justice en Europe et l'évaluation de sa qualité*, Fabri Marco, Jean, Jean-Paul, Langbroek, Philip M., Pauliat, Hélène (eds.), Montchrestien, Paris 2005.

Attila Badó, *Az igazságszolgáltató hatalom alkotmányos helyzetének* és *egyes alapelveinek* összehasonlító *vizsgálata*, [in:] Összehasonlító *alkotmányjog*, Tóth Judit, Legény Krisztián (eds.), CompLex Kiadó Jogi és Üzleti Társadalomszolgáltató Kft., Budapest 2006.

Legény Krisztián, *Az alkotmánybíráskodás modelljei* (Összehasonlító *alkotmányjog*), Judit Tóth, Krisztián Legény (eds.), Complex, Budapest 2006.

Béla Pokol, *A bírói hatalom, Századvég*, Budapest 2003.

Fabian György, Kovacs László Imre, *Voksok* és *mandátumok*, Villányi úti könyvek, Budapest 1998.

Arend Lijphart, *Választási rendszerek: típusok, formák, fejlődésvonalak*, [in:] Fabian György, Kovacs László Imre, *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1999.

Rae Douglas W., *Political Democracy as a Property of Political Institutions*, [in:] Fabian Gy., Kovacs László Imre (rev), *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1997.

Kaase Max, *Personalized Proportional Representation: The "Model" of the West German Electoral System*, [in:] Fabian Gy., Kovacs László Imre (rev), *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1997.

Kasapovic Mirjana, Nohlen Dieter, *Választási rendszerek* és *rendszerváltás Kelet-Európában*, [in:] Fabian Gy., Kovacs László Imre, *Választási rendszerek*, Osiris-Láthatatlan Kollégium, Budapest 1997, (Hungarian).

Cserny Ákos, Teglasi András, *Certain Elements of the Transformed Hungarian Electoral System in the Light of the Experience of the 2014 Elections*, Osteuropa Recht, 2015/3.

Smuk Péter, *Választójogunkról csak pontosan, szépen…*, Közjogi szemle, 2014/3.

Buza László, *A kisebbségek jogi helyzete*, 1930; *A magyar* állam és *a nemzetiségek – A magyarországi nemzetiségi kérdés történetének jogforrásai 1848–1993*, ed. Balogh Sándor, Napvilág Kiadó, Budapest 2002.

Bindorffer Györgyi, *Kisebbség, politika, kisebbségpolitika – Nemzeti* és *etnikai közösségek kisebbségi* önkormányzati *autonómiája Magyarországon*, Gondolat Kiadó, 2011.

Sulyok Tamás, *Helyzetjelentés az Alkotmánybíróság alapjogvédelmi tevékenységéről*, Alkotmánybírósági Szemle, 2017/2.

Domonkos Endre, *Nemzetközi autonómia-modellek* **és** *kisebbségi kérdés A katalán regionális autonómia és tapasztalatai Ph.D. értekezés* 2010.

Szabadfalvi József, *Nemzetállam* és *szuverenitás*, [in:] Államelmélet, Takacs Péter, Bíbor Kiadó, Miskolc 1997.

Fejes Zsuzsanna, *Határok nélkül? A határon* átnyúló *együttműködések jogi* és *közigazgatási környezete Európában* és *Magyarországon*, Akadémiai Kiadó, Budapest 2013.

Fejes Zsuzsanna, *Határtalan lehetőségek: az együttműködés jogi feltételei a magyar-román-szerb hármashatár mentén*, [in:] Soos Edit, Fejes Zsuzsanna, *Régió a hármashatár mentén*. p. 158, Szeged, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, 2010.

Lajos Edina, Az ombudsmani tisztség nemzetközi összevetésben, [in:] (ed.) Lajos Edina, Alkotmányosság a pandémia korszakában Licium-Art, Debrecen 2021.

Farkas György Tamás, A választási rendszer egy speciális ága – a kisebbségek parlamenti képviseletére vonatkozó választójogi szabályozás Magyarországon és külföldön, Doktori értekezés, KRE-ÁJK Budapest 2022.

Majtényi Balázs, *Nemzeti* és *etnikai kisebbségi jogok*, [in:] *Az Alkotmány kommentárja*, Jakab András, Századvég Kiadó, Budapest 2009.

Farkas György Tamás, *A nemzetiségek parlamenti képviselete Hazánkban* és *a környező országokban*, (Erik Stenpien, Miskolczi Bodnár Péter) Jog és Állam X. Jogász Doktoranduszok Országos Szakmai Találkozója 2015/20. szám KRE-ÁJK Budapest 2015.

Arató Balázs, *Alkotmányjogi panasz a német jogrendben, különös tekintettel a befogadhatóság kérdésére*, [in:] *Az Alaptörvény érvényesülése a bírói gyakorlatban II*., Anon (ed.), HVG-ORAC Lap- és Könyvkiadó Kft. (2019).

Sulyok Márton, *Compromise*(*d*)*? – Perspectives of Rule of Law in the European Union*, "Central European Journal of Comparative Law", 2021/1.

Orbán Balázs-Palkó Attila, A jogállami univerzum tágulásáról és ennek veszélyeiről, Kommentár 14:2.

Stumpf István, A járvány hatása az alkotmányos hatalomgyakorlásra, [in:] (eds.) Körösényi András-Szabó Andrea-Böcskei Balázs: Vírusba oltott politika: Világjárvány és politikatudomány, Napvilág Kiadó, Budapest 2020.

DR HAB. MARZENA TOUMI, PROF. UCZ.
War Studies University

The rule of law and the protection of marriage and family in Polish law presented on the basis of a comparative study

1. Introduction

The rule of law refers to the observance of the law by the state acting through its organs. It is addressed to those in power, therefore public officials should base their actions on the applicable law. The principle of the rule of law also applies to the law-making process – and so the issue in family law is of key importance today.

Regardless of the country, its constitution and political system, the family is the most important and fundamental social unit on which the society as a whole is based. Its peace as well as material and legal stability guarantee the survival and development of both this social unit and the whole nation.

"There is a growing interest in the issue of the family especially due to […] growing social and economic as well as cultural changes, which constitute a complex multidimensional context for it, and at the same time influence the evolution of its structure, as well as the functions assigned to it, as well as its roles"[1].

[1] U. Ostrowska, *Współczesna rodzina w ujęciach terminologicznych*, [in:] *Rodzina i dziecko w zmieniającym się świecie. Perspektywa historyczna i pedagogiczna*, eds. K. Jakubiak, R. Grzybowski, Toruń 2020, p. 189.

The family and marriage, which is usually its basis, are extremely important institutions in society. Therefore, family matters are not left to the discretion of those concerned, but they are regulated by law. In addition, it should be noted that in the individual legal systems discussed in the text, the legal institutions in question are of great importance, and their relations go far beyond these communities.

The scope of the comparative analysis covers mainly European and Arab countries as well as Strasbourg jurisprudence.

2. Family concept

The family is usually defined as a group of people who are very close to each other and who are in a relationship with each other[2], who share a family ties, based on a validly concluded marriage. They share a common goal, share similar values and have a long-term commitment to each other[3].

[2] The family bond arises as a consequence of making a decision to establish a community, which is a family, and then living in a sense of belonging to it, descending from common ancestors, cultivating the same values, sharing the same fate, supporting each other in difficulties, but also taking advantage of profits. which is brought about by functioning in the family, due to the fact that it is covered by legal protection, not only within the scope of family law or inheritance law. The family bond is a personal good while it exists, as a good worked out by its related persons. It cannot be equated with biological origin, and therefore it does not arise automatically between people coming from each other or with the performance of a legal act in the form of, for example, submitting a declaration leading to marriage or adoption. It requires a certain degree of emotional involvement between the people it is supposed to connect and should change over time"; Judgment of the Supreme Court – Civil Chamber of 7 July 2017, V CSK 609/16, Legalis. The jurisprudence also emphasizes that the family bond can be considered a value closely related to a human person in a manner typical of a personal good, although it is related to a social relationship, see: *Dobra osobiste i ich ochrona*, ed. M. Romańska, Warszawa 2020, pp. 102–106.

[3] The family is identified with the primary group that has its own identity, which is made up of people who identify with it. Its members' relationships (personal and intimate) are based on tradition and alleged or actual biological connectivity; see: F. Adamski, *Rodzina. Wymiar społeczno-kulturowy*, Kraków 2002, pp. 27–29.

A traditional family consists of a mother and a father who, when married, raise their biological children in the same household[4].

While this is still the standard we usually refer to when thinking of "family", but in a changing world, with statistics showing the growing number of divorces, and the singularisation of life[5], the reality is that this image of the family is currently changing. As a consequence, many modern families consist of stepfathers, half-siblings, same-sex parents, and more distant relatives, etc. Therefore, more and more often the family is defined on the basis of factors such as loyalty, respect, love and responsibility, and not kinship relationships, and in some countries in the world there are attempts to adapt the law to such a concept of the family.

The negative phenomenon of native disintegration is that we are born between them in a common conflict, one by one perception of one of them – parental abduction.

The basis of the family is a validly contracted marriage, which, as a legal institution, has at the same time certain natural, biological features that are unique to the marriage, and which are not shared by other institutional social relationships. From a legal point of view, the institution of marriage also serves to protect the natural rights of spouses and the natural rights of their children, i.e. the rights existing independently of the will of the legislator, who can never refuse to provide them special legal protection[6].

Although the Polish Family and Guardianship Code does not directly define the concept of family, in accordance with the wording

[4] The term "family" covers not only a complete family (married parents and a child/children, including adopted ones), but also an incomplete family (one parent with a child, spouses without children), as evidenced by e.g. Art. 71 sec. 1 of the Constitution of the Republic of Poland and some provisions of the The Act of February 25, 1964, Journal of Laws of 1964, No. 9, item 59 (e.g. Art. 23 sentence 2, Articles 24, 27, 28, 30 § 1, Article 39 sentence 2, Article 45 § 1 sentence 3); Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483; Act of February 25, 1964 – Family and Guardianship Code, Journal of Laws of 1964, No. 9, item 59, as amended.

[5] This term is applied to people living alone, either by their own conscious choice or for random reasons. U. Ostrowska, *op. cit.*, p. 200.

[6] B. Banaszak, *Konstytucyjna regulacja małżeństwa a prawo do zawarcia małżeństwa*, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014, pp. 77–82.

of Art. 23 and art. 27 – a family is created by a woman and a man by entering into a marriage relationship which directly results in founding a family[7]. Although the jurisprudence has extended the provisions of Art. 23 in fine, the concept of family also applies to relationships of actual marriage[8], there is no doubt that both the grammatical[9] and systemic interpretation support limiting the concept of "the family that the spouses established by their relationship" (Article 23 in fine) only to spouses and their common offspring. Deviations from this principle may appear only in relation to the issues of meeting the needs, personal care and efforts to raise children, and may be justified by the principles of social coexistence[10]. This is also confirmed by the purpose of the Act on supporting the family and the foster care system[11], which does not contain a definition of a family, but its application must take into account the child's right to upbringing in a family as a priority over others. It also grants the child the right to return to their family and maintain personal contact with his parents (see Article 4).

The importance of marriage and the family established on its basis is also important for the protection of the best interests of the child. According to the sentence 2 Art. 146 of the Family and Guardianship Code entrusting joint custody over a child is possible only to persons who are married. This provision clearly states that two-person care cannot be entrusted to persons living in cohabitation[12].

---

[7] J. Gajda, *Komentarz do art. 23*, [in:] ed. K. Pietrzykowski, *Kodeks rodzinny i opiekuńczy*, Warszawa 2015, Legalis.

[8] For example, the judgment of the Court of Appeal in Szczecin of June 27, 2013, III AUA 104/13, Legalis; The judgment of the Court of Appeal in Gdańsk of May 14, 2014, III AUA 1441/13, Legalis. See also the judgment of the Supreme Court of February 11, 2011, II UK 273/10, Legalis.

[9] J. Gajda, *Komentarz do art. 23*, *op. cit.*

[10] *Ibidem*.

[11] Act of 9 June 2011 on supporting the family and foster care system, Journal of Laws of 2011, No. 2016, item 575.

[12] The source of cohabitation is the conscious choice of this form of living by those interested. Sometimes it may be the result of an unsuccessful attempt to get married due to failure to comply with at least one of the conditions provided for by the law. In the law, the term "cohabiting" is usually used to describe cohabitation in actual life.

The rules governing the consequences of getting married cannot be applied to the effects of cohabitation, even by analogy. According to Art. 121 of the Civil Code, adoption causes legal effects resulting from natural kinship, but nullifies these effects in relation to natural relatives[13]. This rule does not apply when the child is adopted by the spouse (Art. 121 (1) of the Civil Code). "The motive for such regulation is the desire to provide the child with the conditions existing in a normal, healthy family, and such a family is created in the light of the provisions of the Polish Civil Code. only as a result of a marriage"[14]. Moreover, as indicated by the Supreme Court, the care provided by spouses provides the child with natural conditions for development[15].

Relationships between parents and children are the basis of the functioning of the family.

Parental responsibility is the responsibility and right of the parent to care for the child. It lasts from the birth of a child until the child reaches the age of majority, and includes, inter alia, taking care of the person and property and raising the child. It is also connected with statutory representation, i.e. representing the child in legal actions and responsibility for their actions. It should be performed as required by the best interests of the child and the public interest. Parents are to educate and guide the child, take care of the child's physical and spiritual development and prepare them properly to work for the good of society according to their talents. And the child owes obedience to their parents.

"The functioning of the family consists, inter alia, in the upbringing of the next generations and handing them over the material and cultural heritage. The special importance of the family results mainly from the fact that it is the environment as the basic cell of humanity primary socialization. It is emphasized that the family plays an important role in the processes socialization and education and creates optimal conditions for living people also in extra-family

[13] Decision of the Supreme Court of 25 October 1983. III CRN 234/83; OSNC 1984/8/135.

[14] Act of 9 June 2011 on supporting the family and foster care system, Journal of Laws of 2016, item 575.

[15] J. Gajda, *Komentarz do art. 146*, *op. cit.*

roles important for society. Parental care gives the child a sense of security (emotional stability) and belonging, and enables the creation of emotional bonds necessary for proper mental and physical development. It is noted that the proper functioning of society and families are integrally linked"[16].

Although under the protection of art. 18 of the Constitution of the Republic of Poland of the family certainly includes a child whose birth de facto creates family ties, additionally Art. 72 sec. 1 provides that the Republic of Poland ensures the protection of children's rights. To this end, each person, including a third person, may, for example, initiate the protection of a child by public authorities against violence, cruelty, exploitation and demoralization[17].

Pursuant to Art. 48 sec. 1 of the Constitution of the Republic of Poland, parents have the right to raise their children in accordance with their own convictions, however, this education should take into account the child's maturity as well as freedom of conscience and religion and their beliefs. In practice, the latter provision applies to an older child. Moreover, Art. 53 sec. 3 of the Constitution stipulates that parents have the right to provide their children with moral and religious education and teaching in accordance with their convictions[18].

Both in Poland and in the case of all legal solutions adopted in the EU countries, spouses have equal rights and obligations in marriage. They are obliged to live together, for mutual help and fidelity, and to work together for the good of the family they have founded. They jointly decide on important family matters. If they are unable to reach the agreement, each of them may apply to the court to resolve the matter. Both spouses are obliged to contribute towards meeting the needs of the family founded by their marriage according to their ability, earning capacity and resources. Fulfilling this obligation may also consist, in whole or in part, in personal efforts to raise children and in working in a common household[19].

---

[16] P. Mostowik, *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym*, Kraków 2014, p. 22.

[17] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009, pp. 366–368.

[18] P. Mostowik, *op. cit.*, pp. 27–28.

[19] Articles 23, 24 and 27 of the Family and Guardianship Code.

Art. 33 paragraph 1 of the Polish Constitution provides that a woman and a man have equal rights in family life which must be understood in particular raising children. Thus, the legal position of the mother in relation to the child cannot be – with natural differences, e.g. in the puerperium or feeding period – different from the legal position of the father, which also applies to the exercise of parental responsibility.

This rule does not mention the obligations, even though it is actually their implementation serves to exercise parental rights. This provision applies to a woman and a man who are the parents of the child. It cannot be concluded that there are more parents people or that a woman could legally be the "father" of the child (e.g. to execute parental rights together with his mother), which would express the declared equality the rights of women and men. This standard is based on joint performance parental rights and responsibilities by the mother and father.

In all the EU countries, the so-called parental authority over the child is exercised automatically by the mother, as well as by the married father. In most cases, the parents jointly exercise parental responsibility.

However, the rules governing whether or not the unmarried father has such rights and obligations vary from country to country.

All the EU countries respect the right of children to a personal relationship and direct contact with both parents, even when they live in different countries. In the event of divorce or separation, it is important to establish whether the children will live with one parent or with both of them alternately.

Court decisions on parental responsibility issued in one of the EU countries are recognized in all EU countries without any additional formalities. The standardized procedure facilitates the enforcement of these judgments.

On the other hand, in the countries where Islam is the dominant religion and legal solutions remain under the influence of Sharia[20]

[20] The problem in most Arab states is that Sharia remains an abstraction to most ordinary citizens. Moreover, the laws regulated by Sharia depend on the interpretation of religious texts. These interpretations vary from country to country, and sometimes even from city to city, and often from imam to imam.

especially in the case of marital and family relations as well as inheritance and other institutions of the so-called "Personal Status Laws", man and woman are equal before the law and the God, but they have completely different tasks in the family and in social life. Equality before the law and the God does not abolish their complementarity, according to which the man is the one who protects and maintains the family, and the most important duty of a woman is to bear and raise children and to provide the family with basic support[21].

Also the Cairo Declaration on Human Rights in Islam of 5 August 1990, signed by 45 foreign ministers representing countries associated in the Organisation of the Islamic Conference, specifying the foundations of human rights legislation in the countries where Sharia is the source of law, clearly states that the family is "the foundation of society, and marriage is the foundation of the family. Men and women have an equal right to marry and there are no restrictions of race, colour or nationality that would prevent them from exercising this right" (Article 5a)[22].

In Arab culture, the family, rather than the individual, is the core of the society. Family unity, honour, commitment to its affairs and loyalty to it are of great importance, even greater than to one's own country. At the same time, the family is the smallest and most important unit in the Muslim social structure. It is a broad system ensuring social and economic security and it usually consists of three or four generations. The family has primarily patriarchal structure, and its members form a kind of community with particularly strong ties[23]. Islam takes special care of the family, sanctioned by law[24].

Conservative religious leaders and their stern supporters vehemently oppose adopting a more liberal interpretation of family rights, exacerbating the taboos surrounding the discussion on the subject.

[21] S.H. Nasr, *Istota islamu*, Warszawa 2010, pp. 164–165.

[22] The text of the declaration in English: www.umn.edu; See also: M. Toumi, P. Zając, *Małżeństwo w prawie kanonicznym i w prawie koranicznym* (*szaria*), [in:] *Człowiek, Państwo, Kościół. Księga jubileuszowa dedykowana Księdzu Profesorowi Arturowi Mezglewskiemu*, eds. P. Sobczyk, P. Steczkowski, Lublin 2020, 536.

[23] It is useful to understand the structure of generations in the family: grandparents, parents, children. All relatives (including in-laws) are called "Arham".

