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Double state and the doubling of the legal system

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Constitutional Law and the Duplication of the Branches of Law

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Foreword

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

of private, criminal and procedural law created by Napoleon in the early 19th century were already based on the threefold legal layers: the text layer, the dogmatic layer and the layer of judicial case law. To be more precise, the third layer, an addition to the judicial cases, did not emerge until decades after Napoleon, when the true third legal layer of the judicial precedent law could be recognised.

In Europe in the 19th century, these two evolutionary developments led to numerous criticisms in theoretical legal thinking pointing to the problems around these changes, requesting to prevent them and restore to their former state. By voicing the benefits of customary law in his writing *Vom Beruf…* in 1815, Carl Friedrich von Savigny managed to slow down the process of codifying – which in France had already begun – for many decades in the German lands. Likewise, from the early 19th to the late 20th century, the abstract codes were subject to numerous criticisms, because they brought about the loss of the colourful case law provisions. There are a number of legitimate aspects in this criticism, of course, but their recognition can at best justify the search for corrections, and neither the systematic conceptual legal dogmatics nor the conscious legislation of democracy could be abandoned.

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

of the U.S.' constitutional adjudication to the occupied European countries during the first decades after the Second World War was not followed by other countries, constitutional adjudication has become more widespread in the past decades, and today there may be hundreds of constitutional courts in Europe and around the world. Is there a permanent function that explains this spread and permanent activity?

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

If one analyses the widespread application of the new legal level of constitutional adjudication above legislation that has taken place around the world, one may also find a lasting function for this phenomenon in the fact that, in this way, democracy, which is based on millions of voters, ultimately becomes institutionally linked to society but, at the same time, subject to corrections by the elite (see Robert H Bork, *The Tempting of America. The Political Seduction of the Law* [New York: Simon & Schuster, 1990], 17). In this way, what the French revolutionaries of the Enlightenment obtained by fight – following Rousseau's idea, popular representation –, can coexist with the power realities of the elites. From a pessimistic point of view, this is a limitation of democracy – as has often been written down against constitutional adjudication –, but from an optimistic point of view this may be the only way to maintain mass democracy, at least in this form, despite the unstoppable dominance of the elite.

Chapter 1
The doubling of the legal system

30 years ago, at the end of the 1980s, I examined the structural complexity of law based on Niklas Luhmann's study on legal dogmatics.[1] In addition to this research of mine, Karl Larenz's and Josef Esser's debate on the role of supreme court case law in the legal system further encouraged me to go beyond the established concept of law – which identifies law with the legal texts – and to try to develop a multi-layered concept of law instead.[2] According to this concept, the legal system consists of the text layer of the laws, the layer of legal dogmatics and the case law of supreme courts. The debate between Larenz and Esser in Germany took place in the late 1950s, and subsequently, the emergence of constitutional adjudication fundamentally changed and expanded the functioning of the legal system by the end of the late 1980s. Since then, an increasing number of constitutional courts have emerged worldwide, and so I have taken the constitutional basic rights and constitutional principles as a new layer of law – going beyond the inspiring precursors who formulated the multilayered legal system – and referred to it in my later studies as a layer of fundamental rights.[3]

In recent years, the juristocracy's reorganisation and completion of the democratic mechanisms of society's governance has been emphasised by several analyses.[4] This is particularly true in Western democracies, but it is also increasingly important in many parts of the world, and it makes it

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

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

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

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

necessary for me to further develop my multi-layered legal concept. For, as I reflect on the consequences of constitutional adjudication, I find that the simple inclusion of the newly emerging constitutional law into the legal system as a fourth layer of law – alongside the text, dogmatics, and case law – can be estimated as too restrictive now; it did seem sufficient at the beginning of the 1990s, but it does need to be somewhat reworked by becoming more inclusive. Indeed, there is a much deeper reorganisation of the law and political will-building of the state, and so it is theoretically not sufficient to grasp constitutional adjudication and constitutional rights as a simple addition to the multiplicity of law. In the following parts of this study, I would like to begin this rethinking.

1. The traditional layers of law

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

(3) the case law of supreme courts, which, in each case, equip the abstract legal provisions with concrete meaning.

The relationship between these three legal layers may vary from one legal system to another. For example, the English legal system, which developed on the basis of judicial case-decisions, as well as the parliamentary laws, which became more important in the late 19th century, used these casuistic regulatory techniques, thereby not recognising more abstract norms and concepts. Such abstract legal doctrines and terms as existed on the European continent could not be observed in England.[5] In case of the latter, law is essentially a combination of case-specific precedents and the detailed legal provisions that are similarly tailored to specific situations – just like two halves of a single legal layer. Although it should be noted that there are still a number of legal concepts in the English legal system, this is not as significant as in Continental abstract code law.

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

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

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

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

Over the past half-century, in addition to these traditional legal strata, legal systems in several countries have increasingly developed a new legal framework that has, to some extent, restructured the traditional layers of law. These are the fundamental rights and principles of the constitution, and they play a major role only where, in addition to the written constitution, constitutional adjudication has also developed. Initially, in the early 19th century, this was only the case in the United States, but since the 1950s it has occurred in several Western European countries as well. More recently, constitutional adjudication has also been introduced in most new democracies of Central and Eastern Europe. In the same way, constitutional courts have been established on the other continents since then.[6]

The fundamental rights of the constitution originally emerged as basic human rights in the 18th century, during the ideological-political struggle against feudalism; they formulated various political and humanitarian needs. In the 19th and 20th centuries, they were included in the new state constitutions. When constitutional judges began deciding constitutional disputes on the basis of the fundamental rights and principles of the constitution, it became clear that fundamental rights can easily be considered an abstract requirement for governmental decisions, but for a given case-decision they can only give conflicting directions of judgment. In other words, these fundamental rights are often contradictory on a case-by-case basis and can only be applied with the restraint of one or the other's preference. However, if another judge is given the power of decision and prioritises

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

another fundamental right, this judge may come to the opposite conclusion. Therefore, unpredictable constitutional adjudication is often observable, because the different hierarchies of values of the different judges determine which rights they consider superior to others. Moreover, this new kind of constitutional law can only really develop in countries based on democracy and pluralistic political struggles, since a constitution cannot function under dictatorial politics. Thus, in addition to the majority in legislature, large social groups engaged in a democratic political struggle also have the opportunity to gain supremacy in the supreme courts and the upper hand in the constitutional court. These developments started early, and in analyses they were singled out as the legalisation of politics and as the politicisation of law.

2. Democracy pushed into the background

In Germany, the debates about the juridification of politics and democracy already began during the Weimar period in the 1920s. This was when the Constitutional Court in neighbouring Austria began reviewing parliamentary decisions, and also in Germany the Federal Supreme Court started to expand the law to the labour disputes in trade union struggles.[7] From the early 1950s, constitutional adjudication began in Germany and Italy and, especially in Germany, it restricted democratic decision-making. At the same time, the United States, the birthplace of constitutional adjudication, also began a radical shift towards policy-making by the highest judge. As a result, the foundations of American political decision-making shifted in many respects from the democratically elected institutions to the courts, and in courtrooms it began to decide the polities' struggles as constitutional disputes.[8] This expanded kind of constitutional adjudication then spread in

[7] In his study of 1928, the German law professor Otto Kirchheimer even considered the then legal regulation of employment as an unauthorised interference with politics, and this argument has been used in recent decades in several dimensions as a criticism of the law that restricted the field of politics. See Rüdiger Voigt, 'Verrechtlichung', in *Verrechtlichung. Analysen zu Funktion und Wirkung von Parlamentarisierung, Bürokratisierung und Justizialisierung sozialer, politischer und ökonomischer Prozesse,* ed. by Rüdiger Voigt (Königstein: Athenäum, 1980), 15–16.

[8] The advocates of this process refer to it as 'cause lawyering', emphasising the morally right aspects, but in this way hiding the fact that this process opposes democratic political

European countries at the end of the 1970s, first in Spain and Portugal, and somewhat later, in the 1980s, an enormously expanded constitutional adjudication was enacted also in Latin American countries where dictatorship was wiped out. After the collapse of the Soviet empire at the beginning of the 1990s, constitutional courts were formed in all Central and Eastern European countries of this former empire and in the newly independent former Soviet member states. This development was promoted and pushed by the American political elite that exerted a world-wide domination either as occupying power, like in Germany and Italy, or as hegemonic world power. Thus, after the fall of the dictatorships, these countries did not create a purely democratic political framework which left the masses of citizens the freedom to determine their own fate, but instead, a normative framework was set up, which was governed later by the global world power.

Even in countries where constitutional control over legislation did not exist at all – in other words, there was no juridification over democratic political decision-making – a shift of power began in that direction. The analysis of the Canadian political scientist, Ran Hirschl, focused on these processes.[9] He examined constitutional reforms in four countries that severely curtailed unrestricted parliamentary sovereignty through the introduction of constitutional adjudication, and where the power was given to the highest judges to review and potentially reverse fundamental political decisions of the parliament. This was the case with Israel, Canada, the Republic of South Africa and New Zealand. Since they had previously been governed by British legal traditions, no separate constitutional court was established in these countries – with the exception of South Africa – and, following the model of the United States, this competence was given to the highest court.

Hirschl's main thesis was that in all four states, at the time of the transfer of a considerable part of the parliamentary power to the highest

decision-making. See Stuart Scheingold: 'The Struggle to Politicize Legal Practice: A Case Study of Left-Activist Lawyering in Seattle', in *Cause Lawyering: Political Commitments and Professional Responsibilities,* ed. by Austin Sarat and Stuart Scheingold (New York: Oxford University Press, 1998), 118–150.

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

court, a power situation had been present in which a parliamentary shift in power from the long-standing dominant political forces had already begun and it was only a matter of time to lose the parliamentary elections. In this situation, since they could be confident that the majority of the elite of the Supreme Court and the university law professors surrounding them would reaffirm their cultural and social values, a constitutional reform was carried out so as to give most of the power to the highest judges before they would be defeated by the upcoming rival parliamentary forces. Such was the situation when, spurred on by solemn declarations and eloquent speeches on constitutional changes, it was decided by vote to take away the priority of the Parliament, and amandments to the constitutions were made to subordinate the Parliament to the Supreme Judicial Forum.

A clear example of this was the establishment of the Israeli Supreme Judge's control over the decisions of the Israeli parliament, the Knesset, which took place in 1992. In Israel, a largely secular Ashkenazi cultural and political elite dominated every aspect from the start, and although there were, in the early years of the formation of Israeli public law, faint voices of opposition from the ranks of law professors, who propagated a division of power on the American model and constitutionalism, the MAPAI – the predecessor of today's Labour Party –, led by David Ben Gurion, silenced any such attempt at dissension. This attitude continued into the late 1980s, but the slow decline of their dominant position began when the Sephardic Jews of lower social status formed a party. Consequently, both the Eastern and the Sephardic Orthodox (mostly ultra-Orthodox – haredi) Jews entered the political arena and joined in the struggle for political power. Before a possibly definitive disturbance of the power of this dominant elite in the Israeli parliament, the constitutional reform in the Knesset was voted and the Supreme Judicial Forum was given the competence to decide on the constitutionality of the laws.[10] Since then, these supreme court rulings are

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

regularly in line with the values of the former dominant elite, and in this way, the old elite has been able to retain its dominance despite losing its majority in the legislature due to the involvement of other religious parties.

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

The situation was similar behind the constitutional changes in New Zealand in the 1990s, when the parliamentary dominance of the British-born elite was undermined by the higher birth rate among the Maori population and by the influx of the masses of other Asian and Oceanic immigrants. This development brushed aside the objections to creating supreme judicial control over the legislation. While back in 1968 Geoffrey Palmer, as a young university lawyer freshly returned from his U.S. study tour, cautioned against a constitutional judicial review on the American model, from the 1980s he became, as a Prime Minister in the face of changing parliamentary balance of power, an arch-propagator of the very same constitutional amendments.[11] The continued dominance of the English elite in the judiciary,

[11] 'In 1968, Geoffrey Palmer, then a young academic, had in his own words "recently returned from studying the mysteries of the United States Constitution". He warned against a Bill of Rights on the grounds that is was not needed, would catapult the judiciary into political controversy, and would be "contrary to the pragmatist traditions of our politics".' Quoted by Hirschl, *Towards Juristocracy,* 87. 'But two decades later, when the white bourgeoisie's control

despite the presence of more fragmentation in the case of political power, has since guaranteed the unchanged power relations in New Zealand. Leaving aside a detailed account of the change of power in South Africa until the mid-nineties, the same phenomenon characterises South Africa as was described about New Zealand just now; here the political elite of the European white minority gained control of the power of Parliament through the newly created constitutional court.[12]

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

The limited democracy of the Germans – which has since been regarded by official narratives as a true and elevated 'democracy of the rule of law' – served as a model for the global dominant world power, namely, the United States. Following the overthrow of dictatorships in the late 1970s, this

over New Zealand's major policy-making arenas was challenged, that same speaker – now Sir Geoffrey Palmer – in his capacity as Minister of Justice in the Lange Labour government (1984–1989) and later Prime Minister (1989–1990) initiated and championed the empowerment of the New Zealand's judiciary through the enactment of the 1990 New Zealand Bill of Rights Act.' Hirschl, *Towards Juristocracy,* 87.

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

model was supported in Spain and Portugal, and particularly among the Spaniards, the strong German model of constitutional adjudication was introduced to control democratic decision-making. Since then, an activist constitutional style is present in Spain, even more so than in Germany. An example of this is that Spanish constitutional judges are prepared to judge even against a literal provision of the constitution, which cannot be observed in the case of German constitutional judges.[13] The radicalisation of activist constitutional adjudication in Spain served as a good tool for the U.S. to build a similar constitutional model in Latin American Hispanic countries. The means for the U.S. to do so were their subsidies and aid, which were tied to creating this model. In this way, a large part of Latin America became the most important basis of juristocracy. The enormous power of the constitutional courts and the highest courts, which imitate their style of decision-making, results in the fact that in these countries fundamental sociopolitical decisions are only possible through the involvement of these courts in most cases.

It is into this process of dissemination and radicalisation of constitutional adjudication in the 1980s and 1990s that the turns analysed by Hirschl can be integrated. To some extent, however, they admittedly differed from the spread of juristocracy on a global level, because in the countries analysed by him, the political powers struggling in the parliamentary arena to maintain their dwindling political dominance voluntarily introduced juristocracy in order to retain or regain it. This strategy was kept after the dissolution of the Soviet empire in the early 1990s, and was further put to use to provide democracy as well as a juristocracy in the newly created countries. By that time, the German–Spanish model of constitutional adjudication in South America had already been put to the test and the Americans, who controlled the transition and regime change fairly directly here, did not recommend the more modest model of the Austrian Constitutional Court for the newly independent Central European states and the successor

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

states of the dissolved Soviet Union. Instead, they propagated the German–Spanish model with the broadest control over parliamentary democracy. If a constitutional court with limited powers, such as in Poland, had been set up after all, a few years later this model would have been changed to a model of the barely restricted constitutional court, which was described as a 'true democracy' in the global narrative. These constitutional courts, with their vast powers, are very unlike the picture Hans Kelsen had once thought of as a thin framework on democracy, and rather represent one of the highest powers in the state. For the uses of the globally dominant American power elites, this power of the strong constitutional courts finds its rationality in the possibility to gradually integrate the constitutions of each country into a unified global system of constitution interpretation. This integration and unification would be brought about by the assistance of American foundations, intellectual think tanks, and the local legal elite that is supported by them. As a result, since the late 1980s, a close-knit global constitutional oligarchy has been progressively organised over the parliaments of formally independent states. The emergence of a 'juristocracy instead of democracy', which was analysed by Hirschl, can be thus seen more comprehensively and then further cases of juristocracy can be uncovered.

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

The developments described above have led to a doubling of the political system. The system of democracy, which is characterised by elections involving millions of citizens, a multiparty system and the legislation of the parliamentary majority, remains. However, the system of constitutional court decisions, which is based on a few dozen abstract rules and principles of the constitution, has brought about a second system of governance. In this second system, the decisions for social governance are not made as the results of open political competition and choice between alternatives, but are presented neutrally as mere results of judicial interpretation and as a simple derivation from the rules of the constitution. In fact, these decisions are vague and their interpretation rather open-ended. In the countries of comprehensive Western civilisation, therefore, several intertwined legal groups have been created with the aim to create a common line of interpretation for constitutional interpretation. This common line of interpretation

favours certain possible interpretations and prohibits others. This includes setting up a network of constitutional law teachers, international lawyers and legal theorists from different countries, organised by the global foundation networks. The permanent participants in these networks regularly consult each other at conferences and then summarise the proposed constitutional interpretations and formulas of the 'profession' in English-language books. This includes setting up various international advisory bodies, which will then control in each country compliance of the 'professionally-recommended' interpretations of global constitutional networks and, if they find a problem, may impose various economic sanctions, such as revoking subsidy funds or, in case of EU countries, revoking Cohesion Fund resources. In terms of content, this common line of interpretation means influencing the interpretations of the constitutional judges of different countries in the service of the interests and future visions of the most important global ruling groups. In Europe, this role is primarily played by the Venice Commission, which, in principle, should only be an advisory body, but the EU authorities have transformed it into the strictest controller of the public law of the Member States (especially the Eastern Europeans).

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

document, but as the basis of constitutional adjudication it becomes a living part of the legal system. Obviously, constitutional adjudication, therefore, doubles the political system and, in addition to democracy, builds up mechanisms of power for the judiciary, and then the legal system is also driven towards a doubling.

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

but by the lawyer-politicians of each party and the legislative departments of the ministries. The changeover to a doubling of the legal system in Hungary was only created by the new Constitution, which came into force in 2012, and the new Constitutional Court Act that was based on it.

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

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

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

(2) The next difference is that legal dogmatics in the traditional three-layered structure of legislative law has dominance over the supreme court judgments, and only the centuries-old formation of this dogmatic layer allowed the creation of law books in the 19th century; by contrast, in the case of constitutional law, legal dogmatics is only a modest conceptual one. In addition, this modest constitutional dogmatics was shaped under strong political points of view due to the high degree of normative openness in constitutional declarations and constitutional principles. As a result, in this area it is not possible to adopt a politically neutral conceptual apparatus,

as is the case with traditional legal dogmatics. Therefore, constitutional dogmatics only exists in the practice of the individual countries, in the justification of the decisions of the constitutional judges and the local jurisprudential writings. As to a comprehensive European or even more comprehensive professional consensus, it does not exist. Instead, one can only mention a few commonly used formulas for constitutional disputes – in Europe these are mainly from the Germans – that are used by European constitutional courts. Volumes published in world languages that seek to consolidate this in larger areas are more likely the products of the aforementioned interpretive networks organised by global powers with the aim to limit the constituent power of sovereign states, rather than truly neutral professional products. The same applies to the impact of certain rulings of the European Court of Human Rights in Strasbourg on the constitutional courts in European countries, because they restrict the sovereignty of nation states and transmit global rule on legislation, and so they cannot be regarded as a neutral normative order. It follows that within European countries, the legal and political elite that is more closely interwoven with the global powers welcomes this, while the sovereignty-defending elites are against it.

(3) It is also a deviation in the case of constitutional law from the traditional legislative law that there is no hierarchy of norms between the more specific constitutional provisions and the general constitutional principles and declarations. In traditional law, for 600 years, the *lex specialis derogat legi generali* principle of interpretation consistently ensured that special rules tailored to the situation prevailed over the more general rules, and this always meant a defence against such intentions of the legislature.[14] However, with the emergence of constitutional adjudication, it was constitutional law itself that has reversed this principle in recent decades, and the constitutional provisions with a *lex generalis* nature are always enforced before more specific rules of law. Then again, this reversal and the new priority of *lex generalis* does not stop at the border of subordinate legislative law, but continues in the field of constitutional law itself, and the more specific constitutional

[14] The solution of the dilemma between *lex generalis* and *lex specialis* was elaborated by Baldus de Ubaldis, and the axiom of *lex specialis derogat legi generali* has also become valid in modern times. In the description of Peter Stein, the following happened: 'Bartolus' succesor, Baldus, emphasized that he was a party to an action in his favor, is prima facie in the right.' Peter Stein, *Regulae Iuris. From Juristic Rules to Legal Maxims* (Edinburgh: Edinburgh University Press, 1966), 87.

rules have no priority over the general declarations of the constitution, which have very little normative content. In this way, constitutional judges have an almost unlimited freedom of decision because they can reverse the more specific constitutional provisions due to the normatively empty constitutional declarations. Of course, there are big differences among the constitutional courts of the world in this regard, but my previous empirical investigation showed that, to furnish an example, the situation in Lithuania was similar to Hungary, and the judges of the constitutional court base their decisions on the general formulas of the Constitution, rather than on more specific constitutional rules.[15] In this way, the detailed will of the constitutional authority is not protected. There is no general formula for this dilemma in this area, this is more of an openness. In other words, in contrast to the priority given to general constitutional law over the detailed rules of subordinate law, constitutional law itself does not prioritise either the specific provisions or the general constitutional principles and formulas. Thus, within any constitutional court, the prevailing majority of judges can argue that special constitutional provisions precede the more general constitutional principles and formulas, but they may also argue that the decisions are based on some of the most common constitutional principles, such as the rule of law or human dignity. In short, there is no indicative formula for this dilemma within constitutional law, even within the legal elite of a country, and I do not think that this is independent of the fundamental politicisation of these legal circles, since the majority of constitutional law teachers are not neutral analysts, but mainly interested lawyers of NGOs or had been, at least, socialised by the NGOs and only later became university professors. Therefore, the majority of constitutional judges in a given country can always decide without being constrained by an underlying professional guidance, whether the detailed constitutional rules they interpret take precedence over purely declarative general constitutional principles, or vice versa, they let the latter overrule the more specific constitutional law provision tailored to the case.

