The Juristocratic State

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Its Victory and the Possibility of Taming

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Foreword

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

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

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

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

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

1. The Functions of Constitutional Courts – A Realistic Perspective

Introduction

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

1.1. The Expansion of Functions of Constitutional Courts

The idea of constitutional adjudication arose in the United States in the early 1800s as a consequence of the federal structure, which was historically the first one to be established. The collision of the federal power and the state power was the problem that historically caused the establishment of constitutional adjudication. The federal and state legislations collided because the federal government powers were exhaustively listed in the Federal Constitution and all the other powers were given to the Member States but there was no institution to resolve the possible collisions. In 1803, the head of the Federal Supreme Court, Chief Justice John Marshall, came to the idea that such conflicts must be decided by the Federal Supreme Court. For a long time only this function was associated with constitutional adjudication. This narrow function expanded in the second half of the 1800s in the United States, and the justices of the Supreme Court

began to review the legislative acts on the basis of the incorporated fundamental rights, too. With this modification, what was initially a purely formal review of the legislative acts, was transformed into comprehensive content control, and, on the other hand, on the basis of the open nature of the fundamental rights, the constitutional adjudication was gradually transformed into the position of a strong political centre over the legislature.

In Europe this new constitutional adjudication was watched with great respect and the federal statehood in Switzerland gave the first impetus to take over this institution.[1] In 1874 a constitutional amendment made it possible for citizens to complain before the Federal Court concerning the state acts that violated their rights. Based on this experience, the prestigious Austrian lawyer, Georg Jellinek, in 1885 outlined in a study a comprehensive constitutional adjudication for Austria.[2] In this version of the constitutional adjudication, the constitutional court would not only review the legislative acts, but in addition, would have control over the course of the elections as well as the protection of constitutional amendments requiring a qualified majority law against simple laws.

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

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1 See Jellinek, Georg (1885): *Ein für Verfassungsgerichtshof Austria.* Wien, Alfred Hölder K. K. Universitäts und Buchhandlung. 57.

2 See Jellinek (1885): Ibid. 10–52.

of constant political rivalry between the government's parliamentary majority and the opposition parties. In this way, it became the final political judge during the review of parliamentary acts.

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

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[3] As Noah Feldman wrote, the forced nature of the Japanese Constitution by the Americans became known to the Japanese public's attention only after ten years; then a committee was established for screening and possible revision of the provisions of the constitution. But nothing changed in the end. This could not happen today – Feldman adds – because of indispensable internal legitimacy of constitutions: "Less than a decade after the adoption of the Japanese Constitution, the document's imposed foreign origins became public knowledge in Japan. A commission was formed to consider redrafting and despite the recommendations for changes, the existing constitution was preserved in its entirety. Half a century later, one cannot imagine this sort of acquiescence being reproduced in most places of the world. Today, in order to acquire legitimacy, a new constitution must be understood as locally produced." Feldman, Noah (2005): Imposed Constitutionalism. *Connecticut Law Review*, Vol. 37, No. 4. 859.

[4] A lot of information concerning the radical elite change towards the transatlantic spirit after the Second World War is provided by the excellent book of Stefan Scheil, see Scheil, Stefan (2012): *Transatlantische Wechselwirkung. Der Elitenwechsel in Deutschland nach 1945.* Berlin, Duncker und Humblot; regarding the Constitutional Court see 155–159.

Constitutional Court was able to build up its power over the activities of the German state. Later in the 1980s and '90s, during the spread of constitutional adjudication over Europe, Africa and Asia, the Italian model did not exert significant influence and the German model has become a major pattern for the takeover. So this study wants to concentrate on the analysis of this model.

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

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

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[5] The role taking of the German Constitutional Court was decisively determined in the first years between 1951–1971 by Gerhard Leibholz returned from exile in 1946. In his so-called *Status-Denkanschrift* (memorandum) he outlined the privileged position of the Constitutional Court against the government and the parliamentary majority government in 1952. Under his leadership, the German constitutional judges began a bitter struggle against the Adenauer Government in order to enforce their primacy over each state body. For details see Collings, Justin (2013): Gerhard Leibholz und der Status des Bundesverfassungsgerichts. Kareere eines Berichts und seines Berichterstatters. In Kaiser, Ann Bettina (Hg.): *Der Parteienstaat*. Baden-Baden, Nomos. 228–258.

There was an important modification during the later development which the German constitutional judges started to apply parallel with the annulment of parliamentary acts. Originally, the separately organized constitutional court created directly for the control of the legislation had only a capacity of the *negative legislation* (in other words: the annulment of the law), as the founding Father of the Austrian model, Hans Kelsen wrote. But in the practice of the German Constitutional Court this began to gradually change and in the reasoning parts of their decisions – parallel with the annulment – the constitutional judges began to provide dense regulations that were recorded in detail concerning the way the new law had to be created in order to be accepted by the constitutional judges as constitutional. In this way, the negative legislation began to slide towards becoming a stronger positive legislation. Then the new constitutional courts which were established in the 1980s and 1990s based on the German model, took over and expanded this change into a more positive legislation.

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

[6] The most obvious example of such a decision-making style of the Spanish constitutional judges was their decision in 2012, in which they decided over the Civil Code provision permitting same-sex marriage. The Spanish Constitution literally states that marriage is a legal tie between a man and a woman, but this provision was recognized as consistent with the constitution bythe Spanish constitutional judges. The relevant provision of the Spanish Constitution in English translation reads: "Art 32.1. A man and a woman will be entitled to marry in terms of full legal equality." This is interpreted by the constitutional judges as follows: "Otherwise, if strictly and literally interpreted, Article 32 CE only identifies the holders of the right to marry, not the other spouse, although, we must insist, systematically speaking it is clear this does not mean that there was a wish in 1978 to extend the exercise of this right to homosexual unions." STCNo. 198/2012, 5. However, despite the declared admission of the opposition of their decision to the constitution, they declared the same-sex civil marriage as consistent to the constitution.

the German initiative, the Spanish practice of decision making has established here the phenomenon of *pseudo-constitution* which is the dominance of the case law of the Constitutional Court which pushes aside the written Constitution.

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

The Hungarian Constitutional Court started to develop its decision-making style in these months and – encouraged by its charismatic president – László Sólyom, it took over the most activist formulas from the practice of the German one.[7] In addition, the Hungarian constitutional judges were not burdened by the huge workload of the complaints against the decisions of the ordinary courts which was the situation in Germany and in the other European countries. In Hungary – in line with the Austrian solution – constitutional adjudication was initially set up to directly control the legislation and not the ordinary courts. In addition, this direct control – unlike that of the Austrians – could be initiated by everyone and therefore the annulment of the parliamentary acts

[7] Kim Lane Scheppele – based on her positive assessment – compares the charismatic presidential role of László Sólyom with the role taking of the President of the Russian Constitutional Court, Valery Zorkin; she considers them the most prominent personalities of constitutional courts in the post-Soviet times. See Scheppele, Kim Lane (2006): Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe. *University of Pennsylvania Law Review,* Vol. 154, No. 6. 1757–1851.

by the constitutional judges took place almost daily in the early years. During the frequent annulments of parliamentary acts, it emerged that the basis of the decisions of the constitutional judges was not the written constitution but an "invisible constitution" set up by the Constitutional Court's own decisions. This decision-making style was used by the German and the Spanish constitutional judges earlier also but they did not dare declare it openly. In a political situation where the full media power, university and academic intellectual power and economic elite stood behind the opposition parties, the constitutional judges with their "invisible constitution" became heroes of democracy in the eyes of social groups that supported the opposition. In this political atmosphere they could cross out the constitutional provisions and the more laws they destroyed, the more recognition was given to them by the mass media and the representatives of the academic intellectual power. With such tremendous backing – when the criticism against the Constitutional Court's decisions was almost forbidden in public – the Hungarian Constitutional Court's practice began to take over all the established forms of the competence expansion and the determination of the content of the future law.

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

Summarizing the expansion of functions, the following can be stated. The focus of the functions of the constitutional courts is the protection of the provisions of the constitution, which must always be realized in the midst

of the struggles between the parliamentary majority and the parties of opposition and eventually between the government and the head of state. Beyond binding the new parliamentary acts to the provisions of the constitution, the main purpose of the functions is to ensure the peaceful change of the government after the fall of the ruling party in the parliamentary election or in case of the government's ouster in the Parliament also. These functions include the review of the electoral litigation and the review of the creation of parliamentary acts and this latter can take place before the promulgation of law *(prior review),* or subsequently after publication. The posterior review can take place in the abstract, when the deputies – a group of MPs (for example, fifty or a quarter of all MPs etc.) may challenge the new law, or, in federal-type states, the governments of the Member States or legislation can challenge the federal law, and vice versa, Member States' laws can be challenged by the federal government bodies. In some countries, however, this is broader and this posterior review is possible for everyone. For example, in Hungary, the 1990 regime until 2012 made this *actio popularis* possible and anyone – even non-Hungarian citizens – could challenge any applicable laws and regulations before the Constitutional Court with resorting to constitutional complaint immediately after the publication of these said laws and regulations and demand their annulment.

In addition to these main functions – if they already exist – the constitutional courts have such functions also by which they can decide over the power abuse committed by the head of state or by the Prime Minister during the procedure that was started by the parliamentary majority or otherwise. To furnish some examples, it was in this way that the constitutional judges deprived the President of Lithuania – Rolanda Paksas – of his office in 2004. The Prime Minister of Thailand was also thus removed from office twice after 2000. Although this has not occurred yet, the Hungarian Constitutional Court also has this power and thus, at the proposal of two-third of the MPs, it can remove the head of state from its office if the intentional violation of the Constitution or of the law is established.[8]

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

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

1.2. The Constitutional Court as an International Tribunal

Constitutional adjudication migrated from America to Europe after the Second World War and received an additional function in respect to international law which did not exist at its original site. The German Constitution of 1949 was created under the close control of the lawyers of the occupying US troops and because the division of Germany and permanent occupation was the aim, some provisions were also included in the German Basic Law to prevent the build-up of a new totalitarian regime by the general elections, as it had taken place in 1932.[9] This way, the direct subordination of the German law to the international law by the German Basic Law was another tool for the control of the German State and this control was given to the Constitutional Court: "The general rules of international law are part of the federal law. They take precedence over laws and directly establish rights and obligations for the inhabitants of the federal territory." (Article 29). Then, the priority of the international law over the German law is specified by the Article 100 (2) in such a way that if doubt arises in a situation whether an international law is part of the federal law, then the Constitutional court decides in these cases. In the past sixty years, the German Constitutional judges have exercised this competence only modestly[10] but in any case, this example has urged some European constitutional courts that were established later to incorporate this new function among the competences of constitutional adjudication. This way,

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

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

the national laws are controlled by these constitutional courts not only on the basis of Constitutional law but also on the basis of international law. With this doubling and intertwining, constitutional law and international law started in some way to converge, although it is always determined by the attitude of the majority of the constitutional judges in a country, what degree of "international court" in addition to the constitutional court they want to realize.

However, by the possibility of this intertwining, some new developments emerged which give new aspects to constitutional adjudication. One of these developments – with a strong global power support – is the constitutionalization of international law which is utilized by several legal expert groups. These lawyer groups mentally grasp the international law originally created by the contracts of the sovereign nation-states as the *global constitution* and they try to use it to achieve the subordination of nation-states and their national constitutions.[11] *Prima facie* it is only a theoretical development, but if we look at the development of the more comprehensive global world order in recent decades, it fits in very well with these. Namely, since the early 1970s and then from the 1980s onwards, a new monetary-capitalism began to be built in place of old nation state capitalism based on *Keynesianism* and stage by stage the boundaries of the nation-states of individual countries started to be removed in order to integrate them into the new global monetary-capitalism.[12] From the 1990s onward, after the disintegration of the Soviet Empire, the Central and Eastern European countries have entered this global monetary-capitalist organization. The increasing European integration – similar to the endeavour of other regions of the world – received the incentives and the background from these global monetary organizations in order to control the diverging nation-states. From 1995 onwards, the IMF, the World Bank and especially WTO were able to stabilize this new world and new forums about the nation-states were created by international treaties in order to penalize them if their obligations were hurt. Actually, it was only from 2008 onwards, when the great banking crisis erupted and the whole financial market system based on global banking families proved to be fundamentally inadequate to maintain world capitalism, that this whole global structure was shaken. Parallel with the effects of the demographic crisis of the Central and Eastern European countries enhanced by

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

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

the migratory movements of their peoples to Western Europe, these phenomena made the political forces of the nation states stronger against the European Union and also confronted the global mechanisms over the nations. The new tendencies, however, are still at an initial stage of recent developments and this way, on an intellectual level they could still not urge strong reversing trends against the global monetary-world and in the intellectual sectors the forces of globalization still remain dominant.