[24] A. Piwko, *Rodzina muzułmańska wobec wyzwań współczesności*, "Studia Theologica Varsaviensia", No. 1/2015, p. 103.

In some Arab societies it is permissible to have more than one wife. This can result in creating a more complex family structure. In these societies, Islam specifies requirements to ensure equal treatment to every wife and equal support to all the children.

The father is the head of the family, but it happens that this function is performed by the older, married son. The leader of the family represents the family in public life and it is he who decides the fate of its members. The most important duty of a father is to look after everyone under his authority. It is he who provides the family with financial continuity, which is why children, like his wife, owe him respect and obedience[25].

In turn, children are responsible for caring for their elderly parents and is the best form of gratitude for their upbringing. Islam has given children an extremely important position in society, while encouraging spouses to have children. God's words are often quoted: "Money and children are the flower of life"[26]. The fundamental right of a child in Islam is the right to life, and the protection of that life is one of the precepts of Muslims.

The definition of the family as the natural and basic unit of the society, having the right to protection and assistance from the state and society, has also been included in: Article 16 of the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948[27], Article 12 *of the Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950[28], Article 23 of the *International Covenant on Civil and Political Rights* adopted by the General Assembly of the United Nations on 16 December 1966[29], Article 10

[25] *Ibidem*, p. 109.

[26] W. Tarish, *Rodzina w Koranie*, [in]: ed. Z. Kijas, *Rodzina w wielkich religiach świata*, Kraków 1999, p. 105.

[27] *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on 10 December 1948; ONZ 1948 r., available at: sejm.gov.pl) [accessed on: 17 November 2021].

[28] *Convention for the Protection of Human Rights and Fundamental Freedoms* of 4 November 1950; Journal of Laws of 1993, No. 6, item 284.

[29] *International Covenant on Civil and Political Rights* adopted by the General Assembly of the United Nations on 16 December 1966, Journal of Laws of 1977, No. 38, item 167.

of the *International Covenant on Economic, Social and Cultural Rights* adopted by the General Assembly of the United Nations on 16 December 1966[30].

The right of the family to legal, economic and social protection is also discussed in Article 33 section 1 *of the Charter of Fundamental Rights of the European Union* of 12 December 2007[31].

In the case of the European Union law, when clarifying the scope of the concept of the "family", among others, the following Directive 2004/38/EC 7[32] applies.

In accordance with Article 2 of the above-mentioned Directive, "a family member" means:

a) the spouse;
b) the partner with whom the European Union citizen has contracted a registered partnership on the basis of the legislation of the Member State concerned, if the legislation of the host Member State treats registered partnership as equivalent to marriage, and in accordance with the conditions laid down in the relevant legislation of the host Member State;
c) the direct descendants who are under the age of 21 or are still dependents and those of the spouse or partner as defined in point b);
d) the direct dependent ascendants and those of the spouse or partner as defined in point b).

Directive 2014/54/EU 8[33] also refers to the above-mentioned definition.

---

[30] *International Covenant on Economic, Social and Cultural Rights* adopted by the General Assembly of the United Nations on 16 December 1966, Journal of Laws of 1977, No. 38, item 169.

[31] Official Journal of the EU C of 14 December 2007 (2007/C303/01).

[32] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC Text with EEA relevance; available at https://eur-lex.europa.eu/legal-content/PL/TXT/?uri=celex%3A32004L0038 [accessed on: 20 November 2021].

[33] Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures to facilitate the exercise of the rights conferred on

3. Protection of family and family life

Polish Basic Law protects marriage, family, motherhood and parenthood, granting both assistance and protection in this respect.

The constitutional approach to the family assumes the protection of the social reality, which is the sum of relations between individual members of the family in the form of marital and parental relationships, kinship ties and adoption. These connections, essential for the formation of a family, determine what kind of family relations are protected by the state. The basic principles in the field of family relations contained in the Constitution[34] include: the principle of protection of marriage, family, motherhood and parenthood and placing them under the protection of the state (Article 18 of the Polish Constitution), the principle of equal rights for men and women (Article 33 of the Polish Constitution), the principle of protection of the good of the family (Article 71 of the Polish Constitution) and the protection of the rights of children and their upbringing[35] (Article 48 section 1, Article 53, Article 72 section 2 of the Polish Constitution)[36].

They also include: family autonomy, protection of private and family life, the durability of marriage, equal rights for parents, with emphasis on the importance of motherhood and fatherhood, guarantee of inheritance and the good of the family in the state policy. Particular emphasis is placed on the protection of the family and on providing assistance, in particular, to families in a difficult financial and social situation, families with many children and single-parent families. The constitutional legislator's care for the family well-being

workers in the context of free movement of workers Text with EEA relevance; available at: https://eur-lex.europa.eu/legal-content/PL/ALL/?uri=CELEX%3A32014L0054 [accessed on: 17 November 2021].

[34] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483.

[35] For this purpose, the institution of the Ombudsman for Children was also introduced.

[36] See: A. Tunia, *Ochrona małżeństwa i rodziny w prawie polskim oraz w prawie wewnętrznym kościołów chrześcijańskich*, "Studia z Prawa Wyznaniowego", vol. 13/2010, pp. 100–104.

is mainly reflected in the provisions of Article 18 and Article 71 section 1 of the Polish Constitution[37].

As interpreted by the Constitutional Tribunal, these provisions require the state to undertake such actions that will strengthen the ties between the persons making up the family, and in particular the ties existing between spouses, parents and children.

When choosing the statutory model of marriage and parenthood, and thus determining the legally relevant relations between spouses and parents as well as children, the legislator cannot ignore the constitutional requirement of dignity, defined as the "right of personality"[38]. In the constitutional judicature, dignity defined in this way is identified with the existence of "a certain material minimum, providing the individual with the possibility of independent functioning in the society and creating opportunities for every

[37] However, the legal nature of these provisions of the Constitution is disputed. While there is no doubt in the jurisprudence of the Constitutional Tribunal that Art. 18 of the Constitution contains program norms, while the legal nature of Art. 71 sec. 1 of the Constitution, which stipulates that the state in its social and economic policy takes into account the good of the family, and families in difficult material and social conditions, especially those with many children and incomplete ones, have the right to special assistance from public authorities, is the subject of divergent positions of the constitutional court.

In some judgments, the Tribunal stated that Art. 71 sec. 1, second sentence of the Constitution expresses a subjective right subject to protection under a constitutional complaint (see judgments of: November 15, 2005, Ref. No. P3/05, OTK ZU No. 10/A/2005, item 115; May 18, 2005, reference number K 16/04; May 4, 2004, reference number K 8/03, OTK ZU No. 5/A/2004, item 37; May 8, 2001, reference number P 15/00, OTK ZU No. 4/2001, item 83). In other judgments, the Tribunal assumed that: "The entitlement to assistance provided by public authorities to families in a difficult financial and social situation is defined in various acts". Special assistance from public authorities "referred to in the Constitution of the Republic of Poland, is limited only to family allowances and also applies to other forms of assistance, including cash benefits from social assistance"(judgment of the Constitutional Tribunal of October 15, 2001, ref. K12/01, OTK ZU No. 7/2001, item 213); "Article 71 (1), second sentence, of the Constitution (…) specifies the required level of benefits for families in a difficult situation. This assistance should be of a special nature, which, however, does not in any way mean releasing the family from its maintenance obligation" (judgment of April 19, 2011, file No. P41/09, OTK ZU No. 3/A/2011, item 25 – see the judgment of the Constitutional Tribunal of November 15, 2005, file No. P3/05).

[38] Art. 30 of the Polish Constitution.

human being for the full development of their personality in the surrounding cultural and civilisation background"[39].

On the basis of the above-mentioned principles referring to the family it can be assumed that from the constitutional point of view, the family and the ties between its members constitute intrinsic values, which are based on moral and cultural principles. The special role of the family is emphasised by the provisions of Article 18 in Chapter I of the Constitution, entitled "Rzeczpospolita", containing provisions specifying the basic principles of the political system[40].

Also the Acts: on family benefits[41], on state aid in bringing up children[42] and on assistance to persons entitled to alimony[43] take into account the status of the family.

The scope of protection of the family and family life, both in other EU and non-EU countries (including Arab countries) is not uniform.

They also include: family autonomy, protection of private and family life, the durability of marriage, equal rights for parents, with emphasis on the importance of motherhood and fatherhood, guarantee of inheritance and the good of the family in the state policy. Particular emphasis is placed on the protection of the family and on providing assistance, in particular, to families in a difficult financial and social situation, families with many children and single-parent families. The constitutional legislator's care for the family well-being is mainly reflected in the provisions of Article 18 and Article 71 section 1 of the Polish Constitution.

---

[39] The judgment of the full bench of the Constitutional Tribunal dated March 7, 2007, file ref. K 28/05, OTK ZU No. 3/A/2008, item 24 and the judgment of the Constitutional Tribunal of April 4, 2001, file ref. K 11/00, OTK ZU No. 3/2001, item 54.

[40] The remaining provisions related to the family are contained in Chapter II and – generally referred to as "Freedoms, rights and obligations of man and citizen" – are a development of Art. 18 of the Constitution.

[41] Act of November 28, 2003 on family benefits, Journal of Laws of 2003, No. 228, item 2255 with amendments.

[42] Act of February 11, 2016 on state aid in raising children, Journal of Laws of 2016, item 195.

[43] Act of September 7, 2007 on helping persons entitled to alimony, Journal of Laws of 2007, No. 192, item 1378 with amendments.

Some basic laws define it as a duty of the state, which should be more active in this respect (e.g. Portugal[44], Croatia[45], Hungary[46], Greece[47], Spain[48], Ireland[49], Lithuania[50], Latvia[51], Germany[52]).

Others emphasize the right of citizens to demand that the authorities respect their rights (Italy[53], Belgium[54]).

---

[44] Art. 67 of the Constitution of the Portuguese Republic of April 2, 1976, transl. A. Wojtyczek-Bonnand available at: http://biblioteka.sejm.gov.pl/wp-content/uploads/2016/03/Portugalia_pol_010116.pdf [accessed on: 19 November 2021].

[45] Article 35 of the Constitution of the Republic of Croatia of December 22, 1990 (according to the legal status as of January 1, 2007), trans. T.M. Wójcik, M. Petryńska, Warszawa 2007, available at: http://libr.sejm.gov.pl/teko1/txt/konst/chorwacja.html [accessed on: 19 November 2021].

[46] Article L, Art. 26 of the Basic Law of Hungary of April 25, 2001, trans. J. Snopek, Konstytucje państw Unii Europejskiej, Warszawa 2011, available at: http://libr.sejm.gov.pl/teko1/txt/konst/wegry2011.html [accessed on: 19 November 2021].

[47] Article 21 of the Greek Constitution of June 9, 1975 (according to the legal status as of July 1, 2005), trans. G. Ulicka, W. Ulicki, Warszawa 2005, available at: http://libr.sejm.gov.pl/teko1/txt/konst/grecja. html [accessed on: 20 November 2021].

[48] Article 39 of the Spanish Constitution of December 27, 1978, as amended on August 27, 1992, trans. T. Mołdawa, Warszawa 1993, available at: http://libr.sejm.gov.pl/teko1/txt/ konst/hiszpania.html [accessed on: 20 November 2021].

[49] Article 41 of the Constitution of Ireland of July 1, 1937 (as of January 1, 2005), trans. S. Grabowska, Warszawa 2006, available at: http://libr.sejm.gov.pl/teko1/txt/konst/irlandia. html [accessed on: 20 November 2021].

[50] Article 38 of the Constitution of the Republic of Lithuania of October 25, 1992 (according to the legal status as of May 15, 2006, trans. H. Wisner, Warszawa 2006, available at: http://libr.sejm. gov.pl/teko1/txt/konst/litwa.html [accessed on: 17 November 2021].

[51] Article 110 of the Constitution of the Republic of Latvia of February 15, 1922 (according to the legal status as of October 15, 1998), source: Latvian Constitution, trans. L. Gołubiec, Warszawa 2001, available at: http://libr.sejm.gov.pl/teko1/txt/ konst/lotwa [accessed on: 19 November 2021].

[52] Article 6 of the German Constitution of May 8, 1949, trans. B. Banaszak, A. Malicka, Warszawa 2008, available at: http://libr.sejm.gov.pl/teko1/txt/konst/niemcy.html [accessed on: 17 November 2021].

[53] Article 29 Constitution of the Italian Republic of December 27, 1947 (according to the legal status, January 1, 2004), trans. Z. Witkowski, Warszawa 2004, available at: http://libr.sejm.gov.pl/teko1/txt/ konst/wlochy.htm [accessed on: 22 November 2021].

[54] Article 22 of the Belgian Constitution – consolidated text of 14 February 1994, trans. W. Skrzydło, Warszawa 1996; Konstytucja Belgii, available at: sejm.gov.pl).

Under some constitutions obligations of the state and the citizens' rights are jointly proclaimed (Estonia[55], Germany[56])[57].

Moreover, the existing differences result from both the understanding of the concept of family and the attitude to the perception of the essence of marriage, that is not necessarily considered as a relationship between a man and a woman[58].

Although until recently the marriage of two people of different sex raising their children together was considered a family, at present this concept no longer reflects the family model in many countries, especially in the Western Europe.

In Arab countries, constitutional regulations are based on Islam and Sharia, which is the starting point for understanding the family and its protection resulting from it.

In all the constitutions of Arab countries, the family is the basis of society, it draws its strength (is based on) from religion, morality

[55] § 26–27 of the Constitution of the Republic of Estonia of June 28, 1992, trans. Aarne Puu, available at: http://libr.sejm.gov.pl/tek01/txt/konst/estonia2011.html [accessed on: 22 November 2021].

[56] Article 6 of the German Constitution of May 8, 1949, trans. B. Banaszak, A. Malicka, Warszawa 2008, available at: http://libr.sejm.gov.pl/tek01/txt/konst/niemcy.html [accessed on: 22 November 2021].

[57] See more: M. Bielecki, *Ochrona rodziny i życia rodzinnego w kontekście wychowywania zgodnie z przekonaniami rodziców*, Warszawa 2020, p. 11.

[58] In December 2020, the Hungarian constitution introduced a definition of the family that it is based on marriage and parent-child relationships. "The mother is a woman, the father is a man", available at: https://www.rp.pl/polityka/art8728641-wegrzy-zapisali-w-konstytucji-ze-matka-jest-kobieta [accessed on: 22 November 2021].

(Bahrain[59], Egypt[60], Yemen[61], Iraq[62], Jordan[63]) and love for the homeland (Bahrain, Qatar[64], Kuwait[65]), patriotism (Egypt) and benefits from the protection of the state and the society (Algeria[66], Libya[67], Oman[68], Tunisia[69]).

The state guarantees that woman's responsibility towards her family is reconciled with her work in society (e.g. Bahrain, Egypt, Iraq). The provisions of all constitution's guarantee the protection of motherhood, children and the elderly.

A common feature of all constitutional regulations is the lack of a constitutional definition of the family. All of them use the concept of the "family" but do not specify what is the exact meaning of it.

---

[59] Article 5 of the Constitution of the Kingdom of Bahrain of February 14, 2002, available at: http://www.bahrain-embassy.or.jp/en/constitution.pdf [accessed on: 22 November 2021].

[60] Article 5 of the 2014 Constitution of the Arab Republic of Egypt, available at: https://www.constituteproject.org/constitution/Egypt_2014.pdf [accessed on: 22 November 2021].

[61] Article 26 of the 2015 Constitution of the Republic of Yemen, available at: https://www.constituteproject.org/constitution/Yemen_2015.pdf?lang=en [accessed on: 19 November 2021].

[62] Article 29 of the Iraqi Constitution of 2005, available at: https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en [accessed on: 19 November 2021].

[63] Article 4 of the Constitution of the Hashemite Kingdom of Jordan of 1952, as amended, available at: www.ilo.org/dyn/natlex/docs/ELECTRONIC/105493/129083/F1157293722/D0001001.pdf [accessed on: 19 November 2021].

[64] Article 21, Qatar Constitution 2014, available at: https://www.constituteproject.org/constitution/Qatar_2003.pdf?lang=en [accessed on: 19 November 2021].

[65] Article 29 of the Kuwait Constitution of 1962, as amended, available at: https://constitutions.unwomen.org/en/countries/asia/kuwait?provisioncategory=f62f03f36c6d49a49d805689c0f00a82 [accessed on: 20 November 2021].

[66] Article 47 of the 2020 Constitution of the Democratic Republic of Algeria, available at: https://www.constituteproject.org/constitution/Algeria_2020.pdf?lang=en [accessed on: 20 November 2021].

[67] Article 5 of the Libyan Constitution of 2011, available at: https://www.constituteproject.org/constitution/Libya_2011.pdf [accessed on: 20 November 2021].

[68] Article 12 of the Oman Constitution, 1996, as amended, available at: https://www.constituteproject.org/constitution/Oman_2011.pdf?lang=en [accessed on: 20 November 2021].

[69] Article 7 of the Constitution of the Republic of Tunisia of 2014, available at: https://www.constituteproject.org/constitution/Tunisia_2014.pdf [accessed on: 20 November 2021].

It is clarified in the lower-level legislative acts, or it is based on the principles of religion.

On the basis of their analysis, the model of the family is presented as – first of all, a marriage (in various types), parenthood and close kin and distant relationships.

"Due to the numerous and at the same time profound changes affecting the family and the environment in which this basic unit of society exists, it is necessary to regularly adapt legal and institutional solutions to them, in order to enable the implementation of an effective and efficient family policy. One of the key factors shaping the family policy is the understanding of the very concept of a family (or possibly a family household). Firstly, it is necessary to answer the question what types of coexistence should be identified as a family and treated like that. Secondly, it is essential to indicate which of them are preferred by the state and why they (in general or at least as first) should be provided with support"[70].

Most European Union and Arab countries provide protection of the family at the constitutional level, but the role that the state should play in supporting the family or the scope of its interference with parental rights has not been unified.

Constitutional provisions are milestones for national family policies, which are shaped by the demographic, economic, social and cultural conditions typical for a particular country.

Family policy, perceived through its goals, is the set of standards, actions and means used by the state to provide the family with favourable conditions to enable its formation, and then its proper development, while fulfilling all its functions (desirable from the social and economic point of view)[71].

The policies of the Francophone countries (France, Belgium) represent direct policies aimed at children and their welfare.

---

[70] E. Cichowicz, *Uwarunkowania przeobrażeń polityki rodzinnej – wybrane przykłady oraz propozycje kierunków zmian w zakresie wsparcia rodziny*, [in:] *Polityka rodzinna w Polsce z perspektywy wybranych aspektów polityki społecznej i ekonomii. Doświadczenia innych państw europejskich*, eds. A. Kubów, J. Szczepaniak-Sienniak, Wrocław 2014, p. 12.

[71] *Ibidem*, pp. 15–16.

"Effective family policy moves away from episodic activities in response to current social problems, towards comprehensive and direct support for families. However, it is of an auxiliary nature and supports the family only in tasks that cannot be carried out effectively by it. Such a policy should be dependent on political pressure and free from various ideological and religious pressures. Instruments of modern policy aimed at supporting families are used to achieve strategic (long-term) and operational (short-term) goals. Importantly, an effective family policy is complementary to other specific policies implemented in a given country"[72].

The state is the most important entity responsible for shaping and implementing family policy. The effectiveness of the implemented solutions that affect the functioning of families depends on the organizational capabilities of the state.