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

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

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

This question has not yet been resolved, because even in case of a constitutional amendment or a completely new constitution, it continued to be disputed whether the case law of the constitutional court based on the earlier constitutional text remained applicable or not. Due to the indecision of this issue, after the constitutional amendment or the new constitution entered into force, there emerges a legal and political struggle

within the constitutional court as well as in the political public for the use of the previous constitutional case law for the application of the new constitutional text. It is not only this question that has remained unsolved, but also the question of whether or not the constitutional court can review the constitutional amendments or even the creation of a new constitution on the basis of its existing case law.[16] It is undisputed, in my opinion, that this indecision is less due to the theoretical difficulty of the subject than to the most general socio-political struggles that normally take place around the subject. For example, some Hungarian researchers and scientists of constitutional law have again pointed out in their studies that constitutional courts can review the constitutionality of constitutional amendments and even declare them unconstitutional. This control is even more significant in the interpretation argued by some domestic researchers in Hungary, namely, that the new Constitution of 2012 is not a new constitution at all and it can be seen as a mere amendment to the old Constitution. In this way, the judges of the Hungarian Constitutional Court could abolish this whole new Constitution. (This thesis was represented in several studies by a former constitutional judge, András Bragyova.)

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

(6) The next difference between constitutional and traditional law is that in the area of the new constitutional law, specialisation has not been resolved. This is especially problematic, since the material of normative

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

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

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

As a result, constitutional law has doubled much of the material of traditional law after several decades of constitutional adjudication, however, there has been no division of jurisdictions and no specialisation of constitutional judges and their preparatory staff. To some extent, the solution of the German constitutional judges is a notable exception; they created a system in which the new constitutional judge is automatically included as judge for the preparation of future draft decisions in a certain legal branch, thereby inheriting the areas of his predecessor, which results in a certain specialisation in a certain field of law. Furthermore, the newly elected constitutional judge initially also inherits the trained staff of his or her specialised predecessor, who are also already specialised in the field he becomes responsible for. In this way, specialisation can also be reproduced in the new constitutional law, to some extent at least. However, this is only partially the case, since all the members of the full constitutional court are equally involved in the decision of the institution and thus every constitutional judge is compelled to be knowledgeable in all partially specialised areas of law if he wants to remain authentic. This is one option. As an alternative, it is also in the judge's power to hand over most of the content-related decision-making to his/her experienced employees. To summarise, the difference in the division of jurisdictions in ordinary law and constitutional law give a different role for ordinary judges and constitutional judges. In the latter case, it is possible – at least in the case of the European constitutional courts – to hand over content-related decision-making to the staff of the judges, and the ever newly elected constitutional judge can save himself/herself the hard work of becoming a true constitutional judge.

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

In recent decades, more and more countries around the world have created constitutional adjudication by either establishing a separate constitutional court or rebuilding the Supreme Court based on the American pattern.[17]

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

Constitutional adjudication on the U.S. model leads, in the first place, to a doubling of the law, but it can only slowly become a political machinery that is able to compete with democracy. However, as the events of the 1960s in the United States have shown, the decade-long aspirations of social groups that at the level of the masses of democratic struggle have the weaker position but otherwise enormous resources, can also lead to this form of constitutional adjudication for the creation of a competitive political centre. However, if a separate constitutional court is created and most constitutional judges come from the ranks of law professors and lawyers, an immediate doubling of the political arena will be likely. This political role is somewhat limited if such a constitutional court, in addition to its wide-ranging powers in the field of annulment of the law, must also review the final court decisions. This latter workload usually means thousands of constitutional complaints per year, and thus the constitutional judges have less time to control the legislation. This was recognised in Russia by the dominant political forces during the restructuring of the Russian Constitutional Court in 1992; as the constitutional judges had previously been the most involved in power struggles, the restructuring shifted its activities to the review of final judgments of ordinary courts, and by this new workload, the political ambitions of the constitutional court judges was quickly erased.[18] In fact, this may also have played a role in Hungary in the reorganisation of the constitutional court of 2012; the court had previously exercised a very active political role, and since the reorganisation in 2012, its main task has been to review ordinary court decisions.

The next question to be clarified is that if constitutional adjudication has already been drawn into the internal processes of applying the law by reviewing ordinary court decisions, then what components decide the speed and the level of expansion of the doubling of traditional legal layers (textual layer, dogmatics, case law) that takes place in the new area of constitutional law. In addition to the constitutional text layer, a constitutional case law is always created, since this is also produced by the decision-making of the constitutional judges when reviewing the judgments of ordinary courts.

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

However, the extent to which this case law outweighs the importance of the constitutional greatly differs among individual constitutional courts. In analysing the decision-making style of the European constitutional courts in an earlier study, I found that the strong suppression of the constitutional text in favour of previous judgments of the constitutional court is not only present in Hungary, but this practice can also be observed in case of the Spanish and Lithuanian constitutional courts. On the other hand, this practice could not be observed in case of the Slovenian, Croatian and Romanian constitutional courts where the constitutional judges base their arguments on the constitutional text. When it comes to Poland and the Czech Republic, they do resort more strongly to case law, but not as much as in case of Hungary, Spain or Lithuania.[19] In Hungary, this style was created by the constitutional judges of the first cycle of the constitutional court, which began in 1990, and, in my experience, once established, it is almost impossible to change it and put the emphasis back on the constitutional text. Probably similar coincidences – such as the charismatic role of the first president of the Hungarian Constitutional Court, the ambitions of the then majority of constitutional judges to seek greater control over politics and law, and so on – caused such a prominent role of constitutional adjudication in the two other countries besides Hungary, by which the constitutional text was pushed into the background.

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

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

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

Niklas Luhmann analysed the specific function of the constitution and its evolutionary achievements, and found that the emergence of the constitution at the end of the 18th century brought to light certain issues that had hitherto been hidden from political debate; namely, certain fundamental questions regarding power, as well as certain social problems.[20] In this way, these elementary social and power issues could be the subject of political struggles. Indeed, although in some political and philosophical writings Aristotle's alternatives for forms of government were discussed in the earlier centuries (democracy, aristocracy, and so on), these discussions remained the internal affairs of a few dozen philosophers and intellectuals, and had no effect on the political life of the countries. What changed this was the spread of Rousseau's social contract idea among the intellectual groups during the Enlightenment. Based on this idea, intellectual circles began to demand that the foundations of society and the state should be discussed and laid down in writing in the contract concluded by the citizens. First, the American settlers who fought for their independence formed the first constitution on this basis. Then, as of 1789, in the course of their internal struggles, the French revolutionaries discussed dozens of drafts of constitutional laws, thereby exemplifying that the decision regarding basic power issues could also be a part of political struggle. In the meantime, political democracies have emerged that are based on competing parties and their changing governmental powers, and they have managed to survive, even if a number of fundamental social questions are constantly under discussion among the political public and these discussions permanently divide society into different divisions. However, on the most fundamental constitutional issues, there is usually a very high threshold for constitutional change in each country, and this keeps such debates in small intellectual circles, far from the general public. Without a revolution, a constitutional change is sometimes practically impossible, but even in countries where constitutional changes are easier, it may occasionally take decades to achieve the majority required for constitutional changes. In principle, the creation of constitutions has opened up the possibility to discuss and shape the

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

most fundamental questions of society, but it is largely made illusory by the high threshold for changes. This is, of course, advantageous in that the too frequent changes in the foundations of society and power can lead to chaos. On the other hand, the unattainable level of change can lead to the radicalisation of elites aspiring for this change.

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

The intellectual arena surrounding constitutional adjudication is, therefore, inevitably involved in the struggles of political debates, which are wrapped in constitutional clothing. This also applies to the development of constitutional dogmatics. Logical coherence is important here, just like in the case of the legal dogmatics of simple legal branches of law. Here, however, the dominance of logical coherence is suppressed by the great importance of dogmatic content for the fundamental questions of society, as well as by the normative openness of constitutional provisions. In the alternative solutions of constitutional dogmatics, logical coherence is actually only a secondary issue. It must be noted that this is only one of the differences between constitutional dogmatics and the legal dogmatics of various legal branches that exist alongside ordinary law. This is due to the fact that the debate on possible alternatives of legal dogmatics (in criminal law, private law, and so on) has developed a separate legal policy area; these with debates take place after the creation of dogmatical legal studies by the law professors and their publication in legal journals, and the alternatives of legal dogmatics are politically transformed before their use in legislation. Sections of judicial associations and bar associations also discuss the political

implications of the various *de lege ferenda* proposals that were made by legal professors who are involved in the intellectual debate in public life at their annual meetings, and the lawyer-politicians of each major party also observe these discussions. So the parties have information about the liberal or conservative consequences of the dogmatic alternatives that are already in the pre-parliamentary area.

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

With regards to the relationship between constitutional dogmatics and the traditional dogmatics of the legal branches, a distinction must be made between two types of constitutional adjudication; one is that of the separate constitutional courts while the other one is based on the American model, where it is carried out by the ordinary supreme courts. In the latter case, judges with decades of experience in traditional justice also perform the function of constitutional adjudication, so that constitutional provisions, principles and declarations that have been added to legal law, even if they are

abstract, remain united with traditional law and, in this way, the traditional legal system does not become that much doubled. Likewise, constitutional dogmatics based on new, more abstract constitutional provisions remains more closely integrated within the framework of traditional legal thinking. Within this framework, traditional dogmatic concepts themselves are, of course, more politicised, because of a broader interpretation of open constitutional principles and declarations. This politicisation, makes clearer the proximity of individual dogmatic alternatives to one or the other world of political values. The price of a more uniform legal system is, therefore, that the entire legal system is more strongly politicised, while in case of a separate constitutional court, a politically neutral legal dogmatics of the traditional legislative branches of law remains largely unaffected alongside a thoroughly politicised constitutional dogmatics.

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

to the political premises dictated from outside. In addition, there is also at least one German professor of criminal law who states that if the majority of German constitutional judges do not want to follow them, it is possible that the ordinary judges themselves will push aside the limitations of traditional criminal dogmatics and practice interpretations derived from constitutional criminal law.[21]

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

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

Chapter 2
Some questions of constitutional law

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

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

1. General questions of constitutional law

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

1.1. The layer of the constitutional text

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

Another subquestion of the disposition over the constitutional text is the size of the majority required in parliament to amend the constitutional court act, since the meaning of the constitutional text is ultimately determined by the majority of constitutional judges. So if the number of constitutional judges is not set in the constitution itself – and this is the general rule –, they can be increased or decreased by amending the constitutional court

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

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

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

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

What has been said so far has only been a set of introductory questions concerning the constitutional text, and if one turns to the internal questions of content, the question arises to what extent the constitutional text consists of precise rules or mostly only solemn constitutional declarations

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

Another important question of the constitutional text layer is how much freedom this text allows the constitutional judge to interpret or, on the contrary, whether it contains interpretation rules that aim to force these judges in a certain direction. In this regard, it can be said that there are relatively few constitutions that bind constitutional judges closely to interpretation rules. This is probably only because constitutional adjudication itself has only become widespread in the past few decades, and, therefore, its dangers were not recognised when it was introduced. However, in some constitutional texts that are easier to change or in newly created constitutions, there are such interpretative rules in some places, as in the new constitution of Hungary.

1.2. The layer of constitutional precedents

One of the preliminary questions of constitutional case law concerns the circumstances under which constitutional judges make these precedent decisions and how they relate to them in subsequent decisions. Among these, it is important to mention that, in contrast to the fragmented legal system and the specialised judicial system in Continental European countries since the 19th century, constitutional adjudication, which was transferred from the USA to Europe, means a non-specialised general jurisdiction. As in general, the courts in the United States are generalist in

nature and do not specialise in specific areas of law. As a result, unlike in the United States, in Europe only specialised lawyers can become constitutional judges, and no matter how famous a professor may have been before his election, this only gives him decision-making authority in a narrow area of law. Thus, the incumbent European constitutional judge is inevitably only an inexperienced beginner, although he/she has to make decisions on an equal footing with the other judges within the college of judges the next day. In this way, he/she still has a task ahead of him to metamorphose from a specialised legal professor, or from a lawyer or ordinary judge, into a generalist constitutional judge in order to actually be able to take part in the decision-making process.

In addition, unlike the top U.S. judges who mainly deal with constitutional adjudication, the European constitutional courts have developed a system of permanent staff to prepare or analyse court drafts, and the members of this experienced staff always await the newly elected constitutional judges.[22] These employees have already accumulated many years of experience in the field of generalist constitutional adjudication. The aforementioned shortage of newly elected constitutional judges is thus supplemented by the fact that the receiving permanent staff can easily carry out the work of the constitutional judge. As a result, it is natural for the new constitutional judge to be patronised by his/her staff in the first few months and to only act as a postman of his/her staff's positions and opinions in plenary sessions, unless the cases fall within the narrower branch of law that he/she is familiar with and would otherwise be dealing with. However, this can only have a 10 to 15 per cent chance in relation to the full repertoire of constitutional court decisions, but even less in the case of a legal historian or a specialist in a peripheral branch of law.

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

Under these two circumstances, the new constitutional judges must themselves decide right upon filling the position how they should proceed and what kind of role they want to have as constitutional judges. The newly elected constitutional judge, depending on his/her age (a new constitutional judge is usually around the age of 50 to 60 years) and his/her personality, can decide that he/she will rely on his/her staff forever and that he/she will only represent their opinions in matters beyond his/her own narrow legal sphere in plenary meetings. Occasionally this attitude can change when there are cases in which he/she has not been given a firm position by his/her staff, or simply agrees with the views of other constitutional judges, and he/she agrees to side with them. Such connections can lead to the permanent formation of small voting groups with one opinion leader and two or three constitutional judges following him/her within the plenary session.

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

Apart from these completely different role concepts (let us call them sovereign versus opinion transmitting roles of constitutional judges), a frequently adopted role concept that is somewhere in the middle of these opposites is that a new constitutional judge who specialises in a narrow legal area expands the scope of the narrow legal area with some other legal areas, where he/she wants to shape his/her positions him/herself, leaving only the rest to his/her employees. Since the above-mentioned circumstances exist in all European constitutional courts, albeit in different ways, this is a general tableau of role-taking in the decision-making body of constitutional courts, which consists of different constitutional judicial roles. Based on my own experience and information, I estimate that of the 40 Hungarian constitutional judges during the last decades so far, around 12 to 15 were

sovereign, 16 to 18 were constitutional judges with partially expanded competence in other areas, and 8 to 10 were mainly opinion transmitters for their employees, and if the employees had no firm positions, they were merely opinion supporters of other constitutional judges. Providing a typology of the role of constitutional judges in the decision-making process, we can talk about the roles of opinion sovereignty, partial opinion sovereignty, and the opinion transmitter and opinion supporter roles in the respective constitutional courts.

It follows that the constitutional court in each country is composed of constitutional judges who play completely different roles, which has important implications for the creation of precedent decisions and their subsequent fate. Crucial to precedent decisions is the long-established thesis that employees are less autonomous than the elected judges, and therefore, when the actual weight of the decision is shifted to them, they tend to stick to pre-established precedents and rethinking them is largely excluded.[23] Experience in Hungary also shows that even after the constitutional text has changed significantly since the old precedents had been set, the majority of the judges and the staff (with its 45 members) behind it can only be made to yield and give up their opinion set out in the old precedents by a major argumentative struggle. Taking this and some other contextual factors into consideration, this can lead to a decision-making shifting from written constitutional provisions to permanently established precedents, the latter forming a kind of *pseudo-constitution* that suppresses the written constitution itself.[24] In this situation, the endeavours of a newly elected constitutional judge to restore the status of the written constitution are completely in vain, since he/she cannot influence his/her own staff, which he/she inherited from his/her predecessor, to side with

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

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

him/her against the power of the above mentioned *pseudo-constitution*. And even if he/she succeeds in doing so, his/her own drafts will not receive majority support, just because they diverge from the precedents, and it is practically impossible to get a majority. If such a new and determined constitutional judge wants to change the argumentation formulas of established precedents in a plenary session in case of other people's drafts, it will feel like running head first into a wall, meeting with the reaction 'we do not use this formula!'. Another consequence of the different roles of the constitutional judges for the plenary debate is that because only a part of the judges have actual responsibility for their opinions and positions, and the judges with the opinion transmitter role are only formally involved in the debate, real discussions only rarely take place.[25] In this way, the precedents that have been established do remain unchanged.

These were, therefore, structural questions relating to the layer of precedents in the case of constitutional law. Next, the analysis focuses on internal, substantive questions. Such a substantive question is to what extent the decision-making styles developed by the individual constitutional courts have become textually true to the provisions of the constitutional text or whether they only consider the most general explanations of the constitution and use their openness to constantly develop new fundamental rights. In the latter case, essentially a new constitution is created instead of the original one. It is important to emphasise that it is not only the already established precedents that tend to become almost eternal and hardly changeable in the practice of the European constitutional courts, but this applies even more to the once established style of decision: for the simple reason that an overlying disposition of this style requires its conscious and critical understanding, and in the absence of this disposition, the decision style itself, as an invisible wall, stands in the way of change. The decision style itself cannot be summoned

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

and criticised by a constitutional decision, because it behaves more like some invisible creeper that is simply there and represents a limit. In my experience, most new constitutional judges in Hungary – as is usually the case with European constitutional judges due to their legal knowledge of other areas – had not previously been systematically and critically concerned with constitutional decisions before they got their post, and so they could only adapt to the already established decision-making style without being able to see that there are alternative decision-making styles in comparison.

There are big differences in the decision-making styles of the European constitutional courts, and in an attempt to summarise them, it can be said that, on the one hand, there is a kind of decision-making style that deviates most freely from the constitutional text and that, in place of the constitution, draws up a new constitution from the general declarations and constitutional principles. This style of decision-making was developed by German constitutional judges from the late 1950s and was gradually adopted primarily by the Spanish, Lithuanian and Hungarian constitutional courts. In contrast, Croatian, Slovenian and Romanian constitutional judges are more bound by the constitutional text and its provisions.[26]

The next question is to what extent individual constitutional courts base their later decisions on their previous precedents, or rely primarily on written constitutional provisions. There is also a difference between individual constitutional courts when it comes to whether an increased focus on one's own case law goes hand in hand with constitutional provisions taking a back seat to reason or not. This would not be necessary, and, in addition to the numerous quotations from precedents, the parallel inclusion of constitutional provisions in the justification and in supplying a basis for decisions could, in principle, remain. In Hungarian practice, for example, it can be observed that the formal reference to the relevant constitutional provisions in the first part of the justification of a decision immediately removes those provisions and no longer actually includes them in the justification. In this way, the justification for the decision almost exclusively discusses the harmony or conflict of the audited legal provision with the case law and not with the actual constitutional provisions. In the justification,

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

not more than a single sentence is generally mentioned stating whether a controversial legal provision is constitutional or unconstitutional, but a specific constitutional provision is almost never analysed to decide about a problem. The analysis of the decision-making style of the constitutional courts in countries around Hungary shows that if there is a decrease in the inclusion of the constitutional court's own jurisprudence, the references to the written constitutional provisions increase in parallel, and vice versa. In this way, the use of the provisions of the Constitution to justify the decisions of the Constitutional Court is stronger in Poland than in Hungary, but even stronger in the Czech Republic, and most spectacular in Slovenia. They analyse the wording of the most various provisions of their constitution if these become important with regard to the case. The Croatians, who are the least dependant on previous constitutional decisions, also distinguish themselves by primarily analysing the specific constitutional text to justify their decisions, but they do not achieve the same intensity in this regard as the Slovenians.

Regarding the inclusion of case law in the decision-making process in Central and Eastern Europe, a Hungarian–Polish–Czech–Slovenian–Croatian spectrum can be established in descending order, and the Romanian pattern can be placed before the Croatian in this spectrum. Precedent decisions are only cautiously mentioned by the Romanian constitutional judges and only those that were made relevant by the subject of the decision itself. Text quotations from case law are rare among them, and only a few important lines are included, but most of them contain only the essence of the old reasoning of the precedent. In my previous empirical decision analysis, I found very few chain-like quotations in several repeating precedent decisions in the justifications of the decisions of the Romanian constitutional court, as is the general rule for the Lithuanian, Spanish and Hungarian constitutional decisions, for example.[27]

The alternative to overemphasising case law is generally the massive inclusion of specific constitutional provisions in the justification of decisions, and here, too, the Romanians are close to the Slovenians. Romanian constitutional judges almost always rely directly on the wording of constitutional provisions, and after being quoted verbatim, the text is interpreted and then compared directly with the meaning of the contested legal provisions. It can be said that the practice of the

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

Romanian constitutional court does not differ formally from the legal justification of the ordinary courts in Hungary and it arises directly from the text of the relevant (constitutional) provision. In order to counter this immediately, the Hungarian constitutional court style, which follows the constitutional court style of the German constitutional judges, completely breaks through the limits of ordinary legal interpretation, and the actual argumentation no longer mentions the specific text of the constitution. In Hungary, precedent decisions and not actual constitutional provisions appear to be the basis for decisions.