Against this structural background it is possible to explain the intellectual developments that created the theory of the constitutionalization of international law in the intertwining circles of international lawyers and constitutional lawyers in the mid-1990s. Austrian lawyer Alexander Somek criticizes this effort as follows. Because in the early years of 2000, the project of the European constitution and the United States of Europe completely failed in terms of politics and, in addition to this, the increasing growth of euro-scepticism does not allow any return to this, the law professors consequently followed in the footsteps of politicians and by redefining the legal concepts they try to create the desired social reality. Their motto is: if the new world order can no longer be created by political means, you can imagine that the desired change has already happened and make it look as if the changes had already become a reality.[13]

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

The constitutional courts in Romania and Croatia do not have the "international court"-character on the basis of their constitutions and the constitutional judges in both countries control domestic laws only on the basis of their national constitutions. Turning to those where there is this double character

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

of the constitutional court, in the following the discussion will move from weak to strong in this respect. This way, one must start with the Czech constitution which includes the double-checking basis of the constitutional judges over the domestic law only in a limited form. By the Article 87 (1) i) provision of the Constitution, the Czech constitutional judges can control domestic law not on the basis of the abstract international treaties, but only such law can be annulled by which the implementation of certain international courts judgment is prevented.[14]

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

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

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

has been omitted and set a time period and prescribe a mandatory legislation for the elimination of the omission.[16]

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

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

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

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

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

The Hungarian Constitution contains the possibility of the control of domestic law as widely as it was visible in the German and Slovenian samples. Sometimes, on this double control basis, such a majority of constitutional judges was formed in Hungary that it also tried to control constitutional power and on the basis of the general rules of international law (*ius cogens*) these constitutional judges also saw it possible that they could annul constitutional amendments. The paragraph (3) of article Q) of the Hungarian Constitution contains the possibility of control of domestic law on basis of international law, according to which the Constitutional Court – in addition to the fundamental constitutional rights – can check the national legislation: "Hungary accepts the generally recognized principles of international law. Other sources of international law become parts of domestic law after promulgation." There is no problem with international law being promulgated and this cannot create a formal restriction of state sovereignty because earlier this was explicitly accepted by the Hungarian State. However, some problems may be caused by the *ius cogens* over domestic law because with certain interpretations it makes it possible for the constitutional judges to extend their control to the Constituent power itself. This way, a possible new constitution or amendments to the Constitution can be declared by the constitutional judges as contrary to the rules of the *ius cogens* and they can be squashed. This position was occupied in 2010 by the then majority of Hungarian Constitutional Court majority; they declared in the 61/2011 (VII.13) AB decision that they would grasp the ius cogens rules of international law not only over the entire legal system but also over the Constituent power. With this interpretation they declared that the future amendments to the Constitution would be controlled by the constitutional judges. The exact text sounds like this: "The norms and the principles of the ius cogens of the international law can serve as benchmark for monitoring (…) the norms and principles of the ius cogens and their core values together constitute a standard to which all Constitution and their amendments in the future will have to comply." (part V. 2.2.). This interpretation was usually rejected from 2011 onwards by the majority of the extended Constitutional Court – after fierce internal debates – but in the 12/2013 (V. 24) AB decision it was confirmed again.[20] Against this expanded interpretation, in my opinion, the sovereignty-

[20] As a literature backing it can be summoned the analysis of two studies written by John McGinnis and Ilya Somin. In these analyses, they see the international interweaving of strong political elites that failed in the domestic political system but they are strong on a global scale as the driving forces behind the constitutionalization of international law. These forces are politically weak at home and that's the reason why instead of democracy they tend to trust

friendly interpretation of the article Q) of the Hungarian Constitution can only be that the rules of the ius cogens of international law are merely the framework for the international contracting authority of the Hungarian state and they are not aimed at subjecting the constitutional power to the constitutional judges.

1.3. The Structural Distortions of the Functional Activities

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

Before analysing the distortions arising from the arbitrary expansion of the powers by the constitutional judges, it is worth highlighting that a control over the constitutional courts could only be established with difficulty, given that this institution is directly related to the foundation document of the constitutional power; this way, it is above all state organs. There is no state power body that could take charge of it. After a while, this structural situation inevitably entails that the irrefutable constitutional judges begin to interpret the comprehensive and normative empty constitutional rules more and more broadly. Or, making use of an alternative method, it can read out new fundamental rights from the comprehensive and normative empty declarations of the constitution, thus step by step a new constitution will be created by the constitutional judges. One way to do that – as could be found for example mainly in the Lithuanian Constitutional Court decisions – is that the decisions are based on the very comprehensive formula of the rule of state, even though they were also specific provisions in

the international judicial oligarchies: "A final explanation for the rise of raw international law may be its attractiveness to groups that are dissatisfied with the outcomes of the domestic political process. Political scientist Ran Hirschl has suggested that social and political elites have reacted to the rise of democracy in the modern world by constructing more powerful and wide-ranging roles for the judiciary over which they retain substantial influence." McGinnis, John O. – Somin, Ilya (2007): Should International Law Be Part of Our Law? *Stanford Law Review,* Vol. 59. 1185; and their second study by which the expansive jurisdiction based on human rights is criticized: McGinnis–Somin (2009): International Human Rights and Democracy. *Notre Dame Law Review,* Vol. 84, No. 4. 1739–1798.

the constitution to decide the disputes. This way, only the formula of the rule of state remains from the original constitution and the other parts of it will be pushed into the background. With this method, finally, a new constitution is built up step by step by expanding new and new aspects of the formula of the rule of state.[21] The first majority of the Hungarian Constitutional Court also used this method in the 1990s, but additionally they took over from the German constitutional judges the formula of the inviolability of human dignity. Then, building on both formulas, this majority declared quite openly the creation of the "invisible constitution" and it was stated that in the future more and more new constitutional provisions would be drawn from this.

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

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

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21 As a critique of this development the concept of "total rule of law" was introduced by the Hungarian constitutional judge, Varga Zs. András (2015): *Through Distortion of an Ideal an Idol was Created? The Dogmatics of the Rule of Law.* (Eszményből bálvány: A joguralom dogmatikája.) Budapest, Századvég. 25–32.

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

democracies, such a possibility of the resistance against the constitutional judges comes into existence very rarely.

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

a) The most important reason of this can be seen in the generalist nature of the constitutional adjudication, which runs counter to the European system of specialized courts that are being developed ever since the early 1800s. In the United States the generalist courts remained, and the upper and the supreme courts decide the cases taken from each branch of the entire legal system, and the judges are not specialized in civil law, criminal and other cases. Or if there is such a specialized court (e.g. patent cases) in a sector, which is an exceptional case, the judges of the supreme court with generalist judging competence make the decisions in the case of the appeal, too. Constitutional adjudication was established for the first time in the United States in the early 1800s; it arrived at Europe in the first decades of the 1900s. Now, in most European countries there already is an existing institution. The European specialized court system with the specialized and differentiated judiciary – and, last but not least, also the legal community that is sector by sector differentiated – coupled with fundamentally different components to the constitutional adjudication, as it was on the original site. Of course, the constitutional judges also came with an only narrow competence and after becoming a member of the constitutional court, they should be able to decide concerning everything that can be found in the full spectrum of the law. Due to the specialization of a narrow area, the European constitutional judges are faced with bigger problems than their colleagues in the US.[23] The justices of the Federal Supreme court in the US who are provided primarily with the function of the constitutional adjudication, have been for years performing the function of generalist judging at a lower level – typically parallel

[23] There are some institutional problems arising from the coexistence of the generalist constitutional adjudication and the specialist European judicial system; for a thorough analysis see one of my earlier studies: Pokol Béla (2014): Generalist Judges in the Specialized Judicial System: A Dilemma of the European Constitutional Judges. (Generális bírák a specializált bírósági rendszerben. Az európai alkotmánybírók egy dilemmája.) *Review of Legal Theory (Jogelméleti Szemle),* No. 2. 226–243.

with law professor activities – and thus the subsequent role of the generalist constitutional judge is not a challenge for them. After all, they must continue to deal with criminal, civil, property law, administrative law, etc. issues, as they have always done.

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

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

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

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[24] The lesser decision-making competence of the law clerks does not prevent that they are included in the preparatory work of the drafts: "But what one expects (…) if most judicial opinions are written largely by law clerks (as they are), who are not inveterate legalists because they lack the experience, confidence or "voice" to write a legislative opinion of the kind that judges like Holmes, Carodozo, Hand, Jackson, Traynor, or Friendly wrote. The delegation of judicial opinions writing to law clerks may explain the decline in the number of judges whom anyone would be inclined to call "great"." Posner, Richard A. (2011): Realism about Judges. *Northwestern University Law Review,* Vol. 105, No. 2. 583.

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

[26] See Kranenpohl (2010): *op. cit.* 88.

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

d) The fourth reason that causes the formation of the pseudo-constitution is the huge workload of the European constitutional courts. As was already mentioned, there is a marked difference between the workload of the US Supreme Court and the European constitutional courts; while the justices of the Supreme Court have to decide only one hundred cases per year, the European constitutional judges have to deal with thousands of cases every year. This way, the busy European constitutional judges are not only unable to write lots of concurring and dissenting opinions, but they are also

[27] What kind of charges will attract the newcomer constitutional judge, who tries to stick with the original constitution, and only secondarily follows the pseudo-constitution hardened case law can be seen in the book of Kranenpohl: "Gerade das BverfG hat eine starke Neigung, im Sinne der Wahrung von Rechtssicherheit die bisherige Rechtsprechung weitgehend beizubehalten. (…) Schon durch den bloßen Umfang der bisherigen Rechtsprechung sind damit bereits weite verfassungsrechtlich relevante Bereiche vorstrukturiert, was dem Berichterstatter im Regelfall lediglich erlaubt, sich mit seinem Vorschlag innerhalb der bereits formulierten Prinzipien zu bewegen." Kranenpohl (2010): *op. cit.* 143.

unable to override the once established earlier case law in the light of constitutional values and on the basis of the original text of the constitution itself. This problem was already indicated by Richard Posner: "The heavier a court's caseload, the less likely it is to re-examine (…)."[28]

1.4. Summary and Outlook

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

The emergence of the dominant position of the constitutional courts necessitates a conceptual framework in which the typology of the government forms itself is enlarged and beyond parliamentarism, presidentialism and semi-presidentialism, the juristrocratic form of government must be

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28 Epstein, Lee – Landes, William M. – Posner, Richard A. (January 2010): *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis.* University of Chicago Law and Economics. Olin Working Paper, No. 510. 117.

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

conceptualized.[30] In addition, by the shifting of power dominance towards the higher courts with the constitutional court above them, new forms of political struggles were created as a consequence, and political struggle of the litigation in the courtroom has emerged. This has taken place most clearly in the United States since the early 1960s, and this has since been celebrated by its adherents as the *rights revolution*. As the advocates of the "cause of lawyering," the movement lawyers try to fight the decisions of the courts based on the constitutional rights and freedoms, which cannot be achieved by the political struggles in Congress and in the Member State Legislature. As a consequence of this new political form, the selections of the new judges to the higher courts – especially to the federal Supreme Court – takes place in the wake of political struggles which is similar to the presidential election. Furthermore, the judges and justices elected by the successive Democratic and Republican presidential administration face each other in the decision-making processes as internal "judiciary parties". In Europe and in other countries around the world, the same thing takes place with respect to the election of the constitutional judges, even though the role of the movement lawyers in litigation and politics has not reached the degree here, as could be seen in the United States in the 1960s and 1970s.

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

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

2. The Juristocratic Form of Government and its Structural Issues

Introduction

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

grasped as an increase in the separation of powers.[31] In the original birthplace of constitutional adjudication in the United States, there was no need for reshaping the established forms of government because here this activity was achieved by the ordinary courts and these were seen as a branch of power next to the other two branches of power (legislation and presidential power). In Europe and on other continents, however, the constitutional courts were separated from the ordinary courts and they mostly are not a simple third branch of power anymore for two important reasons. Firstly, the new constitutional courts can control the legislation not only in the course of the litigation processes, but they can also annul the new Parliamentary acts immediately after their enactment. Thus, while in the USA constitutional adjudication could affect the central political battles and laws created in these battles only after years, in the case of the new constitutional courts, their role in the power game is more evident. On the other hand, in the USA the control of constitutional adjudication over the legislation and the government is more limited than in the case of the new constitutional courts because here the laws are not annulled formally by the main courts (Federal Supreme Court in the last instance) but only prohibited for the lower courts to use them. In contrast, the new constitutional courts cannot only formally annul the parliamentary acts but they can also give instructions, the content of which must be included into the future law by a parliamentary majority.

In Europe from the 1950s onwards and then on other continents in the 1980s and 1990s a great transformation in the public power structure was set up by the new constitutional courts. This has already begun in the case of the German constitutional court set up in 1949 because here the control and the annulment of the new laws immediately after their enactment in Parliament has become possible without any preliminary judicial process. The constitutional court in Italy institutionalized in 1946 also went in this direction, although here the control of the new Parliamentary acts can take place only in the preliminary judicial processes, but here the judges can stop the judicial process and may directly ask the Constitutional Court to annul the statutory provisions. Thus, the direct involvement of the constitutional judges in the state power struggles became intensified compared to the original American model of constitutional adjudication. But the growing power role of the constitutional courts was really created in the 1980s when it spread

[31] For a more detailed analysis of these questions see one of my previous studies: Pokol Béla (1994): *The Hungarian Parliamentarism*. Cserépfalvi Press.11–45.

to South American countries; then in the 1990s, after the Soviet empire fell apart, throughout the Eastern European countries new constitutional courts were created with increased power. This trend then established strong constitutional courts in several Asian countries too; such as Taiwan, South Korea and Thailand.

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

2.1. Two Types of Political Ties for the Constitutional Judges

The function of constitutional adjudication and the selection mechanisms of the constitutional judges by politicians entail that in the decision-making of the constitutional court there are ties to politics. However, it differs from court to court and within each court which level and grades of these ties become realized in respect to the individual judges. Empirical research all over the world analysing lots of courts and the separate opinions of the constitutional judges arranged on a scale showed a high degree of dispersion of judges in respect to their political binding. It seems that this binding can be divided into two major types. The greater degree of political binding is on one side where the constitutional judges act as party-soldiers. Another group of judges with a looser tie to politics is on the other side whose decisions are influenced only by the political values of a political camp, but the random interests and opinions of the parties are not taken into account. Which of these types dominate in a country is affected by a number of institutional mechanisms, constrains and rules; the personality traits

of the individual constitutional judges also play a big role. However, before analysing them, it seems useful to highlight a distinction between the continental European judicial role and function and the American judicial role and function. Namely, due to the adoption of the idea of constitutional adjudication from America to Europe, the European constitutional judges are closer to the American judicial role-playing than to the ordinary judiciary in Europe.