"The policies of the Scandinavian countries – are based on the idea of individualisation of the civil rights, including individual rights of children regardless of their family of origin, rights of the elderly and the disabled, and ensuring equal opportunities for men and women. Social services are the most significant elements of this policy, not cash benefits.

In Germany, Austria and partly in the Netherlands, family policies are based on the principle of subsidiarity, including citizens' own precaution manifested through participation in insurance systems.

In Great Britain and Ireland, social and family policy is based on the principle that the family should first and foremost take responsibility for itself. As a result, the scope of universal assistance is small. Assistance for low-income families prevails, and family policy is currently focused on reducing poverty, mainly as regards children".

In the case of family policies of southern European countries, the emphasis is on the principle of subsidiarity and family solidarity. The immediate families, close kin and distant relatives are obliged to provide assistance and support (vertical and intergenerational

[72] K. Filipek, *Uwarunkowania polityki rodzinnej Polski, Czech i Węgier*, "Prace Instytutu Europy Środkowej", No. 11/2020, pp. 10–11.

solidarity). Benefits are granted on the basis of the income criterion"[73].

In view of the deepening demographic crisis in Central Europe, Hungary is definitely in the first place in terms of implementing an effective pro-family policy. Supporting families by the state is certainly an investment in the future. The result of effective solutions introduced in Hungary is an increase in the number of births, better living conditions and a lower number of divorces. The pro-family policy program includes, inter alia, allowances encouraging citizens to take up professional activity.

In Arab countries, constitutional and statutory regulations are based on Islam and Sharia, which is the starting point for understanding the family and its protection resulting from it.

Almost one-third of the legal provisions in the Quran deal with the family issues and the proper functioning of the family. The special importance of marriage and family is also emphasised in the Sunnah.

Currently, a noticeable trend is, among others, striving to unify the legal institutions that aim at humanisation of social life. This applies especially to the legal situation of the family, and in particular the situation of a child and a woman. This is undoubtedly reflected in the international acts, most often in the form of multilateral conventions, many of which have been ratified by Poland. On the basis of one of them, the *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on 4 November 1950[74] the European Court of Human Rights was established to ensure the compliance with the provisions of the Convention.

[73] B. Balcerzak-Paradowska, *Ogólne kierunki zmian w polityce rodzinnej krajów Unii Europejskiej*, [in:] *Polityka rodzinna w krajach Unii Europejskiej – wnioski dla Polski*, ed. M. Zubik, Warszawa 2009, p. 18.

[74] Journal of Laws of 1993, No. 61, item 284 with amendments.

4. Polarisation of the legal definition of the concept of marriage

The starting point for consideration of the definition of marriage in international documents regarding the human rights shall be Article 16 of the *Universal Declaration of Human Rights* (10.12.1948)[75], in which the family was defined as the natural and fundamental unit of the society, having the right to be provided with protection and assistance by the society and the state (point 3). Men and women without any limitation due to race, nationality or religion, have the right to marry and to found a family.

They are entitled to equal rights as to marriage, during marriage and at its dissolution. Marriage shall be entered into only with the free and full consent of the intending spouses (points 1 and 2).

Although the declaration at the time of its adoption was only a standard – as a resolution of the General Assembly, it did not create international legal principles and was not legally binding. At present, most lawyers dealing with international law consider it to be the common law, therefore they presume that it is generally applicable.

Also the International Covenants on Human Rights, two international agreements adopted by the General Assembly of the United Nations on 16 December 1966 (the *International Covenant on Civil and Political Rights* in Article 23 and the International Covenant on Economic, Social and Cultural Rights in Article 10) relate to the issue of family and marriage, and, like the Universal Declaration of Human Rights, they define the family itself as well as the right to marry (and consequently, the marriage itself).

In *the Covenants on Human Rights*, the key feature of marriage is also the freedom of decision of intending spouses with regard to concluding marriage, as a condition of its validity.

On the other hand, the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 4 November 1950, in Article 12 provides that both men and women of marriageable age have the right to marry

[75] Available at: https://www.un.org/en/about-us/universal-declaration-of-human-rights [accessed on: 15 November 2021].

and to found a family, in accordance with the national laws governing the exercise of this right[76].

Moreover, the context of interpretation imposed by the judicature of the European Court of Human Rights makes it possible to analyse the right to marry as a detailed aspect of the more extensive right to respect for private and family life (Article 8 of the ECHR) and – particularly in recent years – as a correlative right of non-discrimination (Article 14 of the ECHR).

Together with the Treaty of Lisbon – on 1 December 2009, the Charter of Fundamental Rights of the European Union entered into force, which in Article 9 provides that the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

The authors of the Charter changed the definition of the family, including in this concept "cases in which national legislation recognises arrangements other than marriage for founding a family". A family defined in this way "benefits from" – as provided for in Article 33 of the Charter – "legal, economic and social support".

However, the European Union does not leave this issue to the member states. In December 2015, the European Commission adopted the document "List of actions by the Commission to advance LGBTI equality". On 17 February 2016, the Council of the European Union adopted a draft document concerning the Council's reply to the Commission's document. The contents of the proposed document were not adopted due to objections expressed by Hungary.

Also the European Court of Human Rights in Strasbourg has repeatedly referred to the concept of marriage in its judicature, addressing the issue of the biological sex of the spouses – arguing that the guarantees of marriage concern a marriage between two persons of different sex and that the purpose of this regulation is to protect marriage as foundation of the family[77].

---

[76] M. Kubala, *Polaryzacja prawnego rozumienia pojęcia małżeństwo w międzynarodowych dokumentach praw człowieka*, [in:] *Problemy małżeństwa i rodziny w prawodawstwie polskim, międzynarodowym i kanonicznym*, eds. R. Sztychmiler, J. Krzywkowska, M. Paszkowski, Olsztyn 2017, pp. 12–16.

[77] The judgment of the ECHR of October 17, 1986, 9532/81, Rees v. Great Britain, HUDOC; The judgment of the ECHR of September 27, 1990, 10843/84,

However, a significant change occurred in the judgement of *C. Goodwin v. The United Kingdom* of 2002, in which the Court held that the wording used in Article 12 of the Convention, referring to the right of a man and a woman to marry does not mean that sex must be determined according to purely biological criteria, and acknowledged the right of persons who have their sex changed to marry. The Court concluded that the inability of a postoperative transsexual woman to marry in her assigned gender violated Article 12 of the Convention[78].

In grounds for its decision, the Court referred to the changes in the definition of the institution of marriage since the adoption of the Convention in 1950, to the progress of medicine in issues related to transsexuality and to Article 9 of the Charter of Fundamental Rights of the European Union, in which the wording of Article 12 of the ECHR concerning a man and a woman was omitted, and thus assumed the possibility of the existence of homosexual marriages, leaving this issue, however, to the national legislators of particular member states of the Council of Europe for further consideration[79].

Moreover, the Court noted that the changes in the legal order of the Parties to the Convention were still ongoing. It stated: "The Court cannot ignore the fact that there is an emerging European consensus towards legal recognition of same-sex couples"[80]. Moreover, this trend has developed rapidly over the past decade. Despite this, most countries provide no legal recognition for same-sex couples. Therefore, the area in question must therefore still be regarded

Cossey v. Great Britain, HUDOC; The judgment of the ECHR of June 30, 1998, 22985/93 and 23390/94, Sheffield and Horsham v. Great Britain, HUDOC.

[78] Christine Goodwin v. Great Britain – judgment of the ECtHR of 11 July 2002, application no. 28957/95, [in:] M.A. Nowicki, *Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004*, Kraków 2005, p. 865; The judgment of the ECHR of July 11, 2002, 28957/95, Goodwin v. Great Britain, HUDOC.

[79] See: Z. Cichoń, *Prawa rodziny w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu*, [in:] Palestra No. 7–8/2013, available at: https://palestra.pl/pl/czasopismo/wydanie/7–8-2013/artykul/prawa-rodziny-w-orzecznictwie-europejskiego-trybunalu-praw-czlowieka-w-strasburgu [accessed on: 24 November 2021].

[80] Glos by Wojciech Brzozowski to the judgment of the ECHR of 24 June 2010, no. 30141/04; EPS 2011/4/42–45.

as one of evolving rights with no established consensus, where countries must also enjoy a margin of appreciation in the timing of the introduction of legislative changes[81].

The fact remains that the law under Article 12 of the Convention concerns monogamous and heterosexual marriage, which was clearly emphasised by the Court in the judgement of *Schalk und Kopf v. Austria* (judgement of 24 June 2010)[82], stating that the Convention did not oblige countries to include homosexual couples in the concept of marriage, and thus dismissed the complaint for violation of Article 12 and Article 14 (prohibition of discrimination). It shall not constitute discrimination, in the view of the Court, if the legal recognition of a gender change is conditional on the prior dissolution of the marriage (decision in the case *Parry v. The United Kingdom* of 26 November 2006)[83].

In 2015, the ECHR resolved the case of Oliari and other vs Italy[84]. The appeal concerned Italian authorities' refusal to provide any form of legal recognition and protection for same-sex relationship of the appellant. The ECHR found that the concept of "family life" could also refer to people who were in permanent homosexual relationships, even if they lived separately, and decided that the Italian authorities violated Article 8 of the ECHR[85].

It should be added that one of the premises for such a decision, which was referred to by the ECHR, was the judicature of Italian

---

[81] The judgment of the ECHR of June 24, 2010, 30141/04, Schalk and Kopf v. Austria, HUDOC.

[82] *Ibidem*.

[83] Spain v. The United Kingdom, Jud. Of the Court (Grand Chamber) of 12 September 2006 in case 0145/04; available at: tps: //curia.europa.eu/juris/showPdf.jsf; jsessionid = 9ea7d2dc30dbffa96517dfd54373b73c91be753c95de.e34KaxiLc3qMb40RchoSaxuKaNfo? text = & docid = 63873 & = & doclndex = 63873 & = & doclndex = 63873 & = & doclndex = please provide correct www address and info when it was [accessed on: 20 November 2021].

[84] K. Warecka, *Strasburg: związek partnerski to podstawowe prawo człowieka. Oliari i inni przeciwko Włochom – wyrok ETPC z dnia 21 lipca 2015 r., skarga nr 18766/11*; available at: https://sip.lex.pl/komarzenia-i-publikacje/omniane/strasburg-zwiazek-partnerski-to-podstawowe-prawo-czlowieka-oliari-151260049 [accessed on: 17 November 2021].

[85] Similarly: The judgment of the ECHR of March 14, 2018, Orlandi and others v. Italy, HUDOC.

courts, which had previously made a certain reinterpretation of the principles of family law.

According to three out of seven dissenting judges, this decision could be used to exert pressure on the states – parties to the ECHR to provide legal recognition to same-sex couples.

Similarly, in the judgment of the ECHR of 13 July 2021 in the case of Fedotova and others v. Russia. Three same-sex couples, the first couple in 2010 and the second and third couples in 2014, have filed complaints with the European Court of Human Rights in Strasbourg, accusing Russia of violating their right to respect for private and family life, seeking compensation for "injuries and expenses incurred due to the impossibility of getting married. The Court found that same-sex couples are in a similar situation to opposite-sex couples when it comes to the need for legal recognition of the protection of their relationship, and the state has an obligation to institutionalize same-sex relationships, even if the majority of society opposes it".

While the Court declined to award compensation to the applicants, it considered that the mere finding of a violation constituted sufficient compensation for their harm[86].

Also in Poland, for several years, cases concerning the transcription of a foreign birth certificate of a child in which the registered parents are persons of the same sex and the confirmation of Polish citizenship by such a child have been the subject of judicial cognition of Polish administrative courts. "When deciding such, the courts face the necessity to resolve not solely conflicts of norms (principles and values) within the domestic law, but also conflicts of legal systems. The cases concerning transcription of a child's foreign birth certificate, in which the registered parents are persons of the same sex, as well as confirmation of Polish citizenship by such a child, have been in the field of judicial cognition of Polish administrative courts for just several years. The issue of admissibility registering same-sex couples as parents of a child in Polish registry office has gained the great importance in the context of shaping social and family relations and

[86] The judgment of the ECHR of July 13, 2021, 40792/10, 30538/14, 43439/14, Fedotova and others v. Russia, Hudoc.

the role of positive law as their regulator in dynamic society. When deciding such, the courts face the necessity to resolve not solely conflicts of norms (principles and values) within the domestic law, but also conflicts of legal systems. In the process of judicial application of law there is a need for balancing – on the one hand – the principle of the protection of the rights of a child, and – on the other one – other principles basic to the Polish legal order, i.e. the fundamental principles of the socio-political system (especially the principle of protection of marriage as a liaison of a men and a woman as well as the protection of family, motherhood and parenthood that arise from the art. 18 of Polish Constitution) and the general principles governing particular areas of civil, family and procedural law. The child's welfare is a general constitutional clause that shall be interpreted with the reference to the constitutional axiology and to the entire legal system. The protection the child's best interests is also the overriding principle of the Polish family law, and governs all of the regulations in the area of relations between parents and children. The important and delicate nature of this matter caused the discrepancies in the jurisprudence due to admissibility of such transcription in the light of the public order clause. The panel of seven judges of the Supreme Administrative Court, in Resolution No. II OPS 1/19, determined that Polish law did not allow the transcription of a foreign birth certificate showing same-sex persons as parents"[87].

Currently, within the territory of European Union, same-sex marriage is legalized in Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, the Netherlands, Portugal, Spain and Sweden, as well as Iceland and Norway.

However, the states were not obliged to grant parental rights to partners in relation to the children of the other partner. It is also left to the discretion of states to grant parental rights to transsexuals and how to regulate the relationship between a child conceived through artificial insemination and a person acting as a biological father.

[87] See: A. Chmielarz-Grochalmm, *European standards applied by administrative courts in resolving cross-border problems of citizenship and transcription of civil status certificates*, Acta Universitatis Lodziensis. Folia Iuridica, vol. 93 (2020).

5. Conclusions

The Constitution is the supreme law of the Republic of Poland and its provisions are directly applicable, unless the Constitution provides otherwise (Article 8). The provision of art. 7 of the Constitution of the Republic of Poland unequivocally indicates that organs of public authority operate on the basis and within the limits of the law. This in turn means that these organs are obliged to observe the Constitution of the Republic of Poland and applicable laws. Such acts include, inter alia, Act of February 25, 1964, Family and Guardianship Code. Pursuant to Art. 1 § 1 of the Family and Guardianship Code, contained in Title I "Marriage", Section I – "Getting married", a marriage is contracted when a man and a woman both present at the same time declare to the head of the registry office that they enter into marriage with each other.

When establishing the basic principles of the legal order of the Republic of Poland – for the purposes of the public policy clause – one should take into account, inter alia, Art. 18 of the Polish Constitution, which defines marriage as a union of a woman and a man. It should be emphasized that the concept of marriage expressed in the constitution is autonomous and independent from other normative acts, both domestic and international. In the Polish legal system, the requirement of being sexually different is undoubtedly a substantive premise for marriage[88].

Marriage is the cornerstone of the family to protect implemented by public authorities should take into account the vision of the family as a lasting relationship between a man and a woman focused on motherhood and responsible parenthood.

The protection of the family, carried out by public authorities, should take into account the concept of the family as a permanent relationship between a man and a woman focused on motherhood and responsible parenthood. The aim of the regulations relating to the status of the family is to impose on the state, and especially on the legislator, an obligation to undertake such activities that shall

[88] Judgment of the Supreme Administrative Court of February 28, 2018, file ref. II OSK 1112/16.

strengthen the ties between the persons founding the family, and in particular the ties existing between parents and children and between spouses.

This also applies to tax solutions aimed at implementing the pro-family policy by the state[89]. However, these solutions should never lead, even indirectly, to weakening the strength of family ties by such solutions according to which it is preferable to bring up children only by one parent or even by both of them, but without concluding a marriage, which would provide legal regulations relating to the relationship between these people[90].

The doctrine rightly emphasizes that the family is a relationship that is part of nature and that is primal to the state and law. It has existed since the dawn of history and is subject to evolution both within its structure, in the sphere of its functioning, and in relation to its external face.

This understanding of the family consequently led to the inclusion of the problem of family relations within the broader category of constitutional (fundamental) rights and fundamental human and civil rights, the protection of which is currently provided for both by national constitutions and international agreements (in particular those established under the auspices of the United Nations and the Council Europe).

Parental responsibility should be exercised as required by the welfare of the child and social interest. Parents are to educate and guide the child, take care of the child's physical and spiritual development and properly prepare the child to work for the good of society according to the child's predispositions.

The child, on the other hand, should be obedient to its parents. The right to legal protection of family life should include the protection of parents' rights as persons responsible for the upbringing of their children. The right to legal protection of family life must take

[89] P. Smoleń, *Trudności i wątpliwości na tle tzw. prorodzinnej polityki państwa*, [in:] *Problemy i kontrowersje związane z opodatkowaniem dochodów osób fizycznych*, eds. B. Kucia-Guściora, P. Smoleń, Lublin 2008, pp. 22–23.

[90] M. Zubik, *Podmioty konstytucyjnych wolności, praw i obowiązków*, "Przegląd Legislacyjny", No. 2/2007, p. 41.

into account the specific roles of particular family members, and the legal protection of family life should create optimal conditions for the development of a child staying in the custody of its parents.

Today's times require very clear language and legal precision. There is no doubt that the Constitution obliges state authorities to provide care and assistance to a family based on marriage as a union of a woman and a man, parenthood and motherhood. This normative family model is reflected in the basic statutory act regulating family-care relations. Although the guiding principle of the family and guardianship code is the best interests of the child, its implementation is inextricably linked with the marriage of two people who are sexually different.

Some of the definitions of a family or a family member included in the Polish legal system implement this normative family model based on biological or legal ties.

In several acts, the legislator disregarded the constitutional norm expressed in Art. 18 of the Constitution and led to a situation in which the adopted definition of the family, instead of promoting and strengthening family ties, leads to their weakening. Such a situation occurs under the Act on Counteracting Domestic Violence and the Act on Social Assistance. In the first case, the very use of the concept of family in relation to the phenomenon of violence raises doubts. In the second case, however, there are doubts about opening the concept of family to cohabitation and other forms of cohabitation. This discrepancy opens the door to the polarization of family understanding. The regulations should be clear enough in this respect so that they do not allow for over-interpretation. The introduction of a single element of community control in the system that will be introduced, start introducing the definition will not be given as a safeguard against a provision of the law.

However, it should be emphatically emphasized that the legislator's sensitivity the social changes mentioned in the introduction should not rely on a simple one equating to marriage and family as regards rights their rights and the scope of protection, various contemporary forms interpersonal life.

Attempts at a broad interpretation of the concept should be assessed similarly family, carried out by case law.

Both the legislator, and entities applying the law, they also devote too little fundamental attention also for the discussed issue, the principle of protecting the best interests of the child.

It is this principle that should first of all be kept in mind when taking any solutions regarding the family.

REFERENCES

Adamski F., *Rodzina. Wymiar społeczno-kulturowy*, Kraków 2002.

Balcerzak-Paradowska B., *Ogólne kierunki zmian w polityce rodzinnej krajów Unii Europejskiej*, [in:] *Polityka rodzinna w krajach Unii Europejskiej – wnioski dla Polski*, ed. M. Zubik, Warszawa 2009.