1.3. The questions of constitutional dogmatics

Fundamental constitutional rights, which are hierarchically above simple laws and ordinances, originally protected citizens from the state and its legislation if their laws and ordinances were at times made in a way that violated the fundamental rights of citizens, just as human rights performed this function according to the ideas of the Enlightenment. The impact of fundamental rights on simple legal acts and their legal dogmatics began in the United States, back then the only place with constitutional adjudication. A particularly important event in this respect was the famous Lochner judgment of 1905, when the Federal Supreme Court annulled a new law in New York because the Court viewed it as a violation to the constitutional protection of property and the principle of freedom of contract. Here the state was one of the litigants against which private individuals should be protected. This indirect influence increased with the Germans in the 1950s when the chief labour court annulled an otherwise proper employment contract between two private individuals, based on the direct effect of the constitution and its status as a legal source above simple laws for the courts and citizens. Although the German constitutional judges weakened this in 1958 and a simple legal provision in private law relationships could no longer be overridden by a regular judge on the basis of a constitutional provision, an indirect influence of fundamental rights in private law was recognised. It has been determined that the openness of the provisions of the ordinary law applied should be interpreted in the light of constitutional principles and fundamental rights, and only if it complies with the relevant fundamental right will the judicial decision be constitutional. If there is no openness, and if the

judge suspects that the legal rule applied is unconstitutional, the judge can stay his/her proceedings and ask the constitutional court to carry out a constitutional review, but he/she cannot push this aside him/herself.

With this turn, the indirect impact of fundamental rights and constitutional provisions on private law in Germany began, and this indirect application of fundamental rights between individuals was gradually adopted by the constitutional courts of several countries after their establishment. This indirect horizontal effect in relation to constitutional fundamental rights between private parties was accepted by the then existing Italian constitutional court, and this was later adopted by both the Spanish and Portuguese constitutional courts. In contrast, the Irish, where constitutional adjudication is exercised by ordinary chief judges, have accepted the direct effect. However, where the indirect effect of fundamental rights was formally adopted, it was later extended to such an extent that it actually coincided with the direct effect. As Mattias Kumm wrote in an article in 2006, a constitutional change in Germany that would from now on require direct application of fundamental constitutional rights would actually have no effect, since it actually exists today.[28]

The German constitutional judges used various formulas for the influence of constitutional law in private law, and these enabled the penetration of constitutional law into the individual legal branches of the legal system to different degrees. One of the formulas emphasises the impact of fundamental rights, which can penetrate here due to the open norms and principles of every legal regulation. Typically, such an extremely open right in private law is the principle of good faith, but there are principles in all areas of law that are open in nature and the fundamental rights can have an impact through them. Another formula has opened up the possibility of intrusion even more, because it saw fundamental rights as an objective order of values that cannot be restricted, and therefore has a greater chance of being drawn anywhere. The broad concept of objective value can then generalise, beyond fundamental rights, every constitutional principle mentioned in the constitution and every institution protected under constitutional law and make them referrable as constitutional values against the provisions of simple laws, be it criminal or procedural law.

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

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

The constitutionalisation of a branch of law means a change in three directions. If, on the one hand, this happens at the level of the constitutional court of a particular country and the normative arguments of constitutional adjudication are the most important norms for a particular branch of law, this removes the free formability of the rules of this branch of law at the discretion of ordinary legislature. On the other hand, the decisions of the constitutional court regarding the generally defined legal norms of a particular branch of law can direct the judge's discretion, too, in certain directions. This second option is also possible in a way that not the constitutional judges themselves give this incentive to the ordinary courts, but some university professors in the individual branches of law themselves turn to constitutionalised argumentations, because they believe that this will serve their legal policy purpose better. This, in turn, represents the third strand of constitutionalisation in addition to constitutional adjudication's influence on the legislation and on judicial application. This aims at the legal dogmatics of a certain branch of law and instead of traditional dogmatics, this supplies legislature and judicial interpretation with such normative concepts, tests and standards that are derived from constitutional values. However, this voluntary constitutionalisation brought about by university professors (that is, the type without the force of constitutional judgments) depends on whether the composition of the judiciary in a particular country is likely to follow the directions of legislative amendment based on constitutional argumentation advocated by university professors. Without the support of the decision-making majority of the constitutional judges, it is not worthwhile for a university law professor to condemn the 'constitutionally blind', 'disobedient' judges with prophetic curses if they do not follow the constitutionalised interpretation suggestions of the professors. In that case it is worth finding another way and trying to rely on the political legislative process in order to be able to implement the desired changes in legal policy

in a branch of law. As *Ian Holloway* writes about U.S. labour law, after its – according to him – failed path of constitutionalisation, since the American society is structured in a way that it is more worth to devise the political legislative path to achieve the desired goals, it is necessary to move away from the unsuccessfully experimented path of constitutionalisation: 'Rather, it will focus on whether the experience of other nations supports the argument that the constitutionalisation of labor law in the United States would be desirable – or whether there is something in the nature of American society which suggests that caution is advisable in viewing the Constitution as the preferred vehicle for normative change in labor law.'[29] Such sincere self-disclosure is rarely found in the endeavours for constitutionalisation of traditional branches of law in different countries, but it is obviously one of the main driving forces. In addition, there are the internal ambitions of some constitutional judges who, if they could not influence their original legal branch as simple law professors, are trying at least now to triumph with their views as constitutional judges. What does not go through the traditional path of political legislation, or is not achievable in a certain branch of law due to opposition from dominant professors of traditional dogmatics, can be achieved in the alternative way of constitutionalising this branch of law, at least if the majority of judges in the constitutional court can be trusted. In other words, what Ran Hirschl has already analysed in relation to the political tactics of the legislative majority – the strategy to hand over power to friendly chief judges as a final escape before the collapse of the parliamentary majority – can be used in other specific ways as a support for the analysis of constitutionalisation of certain branches of law.

2. Some questions concerning the layers of Hungarian constitutional law

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

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

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

Looking at the different parts of the text level of the Hungarian Constitution, which came into force in 2012, we need to differentiate, first of all, between the preamble entitled *National Avowal*[30] and the actual constitutional text and, on the other hand, between the first part of the actual text with sections entitled *Foundation* and *Freedom and Responsibility* – with the *Foundation* containing mostly a series of solemn declarations that are normally in the preamble, and the *Freedom and Responsibility* laying down the fundamental rights – and the more exact final part entitled *State*, which regulates the framework of the state and the main organs with more detailed standards. The preamble entitled *National Avowal* is hierarchically placed very high by the constitution itself, since Article R of the *Foundation* prescribes the interpretation of the entire constitution in accordance with the *National Avowal*. Thus, the normatively open declarations of the *National Avowal* increase the openness of the entire constitutional regulation and thereby expand the freedom of interpretation of the constitutional court. This freedom of interpretation is further increased by the fact that Article R also requires interpretation according to the achievements of the historical constitution, and because these achievements are nowhere defined, their determination is the future task of the constitutional judges themselves.

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

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

The constitutional text tries to defend itself and its amendments against the review of the Constitutional Court by expressly stipulating in Article 24 Paragraph (5) that such a review is only possible 'in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation'. This provision was incorporated into the text of the constitution by the fourth amendment to the constitution, when the majority of constitutional judges expressed their willingness to comply with the demands of the little circle of domestic constitutional professors and to subject the constitutional amendments to their review. However, due to the loose connection to the constitutional text that has so far been developed in the decision-making style of the Hungarian constitutional court, it should be noted that previous experience does not guarantee complete protection for the constitution against interpretations in the direction of total control of amendments of the constitution in certain domestic and foreign policy constellations, since there is no overarching authority over the majority in the constitutional court and, in this way, the review by this court cannot be prevented. Even this restrictive provision may justify the review, insomuch as the constitution itself has explicitly approved the review in one respect. ('The Constitution itself has expressly empowered the Constitutional Court to review its amendments!') That a deviation from the express provisions of the constitution is not merely an imaginary proposition is also shown by the fact that although the fourth amendment of the constitution had ordered the repealing of the constitutional court's case law – created on the basis of the previous constitution –, the majority of the constitutional court did not follow this prohibition, and this case law is still used in the constitutional court decisions these days. Despite the express provision, the majority of the Constitutional Court made it possible – in decisions 22/2012 (V. 11.) and 13/2013 (VI. 17.) – to base itself on the previous decisions of the Constitutional Court, which were overturned by the Constitution.

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

sometimes portrayed in the relevant international literature as the most activist constitutional court in the world.[31]

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

The seventh amendment to the Hungarian constitution then put the arguments and points of view in the justification of the respective law in the first place with regard to the interpretation tied to the legal purpose. However, this provision was immediately relativised in the *Reasoning* for this seventh amendment by adding that in the interpretation 'the arguments stated in connection with the adoption of the legal regulation, the achievements of the historical constitution and the results of the theory of law may be further used' (Reasoning of Article 7). It, therefore, left it up to the courts and ultimately to the Constitutional Court to determine the hierarchy among the main types of interpretation of the law. As such, this openness of the constitution – due to the corresponding reasoning – does not require a mandatory departure from the previous practice of interpretation. However, if the Constitutional Court focuses on the amended constitutional text instead of its reasoning, it can put the points of view and arguments of the respective legal justification at the top of the hierarchy of legal interpretation.

It is certainly possible to say that Article 28 also indirectly applies to the interpretation of the law by authorities other than the courts, but the question

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

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

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

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

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

2.2.1. Constitutional criminal law

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

The extension of the criminal law constitutional guarantees to the idea of constitutional criminal law was made by transforming the *ultima ratio* nature of criminal law in a constitutional requirement. In this way it is proclaimed as a constitutional order that an unlawful circumstance can only be punished under criminal law if the milder sanctioning system of the other branches of law is not sufficient and, if so, such a criminal law regulation is unconstitutional. This criminal law thesis as a constitutional order then appears as a restriction of the penal state power (in the USA 'police power'), and, on this basis, the constitutional court can in principle review and cancel all criminal law regulations that were not found to be compatible with the *ultima ratio* principle. However, since this principle is not present in the constitution of Hungary – and in general, in any constitution of the world, one can only elevate it to constitutional level by deriving it from a general constitutional principle, and this task is

mostly solved by using the rule of law principle. Furthermore, since some principles of criminal law are listed in the constitutions as constitutional guarantees – such as, for example, the principles of *nullum crimen sine lege* and *nulla poena sine lege,* as well as the presumption of innocence –, by extending these and developing further aspects from these, they are not regarded as constitutional guarantees of criminal law anymore, but are treated as part of the entire constitutional criminal law.

There were opponents of this expansion within the field of criminal law in Hungary, such as Imre Wiener A, who feared that the autonomy of the dogmatics of criminal law would be compromised by constitutional criminal law. There were, furthermore, opponents from outside, who criticised this expansion as a reduction of the controlling power of the democratic parliamentary majority over criminal law.[32] If, through the interpretation of the constitutional court, the review of criminal law goes beyond the safeguarding of guarantees and all penal provisions are included that are not provided for in the constitution itself, then all criminal law will be removed from the control of the parliamentary majority government.

2.2.2. Constitutional private law

Private law was the other branch of law whose constitutionalisation began in Hungary around the millennium, together with the making of a constitutional private law. The first, rather striking sign of this was the volume entitled *Alkotmányosság a magánjogban* [Constitutionalism in Private Law] edited by András Sajó in 2006 with studies on certain parts of private law.[33] Another one was a monograph written by Fruzsina Gárdos-Orosz in 2011, which examined the decisions of the Hungarian Constitutional Court and the positions of Hungarian authors from a comparative legal point of view.[34] However, the new 2012 constitution, which came into force after the publication of these volumes, created a new situation with regard to the

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

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

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

constitutionalisation of traditional branches of law because it introduced a procedure for challenging final court decisions with constitutional complaints. Since then, the Constitutional Court has revised hundreds of such court rulings and the constitutionalisation of the branches has continued on a larger scale, but its analysis has so far been lagging behind.[35] Likewise, András Téglási's doctoral dissertation completed in 2011, which deals with the constitutional fundamental right of property, is based on the previous situation, but in 2015 he expanded his analysis in view of the years that have passed since.[36]

In the period before 2012, Hungarian constitutional judges could only turn a normative requirement, derived from relevant constitutional fundamental rights and values, into a constitutional requirement for the individual branches of law during the control of a legislative process. With a view to preserving the autonomy of the ordinary courts vis-à-vis the constitutional judges, the Supreme Court insisted that these constitutional requirements only bind the legislation and that the judges are only subordinate to ordinary law. With this limited influence of the Constitutional Court, however, there have been shifts in Hungarian private law that have created tensions regarding the principles of traditional private law dogmatics. The principle of freedom of contract was thus opposed to the comprehensive concept of non-discrimination, which was also a prerequisite for Hungary's accession to the EU in 2004. In addition, the conflict of right to freedom of expression with property rights has created tension between tenants and landlords. In the same way, increased legal uncertainty was supposed to have been brought about by the discrepancy between fundamental rights and abstract norms of human rights disputes in Strasbourg on the one hand and more specific and precise rules of private law on the other. In the aforementioned

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

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

volume from 2006, Barna Lenkovics writes about the growing international skepticism about human rights and the emergence of the criticism of 'human rightsism'.[37] It has to be highlighted that the British Brexit, which has now ended, was originally directed against human rights activism in Strasbourg, and this shows what tensions between human rights, fundamental rights jurisdiction and national legal systems – including the traditional dogmatics of private law –, can develop, and to what explosions these can lead.

Among the authors of the above mentioned studies there are both defenders of the constitutionalisation of private law and opponents, and also those whose position cannot be determined in this regard. László Székely criticises the followers of constitutionalisation as people who suffer from the disease of 'constitutional narrow-mindedness', and the lines quoted by Barna Lenkovics and Attila Menyhárd can also be put in this more critical camp.[38] In contrast, András Sajó's analysis and Fruzsina Gárdos-Orosz's monograph can be qualified as a defence of constitutionalisation.[39]

2.2.3. Constitutional labour law

Although there is a high number of Google search results for 'constitutional criminal law' or 'constitutional private law', this does little help for those who are looking for information concerning constitutionalisation in Hungary's labour law. One of the few search results in this area also indicates that this is not due to the poor effectiveness of the search engine, but that this topic does not appear in Hungarian labour law research beyond one serious analysis.[40] This one in-depth analysis, however, is worthwhile to look at, because this monograph very thoroughly examines the possibility of constitutional labour law and illustrates developments in this area in a comparative way. This monograph was written by György Kiss in 2010 and is entitled *Alapjogok*

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

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

[39] Sajó, 'Előszó'.

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

kollíziója a munkajogban [The Conflict of Fundamental Rights in Labour Law]. Although his monograph was written before the new Constitution, this does not pose a problem, because the new constitution only legalised the practice of the Constitutional Court in this regard, and that could already be discussed in Kiss's analysis.

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

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

2.2.4. Constitutional finance law

Compared to the previous Constitution, the new Constitution expanded the scope of regulated financial matters and, in addition to the large number of financial provisions, also prescribed the codification of detailed rules regarding the financial sector. In terms of the depth of its regulation, this area of law became equivalent to the traditional constitutional areas that have been raised to the highest constitutional level (government, courts, electoral system and so on). Thus, the traditional branch of finance law has been constitutionalised by the new Constitution itself, and therefore its situation differs from all the three branches of law previously discussed. For example, criminal law guarantees introduced at the level of constitutional law would not have required independent constitutional criminal law. It is created by some criminal law professors extending these guarantees based on the *ultima ratio principle* and the thesis of *mandatory legal interest* as general constitutional barriers to state criminal liability. But it is only claimed by a few criminal lawyers who want to stand up against traditional criminal law with their self-constructed constitutional criminal law. Likewise, in the case of private law, constitutional private law can only be presumed to appear above traditional private law if the role of fundamental rights is seen

as valid not only in the vertical relationship between private individuals and the state – which is the original idea –, but also between private individuals. The introduction of property right – and the mandatory compensation for expropriation – as a constitutional guarantee would not yet result in constitutional private law, just as the order of equality before the law does not make it necessary. The constitutional prohibition of discrimination was only applicable in a narrow framework – with regard to fundamental rights, and certain permanent personal characteristics (gender, race, origin and so on) –, and it was only extended by the majority of Hungarian constitutional judges to all discriminations by the legislation, as a general prohibition of discrimination; furthermore, it came to be understood not only in the relationship between private individuals and the state, but also in the relationships between private individuals. In this way, constitutionalisation really penetrates the area of traditional private law regulation and it doubles the legal system, but it is more a result of legal policy efforts by the professors of private law rather than a result of constitutional regulation. In the case of labour law, the few constitutional provisions in Hungary that touch its foundations would also be only guarantees As I mentioned earlier, the constitutionalisation of labour law was urged by a comprehensive monograph in this area which supported its privatisation with the help of giving horizontal effect to fundamental rights between private persons.

Contrary to these branches of law, the entirety of the foundations of financial law has been incorporated into the Constitution. However, at least with regard to the review conducted by the Constitutional Court, a temporary restrictions have also been imposed, namely, budget law and its constituent taxes and levies were excluded from the constitutional review over a certain state of government debt. Two Hungarian financial law professors can be highlighted who have regularly dealt with constitutional issues in the past: István Simon, who summarised the most important issues in this area in an analysis from 2019[41] after several studies on this topic, and Dániel Deák, who, also after several studies, dealt with constitution and tax law in a comprehensive monograph.[42] Some introductory remarks suffice here, as they will be dealt with systematically in the next chapter when the questions of constitutional branches of law will be more fully at the centre of the analysis.

[41] István Simon, 'A magyar pénzügyi alkotmányjog átalakulása', *MTA Law Working Papers* no 2 (2019).

[42] Dániel Deák, *Alkotmány és adójog* (Budapest: HVG-ORAC, 2016).

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

2.3. The layer of precedents of Hungarian constitutional law

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

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

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

Chapter 3
An alternative issue of doubling: constitutional law versus simple law

The longstanding constitutional adjudication in Germany has gradually created an opposition between constitutional law and the rest of the legal system as simple law. When the 1949 Basic Law of the Federal Republic of Germany was initially extended through fundamental rights to the entire legal system, but the Constitutional Court did not yet provide sufficient material for the interpretation of the Basic Law, jurisprudential studies first wrote about jeopardising the primacy of Basic Law by simple law. At that time, the focus of the discussion was on the mere formality of the primacy of Basic Law, insomuch as, instead of the upper level controlling the content of simple law, the content of simple law is brought up to the level of constitutional law. In the early 1960s, Walter Leisner was still concerned with the relationship between constitutional law and simple law from this point of view,[43] but after a time, since the increasingly expansive German constitutional judges have penetrated simple law through their decisions, more and more law professors have started to fear for German legal system of excessive constitutionalisation.[44]

As early as 1960, a constitutional court ruling used the expression 'special constitutional law', stating that judges in ordinary courts must not only take into account the norms of traditional law in their decisions, but also the norms of Basic Law as special constitutional law that apply

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

[44] Matthias Jestaedt, *Grundrechtsentfaltung im Gesetz: Studien zur Interdependenz von Grundrechtsdogmatik und Rechtgewinnungstheorie* (Tübingen: Mohr Siebeck, 1999), 32: 'Unbeschadet dessen dürfte sich heute weit weniger das Problem stellen, wie die Verfassung vor "Unterwanderung" durch niederrangiges Recht, vor "Begriffserfüllung von unten nach oben" … geschützt werden könne, als die umgekehrte Frage: wie nämlich – bei anerkannter Nachrangigkeit des Gesetzesrecht – dessen Eigentümlichkeit und Selbstand behauptet werden können angesichts einer ausufernden Grundrechtsauslegung.'

to them.[45] However, since the individual fundamental rights ultimately extend to all areas of the legal system, 'special constitutional laws' mean that traditional legal areas are completely doubled. Instead of taking this phenomenon as a doubling of the law, the term 'simple right' has spread. This notion emphasises that the other branches of law are simple legislative laws, in contrast to constitutional law, which is based on a higher social consensus of qualified majority voting. This duality of the legal system was therefore thematised as constitutional law versus simple law. The status of constitutional law, which was elevated from the level of a branch of law to the level of an entire legal system, was then systematically discussed at a conference on constitutional law in 2001 with the participation of renowned German legal theorists, and the conference contributions were published in a volume in 2002. This thematisation differs from mine in that I use other focal points and I compare and contrast the layers of traditional law and those of constitutional law. It therefore seems worth considering which aspects of the German thematisation could be used to expand my theory of the doubling of the law and its layers. In the following, I will first analyse the studies of two speakers at the German conference and then examine a volume by Matthias Ruffert from 2001 on this topic. In my further analysis, I am going to draw the lessons from these German writings with regard to my analysis on the doubling of law, and see what new aspects can the concept of multi-layered law contribute to the understanding of the doubling of the legal system.