2.1.1. Career Judges and Recognition Judges

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

of the individual judges is more autonomous from the collective of the court than their European counterparts have it.[32]

On the ground of their selection mechanisms, the European constitutional judges are as much the same recognition judges as the American judges, so the characteristic of the "recognition judge" can be extended to them: "Constitutional judges belong to the recognition judiciary, appointed at senior stages in their careers, while ordinary judges are members of career judiciary, appointed at young ages and spending their whole lives in the job. In many cases, the appointment mechanisms of constitutional courts will be perceived as more political than those of the supreme court justices."[33]

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[32] The two types of judiciary are analysed by Tom Ginsburg and Nuno Garoupa as follows: "The distinction between career and recognition judiciaries is useful to identify general approaches to the balance between independence and accountability. (…) Career systems emphasize collective reputation (in which internal audience prevail over external audiences); recognition systems emphasize individual reputation (thus targeting more openly external audiences). Collective reputation emphasizes collegial aspects of the judicial profession. Individual reputation depends in part on the primary social function of the judiciary, such as social control, dispute resolution or law-making. We believe that collective reputation dominates when the legal system emphasizes social control (…). In constitutional law, where law-making is presumably the dominant function of judges engaging with the grand principles of democratic governance in high-stakes issues, most common and civil law jurisdiction use recognition judiciaries. On the other hand, in many areas of the administrative law, where social control of lower officials is the more relevant consideration, both common and civil law jurisdictions have shown a strong preference for career judiciaries. (…) Career judiciaries resemble a bureaucracy, and so raise issues of shirking and sabotage of the agency's mission that are familiar to organizational theorists. Not surprisingly we observe a formal reliance on codes and significant procedural limitations to constrain the judges, limit their ability to sabotage the law, and decrease the costs of monitoring their performance. As a result, a career judiciary is methodologically conservative and systematically unadventurous, and unwilling to acknowledge its role in law-making. (…) Recognition judiciaries are different. They are dominated by lateral entry; and promotion is of little significance to the individual judge. Since ex ante quality is easier to observe, judges are less constrained and tend to apply more flexible standards as opposed to clear rules. There are two possible behavioural consequences for the recognition model. First, the judiciary is more politicized (but not necessarily more democratic since it might not follow the legislator). Second, recognition judiciaries will be more creative in establishing and developing precedents (presumably inducing higher rates of reversal.)" Ginsburg–Garoupa (2011): *Hybrid Judicial Career Structures: Reputation v. Legal Tradition.* Chicago, Coase-Sandor Working Paper Series in Law and Economics, University of Chicago Law School. 6–7.

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

After this general presentation – where in the case of constitutional judges in relation to the ordinary judges the higher degree of politicization could be emphasized – we have to analyse in respect to politicization two types of constitutional judges.

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

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

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

With this amendment of the explanations of these schools, which emerged as the explanation of the American ordinary courts, each European constitutional court can be analysed as one of the two types in respect to its level of politicization. Especially where the constitutional judges in their existential conditions remain strongly bound to the dominant political parties by the institutional and regulatory arrangements, there the dependence of the judges can create the dominance of the party-soldier type. In contrast, where by the institutional arrangements the existential conditions are optimally designed, there, as a rule, the strong party ties are removed and only reduced political ties exist. In the last case, the attachment of the constitutional

judges to their nominating parties exists only on the level of political values of a political camp and this loose binding makes it possible that the constitutional judges specifying the provisions of the constitution develop solid clues to the case law and assist their colleagues in creating such. In case of loose binding, the constitutional judges always try to vote on the basis of the case law created by them and their decision-making is influenced only by political values not by the simple interests of a political party. In contrast, the constitutional judges with a strong degree of party-ties do not care about case law standards and they do not even follow the cases that are not politically important; they leave such drafts prepared by others and if one such judge becomes the judge-rapporteur in a case, he gives the politically indifferent matters to his staff in order to create a draft and at the meeting he remains indifferent whether the aspects of his draft can fit into a coherent case law or not. This type of constitutional judge activates himself only in politically important cases when he has in mind only the interest of the political party that nominated him.

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

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

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

Empirical studies are usually limited only to the detection of the political binding without differentiation; I could not find information regarding the proportions of the two grades of this binding. This can be the consequence of the fact that in the comparative research of Nuno Garoupa and Tom Ginsburg, who are in the centre of this research field, the main effort is to demonstrate the higher frequency of the limited political ties intersected with constraints of institutional conditions against the explanation of the behaviourist school which asserts the total determination of the judicial decisions by political ties. Thus, they neglect the systematic analysis of possibility of the political binding on two different levels. However, some data can be found in the empirical studies to prove it. For example, in case of the Spanish constitutional judges,

[34] That these effects can be considered valid in respect to constitutional adjudication in the whole world is confirmed by Nuno Garoupa and his co-authors: "Whereas concrete review „judicializes" constitutional courts, preventive review has the opposite effect. Mere preventive review makes a constitutional court less judicial and more political in nature." Garoupa, Nuno (2011): Empirical Legal Studies and Constitutional Courts. *Indian Journal of Constitutional Law.* 33–35. Another empirical research showed the high level of party affiliation in the case of preventive review: "There is a high correlation between party affiliation and voting, with respect to preventive review". Amaral-Garcia–Garoupa–Grembi (2008): Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal. *Illinois Law and Economics Research Papers Series,* Research Paper No. LE 08–021. 9.

while in their voting behaviour a high degree of party-binding is showed by the empirical research, a study demonstrates that this stronger party affiliation exists in cases when the political motivation of the judges is more directly affected, but if this is not the case, then the direct party affiliation diminishes and only the political binding as to political values comes to the fore. This is the case when the Spanish Constitutional Court decides disputes between the unified Spanish state and regional splits as Catalonia and the Basque territory, which aims to achieve a separate statehood. Then the ties of the judges to the political parties that nominated them become reduced and the cleavages at the level of political values come to the fore: "Our paper, looking at how judges vote, also indicates that Spanish constitutional judges are less likely to vote to party interests in the presence of strong regional or national interests."[35] Analysing the Portuguese Constitutional Court, it comes out even more clearly that the political binding of the constitutional judges may be different and while in the case of one group of judges this binding can be very strong in the form of direct party affiliation, the other group of judges has only a binding at the level of political values. Nuno Garoupa and his research team in a study in 2008 found that the Portuguese constitutional judges who were nominated to the constitutional court by the leftist (Socialist or Communist) parties have a voting behaviour that shows a closer party binding than detectable in case of judges nominated by the right-wing (Christian Democrat and Conservative) parties: "We have shown that there is a strong association between being affiliated with the left-wing party (Socialists and Communists) and voting unconstitutionality, whereas the association between the right-wing parties (Conservatives and Christian-Democrats) results in weak voting. These results are confirmed when we look at voting according to party interests and legislation that have also been endorsed by the party with which the constitutional judge is supposed to be affiliated."[36]

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35 Garoupa, Nuno – Gomez, Fernando – Grembi, Veronica (2011): *Judging Under Political Pressure: An Empirical Analysis of Constitutional Review Voting in the Spanish Constitutional Court*. Source www.researchgate.net/publication/228163474_Judging_Under_Political_Pressure_An_Empirical_Analysis_of_Constitutional_Review_Voting_in_the_Spanish_Constitutional_Court.

36 Amaral-Garcia–Garoupa–Grembi (2008): Judicial Independence and Party Politics in the Kelsenian Constitutional Courts: The Case of Portugal. *Illinois Law and Economics Research Papers Series,* Research Paper No. LE 08–021. 19.

2.2. Structural Issues of the Juristocratical Form of Government

The decisive point in the transformation from a simple actor in the system of checks and balances into the juristocratic form of government for the constitutional courts is the competence to annul the parliamentary acts immediately after their creation. This is a crucial point because, this way, the constitutional judges become directly included into the political struggles of the democratically elected actors. In democracies based on political competition, parliamentary opposition and eventually the other public actors that oppose the parliamentary majority and its government – especially the local governmental bodies, or, in federal states the national/regional governments, local parliaments etc. – try to instrumentalise the constitutional court in order to block the parliamentary majority and the governmental activity. This way, the opposing political forces behind the constitutional court can wholly or partly impose their will on the governmental majority. This is no longer parliamentarism, but the appearance of a juristoctratic form of governance which exists side by side with the parliamentary majority suppressed in the form of a semi-parliamentary system. This is similar to other mixed forms of government that can be seen in semi-presidential systems. In fact, although it is not explicitly emphasized in its name, the semi-presidential system always has a counter-force in semi-parliamentarism. In other words, these two forms of government operate in co-existence and the powerful head of state has to struggle permanently with the parliamentary majority and its prime minister. This co-governance causes no great tension if in a country there are more or less centralized political parties and both positions (i.e. the head of state and the prime minister) are filled by the same political party. In that case, the mixed form of government mostly operates in a smooth way. If the public opinion has shifted in the meantime, however, and at the two different elections these positions are filled by political leaders from opposing political camps, then ongoing public fights will start between the head of state and the parliamentary majority and its prime minister. Since this has first and most clearly evolved since the system in France was set up in 1958, called V. Republic, the co-governance of the political enemies is in general called *cohabitation.*

The juristocratic form of government can be involved in the same situation. This can emerge if such a majority of the constitutional judges exists for a longer period of time with stable political preferences (caused by the filling

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

In case of a constitutional court, this situation of cohabitation has only rarely emerged so strongly in the last decades – at least so far – and over the past half-century, this stemmed from the fact that in Europe and the wider Western civilization (America, Australia) such an economic and demographic stability and prosperity existed, by which a rare tranquillity in history was brought about. This way, through the densely consolidated constitutional framework and binding political preference value the political parties were forced to the centre and the radical changes by the parliamentary elections were improbable. The alternation of political parties in government was thus more or less only the “left” and “right-wing” alternative of the same political centre. This way, there was not so much difference between the political preferences of the constitutional court’s majorities and the ones of the changing parliamentary government majorities which always stemmed from the political centre. However, this situation seems to have started to disappear

in recent years for two reasons. First, in the Western countries the control of the social sub-systems has undergone a radical transformation in the recent decades and the banking and financial sectors were able to acquire total control over the whole society (the mass media, the arts and cultural subsystems, scientific research and commercialization in the military sphere, etc.).[37] However, this caused such great distortions that since the outbreak of the 2008 financial and economic crisis, the entire Western civilization seems to have reached an evolutionary dead end. This crisis is intensified by a more profound demographic crisis. The latter was observed within a few decades. However, its consequences have increased dramatically in recent years. Because of the declining population and work forces, millions of migrant workers were brought in to work; they were mainly imported from the Islamic countries. Through their higher birth rates and family unification, the number of Muslims in Europe has expanded to 23 million. These people mainly live in Western Europe's major cities and they have built parallel societies there. The Christian culture of Europe's population and the constant battles and tensions with the Muslim population has become the main political cleavage in recent years in most Western European countries. The recently launched big masses of new Islamic migrants combined with the inertia of the political parties that make up the centre give rise to radical parties that were marginalized in the past. And because of the tensions caused by migration and the demographic crisis, it seems a plausible assumption that in a few years central parties will be replaced by new radical political forces. This way, the difference between the new parliamentary majorities and the political preferences of the constitutional courts in European countries can be forecasted in the near future. This can bring forth the tensions between the two mixed forms of government that have hitherto existed only on paper as part of the constitution.

This situation was created because of a series of random reasons in recent months in Poland. In this country a political alternation had existed during several cycles, in which a left-wing and a centre-right party dominated

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[37] See the analyses of this topic: Bieler, Andreas – Morton, A. D. ed. (2001): *Social Forces in the Making of the New Europe*. Hamshire, Palgrave Macmillan. 47–69; Carroll, William C. – Carson, Colin (2003): Forging a New Hegemony? The Role of Transnational Policy Groups in the Network and Discourses of Global Corporate Governance. In *Journal of World-Systems Research,* IX. 1, Winter Edition. 67–102; and Smith, David A. – Böröcz József eds. (2016): *A New World Order? Global Transformation in the Late Twentieth Century*. Greenwood.

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

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

a) In order to assess the power of the juristocratic actor against the parliamentary majority and its government, it is the degree of the monopolized access of the constitutional court to the constitution that is the most important aspect. The direct access to the constitution conceptually derives for the constitutional court's function, so it does not require an explanation. Conversely, one may ask whether the parliamentary majority has the competence to overrule the decisions of the constitutional judges or to change

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

b) By the constitutional court's high degree of monopolized access to the constitution its power is increased. This could, however, be further amplified if the wording of the text of the constitution was based on general declarations

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

It is quite another question whether the amendment of the constitution can be reviewed by the constitutional judges. This option emerged in Germany after the Second World War when for the first time a powerful constitutional court in Europe was created. This took place because here the occupying US military government had more faith in the constitutional court filled with trustworthy lawyers returned from the USA than in a mass democracy based on an election by millions of German people. In this atmosphere, the German Constitutional Court expanded its competence in the following manner: the whole chapter of fundamental rights was declared untouchable by the constitutional amendment. This pattern has then given impetus to some other countries so that – unlike the original American constitutional idea – the review of the constitutional amendments has consequently been brought under the authority of the constitutional court. This move already means the takeover of the constituent power openly, since, in this case, the constitutional court's monopolized access to the constitution becomes almost complete. However, this step was exceptionally made by only

some constitutional courts. Although in 2011 there was an experiment in Hungary alone by the then constitutional judges to completely annul the new constitution. As the motion for the annulment had just been rejected by a slight majority of the constitutional court, the constituent power explicitly regulated this option in such a way that it essentially restricted this possibility in order to avoid such a new attempt.[38] Within this sub-question, a further question is whether or not a country's constitution – following the German model in this respect, too – contains a competence of the constitutional court to review the domestic law compared to the general rules of the international law. In this case, the domestic constitution and its amendments can be reviewed by the constitutional judges on the ground of the general principles and rules of the international law. And since there is no codification of these general principles, the constitutional judges can decide whatever they want. In Hungary, the possibility of this annulment was already declared in 2011 by the earlier majority of the constitutional court.