Banaszak B., *Konstytucyjna regulacja małżeństwa a prawo do zawarcia małżeństwa*, [in:] *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, ed. M. Jabłoński, Wrocław 2014.

Banaszak B., *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2009.

Bielecki M., *Ochrona rodziny i życia rodzinnego w kontekście wychowywania zgodnie z przekonaniami rodziców*, Warszawa 2020.

Christine Goodwin v. Great Britain – judgment of the ECtHR of 11 July 2002, application no. 28957/95, [in:] M.A. Nowicki, *Nowy Europejski Trybunał Praw Człowieka. Wybór orzeczeń 1999–2004*, Kraków 2005.

Cichoń Z., *Prawa rodziny w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu*, "Palestra" No. 7–8/2013, https://palestra.pl/pl/czasopismo/wydanie/7-8-2013/artykul/prawa-rodziny-w-orzecznictwie-europejskiego-trybunalu-praw-czlowieka-w-strasburgu.

Cichowicz E., *Uwarunkowania przeobrażeń polityki rodzinnej – wybrane przykłady oraz propozycje kierunków zmian w zakresie wsparcia rodziny*, [in:] *Polityka rodzinna w Polsce z perspektywy wybranych aspektów polityki społecznej i ekonomii. Doświadczenia innych państw europejskich*, eds. A. Kubów, J. Szczepaniak-Sienniak, Wrocław 2014.

Dobra osobiste i ich ochrona, ed. M. Romańska, Warszawa 2020.
Dyczewski L., *Rodzina. Społeczeństwo. Państwo*, Lublin 1994.
Filipek K., *Uwarunkowania polityki rodzinnej Polski, Czech i Węgier*, "Prace Instytutu Europy Środkowej", No. 11/2020.
Gajda J., *Komentarz do art. 23*, [in:] ed. K. Pietrzykowski, *Kodeks rodzinny i opiekuńczy*, Warszawa 2015, Legalis.
Gajda J., *Komentarz do art. 146*, [in:] ed. K. Pietrzykowski, *Kodeks rodzinny i opiekuńczy*, Warszawa 2015, Legalis.
Glos by Wojciech Brzozowski to the judgment of the ECHR of 24 June 2010, No. 30141/04; EPS 2011/4 / 42–45.
Kubala M., *Polaryzacja prawnego rozumienia pojęcia małżeństwo w międzynarodowych dokumentach praw człowieka*, [in:] *Problemy małżeństwa i rodziny w prawodawstwie polskim, międzynarodowym i kanonicznym*, eds. R. Sztychmiler, J. Krzywkowska, M. Paszkowski, Olsztyn 2017.
Mostowik P., *Kilka uwag o ochronie małżeństwa na tle Konstytucji i prawa międzynarodowego*, [in:] *Wokół problematyki małżeństwa w aspekcie materialnym i procesowym*, Toruń 2017.
Mostowik P., *Władza rodzicielska i opieka nad dzieckiem w prawie prywatnym międzynarodowym*, Kraków 2014.
Nasr S.H., *Istota islamu*, Warszawa 2010.
Ostrowska U., *Współczesna rodzina w ujęciach terminologicznych*, [in:] *Rodzina i dziecko w zmieniającym się świecie. Perspektywa historyczna i pedagogiczna*, eds. K. Jakubiak, R. Grzybowski, Toruń 2020.
Piwko A., *Rodzina muzułmańska wobec wyzwań współczesności*, "Studia Theologica Varsaviensia", No. 1/2015.
Smoleń P., *Trudności i wątpliwości na tle tzw. prorodzinnej polityki państwa*, [in:] *Problemy i kontrowersje związane z opodatkowaniem dochodów osób fizycznych*, eds. B. Kucia-Guściora, P. Smoleń, Lublin 2008.
Tarish W., *Rodzina w Koranie*, [in]: ed. Z. Kijas, *Rodzina w wielkich religiach świata*, Kraków 1999.
Toumi M., Zając P., *Małżeństwo w prawie kanonicznym i w prawie koranicznym* (*szari'a*), [in:] *Człowiek, Państwo, Kościół. Księga jubileuszowa dedykowana Księdzu Profesorowi Arturowi Mezglewskiemu*, eds. P. Sobczyk, P. Steczkowski, Lublin 2020.

Tunia A., *Ochrona małżeństwa i rodziny w prawie polskim oraz w prawie wewnętrznym kościołów chrześcijańskich*, "Studia z prawa wyznaniowego", vol. 13/2010.

Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948; ONZ 1948 r. (sejm.gov.pl).

Warecka K., *Strasburg: związek partnerski to podstawowe prawo człowieka. Oliari i inni przeciwko Włochom – wyrok ETPC z dnia 21 lipca 2015 r., skarga nr 18766/11*, https://sip.lex.pl/komarzenia-i-publikacje/omniane/strasburg-zwiazek-partnerski-to-podstawowe-prawo-czlowieka-oliari-151260049.

Zubik M., *Podmioty konstytucyjnych wolności, praw i obowiązków*, "Przegląd Legislacyjny", No. 2/2007.

DR HAB. GRZEGORZ PASTUSZKO, PROF. UCZ.
University of Rzeszów

Influence of the EU institutions on the Polish constitutional order in the context of the dispute over the rule of law

1. The principle of the rule of law of the EU and its impact on the constitutional order of a Member State – introductory remarks

The principle of the rule of law, also known as the rule of law[1], is undoubtedly one of the greatest achievements of European legal thought. With deep conviction, one can say that we are dealing here with a principle that broke the paradigm in thinking about relations between the individual and public authority, and thus permanently determined the functioning of the political and legal systems of the Old Continent. No wonder then that the principle in question influenced not only the shaping of the constitutional identity of individual European countries, but also left its mark on the

[1] On the terminological implications of the terms: the rule of law and the rule of law see P. Marcisz, M. Taborowski, *Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności. Krytyczna analiza analizy krytycznej* (*artykuł polemiczny*), "Państwo i Prawo" 2017, No. 12, p. 100; P. Bogdanowicz, *Pojęcie, treść i ochrona praworządności w prawie Unii Europejskiej*, [in:] *Wniosek Komisji Europejskiej w sprawie wszczęcia w stosunku do Polski procedury art. 7 TUE*, eds. J. Barcz, A. Zawidzka-Łojek, Warsaw 2018, p. 3; A. Grzelak, *Ramy prawne UE na rzecz umacniania praworządności. Uwagi na tle wniosku Komisji Europejskiej z 20 grudnia 2017 r.*, "Sprawy Międzynarodowe" 2018, No. 2, vol. 71, p. 215.

supranational structures they created. It is all too clearly visible in the case of the European Union, an organization that refers directly to this principle and places it among one of the most important values underlying the functioning of the entire community.

Under the current legal framework, the rule of law is directly reflected in Art. 2 of the Treaty on European Union. This regulation, which is the most exposed legal directive within the *acquis communautaire*, which defines the framework of the EU's axiological order, covers a wide range of fundamental values, including the concept of the "rule of law". According to it: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, as well as respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

Such a regulation leaves no doubt that the authors of the treaties treat the principle of the rule of law as one of the basic elements of the Community legal architecture and at the same time a determinant of the direction of the European integration process. It can be read from its content that a uniting Europe, based on the ideals of political democracy, should refer at every stage of its development to the fundamental assumption according to which organs of public authority remain bound by law and operate within its borders[2]. Such an attitude makes the doctrine incline to the perception of Art. 2 of the Treaty on European Union, the rule of law in terms of the constitutional principle[3], strongly determining the characteristics of the European systemic space.

[2] The literature very clearly emphasizes the relationship between the democratic system and the rule of law. The authors of this view point out directly that democracy cannot exist without the functioning of the rule of law; see: Mineshima, Dale Sachiko Oi Lin Nalani, *The Rule of Law and the Eastern Enlargement of the EU*, Durham 2001, available at: http://etheses.dur.ac.uk/3827/ [accessed on: 20 September 2021].

[3] F.M.L. Hilpert, *An Old Procedure with New Solutions for the Rule of Law Crisis*, "Nordic Journal of Law" 2019, No. 2, p. 3; L. Pech, *The Rule of Law as Constitutional Principle of the European Union*, New York 2009, *passim*.

The analysis of the principle in question raises the question of its significance for the functioning of the domestic constitutional order. It is beyond dispute that the norm of Art. 2 of the Treaty on European Union, and thus the principle discussed here, remains addressed to individual Member States[4], which must therefore affect the sphere of their systemic regulations. As it can be assumed, this norm imposes on the Member State, on the one hand, an order to follow the values indicated therein, and on the other hand, a prohibition on not respecting them[5]. Although this is not expressed directly in the text of the treaty, it is difficult to find a different interpretation in the face of the axiological directive so clearly manifested in the layer of primary law. There is no doubt that we can speak of a clause designed to disseminate axiological patterns in the emerging European political space, covering the level of functioning of both the EU and national institutions.

The above observation leads to a logical conclusion that the principle of the EU rule of law, enshrined in the provisions of the Treaties, is essentially a separate entity from the rule of law in force in individual Member States. When considering it in the context of its impact on the national constitutional order, it should be remembered that in many aspects it eludes the framework of understanding the rule of law at the national level, adopting its own, autonomous

[4] Incidentally, it is worth noting that this norm is also addressed to the institutions of the European Union, although it does not clearly result from the content of Art. 2 of the Treaty on European Union. Another interpretation would conflict with, for example, judgments handed down in the past by the Court of Justice of the European Union (comp. G. Grabowska, *Wartości w statutach organizacji międzynarodowych*, [in:] *Wartości Unii Europejskiej a praworządność*, M. Romanowski (ed.), Warsaw 2020, p. 48), including notably the infamous Les Verts vs. The Europeen Parliament, in which the bench made a very clear reference to the principle of the rule of law of the EU institutions. He wrote, namely: "The European Community is a community of law, which means that both Member States and institutions are subject to control of the compliance of their acts with the basic constitutional charter, which is the treaty" – Judgment of the ECJ of April 23, 1983, Les Vets vs. Parlement Europeen, C-294/83.

[5] G. Pastuszko, *Możliwości ekstensywnej wykładni przepisu Art. 2 TUE w kontekście procedury badania praworządności w państwach członkowskich i powiązania jej z budżetem*, [in:] *Wartości Unii Europejskiej a praworządność*, M. Romanowski (ed.), Warsaw 2020, pp. 192–193.

content. This state of affairs results from the fact that the indicated principle, although it was shaped under the influence of the systemic traditions of individual countries, especially Germany and France, gained a separate – political, normative and judicial dimension in the course of the historical development of the European community. This was largely due to the successively emerging legal and political documents relating to the issue of the rule of law, as well as – to the greatest extent – the active activity of the Court of Justice of the European Union (the documents and the Court's rulings will be discussed in the course of further considerations). The latter, in many of its judgments, recognized the European Union as a community based on the rule of law, pointing to its components by interpreting it (in some cases not without some controversy, anyway) and thus giving a more or less clearly defined content. As it can be assumed, this is a sufficient reason to accept the thesis that the EU rule of law must be treated as a manifestation of the post-national character of the European Union and, with this awareness, confronted with the traditionally understood concept of the rule of law subject to local conditions[6]. This is because this rule of law "[…] operates exclusively at the level of national legal orders, essentially aimed at limiting the arbitrary exercise of public authority over persons under its jurisdiction, while the rule of law of the European Union essentially operates at the level of European Union law and interstate order and is a set of […] Higher requirements or meta-values that aim to characterize more generally the entire legal framework of the European Union, as well as the functioning of the European Union and the behavior of persons governed by the European Union law"[7].

Another thing is that recognizing the distinctiveness of the principle of the EU rule of law and including it in the sphere of autonomous concepts of European Union law does not mean in any way

[6] L. Den Hertog, *The rule of law in the EU: Understandings, development and challanges, The Rule of Law in the EU: Understandings, Development and Challenges*, "Acta Juridica Hungarica", 2012, No. 3, vol. 53, p. 208.

[7] V. Argyropoulou, *Enforcing the Rule of Law in the European Union, Quo Vadis EU?*, "Harvard Human Rights Journal", 02.11.2019, available at: https://harvardhrj.com/2019/11/enforcing-the-rule-of-law-in-the-european-union-quo-vadis-eu/#_ftn1 [accessed on: 7 September 2020].

that its content remains completely detached from the rule of law that occurs in individual Member States. In the literature on the subject, attention is drawn to the national roots of this principle and hence the conclusion is drawn that its perception at the Community level cannot disregard the perception at the national level. This thesis shows a clear reluctance to any attempts at a confrontational evaluation of these two categories, and at the same time reveals the intention to treat them as a harmonious whole. Its author, Laurent Pech, emphasizes unequivocally that "while EU institutions are entitled to give a «European sense» to the rule of law, it would therefore be wrong to think that they usually do so without regard for a common denominator in the constitutional. traditions of the Member States, especially in the situation where the rule of law has been expressly recognized as a principle which is common to the Member States. Even if national understandings were to dramatically differ […] the Court of Justice has shown, for instance, with respect to the general principles of Community law, that it can derive these principles from the laws of the Member States even when they are not unanimously recognized, differently understood or diversely applied at the national level"[8]. A similar approach to the problem is presented by another author, Robert Grzeszczak, who states that "Certainly, the EU understanding of the rule of law differs to some extent from its understanding at the level of each of the Member States separately. However, these are differences that are generally embedded in the peculiarities of given countries, and do not change the core of this principle, which is the same for everyone. Despite the different constitutional traditions and the noticeable differences between these traditions (e.g. with regard to its "institutionalization" in national legal orders), it is possible to indicate the features common to this principle"[9].

Defining the relationship between the two autonomous spheres of the rule of law: national and EU, brings about many difficulties. The biggest problem, as it can be assumed, is the low legal precision

[8] L. Pech, *op. cit*., p. 6.

[9] R. Grzeszczak, *Skuteczność unijnych procedur ochrony praworządności w stosunku do państw członkowskich*, "Państwo i Prawo" 2019, No. 6, p. 36.

of these concepts, and at the same time the complexity and variability of their normative content. It is well known that the rule of law is a principle with very unclear legal characteristics, expressed in numerous solutions, institutions and practices, and at the same time embedded in strongly diverse cultural contexts and systemic traditions. It is not without reason that in the literature it is considered a meta-principle that comprehensively affects a given legal system and penetrates many of its areas[10]. In such a situation, the full-scale and precise delineation of the boundaries between the European rule of law and the national rule of law becomes, in fact, an impossible task. The only thing that is within the scope of our perception is the assessment *a casu ad casum* of individual components of this principle, while indicating whether there is harmony and compliance between the EU and national components, or whether they are contradictory.

The fact that the principle of the rule of law is in fact a very vague legal category has been written many times in the legal literature. This was indicated by, for example, Peter Ingram, who emphasized that "The rule of law has suffered many interpretations". Simon Chesterman spoke in a similar vein, arguing in turn that" the content of the term of "rule of law", then, remains contested across both time and geography. Analysis of its content often begins by parsing out formal and material understandings. Those theories that emphasize the formal aspects describe instrumental limitations on the exercise of the State authority; they tend to be minimalist, positivist, and are often referred to as «thin» theories distinguishing them from the "thick" theories that incorporate substantive notions of justice"[11]. Against this background, the voice of Paul Craig sounded even more skeptical, as he provided health warning to people interested in learning about the rule of law. As the author emphasized, an attempt to find an answer to the question of what the rule of law means is in fact impossible due to "a great difference

[10] *Ibidem*, pp. 34–15 together with the literature cited there.

[11] S. Chesterman, *An international Rule of Law*, "The American Journal of Comparative Law" 2008, No. 2, vol. 56, p. 340.

of views as to the meaning of the rule of law and its effects resulting from violating its very concept"[12].

The problem of normative ambiguity is particularly clear in relation to the principle of the rule of law in the European Union legislation. In this case, the attempt to decode the normative content is hampered by the lack of precise legal regulations and, on the other hand, by the multitude of documents relating to this issue. As for the latter, it should be noted that they are of a different nature, legal or political, and at the same time either use overly general phrases[13] or refer to individual cases related to the rule of law in a given Member State[14]. Certainly, it is impossible to speak of their normative transparency and it is difficult to unambiguously determine the full scope of the definition of the rule of law on the basis of them. These documents include, among others accession criteria for countries joining the European Union, reports and criteria established for the functioning of the cooperation and verification mechanism for Bulgaria

[12] P. Craig, *The Rule of Law*, [in:] *Relations between the executive, the judiciary and Parliament*, London 2007, pp. 87 and 97; quoted after J. Greń, *Zasada rządów prawa w polityce zewnętrznej Unii Europejskiej*, "Przegląd Prawa Konstytucyjnego" 2013, No. 2, p. 162.

[13] For example, in the above-mentioned conclusions of the European Council adopted on June 21 and 22, 1993 (the Copenhagen criteria), it was indicated when defining the conditions for the accession of countries aspiring to be a member of the European Union that "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union" – Presidency Conclusions Copenhagen European Council – 21–22 June 1993.

[14] In this case, a good example is the reports assessing the progress of work under the Cooperation and Verification Mechanism adopted when Bulgaria and Romania entered the structures of the European Union. These documents contain assessments made by the European Commission relating to legislative changes introduced in the legislation of both indicated countries and related to the area of the rule of law; see The reports assess progress under the Cooperation and Verification Mechanism, with judicial reform, the fight against corruption and, concerning Bulgaria, the fight against organized crime, available at: https://ec.europa.eu/info/policies/justice-and-fundamental- rights / upholding-rule-law / rule-law / assistance-bulgaria-and-romania-under-cvm / reports-progress-bulgaria-and-romania_pl [accessed on: 20 September 2021].

and Romania, rulings of the Court of Justice of the European Union, Commission Communication "A new EU framework to strengthen the rule of law", Communication from the Commission "Proposal: a Regulation of the Parliament Of the European Parliament and of the Council on the protection of the EU budget in case of generalized deficiencies as regards the rule of law in the Member States", "Rule of law checklist" issued by the Venice Commission, United Nations Rule of Law Indicators List, New EU framework to strengthen the rule of law, Regulation of the Parliament Of the European Parliament and of the Council on the protection of the Union's budget in case of generalized deficiencies as regards the rule of law in the Member States, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council on a general system of conditionality to protect the Union's budget, etc[15].

The above state of affairs must raise the question of the scope of the impact of such a capacious and legally undefined principle on the constitutional order of a Member State. It is a fact that, in accordance with the intentions of the authors of the Treaty on European Union, the rule of law, placed at the center of the axiological system of the Union, should emanate from countries aspiring to membership[16] and thus influence the effects of processes related to the shaping of their internal legislation. In this context, several issues emerge which undoubtedly deserve reflection. Firstly, it should be noted that the role of the European Union promoting the rule of law cannot in any case be to impose any specific system solutions with a predetermined content. In the area of establishing this type of regulation, the exclusive competence remains with the Member States, thus retaining the full right to decide on the constitutional architecture of their systemic systems. Looking from the point of view of the needs of this axiological promotion, such a situation

[15] Comp. M. Taborowski, *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej*, Warsaw 2019, pp. 61–62; More on this subject: T. Bingham, *The Rule of Law*, "Cambridge Law Review" 2007, No. 67, pp. 67–85.