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

1. The German concept of constitutional law versus simple law

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

1.1. The position of Robert Alexy

Alexy begins his analysis with a warning from *Hans Kelsen,* who brought constitutional adjudication to Europe, from a lecture of his at a state law conference in 1928: a constitution must contain precise rules if a constitutional court is to be attached to it. According to Kelsen, care must be taken not to include abstract legal principles and values as well as open concepts in the constitution, since they pose a threat to democracy if they are coupled with a constitutional court.[46] Kelsen emphasised that by using vague and open concepts, constitutional judges can become a superpower that would be intolerable to society and democracy. Alexy then regrets that this early warning from Kelsen could not prevent the expansion of constitutional material in Germany.[47]

For the first time, this expansion happened through the Lüth decision of the German constitutional judges, when they, expressedly for the penetration of basic rights into private law and using Rudolf Smend's earlier theory, reinterpreted the basic rights as 'objective values' and 'cultural assets' of the entire cultural system. In this form, fundamental rights demanded

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

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

an impact on the entire legal system, and the German constitutional judges made this public with the formula 'radiation of fundamental rights to all legal areas'. This reinterpretation then granted the extended fundamental rights, despite Kelsen's intention, increased constitutional power ('The Smendian idea is used in this way with Kelsen's teeth'), and thus gave the constitutional judges the possibility of arbitrary intervention in all legal fields. After the intervention, the constitutional judges were always given a free hand, as values in certain situations can only be weighed against other values – one suppresses the other –, and through this discretionary power, the constitutional judges became masters of the constitution, as Kelsen had foreseen. Alexy also points out that the formula of the Lüth decision on the radiation of fundamental rights was later supplemented, and the repertoire of constitutional adjudication was expanded with the protective function of fundamental rights, which, in addition to private law, made it possible to penetrate into all areas of law. Likewise, the arbitrary ability of the constitutional court to thus penetrate was exacerbated by the generalisation of 'equality before the law' to a general equality law combined with the requirement of proportionality, with the decision on proportionality always remaining in the hands of the constitutional judges.[48] In this way, going beyond the purely protective nature of fundamental rights, the laws of legislation could be examined as well as the decisions of the ordinary courts, and whether or not there is sufficient protection or proportionality to require positive action by the state; it is always the constitutional judges who can evaluate these, almost without restriction.

Alexy also notes that these extensions enable constitutional control of every state action and application of law – and that means the direct constitutionalisation of the system of law –, but beyond that, an indirect constitutionalisation has also taken place in Germany in the direction of the judiciary. The German constitutional judges interpreted the obligation of the judges to be bound by law and parliamentary acts, formulated in Article 20 Paragraph (3) of the Basic Law, in the sense that a judicial decision that

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

contradicts a simple law or regulation also indirectly violates the Basic Law and this also implies an unconstitutionality. In this way, the parties concerned can submit a constitutional complaint to the constitutional court because of an unconstitutionality. With this interpretation, the entire legal system was subjected to a constitutional review, either directly (radiation of fundamental rights, protective function of fundamental rights, opposition to disproportionality) or indirectly, in all areas of law.

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

He begins by stating that all of these criticisms argue for an over-constitutionalisation, but following them would result in sub-constitutionalisation that would be as problematic as the former. Thus, there is objectively a playing field in front of the constitutional court for the proper fulfilment of its task, and there can be neither an over-constitutionalisation nor a sub-constitutionalisation within this playing field. And that can only be ensured by a playing field dogmatics.[49] The pre-question of this playing field dogmatics is whether the German Basic Law can be understood as the framework of the legal system, as Böckenförde stated in his criticism of constitutional jurisdiction, or, on the contrary, as the basis of the legal system. Alexy believes Böckenförde's position is too rigid and says that on closer inspection, both are the same and the constitution is basically the basis and not just the framework of the legal system.[50] With this decision, Alexy has already implicitly approved the leadership of society and the control

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

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

of the entire legal system by the constitutional judges, and therefore his playing field dogmatics can only be a tool for constitutional judges. It must be seen, however, that unlike the United States Constitution – the world's first constitution – and the 19th-century constitutions, the constitutions of the past few decades in the world have actually gone, beyond providing merely a framework, toward deciding about basic legal and state issues. Of course, this also means that the constitutional courts can actually call into question the entire legislative program and the cyclically changing democratic government majorities and thus the idea of democracy, as Kelsen, Carl Schmitt, Ernst Forsthoff and later Böckenförde stated. If we take this seriously, we should somehow interpret constitutional primacy over the law more narrowly in order to allow enough freedom for the legislation of the cyclically changing parliamentary majority, which is based on millions of citizens. But Alexy's theoretical decision, replacing democracy with playing field dogmatics, confirms the supreme role of constitutional judges, who concretise the entire constitutional order.

Alexy endeavors to limit this control and ensure the role of the legislature under constitutional adjudication by trying to divide the playing field for the legislation and the constitutional court. He claims that the playing field is only where the constitution does not issue a command in one direction and states a prohibition in other directions. There is a playing field for democratic legislation in these free areas, and constitutional judges can only check whether the frameworks of the playing field were observed. But when he moves onto discussing the playing field, Alexy inconspicuously turns determinateness by the constitution to determinateness by the constitutional judges, and begins to discuss how the playing field is determined by constitutional judges. However, this avoids the difficulty of clearly delimiting general and normative, extremely open fundamental rights as orders, such as the 'right to free development of personality' guaranteed by the German Constitution, or the understanding of equality before the law as general equality, or the 'inviolability of human dignity', which can all be examined in all human relations and state regulations by the German and a number of other European Constitutional Courts. However, if we put this into our perspective, it turns out that Alexy's assumption that constitutional provisions provide a free space for state activity through clear commands and prohibitions is wrong. This would only be the case if, for example, the constitutional court had clarified the right to free development of personality in a restrictive interpretation or had more precisely determined the inviolability of human dignity as a ban on

humiliation. Instead, the German constitutional judges have broadly defined their meaning and thus subject all state regulations and judicial judgments to the discretion of the constitutional court. Therefore, Alexy wrongly claims that within constitutional orders and bans there is a free playing field for state legislation and the law enforcement of the ordinary courts without the control of the constitutional court. It is questionable whether Kelsen's fear of a boundless constitutional adjudication that Alexy willingly describes and the criticism by Forsthoff and Böckenförde in the light of real German Constitutional Court practice can be rejected as unfounded.

The German constitutional judges themselves have already laid down many formulas in relation to the playing field (formation field, judgment field, action field, decision field, adjustment field, evaluation field, discretion field and so on), and when reviewing these, Alexy sees two different types of constitutional playing fields. One is the *structural playing field*, which can be defined by whether there is an explicit order of action in relation to an area or a prohibition of a certain direction in the Basic Law. The other is *the epistemic playing field*, the limits of which are not contained in the Basic Law, but in the ability to recognise where the further, from the constitution derivable limits within the structural playing field are. Finding the latter limits is made possible by functional considerations, of which Alexy highlights three types: playing field for purpose, playing field with a scope for tool selection and playing field for discretion.[51] The focus is on the discretion, in which – from the practice of German constitutional jurisprudence, which, incidentally, has been adopted by most European constitutional courts – it should always be checked whether the relevant regulation was necessary and suitable for the achievement of objectives, and if so, then whether it was proportionate to the otherwise necessary restriction. Suitability, necessity and proportionality – these are the three elements of the playing field of discretion, and the key to Alexy's playing field dogmatics. Although, as we have seen, due to the most widely interpreted fundamental rights and the general equality law, there is practically no free and uncheckable playing field for legislation, still, if this threefold discretion test could work properly, in a standardised way, democracy would be damaged anyway, but

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

at least the juristocracy that would take its place would offer a predictable framework. The fact is, however, that these considerations could only approach the level of information processing of law-making ministerial apparatus with processing a huge amount of information, and the constitutional judges have no means for this. On the other hand, even if it were possible in one case, they could only decide on the necessity and proportionality based on their subjective value judgments. In contrast, Bernard Schlink is right when he argues that the outcome of the consideration only shows the direction of the bias of the person who does it, and it is largely subjective.[52]

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

1.2. The position of Philip Kunig

Kunig's analysis begins with the analysis of fears in Germany that emerged in 1949 regarding the intrusion of constitutional fundamental rights and

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

principles into the ordinary courts, and he points out that this review was then interpreted by most as a 'rightful enforcement of the ordinary judges to get down from their ivory towers'.[53] Later, however, as a result of the expansive German constitutional judges, both judges and jurists rebelled against the suppression of ordinary courts, and they argued that the constitutional court encroaching on traditional dogmatics cannot really understand the context of this, and on the other hand, the private law dogmatics has a nobler tradition than the new doctrines of constitutional adjudication.[54] All this indicated that this is not just about the clash of generalist constitutional adjudication and the specialised jurisdiction of ordinary courts, but that all traditional branches of law have been attacked with the expansive expansion of constitutional judicial control: 'Jedenfalls gibt es einen Kompetenzkonflikt, der im Gewand des Streits um das rechte Verhältnis von Gerichtsbarkeiten auch Züge eines Streits von Teildisziplinen der Rechtswissenschaft aufweist.'[55]

Kunig also deals with the question of the relationship between legal disputes in ordinary judicial proceedings and the later constitutional complaint proceedings before the constitutional judges, and how it is possible to distinguish between the contents of simple law and the constitutional principles and constitutional provisions in these two proceedings. It is generally understood that the procedure for deciding on a constitutional complaint is, compared to ordinary judicial proceedings, only a narrow investigation and no longer affects the content of traditional legal branches, but only the aspects relevant in the context of constitutional provisions are taken into account. He remembers, however, that there were some who only qualified

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

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

[55] Ibid.

and disputed this distinction as a 'lie of life' *(Lebenslüge)*. However, Kunig reverses the accusation and says that the exact opposite is the case: 'Im Verfahren der Verfassungsbeschwerde ist der Verfassungsstreit die Fortsetzung des fachgerichtlichen Verfahrens im auf das Verfassungsrecht verengten Blickwinkel. Angesichts dessen müsste einer Rechtstheorie, welcher der Nachweis der Unmöglichkeit dieser Unterscheidung gelänge, die von der Verfassung vorausgesetzte Unterscheidbarkeit zwischen Verfassungsrecht und anderem Recht als Lebenslüge erscheinen. Die Verfassung zwänge gleichwohl zur Aufrechterhaltung dieser Lüge, allerdings erzwingt sie nicht das Bild von Stufenbau der Rechtsordnung. Es ist missverständlich, weil Stufen hartkantig aneinander stoßen und wir es hier eher mit gleitenden Skalen zu tun haben.'[56]

In this debate, a monograph written by the staff of the German Constitutional Court based on many years of practice in German constitutional complaints also assumes that the contents of traditional private law, criminal law, and so on, cannot really be distinguished from the aspects of constitutional provisions when discussing and deciding on individual constitutional court cases.[57] This way, even if the 'lie of life' rating may be too hard, it still tells the truth. It is of course also possible that this indivisibility can only be created by the Germans and the Constitutional Courts following them, since the scope of the questions of constitutional adjudication has already been expanded contrary to the original idea of this adjudication. For example, by the time the German constitutional judges accepted the horizontal effect of fundamental rights in private law in their Lüth judgment of 1958, they had naturally interfered with the provisions and dogmatic solutions of private law. As a practising constitutional judge in Hungary for the past nine years by now, let me point out that I have seen this expansionist tendency several times in the discussions and the inseparability comes about when an entire constitutional branch of law is created instead of mere constitutional guarantees. This is also due to the fact that due to the fundamental structural circumstances of constitutional adjudication, there is no longer any control over this activity, which could act against its further expansion. The constitutional judges, therefore, do not rely on a closed set of aspects of fundamental rights and a derived and

[56] Ibid. 40.

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

defined set of constitutional principles when dealing with the proposals submitted to them, but on an attitude that the expansion can be continuous. The end result is the doubling of the entire legal system, and, in this way, the individual constitutional branches of law emerge over the traditional branches of law.

1.3. Matthias Ruffert's analysis

Ruffert emphasises that the constitutionalisation of law through constitutional adjudication means a different change in the private law part of traditional law than in the public law part, such as criminal law and financial law. This is because in the former case it limits private autonomy, while in the latter case private autonomy is not in focus.[58] If one adds the democratic component of the state to this finding, it is striking that this change reorganised the state's power to dispose of the law by passing it from the democratic legislation to the supreme judges and the law professors behind them. Another consequence for private law is that this modified state power not only removes the democratic component in favour of juristocracy, but also limits the autonomy of private law.

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

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

occupation authorities and their jurists, was primarily determined by the fear of the democracy of the millions of Germans, and so this democracy was controlled by such a powerful constitutional court that was wholly unprecedented in the world at the time.[59] This fear of the democracy of the German masses and the resulting limited democracy was then veiled in public accounts, and it was portrayed on the one hand as a consequence of the 'sin' of legal positivism, on the other hand as an 'improved' democracy. Theoretically, the thesis that positivism is the logical consequence of political democracy in the area of legislation is tenable, although in addition to the legal text, the legal dogmatic formulas and precedents of the Supreme Court are required to get the full picture of law. The American occupation authority after the Second World War had no problem with positivism, but with the dangers of democracy posed by the German masses. It is important to clarify this fact also because this German constitutional court model has been promoted and adopted in many countries in Europe and on other continents in recent decades.[60] For this reason, the narrow portrayal of the

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

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

role of fundamental rights and constitutional adjudication and the idea that these would overcome 'evil legal positivism' should be criticised: 'Sie ist das Ergebnis der Auffassung, daß für den Zusammenbruch des Rechtsstaates im Dritten Reich in erster Linie der überzogene (Gesetzes-) Positivismus verantwortlich war.'[61]

In his analysis of the role of fundamental rights in the legal system, Ruffert refers to Jürgen Schwabe's 1971 book *Die sogenannte Drittwirkung der Grundrechte* ('The so-called third-party effect of fundamental rights'). In his book, Schwabe understood fundamental rights as binding programs for state legislators and law enforcement bodies: they should create and apply these right in a way that they help citizens in the aspects guaranteed by their fundamental rights to protection. From this point of view, Schwabe saw no difference between public and private law. In his opinion, it is not the private litigants who are obliged to enforce the fundamental rights in private disputes, but the judge. What came to the foreground was not that aspect of the fundamental rights which obliged the individual, but the enforcement obligation of state organs and thus the emphasis from the former was implicitly removed, which was emphasised in the subject of fundamental rights: 'Gesetzgeber und Richter als Staatorgane griffen in die Grundechte des betroffenenen Grundrechtsträgers ein, wenn sie diese bei der Rechtsetzung und Rechtsprechung nicht hinreichend beachteten.'[62] This was later criticised by some theoretical opponents as a return to the statist state-friendly legal concept, but it was also followed and modified by a number of followers. Overall, however, the majority of legal literature rejected this.

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

was suggested by some otherwise famous German thinkers (like Habermas) in the 1980s: 'constitutional patriotism' *(Verfassungsgpatriotismus),* identifying with the Constitution.

61 Ruffert, *Vorrang der Verfassung,* 11.

62 Ibid. 17.

Abwehrrechten kein bestimmtes staatlichen Handeln vorschreiben, bieten sie sich als flexible Begründung für die Grundrechtswirkung im Privatrecht an.'[63] This concept regarding the obligation to protect fundamental rights in private law was then generally recognised in the German legal literature. Of course, it is not clear, says Ruffert, why this concept should only imply the indirect effect of fundamental rights, since they would have to have a direct effect. In any case, the initial defence function of fundamental rights has now been converted into multi-dimensional functions, among which the defence function is present, but also a protective function. In fact, the defence function began to intensify in the early 1990s. However, the presence of both in the justification of the German constitutional judges shows that the German constitutional judges wrote in the famous commercial agent decision *(Handelsvetreterbeschuß)* about their obligation to interpret private law within the framework of the duty to protect the constitution. Likewise, the obligation to protect the weaker and to compensate the weaker in unequal situations was defined as the mandatory direction of interpretation of the constitutional court in private law disputes before them. Ruffert also points out that for a long time, the debate focused only on the intrusion of fundamental rights into private law, but later this intrusion began to generalise in relation to the whole of the Basic Law, and the altered thematisation was about constitutional law versus simple law.[64]

Then Ruffert goes on to the idea of 'concretised constitution' in his analysis. The constitution takes precedence over ordinary law, but it is abstract and normatively very open and therefore it has to be concretised in order to regulate individual cases. The question is, therefore, who is entitled to this concretisation and who creates the specific constitutional law. One answer was the concept of 'partial constitutions' at the end of the 1970s, and, according to this concept, the partial constitutions between the constitution and the law could be made in such a way that the relevant provisions of the constitution were linked to some essential parts of the

[63] Ibid. 21.

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

law: 'Eine Teilverfassung bündelt verfassungsrechtliche Vorgaben und verfassungsgeprägtes Gesetzesrecht in einem "gesellschaftsverfassungsrechtlichen" Subsystem. Auf diese Weise entstehen Wirtschafts-, Sozial- und Arbeitsverfassung, daneben Ämter- bzw. Dienstverfassung.'[65] The German constitutional judges, who had examined it in the light of the economic constitution, rejected it, as did the legal literature. Ruffert nevertheless considers it theoretically supportable and instructive.

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

Ruffert's emphasis on the effects of constitutional adjudication so far can be summarised as follows; due to the attitude of the German constitutional judges, he does not regard the constitution as a framework for the legal system, but rather as the basis of the legal system that has already made the most important substantive decisions, and on the basis of these decisions, constitutional judges can already examine in detail the content of the laws and their judicial interpretations. As Ernst Forsthoff once wrote, according to this view, the constitution already contains the entire legal system in a nutshell, and constitutional judges are authorised to extract the entire legal system from it with their decisions.[66] According to this view, the constitutional guarantees for the traditional branches of law do not remain in the role of mere barriers, but can be expanded as desired, and can, therefore, develop into a whole constitutional branch of law.

Another thing could be added to the above debate on the distinction between the constitution as the framework or the basis of the legal system; namely, that it was only possible to deduct in the light of the actual German constitutional adjudication that the constitutional judge's unrestricted

[65] Ruffert, *Vorrang der Verfassung,* 39.

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

intrusion into the legal system would be the consequence. This can be counteracted by the fact that if the constitutional judges interpret the constitution as a part of a democratic constitutional state, then they can, without worry, interpret the constitution, which was declared as the basis of the law, as the framework of law. It is important to emphasise this as the Hungarian Constitution explicitly states its status as the 'basis of the Hungarian legal system' [Article R Paragraph (1)]. According to the above criticism, there should be no obstacle to interpret this only as a framework, which must be concretised primarily by the democratically elected parliamentary majority, through the multitude of acts.

Ruffert's analysis contains a cautious criticism of the constitutional court, that does not respect the established dogmatics of private law, but this criticism itself shows the peculiar emphases in German legal literature. It shows that the inclusion of the concepts originally developed in private law into the text of the Basic Law (often in the form of a mention, as in Article 74 on competing federal and national competences) doubles these concepts and, in a next step, the constitutional judges are able to brush aside original limitations posed by the framework of private law and use these concepts in a way that is incompatible with private law dogmatics. This was the case when tenants' right were perceived as property right in 1993, when a tenant's 'property right' was protected against the owner based on the constitutional protection of property.[67] Ruffert tries to combat this intrusion and the erosion of traditional private law by trying to prevent constitutional judges from modifying the concepts of private law dogmatics which have been developed over centuries are not just the result of one-off legislative decisions. He also emphasises their real-life nature compared to decisions of the constitutional court.[68] This intrusion is

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

[68] Ibid. 47: 'Rechsbegriffe und -institute des Zivirechts sind zumeist nicht Ergebnis einer einzigen gesetzgeberischen Entscheidung, sondern lassen sich in ihrer Entstehung bis in das

mitigated – according to Ruffert – by the fact that even if this constitutional interference with private law already exists, one can be comforted because the spirit of the constitutional concepts itself essentially comes from private law. Ruffert quotes two famous professors of public law from the end of the 19th century, Carl Friedrich von Gerber and Paul Laband, who demanded a systematic cleansing of public law from private law concepts.[69] In a broader sense, this consolation naturally does little to help a law scholar in criminal law and other traditional legal disciplines. Finally, it should be pointed out that the German Basic Law is based on the component of democracy within the rule of law of a democratic state, but this is not emphasised in this analysis. In addition, when Ruffert discusses violations of legislation and private jurisprudence, he expressly emphasises only the latter as something to be protected.

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

It has to be seen that although the juxtaposition of constitutional law and simple law in German literature essentially discloses the doubling of the legal system, this remains only an implicit conclusion, and consequently does not present any further lines of research that would be self-evident in the case of deliberate thematisation. Namely, how the problems look like in this new constitutional law, the same problems that have been explored for centuries in the case of traditional simple law? After all, most of the questions of legal theory that have already been examined in relation to traditional branches of law can be raised here. The deliberate raising of the question of doubling the law itself therefore enables us to compare a number of aspects of new constitutional fields of law with traditional branches of law. For example, what is the difference between adjudication

Römische Recht, dessen Rezeption und andere Phasen oder Quellen der Zivilrechtsbildung zurückverfolgen. Diese Tradition vermag in vielen Fällen eine dem jeweiligen Institut eigene Rationalität vermitteln, denn traditionelle Intitutionenbildung führt dazu, daß über die zeitliche Evolution unsachgemäße Lösungen ausgeschieden und vorteilhafte Konzepte aufrechterhalten werden. … Hinzu kommt, daß die Entwicklung des Zivilrechts durch Privatrechtgesetzgebung und vor allem Zivilrechtsprechung eine besondere Nähe zu den Sachproblemen aufweist.'