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

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

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

d) Finally, the length of mandate of the constitutional judges that separates them from the re-elections by the political actors is important for the analysis of the strength of the juristocratic form of government. Despite the high level of monopolized access to the Constitution and the widest interpretation power over the Constitution based on the general-empty formulas of it and, further, the sufficient activation speed of the competence to the annulment of the parliamentary acts, the power of the constitutional court over the parliamentary majority is constrained, if the constitutional judges are appointed only for a short period of time. This way, the determination of the juristocratic forces will always revert to the parliamentary majority and the head of state in form of the new judicial appointments. Particularly, in addition to the short cycle, even if the re-election of the old judges is possible, the obedience of the constitutional judges to the parliamentary majority is – more or less – inevitable. With all this, the weight of power of the juristocratic form of government against the parliamentary majority can be kept below a threshold. Conversely, if the cycle of the constitutional judges is long, eventually for a lifetime (especially if there is no upper age limit for compulsory retreat, as in the USA, for instance), then all this tendency will increase the power of juristocracy. The very long cycle of the judges alone is enough to enhance

the weight of power over the other branches of power, as is shown in the US, where the supreme judicial body has in every aspect a tighter power than the new constitutional courts in Europe or Asia. However, the American supreme judges in office for 30 or 35 years represent power unchanged throughout generations, and conversely, the judges of the new constitutional court in the world mostly have only a limited period of mandate. There are big differences among the constitutional courts of the world; the most common is the nine or twelve-year cycle, but there is also a six-year cycle in some cases with a ban on re-election, and there is usually an upper age limit, too (for example, 70 years) that assures the obligatory exits.

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

2.3. Epilogue

By these structural characteristics only the relationships between the juristocratic form of government and the half-parliamentary form of government (or the semi-presidentialism) are given in an abstract fashion. However, on a more concrete level, these relationships can be understood if a lot of further aspects are included in the analysis. It may be important in this respect to see how the formal prerequisites for the post of the constitutional judge are regulated. For example, whether in a country all lawyers with a few years of experience can be candidates for this position, or is it just one of the supreme court judges and a university law professor who can occupy this position. In fact, the fewer the prerequisite for this, the more opportunities will be opened for the political parties to send a party-lawyer into the constitutional court. And if it is possible only with the parliamentary opposition together, then the party-lawyers of both sides will be sent into this body on a parity basis. In the latter case, the completely unknown lawyers have a chance to become constitutional judges, because, this way, they have no aversion from

the opposite side. However, it means that the totally inexperienced new judges will always be exposed to the experienced law clerks of their predecessors and the old case law will be mechanically taken over by them. Further, it is equally essential how the actual decision-making processes of the constitutional court are established in a country. For example, how great a power for the chairman of the constitutional court is given in the determination of the agenda or in the selecting of the rapporteur in the cases etc.[39] These details are important for the complete understanding of the functioning of a constitutional court in a political system, but, in my opinion, these only give colour to the understanding of the power relationship between the juristocratic form of government and the semi-parliamentary form of government with a parliamentary majority. Thus, the crucial aspects can be explored by the analysis of the four main dimensions indicated above.

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

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

speed of its power to the annulment of parliamentary acts can be seen and all these would be completed finally with the length of mandate of the constitutional judges for lifetime – which separates them completely from the re-elections by the political actors – then would the full power of juristocracy emerge. In this situation, the democratic institutions elected by the people would operate only as a disguise for the full power of the juristocracy. This situation is unlikely to happen in Europe, but as indicated in Ran Hirschl's excellent book, certain constellations of power might move in such a direction that seems at first sight irrational and yet some dominant political groups do make it.[40]

[40] See Hirschl, Ran (2004): *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*. Harvard University Press.

3. The Juristocratic State – The Decomposition of its Aspects

Introduction

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

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

The changes caused by the rise of the juristocratic state lead to a shift in this basic structure. The central change is that the precise rules of the laws

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

Among the existing analyses, the work of Bernd Rüthers and Alec Sweet Stone can be mentioned in the first place, where these changes have already been outlined.[41] The analysis of Rüthers emphasize the transformation of the

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

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

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42 See Rüthers, Bernd (2014): *Die heimliche Revolution vom Rechtsstaat zum Richterstaat.* Tübingen, Mohr Siebeck. But the effect of this transition had already been the focus of his attention during the first years of 2000; cf. Rüthers, B. (2003): Demokratischer Rechtsstaat oder oligarschischer Richterstaat? In Picker–Rüthers Hrsg.: *Freiheit und Recht*. München. 11–136; and Rüthers, B. (2006): Geleugneter Richterstaat und vernebelte Richtermacht. *NJW.* 2759–2761. Relevant Hungarian literature: András Zs. Varga made a similar criticism of the "total rule of law" see Varga Zs. András (2015): *Through Distortion of an Ideal an Idol was Created? The Dogmatics of the Rule of Law. (Eszményből bálvány? A joguralom dogmatikája.)* Budapest, Századvég.

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

Before concluding, an analysis is still to be presented concerning the extent to which these changes have been realized in Hungary (8).

3.1. The Dissemination of Constitutional Adjudication and its Power Growth

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

[44] In 1885 Georg Jellinek, inspired by the experience of US constitutional courtship, made a proposal on the implementation of this activity in Austria, cf. Jellinek (1885): *op. cit.* But in fact the constitutional court, inspired by Hans Kelsen, was included in the Austrian constitution in 1920.

Moreover, the jurisdiction of that court had changed, and it had not been placed at the end of the regular legal disputes, but directly over parliamentary legislation. This way, the constitutional court controlled much more closely the legislation, and the possible repeal of the law was directly connected with the political struggles within Parliament. This meant a considerable step on the way to the replacement of democracy by the juristocracy; finally due to some structural reasons this change did not happen and the otherwise modest competences of the Austrian Constitutional Court did not create the subordination of the parliamentary majority by the constitutional judges.

This step came only in the years after the Second World War, when the constitutional court was included in the newly created German and Italian constitutions under the control of the American occupation authorities.[45] From the original version of constitutional adjudication in the US, one would have expected that the highest ordinary court would be entrusted with constitutional adjudication by the Americans, but the creators of the new system in Germany had an even greater aversion to the judges – in the office under Hitler – than in former times in Austria, and, this way, a separate constitutional court was created. In Italy, the Austrian model was little changed and an organization with modest competencies remained. In Germany, however, the situation changed fundamentally. The citizens were allowed to submit an immediate constitutional complaint right before the constitutional court if their rights were irreversibly damaged by the passing of time and, in general, all parties concerned in the legal disputes had the right to stand before the constitutional court with a constitutional complaint, when the litigation by an ordinary court had come to a decision. In addition, the member state governments may file a complaint against the federal measures and vice versa before the federal constitutional court. These changes significantly increased the dominance of the constitutional court over the democratic parliamentary majority, but later this dominance was further enhanced. Namely, the constitutional court had been filled with lawyers and law professor friends, and these trusted constitutional judges could always be sure

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

of the safe support of background power.[46] This way, they began to interpret their competences most widely. In the early 1950s, there was indeed a conflict between the government of parliamentary majority and the constitutional court because in the secure awareness of its democratic legitimacy, the former did not want to admit the priority of constitutional judges. During the US occupation, however, it was clear which side had a better position, this way, the German constitutional judges were unhindered to further expand their otherwise wide competencies. The main route was mainly that some empty formulas, which had little normative content (such as "the right to the all-round development of the personality" or the "inviolability of human dignity", etc.) were interpreted in such a way that they were called "mother rights" which could give birth to more and more new fundamental rights. This way, for a few years, a new constitution was established instead of the original, and the constitutional court had also begun to interpret the original constitutional provisions in the light of this self-made constitution. In addition, they proclaimed their expanded competency to the control of the constitutional changes, and thus they achieved the priority not only over the legislative power, but also over the constitutional power, and this had nothing to do with the original idea of constitutional adjudication.

During economic prosperity after the Second World War and in the Keynesian model of welfare Capitalism, there was a good political climate in all Western Europe, and the limited model of democracy by the strong constitutional judiciary caused no greater criticism in Germany and only a few German theoretical jurists voiced some criticism. With the often keen and rather tasteless debates of parliamentary democracy for a background, the constitutional judges dressed in their solemn marshes with ceremonial robes met great public sympathy while announcing their decisions. Encouraged by positive reception, in the late 1970s, the Western powers, among them the US government, after the collapse of several dictatorships were forced to propose this model of limited democracy by a strong constitutional adjudication for the countries as a new state structure. For this model, the naming of the rule of law was used, and this is appropriate to the extent that only the formal framework of cyclic governmental changes and the free path of democratic change are protected by constitutional adjudication.

[46] For the radical change of elites in Germany after the Second World War see Scheil, Stefan (2012): *Transatlantische Wechselwirkungen: Der Elitenwechsel in Deutschland nach 1945*. Berlin, Duncker und Humblot. Concerning constitutional judges see Scheil (2012): Ibid.155–159.

But here too much of the competencies is transferred to the constitutional court that goes far beyond the guarantees and are partly the takeover of the state's main power.

This enhanced model of constitutional adjudication was adopted by Portugal and Spain in the late 1970s after the collapse of their dictatorships, and, in particular, the Spaniards realized the importance of the expanded model of the Germans. Not only was the separation from the written constitution in Spain increased by the fact that a new self-created constitution was conceived on the basis of the empty normative formulas of the Constitution, but the Spanish constitutional judges were also prepared to wipe out the concrete provisions of the Constitution in its decisions.[47] In the 1980s, the US political elite, which dominated the international scene, was able to use this German-Spanish model of constitutional adjudication in the South American countries, and constitutional courts with the broadest competences were set up in a number of states of the continent. Then came the collapse of the Soviet Empire, and the German model of strong constitutional adjudication was also pushed for the torn-up Central European satellite states. The inner collapse of the Soviet Union in 1991 and the new independent states thus realized the strong German model of constitutional adjudication, and in the times of President Yeltsin, under the most direct American influence in Russia, a strong constitutional adjudication was established. This process was then passed on to a number of Asian countries and to Africa in the 1990s, and today the strong constitutional courts are also equipped with the most extensive competences. This power position, however, stands furthest from the original ideas of constitutional adjudication.

3.2. The Pseudo-Constitution of the Constitutional Courts

Compared to simple laws, constitutions define norms, fundamental rights and constitutional values in a more abstract manner. This way, the constitutional judges have to make much more concretization and interpretation, and these can be made with much greater freedom than in case of ordinary

[47] See the decision on the same sex marriage in 2012 when, despite the explicit prohibition of the Spanish Constitution, the possibility of same sex marriage was declared constitutional in the Civil Code. See Pokol Béla (2015): Constitutional Decision-Making Styles in Europe. (Alkotmánybírósági döntési stílusok Európában.) *Review of Legal Theory (Jogelméleti Szemle),* No. 3.

courts. For this reason, the constitutional judges are given a broad authority, responsibility and power to interpret the constitution. In the course of this interpretation, they can make binding precedent decisions that sometimes work as additions to the constitution. The newcomer constitutional judges will always be chosen by representatives of the changed democratic public opinion in the form of a new parliamentary majority and they are, of course, bound to the constitution, in accordance with their oath. This way, they can reject the existing constitutional precedents and they can establish new precedents. The new constitutional judges (and with them the majority of the constitutional court) are only bound by the old precedents to the extent that they have to give explicit grounds for the deviation. (Without this explicit argumentation only arbitrary decisions would arise and chaotic constitutional designs.) In reality, however, this partial attachment of the constitutional judges is only possible in principle, and a series of structural causes make it difficult to deviate from the existing precedents. Of this difficulty even a final break with the original constitution can originate, and a *pseudo-constitution* would come from the indispensable precedents. This implicitly slips the constitutional power from the hands of the Constitutional Court.

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

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

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

b) In case of the European constitutional judges, this competence problem is mounted by the fact that they remain in their position for only a relatively short time. In contrast to their American counterparts, who are appointed for life with no time limit, the European constitutional judges are usually chosen for a short time (9–12 years), this done with an upper age limit, usually 65–70 years. This way, the European judges often spend only six to eight years at the post, as opposed to the usual American counterparts of 30–40 years. One consequence of this is that the composition of the European constitutional courts changes frequently, and there are always two or three new judges, who are only just getting started with the decision-making work, while a part of the rest has already begun to prepare for the exit due to the age limit. Compared with their American counterparts, the European constitutional judges have decision-making activities with a much more transient nature, and this intensifies the competency problem arising from generalist judging and creates a discouraging effect in respect to the rethinking of the existing case law which does not appear in the case of justices of the US Supreme Court. In the first years after their election, the European constitutional judges may target the mastering of the many thousands of pages of the

[48] There are some institutional problems arising from the coexistence of the generalist constitutional adjudication and the specialist European judicial system; for the analysis of these problems please see my earlier study: Pokol Béla (2014): Generalist Judges in the Specialized Judicial System: A Dilemma of the European Constitutional Judges. (Generális bírák a specializált bírósági rendszerben. Az európai alkotmánybírók egy dilemmája.) *Review of Legal Theory (Jogelméleti Szemle),* No. 2. 226–243.

existing case law, but on the ground of constitutional values there are only a few exceptions who undertake to reinterpret this law. Thus, the competence problem merging with the impact of the temporary position results in the following: the case law established by the ancestors appears as a pseudo-constitution impossible to throw away unlike the simply changeable case law.

c) In addition to these two, the role of the law clerks of the European constitutional judges should be emphasized which is fundamentally different from the role of their American counterparts. The possibility of the judges' own law clerks evolved since the early 1990s in the US Supreme Court in order to assist the decision-making work, and recently there are three law clerks in case of the federal appeals judges and four in case of the justices of the Supreme Court. These American judicial assistants are selected by the justices and judges from among the students of the best law schools and they will receive a one-year mandate, even if in some cases this mandate will be repeated. In these conditions, the law student-law clerks are clearly subordinated to their justices who have many years of judicial experience.[49] The situation is radically different in case of the relation between the European constitutional judges and their staff. Since the German model was copied by most European constitutional courts, we should start with the presentation of this. This model has broken with the American "freshman" scheme, and the staff of the judges are selected from among the young ordinary judges with some years of experience. The other change was that they not only work as law clerks for a year, but they also remain fora long time at these posts.[50] With these changes, the relation of the constitutional judges and their law clerks is substantially transformed compared to the American one and the decision competence of the law clerks reaches the one of the constitutional judges. It is not possible to know exactly what is the proportion

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[49] The lesser decision-making competence of the law clerks does not prevent that they are included in the preparatory work of the drafts: "But what one expects (…) if most judicial opinions are written largely by law clerks (as they are), who are inveterate legalists because they lack the experience, confidence or "voice" to write a legislative opinion of the kind that judges like Holmes, Carodozo, Hand, Jackson, Traynor, or Friendly wrote. The delegation of judicial opinions writing to law clerks may explain the decline in the number of judges whom anyone would be inclined to call "great"." Posner, Richard A. (2011): Realism about Judges. *Northwestern University Law Review,* Vol. 105, No. 2. 583.