[16] See K. Raube, M. Burnay, J. Wouters, *By way of introduction: the rule of law as a strategic priority for EU external action-conceptualization*, "Asia Eur J" 2016, 14:1–6.

generates far-reaching limitations of the causative possibilities of the activities of the EU institutions. Deprived of legislative instruments, these *nolens volens* institutions have to take into account the will of national legislators, and their task is at most to "score" elements of the constitutional order that violate the EU rule of law and possibly to formulate recommendations (using the available legal instruments, which will be discussed in later considerations). Under no circumstances do they have the possibility of making direct legislative interference in this matter, unless one of the states decides to transfer to the European Union its competences related to the establishment of systemic regulations. Secondly, it should be emphasized that in the absence of precisely formulated legal directives, but also in the face of a heterogeneous and constantly evolving practice, the scope of the impact of the EU institutions on the political systems of the member states does not, in fact, experience any such limitations. As a rule, it remains permissible to assess all solutions functioning within a given system, if only in a given case shortcomings in terms of the requirements of the EU rule of law are noticed. Thirdly, it is also right to emphasize that the validity of the rule of law applies to both countries aspiring to membership of the European Union, as well as those already part of it. The former – as shown in particular by the accession experience of the last twenty years – often have to meet a number of requirements, without excluding the need to undertake further reforms after joining the community (as was the case, for example, with Romania and Bulgaria[17]). Fourthly, and finally, it is worth adding that upholding the rule of law by the institutions of the European Union entails the difficulty of promoting the same standard in all Member States. If a deficit of this principle is found in one country, it should logically be stated in similar cases in other countries. After all, it is difficult to consider a situation where in individual Member States this principle is applied to a different extent and with varying intensity, allowing legal solutions incompatible with the requirements of the EU rule of law to be removed partially, and not throughout the

[17] This was served by the adopted in 2007 Mechanism for Cooperation and Verification (CVM).

entire Union. Unfortunately, however, the EU legislation does not provide any legal tools that would allow for a coherent and well-thought-out policy in this area. The practice of examining solutions and institutions that cause doubts in all countries where they occur has not developed either. However, we observe exactly the opposite approach – the assessment of the rule of law is by definition individual and limited to individual countries, and its effects are in no way later universalised in the pan-European dimension.

2. Normative limitations of the impact of the rule of law of the EU on the constitutional order of the Republic of Poland

Obviously, the constitutional order of the Republic of Poland is also influenced by the principle of the EU rule of law. This is expressed in the fact that the solutions functioning in our country must comply with this principle, and in the event of noticed shortcomings – they should be changed. Such an assumption, aimed at the good of the entire community, results from the obligations assumed by Poland, specified in the treaty provisions.

Of course, the phenomenon of the impact of the EU rule of law on the national constitutional order should be seen against the broader background of mutual interactions between EU law and domestic law. Such a cognitive perspective allows us to see real possibilities of harmonizing Polish regulations with the requirements of the European Union, as well as limitations related to this process. The latter, setting the limit of permissible interference of EU law, clearly show that the Republic of Poland has the status of a sovereign state, which gives it a certain decision-making autonomy in the law-making process. As a result, the decision on the possible establishment of certain solutions lies solely with the authorized state bodies.

The constitution in force in Poland should be regarded as the key limitation referred to above. The limiting role of this act results from the fact that, due to its position at the head of the hierarchy of sources of law in Poland, it prevents the introduction of

regulations inconsistent with its content, even if they were an expression of the development of the principle of the EU rule of law. Such a state of affairs is determined by the principle of the supremacy of the Constitution included in the Constitution, the content of which is directed to the bodies creating the law, the prohibition of establishing norms contrary to constitutional regulation (the so-called negative aspect of supremacy) and the order to specify and develop (implement) the provisions of the Constitution (the so-called positive supremacy)[18]. This principle, when viewed from the national perspective, leaves no doubt as to the primacy of constitutional regulations over the EU[19]. The consequence of its application is, among others the existence of a specific relationship between the principle of the rule of law expressed in the provisions of the Polish constitution and in the treaties. As we have already noted, both of these principles are by definition autonomous and both operate in parallel in the Polish legal order. Taken together, they set the normative standard of the rule of law functioning in our country, creating a specific conglomerate of its national and EU components. Basically, the coexistence of the principles indicated should be based on balance and harmony, because ultimately, no matter how you look, both of them coincide with each other in terms of content, and they mean the same to a large extent. In some situations, however, it is not possible to exclude a conflict between them, and therefore controversy in assessing which standard – national or the EU one – has priority in a given case. The solution to this dilemma is brought by the aforementioned concept of the supremacy of the Constitution, which unequivocally favors the national rule of law. Its adoption means that it is impossible to adjust national solutions to the

[18] M. Granat, *Pojęcie i przedmiot prawa konstytucyjnego*, [in:] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2001, p. 24.

[19] This applies not only to Poland, but also to many other European countries, where, due to the supremacy of constitutional norms, any collisions between them and the EU norms are removed either by refusing to apply unconstitutional norms or by changing the constitution; B. Banaszak, *The principle of supremacy of the Constitution in the Polish legal order*, [in:] M. Jabłoński, S. Jarosz-Żukowska, *The principle of primacy of European Union law in the practice of public authorities of the Republic of Poland*, Wrocław 2015, p. 46.

requirements of the EU rule of law, if they would be in conflict with the rule of law specified in the fundamental law of the Republic of Poland. With reference to the above thread, it cannot be omitted that the thesis about the superior relationship of the Constitution does not correspond to the principle of the primacy of the EU law formulated by the Court of Justice of the European Union. The latter, functioning in the Luxembourg jurisprudence for a long time, also exposed directly in the context of disputes with Poland, completely changes the approach to the problem. According to which, it is the EU regulations that enjoy a privileged position and stand above the constitutional order adopted in the Member States, despite the fact that the primacy referred to here has not been proclaimed by the Treaty establishing the European Communities or the Treaty on European Union (it is mentioned only in Declaration No. 17 annexed to the Treaty on European Union). Without going into a deeper analysis, it is worth noting that this direction of thinking is based on a number of different arguments. Perhaps most importantly, the belief that "Without primacy, one can hardly say that the Union's legal order produces legal certainty or is based on the rule of law; if a national court can unilaterally set aside law, whenever and whatever grounds, the EU citizens and other rights holders cannot effectively know what their legal position is"[20]. Looking from the perspective we are interested in here, this principle breaks the paradigm of thinking about national constitutionalism, leading to its depreciation. For if we take it at face value, then one should recognize the inferiority of the latter to European constitutionalism[21], and consequently accept the statement that "national constitutionalism is simply a contextual representation of constitutionalism whose dated and artificial borders are challenged by European

[20] T. Tuominen, *Reconceptualizing the Primacy – Supremacy Debate in EU Law*, "Legal Issues of Economic Integration" 2020, No. 3, vol. 47, p. 245.

[21] If it is even justified to use this concept in the absence of an act having the rank of a European constitution. In Polish literature on the "European constitutional space" writes: J. Szymanek, *Europejska przestrzeń konstytucyjna*, [in:] *Ustroje. Tradycje i porównania. Księga jubileuszowa dedykowana prof. dr. hab. Marianowi Grzybowskiemu w siedemdziesiątą rocznicę urodzin*, eds. P. Mikuli, A. Kulig, J. Karp, G. Kuca, Warsaw 2015, pp. 110–112.

constitutionalism. In themselves, constitutional ideals are not dependent on nor legitimized by the borders of national polities. As a consequence, there is often no a priori claim of higher validity for national constitutionalism vis-à-vis European constitutionalism"[22]. The fact that this is the wrong direction of understanding the relationship between the domestic and the EU legal order is confirmed by the jurisprudence and doctrine, which for years have been dominated by the view that unequivocally supports the supremacy of the Polish Constitution[23] (although opposing views are encountered in this respect). As far as the case law is concerned, the thesis expressed in the judgment of the Constitutional Tribunal of May 11, 2005, according to which "Poland's accession to the European Union has not undermined the primacy of the Constitution over the entire legal order in the area of the sovereignty of the Republic of Poland, is unequivocal. The norms of the Constitution, as the supreme act expressing the sovereign will of the Nation, would not lose their binding force, nor would they be changed by the mere fact of irremovable contradiction to certain Community regulations. If such a contradiction occurred, it would be up to the sovereign Polish legislator to make a decision on the method of its solution, including consideration of the purposefulness of changing the Constitution itself", and also that "The concept and model of Community law created a new situation in which two autonomous legal orders. Their interaction cannot be fully described with the help of the traditional concepts of monism and dualism in the system: internal law – international law. The existence of a relative autonomy of both legal orders (national and community) does not mean that they do not interact with each other. It also does not eliminate the possibility of a conflict between Community law and the Constitution. The

[22] J.H.H. Weiler, *In defence of the status quo: Europe's constitutional Sonderweg*, [in:] *European Constitutionalism beyond the State*, eds. J.H.H. Weiler, M. Wind, Cambridge 2003, p. 7, spéc. p. 74.

[23] Not only in Poland, but also in other EU countries, where "the opposition of the national courts against unlimited acceptance of the primacy of Community law has been observed for a long time"; see: R. Kwiecień, *The Primacy of European Union Law over National Law Under the Constitutional Treaty*, "German Law Journal" 2005, No. 11, vol. 06, p. 1486.

above-mentioned conflict would arise if there was an irremovable contradiction between a constitutional norm and a norm of Community law – a contradiction that cannot be eliminated by applying an interpretation respecting the relative autonomy of European law and national law. Under no circumstances may such a collision be resolved by recognizing the supremacy of a community norm over a constitutional norm. Nor could it lead to the loss of binding force of a constitutional norm and its replacement by a Community norm, or to limiting the scope of application of a constitutional norm to an area not covered by the regulation of Community law. In such a situation, the Nation, as a sovereign or body of state authority constitutionally authorized to represent the Nation, would have to decide either to amend the Constitution, or to introduce changes in Community regulations, or – ultimately – to withdraw Poland from the European Union"[24]. On the other hand, when it comes to doctrine, the view of M. Romanowski and J. Szymanek is particularly eloquent, and at the same time formulated in an unambiguous way, which indicates four basic reasons for the necessity to grant supremacy to the Polish Constitution. Its authors emphasize that "Such an approach should, however, be assessed as a hyperbole of the pro-EU interpretation of the constitution, and above all, a failure to perceive four key circumstances. Firstly, that the narrowly understood principle of constitutionalism merely confirms the ontological status of the constitution as a fundamental law, which means that a change in understanding this principle *mutatis mutandi* must lead to the questioning of the constitutional status of the constitution. Secondly, that the principle of constitutionalism and the principle of favoritism towards international law are usually two parallel constitutional principles and it is difficult to speak of a relationship of subordination or dependence in their case. Thirdly, that within European integration the processes of conferral of competences are regulated precisely at the constitutional level and treated, after all, as an

[24] The judgment of the Constitutional Tribunal of 11 May 2005, K 18/04; this thesis was accepted in another ruling: the judgment of the Constitutional Tribunal of 24 November 2010, K 32/09; See also: The judgment of the Constitutional Tribunal of October 7, 2021, file ref. K 3/21.

exception and not a rule (which is manifested in the so-called integration clauses). Fourthly, that the legislators, aware of the ongoing processes of internationalization of law, often supplement the principle of constitutionalism with the requirement of compliance of the introduced international (EU) law with the constitution"[25].

The binding treaty provisions are another factor limiting the scope of the EU rule of law's impact on the Polish constitutional order. I am talking here specifically about Art. 4 sec. 2, proclaiming the principle of constitutional identity of the member states and art. 5 sec. 2 and 3 of the Treaty on European Union, creating the principle of conferral of competences. Both of these regulations define the sphere of competence of the EU institutions, highlighting the boundary between what the EU can and cannot do in relations with other member states.

The qualification of the principle of constitutional identity on the side of the restrictions indicated here results from the fact that the provision constituting it was conceived from the beginning to protect the Member States against unauthorized interference of the EU decision-making centers, but also – looking à *rebours* – to guarantee these states the sphere of constitutional autonomy. Thanks to it, the deepening of the process of European integration, resulting from the nature of the EU as an international organization, is to proceed in a harmonious manner, with the aim of strengthening the systemic and institutional ties linking the EU with the Member States, but at the same time with full respect for their constitutional separateness. Looking from this perspective, it can be concluded that Art. 4 sec. 2 TEU is a regulation that allows searching for a safe balance between the dynamics of development tendencies aimed at building the legal and political subjectivity of the uniting EU and the natural need of the states that form it to maintain the independent structures of

[25] M. Romanowski, J. Szymanek, *Zasada konstytucjonalizmu jako wyraz tożsamości konstytucyjnej państw członkowskich Unii Europejskiej*, [in:] *Constitutional identity and UE axiology – perspective of Central European States*, ed. G. Pastuszko, Warsaw 2021, See also B. Banaszak, *Komentarz do art. 8*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komenatrz*, Warsaw 2009, pp. 62–66; M. Florczak-Wątor, *Komentarz do art. 8*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warsaw 2019, pp. 48–49.

their statehood. It is therefore – as it should be assumed – a kind of "shock absorber" of integration processes (hence we can call it a "depreciation clause"), making it possible to avoid or at least mitigate possible conflicts and tensions in relations between the EU decision-makers and national authorities.

Another thing is that the effectiveness of the protection resulting from the clause in question is reduced by its unclear, low-precision content. In this respect, the opinions of the doctrine are significant, which clearly shows that the concept of constitutional identity, due to its capacity, can be interpreted in various ways and in different contexts[26]. The dilemmas that arise here are well reflected in the words of Vladan Petrov, who explicitly states that "The concept of constitutional identity is extremely indeterminate, vague, and sometimes confusing. When reading about constitutional identity, it gives us the impression that not even the best experts on this concept are entirely sure about what is the 'minimum' that it has to encompass". In making this conclusion, the author asks several questions aimed at facilitating the determination of what constitutional identity is: "is the constitutional identity more than just a norm that defines the carrier of the sovereignty (people, nation, citizens); can constitutional identity be found only in constitutional tradition; is the constitutional identity composed of all or only basic constitutional principles and values; if the latter, then what is a 'minimum of the identity'; when and why changes to constitutional identity happen and what needs to be changed so that we can discuss the new identity; if the 'autobiographical' part is the essential part of the identity of every constitution, is it even possible to talk about European constitutional identity when 'Europe' does not have a constitution,

[26] On the problems related to the interpretation of the concept of constitutional identity see among others: M. Rosenfeld, *Constitutional identity*, [in:] *Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012, p. 757; A. Śledzińska-Simon, *Koncepcja tożsamości konstytucyjnej: wymiar indywidualny, relatywny oraz zbiorowy*, "Acta Universitatis Wratislaviensis", No. 3744, "Przegląd Prawa i Administracji" CVII, Wrocław 2016, pp. 335–336; K. Kovács, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, "German Law Journal" 2017, 18, p. 1706.

etc.? Each one of these questions deserves to be given special attention, so they will not be discussed in detail here"[27].

Regardless of the problem indicated above, it should be remembered that the principle of constitutional identity is used by the Polish constitutional court as a shield against unauthorized interference of the EU legislation. Its jurisprudence clearly reveals the thesis that there is a constitutional minimum of principles and values that are left to the exclusive regulatory competence of national state bodies. In making such a case, the Tribunal unambiguously refers to one of the possible interpretative concepts of the concept of constitutional identity, based on the assumption that this identity covers the systemic rudiments of a democratic state[28]. At the same time, it expresses the conviction about the need to maintain the axiological integrity of the norms contained in the constitution, which – as the doctrine rightly emphasizes – should be based on a coherent and holistic system of values (only then can the collision between individual values be effectively resolved and, as a result – can be also ensured effective implementation of constitutional norms)[29]. To this end, it additionally proposes to include the aforementioned constitutional minimum with the prohibition of conferring competences on the European Union. In its ruling, we read specifically: "The Constitutional Tribunal shares the view expressed in the doctrine that the competences subject to the prohibition of conferral constitute constitutional identity, and thus reflect the values on which the Constitution is based […]. Thus, constitutional identity is a concept that delineates the scope of "the exclusion from the competence to transfer matters belonging […] to the" hard core", cardinal to the foundations of the system of a given state" […], the transfer of which

[27] V. Petrov, *European versus national constitutional identity in the republic of serbia – a concurrence or unity?*, *Constitutional identity and UE axiology – perspective of Central European States*, ed. G. Pastuszko, Warsaw 2021,

[28] G.J. Jacobsohn, *Constitutional Values and Principles*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012.

[29] M. Piechowiak, *W sprawie aksjologicznej spójności Konstytucji RP. Dobro wspólne czy godność człowieka?*, [in:] *Jednolitość aksjologiczna systemu prawa w rozwijających się państwach demokratycznych Europy*, ed. S.L. Stadniczeńko, Opole 2011, p. 111.

would not be possible under Article 90 of the Constitution. Difficulties related to establishing a detailed catalog of non-transferable competences, should be included among the matters covered by the total prohibition of transferring of the provisions specifying the main principles of the Constitution and provisions on the rights of the individual that define the identity of the state, including in particular the requirement to ensure protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better implementation of constitutional values and the prohibition of transferring the constitutional power and competence to create competences […]"[30].

3. Rule of Law Treaty Procedures Used Against Poland

An instrument that gives the possibility of influencing the Polish constitutional order by the EU institutions are the procedures regulated in Art. 7 of the Treaty on European Union. This is due to the fact that their use may be connected with examining the state of the rule of law in a Member State (in line with the general assumption, the scope of this survey covers all the values listed in Art. 2 of the Treaty on European Union), i.e. with the assessment and possible attempt to change its existing legal order of systemic solutions.

The aforementioned provision provides for two separate procedures which, as a rule, form an integral whole, although there are no obstacles to starting them separately[31]. The first gives the Council the right to find a clear risk of a serious breach by a Member State of the rule of law by a majority of 4/5 of its members, with the prior consent of the European Parliament (Art. 7 (1)). Its launch belongs

[30] Judgment of the Constitutional Tribunal of 24 November 2010, K 32/09.

[31] K.L. Scheppele, L. Pech, *Is Article 7 Really the EU's "Nuclear Option"?, Verfassungsblog of matters constitutional*, 06.03.2018, available at: https://verfassungsblog.de/is-article-7-really-the-eus-nuclear-option/ [accessed on: 15 September 2021].

to a group of 1/3 of the Member States, the European Parliament or the European Commission, which must submit a special request for this purpose. Such a request is directed to the Council, which will carry out checks. Before taking a final decision, the Council hears the Member State concerned and, if necessary, makes recommendations to it (Art. 7 (1)). The second procedure goes one step further (hence it is called the "nuclear option"), as it gives the Council the opportunity to find a serious and persistent breach by that state of the values set out in Art. 2 of the Treaty on European Union. In this case, the initiative is in the hands of 1/3 of the Member States or the European Commission. Upon receipt of the request, the Council invites the Member State to submit its observations. The final decision on the matter is taken by unanimity, after obtaining the consent of the European Parliament (Art. 7 (2)). This stage paves the way for a qualified majority resolution to suspend certain rights under the Treaties for that Member State, including the voting right of the representative of its government in the Council (referred to in the literature as "moral quarantine"[32]); In doing so, the Council takes into account the possible effects of such a suspension on the rights and obligations of natural and legal persons (Art. 7 (3) TEU). The cessation of the violation of EU values creates grounds for a decision to repeal the indicated measure. The Council may adopt it by qualified majority in the event of changes in the situation which led to its establishment[33] (Art. 7 (5) TEU). The procedure governed by Art. 7 of the Treaty on European Union, an additional mechanism is "superimposed", devoted *sensu stricto* to the examination of the rule of law in the Member States. It was introduced by the European Commission under the influence of demands made by some European countries in relation to the situation in Hungary, which took place in March 2014 under the Commission's Communication "A new EU framework to strengthen the rule of law"[34]. This mecha-

[32] J.W. Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, "Eropean Law Journal" 2014, No. 2, vol. 21, p. 7.