[69] Ibid. 50.

in terms of simple law and constitutional justice? And what can result from the confrontation between specialised adjudication of simple law and the generalist constitutional adjudication in Europe, where, for centuries, only specialised adjudication existed? The deliberate raising of the duplication of law can in itself bring something new, not only in comparison with the much discussed alternative thematisation in Germany, but also in relation to the concept of multi-layered law. This leads to a series of comparisons about the different relevance of text, dogmatics and case law between the new constitutional areas of law and the traditional branches of law, and not only a diffuse comparison of both laws – constitutional law versus simple law – emerges. Thus, the new concept of doubling discussed here and the novelty of the questions arising from it with regard to the alternative issue of doubling encountered in German literature can reasonably be stated. But which aspects can be taken from the alternative thematisation that could also enrich my theory of the doubling of the law? From one point of view, the analyses above have certainly inspired me, and these concern the delimitation and clarification of constitutional law, the new constitutional branches of law and traditional simple law.

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

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

In summary, the problem of the constitutional regulation of the entire legal system, which is continuously fleshed out by the constitutional judiciary, and the relationships of the branches of law can be described sketchily in the following way. (1) First of all, it seems appropriate to refer to a *constitutional level* of the entire legal system and not to constitutional law as a branch of law, so as not to confuse it with the other simple branches of law. (2) Historically, the higher constitutional regulation was directed at the basis of the organisation of state power since the late 18th century. It was called *Staatsrecht* in Germany and later also in Hungary ('államjog'), and it has been called *constitutional law* proper ('alkotmányjog') in Hungary in the last decades. (3) However, to ensure a clear distinction between names, it appears necessary to call this central part of constitutional law (core constitutional law) *state power law,* rather than simply renaming it state law *(Staatsrecht),* since the new expression better emphasises its distinction from administrative law. (4) On the other hand, the branch state power law as a whole cannot be

included in the constitutional law – although these relationships normally receive the foundations of their regulation more fully in the constitution –, since laws that specify their constitutional rules (electoral system, judicial system, and so on) lie outside the constitution. (5) It is possible to include the specific and substantiated constitutional laws in this system, which contain the constitutional rules of each traditional legal branch, the relevant fundamental rights and the constitutional decisions specifying them, and can be regarded as supplements to the traditional legal branches. In this narrower sense, they supplement and limit the dogmatics of the traditional branches of law in some aspects, but do not compete with them. (6) In this way, it is possible to designate them as constitutional criminal law, constitutional private law, and so on, but it should always be kept in mind that they only join traditional legal fields in a complementary sense and cannot be built up as competing constitutional dogmatics against them.

Chapter 4
Specified constitutional laws (constitutional branches of law)

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

1. Constitutional private law

As has already been shown in the relevant analyses of the previous chapters, the autonomy of the dogmatic order of private law can be terminated to different degrees by the penetration of fundamental rights, and thus private law can only function together with an overarching system of constitutional considerations. Constitutional adjudication in some countries has retained that fundamental rights, according to their historical origin, can only function for the protection of private parties against the state and that relations between private parties should be left to traditional dogmatics and the regulation of private law. In many countries, however, they have gone beyond this, and fundamental rights have also penetrated the norms of private law which govern relationships between private parties. The German constitutional judges were pioneers in this area and they influenced the constitutional judges of other countries. They developed a distinction between direct and indirect influence of fundamental rights and rejected direct influence, which would affect private law too much, and consequently decided in favour of indirect influence. This means that the priority of the norms of private law remains, and the relevant fundamental rights must be included in their interpretation. However, the reasonings that were used went further. In one case, they declared that fundamental rights are cultural values that must be passed on throughout the legal system. In another case,

they declared the state's duty to protect them was justified in order to help the intrusion of fundamental rights. In this way, ordinary courts should always correctly assess whether the protection area of relevant fundamental rights is not damaged by the regulations of simple law and whether the conflict between them can be judged as proportionate for the protection of fundamental rights. Due to these shifts, the only indirect influence of basic rights became increasingly illusory, and, in fact, a direct effect was brought about.

In a 2017 article, Wolfgang Lüke describes this shift towards a direct effect by stating that the original indirect effect declared by the Lüth judgment was only asserted in relation to private delictual liability norms, the prohibitions of which are similar in many respects to the administrative norms. The Lüth judgment itself emphasised this when the affect on private law.[70] Although this was later expanded in the 1970s by the obligation of the legislature and the judiciary to protect fundamental rights, what really meant a penetration by fundamental rights was, in Lüke's analysis, putting the freedom of contract under the control of fundamental rights in the early 1990s. This shift was brought about by the German constitutional judges in the so-called guarantee decision *(Bürgschaftenentscheidung)* in 1993, in which the practice of bank lending with family guarantee was reviewed. The reason for this practice was that borrowers often bestowed their assets to their family members and left the creditor banks unsecured if the debtors refused to repay their claims in court. In some cases, however, the family members were essentially without any income and would have had to pay back hundreds of thousands. After appeals to higher courts, a diverging decision-making practice arose at the Federal Court of Justice. One of its chambers focused on the behaviour of a bank that did not investigate the guarantor's apparent bankruptcy, and therefore decided against the bank. The other chamber decided in favour of the bank and declared the bank

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

guarantee by the family member valid and binding based on the free discretion and the contractual freedom of the guarantor. In this way, the issue was referred to the constitutional judges in 1993.

There were two cases, and in one of them the borrower was a small-scale businessman whose 21-year-old daughter with a minimum wage job acted as his guarantor, and had to pay 100,000 German marks for her father's debts. In another case, a woman who raised small children at home and had no income of her own was the guarantor for her husband's loan. The novelty of the constitutional judges' decision was that they interpreted the case as the violation of the right to universal personal development in Article 2 Paragraph (1) of the German Basic Law. The circumstances under which these people were made guarantors were qualified as external coercion *(Fremdbestimmung)*: if a party is in a very subordinate position and therefore has made a disproportionately burdensome undertaking, this situation already means loss of autonomy. In addition to the decision about the violation of the fundamental right, the German constitutional judges also included Articles 20 (1) and 28 (1) of the German Basic Law, which declare not only the rule of law but also the welfare state.[71] For this legal impact of fundamental rights on the innermost part of private law and the revision of the primacy of private autonomy, the guarantee decision emphasised Article 138 of the BGB (German Civil Code), which declares the nullity of the contract in the event of immorality. It is important to emphasise, however, that this decision was essentially based on the right of self-determination – which was derived from the fundamental right to universal personal development –, and in the statement of *Fremdbestimmung* other constitutional articles, too, were included for confirmation; Article 138 of the BGB was only used so as to harmonise this argument with the norms of private law, but cannot be seen as a basis for decision-making.

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

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

of the norms of traditional law with the help of fundamental rights – that is, the indirect effect – that is formally recognised. Such direct intrusion of fundamental rights can also be found in Italy, although based on other reasoning. Here too, only the indirect effect of fundamental rights was recognised for a long time, and the shift to direct effect only began in 1994 and was carried out by the *Corte di Cassazione,* the highest ordinary court in Italy. The basis for this was the link between the exercise of fundamental rights and the duty of solidarity under Article 2 of the Italian Constitution, and here, too, the subordination of the weaker party at the time the contract was concluded and the disproportionate advantage of the other party were assessed as a violation of fundamental rights. Here too, the declaration of unconstitutionality was introduced into the system of private law norms by an intermediary, by declaring it with the help of the general clause of the Italian Civil Code on the requirement of good faith.[72]

Let us take a look at a study of an Oxford professor, Hugh Collins, that needs to be taken into account when discussing the effect of fundamental rights between private parties because, in addition to the comparative analysis, an attempt is also made to provide a comprehensive legal theoretical justification.[73] Collins commented on the German debate concerning the horizontal effect of fundamental rights, including the differences between indirect and direct effects, and pointed out that, due to the signing of the Strasbourg Convention on Human Rights, in some cases the effect of fundamental human rights between private parties were recognised as domestic law in Great Britain as well. He cites the case *'McDonald v McDonald'* in 2017 as an example, when a young woman with reduced

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

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

mobility and intellectual disabilities lived in an apartment bought by her parents and paid the agreed rent from her state grant. However, due to the mortgage on the apartment, a bank became the new owner after the 2008 financial crisis and the bank ended the lease. Then the new owner asked the young woman to move out. However, according to Article 8 of the ECHR, her lawyer argued that the right of the tenant to the home is protected by their 'right to home' against the right of the owner: 'Everyone has the right to protect their privacy, family, home and correspondence.' [Article 8 Paragraph (1)]. Since it was a relationship between private parties, the bank's property right was also protected under the Human Rights Convention, but the Supreme Court of England accepted that in the dispute between the private parties two fundamental rights were opposed, and they have an effect not only vertically, in the relationship between the state and private parties. As a result, the Court accepted that such disputes should be resolved by taking into account the conflicting fundamental rights of the two parties: 'The Supreme Court of the United Kingdom agreed that her eviction by the bank interfered with her right to a home and that the law of landlord and tenant should be aligned with that requirement in Article 8. (…) provided the bank followed the procedures set out in legislation for the eviction and conformed to any requirement in the lease, a proper balance would be struck between the right to a home and the right to property'.[74] Following this consideration, the top judges decided in favour of the bank, but the effect of fundamental rights between private parties and the obligation of the British judges to apply private law in conjunction with fundamental rights are clearly visible in this case.

Collins points out that since 1948, a more limited recognition of the effects of constitutional rights under private law has been found in the United States. This happened in the *'Shelley v Kramer'* case, when African-American Shelley bought a house in St. Louis for her family, the original owners of which, together with other neighbours, had previously signed a mutual agreement to limit their property by committing themselves not to sell to African-Americans. On this basis, one of his neighbours, Kramer, challenged the purchase agreement in court to prevent the new African-American owner from moving in, and requested that his property be declared null and void on the basis of the neighbourhood agreement. The local court did this, but the case reached the highest federal judges, and

[74] Ibid. 7.

the Supreme Court judges ruled that state courts should always examine the disputes before them in the light of relevant fundamental constitutional rights, and when a transaction that is otherwise sound under private law contradicts a fundamental right, then it cannot be confirmed by the courts. This solution introduced a minor version of the horizontal effects of fundamental rights into the U.S. legal system, which became an aspect of *state action doctrine* that previously tried to exclude the horizontal effects.[75] In the same way, the formula created in 1964 in the *'New York Times v. Sullivan' case* concerning libel between private parties was a recognition of this influence. In the case it was declared that private liability would take a back seat in favour of fundamental right to freedom of opinion and expression if the slanderer was not aware of the falsity of his allegation and was not negligent in this regard. Since this fundamental right even protects false claims by private party within these limits, the court cannot decide that, because of the *state action doctrine*, the private party must grant compensation otherwise owed under private law.[76]

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

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

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

a broader intellectual movement to reconceive the foundation of the legal system not in terms of a closed system of rules but rather as a coherent body of individual rights.'[77]

Collins's legal-theoretical basis for this assessment is a modified concept of the legal system that does not see it as a system of rules, but as a system of individual rights, which Collins inherits from Dworkin's legal theory established in the 1980s. From the beginning of the 1960s, Dworkin's entire theoretical activity was against the concept of law as a system of rules, and he first spoke out against Hart's legal theory and for the correction of rules in the light of general legal principles, then from the mid-1970s for the same correction in the light of constitutional fundamental rights. As a summary of this last version of his legal theory in the 1980s, Dworkin formulated two opposing versions of the rule of law, one of which regarded law as a system of rules contained in the codes and the other as a system of individual rights. According to the first, while public policies are generally not allowed to target a person, the state can do so according to its own rules if the previously laid down, generally valid rules allow it. In contrast, another concept advocated by Dworkin is based on the idea that citizens have political and moral rights *before* state regulation and that the positive state rules created by the state and applied by its judges must respect them. While the judges have to apply in their judgments certain codes of law that contain positive legal rules, they always have to interpret them in such a way that the fundamental rights of the individual are not violated. If the rules do not allow such an interpretation in individual cases (these are the *hard cases*), the judge must push aside the rule and thus make a decision in accordance with fundamental rights.[78] Collins finds that the penetration of fundamental rights into the rules of private law is in line with Dworkin's concept of law, and that despite all the disadvantages that this change may bring about, it generally improves the legal system. To conclude the presentation of Collins's position, however, it must be examined to what

[77] Ibid. 3.

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

extent this analysis can be accepted and which aspects may have been hidden in order to be able to evaluate it positively.

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

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

After these concealments have been removed and the connections have been better understood, the question remains to what extent the state's

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

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

Therefore, in the analysis of Gárdos-Orosz's private law, the first criticism can be expressed as early as her analysis about 'transforming private law into public law'. From the beginning of the 20th century, this process meant a state intervention in the previously unrestricted freedom of contract, both as burdening property with obligations and as a restriction of certain aspects of freedom of contract and in particular long-term employment contracts, which led to the separation of labour law from private law. This was the result of long-standing political struggles and parliamentary legislative struggles

and, in the end, a separate labour law was brought about. Later, with the advent of constitutional adjudication, private law started of course to be transformed into public law in some places, including Germany, not only by way of the parliamentary legislative process, but also by way of constitutional adjudication and the interpretation of fundamental rights; but this was only an alternative to a shift by legislative means. In contrast, in the monograph now criticised, this general tendency of transformation of private law into public law is implicitly equivalent to the constitutionalisation of private law.[79] This way, however, it is hidden that this transformation did not need at all to be done through constitutionalisation, as discussed in the previous chapter dealing with the analysis by American author Ian Holloway.

In Gárdos-Orosz's analysis, I consider the recognition of the horizontal effect to be one-sidedly highlighted in the case of the American *state action doctrine,* too. As I mentioned earlier, quoting from Jud Mathews's study, this doctrine was originally intended to rule out the effects of constitutional rights between private parties and it only played a role in this direction in the *'Shelley v. Kramer' decision* of 1948. However, it considered entirely legitimate to deviate from the requirements of fundamental rights in relations between private parties and only prohibited their enforcement in court. So it is by no means a version of the German indirect horizontal effect, let alone a direct effect. However, this 'minus' is not visible in the volume's analyses, and in contrast to Germany, the minimal recognition of its influence on private law is not emphasised here, so that it only appears as an example of a worldwide trend towards the constitutionalisation of private law.[80]

The volume can also be criticised for portraying the position of Uwe Diederichsen, one of the greatest critics of the constitutionalisation of private law by the German constitutional judges. Diederichsen's position is portrayed in such a way as if he simply claimed the strengthening of the direct effect instead of the indirect effect of fundamental rights.[81] Diederichsen's criticism of this development is therefore eliminated, and in the entire volume, a regular discussion of the criticisms of this development in the literature of all countries

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

[80] See ibid. 41–45.

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

concerned is absent.[82] However, the position of the author in this area is more reserved than, for example, that of Tamás Lábady, Hungarian professor and former constitutional judge, who supported the direct effect of fundamental rights; Gárdos-Orosz only advocates recognition of the indirect effect.

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

2. Constitutional labour law

A 2015 study by English professor Judy Fudge[83] clearly shows the motivations that inspire labour lawyers and employees' organisations, that is,

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

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

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

In Canada, the 1982 Charter of Fundamental Rights revolutionised the entire legal system and allowed the Supreme Court to exercise strong control over both parliamentary legislation and traditional law. In the early years after this change, however, the unions could not rely on the support of the supreme judges in their struggles against the unfavourable changes in labour law. This was observed when in the mid-1980s labour law prohibited public service strikes to support claims – the most powerful weapon workers use – and, in parallel with the mandatory arbitration of such agreements, the possibility of the strike was eliminated. The unions tried to make the supreme court declare this unconstitutional because of freedom of association, but the supreme judges were not partners in their 1987 lawsuit.[84] At the heart of the union lawyers' argumentation strategy was the need to interpret the Canadian Charter of Fundamental Rights in the light of

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

relevant international legal norms, which, as we shall see, was one of the main strategies for the constitutionalisation of traditional law. Most of the panel's judges opposed this, and only one dissenting judge, Chief Justice Dickson, used international law to support his opposition. Although he did not claim to be bound by international law when interpreting the Charter of Fundamental Rights, he interpreted the Charter as giving fundamental rights the level of protection that the International Convention on Human Rights offers. In his dissenting opinion, he referred to the decisions of the International Labour Organisation (ILO), which recognised both the right to collective bargaining and the right to strike as part of the right of association. After the judges were replaced, the efforts of the Canadian trade unions matured in 2001, and the new majority of judges, respectful of Dickson's previous dissenting opinion, based their decision on this opinion. Since then, in Canada the constitutionalised version of labour law results in that employment contracts have been protected separately from private law contracts.[85] Both the right of workers to free foundation of unions, the right to strike and the status of collective agreements under the protection of fundamental rights were gradually adopted by Canadian judges in the years after the turn of the millennium, and they include the position of the ILO bodies in their interpretation of fundamental rights.

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

Against the background of a turn to monetarism, the European trade union federations and the social groups behind them tried to counteract the changes in their national legal systems that were detrimental to them,

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

and tried at the European level to standardise workers' rights alongside the ECHR. They have convinced the Council of Europe to adopt a declaratory 'Charter of Fundamental Social Rights of Workers'. While this was only a recommendation, it served as the basis for the legitimacy of the struggle for the charter to be included in a later, broader Charter of Fundamental Rights, and it was in the end included in Article 28 as a right to collective bargaining and action. (In a broader sense, Articles 27 to 32 contain the fundamental rights for the details of the employment relationship in this Charter.) However, in the present cases, the judges in Luxembourg have come to the conclusion that the freedoms within the EU (the free movement of goods, capital, work and services across the EU) take precedence over the fundamental right to collective bargaining of workers in each Member State (see *Viking* and *Laval decisions*), and this position has not been abandoned. In contrast, the ECHR in Strasbourg made the same change that the supreme judges in Canada had previously made, and gave up their previous negative views in their 2008 decision in the *'Demir and Baykara v. Turkey'* case: the meaning of this decision was polarly opposed to that of the *Viking* and *Laval decisions* that were made at the same time. The European Court of Human Rights in Strasbourg, referring in its decision to the Human Rights Convention, the ILO Convention and the right to collective bargaining of the EU Charter of Fundamental Rights, decided that these have priority over the economic freedom of contract. The European Commission for Social Rights (ECSR), which was set up together with the Social Charter in the mid-1990s, also supports this direction, but can only make its decisions as recommendations. The union-friendly stance of this Commission and the ECHR is therefore in vain, as the European trade union federations are weakened by the opposition of the Luxembourg Court. The ECSR decisions in favour of the unions can be repelled by the EU Member States concerned by way of referring to the Luxembourg *Viking* and *Laval* decisions. It was on this basis that, following an ECSR decision in favour of the Swedish trade unions, the Swedish government refused to restructure its internal labour law.[86]

[86] Ibid. 25: 'The discrepancy between the robust normative stance of the ECSR and its weak enforcement powers is captured in the Swedish government's response to the ECSR's finding that it had violated the labour rights guaranteed by the European Charter of Social Rights. Swedish unions brought a claim under the collective complaint procedure that the recent amendments to Swedish law in response to the Laval decision violated the right to

Efforts for right protection based on fundamental rights following unfavourable labour law regulations in the United States, the United Kingdom and Germany are presented in Ian Holloway's study.[87] In the United States, from the beginning of the 1900s constitutionalisation meant preventing the separation of labour law from private contractual freedom; the *Lochner judgment* of 1905 declared an act that regulated the hard labour circumstances of the bakers in favour of the employees as unconstitutional. For over 30 years, a series of judgments followed, declaring a similar unconstitutionality, such as a legal requirement in the member states to set the minimum wage for women or a federal law prohibiting employment contracts that sanction union membership. There was only a change in connection with the public law 'civil war' events of the New Deal legislation. The federal judges, who were under political pressure, declared the laws that created worker protection constitutional and made it possible to cut labour law from private law.[88] In the United States, subsequent changes in labour law to protect workers continued to be determined by the political arena and legislative laws, and they were not driven by the constitutionalisation of this sector. Even if supreme judges intervene in employment relationships by making decisions based on fundamental constitutional rights, they protect the individual fundamental rights of individual workers and not their collective right to organise. As an example, Holloway cites the 1987 Supreme Court decision ('*Rankin v. McPherson*', 483 U.S. 378 (1987)] in which the Federal Court ruled that the dismissal of an employee at the Sheriff's Office was unconstitutional because of his freedom of expression. The dismissal was based on a remark made by the worker in his workplace

strike protected in the ESC. Not only did the ECSR decision contain an extensive review of ILO standards, it went further than the ILO's CEARC in its willingness to be explicit in subjecting a Member State's legislative response to a judgment of the CJEU to scrutiny for compliance with the ESC. … The Swedish government responded by complaining that the ESCR's decision "creates an unnecessary tension between the obligation of EU Member Sates to respond to EU law and the obligations to respect the Charter".'