[50] Earlier, five or six years could be spent at the post of the staff of the German Constitutional Court, but lately it is usually only two or three years. See Kranenpohl (2010): *op. cit.* 106–108.

of those German constitutional judges who passed on to their staff a large part of the decision on merit. In an empirical research on this topic this is presented as a serious problem. After interviewing some German constitutional judges, Uwe Kranenpohl finds: "Dabei signalisiert der leicht kritische Unterton dieses Gesprächspartner, dass einige Kollegen bei ihm durchaus im Verdacht stehen, ihren Mitarbeitern unangemessen umfangreiche autonome Gestaltungsbereiche einzuräumen. Noch deutlicher bringen dies zwei andere Interviewpartner durch Flucht in Sarkasmus zum Ausdruck: Das hängt eben sehr vom einzelnen Richter ab. Ich glaube, ich kann für mein Dezernat sagen, dass da kein 'Entzug des gesetzlichen Richters' stattgefunden hat – aber ich kann das nicht allgemein behaupten." (Interview No. 6.) "So gibt in der Tat Verfassungsrichter, da muss man davon ausgehen, die unterschreiben jeden Mist, der Ihnen von den Wissenschaftlichen Mitarbeitern vorgelegt wird und kontrollieren das nicht!" (Interview No. 21).[51]

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

[51] See Kranenpohl (2010): *op. cit.* 88.

be confronted with colleagues and their law clerks who deal with the cases on the ground of the pseudo-constitution as the bible of their work.[52]

d) The fourth reason that causes the formation of the pseudo-constitution rather than a simple case law is the huge workload of the European constitutional courts. As was already mentioned, there is a marked difference between the workload of the US Supreme Court and the European constitutional courts and while by the justices of the Supreme Court only one hundred cases must be decided per year, the European constitutional judges have to deal with thousands of cases every year. This way, the busy European constitutional judges are not only unable to write a lot of concurring and dissenting opinions, but they are also unable to override the once established earlier case law in the light of the constitutional values and on the basis of the original text of the Constitution itself. This problem was already indicated by Richard Posner: "The heavier a court's caseload, the less likely it is to re-examine (…)."[53]

e) These effects have been increased by a mandatory uncritical attitude in the legal sciences regarding constitutional adjudication that has been established over the last sixty years by the fact that the constitutional courts were usually created in the wake of dictatorships that had just been overthrown and the new constitutional courts were seen as the symbols of freedom. During the dictatorship, the disciplines of constitutional law and legal theory were mostly repressed, since they would have to deal with the central state power structure and the alternative concepts of law other than the dictatorship's official one. Where there was a dictatorship for a long time, like in Germany, later in Spain, Portugal and then again in the countries of the Soviet Empire, there were two or three generations of lawyers who consequently also dropped out of the constitutional and legal theory of knowledge. Regarding the countries of Eastern Europe, immediately after 1989 the multi-party

[52] What kind of charges will attract the newcomer constitutional judge, who tries to stick with the original constitution, and only secondarily follows the pseudo-constitution hardened case law, can be seen in the book of Kranenpohl: "Gerade das BverfG hat eine starke Neigung, im Sinne der Wahrung von Rechtssicherheit die bisherige Rechtsprechung weitgehend beizubehalten. (…) Schon durch den bloßen Umfang der bisherigen Rechtsprechung sind damit bereits weite verfassungsrechtlich relevante Bereiche vorstrukturiert, was dem Berichterstatter im Regelfall lediglich erlaubt, sich mit seinem Vorschlag innerhalb der bereits formulierten Prinzipien zu bewegen." See Kranenpohl (2010): *op. cit.* 143.

[53] Epstein–Landes–Posner (January 2010): *op. cit.* 117.

parliamentary democracy came and constitutional adjudication emerged. The idea of constitutional adjudication was mainly imported from the United States – reframing specifically for use in Europe – and it was celebrated as the most important symbol of the rule of law. Furthermore, learning from the fact that Hitler was raised to power by the election of millions of German people and the dictators in Austria and Italy also enjoyed great popularity, the American lawyers in the occupied countries after the Second World War tried to build the constitutional courts as restrictions on the massive parliamentary movements. This aspect of constitutional adjudication later gained importance also in Spain and Portugal, and after the fall of the Soviet Empire, the clear dominance of American intellectual influence in the new democracies of Eastern Europe encouraged withdrawal from all criticism regarding constitutional adjudication. Completely inexperienced in this area of law in Eastern Europe, the new constitutional legal theory and the legal circles celebrated the declarations and normative arguments contained by the decisions of the constitutional judges as irrevocable truths. These, of course, were largely imported from the German and Italian constitutional courts, but, for example in Hungary, these decisions went well beyond the original ones regarding the constraints over the majority of the legislation and the departure from the written constitution.

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

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

these, Matthias Jestaedt views this situation in Germany as the following: at the beginning of the 1950s the German legal sciences generally experienced a depreciation of the theoretical level in relation to the legal theory concepts – and here we cannot merely talk about legal positivism, which sees its job narrowly as only the systematization of enacted legislation – but it became more constrained and as a super legal positivism, *court-positivism* was created.[55] For this court-positivism, the law is what the courts in the courtroom are deciding thousands of times, and jurisprudence and legal education are only responsible for the judicial case law. The situation highlighted by Bernard Schlink as constitutional court-positivism is only a part of this wider distortion.

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

All in all, these five reasons and their cumulative implications have set a barely surmountable pseudo-constitution before the original constitution in many European countries, and the newly elected constitutional judges

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

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

with their old guard of the law clerks can base the decisions mostly on this pseudo-constitution.

3.3. The Juristocratic Form of Government

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

In order to assess the power of the juristocratic actor against the parliamentary majority and its government, it is the degree of the monopolized access of the constitutional court to the constitution that is the most important aspect. The direct access to the constitution conceptually derives for the constitutional court's function, so it does not require an explanation. Conversely, one may ask whether the parliamentary majority has the competence to overrule the decisions of the constitutional judges or to change its organizational conditions; there are, in this respect, big differences among the countries. Ultimately, however, it depends on the extent to which the constitutional court has superior power over the parliamentary majority, and by these judges the majority will be utterly suppressed or only a moderate suppression takes place. The more difficult it is to amend the Constitution to the parliamentary majority, or to change the laws on the constitutional court, the greater the degree of the constitutional court's monopolized access to the constitution is. Conversely, the lighter the constitutional amendment, or at least the process of rewriting the law on the organizational conditions of the constitutional court by the parliamentary majority is, the more partial the weight of the juristocratic power against the parliamentary majority becomes. This way, the suppression of parliamentarism into the form of half-parliamentarism takes place only in a moderate version. To furnish an example of the easy way of the constitutional amendment, there is the case of the Austrian Constitution, which only requires for its amendment the vote of a majority of all the members of the parliament, and it happened several times in the past that the decision of the Austrian Constitutional Court was neutralized by a corresponding amendment of the constitution itself. In Hungary, the constitutional amendment is bound to the two-third votes of all MPs, and when, in the period of 2010–2015, the government majority has this qualified majority,

the neutralization of the decisions of the constitutional judges occasionally takes place by the amendment of the Constitution too. In Poland, the constitutional amendment is similar to that of Hungary, but to change the law on the organizational conditions of the constitutional judges is easier and it is only connected to a simple parliamentary majority. So when in the 2015 parliamentary election a parliamentary majority with radically different political values from the previous constitutional interpretation of the constitutional judges was established, the polar opposing new parliamentary majority had enough legal means to modify the opposing majority of the constitutional court. However, in a number of countries more difficult preconditions exist in order to change the constitution, or at least to rewrite the laws on the constitutional court, and, therefore, the juristocratic form of government may have a stronger position against the parliamentary majority and the half-parliamentarism than it has in Poland.

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

suppressed, and the institutions of half-parliamentarism have the possibility to counteract the opposing constitutional court.

Another question within this context is whether the amendment of the Constitution can be reviewed by the constitutional judges. This option emerged in Germany after the Second World War when for the first time a powerful constitutional court in Europe was created. This took place because here the occupying US military government had more faith in the constitutional court filled with trustworthy lawyers returned from the USA than in a mass democracy based on an election by millions of German people. In this atmosphere, the German Constitutional Court expanded its competence in the following manner: the whole chapter of fundamental rights was declared untouchable by the constitutional amendment. This pattern has then given impetus to some other countries so that – unlike the original American constitutional idea – the review of the constitutional amendments has consequently been brought under the authority of the constitutional court. This move already means the takeover of the constituent power openly, since, in this case, the constitutional court's monopolized access to the constitution becomes almost complete. However, this step was exceptionally made by only some constitutional courts. Although in 2011 there was an experiment in Hungary alone by the then constitutional judges to completely annul the new constitution. As the motion for the annulment had just been rejected by a slight majority of the constitutional court, the constituent power explicitly regulated this option in such a way that it essentially restricted this possibility in order to avoid such a new attempt.[57] Within this sub-question, a further question is whether or not a country's constitution – following the German model in this respect, too – contains a competence of the constitutional court to review the domestic law compared to the general rules of the international law. In this case, the domestic constitution and its amendments can be reviewed by the constitutional judges on the ground of the general principles and rules of the international law also. And because there is no codification of these general principles, the constitutional judges can decide whatever they want. In Hungary, the possibility of this annulment was already declared in 2011 by the earlier majority of the constitutional court.

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

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

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

So if a political scientist wants to establish the country-ranking of the power weight of the constitutional court against the parliamentary majority in the whole world, then he or she needs to get started on the basis of the above parameters. The constitutional court‘s degree of monopolized access to the constitution must be analysed; the breadth of the constitutional interpretative power given by the general formulas of the constitutional text; the activation speed of its power to annul the parliamentary acts; and finally

the length of mandate of the constitutional judges which separates them from the re-elections by the political actors.[58]

3.4. The Objective-Teleological Interpretation of Law: The Detachment of the Judges From the Legal Text

The prescriptions of the law only provide the framework for judicial decisions, and they do not fully determine these decisions. Since the early 1800s, however, a common legal technique – based primarily on Savigny's rules of interpretation – had been developed in the German-Roman legal circle, and through this the judicial attachment to the laws was more or less secured. The attachment to the exact rules of the precedents could be observed in the Anglo-American customary law, too. This interpretive canon was then supplemented in the continental European countries by Rudolf von Jhering in the 1870s, and the teleological interpretation was the fifth after the previous quartet of cannons (grammatical, logical, systematic and historical interpretation). Jhering himself advocated the judges' strong attachment to the law, and he regarded the realization of this as the most important basis of legal certainty which became even more important in modern times. By highlighting the targets behind the rules of law, however, and thus the possibility of competition between the text of the norm and its purpose, he unknowingly contributed to the detachment of the judges from the legal texts. Some anxious developments in criminal law came to an end even after the death of Jhering in 1892. Namely, the purpose behind the text was emphasized in 1887 in the study of Franz von Liszt, an earlier Jhering disciple, and Jhering's idea was transformed into a dual guideline for the judges in criminal law.[59] According to his thesis, the text of the Criminal Code is compulsory for the judges, but behind this text the purpose of the text is also compelling and this doubling gave the possibility for the judges to revise the legal text. In view of the purpose of the norm, it can always be argued that the legislators could not find the right text phrases for this purpose, and with regard

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

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

to the purpose, the text can always be altered, rewritten, expanded or even narrowed by the judges. This change of interpretation in criminal law was in polar opposition to the criminal legal principle of *nullum crimen sine lege*, which had been most important since the Enlightenment in the modern era. This way, Franz von Liszt himself became frightened of the consequences and he had the relevant parts from his newly issued textbook deleted in 1990.[60] In private law there was at first no such problem, because here Jhering's idea was developed further by Philip Heck in his bantering writings of 1912 in such a way that the intentions of the legislators were placed at the centre of interest of jurisprudence, and the fact that the judges were bound by law was always emphasized.

This being bound by the law in interest jurisprudence they began to make some changes in the German legal sciences in the 1950s, and similar transformations in several continental countries occurred as an effect of this change. To do this, an aid meant such a declaration after the Second World War that the injustices in Nazi Germany were qualified as the consequences of legal positivism, and it began to sew these sins on the neck of the judiciary trained by legal positivism. Today, this explanation has already been rejected – as a result of the thorough analysis of Bernd Rüthers[61] – but a judge bound to the legal text is still a negative model for many legal scholars. In this climate the idea began to spread that a judge and other interpretation experts did not need to seek what legislators actually wanted to achieve by law, but instead what could reasonably be achieved.[62] The judge is always to decide on reasonableness individually, and his point of departure should always be that the law was smarter than the lawmaker himself. The reason this objective-teleological method of interpretation has spread in recent years

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60 See Finkey, Ferenc (1909): *Unrechtmnäßigkeit als eine strafbare Handlung.* Budapest, Ungarische Akademie der Wissenschaften. 24–25.