[33] See: Ł.J. Pikuła, *Aksjologia Unii Europejskiej w świetle źródeł, wykładni i instytucji*, Toruń 2015, pp. 95–99.

[34] European Commission, Communication from the Commission to the European Parliament and the Council. A new EU framework to strengthen the rule

nism created conditions for a dialogue between the Commission and a Member State, which gave the opportunity to work out a solution to prevent the occurrence or development of a systemic threat to the rule of law in that country. For this reason, a three-stage negotiation process is foreseen, followed, in the event of an unsatisfactory result, by launching the procedure set out in Art. 7 sec. 1 of the Treaty on European Union[35].

It should be remembered that Poland was the first country to which Art. 7 in practice. The request in this regard was submitted by the European Commission on December 20, 2017, thus opening the way for further action. Importantly, it was only decided to launch the first of the procedures, which included conducting a dialogue, monitoring the state of the rule of law and formulating recommendations. On the other hand, the second procedure was abandoned, assuming that under the existing political conditions it has no chance of success.

Without going into detailed considerations on the course of the implementation of this process, which in principle continues to this day, it should be noted that despite the recommendations made (they concerned various aspects of changes in the law regulating the functioning of the judiciary), it did not persuade the Polish authorities to make concessions, but only resulted in complaints prepared by the Commission with the Court of Justice of the European

---

of law, 11 March 2014, COM (2014) 158 final, available at: http://eurlex.europa.eu/legal-content/PL/ TXT /? Uri = celex: 52014DC0158 [accessed on: 20 July 2020].

[35] A. Grzelak, *Ramy prawne na rzecz umacniania praworządności. Uwagi na tle wniosku Komisji Europejskiej z 20 grudnia 2017 r.*, "Sprawy Międzynarodowe" 2018, No. 2, p. 223; see also: the negative opinion of the legal service of the Council of the EU on the compliance of the European Commission Communication on a new EU framework to strengthen the rule of law with the Treaties, No. 10296/14, Brussels 27 May 2014 r., pp. 5 and 7, available at: http://data.consilium.europa.eu/doc/document/ST-10296-2014-INIT/pl/pdf [accessed on: 20 July 2020], see also: a critical analysis of the solutions proposed by the European Commission: J. Prostak, *Nienaruszalność unijnego systemu wartości jako* żywotny *interes Unii Europejskiej* – krytyczna analiza mechanizmu egzekucji postanowień art. 2 Traktatu o Unii Europejskiej, "Zeszyty Naukowe. Uniwersytet Ekonomiczny w Krakowie" 2017, No. 7, pp. 94–97.

Union. Obviously, this was due to the findings made in the course of the inspection activities[36]. This state of affairs sparked criticism among the representatives of legal science, in which the attention was drawn to several problems emerging here. Firstly, the issue of limited possibilities of examining the state of the rule of law by the EU institutions was raised. D. Kochenov, L. Pech pointed out here that the treaty in its present form "[…] leaves the EU with an extremely limited set of legal tools to address systemic violations of the EU values at national level"[37]. Secondly, the problem of low effectiveness of the existing procedures was also signaled, including the problem of the lack of real causative possibilities on the part of the EU institutions. Barbara Grabowska-Moroz and Małgorzata Szuleka wrote eloquently on this subject, noting in the context of disputes with Poland that "[…] in the absence of the Polish government's will to break the current constitutional impasse, any structural dialogue conducted on the international arena may prove ineffective. Regardless of whether the conduct of the rule of law review procedure for the first time will dispel doubts related to it and allow the practice to be cemented, the key to solving the Polish constitutional crisis lies with the government. In other words, the answer to the question of whether the rule of law procedure will be an effective drug or a placebo depends on whether the patient himself wishes to undergo treatment"[38]. Robert Grzeszczak spoke in a similar vein, also stressing the lack of effects of the actions taken by

[36] See: *Skarga przeciwko Polsce skierowana do TSUE. Jest decyzja Komisji Europejskiej*, "Dziennik Gazeta Prawna", 24.09.2018, available at: https://prawo.gazetaprawna.pl/artykuly/1272926,zdecydowala-o-skierowaniu-skargi-do-trybunalu-sprawiedliwosci-ue-przeciwko-polsce.html [accessed on: 14 September 2021]; see also: *Komisja Europejska kieruje do TSUE następną sprawę przeciwko Polsce*, "Dziennik Gazeta Prawna", 23.09.2021, available at: https://serwisy.gazetaprawna.pl/telekomunikacja/artykuly/8253406,ke-tsue-sprawa-przeciwko-polsce.html [accessed on: 13 September 2021].

[37] D. Kochenov, L. Pech, *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction*, EUI Working Paper RSCAS 2015/24, p. 4.

[38] B. Grabowska-Moroz, M. Szuleka, *Unijna procedura kontroli praworządności – panaceum czy placebo? Unijna procedura kontrolipraworządności – panaceum czy placebo?*, Warsaw 2016, p. 23.

the European Union in practice. In his opinion, "The main problem of soft and hard mechanisms is that they duplicate both in mileage and in terms of their assumptions. Due to the low probability of launching sanctions under Art. 7 sec. 3 TEU, the only EU mechanism for controlling states is issuing recommendations which – as the practice so far shows – are ignored and not effective" [39]. Thirdly, the threats posed by the application of Art. 7, pointing mainly to the risk of an increase in europsceptic moods and the related political consequences. According to the authors mentioned above – Barbara Grabowska-Moroz and Małgorzata Szuleka, the procedure, where the European Commission has such a strong position, may "[…] become a breeding ground for the anti-EU narrative undertaken by the governments of the Member States covered by the procedure"[40]. Robert Grzeszczak made a similar statement. According to him, "As a result, the unsuccessful conduct of the soft procedure indicates that also in the procedure under Art. 7 TEU, it will not be possible for the parties to develop a "constructive dialogue", and the continuation of the procedures may be counterproductive, i.e. instead of restoring the standards of the rule of law – an increase in Eurosceptic sentiment. It cannot be ruled out that a state affected by the indicated sanctions may take some kind of retaliation under international law. It is possible, although difficult in practice, that the status of the EU law in the sanctioned state will be lowered"[41].

The above observations, undoubtedly correct, lead to a question about the legitimacy of maintaining the procedures specified in Art. 7. The case of their use against Poland shows perfectly well that the provisions so conceived do not meet the intentions of their authors, and sometimes they may even be harmful to the functioning of the European Union as an organization based on dialogue and solidarity. Perhaps, therefore, those who take the position of changing treaty provisions and removing the discussed mechanisms are right. Such a decision would deprive the European Union of the temptation to interfere in the internal affairs of the Member States,

[39] R. Grzeszczak, *op. cit.*, p. 49.
[40] B. Grabowska-Moroz, M. Szuleka, *op. cit.*, p. 21.
[41] R. Grzeszczak, *op. cit.*, p. 49.

which would be ineffective and at the same time ruin its image. It seems that it would help to avoid tensions that may harm the deepening of the process of the European integration in matters important to all residents of the community. After all, "Depriving the Commission of the role of «teacher» of ethics will have no consequences for respecting the values in individual countries, since its previous attempts to educate were simply ineffective"[42].

4. Regulation on the general system of conditionality to protect the Union budget

In the catalog of instruments of influence by the European Union on the constitutional order of the Republic of Poland, an important place is occupied by the conditionality mechanism specified in the regulation on the general system of conditionality serving the protection of the Union's budget[43]. This mechanism, introduced on 16 December 2020, is a normative reflection of the concept of making the payments of EU budget funds conditional on respect for the rule of law by the Member States, which has been discussed over a longer period. The assumption is "[…] the culmination of a reflection aimed at furnishing the Union's financial instruments in the service of respect for the rule of law […]" and at the same time "[…] aims precisely to facilitate the exercise of financial pressure on Member States which do not respect the rule of law"[44]. It should be noted that some representatives of the doctrine have high hopes

[42] P. Musiałek, *Szkodzi Unii, ale Polska poniesie jego naprawdę dotkliwe konsekwencje. Wszystko, co musisz wiedzieć o artykule 7 TUE*, Analiza Klubu Jagielońskiego – Państwo na poważnie, Warsaw, 5.01.2018 r., available at: https://klubjagiellonski.pl/2018/01/05/szkodzi-unii-ale-polska-poniesie-jego-naprawde-dotkliwe-konsekwencje-wszystko-co-musisz-wiedziec-o-artykule-7-tue/ [accessed on: 16 September 2021].

[43] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

[44] *Nouveau rebondissement* (*attendu*) *dans la saga du respect de l'État de droit par la Hongrie et la Pologne*, "Le Premier Think Tank juridique français", 09.04.2021, available at: https://blog.leclubdesjuristes.com/nouveau

for the new institution, considering that it may be a long-awaited "effective weapon" in the fight for the rule of law[45]. However, they do exist and such people are very skeptical about this idea. In their opinion, the adoption of such restrictive provisions regulating the imposition of sanctions on member states collides with the idea of cooperation between states, which involves seeking a compromise and weighing common interests[46], which exposes the Union to disintegration processes.

Pursuant to the intention of the drafters of the Regulation (EU, Euratom) 2020/2092 a general regime of conditionality for the protection of the Union budget is based on Article 322 (1) (a) of the Treaty on the Functioning of the European Union, the regulation "containing financial provisions, authorizes the European Parliament and the Council to adopt regulations or procedures for establishing and implementing the Union budget"[47]. Such a rationale of the act in question may, however, raise doubts, as the indicated provision is in no way related to Art. 7 of the Treaty on European Union. This leads to the conclusion that the authors of these provisions wrongly assumed that the new solutions could be based on the applicable treaty provisions[48]. As emphasized in the legal opinion prepared by the Ordo Iuris Institute, "[…] the adopted regulatory proposal is in violation of the powers granted to the European Union, which is not authorized to interfere in matters reserved to

-rebondissement-attendu-dans-la-saga-du-respect-de-letat-de-droit-par-la-hongrie-et-la-pologne-par-romain-tiniere/ [accessed on: 29 september 2021].

[45] R.D. Kelemen, K.L. Scheppele, *How to Stop Funding Autocracy in the EU*, VerfBlog, 10.09.2018, available at: https://verfassungsblog.de/how-to-stop-funding-autocracy-in-the-eu/ [accessed on: 29 September 2021]; In the literature, you can find other voices approving the indicated idea; see: G. Halmai, *The Possibility and Desirability of Rule of Law Conditionality*, "Hague Journal on the Rule of Law" 2019, No. 11, vol. 11, p. 188.

[46] J.W. Muller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, "European Law Journal" 2015, No. 2, vol. 21, pp. 141–160.

[47] J. Łacny, *The Rule of Law Conditionality Under Regulation No 2092/2020 – Is it all About the Money?*, "Hague Journal on the Rule of Law" 2021, No. 13, p. 89.

[48] Comp. A. Wyrozumska, *Porozumienie w sprawie rozporządzenia "pieniądze za praworządność" może okazać się skuteczne*, "Monitor Konstytucyjny", 22.12.2020, available at: https://monitorkonstytucyjny.eu/archiwa/16650 [accessed on: 25 September 2021].

sole discretion of its Member States, which include, in particular, the judicial system. The EU treaties clearly define the catalog of EU powers and there is no judicial system among them (Art. 3, 4, 6 of TFEU), except power to facilitate access to justice (Art. 67 (4) TFEU). Moreover, the adopted proposal for a regulation infringes the principles of international law by attempting to force through a mechanism that is inconsistent with the treaties adopted by all Member States. The TFEU states that unanimity from the rest of the countries is required to impose sanctions. If a lower requirement were to be set, the relevant provision in the Treaty would have to be first changed. Finally, the introduction of the proposed regulation may change the paradigm of the EU, which will formally dictate to sovereign states the norms of universally binding law"[49].

Following the already well-worn trail of analogous acts from the past, in Art. 1 the regulation establishes legal definition of the concept of the rule of law, which – as it is so aptly noted in the doctrine – is relatively thick[50]. Referring explicitly to Art. 2 of the Treaty on European Union, it includes several minor principles that the legislator sees as the "core" of the rule of law. Specifically, they are: legality, legal certainty, the prohibition of executive arbitrariness, effective judicial protection, separation of power, non-discrimination, and equality before the law. However, this list is not exhaustive and is limited to the principles of a fundamental nature. Such a conclusion suggests the clear intention of correlating the concept of "rule of law" with Art. 2 of the Treaty on European Union, while placing it in an interpretative context determined by other values and principles declared in this regulation. As it can be assumed, such a normative figure opens up the possibility of a very flexible interpretation of the category of "rule of law" and thus creates grounds for highly

[49] *Opinion of Ordo Iuris Institute in regard of proposal for a regulation on a new general regime of conditionality to protect the EU budget*, p. 4, available at: https://ordoiuris.pl/sites/default/files/inline-files/Opinion_of_Ordo_Iuris_Institute_in_regard_of_proposed_rules_on_conditionality_regime_and_judiciary_reforms_in_Poland.pdf [accessed on: 23 September 2021].

[50] N. Kirst, *Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?*, "European Papers" 2021, No. 1, vol. 6, p. 106.

arbitrary decisions. Hence, it cannot be ruled out that in addition to those mentioned in Art. 1 of the Principles Regulation, the meaning of the term "rule of law" will also include other principles, more or less related to the rule of law, such as e.g. the principle of trust in the stability of the legal situation, the principle of proportionality, the right to good administration, etc. What is more – it is also impossible to remove the risk that when determining what the rule of law is, the interpreting subject will even resort to extra-legal assessments, even those that have ideological or political character.

This definition is additionally supplemented by the directive contained in Art. 3, which indicates the potential directions (it is not a complete enumeration) of the application of the provisions of the Regulation. From this, it is clearly visible in which cases the EU institutions will be able to apply financial pressure to the Member States. In particular, these are: threats to the independence of the judiciary, failure to prevent arbitrary or unlawful decisions by public authorities, including law enforcement authorities, limiting the availability and effectiveness of remedies, including through restrictive procedural rules, failure to execute judgments or limiting the effective investigation, prosecution or punishment of break the law.

The provisions of the Regulation are applicable when the following "[…] breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way" (Art. 4 (1)). The regulation formulated in this way clearly shows that the project initiator uses the means of making the text of a normative act more flexible, and as a result gives the authorities authorized to investigate the reported violations – in this case the European Commission – a wide range of decision-making leeway when formulating the assessment of the legal status existing in a given Member State or actual. Under the terms of its validity, these institutions will be able to arbitrarily determine what constitutes a "serious" threat to the interests of the EU and what constitutes a "sufficiently sufficient threat" to them. In both cases, we deal with solutions that "blur" the requirement to identify the "directness" of threats, causing that indicating what is such a threat and what is not will sometimes be subject to the risk

of interpretative relativization. In such a state of affairs, it is difficult to state unequivocally what specific normative content is behind the analyzed formulation. It can only be assumed that the European Commission recognizing these threats will have to prove the direct impact of phenomena violating the rule of law on the method of allocating funds from the EU budget in Poland by indicating specific facts, although without the need to use clearly defined criteria, but only on the basis of its findings (e.g. on the basis of the assessment of legislative work launched but not completed in a Member State, existing legal provisions, announced or taken actions of specific state and local government bodies, etc.).

It should be noted that the regulation in question is so broadly and flexibly formulated that it is generally difficult to determine in advance how and when indicating what kind of facts the European Commission – being the *spirit movens* of actions taken at the EU level – would prove the violation of the rule of law and the resulting impact on sound financial management of the EU budget or the protection of the Union's financial interests, possibly resulting in serious risks to that management or those interests. In particular, it does not follow that the procedures initiated under the regulation must be closely related to a single case or individual cases, which means that in this respect there is full discretionary power of the Commission[51]. This belief is also confirmed by the provisions regulating the scope of admissible and, in part, necessary evidence used to investigate violations of the rule of law by the European Commission (as the body initiating this process). In Art. 5 sec. 2–5 of the regulation we find: first, a generally defined directive, according to which the Commission should take into account relevant information from available sources, including, inter alia, decisions, conclusions and recommendations of EU institutions as well as other important international organizations and recognized institutions; Second, the legal obligation to read the information and observations submitted by a Member State. It clearly follows that any evidence gathered in the course of the proceedings is subject to the free assessment of the Commission, which makes its final position in the case highly

[51] N. Kirst, *op. cit.*, p. 110.

subjective and arbitrary; this means that the commission may even refer to very loosely related facts and cause-and-effect relationships of specific events.

The method of regulating the financial sanctions mechanism is a separate issue. This problem is referred to in Art. 5, which specifies, inter alia, legal forms of these sanctions and the procedural actions of the European Commission required in this matter. What draws attention here is the deficit of clear decisions as to the permissible scope of application of sanctions, and therefore as to what specific consequences will entail recognition of a violation of the rule of law by a given Member State. In this respect, there are no clear and unambiguous evaluation criteria (hence it seems reasonable to introduce changes in the future). Instead of them in the paragraph. 3 of the regulation, the initiator introduces a generally defined clause which states that "The measures taken must be proportional. They are defined in the light of the actual or potential impact of breaches of the rule of law on the sound financial management of the EU budget or the financial interests of the Union. The nature, duration, gravity and extent of breaches of the rule of law will be duly taken into account. As far as possible, the measures relate to the activities of the Union concerned by the infringement. The vague phrases appearing here, such as 'potential impact of breaches of the rule of law on the sound financial management of the EU budget or the financial interests of the Union', 'proportionality of the measures used', 'due regard to the nature, duration, gravity and extent of the breach of the rule of law', and finally 'linking the measures as far as possible with these infringements' leave no doubt that the Regulation gains a very discretionary power on the basis of the Regulation to determine how a given Member State is to be penalized. Hence it follows that it can block both part and all of the specified funds. As it results from the previous considerations, the body with the right to initiate the control procedure is the European Commission, which has a very wide discretion in this regard (it plays the role of the "negative legislator"), although – as indicated in the recitals of the regulation – it should be guided by the principles of objectivity, non-discrimination and equal treatment of Member States and should be conducted according to a non-partisan and

evidence-based approach (point 26). The Commission takes its actions when, in its opinion, the conditions for violation of the rule of law set out in the regulation are met. In that event, it shall send the Member State concerned, unless it considers that other procedures laid down in Union legislation would have enabled it to protect the Union budget more effectively, a written notification stating the factual elements and the specific reasons on which it has based its findings. In addition, it also informs the European Parliament and the Council without delay of the notification made (Art. 6 (1)). In making its findings, the Commission shall take into account relevant information from available sources, including decisions, conclusions and recommendations of the Union institutions, other relevant international organizations and other recognized institutions (Art. 6 (3)). It may also request additional information necessary to carry out the assessment, both before sending written notification (Art. 6 (4)). The Member State concerned shall provide the requested information and may comment on the findings of the notification specified by the Commission within a period of at least one month and no more than three months from the date of notification of the findings. In its comments, the Member State may propose that remedial measures be adopted to the findings in the notification to the Commission (Art. 6 (5)). If the Commission considers that the conditions set out in the Regulation are met and any remedial measures proposed by the Member State are not adequate with regard to the findings in the Commission's notification, it shall submit to the Council a proposal for an implementing decision on appropriate measures. The proposal provides specific reasons and evidence to support the Commission's findings (Art. 6 (9)). The Council adopts an implementing decision within one month of receiving the Commission's proposal. In exceptional circumstances, the period for the adoption of this implementing decision may be extended by a maximum of two months (Art. 6 (10)). The Council, acting by qualified majority, may amend the Commission proposal and adopt the amended text by means of an implementing decision (Art. 6 (11)). The Member State concerned may at any time adopt new remedial measures and submit a written notification to the Commission containing evidence showing that the rule of law has

been re-established (Art. 7 (1)). In reacting to this, the Commission has the right to conclude that: the situation has been remedied in full, in part or not at all. Depending on the adopted position, a decision is made to – accordingly – repeal the measures, adjust the adopted measures, and take further action (the applicable provision does not specifically regulate this – (Art. 7 (2)).