87 Holloway, 'The Constitutionalization'.

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

after President Reagan's unsuccessful murder, in which he expressed his hope that the next one would be successful.[89] The sheriff's office found this inconsistent with the work there, but the supreme judges said that this expression of opinion was still under the protection of the fundamental right to freedom of expression. Contrary to this American decision, the Federal Labour Court in Germany, which is otherwise recognised as having a leading role in the constitutionalisation of labour law by activists, ruled that the dismissal of a worker who distributed political brochures at his workplace is constitutional. The argument was that the peaceful atmosphere in the workplace takes precedence over the expression of opinion. Holloway sees in it the differences between American and German – and generally, continental European – societies. While continental Europeans have been accepting the formation of interpersonal relationships and conflicts by state for generations, the English and American cultural atmosphere leaves the formation of rules of group democracy to the struggle within small communities. American labour law, therefore, lays down less substantive rules for employment relationships, rather an attempt is made to establish special procedures for carrying out fair negotiations in collective decisions:

> Thus, to the extent that people advocate the constitutionalization of American labor law as the first step in the democratization of the workplace, they should not expect a German-style result. Indeed, one could argue that the typical American workplace *already* represents a model of American-style democracy, with its emphasis on individual employment contracts and the prevailing notion of 'every person for herself'.[90]

Instead of the substantive labour law rules of the continental European states, Anglo-American labour law is mainly a labour law of individual determination and means procedures for collective decision making, and if it continues in the direction of constitutionalisation, it follows the same logic here.

Daniel J. Galvin's 2019 study[91] on U.S. employment relationships presents more recent conditions, so let us take a look at it. In his description, the Federal Employment Relations Act of 1935, which made the collective bargaining system the centrepiece of American labour law, could

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

[90] Ibid. 137.

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

remain in force because President Roosevelt had successfully broken the position of supreme judges. This system was underpinned by a strike law, and because of the success of the Act, the membership of the unions in the early 1950s represented over 50 per cent of all workers. The level of wages, hours, overtime, and other working conditions they negotiated in collective bargaining had a profound effect on the mass of American workers thanks to the high union rate. This began to change in the 1970s, when the export of capital to low-wage countries and the organisation of production in global production chains began and the suppression of union organisation in these countries guaranteed low wages and favourable working hours, overtime, and so on, for employers. Against this backdrop, union-based collective bargaining agreements in the United States have gradually declined in recent decades and have been increasingly replaced by individual labour agreements, the regulation of which required mandatory arbitration to resolve problems and disputes at work, and both the judiciary option and the right to strike has been excluded. After this system was set up, the share of union members among all workers decreased to ten per cent by 2018 and five per cent in the private sector.[92] The foundations of labour law from 1935 disappeared because the labour law of union-centred collective agreements became weightless. The creation of a broader basis of industrial relations regulations under the name of 'employment law' alongside the old 'labour law' by occupational safety and health activists and labour lawyers has been a new tactic in recent years, including organising the struggle for fundamental rights in court.[93] In this description by Galvin, traditional American collective labour law, which was once obtained in a legislative way, is being doubled by a new regulatory layer that also includes

[92] Ibid. 50–53.

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

constitutionalisation. As we have seen, constitutionalisation in its early years (from 1905) in America aimed precisely at preventing the separation of labour law from private law. Roosevelt pushed back this constitutionalisation to enable the development of legislative labour law. Now the situation is reversed, and constitutionalisation is trying to move away again from privatised employment. We have seen that Ian Holloway was a pessimist in this area in the early 1990s and he hoped more for a success by way of legislation, and a study cited by Galvin about a 2018 SCOTUS decision shows once again that believers in the legislative way are chasing illusions in the area of labour law. The majority of the highest federal judges found in this decision that the practice of inserting a mandatory arbitration clause into individual employment contracts was not unconstitutional, and the system of 'forced arbitration' – as its critics call it – was confirmed.[94]

However, if we take into account the changes in U.S. politics that have taken place in recent years since Donald Trump was elected president, we can look at the issue of reintegrating labour law into private law from a new angle. The biggest problem in the world of U.S. workers has been the rise in mass unemployment, especially among the ranks of industrial workers, as capital gradually migrated to low-wage Asian countries from the late 1970s. In this way, the question of wages, working hours or overtime became secondary to enormous unemployment. Trump recognised this in his presidential campaign and identified the forced return of productive capital as one of his program items, which he largely achieved after winning the presidency, and he was able to significantly reduce unemployment. While it is not expected that a cutback in private law in the area of employment relations would be targeted in Congress, and Trump's two appointments to the position of Chief Justice did not create a union-friendly majority of SCOTUS, millions of workers (and employees) did manage to bring about the advantageous change in labour circumstances in America by way of the pressure from political democracy.

This finding can be applied in Europe, and the regulation of Hungarian employment after 2010 can be demonstrated to be a modified version of the Trump example. Throughout labour regulation, Orbán's government policy has always contributed to making productive capital and multinational

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

companies more flexible, and has always focused on creating conditions conducive to capital unemployment. While the opposition in Parliament fought to prevent these changes in labour law using the 'slave law' label, the vast majority of workers reportedly did not feel the changes so disadvantageous. Likewise, it is not characteristic of the Constitutional Court in Hungary to intensify the constitutionalisation of labour law issues with the help of the norms of international agreements. In contrast, for instance, in 2018 the Italian constitutional judges repeatedly repealed decisions of national legislation using the ad hoc decisions of the ECSR (European Committee of Social Rights) – which organisation is based on ILO traditions –, relying on the provision of the Italian constitution to respect international legal obligations. It is true that they always emphasised in the explanatory statement that this convention was definitely not signed by the Italian State and was therefore only an inspiration for them and is not binding: 'Even though the Committee decisions are considered authoritative rather than binding… Although ILO convention no. 158 is inapplicable in Italy because the State has not signed it, the Court refers to it by emphasising that Article 24 ESC is inspired by that convention. (Summary, Constitutional Court of Italy, Judgment No. 194 / 2018, Sept. 2018.)[95]

With regard to the scholarly analyses of the constitutionalisation of labour law in Hungary, György Kiss's monograph on this topic should be considered first. Just as with regard to the constitutionalisation of private law, the thoroughness but also the bias of the book by Gárdos-Orosz could be emphasised, these characteristics can also be emphasised here. As to his concept of labour law and constitutionalisation, Kiss supports the integration of labour law into private law and its principles, and together with the constitutionalisation of private law and due to fundamental rights under private law, the constitutionalisation of labour law is presented as desirable.[96] One aspect of this concept is that Kiss has an aversion to union-centred collective labour law and prefers individual labour law, viewed

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

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

as a custodian of private autonomy.[97] While recognising the inequality of the dependent worker against the employer, he does not support tackling this problem through trade union bargaining as he believes that after a time such organisations tend to act in their own interests rather than the interests of the workers.

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

Also from a narrower perspective, it is only worth supporting this strategy if the legal and constitutional environment makes it hopeful, and it can also be seen from Kiss's monograph that this situation does not exist in Hungary. As early as the early 1990s, there was no such environment

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

in constitutional adjudication in Hungary, and constitutional judges were hostile to workers' rights. This situation has not changed since then, the institutional background of constitutional complaints in Hungary is still underdeveloped, not independently from the above mentioned weakness of the trade union sector. Therefore, this monograph can only be seen as a supportive treatment of fundamental rights issues and constitutionalisation, and less as an analysis of the current problems of capital and workers. This broader framework, however, brings with it the prospect of promoting juristocracy instead of democracy and the dissolution of traditional legal dogmatics, which the monograph does not recognise at all.

After the general criticism, one can also criticise the starting point of the understanding of fundamental rights in Kiss's monograph, since he regards them as historically derived from human dignity.[98] This is not true at all, since human rights were first converted into fundamental constitutional rights by the U.S. Constitution and then they were only applied as narrow sectoral freedoms. It is true that Kant's legal philosophy focused on the generalised formula of human dignity, but it had no effect on American constitutional adjudication. Kantian abstract universalism was completely foreign to American legal thought, which continued English pragmatic legal thought. Here, case-by-case decisions and narrow, casuistic formulations have made progress in defining individual fundamental rights, and there was no attempt to make progress with comprehensive philosophical conclusions. It was only 150 years later that the German Basic Law included barely definable and empty normative formulas such as the inviolability of human dignity and 'the right to free development of personality', and this was not independent of the U.S. lawyers who, after the Second World War, set up a constitutional court in occupied Germany which could use arbitrarily easily expandable formulas of fundamental rights to control the formation of democratic will of millions of Germans. It is also important to point out the historically incorrect analysis of the foundations of fundamental rights, which was criticised here, since later, with the spread of the constitutional adjudication, the German model became the dominant model in a number of countries. So its actual development and honest understanding of the motivations behind the German model are crucial regarding the whole modern constitutional adjudication.

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

While we cannot agree with György Kiss's position on the horizontal effect in the constitutionalisation of traditional branches of law because he fully supports it, his account of the American state action doctrine can be considered appropriate from the perspective of this position. As we saw in the analysis of Fruzsina Gárdos-Orosz's book, she slightly 'bent' the state action doctrine to support her positive stance on horizontal impacts, while György Kiss clearly demonstrates that this doctrine is not even on the level of indirect horizontal impacts of fundamental rights – because it somehow requires state participation in fundamental rights – and therefore cannot serve as a model for the desired stronger horizontal effect: 'It follows that the state action doctrine was the result of a compromise for the survival of the United States, so it was a preliminary, but in my opinion by no means a model for the development of European law.'[99]

3. Constitutional criminal law

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

[99] Ibid. 138.

In most countries where constitutional adjudication exists, the constitutionalisation of criminal law means that the guarantees traditionally developed in criminal law theory have been raised to the level of constitutional guarantees. The observation of these guarantees is checked by the constitutional judges both at the level of legislation and the judicial application of the law. The most important of these are the principles of *nullum crimen sine lege* and *nulla poena sine lege*; they ensure that only acts that are deemed to be criminal offences by law at the time when they are committed can be punished and would only be punished with the penalty prescribed at that time. In a broader sense, these safeguards prohibit retroactive effect across the legal system, but the severity of criminal sanctions in this area has also resulted in a stricter guarantee system. In this way, the *prohibition of analogy* in criminal law derives from these principles, since in the context of a modern world that strives for predictability, it would be intolerable if, using an analogy, the judge came to the conclusion that an earlier act committed by someone was a crime. This leads to the *prohibition of judicial customary law* in this area, if it is used to expand criminal liability in a way that it contradicts the purely grammatical meaning of the relevant legal provision,[100] While both analogy and judicial case law are used in most branches of law today, these are legal techniques which are not possible due to the severity of criminal sanctions. These principles, which have been transformed into constitutional guarantees, also require the laws to be the *precisely defined,* the lack of which is not unconstitutional in other areas of law.[101] Another such principle of criminal law raised to the status of constitutional guarantee is the *presumption of innocence,* according to which only persons who were found guilty by a final court decision can be considered guilty and be punished. The same principle applies to the *right to defence,* which guarantees the right to defend the suspect as a constitutional guarantee.

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

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

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

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

The constitutionalisation of Canadian criminal law went far beyond the jurisdiction of the United States Supreme Court, which was originally viewed as a model for the Canadian Charter of Fundamental Rights. In the U.S., even the most activist Warren Court himself declared as a goal only the constitutionalisation of certain points of criminal proceedings in the 1960s, the majority of which was later withdrawn, but the constitutionalisation with regard to substantive criminal law did not even came into question.[102] Proponents of this expanded constitutionalisation in the U.S. began to hope

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

only in 2003 when a Texas State law on sexual aberration was declared unconstitutional by the majority of the U.S. Federal Supreme Court in the case of *'Lawrence v. Texas'* because the law violated the individual's right to self-determination in private life. In a broader sense, however, this decision did not establish a doctrine about the possible restrictions on the state's penal power.

This was done by Canada's supreme judges, however, and for this purpose the judges combined John Stuart Mill's liberal principle of harm and principle of proportionality. Accordingly, only the act that causes harm to another person can be punished. In this way, self-harm that a person inflicts on himself cannot be punished because of the freedom of self-determination. Let us put it aside now that Mill's entire theoretical foundation considers human community only as the coexistence of individuals, and therefore harm to the community, possibly the gradual destruction of the foundations of the community through individual activities, is not addressed by this theory. In any case, this liberal justification is suitable for the constitutionalisation of all substantive criminal law if the majority of decision-making in a constitutional court tends to include it in a constitutional principle. For this purpose, Article 7 of the 1982 Charter of Fundamental Rights was used in Canada, which declares the protection of freedom and the security of life of people, and the deprivation of liberty should only be ordered in accordance with the principles of justice.[103] This principle of harm has been associated with the principle of proportionality by the Canadian Supreme Court, and as a principle of fundamental justice, it has sometimes been applied to the constitutional review of certain criminal matters. Although in its 2003 decision reviewing a legal provision to punish drug possession even of small quantity, the inclusion of this principle in Article 7 was refused; however, in their decision of 2012, they were inclined to give it constitutional status.[104]

doctrine requiring police to inform suspects of their rights to counsel and to remain silent before a custodial interrogation.' (Introduction, 12.)

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

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

The principle of harm is also used together with other standards in the constitutional review of criminal cases and their state of affairs in Canada. One example of common use is the assessment together with the principle of proportionality, another example is the decision on the constitutionality of the offence concerned on the basis of equality. On this basis, the constitutionality of the criminality of polygamy was supported, since polygamy does harm to women and undermine their right equality with men.[105] The same argument was used in declaring the unconstitutionality of qualifying medical euthanasia for severely disabled people as homicide, because it was considered by Canadian judges to violate the equality of severely disabled people compared to those who are free to choose self-denial.[106]

As the leading nation in jurisprudence in the West, Germans had already reached a high level in the field of criminal law theory and in the analysis of the possible limitations of the state's penal power in the second half of the 1800s. Among these, Rudolf von Jhering's conceptual innovations have had major consequences. It is worth starting with it. His point of departure is that the means of punishment should be avoided, as the law itself should only be applied where no purpose can be achieved without it. Indeed, criminal law instruments also reduce the vitality of society because of the cost of punishment and because the perpetrator is excluded from being productive in society. But if the damage caused by the act in the living conditions in society exceeds a certain level, there can be nothing to stop the state, as a representative of the collectivity of society in a wide sense, from declaring such an act a crime. Jhering sharply protested against legal categorisations which wanted to exclude criminal penalisation from certain areas by arguing that they were, for example, economy related areas of private law and that only private law sanctions were possible there. What needs to be protected under criminal law is a purely political question, and so if a living condition is considered important in a society and private law cannot adequately protect it, criminal

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

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

law must act.[107] One effect of Jhering's analysis is, therefore, the removal of obstacles to state punitive measures and the subordination of criminal law to the free legislation of the state. Instead of applying established criminal act theories, Jhering conceptually tries to create such legal differentiations, from which the overall purpose of law (the provision of social living conditions) can be substantiated from a criminal law perspective. Ultimately, Jhering always analyses how to secure the functioning of society in the broadest sense. Even when it comes to the innermost aspect of individuals, such as the prohibition of the abortion of the fetus, Jhering does not explain with the 'right to life' based on individualism, but by saying that the life of the offspring means providing an essential living condition for society as a whole. The unborn child is not just a part of the mother's body that still needs to be separated, but a guarantee of the living conditions of society.[108] There is a social system of goals behind legal provisions, from which the scope of individual rights are determined. These goals always mean the living conditions of a society, and therefore, in theory, individual rights and legal institutions can only be assessed ultimately in the light of the living conditions of society. In order to understand some of the aftermath of Jhering's legal theory, it should be highlighted that while he always emphasised in his work *Zweck im Recht* that the judges must be bound to the text of the law, he implicitly created the dual theoretical dimension, namely, by setting up the purpose of the rule behind its text, he set up a rule for judging crimes. Then, in the footsteps of Jhering, Franz von Liszt began a tendency to downplay the strict factual requirements required by the *nullum crimen sine lege* principle as purely formal illegality, and, gradually, substantive illegality came to the fore. Although Liszt also emphasised the former, it could later be put aside by those who carried on this idea. On this basis, the German Imperial Court of Justice accepted in 1927 that it was possible to go beyond the text of the law with the help of examining legal interest.

Through several mediations in the wake of Jhering, but contrary to his intentions, Claus Roxin has in the past few decades continued the idea

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

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

of the material legality that is behind the purely formal criminal act and has to assess it. Roxin does not add the category of legal interest *(Rechtsgut)* to the material expansion of illegality, but rather places material criminal offence alongside mere formal criminal offence.[109] The function of material criminal offence is to describe what the state can classify as a crime. The concept of legal interest is assigned to it in such a way that legislature can only justify a criminal offence through protection of a legal interest and, in the absence of this, it is not permitted to create a criminal offence. There is such an opinion, he says, according to which the concept of legal interest in the 19th century served to exclude purely moral sins from criminal law, but Roxin denies this and only admits that the concept of legal interest has really served such a function in recent decades. For example, in the case of punishing homosexuality or sodomy, which was a crime in Germany until 1969, those who wanted to do away with it argued that these, as violations of mere moral ideas, had no legal interest and were merely 'general concepts': 'Es fehlt bei ihnen an einer "realen Verletzungskausalität", sie können daher nach dieser Lehre nur als Verstöße gegen "Allgemeingegriffe" wie die Moral nicht aber als Rechtsgüterverletzungen verstanden werden.'[110]

In the early 1900s, some users of the category of legal interest tried to create another legislative restriction by considering legal interest as pre-state, regardless of government regulations. In this way, they declared the prohibitions and regulations that were created solely by the state to exist without criminal legal character, and they wanted to exclude the criminal protection by these regulations, and only found them suitable for punishment as contravention *(Ordnungswidrigkeit)*: 'weil der Gegenstand des Verbotes oder Gebotes durch den Staat überhaupt erst geschaffen worden also nicht vorgegeben und insofern kein Rechtsgut ist'.[111] Roxin points out that this is problematic since many criminal bans protect general concepts such as 'state', 'law enforcement', 'monetary value' and so on, and no one objects to their criminal defence. In other words, this concept is just an excuse and a search for justification of changing the criminal regulation of some issues

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

[110] Ibid. 10.

[111] Ibid. 12.

and excluding them from criminal law. However, Roxin also disagrees with the opposite attitude, which reduces the concept of legal interest and only considers their role as regulation register for classifying the groups of criminal law rules.[112] The solution, he argues, could be to view legal interest as a constitutional barrier to the state's penal power: 'Der richtige Ansatz liegt in der Erkenntnis, daß die einzige dem Strafgesetzgeber vorgegebene Beschränkung in den Prinzipien der Verfassung liegt.'[113] Roxin thus raised the importance of the category of legal interest, since legal interest would thus appear not only as an intellectual creation of jurisprudence, but also as a constitutional obligation for the authors of criminal law.

In the footsteps of Roxin, the concept of legal interest has become a tool for the constitutionalisation of the whole criminal law for some German authors in recent years, and among them Winfried Hassemer is a moderate and Bernd Schünemann a radical representative. Hassemer describes the dual nature of legal interest, the legal dogmatical and the legal political (criminal political); the first is a function inherent in the system, while the second is the system-belonging to criminal policy is certainly to be welcomed, since one of the greatest confusions when analysing legal interests in Germany as well as in Hungary is that it is mostly presented without differentiation concerning whether or not it belongs to the realm of legal dogmatics. In Hassemer's analysis, however, it is rightly pointed out that only the systematic classification aspect of the categories of legal interest belongs to legal dogmatics. For the legislator, however, the critical analyses from which the political values in criminal law are formed, belong to the field of legal policy struggles. Although it may be one of the means for success in the field of legal policy to disguise this character and present it as a neutral and irrefutable legal dogmatical argument, it cannot deceive the neutral legal analyst. Well, Hassemer does not do that and declares his analysis of legal interest to be a criminal policy approximation. It perceives the nature of legal interest as analogous to the fundamental rights of the

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

[113] Ibid. 14.

constitution, and according to this, it restricts the state in the sanctioning of criminal offences in the same way as fundamental rights. In order to support this, he highlights the 'right to free development of personality' as described in Article 2 of the German Basic Law, and places it at the centre of the entire legal system as a right to general freedom of action, relying on theses expressed by the majority of constitutional judges in certain periods.[114] As a result, Hassemer endeavours to build the entire criminal law on the basis of the instrumentarium of fundamental rights and, if a recognisable legal interest can be derived from fundamental rights, even then he warns of the requirement of proportionality in criminal law regulation.[115] Although in the classic liberal notion of legal interest and classic liberal concepts of criminal law only the critique of excessive criminal regulation *(Übermaß)* can be included, Hassemer points out that, more recently, the requirement of a lower threshold – that is, the constitutionally mandatory criminalisation of an act – has appeared in German constitutional court decisions. In this way, in addition to their role as a barrier, the constitutionalised concept of legal interest can also function as a requirement for the criminalisation of an act: Hassemer himself, too, criticises this, and the example he gives shows the reason for this. In one period of the German constitutional court in which it was dominated by a non-liberal majority, the German constitutional court imposed a strict ban on abortion and even called on the legislator to punish abortion in order to protect the unborn child: 'Es ist vom Bundesverfassungsgerichtshof gegenüber den Strafgesetzgeber insbesondere in Entscheidungen zum

[114] Winfried Hassemer, 'Darf es Straftaten geben, die ein strafrechtliches Rechtsgut nicht in Mitleidenschaft ziehen?', in *Die Rechtsgutstheorie. Legitimationsbasis des Strafrechts oder dogmatische Glasperlenspiel?* Ed. by Roland Hefendehl, Andrew Hirsch and Wolfgang Wohlers (Baden-Baden: Nomos, 2003), 60: 'Jedes strafrechtliche Gebot oder Verbot ist ein Eingriff in die allgemeine Handlungsfreiheit. … Das Rechtsgut trägt den Kern einer Rechtsfertigung eines Handlungsverbots. Ein strafrechtliches Handlungsverbot –in Form einer Strafdrohung gegenüber einem bestimmten Verhalten – lässt sich nicht rechtfertigen, wenn es sich nicht darauf berufen kann, einen anerkannten Zweck angemessen zu verfolgen.'