61 See Rüthers (2012): *Die unbegrenzte Auslegung.* Tübingen, 7. Auflage.

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

all over Europe, in my opinion, is that the greatest political break-line in many European countries exists between the adherents of federal Europe and the supporters of the national-state structure. The strong international networks of foundations, with hundreds of scholarships behind the groups of lawyers for federative states, can have an effect of magnitude greater than the adherents of national legislation. In particular, this separation from the legal texts can be realized if these texts themselves are formulated less and less on the level of exact rules, but only as general principles or abstract normative declarations and constitutional rights. Let us now examine the changes from which the latter trend has been advanced.

3.5. The Shift Between Rules and the Abstract Principles in the Legal System

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

The events of the French Revolution of 1789 showed that the leaders of the revolution, with regard to human rights as absolute requirements, mutually eliminated each other almost without exception. The French revolutionaries left their convictions in the Declaration of Human Rights of 1789 to posterity, and although these ideas did not have any direct consequences in Europe for a long time due to the terrible experiences of the revolution, they were incorporated into the Constitution of the United

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63 See also Stein, Peter (1966): *Regulae Iuris. Of Legal Rules Legal Maxims.* Edinburgh University Press. 87–91.

States. These human rights were largely political (freedom of opinion, freedom of the press, freedom of assembly, etc.) and were later integrated into the revolutionary constitutional plans of 1848 in Continental Europe. But these were only targets for legislation and were not a binding right for the judges to make judgments. This nature was also maintained when constitutional adjudication was established in the United States in 1803 by the Chief Justice, John Marshall. Namely, constitutional adjudication meant here at first only the decision of the Supreme Court in the conflicts of the federal government with the individual federal states in questions of legislative competences. This nature of constitutional adjudication began to change in the second half of the nineteenth century, and its importance for the human rights gradually increased. This meant the substantive examination of the individual laws by the highest courts, and constitutional adjudication began to function as a corrective to the legislative majority.

From a sociological point of view, we can say that this transformation opened up a possibility for the elite groups, which could not reach a majority in the elections in Congress, to achieve a certain degree of control over society by influencing constitutional adjudication. This strategy was developed by groups of large financial capital in the 1910s. In their struggle against the conservative groups of production capital, they supported the rights of the minorities – first of blacks, then of homosexuals, of women, etc. This way, the massive conservative majority of the Congress was fragmented into many minorities, and as a consequence, the transformation of society was not determined by the majority of the Congress, but by the incorporation of human rights and by the constitutional adjudication of the Supreme Court. The dominance of financial capital over American society against the groups of production capital was brought about by constitutional adjudication and by the "minority weapon". In doing so, the financial capitalist groups established foundations that later took up the fight for human rights: "The American Fund for Public Service was created in 1922, and for a short time it supported key rights-advocacy efforts. Roger Baldwin, the Director of the ACLU, became the director of the new fund, and the original board of directors consisted largely of the members of the ACLU's national committee (…) the Fund supported a wide array of left-wing causes in the twenties and thirties and the Fund was the primary source of financial support for court battles directed by the ACLU in the twenties (…) The stock market crash of 1929 devastated the Fund. However, and as a consequence its support for litigation

dropped dramatically in the thirties."[64] This way, the Federal Supreme Court became the highest organ for the creation of the basic legal norms, and since the 1960s the constitutional adjudication has begun to subject not only the legislation but also the everyday decision-making activities of the courts. New techniques of political struggles were created by these processes, and the role of movement lawyers ("cause lawyers") was created which, based on the human rights of the constitution, began to fight for various minorities in courts and not as politicians in the legislative process.[65]

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

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64 Epp, Charles R. (1998): *The Rights Revolution.* Chicago and London, The University of Chicago Press. 58.

65 For cause lawyering see Scheingold, Stuart (1998): The Struggle to Politicize Legal Practice: A Case Study of Left Activist Lawyering in Seattle. In Sarat, Austin – Scheingold S. eds.: *Cause Lawyering. Political Commitments and Professional Responsibilities.* New York. 118–150.

became decisive and the abstract rights of the constitution as well as the legal principles were again centred on American legal life.

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

In the German legal science there was already an attempt at rehabilitation in favour of the legal maxims and legal principles as early as 1953, when Theodor Viehweg wanted to recapture the medieval topical idea of the law instead of systematic legal dogmatics. After a long discussion, however, this attempt was rejected and accepted only as a partial correction of legal dogmatics.[67] A similar critique against too abstract normatives was expressed here in the 1970s, which qualified the *Generalklauseln* as only vague illusions of law in the judgment of the verdict and, in fact, passed on to the judges the right to determine the law.[68] This way, the maxims and the abstract legal principles in continental European legal thinking remained subordinate to the laws as partial help of systematic legal dogmatics, as was demanded even by Bartolus and Baldus seven hundred years ago.

It must, however, be seen that thinking in legal principles and maxims has been given great support in continental European countries because of the strong pressure of fundamental rights and constitutional adjudication in the latter decades. The shift in control of society and highest state power from legislation to the respective constitutional court according to the American model could be observed, especially in the new Eastern European democracies, so that thinking in abstract legal principles

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

67 See Viehweg, Theodor (1974): *Topik und Jurisprudence.* München, Fünfte, durchgesehene u. erweiterte Auflage; for a debate of this idea see Viehweg, T. (1982): *Rhetorische Rechtstheorie. F. S.*, Freiburg-München, herausgegeben von Ottmar Ballweg; Esser, Josef (1956): *Grundsatz und Norm in der richterlichen Fortbil dung des Privatrechts.* Tübingen; and Canaris, Claus-Wilhelm (1968): *Systemdenken und Systembegriff in der Jurisprudenz.* Berlin.

68 See Teubner, Günther (1971): *Standards und Direktiven in Generalklauseln.* Frankfurt am Main.

and maxims instead of systematic thinking plays a special role here. In addition to the influence of the USA as a victory power after the Second World War and as a leading world power, the shift from the laws of the national parliaments to the abstract legal principles is brought about also by the European Court of Human Rights in Strasbourg. As a result, the efforts to suppress systematic legal dogmatics can be observed, for example, in Hungary, and even within the sphere of private and criminal law, there are already shifts from systematic thinking towards loose topical thinking in legal principles and maxims.

3.6. Politics Through Judicial Processes

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

It was possible to change this arrangement in the above-mentioned development, and these changes have actually been taking place in the United States since the early 1960s.[69] These changes have made it possible for the large groups of society to organize their political struggles not via the parliamentary way in order to influence the determination of the law, but directly via the judicial processes in the courtrooms. From the beginning of the 1900s, it became a matter of fact that such minorities, who had no chances in the elections against the majority, turned directly to the courts and, with arguing based on their constitutional rights, they tried to transform – by

[69] See Epp, Charles R. (1998): *op. cit.*

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

This development can be summarized as the most direct change in the basic structures of the rule of law towards the juristocratic state. The consequences of this change are shown by the political struggles established in the judicial meetings, and during this development the path can be observed as in the place of the trio of separate politics/Administration/Justice, the duality of the politicized judiciary and the juridical policy stepped up, and the administrative activity of the administration became directly determined by this structure. Of course, this change has become widespread in Europe only to a small extent, but it is already present in many places. The efforts to transfer are usually carried out by the American foundations, which already have rich domestic experience, or other foundations supported by them (e.g. the Norwegian Foundation in Hungary). So far, however, they have only achieved success in this direction in the European countries

[70] As a theorist and an active fighter of movement lawyering, Stuart Scheingold can be mentioned, see Scheingold, S. (1998): *op. cit.* 118–150.

whenever they were able to find some alliance in the judiciary of the country. I believe that in the last decades this development could be realized in Eastern Europe rather than Western Europe. Namely, West European legal culture has a stronger resistance to this influence than the legal culture of the East European countries with their forty years of Soviet dictatorship.

3.7. Moral Discourse and Deliberative Democracy

In the course of research on the transformation of the rule of law towards the juristocratic state, such changes can also be observed in the field of moral theory over the last decades, due to which the morale of the millions of mass society, and its parliamentary democracy based on it, will be replaced by a close elite morality and justice based on it.[71] The prehistory of this transformation can be traced back to the confrontation between Kant's individual moral philosophy and Hegel's philosophy of public morality, in which Kant only evaluated public morality as an inferior habit, and he tied true morality to the conscious decisions of the individual. In the last decades, Kant's moral theory has been radicalized by Jürgen Habermas' discourse morality – with-great journalistic support from the media and public intellectuals – and finally, morality itself as a collection of rules of system of behaviour has been thrown away and it is conceived as only cultural knowledge. According to Habermas, the moral directives in modern complex societies can only be created as discourse morals by the discourse of the active citizens. Furthermore, in a deliberative democracy, these moral guidelines negotiated by the civilians must be used as a basis for laws. Thus, morality and law are intertwined in this theory, and this gives an elevated status for the law saturated by morality. Ultimately, the laws of the legislation are not determined by morality as the public morality of millions but rather by the moral guidelines of the intellectuals of the civil organizations.[72]

According to his subjective intentions, Habermas would like to convert democracy, which is confined to mere voting only once every four years, into a genuine debating and deliberative democracy. However, on the basis

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71 For a detailed analysis of this moral-theoretical development see my earlier work: Pokol Béla (2013): *Theoretische Soziologie und Rechtstheorie. Kritik und Korrigierung der Theorie von Niklas Luhmann.* Passau, Schenk Verlag. 185–209.

72 See Habermas, Jürgen (1992): *Faktizität und Geltung. Beiträge des Recht und zur Diskurstheorie der Demokratischen Rechtsstaates.* Frankfurt Suhrkamp. 146.

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

Another version of the direct link between morality and law is realized through human rights ideology. From the beginning of the nineteenth century, the idea of natural law ceased to exist in Europe, but human rights ideology remained alive in the United States, and after the Second World War the former idea of natural law was revived by the domination of the United States. As a result, the international treaties of civil rights were clothed in the Human Rights Convention. This Convention, as any other international agreement, is both legalistically formulated, and its use is by means of the same legal interpretation as in the other parts of the law. The naming, however, is saturated by moral overtones and it gives an elevated accent to this regulation. The violation of this is not simply an "infringement" – especially in mass media presentations – but also

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

a morally disgusting and shameful incident. It is often the case that the State condemned by the violation of the Convention on Human Rights rightly points out that the text of the Convention was the most widely interpreted by the Human Rights Tribunal in Strasbourg and went far beyond human rights. But the moral accent does not tolerate "casuist lawyering".

By way of a summary it can be stated that the dominance of the juristocratic state is taken out of criticism by these moral-theoretical supplements and language politics, and those who do so are disadvantaged from the outset.

3.8. The Domestic Situation: The Juristocratic State in Hungary

The analysis has now come to explore the situation in Hungary in this regard, and it is to be emphasized that by the above-mentioned tendencies of transformation only an analytical framework on the structural characteristics of the juristocratic state in ideal/typical purity was sketched. How it was actually implemented in some states – that is, to what extent the transformation into the juristocratic state has already taken place – can only be shown by more detailed analyses. This analysis should first target the special regulation of the constitutional court by the constitution itself and the law on constitutional adjudication. Furthermore, the analysis should examine the political, organizational and procedural conditions in a country under which certain branches of state power, including the constitutional court, are performing their activities. Thus, the first task in Hungary is to analyse how strong competences were given to the Constitutional Court by the Constitution in force from 2012 and on its basis also given by the law on the constitutional court. On the other hand, however, on the basis of this analysis it can be clarified how much the juristocratic form of government has pushed the parliamentary majority to the semi-parliamentary form of government in Hungary, and also the extent to which the state as a whole has transformed itself into the form of a juristocratic state. The next task is to ask the question to what extent the institutional structure and the decision-making processes of the constitutional court have made it possible to gain the constitutive power itself and to place the precedents of its jurisprudence as the pseudo-constitution in the place of the original. Then the analysis goes beyond constitutional adjudication, and with regard to the entire judiciary it is asked to what extent the dominance of the objective-teleological interpretation method in the place

of the other methods in Hungary is realized. Another question of the analysis is the strength of the role of the *Generalklausen*, the empty constitutional declarations, evaluations and formulae instead of the rules at the level of exact meaning in judicial decision-making processes. The extent to which political struggles could be achieved by the judicial process in Hungary, as well as the moral and theoretical support of these legal and political struggles, can also be examined, because these processes can contribute to the realization of a juristocratic state. All these questions can only be solved by means of thorough research, but as a starting point a few answers can be presented here.

The Hungarian Constitutional Court can be qualified as one of the most powerful constitutional courts in the world due to the regulation of the Constitution and the Law on the Constitutional Court. The new Constitution in force from 2012 gave the constitutional court the right to control judicial decisions, as well as its power to directly control the laws of Parliament and the other legal regulations. In addition, we should also point out that during the process of constitutional complaint against judicial decisions, the constitutional court can always go beyond these decisions and it can begin the control of the underlying legal rules, too; even after the transition the closely related regulations or the whole law can be annulled.[74] But if the constitutional court does not want to annul the controlled legal provisions, they may amend or supplement the content of these provisions. Namely, it is capable of annulling the parliamentary act examined only in a mosaic-like manner, and from then on this act can only be used in this modified form. Furthermore, a constitutional requirement may be attached to the examined rule by the constitutional court, and the ordinary courts can only use this rule in the future together with this supplementary requirement.[75] In addition, the constitutional judges can usually choose whether to annul the legal provisions examined or to declare a legislative omission, and the legislator is requested to fill in the identified gaps on the basis of the arguments stated by the constitutional judges.[76] In another direction, however, it can be judged as a barrier of the constitutional court in Hungary that the Constitution explicitly forbade him to examine the constitutional changes in substance. These changes can only be examined by the constitutional court on the basis

[74] See the section 28 (1) of the Law on the Constitutional Court.
[75] See, in this connection, the 46 (3) of the Law on the Constitutional Court.
[76] See, in this connection, the Act § 46 (1)–(2) on the Constitutional Court.

of such procedural rules that are included in the Constitution itself.[77] This rule resulted from the experience that if in a country the issue of the control of constitutional change was not explicitly regulated in the Constitution, such efforts within the Constitutional Court would often be developed to include the entire constitutional change under control, as was actually the case in Hungary.