In the regulations presented above, it is noteworthy that they do not oblige the Commission to act in relation to all Member States, where the legal solutions questioned on the basis of EU legality are in force, but they give it a free choice in this respect. As a result, the scenario of applying the provisions of the Regulation in a selective and arbitrary manner, without taking into account any objective criteria, becomes likely. Such a situation must raise doubts, as it creates a risk of tensions and friction in the relations between the European Union and its members. For this reason, if the regulation in question is considered an appropriate instrument at all, one should consider introducing into its content provisions imposing on the Commission an obligation to automatically initiate a control procedure in relation to all countries with an identical or similar legal status. As one can assume, only such an approach guarantees that the actions of the European Commission in this field will not be perceived as a political action directed against a specific country.

5. Judgments of the Court of Justice of the European Union and their impact on shaping the Polish constitutional order

Yet another instrument by which the European Union tries to influence the shape of the state system in Poland are judgments issued by the Court of Justice of the European Union. Such observations are provided by the jurisprudence developed in recent years in the context of the dispute over reforms related to the domestic justice system. The theses formulated therein show the Tribunal's clear conviction that it is permissible to challenge the compliance with European law of the regulations governing this area and, consequently, the possibility of refusing to apply domestic norms, both

constitutional and sub-constitutional, by an authority. The Luxembourg court therefore unequivocally recognizes its competence to pronounce judgment on these matters.

Without going into a detailed discussion of individual cases pending before the Tribunal, for the purposes of this analysis, it is worth noting that the problem of interference with the Polish political order appears here on two levels. The first includes interpretations of the provisions of the Treaties made by the Tribunal[52], indicating the incompatibility of the provisions regulating the Polish justice system under review with European law[53]. The second, however, refers to the interim measures applied by this authority which affect the functioning of the judiciary[54].

The main problem with the above-mentioned interpretations is that the Tribunal sees the legal basis for undermining national norms in very generally formulated provisions of the Treaties, which in no way relate to the functioning of the justice system of member rights (these interpretations focused on three main issues: 1) recognition of Art. 19 paragraph 1[55], second paragraph in conjunction with

[52] Such interpretations mean that the ruling issued by the CJEU has a legislative character. On the existence of such judgments, see: P. Marcisz, *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*, Warszawa 2015, system lex; A. Kalisz, *Wykładnia prawa Unii Europejskiej*, [in:] *Wykładnia prawa. Model ogólny a perspektywa Europejskiej Konwencji Praw Człowieka i Prawa Unii Europejskiej*, eds. A. Kalisz, L. Leszczyński, B. Liżewski, Lublin 2011, p. 167; J. Helios, *Sędziokracja w Unii Europejskiej? Uwagi w kontekście działalności interpretacyjnej Trybunału Sprawiedliwości Unii Europejskiej*, Wrocław 2014, p. 191; M. Koszowski, *Granice związania orzecznictwem Trybunału Sprawiedliwości Unii Europejskiej*, [in:] *Granice państwa jako granice jurysdykcji w Unii Europejskiej*, ed. S.M. Grochalski, Dąbrowa Górnicza 2012, pp. 35–54 wraz z przywołaną tam literaturą.

[53] Judgment of the CJEU of 19 November 2019 in joined cases C-585/18, C-624/18 and C-625/18; judgment of the CJEU of 24 June 2019 in case C-619/18; the judgment of the CJEU of 2 March 2021 in case C-824/18; the judgment of 15 July 2021 in the case I C-791/19 of the CJEU.

[54] Decision of the CJEU of 17 December 2018, C-619/18 R; Decision of the CJEU of 8 April 2020 to suspend the operation of the Disciplinary Chamber of the Supreme Court, case C-791/19 R; Decision of the Vice-President of the CJEU of 14 July 2021 in case I C-204/21.

[55] This provision states that "Member States shall provide for the necessary legal remedies to ensure effective judicial protection in the areas covered by Union

with Art. 2[56] of the Treaty on European Union and Art. 47[57] of the Charter of Fundamental Rights[58] as a provision authorizing the national court to review the independence of judges appointed by the President of the Republic of Poland and to review the resolution of the National Council of the Judiciary on submitting a request to the President of the Republic of Poland for the appointment of a judge, 2) recognition of Art. 19 paragraph 1, second paragraph in connection with Art. 4 sec. 3[59] of the Treaty on European Union as a provision authorizing or obliging to apply provisions of law in a manner inconsistent with the Constitution, including the use of a provision which, by virtue of a judgment of the Constitutional Tribunal, has lost its binding force as inconsistent with the Constitution, 3) recognition of Art. 1, first and second paragraphs in conjunction with Art. 4 sec. 3 of the Treaty on European Union as a regulation authorizing or obliging the body exercising the right to withdraw from the application of the Constitution of the Republic of Poland or ordering the application of legal provisions in a manner inconsistent with the Constitution of the Republic of Poland). For

law; Treaty on European Union", OJ 2004.90.864 / 30 – Treaty on European Union – consolidated text, taking into account the changes introduced by the Treaty of Lisbon.

[56] This provision states that "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 based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men".

[57] That provision states that "Everyone whose rights and freedoms guaranteed by the law of the Union are violated shall have the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone has the opportunity to obtain legal advice, use the help of a defense lawyer and representative. Legal aid shall be provided to persons who do not have sufficient resources, insofar as it is necessary to ensure effective access to justice".

[58] Charter of Fundamental Rights of the European Union of 7 December 2000, 2012/C 326/02, Official Journal of the European Communities C 326/391.

[59] This provision states that: "Pursuant to the principl of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".

this reason, there is a doubt as to whether the Tribunal acts within its powers, and thus – whether it has the right to issue such judgments from the point of view of constitutional regulations in force in the Republic of Poland.

Supporters defending the position of the Tribunal argue that the issue of the independence of judges is not a matter for the organization of the judicial system and falls within the scope of EU competences. This view is expressed by Anna Wyrozumska, who claims that "the Tribunal has repeatedly emphasized the importance of the independence of judges for the protection of the rights of individuals that may be derived from the EU law, as well as the importance of Art. 19 of the TEU, obliging Member States to provide effective judicial protection in areas covered by the EU law. This provision is an expression of respect for the rule of law, the systemic value of EU law, as indicated in Art. 2 TEU and the individual's fundamental right to a fair trial and effective judicial protection […]"[60]. Marek Safjan expresses a similar opinion, stressing that "[…] the fundamental misunderstanding regarding the lack of competence of the European Union as regards the functioning of national courts is that the assessment of the systems of the Member States carried out on the basis of Art. 19 TEU in conjunction with Art. 47 of the Charter is concerned with the fundamental principles on which the functioning of the judiciary is based, and not with specific organizational solutions and national procedures falling within the scope of the procedural autonomy of each Member State. These principles define the framework and limits of the freedom of the Member States with regard to the organization of the judiciary and procedural autonomy. There can be no doubt that, from this point of view, it is possible to accept different and even substantially different solutions in different national systems, as long as these differences do not adversely affect the fundamental guarantees of judicial protection, in particular judicial independence and impartiality. These principles form […] the basic structure on which the structure formed by the judicial system rests. Hence, the guarantees resulting from Art. 19 TEU must apply to every court, regardless of the area of European law

[60] A. Wyrozumska, *op. cit.* [accessed on: 25 September 2021].

to which the specific proceedings relate, and Art. 47 of the Charter is directly applicable and may as such constitute a direct basis for application by courts in domestic proceedings"[61].

The above theses are criticized in the literature. Some authors directly argue that "[…] the Court of Justice of the European Union does not have the competence to control whether the structure of an authority, in this case a court, is competent or not"[62]. For example, they are opposed by the fact that the presented interpretation concept, if viewed from the perspective of the Polish political system, in fact leads to the creation of competence norms that allow certain authorities – in this case courts – to behave in a certain way. Thanks to them, there is an opportunity to review the independence of judges appointed by the President and the resolutions of the National Council of the Judiciary to submit a request to the President for the appointment of a judge, as well as to make a decision to withdraw from the application of the Constitution or to apply legal provisions in a manner inconsistent with the Constitution: actions – let us emphasize clearly – not regulated in the provisions of the applicable national law. Such a situation must raise doubts from the point of view of the provisions of the binding Constitution. As it seems, it is unacceptable that the above-mentioned competences result from the judgments of the Court of Justice of the European Union, which is by its nature deprived of any legislative powers in the field of the Polish state system. Such origin of competence norms contradicts the requirements of the constitutional principle of the rule of law, which assumes that these norms should be created in the law-making process by authorized bodies, without presuming them[63], and at the same time should be characterized by an appropriate level of specificity. It is also controversial that an

[61] M. Safjan, *Prawo do skutecznej ochrony sądowej – refleksje dotyczące wyroku TSUE z 19.11.2019 r. w sprawach połączonych C-585/18, C-624/18, C-625/18*, "Palestra" 2020, No. 5, available at: https://palestra.pl/pl/czasopismo/wydanie/5-2020/artykul/prawo-do-skutecznej-ochrony-sadowej-refleksje-dotyczace-wyroku-tsue-z-19.11.2019-r.-w-sprawach-polaczonych-c-585-18-c-624-18-c-625-18 [accessed on: 25 September 2021].

[62] A. Wyrozumska, *op. cit.* [accessed on: 25 September 2021].

[63] See Judgments of June 19, 2002, K 11/02 and June 24, 2002, K 14/02.

organ operating outside the national political system is involved in the process of functioning of the mechanisms of the judiciary. This circumstance may lead to the conclusion that there is an unauthorized interference by this body, and as a result, a violation of the principle of the separation of powers included in the Constitution. Finally, it is debatable that the courts have the right to take specific actions based on a court ruling that formulates the interpretation of treaty norms. Such a state of affairs suggests that the indicated courts undertake activities outside the law, without having the appropriate legal legitimacy. Thus, the principle of legalism expressed in the Constitution suffers.

However, a separate problem is the application by the Court of Justice of the European Union to Poland of provisional measures[64] relating to the shape of the system and the functioning of the constitutional organs of the judiciary of that state. This raises the question of the admissibility of issuing such decisions and their effectiveness from the point of view of the provisions of the Polish Basic Law.

Let us recall that these doubts arose in the context of the decision issued by the Court of Justice of the European Union of April 8, 2020[65], under which an interim measure was imposed in the form of obliging the Republic of Poland with immediate effect to apply the provisions governing the functioning of the Disciplinary Chamber of the Supreme Court and to refrain from the referral of cases pending before this Chamber (the reason was the previously issued judgments indicating the failure of the judges of this Chamber to meet the requirements of independence). They resulted from the fact that there were no provisions in the domestic legal system which would allow for a similar suspension. As Jacek Zaleśny notices, "On

[64] The measures in question have a legal basis in Art. 279 of the Treaty on the Functioning of the European Union. According to its content, in cases considered by the Court of Justice of the European Union, it may order necessary interim measures. In turn, the detailed implementation of this standard is defined in Art. 39 of the Statute of the Court of Justice which provides, by applying an ad hoc procedure, the President of the Court of Justice may decide on applications (…) for interim measures pursuant to Article 279 of the Treaty on the Functioning of the European Union.

[65] Decision of the CJEU of April 8, 2020, C-791/19 R.

the basis of the Polish constitution, there is no such possibility to suspend the activity of this body (the Chamber of the Supreme Court – G.P.), because it operates on the basis of the law in force, which is presumed to be consistent with the constitution. It is therefore applicable as such"[66].

As it seems, in the assessment of the indicated problem, the part of the legal community's statement that draws attention to the difficulties of reconciling this type of interim measures with the provisions of the binding Constitution is particularly important. The theses indicating that the issuing of such decisions by a court in Luxembourg have extra-treaty effects and at the same time lead to the disintegration and unsteadiness of the mechanism of state power functioning in Poland are convincing. And so, in the decision of the Supreme Court of August 3, 2021, we read that "Neither provisional decisions nor judgments of the CJEU are directly applicable in the territory of a Member State within the meaning of Art. 91 paragraph 3 of the Constitution ("If it results from the agreement constituting an international organization ratified by the Republic of Poland, the law enacted by it is applied directly, having priority in the event of a conflict with statutes"). According to it, only those acts that are law, and therefore have the feature of normativity, are directly applicable, and whose direct application is confirmed by the content of the agreement constituting the international organization (here – the EU). Priority is also exercised only over statutes. In the case of a provisional decision of the CJEU issued by the Vice-President of the Court of Justice in case C-204/21 R (European Commission v. Poland), as in the case of the CJEU judgment of 15 July 2021 in case C-791/19 (European Commission v. Poland) none of these conditions are met. They are not normative acts, and the content of the EU treaties does not require their direct application. This means that although both the provisional decision and the judgment require a specific action, until their implementation, they do not

[66] J. Zaleśny, *op. cit.*, available at: https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8209593,tk-tsue-wyrok-izba-dyscyplinarna-jacek-zalesny.html [accessed on: 20 September 2021].

independently (normatively) affect the Polish legal order and the functioning of any entities, including state authorities.

The mere failure to implement it may be considered only in terms of an international (treaty) tort and as a breach of it, cause the consequences defined by this order. And further: "This type of legal structure means the obligation of the state, in this case the Republic of Poland. However, the state cannot act "at the beck and call of the CJEU", react immediately to all its recommendations, regardless of the national law. The state acts through its organs competent in the issues determined by the judgments of the CJEU. This must be in accordance with and under national law. The authorities of the Republic of Poland are obliged to do so under Art. 7 of the Constitution, according to which organs of public authority operate on the basis and within the limits of the law. Thus, no state authority that does not have the relevant competences indicated in national normative acts may itself declare itself competent to execute a decision and derive these powers directly from a provisional decision or a judgment of the CJEU. If the legal system lacks provisions enabling the execution of orders included in a provisional decision or in a CJEU judgment, they should be enacted within the framework specified by the Constitution"[67]. In turn, in the judgment of 14 July 2021, the Constitutional Tribunal states that: "It is obvious that in the case of the norms issued by the CJEU, the jurisdiction of the Tribunal does not include the review of the constitutionality of the CJEU judgments falling within the scope of the delegated powers, while respecting the Polish constitutional identity and the principles of subsidiarity and proportionality. However, if the CJEU exceeds the limits of the entrusted powers as well as the principles of subsidiarity and proportionality, or arbitrarily enters the area of constitutional identity, the Court's control of such norm-creating activity of the CJEU (*ultra vires control*) in terms of compliance of the norms issued by the CJEU with the Polish Constitution is not excluded. Leaving the Constitutional Tribunal's control beyond the constitutional control of any legal norms that are to be binding on any basis in the Republic of Poland would mean consenting to

[67] Decision of the Supreme Court of August 3, 2021, I DO 8/21.

the waiver of sovereignty in its legal aspect. Non-compliance with Art. 90 sec. 1 in connection with Art. 4 sec. 1 of the Constitution results from the ruling by the CJEU in the area of the system and competence of the judiciary, i.e. in areas that the Republic of Poland has not transferred to the EU and cannot transfer. No nation can be dictated by the rules of organization of its own state. In implementing the principle of the sovereignty of the Nation, the citizens of the Republic of Poland participate directly and indirectly in the election and appointment of state authorities. Election law is one of the most important civic attributes in a democratic state ruled by law. However, it is not limited only to the formal voting in elections, but includes an important guarantee of self-determination in the process of European integration, protecting the citizens of the Republic of Poland against possible violations by the bodies of the European Union of competences conferred by the treaties. The principle of the sovereignty of the nation excludes any possibility of subjecting the basic norms that make up constitutional identity to decisions and decisions of such authorities, which Polish citizens do not choose and do not control"[68].

In the context of the above considerations, there is a problem of the role of the Constitutional Tribunal, which it plays in the process of defending the Polish legal system against unauthorized interference of law-making judgments of a court in Luxembourg. It needs to be mentioned because the newly developed jurisprudence practice is criticized by some authors. Opponents of this direction of adjudication formulate the argument that, in the light of the fundamental law, the Tribunal is not able to assess decisions issued by other courts[69]. As they emphasize, such a decision of the Court "[…] does not lead to the annulment of the CJEU rulings. The judgments of the Constitutional Tribunal do not have the power to cancel CJEU judgments or to revoke the interpretation of EU law adopted

[68] Judgment of the Constitutional Tribunal of 14 July 2021. P 7/20.

[69] M. Chmaj, *TK nie ma kompetencji do orzekania o środkach tymczasowych, które nakłada TSUE*, "Gazeta Prawna", 14.07.2021, ed. L. Raś, available at: https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8209466,tsue-izba-dyscyplinarna-wyrok-srodki-tymczasowe.html [accessed on: 19 September 2021].

by the Luxembourg tribunal. As a consequence, the provisions of the treaty challenged by the President of the Council of Ministers will continue to apply in the Polish legal system as defined in the judgments of the CJEU, in particular Art. 19, which obliges Member States to ensure effective protection of the law"[70].

The above critical voices result from the fact that Art. 188. The literal wording of the Constitution does not provide for the possibility of reviewing court decisions. According to it, the scope of this control includes only the examination of: 1) compliance of statutes and international agreements with the Constitution, 2) compliance of statutes with ratified international agreements, the ratification of which required prior consent expressed in the act, state bodies, with the Constitution, ratified international treaties and statutes. Such a regulation is not accidental; its adoption is clearly linked to the concept of legal sources established on the basis of the constitutional law. The constitution-maker maintains full consistency here, consciously striving to ensure that the sphere of the control powers of the Constitutional Tribunal remains in correlation with the constitutionally sanctioned catalog of forms of law-making.

Such a state of constitutional regulation may lead to the conclusion that the adopted control mechanism does not take into account the examination of norms included in court decisions, including – which is of key importance to us – decisions of the Court of Justice of the European Union. This position, resulting from the linguistic interpretation of Art. 188 of the Basic Law, it arises first of all as the result of a completely natural interpretative reflex. However, only a deeper analysis shows that it has weaknesses. Contrary to appearances, there are arguments that go in the opposite direction and encourage the recognition of the competence of the Constitutional

[70] Statement by the judge of the Constitutional Tribunal P. Pszczółkowskiego: M. Cedro, T. Żółciak, G. Osiecki, M. Kryszkiewicz, *TK orzekł, że konstytucja jest ważniejsza niż prawo UE. To wyrok na użytek wewnętrzny* [The *Constitutional Tribunal ruled that the constitution is more important than EU law. This is an internal judgment*] "Dziennik Gazeta Prawna", 08.10.2021, available at: https://www.gazetaprawna.pl/magazyn-na-weekend/artykuly/8266128,wyrok-tk-prawo-krajowe-unijne-trybunal-konstytucyjny-mateusz-morawiecki.html [accessed on: 16 September 2021].