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

Abtreibungsverbot aktiviert worden; vgl. zur "Schutzpflicht" für das ungeborene menschliche Leben BVerfGE 88, 203.' Hassemer points out that the shift of the constitutional majority between the political worlds later led to a new decision, which insisted on prohibiting punishment for abortion, and instead, he called on legislation to make counselling prior to an abortion compulsory.

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

This is made clear by Bernd Schünemann's analysis of legal interest, who, linking legal interest with constitutional principles, thinks it possible to set aside some principles of criminal law that were previously considered sacred.[116] Namely, Schünemann's constitutionalised criminal law is not tied to and does not depend on constitutional judicial decisions, but it can also be independently used by any criminal judge even if it goes against the text level of the law ('gegenüber dem bloßen Wortlaut des Gesetzes'!). The reason for this theoretical position can be better understood if it is emphasised that Schünemann criticised the decision of the German constitutional judges because it did not declare the penalisation of cannabis use unconstitutional due to a lack of legal interest, but rather handed it

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

over to the legislature to decide what to do about it.[117] If the constitutional judges cannot be trusted, the criminal judge will decide the matter himself based on the 'constitutional' legal interests, that stand above the legislator and the text of the law – so we can deduce Schünemann's thesis; in contrast, Hassemer has not gone this far.

However, these views belong only to a particular group of German criminal law professors. Although because of their success in the community of criminal law scholars abroad – including Hungary – they deserved to be considered here, it is important to emphasise that the German Constitutional Court itself has not included these views in its doctrines. When deciding on the constitutional complaint in relation to the criminal act of incest in 2008, the German constitutional judges made it clear that they remain within the narrow framework of constitutional guarantees of criminal law and do not accept the concept of an extended criminal constitutionalisation. Although criminal law has an *ultima ratio* nature in the system of legal sanctions, the assessment of such questions in individual cases and in relation to the relevant state of affairs was left to the de-lege-ferenda proposals of jurisprudence, and a constitutional review of the legislator based on these was rejected. Likewise, the legal regulation of criminal matters based on legal interests was classified as a good instrumentarium of criminal policy and criminal law dogmatics, but it was not considered suitable to be used as a constitutional standard and thus to bring about a complete constitutionalisation of criminal law.[118] Bettina Noltenius, by whom the decision is critically discussed, indicates with satisfaction that it is not by chance that the only dissenting

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

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

constitutional judge, Winfried Hassemer, is the only one who comes from the profession of criminal law.

If we turn to Hungarian authors, we have to start with the analysis by Zsolt Szomora, because he is the scholar most openly committed to following this line of expanded constitutionalisation, seen in German criminal law theory. Then a detailed overview of this trend in Hungary, especially the relevant constitutional court decisions, can be obtained from the newly published doctoral thesis by Erzsébet Amberg. With regard to the latter study, it can be said that the Hungarian Constitutional Court, unlike the German decision of 2008, by 2011 ruled 18 times based on the principle of *ultima ratio* in the issue of constitutionality of a criminal law regulation, and in eight cases the unconstitutionality of criminal law was declared.[119]

In his dissertation, Szomora analyses the facts of sex crime based on the individualistic view of society, which has already been seen in the case of the German authors. In this view, society is seen as a group of freely united individuals, in which legal regulations and restrictions for individuals cannot be based on community traditions and moral norms. In this way, he emphasises that penalising the morally most reprehensible act, incest, cannot be considered constitutional. Because the genetic damage to the descendants derived from it is only based on uncertain expert opinions, Szomora proposes that this penalisation be declared a violation of sexual self-determination and thus excluded from criminal law.[120] Also in general, he is of the opinion that the application of criminal law is only legitimate and permissible if they comply with the *ultima ratio* principle and are supported by a legal interest.[121] The lack of this justification means that criminal law provisions of the state are unconstitutional because they

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

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

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

violate a fundamental right, sexual self-determination being such a right: 'The right to sexuality is far more important in limiting the other side, that is, the intervention of the state through criminal law. The recognition of this fundamental right necessarily brings along the process of decriminalisation, experienced in the historical development; namely, homosexuality, extramarital sex or simple prostitution are not punishable by law.'[122] In summary, Zsolt Szomora seems to follow the expanded constitutionalised criminal law approach of the German literature and he uses all those arguments to delineate the framework of criminal law. However, at least in his writings analysed here, he refrains from demanding that constitutional judges declare these Hungarian criminal law regulations unconstitutional, although in Germany a whole movement was organised to achieve this.

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

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

on the principle of *ultima ratio,* and based on an application that attacked the lack of criminal sanctions for serious discrimination. Finally, decision 13/2014 (IV. 18.) also based the argument on the principle of *ultima ratio* in a defamation case and overturned a judicial decision.

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

Finally, I would like to point out that despite the previous enhanced role of constitutional criminal law in Hungary, the relationship between the two different criminal law approaches was not addressed theoretically, only some critiques emerged on this enhanced role, such as by Imre A Wiener. (For example, the Germans at least addressed somehow the problem of duality as the duality of simple law and constitutional law, with regard to private law.) However, as an exception, a recent article by *Imre Németh* reveals such an analysis.[123] The rather vague description of Németh basically claims the duplication of criminal law, which I would like to present more comprehensively, at the level of the entire legal system.

4. Constitutional finance law

If you look around the world in search of attitudes to the constitutionalisation of financial law, it is worth considering at least one example in the United States and Germany and then to examine domestic reflections. Both foreign examples will represent aspects that may also occur in Hungary in

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

the future, although constitutional court decisions have not yet been made in such cases, and these have not received scholarly attention.

The constitutionalisation of a U.S. financial law issue has been called for in recent years by several U.S. authors who have attempted to have the competition between member states and cities for raising capital through tax incentives, property insurance, and capital replacement[124] declared unconstitutional by the Supreme Court. Their argument was that, in this way, almost a third of the budgets of cities and member states are put in the pockets of large multinationals and capital owners, which means that there is not enough left of the budget for small local businesses, for less wealthy layers of society and for other purposes (education, environment, and so on). In addition, through credit borrowing, the big cities and the member states become excessively indebted. In order to counteract this and have this declared unconstitutional, the authors endeavour to change the interpretation of the commerce clause in the U.S. constitution:

> First, the dormant commerce clause doctrine should be interpreted to restrict state and local government subsidies that allow nationally (or globally) organized business to extract unequal government support from more dispersed and localized economic interests … Though government offer these subsidies to attract vital local economic development, these subsidies largely operate as a race to the bottom that tends to undermine meaningful and sustainable growth while increasing inequality and austerity for small businesses and middle or lower income residents.[125]

This clause has been included in the American federal constitution so that the self-serving economic interests of the member states and metropolitan areas do not distort the large economic area united in the federal state and it can function as a single economic area despite competition. But what has really happened is that the huge companies in many Member States can use their capital and paid lobbyists to influence a large part of the political and media elite in the Member States and in metropolitan areas, thereby earning budget money to the detriment of local companies: 'The interstate "subsidy wars" instead tend to operate like taxes or import duties extracted from individual farmers, workers, and entrepreneurs to

[124] Martha T McCluskey, 'Constitutional Economic Justice: Structural Power for "We the People"', *Yale Law & Policy Review* 35, no 1 (2016), 271–296.
[125] Ibid. 279.

support businesses able to use nationalized market power to exclude or exploit localized suppliers and workers.'[126]

Local political groups with local interests took constitutional arguments in the years after the turn of the millennium to address their systemic disadvantages in the city and state budget, and a group of them turned to court on behalf of taxpayers, with a constitutional argument previously made by a law professor. The city of Toledo, Ohio, provided the *Daimler Chrysler* automobile company with 280 million dollars in subsidies, and this was questioned by these local entrepreneurs because there was not enough money for education in the city budget.[127] However, in a 2006 Supreme Court ruling, the case was declared inadmissible because it was a too general argument to question constitutionality. In addition, the federal judges stated that they did not want to interfere in public finance policy and that this would be left to the discretion of policymakers: 'The Court justified this narrow standing interpretation in part with structural reasoning that courts should refrain for interfering with state policymakers' discretion over fiscal matters, and that this judicial respect for political discretion should preclude any assumption about the effect on fiscal policy of hundreds of millions in tax incentives.'[128] So far, the constitutionalisation of this issue and the attempt for a turn in the fiscal struggles of the member states and metropolitan areas in the USA have failed.

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

[126] Ibid. 280–281.

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

[128] Ibid.

As an example of the expanded constitutionalisation of financial law in Germany, the case of the EU banking supervisory authority set up for the countries of the Eurozone is to be examined; this is a banking supervisory authority that has been reviewed by the German constitutional judges. (It should be mentioned that the narrower approach, that is the review along the financial constitutional guarantees, is regulated in Articles 105–115 of the German Basic Law.) In this case, the constitutional complaint requested the constitutional examination of the basic question of German fiscal policy on the basis of a violation of the general right to vote. This can also show that the constitutional judiciary can carry out the review of a regulation in a traditional branch of law based on the most distant constitutional provisions and the normatively empty fundamental rights, and as a result a case law is brought about, from which this branch of law will be increasingly constitutionalised in the future. In this case, the 114 largest banks in the Eurozone countries were placed under the direct supervision of the European Central Bank (including the 19 largest German banks) and the internal banking supervisory authorities of the Member States can only function subordinately. According to an EU regulation and a directive issued to operate this system, deprived banks can automatically lose their primary powers and control over their assets in the event of problems identified during their ongoing banking supervision. This was contested by a constitutional complaint lodged by the finance law professor Markus Kerber on the grounds that this unduly undermines German sovereignty and constitutional identity and that the EU treaties do not contain any authorisation provisions and this supervision could not have been introduced without amendment the EU treaties. So that is a case of *ultra vires*. In the absence of an amendment procedure, the democratically legitimised parliaments of the Member States could not take part in the decision, which is unconstitutional and contrary to the principle of democracy laid down in Article 38 Paragraph 1 of the German Basic Law. The professor's constitutional complaint, who was aware of the earlier constitutional normative arguments already put forward by German constitutional judges to protect universal suffrage from emptying content within the framework of the EU delegation, had a solid foundation. In this way, the constitutional review was followed with concern across Europe, as the entire system was largely based on Germany's money regarding bankrupt banks. In their decision in the summer of 2019, however, German constitutional judges found everything

in order and the banking supervisory authority was declared constitutional, although the banking supervisory authority deprived the rest of the financial autonomy of the member states of the Eurozone.

If we turn to the Hungarian considerations on the constitutionalisation of financial law, we should start with a question from Ernő Várnay, who says that an important question is whether the constitution defines social and economic rights as state goals or explicitly as fundamental rights. This distinction is of utmost importance because a budget from which fundamental social rights cannot be guaranteed could be permanently adjusted by decisions of the Constitutional Court, making stable governance impossible. In this way, a constitutional financial law would gradually develop above the legislative financial law, from norms resulting from constitutional decisions, and economic and political governance through democracy would be replaced by juristocratic governance. It should be emphasised that the right to work and the right to social security have been replaced in the new constitution of Hungary in 2012 by the right to freely choose work and social security as a state goal, and in this way, the possible constitutionalisation of financial law was restricted. The same applies, however, to the fact that the new Constitution has eliminated the constitutional review of budget law for the duration of the reduction in public debt to a certain lower level, and has thus stopped the constitutionalisation of the central part of financial law for many years. Thus, one can agree with Ernő Várnay's position, which was stated during the process of the constitutional planning of 1996, and which for this reason suggested the wording of the constitutional text as a mere state goal: 'From the perspective of the constitutional process of these days, this means that the further development of the constitution must not go in the direction of any concrete basic social rights, and it must remain open regarding the state's obligations.'[129]

The decisions related to the so-called Bokros-csomag which was meant to bring about economic stabilisation in 1995 in Hungary can be

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

rated as the most powerful constitutionalisation of financial law. These decisions took 40 billion forints from this stabilisation package (from the 170 billion forints meant to be saved), and the main argument for the repeal was the principle of legal certainty derived from the rule of law by constitutional judges, and then the category of "acquired rights" created by further derivation. It prohibited retrospective cuts in long-term benefits, particularly maternity benefits and the child benefit system, without giving reasons in principle, so that the constitutional judges could make decisions case-by-case. As a result of this uncertainty, the legislature could not know when it would come into conflict with the bans set out in this way. Decision 43/1995 (VI. 30.) of the constitutional judges did not allow any reduction in the rights acquired for children who were already born or were to be born within 300 days of the decision, but declared decreasing in the long-term maternity and maintenance system to be constitutional, 'especially if it has no insurance element'. In the explanatory memorandum, the constitutional role of 'acquired rights' for the entire legal system was explained even more comprehensively, but it was even more uncertain when the future legislation would be repealed if the acquired right was restricted or withdrawn. Because this repeal was made possible: 'The protection of the rights acquired are the imperatives of the rule of law, but not without exception. However, exceptions can only be assessed on a case-by-case basis. It is for the Constitutional Court to decide whether the conditions for an exceptional intervention are met.' (Explanation, Part II.)

The rest of the reasoning shows the complex system of criteria based on which the constitutional court intended to examine budget and social security laws: 'However, the constitutionality of individual withdrawals also depends on compliance with other constitutional principles and rights, that is, whether they are against the principle of legal certainty or the prohibition of discrimination, and whether, in the case of a service that includes an insurance element, they contradict the protection of property.' (Explanation, Part II). Since by then the Hungarian constitutional judges have enormously expanded the scope of certain fundamental rights, the legislators could not be sure in the least whether their laws would eventually be declared unconstitutional and what should be done to avoid this. I am not exaggerating when I say that the requirements for certain constitutional principles have been so greatly expanded in the past and such a high and insecure standard they

have established for constitutional intervention, that the only reason why it did not explode in later years is that the Sólyom Court's term of office was over and the subsequent majority of the constitutional judges led by János Németh had already resigned from this profound intervention. This withdrawal affected the legal system as a whole, but particularly financial law. A reminder of this, however, may have been one of the reasons for the constitutional amendment that the Orbán government put before the constitutional judges in 2010 concerning a restriction of the review of the budget law, and this restriction also remained in the new Constitution. It is not possible to conduct ongoing state affairs with the possibility of activist interference by the constitutional court based on the uncertain normative basis described above.

The analysis is to be continued with István Simon's two studies, which present the current situation of the constitutionalisation of financial law in Hungary.[130] His studies raise the constitutional questions of several financial regulations which may lead to disputes before the constitutional court and may be abolished. One of these studies raises that while Article 32 Paragraph (1) h) of the Constitution requires local tax administrations to determine the types and rates of local taxes, Article 29 Paragraph (1) of Act CXCIV of 2011 (Stability Act) already changed this so that local taxes can only be set in the frameworks of the law.[131] It is undisputed that the term 'the frameworks of the law' is left to interpretation, but the way and the result of the interpretation touch the most important questions of power between the two parties involved. This is the case, for example, in the event of a dispute between the opposition-led capital government and the parliamentary majority in such an issue, combined with the fact that any of the parties can file a constitutional complaint with the Constitutional Court due to the latest constitutional amendment. It should still be noted that there is no limit to the control of budgetary law by constitutional judges in local taxes, only to the control of the central budget.

Simon's study also indicates a problem between Article 36 Paragraph (6) of the Constitution and Article 7 of the Stability Act. In fact, this paragraph of the Constitution exceptionally allows the mandatory reduction

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

[131] Simon, 'Az Alaptörvény hatása', 7.

rate of government debt compared to the GDP to be ignored and relocated to the budget for the following year 'in case of an enduring and significant national economic recession'. In contrast, Article 7 of the Stability Act changes this so that it can also be ignored and relocated if only the real value of the annual gross product falls. That is, for instance, if the gross production of the economy is not in decline at in volume, only in real value, this can already trigger the consequence of the 'enduring and significant national economic recession' written down in the Constitution, which can theoretically raise the question for the Constitutional Court how the situation relates the text of the Constitution.[132] (For the sake of clarity, it should be noted that a constitutional complaint for this purpose is unlikely to result in a constitutional decision due to the above mentioned budgetary law audit constraint imposed on constitutional judges.)

A remark by István Simon refers to the doubling of financial law – which is the central theme of my analysis –, and in my opinion wrongly: 'Hungarian constitutional finance law has two stages and, in addition to the Constitution, it also includes financial laws adopted by a qualified majority of MPs.'[133] On the contrary, it can be argued that 'constitutional finance law' cannot have two stages and that only the norms of the constitution can be included. All other legislative laws that substantiate it belong to the traditional legal branches, in this case to financial law. In Hungary, the constitutional guarantees of financial law primarily include Articles 36–44 and Articles N) and O) of the Constitution. Because of this mistake, it is important to clarify the problem of the branch of law originally called 'state law' *(államjog)* in Hungary and renamed 'constitutional law' *(alkotmányjog)*. The original regulation of the 19th-century constitutions, by which the organs of state power were regulated, was expanded by fundamental rights and other new regulations in recent decades, and together with thousands of constitutional judicial decisions, constitutional law is expanded across the entire legal system. In this way, constitutional regulation no longer remained a branch of law, but rather duplicated the entire legal system. The problem is that the mere renaming of 'state law' to 'constitutional law' could not capture this change in

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

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

the type of constitutional regulation. One of my goals in the current analysis is to rethink this and analyse the doubling of the entire legal system. As a result, some traditional branches of law are duplicated, and, in this case, a new constitutional finance law is contrasted with the content of traditional financial law and the boundary must be drawn between them, as in the cases of private law, criminal law and labour law.

Among the domestic professors of finance law, Dániel Deák also analysed the questions of the possible constitutionalisation of tax and finance law, and while much of his 2016 book[134] on this topic deals with distant subjects (philosophy of law, social theory, private law and so on), the rest also touches on questions that are the subject of our current discussion. The central position of his analysis on this topic is related to my dissenting opinion as a constitutional judge. In retrospect, I find it worthwhile to have written this because his mental confrontation with me now helps him read through his otherwise branched analyses.[135] He draws from my dissenting opinion that I deny the role of private law as the ultimate source of property relations, including tax law, and he criticises this position. It was important for him to emphasise this, as he not only separates the whole tax law from administrative law and sees private law as the background of tax law, but also considers the exercise of state power, including tax power, to be acceptable only on the basis of legal authorisation by the rules. If in a particular case there is no such authorisation at the level of rules – 'the law is silent' –, then the state is outside its borders and its role is taken over by the rules of private law tailored for individual parties: 'If the law is silent, this means for the citizens freedom, but not for government agencies. Neither national nor international law can accept the state's freedom to act in the light of the principles of democracy and the rule of law, at most in the sense that where there is no public authorisation, private law takes control.'[136] There-

[134] Deák, *Alkotmány és adójog*.

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

[136] Deák, *Alkotmány és adójog*, 434.

fore, the focus of Deák's position is that tax law is private law rather than administrative law, and that public administration can act on the basis of an extraordinary, detailed authorisation. This goes hand in hand with that the inclusion of a constitutionally open fundamental rights can only serve to protect citizens from the state. The possibility that the state organs, in particular the judge in this regard, involve and expand the constitutional fundamental rights or values declared in constitution when assessing the functions of the public body and thus resolve the dispute between the state and the private party in tax law matters, seems to be excluded from the angle of Deák's position. On the one hand, fundamental rights can only be claimed against the state by the citizens, while on the other hand, the state can only act on the basis of authorisation by precise rules.

From the perspective of Dániel Deák, the constitutionalisation of financial law, including tax law, can only use the defence function of fundamental rights and can only be a means of protecting citizens against a broader invasion of an already restricted state. With this approach, however, an audience cannot be found everywhere, for example, the judges in Strasbourg dismissed the tax complaint in their 2001 decision in the *Ferrazzini case* and considered tax law to be part of public law. The attached dissent is cited by Deák who supports it, but I think his position can be considered unacceptable.[137] In fact, tax matters and the power of the tax state are in the same relationship to the citizen as the state's penal power, and tax procedure are at the very core of state administration. There is no need to be an adherent of the ECHR apparatus, that actually shapes the decisions in Strasbourg, to agree with their position now.