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

The next question is the emergence of a pseudo-constitution on the basis of the precedents of the constitutional court, instead of the original written constitution, thus the observer is in a comfortable position. Namely, the first president of the Hungarian Constitutional Court, László Sólyom, declared immediately after the beginning that the task of the constitutional court would be to make an "invisible constitution" with its decisions as one which is valid forever and this constitution should have an advantage over the written constitution.[78] Perhaps this thesis had never been so openly declared in

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77 See the Constitution, article 24 (5)–(6).

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

the world before, although in fact the Germans had already exercised this since the late 1950s, and a pseudo-constitution was also brought about by the permanent jurisprudence of the Constitutional Court in Germany. In this procedure, the relevant provisions of the written Constitution are formally and politely mentioned, but the actual reasoning and decision are made on the basis of the pseudo-constitution. The first president of the Constitutional Court in Hungary had immediately recognized this method at the beginning of constitutional adjudication and he exposed it to the public, after which it was called the concept of the "invisible constitution". I have the presumption that this open statement – in addition to the fundamental lack of deeply rooted democratic tradition – was also made possible by the fact that there never was a constitutional court in Hungary and that there was no knowledge of it in the groups of lawyers. The decision-making practice based on the "invisible constitution" is so strongly rooted that despite the new Constitution of 2012 – and despite its pronounced ban! – decisions these days are still made by the majority of the constitutional judges based on old constitutional precedents (that is, the "invisible constitution").

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

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

The spread of the use of general normative valuations and abstract principles instead of the exact relevant rules – or at least alongside them – can already be found in the course of the judicial activity in the last few years, and in some newly created statutes the introductory provisions stipulated that

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[79] See also Pokol Béla (2015): Constitutional Decision-Making in Europe. (Alkotmánybírósági döntési stílusok Európában.) *Review of Legal Theory (Jogelméleti Szemle),* No. 3.

the individual provisions in these statutes should always be interpreted with the aid of the general legal principles. In the last few years, this direction was further strengthened by the fact that Article 28 of the new Constitution also stipulated that interpretation should always be carried out in accordance with the fundamental rights and the values of the Constitution. Whether or not these rules of interpretation in the future will cause the alienation of the judiciary from abiding the law, cannot be decided today.

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

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

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

4. Possibilities for the Amelioration of the Juristocratic State

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

The unbiased presentation of the juristocratic state as a limited democracy makes it possible to better understand its origins. Namely, the original idea of a constitutional adjudication was not directed at the suppression of democracy, and the will of millions of citizens should not have been pushed aside. On the contrary, the constitutional court was originally only a guarantee of the cyclical renewal of democratic government and the division of powers. This was true for the constitutional judicial powers of the judiciary in the American beginnings between the federal level and the national level as well as the Austrian constitutional adjudication since 1920 due to the ideas of Hans Kelsen. Only the German Federal Constitutional Court, which was created under the control of the US occupation authority in 1949, began on

a road that led to the creation of an increasingly stronger juristocratic state in recent decades in a number of countries around the world. The success of this model and the creation of the other constitutional courts on the basis of this model since the beginning of the 1980s in many countries – which had even given further competencies for the constitutional courts – created the new power system of the juristocratic state. Here the power struggles are always disguised with legal and constitutional arguments, and instead of open political struggles, the battles run on the basis of legal arguments. In addition to the German model, for the changing activity of the new constitutional courts in the world the change of the original idea of constitutional adjudication in the United States itself was also important, which took place in the 1960s.[81] This was the beginning of the "rights revolution" which brought about new techniques for political struggles, and together with the model of expansive German constitutional adjudication, this mixture was the one by which the juristocratic state could be created in a number of countries around the world.

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

At the conference organized by the Konrad Adenauer Foundation in May 2009, Rüdiger Löwe was quoted as saying that the actual extent of American influence on the emergence of the Basic Law and its content is still taboo for scientific research purposes: "Löwes Meinung nach sei der Einfluss der USA auf die Entstehung des Grundgesetzes heute immer noch ein Tabu-Thema. Die USA hätten mit sanfter Strenge auf den richtigen Weg geholfen. General Lucius D. Clay und die amerikanische Regierung gaben nach dem Zweiten Weltkrieg ein engen Korridor vor, in dem sich die deutschen Gründungsväter bewegen konnten".[82] On this question, Marcus M. Payk writes in his review

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81 See Epp, Charles (1998): *op. cit.*118–150.

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

as follows: "Über Brisanz der Frage, inwieweit das Grundgesetz für die Bundesrepublik Deutschland von 23. Mai 1949 als eine eigenständig deutsche Verfassung oder doch eher als ein "Diktat der Alliierten" zu werten sei, ist die Zeit hinweggegangen. Das Problem eines demokratischen Legitimationsdefizits durch die "Verfassungsschöpfung unter Besatzungsherrschaft" (R. M. Orsey) ist zwar wiederholt aufgeworfen, größtenteils aber unter Hinweis auf den eigenständig deutsche Anteil an der Entstehung des Grundgesetzes sowie auf die akklamatorische Funktion der ersten und der nachfolgenden Bundestagswahlen verworfen worden."[83]

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

Barbara Fait made clear in her analysis of the documents on the events of the first years of the American occupation that the Americans did not want to free the Germans in 1945, but to hold as enemies under control and punish them. She cited from the documents in the original English language how strongly the control of all major developments in the early years – like the creation of the Federal Constitution – was practiced by the Americans: "Die (Straf-)Direktive JCS 1067, von April bis Juli 1947 offizieller Richtlinienkatalog der amerikanischen Militärregierung, bringt die restriktive Haltung der Sieger deutlich zum Ausdruck." Germany will not be occupied for the purpose of liberation but as a defeated enemy nation."[85] Another becoming quotation from Fait's analysis shows that behind the efforts

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

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

85 Ibid.

of the US occupation authorities towards limited democracy stood the fear of the German masses: "Deutschland wird nicht zum Zweck der Befreiung, sondern als besiegter Feindstaat besetzt werden. Es war der Hauptziel der USA wie auch die anderen Siegermächte, eine neuerliche Bedrohung der Welt durch Deutschland endgültig auszuschließen."[86]

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

86 See Fait. 420
87 See Fait. 426.
88 See Fait. 429.

by the occupation authorities: "This Constitution must go to the German people as a free creation of their elected representatives and with the least possible taint of Military Government dictation."[89] The author of the study, Barbara Fait, added: "Andererseits waren weder Clay noch sein Stab geneigt, den Besatzunsgzielen oder vitalen amerikanischen Interessen zuwiederlaufende Verfassungsinhalte zu akzeptieren."[90]

For me, these analyses gave a clear answer to the question why the break with the original idea of constitutional adjudication took place, and the expansive power position of the German Constitutional Court was created instead. The ambitions were clearly directed at a restriction of democracy, which, on the basis of millions of Germans, would always have been a threat to the Americans and the other states. In case of the danger of an unacceptable massive political decision-making, further dangerous developments can be basically stopped by a powerful body, and this way a continuous monitoring of the US-dominated western world over Germany can be guaranteed. This limited model of democracy is then given to the public with such a legitimation that this is the "real" democracy that has been improved with the rule of law. And since the everyday events of political democracy really show a series of dissonant experiences, and a strong dislike of the millions of people are caused by the hostile debates in parliament and in the mass media, the constitutional courts, with their secret decision-making mechanisms, and only with solemn announcements of their decisions before the public received massive support in most countries.

The German model of constitutional adjudication was then adopted in many countries around the world in the 1980s and 1990s. We must, however, see that this unhindered spread and the emergence of massive support was also made possible by the fact that this has always happened in countries where a certain form of dictatorship previously existed. The Great Powers organizing the overthrow of the dictatorships – as a rule, with the United States having the leading role among them – were able to present the German model of democracy as a real democracy of modern times. The argument is that nothing in the foundations of democracy has been changed here, but it has only been given another guarantee by the constitutional court. This is not the case, however, in the expanded power of the German Constitutional Court, and it would be true only in relation to the modest role of the original Austrian

89 See Fait. 432.
90 See Fait. 432.

Constitutional Court of 1920. The fundamental change in the German model already implies a clear break with the political principles of democracy which is based on the wills of millions of people, and this model created a political decision-making system that is dressed in legal arguments. That is the reason why the name Juristocratic State is more suitable for its characterization.

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

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

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[91] See Luhmann, Niklas (1982): *Legitimation durch Verfahren.* Frankurt am Main, Surhkamp; for a critical approach see Machura, Stefan (1993): Legitimation durch Verfahren im Spiegel der Kritik. *Zeitschrift für Rechtssoziologie.* Vol. 14, No. 1.

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

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

The other direction is the improvement and "ennobling" of the juristocratic state which has already become a reality in many countries around the world in recent decades. The efforts in this direction should, on the one hand, be the removal of the existing structural distortions in the functioning of the constitutional courts, and, on the other hand, a greater rapprochement of the constitutional decision-making mechanisms to the requirements of democracy. At present, the functioning of the constitutional courts behind the public is characterized by the following distortions: **1**. In its selection mechanism, the guarantee for the avoidance of the mere party soldiers, constitutional judges are not secured in many countries and this distortion can question beyond a certain degree – in addition to the poor quality of the juristocratic state – the frictionless political rotation. **2**. The selected constitutional judges, who typically come from narrow specialized legal fields, cannot grow into the generalized decision-making process of constitutional adjudication. **3.** A further problem is that, on the one hand, the permanent personnel law clerks of the constitutional judges reduce the likelihood of reaching the level of authentic constitutional adjudication in the case of the newly elected ones, and on the other hand, it can make it possible for the chairman or other senior officials of the constitutional court to replace the body of the

constitutional judges by the centralized team of law clerks. **4.** A further distortion means that, in case of several constitutional courts, as in Hungary, the chairman of the constitutional court is not limited by any automatism with regard to the selection of the rapporteur for the individual cases, or he can even maintain the cases for himself. Thus, in the most important cases, the direction of the constitutional decision can be determined personally by the chairman. **5.** As a next distortion, it can be formulated that no organization is superior to the constitutional judges, and in this way, necessarily such secessionist tendencies are created, by which the constitutional judges are removed from the provisions of the Constitution, and those who should protect it, become the greatest danger to it.

If the actual juristocratic nature of the state is assumed, but the structure of this state is still to be improved, the following deficiencies in the current situation will require a solution: **6.** The decision-making of the constitutional court is completely behind the public, and while it is acceptable in the case of ordinary courts, it cannot be tolerated in the case of the constitutional courts whose basic state decisions are made on the basis of their free discretion. **7.** Finally, it must be emphasized that, in case of juristocratic mechanisms of decision-making in the state, the legal NGO organizations have become the centre of political will formation, but they are mostly disguised as human rights defenders and are qualified as a simple civil organization. In fact, they are the groupings of movement lawyers – precisely tailored to the functioning of the juristocratic state – and they play the same role as the political parties play in a democracy. This way, these groups of movement lawyers should be distinguished from simple civilian organizations and a separate regulation should be created for them.

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

4.1. The Selection of the Constitutional Judges

Due to the normative openness of abstract constitutional provisions, the constitutional judges inevitably decide in the broadest discretion, and the great

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

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

If, because of the necessity of the minimum democratic legitimacy of the constitutional court, the role of the legal professional associations is pushed aside in the selection of the constitutional judges – because these associations are necessarily dominated by the interests of cliques behind a professional mask – then the selection by the parliamentary majority should be viewed as appropriate. It should be seen, however, that this can only be meaningful

if the high professional requirements for this selection are defined fairly precisely by the act of the constitutional court. Experience shows that if they are not sufficiently defined, the parties in the parliament will – in the interests of the high qualified majority – decide to abandon even the fundamental requirements, in order to receive the support of other parties for their own candidate. In this way, while the selection of the constitutional judges can be assessed as appropriate by the qualified parliamentary majority, the importance of the supervisory rights of the head of state as an end to this selection process is to be emphasized. It must remain on the level of the formal supervisory role of the neutral head of state, and the nomination to a constitutional judge can – even should – be denied by it only if there is a lack of formal prerequisites.

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

4.2. The Accessibility of the Level of the Authentic Constitutional Judge

No matter how long the novice's legal past is, when he begins to participate in the decision-making process of the Constitutional Court, he has to learn huge amounts of new information. For decades, the new constitutional judge has been a law professor or judge in one of the specialized legal areas but he remembers the other legal areas only as the subjects of the examinations from the time of the law school. But now he should be able to make decisions in all areas of law. Constitutional adjudication means a generalized jurisdiction – in accordance with the court system in the United States where the idea of constitutional jurisdiction emerged – and that is precisely in contrast

with the specialized jurisdiction in Europe.[92] In this way, the law professors and the former judges are almost beginners when their activity as constitutional judge begins. In order to be able to really grow into the role of the authentic constitutional judge, the greatest efforts must be made in the first few months and in order to be able to handle the thousands of pages of case law already created by the constitutional court. All these may fall outside the domain of the newcomer's legal expertise and the only information he or she has is to be found among his/her memories of exams from the time of law school. There is no doubt that a law professor whose research area was not just a narrow legal field has a greater chance of reaching the generalized view of constitutional adjudication. In contrast, maturing into an authentic constitutional judge for lawyers who have worked in the deepest specialization of law (lawyer, judge, legal scientist etc.) is, in many cases, almost an insoluble problem.[93]

However, this is only the starting point because the structures and the decision-making practice of the constitutional court can make the growing up to the role of the authentic constitutional judge more likely

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

93 The American Richard Posner calls our attention to the divergence between European and American court systems, and that this difference arises from a wider divergence between the structure of the two rights: „In Europe the judiciary is much more specialized than it is in this country; and I am not prepared to assert that it is a bad thing, given the very different structure of the Continental system. I have serious reservations, however, about trying to graft on branch of that system, namely the specialized judiciary, onto an alien trunk". Posner, Richard A. (1983): *op. cit.* 778. Posner's argument, however, can be reversed for the opposite, and it can be concluded that in continental Europe – especially after the 1989 regime change in the countries of Central and Eastern Europe – a piece of the generalized jurisdiction system was adopted by the United States in Europe. The generalized Constitutional Court was placed over the specialized court system without seeing the problem of the subordinate of the specialized Supreme Courts to the generalized Constitutional Court.