Tribunal to control the constitutionality of norms created as part of the activities of the Court of Justice of the European Union. Their content proves that the thesis that it is not legally possible to remove from the Polish legal order the jurisprudence of this body that is contrary to the Constitution is not correct.

In defending this view, it should be emphasized that the review carried out by the Constitutional Tribunal does not in fact refer to the court decisions themselves, but concerns the interpretations of treaty norms contained therein. For this reason, it is difficult to say that we are dealing here with the control of sources of law not covered by the provisions of the Basic Law, because, as it has already been shown, the EU treaties, including the founding treaties, are subject to the jurisdiction of the Polish constitutional court. It can be assumed that adopting such optics brings two fundamental benefits. Firstly, it creates the possibility of a comprehensive examination of the treaties, both in part of their linguistic formulations and in part of their normative emanation resulting from the law-making activity of the Court of Justice of the European Union. Secondly, it serves to ensure that the imperative forms of action of the Court of Justice do not interfere, without an explicit treaty basis, in areas constitutionally reserved for national regulation.

The problem of the Court of Justice of the European Union encroaching on the sphere of competence reserved for Polish authorities is clearly emphasized by Krzysztof Wójtowicz. The author, referring to the treaty principle of conferral of competences, argues that such rulings of the Tribunal, which do not fall within the framework of the powers of the European Union, are subject to verification of compliance with the Polish Constitution. As the author notes, "The Court of Justice of the European Union is also bound by the principle of granting, so it can also be accused of exceeding its competences, for example due to conferring content on EU standards that is inconsistent with the Treaties on which the Union is founded. In the case of the Court, it is not possible to verify this kind of allegation in the framework of the EU judicial system, both because of the lack of appropriate procedures and, as a consequence, of the *nemo iudex in causa sua* principle. If we recognize, as is usually done by constitutional courts, that the conferral of competences

takes place on the basis of the constitution, then the exercise of these competences in breach of constitutional provisions would also have to be based on a constitutional basis. […] The consequence of this assumption is the position presented by the Polish Constitutional Tribunal that the Union did not obtain from the Polish state the authorization to enact legal acts or make decisions that would be contrary to the Constitution of the Republic of Poland. […] the transfer of competences to create competences is excluded, and each extension of the catalog of transferred competences requires an appropriate basis in the content of the international agreement and the consent referred to in Art. 90 sec. 1 of the Constitution"[71].

As an inferior argument justifying the thesis on the admissibility of examining the legal norms expressed in the above-mentioned jurisprudence, there may also be the very flexible approach of the Constitutional Tribunal to the legal provisions regulating the issue of its jurisdiction. Already in the early nineties, an exponential concept appeared in the jurisprudence of this court, stating that the review of the constitutionality of the law covers not only acts directly mentioned by the legislator, but also all other acts containing legal norms of an abstract and general nature. Due to this direction of thinking, in the judgment of 19 June 1992, the Tribunal stated that it was competent to examine the constitutionality of resolutions adopted by the parliament not included in the applicable statutory regulation[72]. This, in turn, paved the way for the application of a similar interpretation in later rulings, including those issued under the 1997 Constitution[73]. The Tribunal's statement of January 7, 2016 is very characteristic in this context.It explicitly mentioned the possibility of a broader interpretation of Art. 188 of the Constitution. He argued

[71] K. Wójtowicz, *Sądy konstytucyjne wobec prawa Unii Europejskiej* [*Constitutional courts against the law of the European Union*], Warsaw 2012, pp. 98–99.

[72] See: The judgment of the Constitutional Tribunal of June 19, 1992, file ref. U 6/92.

[73] Decision of the Constitutional Tribunal of December 6, 1994, file ref. U 5/94; The judgment of the Constitutional Tribunal of November 17, 1992, file ref. U14 / 92; Judgment of the Constitutional Tribunal of September 22, 2006, file ref. U 4/06; The judgment of the Constitutional Tribunal of 26 November 2008, file ref. U 1/08.

that "[…] the Constitutional Tribunal considered it appropriate to recall that, as the body appointed to control the compliance of normative acts with regulations of higher legal force, in particular with the Constitution, it always operates on the basis and within the limits of the applicable law and uses effective means legal acts at his disposal, bearing in mind the need to respect the norms, principles and values expressed in the fundamental act. The scope of the Tribunal's freedom has been indicated above all in the Constitution, which defines its position in the structure of public authorities, its tasks and the powers conferred on it for this purpose. When interpreting legal regulations concerning its activities, the Tribunal refrained from interpreting them in a broad way (*interpretatio extensiva*), sticking to the so-called literal interpretation (*interpretatio declarativa*)"[74]. It is clear from this that a different than literal understanding of Art. 188 of the Constitution as regards the scope of norms subject to the jurisdiction of the Constitutional Tribunal.

By the way, it is worth noting that these clearly "expansive" actions of the Tribunal contributed to the conviction among some representatives of constitutional law about the possibility of extending the interpretation of control competences based on the theory of normativity of a given act due to the criterion of functionality. According to it, any act which, irrespective of doubts as to its form or content, may cause, in a specific socio-political and / or institutional situation, the same effects as any other "standard" normative act, should be recognized as normative. As emphasized by the supporters of this theory (the fact that the moderate), B. Naliziński and K. Wojtyczek, "While it does not seem advisable to subject the Constitutional Tribunal to control of too wide a range of legal acts, some particularly important acts of law application issued by the supreme state organs, such as, for example, the decree to dissolve the Seym, should be subject to effective judicial control, allowing for the stopping of actions contrary to the constitution before they even have the time to cause irreversible effects. Extending control over some of these acts would, moreover, be possible with the functional

[74] Judgment of the Constitutional Tribunal of January 7, 2016, file ref. act U 8/15.

criterion of the normative nature of legal acts"[75]. Of course, the aforementioned theory has not yet been applied in the practice of the Constitutional Tribunal, so it is by definition purely theoretical. It does not seem, however, that it should be ignored and denied its legal significance. It can be argued that it is especially useful when there are doubts as to the scope of the Constitutional Tribunal's jurisdiction and, at the same time, there is a risk that the effects of controversial and considered unconstitutional norms will begin to adversely affect the system of the state's political system, thus depreciating the significance of the constitution as an act. about the superior position in the system of sources of law. In such a situation, referring to these assumptions when interpreting Art. 188 of the Basic Law becomes desirable, even as part of supporting argumentation. Undoubtedly, this may be a factor facilitating the Tribunal's decision on recognizing its control powers in relation to this type of "destructive" from the point of view of legal norms.

6. Conclusions

The analysis clearly shows that the European Union has several instruments which allow them to influence the shape of the systemic legislation at its disposal. These instruments are under the control of different authorities and are used in different procedures. Some of them are directly based on treaties (such as the procedures regulated in Article 7 of the Treaty on European Union), while some are very loosely related to the treaties (if there is any connection at all) (Regulation on the general system of conditionality to protect the EU budget, some judgments of the Court of Justice of the European Union). However, all of them aim to promote the rule of law as proclaimed by Art. 2 of the Treaty on European Union.

It should be remembered that the doctrine formulates a number of critical remarks in relation to the discussed instruments. So it is not that their existence is accepted without any reflection. At this

[75] B. Naleziński, K. Wojtyczek, *Glosa do orzeczenia TK z 19.VI.1992*, U 6/92, "Państwo i Prawo" 1993, No. 1, p. 113.

point, it is worth recalling once again voices pointing to the ineffectiveness and risk of deepening anti-EU sentiment related to the provision of Art. 7 of the Treaty on European Union, opinions challenging the compliance with the treaty provisions of the regulation on the general system of conditionality serving the protection of the Union's budget, some judgments of the Court of Justice of the European Union, or views deeming the interference of the Court of Justice of the European Union in matters of the organization of justice unacceptable. They are a clear signal that the current legal solutions and practices of the EU bodies raise serious concerns, and therefore should be an incentive for their re-verification by EU decision-makers.

A particularly undesirable effect of the European Union's actions in the field of promoting the rule of law is provoking an anti-EU narrative and the consequent disintegration of the community. It is known that where there are sanctions, there must also grow aversion towards the institutions of the Union, which is no longer perceived as an organization of solidarity and sovereign states, and gains the image of an external "aggressor". This is a reason to demand a very restrained, especially respecting state sovereignty, use of the existing legal tools, and to a certain extent also for their reform. It seems that only such an approach guarantees the harmonious development of cooperation between the nations making up the European Union.

REFERENCES

Argyropoulou V., *Enforcing the Rule of Law in the European Union, Quo Vadis EU?*, "Harvard Human Rights Journal", 2.11.2019.

Banaszak B., *Komentarz do art. 8*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komenatrz*, Warsaw 2009.

Banaszak B., *The principle of supremacy of the Constitution in the Polish legal order*, [in:] M. Jabłoński, S. Jarosz-Żukowska, *The principle of primacy of European Union law in the practice of public authorities of the Republic of Poland*, Wrocław 2015.

Bingham T., *The Rule of Law*, "Cambridge Law Review" 2007, No. 67.

Bogdanowicz P., *Pojęcie, treść i ochrona praworządności w prawie Unii Europejskiej*, [in:] *Wniosek Komisji Europejskiej w sprawie wszczęcia w stosunku do Polski procedury art. 7 TUE*, eds. J. Barcz, A. Zawidzka-Łojek, Warsaw 2018.

Cedro M., Żółciak T., Osiecki G., Kryszkiewicz M., *TK orzekł, że konstytucja jest ważniejsza niż prawo UE. To wyrok na użytek wewnętrzny*, "Dziennik Gazeta Prawna", 08.10.2021.

Chesterman S., *An international Rule of Law*, "The American Journal of Comparative Law" 2008, No. 2, vol. 56.

Chmaj M., *TK nie ma kompetencji do orzekania o środkach tymczasowych, które nakłada TSUE*, "Gazeta Prawna", 14.07.2021, ed. Lidia Raś.

Craig P., *The Rule of Law*, [in:] *Relations between the executive, the judiciary and Parliament*, London 2007.

Den Hertog L., *The rule of law in the EU: Understandings, development and challanges, The Rule of Law in the EU: Understandings, Development and Challenges*, "Acta Juridica Hungarica" 2012, No. 3, vol. 53.

Florczak-Wątor M., *Komentarz do art. 8*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, ed. P. Tuleja, Warsaw 2019.

Grabowska G., *Wartości w statutach organizacji międzynarodowych*, [in:] M. Romanowski (ed.), *Wartości Unii Europejskiej a praworządność*, Warsaw 2020.

Grabowska-Moroz B., Szuleka M., *Unijna procedura kontroli praworządności – panaceum czy placebo? Unijna procedura kontrolipraworządności – panaceum czy placebo?*, Warsaw 2016.

Granat M., *Pojęcie i przedmiot prawa konstytucyjnego*, [in:] *Polskie prawo konstytucyjne*, ed. W. Skrzydło, Lublin 2001.

Greń J., *Zasada rządów prawa w polityce zewnętrznej Unii Europejskiej*, "Przegląd Prawa Konstytucyjnego" 2013, No. 2.

Grzelak A., *Ramy prawne na rzecz umacniania praworządności. Uwagi na tle wniosku Komisji Europejskiej z 20 grudnia 2017 r.*, "Sprawy Międzynarodowe" 2018, No. 2, vol. 71.

Grzeszczak R., *Skuteczność unijnych procedur ochrony praworządności w stosunku do państw członkowskich*, "Państwo i Prawo" 2019, No. 6.

Halmai G., *The Possibility and Desirability of Rule of Law Conditionality*, "Hague Journal on the Rule of Law" 2019, No. 11, vol. 11.

Helios J., *Sędziokracja w Unii Europejskiej? Uwagi w kontekście działalności interpretacyjnej Trybunału Sprawiedliwości Unii Europejskiej*, Wrocław 2014.

Hilpert F.M.L., *An Old Procedure with New Solutions for the Rule of Law Crisis*, "Nordic Journal of Law" 2019, No. 2.

Jacobsohn G.J., *Constitutional Values and Principles*, [in:] *The Oxford Handbook of Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012.

Kalisz A., *Wykładnia prawa Unii Europejskiej*, [in:] *Wykładnia prawa. Model ogólny a perspektywa Europejskiej Konwencji Praw Człowieka i Prawa Unii Europejskiej*, eds. A. Kalisz, L. Leszczyński, B. Liżewski, Lublin 2011.

Kelemen R.D., Scheppele K.L., *How to Stop Funding Autocracy in the EU*, VerfBlog, 10.09.2018.

Kirst N., *Rule of Law Conditionality: The Long-awaited Step Towards a Solution of the Rule of Law Crisis in the European Union?*, "European Papers" 2021, No. 1, vol. 6.

Kochenov D., Pech L., *Upholding the Rule of Law in the EU: On the Commission's 'Pre-Article 7 Procedure' as a Timid Step in the Right Direction*, EUI Working Paper RSCAS 2015/24.

Komisja Europejska kieruje do TSUE następną sprawę przeciwko Polsce, "Dziennik Gazeta Prawna", 23.09.2021.

Koszowski M., *Granice związania orzecznictwem Trybunału Sprawiedliwości Unii Europejskiej*, [in:] *Granice państwa jako granice jurysdykcji w Unii Europejskiej*, ed. S.M. Grochalski, Dąbrowa Górnicza 2012.

Kovács K., *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, "German Law Journal" 2017, No. 18.

Kwiecień R., *The Primacy of European Union Law over National Law Under the Constitutional Treaty*, "German Law Journal" 2005, No. 11, vol. 06.

Łacny J., *The Rule of Law Conditionality Under Regulation No 2092/2020 – Is it all About the Money?*, "Hague Journal on the Rule of Law" 2021, No. 13.

Marcisz P., Taborowski M., *Nowe ramy Unii Europejskiej na rzecz umocnienia praworządności. Krytyczna analiza analizy krytycznej* (*artykuł polemiczny*), "Państwo i Prawo" 2017, No. 12.

Marcisz P., *Koncepcja tworzenia prawa przez Trybunał Sprawiedliwości Unii Europejskiej*, Warszawa 2015.

Mineshima, Dale Sachiko Oi Lin Nalani, *The Rule of Law and the Eastern Enlargement of the EU*, Durham 2001.

Müller J.W., *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, "European Law Journal" 2014, No. 2, vol. 21.

Müller J.W., *Should the EU Protect Democracy and the Rule of Law inside Member States?*, "European Law Journal" 2015, No. 2, vol. 21.

Musiałek P., *Szkodzi Unii, ale Polska poniesie jego naprawdę dotkliwe konsekwencje. Wszystko, co musisz wiedzieć o artykule 7 TUE*, Analiza Klubu Jagielońskiego – Państwo na poważnie, Warsaw, 5.01.2018.

Naleziński B., Wojtyczek K., *Glosa do orzeczenia TK z 19.VI.1992*, U 6/92, "Państwo i Prawo" 1993, No. 1.

Nouveau rebondissement (*attendu*) *dans la saga du respect de l'État de droit par la Hongrie et la Pologne*, "Le Premier Think Tank juridique français", 09.04.2021.

Pastuszko G., *Możliwości ekstensywnej wykładni przepisu art. 2 TUE w kontekście procedury badania praworządności w państwach członkowskich i powiązania jej z budżetem*, [in:] M. Romanowski (ed.), *Wartości Unii Europejskiej a praworządność*, Warsaw 2020.

Pech L., *The Rule of Law as Constitutional Principle of the European Union*, New York 2009.

Petrov V., *European versus national constitutional identity in the republic of serbia – a concurrence or unity?*, *Constitutional identity and UE axiology – perspective of Central European States*, ed. G. Pastuszko, Warsaw 2021.

Piechowiak M., *W sprawie aksjologicznej spójności Konstytucji RP. Dobro wspólne czy godność człowieka?*, [in:] *Jednolitość aksjologiczna systemu prawa w rozwijających się państwach demokratycznych Europy*, ed. S.L. Stadniczeńko, Opole 2011.

Pikuła Ł.J., *Aksjologia Unii Europejskiej w świetle źródeł, wykładni i instytucji*, Toruń 2015.

Prostak J., *Nienaruszalność unijnego systemu wartości jako żywotny interes Unii Europejskiej – krytyczna analiza mechanizmu egzekucji postanowień art. 2 Traktatu o Unii Europejskiej*, "Zeszyty Naukowe. Uniwersytet Ekonomiczny w Krakowie" 2017, No. 7.

Raube K., Burnay M., Wouters J., *By way of introduction: the rule of law as a strategic priority for EU external action-conceptualization*, "Asia Eur J" 2016.

Romanowski M., Szymanek J., *Zasada konstytucjonalizmu jako wyraz tożsamości konstytucyjnej państw członkowskich Unii Europejskiej*, [in:] *Constitutional identity and UE axiology – perspective of Central European States*, ed. G. Pastuszko, Warsaw 2021.

Rosenfeld M., *Constitutional identity*, [in:] *Comparative Constitutional Law*, eds. M. Rosenfeld, A. Sajó, Oxford 2012.

Safjan M., *Prawo do skutecznej ochrony sądowej – refleksje dotyczące wyroku TSUE z 19.11.2019 r. w sprawach połączonych C-585/18, C-624/18, C-625/18*, "Palestra" 2020, No. 5.

Scheppele K.L., Pech L., *Is Article 7 Really the EU's "Nuclear Option"?, Verfassungsblog of matters constitutional*, 06.03.2018.

Skarga przeciwko Polsce skierowana do TSUE. Jest decyzja Komisji Europejskiej, "Dziennik Gazeta Prawna", 24.09.2018.

Śledzińska-Simon A., *Koncepcja tożsamości konstytucyjnej: wymiar indywidualny, relatywny oraz zbiorowy*, "Acta Universitatis Wratislaviensis", No. 3744, "Przegląd Prawa i Administracji" CVII, Wrocław 2016.

Szymanek J., *Europejska przestrzeń konstytucyjna*, [in:] *Ustroje. Tradycje i porównania. Księga jubileuszowa dedykowana prof. dr. hab. Marianowi Grzybowskiemu w siedemdziesiątą rocznicę urodzin*, eds. P. Mikuli, A. Kulig, J. Karp, G. Kuca, Warsaw 2015.

Taborowski M., *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej*, Warsaw 2019.

Tuominen T., *Reconceptualizing the Primacy – Supremacy Debate in EU Law*, "Legal Issues of Economic Integration" 2020, No. 3, vol. 47.

Weiler J.H.H., *In defence of the status quo: Europe's constitutional Sonderweg*, [in:] *European Constitutionalism beyond the State*, eds. J.H.H. Weiler, M. Wind, Cambridge 2003.

Wójtowicz K., *Sądy konstytucyjne wobec prawa Unii Europejskiej*, Warsaw 2012.

Wyrozumska A., *Porozumienie w sprawie rozporządzenia "pieniądze za praworządność" może okazać się skuteczne*, "Monitor Konstytucyjny", 22.12.2020.