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

What should be placed in the centre of the changes is the emphasis on how important it is for the new constitutional judges to grow out from their former specialized areas of law and obtain the generalized decision-making capacity of a constitutional judge and not to remain under the constant guardianship of his/her permanent law clerk. The most important change would

be if the new constitutional judge did not have any personal staff in the first year, and in the same way, he or she would not be shared as a rapporteur in the first year because the personal law clerks are indispensable for this task. This structural change would urge the newly elected constitutional judges to make the analysis of the drafts made by other colleagues and the analysis of the supplements themselves (for example, the submissions of the complainants, the court judgments in the first and second instance, etc.). This analysis initially involves a great workload, especially in the areas of law which are far from their former area of law, but after the thorough analysis of a few hundred of these draft decisions, it is becoming easier and in the coming years, the new constitutional judge will be a true generalist in the cases in criminal law, civil law, administrative law, labour law, etc.

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

4.3. The Reform Possibilities of the Team of Permanent Law Clerks

With the adoption of the constitutional adjudication of America, the system for the assistance of the constitutional judges was taken over with regard to the technical work of decision-making. Thus, in most countries there is a team of law clerks (scientific staff, legal assistants etc.), which either work personally for each constitutional judge or are centralized under the chairman of the constitutional court. However, the adoption of this institution was very different from the original one. In the original form, the law clerks are selected from law students for a year – strictly selected by the individual judges them-

selves. But after the takeover, the team of law clerks consists of trained judges or other well-experienced lawyers in Europe and in most countries of the world. In addition, this is no longer a temporary team of employees, but the auxiliary system means the constant co-workers of the constitutional court, which have been resident here for many years. Even in several countries (also in Hungary) it is possible that the employees are active here for a lifetime and they are waiting for the new and inexperienced constitutional judges, in order to teach these newcomers. These employees are selected in most countries by the chairman or a senior civil servant appointed by him, although some of them are formally the employees of the individual constitutional judges.

Through these changes, the relationship between the constitutional judge and their employees is fundamentally transformed, and the status of the constitutional judges in the structure of the constitutional court is thereby also touched. These changes have reached different degrees in individual countries and in order to understand this, it is worth comparing the original system of law clerks in the USA with the most distant one. In this way, the effects of these changes can also be better understood in those countries that are within the two ends of the scale. In the original US system of law clerks, every Supreme Court judge occupies a sovereign decision-making position against his self-selected law clerks, who are exchanged annually, and only the technical details of the decision-making are done by them. In addition, the actual decision-making competence of these clerks is incomparably smaller than that of the judges. The system of the Turkish Constitutional Court is the furthest to this system. Here, the individual constitutional judges do not have a team of employees, but only the entire constitutional court and these employees are strictly subordinate to the president and they work under the direct supervision of a high official. In addition to this change, the draft decisions are not prepared by one of the constitutional judges as rapporteurs, but a permanent employee is selected for this task in the individual cases by the chairman. The constitutional judges can get the drafts before the meeting and they discuss it with the employee who has made it. These employees are formally "deputy constitutional judges" not just simple employees, and they are at the centre of the decision-making process of this constitutional court. It is, therefore, such a decision-making mechanism where the chairman of the constitutional court is at the centre, and with the help of the deputy constitutional judges, he can dominate the whole decision-making process, and the real constitutional judges can only make efforts externally to understand the decision-making decisions of the drafts of the employees. Further studies would need to reveal the actual chances of the judges of the

Turkish Constitutional Court in terms of influencing decision-making, but it can be stated at the level of an overall assessment that it should be low.[94] Here, the constitutional court's decision-making power is indeed in the hands of the chairman of the constitutional court, and if the Turkish President can determine it strictly, the whole constitutional system is here only a disguise and a fig-leaf before the actual power of the head of state.

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

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

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

stitutional judges, such as the Romanians and the Turks, although the draft decisions were formally prepared in their name.

The next level of the scale in the direction of authentic functioning is perhaps taken by the Hungarian Constitutional Court. Here the employees of the individual constitutional judges also have an important role in the decision-making, but it depends on the personality of the constitutional judge and there are great differences among the teams of the individual constitutional judges regarding the transfer of the essential decision-making work or only the technical aspects.[96] On the other hand, the members of staff cannot participate in the meeting and in this way, the constitutional judge as rapporteur must always be involved in the details of the draft in order to be able to enter into the debates. However, since, according to the constant practice, the constitutional employees in Hungary are entrusted with this task in the course of many years of work – under the chairman as employer, but indeed, in the teams of the individual constitutional judges – the new constitutional judges are regularly led by the team of experienced old employees to the decision-making process. This means a guardianship over the new constitutional judges during the first months (or years) and this way, the complete decision-making work can remain in the hands of the employees.

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

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[96] The results of an empirical survey were published in the journal of the Hungarian Constitutional Court, and a third of the number of constitutional jurists who define the substance of the draft itself are a third of those who also share this task with their collaborators. The last one third will be decided on the substance of the draft by the employees without the constitutional judge. See Orbán Endre – Zakariás Kinga (2016): The Role of Law Clerks of the Constitutional Court in Hungary. *Constitutional Review (Alkotmánybírósági Szemle),* No. 2. 114.

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

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

[97] The footnote should mention the possibility of *robolawyer* used by the major law offices in New York and some of the dishes there. Through the future use of these algorithms in constitutional decision-making processes, the autonomy of constitutional judges could be fundamentally increased, and especially in routine matters (and it would account for 90% of the work load) it could be used.

4.4. The Creation of Automatism for the Selection of the Rapporteur

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

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

In the case of the German Federal Constitutional Court, the question of the selection of the rapporteur is made easier by the fact that in Germany the Constitutional Court itself has, to a certain extent, approached to the specialized jurisdiction. Its division into senates – elsewhere not existing – means an approximation towards the specialization and both are specialized in different

[98] See Kovács Virág (2013): The Constitutional Decision-Making Processes. Lessons from American Empirical Research. *International Relations Quarterly,* Vol. 4, No. 1. 13.

parts of the German Basic Law. This way, the complaints are automatically distributed between the senates, and the distribution takes place on the ground of which provisions of the Basic Law were determined by the constitutional complaint. This partial specialization is still further increased by the fact that the German constitutional judges receive still more restricted legal areas within the senates (labour law, financial law, criminal law, etc.) and the successor always inherits from his predecessor the narrow legal area. This way, each constitutional judge automatically receives the complaints that belong to his legal area. In order to avoid the confusion, it is still important to note that in spite of specialization at the level of draft-making, the generalized constitutional adjudication remains in Germany, because the decisions of the Federal Constitutional Court are taken by all members of the Senate.

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

Based on the information, the chairman's unlimited power to select the rapporteur developed gradually at the beginning of the 90s in Hungary and firstly it was taken into account which legal area had been practiced earlier by the individual constitutional judges, but it did not become a customary law and now it is not mandatory for the chairman. He can decide on this matter freely and he can even keep dozens of cases, and as a rapporteur he can prepare the draft together with his staff (or with the addition of the employees of other constitutional judges). The chairman of the Italian Constitutional Court also has this unrestricted right for the selection of the rapporteur. Perhaps it can be said that while in the case of ordinary courts the greatest offense would be the distribution of the cases among the judges by the court chairman at his own discretion, the constitutional courts have a loose practice in this regard. In some

countries – as in Hungary – this practice is unlimited, and if this unlimited power is combined with the retention of dozens of cases by the chairman and the decision-making takes place with the centralized team of the permanent employees, then we are close to the decision-making model of the Turkish Constitutional Court. And this is the deepest violation of the idea of constitutional adjudication. Thus, the creation of some kind of automation is most important for the selection of the rapporteur in the individual constitutional decision-making processes. The quality level of the juristocratic state can only be increased if such an automatism is brought about, be it the above-mentioned American, or the German or any other.

4.5. The Attachment of the Constitutional Court to the Constitution

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

Keeping this issue in mind, it cannot avoid establishing a control over the constitutional court in the future. Although this must be done with the utmost caution so that the particular political revenge against the constitutional judges cannot be realized this way. Thus, in the case of the obvious violation of the provisions of the constitution by their decision, the sanctioning of the constitutional judges should be imposed only on the basis of a very high

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

4.6. The Abolition of the Secrecy of the Constitutional Court

While a court can formulate its judgment in the cases on precise legal provisions, and it makes interpretations in a narrow frame, the public declaration of sentence and the written justification is sufficient for the control of the public, and in the interest of the undisturbed session of the court, the secrecy of deliberations may be accepted. But by the decisions of the constitutional courts, the solutions of the basic problems of the state or society are targeted, and these decisions are not made with a simple interpretation of the law, but with a very broad and free consideration of the comprehensive constitutional declarations and rights. Even whole quantities of norms can be brought about by the constitutional court because of such an open basic right as the right to the integrity of human dignity or the right to general freedom of action. Constitutions usually contain open norms, declarations and constitutional values – and these parts of the modern constitutions have even been multiplied! – so this way, the constitutional provisions obtain the more exact content only in the constitutional decisions. In most cases, the unconstitutionality of the laws and the ordinary court judgments – or the contrary – is stated on the basis of earlier decisions of the constitutional court, and the relevant constitutional provision is only formally mentioned. Somewhat sharpening it, it can be said that in the decision-making

processes of the constitutional court, a continuous constitutional work of a constitutional assembly is being done. The results of this work are the decisions of the constitutional court and they determine not only the individual cases but also the constitutional basis for the later decisions of the constitutional court. The concept of a juristocratic state makes this reality clear, and, this way, the decision-making process of the constitutional court, which is a centre of this state, cannot be so freely concealed behind the public as in the case of ordinary courts. It is intended to be created in some form of public control over these processes, which, on the one hand, makes the motivations and considerations in the individual constitutional decision-making processes observable and, on the other hand, it would create the strongest motivations for the constitutional judges to prepare as fully as possible for the debates. As a consequence of this change, it will be necessary to formulate their positions in detail before the beginning of the session and not in some loose brainstorming groping fashion.

For the creation of public control, two ways can be found during the reflection. One way would be the complete opening up of the deliberations of the constitutional court and, as in the case of parliamentary committees, journalists and other public figures could be freely present in these deliberations. The other way would not change the system of closed consultations of the constitutional court but it would be compulsory to publish the verbatim minutes of the meetings completely after the completion of the individual decision-making processes. For example, in this latter solution the literal protocols should be published on the website of the constitutional court together with the decision itself. The first solution would, in my opinion, be unnecessary and it would lead to the unnecessary disruption of the deliberations. But the second option would have no disadvantages, and it would create the benefits of public control. All constitutional judges should then speak in the meetings knowing in advance that later on it will be read by the general public. How the individual arguments for and against the decision were raised as to how the relevant constitutional provisions were mentioned and constructed (or simply pushed aside), as to how the real motivations of the individual constitutional judges appeared in the debate etc. These important details of the decision-making could be seen in the proposed solution by the public. The creation of the technical background for this solution is not a difficult problem because the system of literal protocols already functions in the case of parliamentary meetings and the parliamentary committees, and the staff for this work can be involved. In these modern times language generation algorithms and automatic robots can be used for this work. With this new system of the publicity of the deliberations of the constitutional

court, the possibility for permanent analysis of the decision-making by the previously mentioned monitoring centre would be brought about, and on the basis of the arguments or counter-arguments of the debates, the signs for the removal from the constitution could be detected early.

4.7. Separation of Movement Lawyers from Civil Organizations

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

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

[99] See von Jhering, Rudolf (1872): *Der Kampf um das Recht.* Wien, Verlag der Buchhandlung G. J. Manzsche. Although it is noted that the movement lawyering was quite sure far from the way of thinking of Jhering see Jenkins, Irredel (1960): Rudolf von Jhering. *Vanderbilt Law Review,* No. 1. 160–190. For Jhering's legal and social theory see my earlier study: Pokol Béla (2009): Jhering's Legal, Moral and Social Theory. *Review of Legal Theory (Jogelméleti Szemle),* No. 1. 2–38.

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

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

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

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[100] For a detailed analysis, see my previous analysis: Pokol Béla (2004): Political Think Tanks and Direct Action Groups. *Review of Legal Theory (Jogelméleti Szemle),* Vol. 5, No. 4. 3–15.

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The book analyses the processes by which a democracy-based state is increasingly transformed into a juristocratic basis in a number of countries in the Western world and by their impulse elsewhere in the world too. This is essentially created by the wider and wider competences on the constitutional courts, but the change of the decision-making process of the other supreme courts also shows this direction. What has been politically debated within the democratically elected bodies in a state of democracy – millions of masses cast their votes in order to determine the direction in which these issues should be resolved – it is based in the uristocratic state on the struggle with legal arguments, and the final decisions are made by the supreme court or constitutional court. The analysis also shows that this state operation has not only become popular in a number of countries around the world but it has also a special legitimacy base for this. Apart from some share-outs in the principles of democracy, the justification of the state's decisions are always made – with fewer or more chains of reasoning – by deduction from the Constitution. This special legitimacy makes it a top priority for examining how the decision-making processes of the constitutional court actually take place and whether there are structural distortions in deriving these decisions from the Constitution. The analyses show seven such distortions; in the last chapter of the book, some modalities for refinements are analysed. It is stated that by these refinements the juristic decision-making processes will be more appropriate to match this legitimacy promise. On the other hand, the analysis suggests that even if we admit the state's juristocratic base, we still have to strive to at least partially fasten it back to the principles of democracy.

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