It is not known to what extent Deák's position contributes to his failure to recognise the functioning of the administrative judiciary in today's Hungary. He only declares: 'There is no administrative justice in Hungary, but there is a separate administrative law.' He seems to believe this because the actual judicial decisions about the contested administrative decisions are not made on the basis of private law: 'In Hungary there are administrative actions (although there is no administrative jurisdiction) and there is an independent procedural and substantive administrative law – and also tax law – but the closing of gaps of legal authorisations with private law is uncertain.'[138] One can say with certainty that this

[137] See ibid. 447.
[138] Ibid. 144.

position is a minority position in administrative law in Hungary – which of course could still be correct as such – but the support of this position with the German example ultimately makes it vulnerable: 'In Germany there is administrative justice … its starting point is whether the public authority has not violated the fundamental rights of citizens protected by the constitution.'[139] This position assumes the full constitutionalisation of German administrative jurisdiction, which is inconceivable in the judicial review of dozens of administrative files (filled with dozens of details). If we take Deák's above view that the activities of the public authorities in relation to fundamental freedoms are only negatively influenced, we are at a loss about his view of the functioning of German administration and the judiciary that results from this position.

Finally, it should be noted that Deák's analysis of the Constitution regarding taxation and public burdens can be assessed as incorrect. In contrast to István Simon's new analysis, which shows a fundamental change from the rule of the old Constitution and, in particular, the inclusion of family relationships in the determination of the tax rate in addition to the capabilities regarding common burdens in the new Constitution [Article XXX Paragraphs (1) and (2)], Deák does not even mention this change.[140] Therefore, he only emphasises the waiver of progressive taxation as the author of injustice, because those who are in a more difficult position are in fact made unequal by this formal equality. From this he concludes that: 'In Hungary the rational state is in a crisis.'[141] In comparison, those who are blessed with many children, but are in a financially difficult situation, are very privileged by the above-mentioned provision of the Constitution when determining the amount of tax: 'For persons raising children, the extent of contribution to covering common needs shall be determined by taking into consideration the costs of raising children.' [Article XXX Paragraph (2) of the Constitution.] There is no need to agree, but the thesis of the irrationality of the state can only be biased.

[139] Ibid. 146.

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

[141] Deák, *Alkotmány és adójog,* 446.

5. Theoretical summary

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

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

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

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

When we finally turn to the situation in Hungary, we can see a wave of constitutionalisation in recent decades. In the 1990s, the majority of constitutional judges realised in the field of criminal law such a degree of

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

Finally, I would like to point out once again that today's constitutions have mostly already covered the entire legal system by (1) abolishing the limitation of the previous constitutions to the mere regulation of state organs, (2) by influencing all legal areas through the inclusion of fundamental rights and (3) due to constitutional adjudication. So it is a flawed theoretical construction if the constitutional level of law is taken as a mere synonym for the legal branch of constitutional law. It would therefore make sense to rename the branch of law that examines the regulatory material and the dogmatic constructions of state organs as 'state law' or more precisely 'state power law', separating it from the constitution that extends to the entire legal system. In this way, 'constitutional law' could be conceptually understood as the doubling of the entire legal system. Differing from all other branches of law, it should be conceived on another level of law, 'lying over' all the branches of law. In this way, constitutional criminal law, constitutional private law, constitutional finance law and so on could be resolved from the traditional branches of law and could be comprised in this special branch of law. However, their practitioners would only go as far into the respective traditional areas of law and their dogmatic order as required and justified

by constitutional guarantees. With this conceptual change, we would create a generalist branch of law in addition to the traditional branches – among which a process of increasing horizontal divisions has been going on in continental Europe's legal systems for almost 200 years – due to the needs of a generalist constitutional adjudication. As I have indicated in a number of studies in recent years, generalist constitutional adjudication that has been adopted from the United States only works with the greatest distortions in the specialised legal system in Europe.[142] The creation of the proposed generalist constitutional branch, its integration in the classification system of law, and its urgent introduction to law studies could also help in this regard.

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

Chapter 5
Juristocracy and the constitutional level of law

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

The judicialisation of politics has spread worldwide in recent decades, both in democracies and in authoritarian political systems that suppress pluralism. The particular reason for this in relation to democracies was seen in Ran Hirschl's analysis, according to which the long-standing ruling party surrenders its supreme power to the Supreme Court – provided the party's political values are dominant there, too – in the event of its permanent decline, in order to reduce the power of its successor. In the case of authoritarian regimes, Tamir Moustafa's and Tom Ginsburg's study showed that a rational reason can also be found for the transfer of part of the power.[143] According to the latter study, the dictatorial leader group that focuses on economic modernisation is forced, despite the suppression of political pluralism, to endure the stabilisation and operation of more or less

[143] See Tom Ginsburg and Tamir Moustafa, 'Introduction: The Functions of Courts in Authoritarian Politics', in *Rule by Law. The Politics of Courts in Authoritarian Regimes,* ed. by Tamir Moustafa and Tom Ginsburg (Cambridge: Cambridge University Press, 2008), 1–22.

independent courts in the interest of foreign capital inflows and investors. Then, however, these courts begin to function as a quasi-opposition to a centred political power, and even if no democracy can develop, these courts appear as an 'oppositional' juristocracy against authoritarian political power.[144] In addition to Hirsch's model of juristocracy contrasted with democracy, there is also a model of juristocracy contrasted with autocracy in this way. In his analysis, Chien-Chih Lin also mentions the emergence of juristocracy from grassroots legal aid movements: 'Others are due to bottom-up grassroots forces, such as legal mobilization and cause lawyering.'[145] In Central and Eastern Europe, however, the basic character of these grassroots forces needs to be corrected, since in recent decades they have been organised through American NGO networks, some of which are active worldwide, and in particular the Soros Foundation, which operates a global power organisation under the guise of protecting fundamental rights, supporting juristocracy instead of democracy.[146] So it is not a matter of 'cause lawyering', but the organisation of a way of political competition outside of democracy and party pluralism. In this case, the system of democratical means works, but one of the political elites develops a second subsystem for influencing state power by organising NGOs and having them involved in the judiciary, and educating part of the jurists as legal protection activists. This has been the case in a number of political systems in Central and Eastern Europe since the 1990s, mainly due to the long-standing development of NGOs

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

[145] Ibid. 1069.

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

by the Soros Open Society, and this cannot, therefore, be regarded as a bottom-up grassroots juristocracy.[147]

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

1. East Asian constitutional adjudication

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

1.1. The constitutional adjudication of India

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

[147] See Pokol, *The Juristocratic State*.

played a role, as did imitation. By comparison, constitutional adjudication in India – although imitating the U.S. Federal Court and its activism was important here, too – was not created out of external encouragement, but as a result of domestic socio-political power struggles.

To understand this, one has to know that the codification of the British common law system was continued in India after the 19th century, unlike in Britain and the United States, where unsuccessful attempts were made until the end of the 19th century. From 1860 to 1910, the British colonial lawyers summarised the entire private law of common law into 15 laws, with the exception of tort law, which was then further divided to certain compensation acts (for example Railways Compensation Act, Automobile Compensation Act, and so on). In accordance with the spirit of the times, this codification reduced judicial interpretation of the law to the smallest circle and put down clear rules that had already been laid down in common law. This legal system also remained unaffected by India's independence and has largely survived to this day, but the very far-reaching powers conferred by the Indian constitution on the higher courts, and in particular the Supreme Court, have opened for these courts a special option in the area of private law. What the private law courts were unable to do due to India's codified private law with its strict regulations, was made possible for the supreme judges by the lessons learned from the activist constitutional adjudication in the United States from the 1960s. In particular, Article 32 of the Indian Constitution, which did not simply grant the right of access to the courts – as customary in today's constitutions –, but the right of access to the Supreme Court, made it possible for this Supreme Court to realise activist constitutional adjudication.[148] This is complemented by Article 142, which enables the top judges to take a wide range of direct measures to support their rights, so they do not need the support of the lower courts towards the authorities to enforce their decisions, but these decisions can be enforced by the highest judges themselves.[149] When the Supreme Court

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

[149] 'Bei der Ausübung seiner Gerichtsbarkeit kann das Oberste Gericht Beschlüsse fassen oder Verfügungen erlassen, soweit sie notwendig sind, um in einem Verfahren volle Gerechtigkeit zu erreichen. Jeder gefaßte Beschluß oder jede erlassene Verfügung ist im

began to exercise this power more and more broadly, the higher courts below the Supreme Court followed the new decision-making style and began to use their similar powers, which were granted to them in Article 226 of the Constitution, to implement the constitutionalisation of traditional private law.[150] Thus, a fundamental rights jurisprudence has gradually emerged in addition to the strict rules of private law jurisprudence of common law for the same areas.

Shyamkrishna Balganesh, an Indian law professor living in the United States, wrote in his study that the constitutionalisation of private law in the field of compensation law began in India in the early 1980s, when the Supreme Court involved, under Article 32, more and more in its jurisdiction private claims for damages against the state. Initially, there were complaints from prisoners against the prison staff, and in order to expand the possibilities of these processes, the right of action was also granted to third parties and organisations not directly affected. After all, violation of a fundamental right was possible not only because of the damage that was actively caused, but also through omission.[151] Since this fundamental rights lawsuit required much less burden of proof, traditional private lawsuits

gesamten Gebiet Indiens in der Weise vollstreckbar, wie es durch oder auf Grund eines Gesetz des Parlaments vorgeschrieben wird. Bis eine Regelung zu diesem Zweck ergeht, kann der Präsident sie durch Verordnung vorgeschrieben.' [Art. 142 (1).]

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

151 Shyamkrishna Balganesh, 'The Constitutionalisation of Indian Private Law', *Faculty Scholarship at Penn Law* 1557 (2016), 6–7: 'In exercising its plenary jurisdiction under Article 32 to protect and enforce the constitution's fundamental rights, the Supreme Court's first move was to relax the requirement of *locus standi* to allow third parties to petition the Court in any way or form for relief. In later cases, the Court interpreted its powers to allow it to consider a matter on its own motion *(suo moto)*, effectively eliminating both the standing requirement and the need for an actual case or controversy to arise as preconditions for the exercise of its jurisdiction. … Whereas the early cases had involved deliberate or intentional governmental action (e.g. unlawful detention, torture of prisoners, etc.), in later cases the Court became far more willing to extend liability to situations where the state actor had omitted to take any action. In so collapsing the act/omission distinction, public interest litigation thus came to be extended to situations where governmental inaction had been *a* factor in harm suffered by a victim.'

in this area gradually ceased. For a fundamental rights complaint, it was sufficient to make a statement to the notary about the damage suffered and there was no need to bear the heavy burden of proof that was normally required in a private damages claim. In the 1980s, damages due to medical malpractice, for example in the case of state-financed hospitals, could not only be sued through traditional private law trials against the hospital and the doctors involved, but also through a lawsuit against the Indian state due to the constitution, in which high compensation had a greater chance.[152]

These developments doubled the system of private litigation and in many ways emptied the original private law regime in favour of fundamental rights litigation. To some extent, however, these changes seem to only have made the hitherto stagnating common law system of India more flexible, which was something that the original European private law doctrines could achieve without the detour of constitutionalisation. For example, the Delhi High Court allowed in a case of a fire in an urban movie theatre in 2003 to bring the lawsuit – due to the indirect involvement of the local government – under the more liberal rules of constitutional fundamental rights suits, instead of private law litigation with the strict burden of proof of the violation. It was declared by the judges of Delhi that if anyone operates such a dangerous facility, they are fully responsible for any damage there. This means that objective liability for damage caused by functioning of a dangerous facility was incorporated into Indian compensation law through the detour of constitutionalisation.[153] However, a broader analysis also reveals some problematic developments in Indian constitutional adjudication.

Initially, the Indian Supreme Judges interpreted their jurisdiction abiding by the constitutional text and respecting the priority of parliamentary

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

[153] Ibid. 9.

legislation, but this began to change after a few years. Colonial precedents of the second half of the 19th century also helped to set aside certain laws: such precedents overturned some of the Governor General's decisions for violating the Indian Councils Act of 1861. This judicial control was further expanded by the English Parliament in the Colonial Laws Validity Act in 1865, and this right was expressly delegated to the Indian high courts.[154] Following such precedents, the first Indian prime minister, Jawaharlal Nehru, was cautious despite the Supreme Court's initially modest stance and considered it necessary to defend his extensive land reform, begun in 1951, against constitutional control. This reform obviously violated the property right of the landowners because, among other things, it also wanted to distribute among the masses of the poor that land that was taken from the rich landowners. Therefore, after Article 13 – which contained the constitutional control –, the parliamentary majority of Nehru's government added a new article to the constitution, which excluded these new laws from the possibility of abolition based on fundamental rights. Initially, the Indian Supreme Judges were not against it, but in a 1964 decision they declared that constitutional fundamental rights shall not be restricted by Parliament through any of its powers. During these years, Nehru's daughter Indira Gandhi was the prime minister, and after this court decision it was assumed that the supreme judges would extend the possibility of declaring unconstitutionality to amendments of the Constitution. To prevent this, Indira Gandhi's party, which received an increased parliamentary majority in the new elections, had nine new judges elected to the Supreme Court in 1971, and the extended court ruled on the issue. Then a council of 13 members of the Supreme judicial forum finally decided 7:6 that the Constitution can only be changed by the parliament in such a way that *its basic structure* is not affected. What was included in the basic structure was clarified to varying degrees in later judgments, but in principle the Supreme Judges declared with their decision their right to control amendments of the Constitution. This was interpreted as a declaration of war by the parliamentary majority, and Indira Gandhi appointed a new Chief Justice to replace the previous one and removed three judges from the panel. However, the remaining majority of the court was still against the government and, as an act of

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

revenge, accepted the opposition's request, which challenged Indira Gandhi's election as a Member of Parliament. In June 1975, Gandhi exercised constitutional authority to declare a state of emergency and the powers of the Supreme Court were immediately restricted. However, the struggle did not end, Indira Gandhi failed in 1977, and the reinforced supreme judges took revenge with a number of decisions to cut back Gandhi's political course.

The next step on the way to the supreme power of supreme judges was a broad interpretation of the separation of powers and, based on this interpretation, the right to appoint judges was removed from Parliament and a separate system for appointing judges by the judges themselves was introduced. Although the separation of powers is not contained in the Indian Constitution – contrary to the American Constitution, which is considered exemplary in India –, the judges have found as a substitute that certain state functions are regulated separately in the Constitution, and it can be concluded from this that the branches of state power are thus separate.[155] After many battles, the deletion of judges' appointments by Parliament and the inclusion of these appointments in the judges' own authority realised in 1993, through a lawsuit brought against the Indian state by a bar association. The Supreme Judges accepted their arguments, and from then on five senior Supreme Court judges, led by its president, have been deciding on appointment of new judges. In order to change this and to abolish the right of the Supreme Court to co-opt, in 2003 the majority government at the time presented a proposal to amend the Constitution to establish a National Judicial Council, which failed without a sufficient majority. In 2014, it was resubmitted by the Modri government's parliamentary majority and it was passed, but in 2015 the law was annulled by the Supreme Court as unconstitutional. In response, President of the Supreme Court Dipak Misra was indicted at the request of 71 MPs, but the success of this process requires a majority of the two chambers with the presence of at least two thirds of all members, and this number is unlikely to be reached. Recently, the position of Supreme Court judges

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

has deteriorated due to the fact that out of 25 members of the Supreme Court – which, as is also known to the public, fell into two (liberal or conservative) camps – four senior judges attacked at a press conference the Court President, complaining about abuses inside the court.

Many decisions could be mentioned to characterise the super-activist interpretation of the constitution by the Supreme Judges of India. For example, here is one of the latest that says that in all Indian cinemas, the national anthem must be played before the screening, which must be heard with due respect from the audience who is to listen to it standing. But not less 'brave' was the decision that deduced from the right to life that people actually have the right to a living as a fundamental right.[156] This was further specified in a later decision in the sense that this fundamental right guarantees the basic living conditions necessary for dignity.[157] All of these decisions prompted the Indian Supreme Judges in the 1980s to commission extensive research into social issues so that they could take such decisions. As a result, a whole system of *socio-legal commissions* has been gradually established, which are often tasked with overseeing the implementation of the decisions made by the Supreme Court judges. In this way, a quasi-parallel administrative system was gradually established by the Supreme Court of India, and these auxiliary agencies of the court, also known as *surveillance agencies,* make recommendations to the public administration for the performance of the tasks resulting from court decisions.[158]

This full-fledged super-juristocracy only lags behind the power of the exemplary American activism in constitutional adjudication in that the senior judges of India, due to their mandatory retirement at the age of 65, are often less than four years in active service. This leads to a frequent change of direction due to a varying majority. An example of this is that in a decision in 2013 on Article 377 of the Indian Penal Code, which has existed for 150 years and has remained in force from the colonial era until

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

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

158 Ibid. 1075.

today, they did not declare the punishment of same-sex sexual behaviour unconstitutional. This was done by first separating the right to privacy from the right to life and freedom in 2017, and after the majority of judges of the Court of Justice further changed, Article 377 was finally declared unconstitutional in 2018.[159]

Due to Indian constitutional adjudication, an interesting answer can be given to the question of what function this institution can perform in addition to a parliamentary democracy based on millions of citizens. Robert Bork's analyses have supported the assumption that this is a juristocratic correction of the law based on the value preferences of the elite that stands above the masses, although it is presented in public as the protection of the interests of the lower masses, which they cannot overview. Anuj Bhuwania discusses this question in a relatively new study that analysed the years 1950 to 1975. In this study it is demonstrated how the Indian supreme judges, supporting essentially liberal upper-class views, opposed the measures taken by the parliamentary government to support the lower masses, like the Indian land distribution and other mass aid measures. Following the state of emergency initiated by Prime Minister Indira Gandhi and breaking judicial resistance, the newly appointed majority of judges followed the poor people's support program and started activism to help this. In this process, the supreme judges deliberately relaxed the framework of constitutional adjudication in order to help public interest litigation.[160] In addition, they themselves started to set up legal aid organisations and use them as a tool

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

[160] To describe this, the author shows that the supreme judges often organise the procedures themselves to make in the end the decision they want: 'Arun Shourie, then editor of the *Indian Express,* gave an interview in 1983 where he observed: "A judge of the Supreme Court asked a lawyer to ask me to ask the reporter to go to these areas, get affidavits from some of the victims who are still alive and some of them who were dead, from their families. The affidavits were got [sic] compiled, sent and he entertained a writ. Eight months later someone came to me saying that the same judge had sent him … to ask me to ask the respondent to file such and such information in a letter through so and so. … A third time a civil rights activist asked that the same thing be done. He said the judge had ask him. … The point that the opponents of the case were making was that the litigants were choosing a judge. As it turns out, some judges were choosing their litigants."' Anuj Bhuwania, 'Courting the People: The Rise of Public Interest Litigation in Post-Emergency India', *Comparative Studies of South Asia, Africa and Middle East* 34, no 2 (2014), 327.

to support the intended decisions. This shift finally brought them into a stage when they began to replace the original litigants with the *amicus curiae* organisations they created so as not to interfere with their decision-making. With this change, Indian constitutional adjudication began to shift, and instead of making decisions on narrow individual cases, the decisions of the supreme judges shifted in the direction where they aimed to achieve more comprehensive policy changes and where the litigants of the cases only bothered the judges.[161] In this way, the activism that was originally supposed to help the lower masses turned back into a constitutional adjudication supporting the value preferences of the elite.[162]

1.2. The Taiwanese Constitutional Court

In the case of Taiwan, the use of constitutional adjudication began during the transition from dictatorship to democracy, and here it played a peculiar role, since it was not created after a failed dictatorship to restrict democracy, but the hitherto existing but paralysed council of supreme judges (Council of the Grand Justices of the Judicial Yuan), which had constitutional adjudication among its functions, became operational due to the changing political environment. Here, the Taiwanese Constitution of 1947 created a body of 17 members as a separate judicial council to interpret the constitution at the request of the litigants or the government. The Grand Justices, appointed by the President, tried to do so in the early 1950s by restricting the power of government agencies, but were retaliated and they stopped doing so. After that, they could basically only vegetate, but when the Kuomintang leaders, who were evacuated from China to the island of Taiwan in the second half of the 1940s, gradually grew older with President Chiang Kai-shek and eventually handed over control in the early 1980s, the new leaders allowed the appearance of opposition parties, and the time of supreme judges finally came. The Council of Great

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

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

Judges began to deal with filed applications and to exercise its existing powers more courageously. Ultimately, this allowed for a complete break with the remaining supporters of the dictatorship, and in one of its 1990 decisions, the Council declared it unconstitutional that MPs who had represented mainland China since 1948 were allowed to continue to be MPs for decades without interruption, since it was impossible to elect new MPs in their place [163]

For the entire Taiwanese political system, this decision enabled the constitutional judges to openly break with the old Kuomintang regime, given that President Lee Teng-hui, who came to power in the 1987 presidential election, was anxious to break with the past one-party system with caution. Then, with the help of new power groups, the constitutional judges began to exercise their powers without scruple and successively destroyed the remains of the Chiang Kai-shek system. Unrestricted pluralistic democracy was established, but Taiwan's constitutional judges have also played an important role in the structure of state power since then, and they are somewhat saturating the democratic political system with a dose of juristocracy.

Like most of these institutions in the world, constitutional adjudication in Taiwan was initially aimed at correcting the political system, but after the stabilisation of pluralistic political mechanisms, its effects on the legal system became more visible. This could also be observed more clearly in Taiwan, as the model was the German constitutional court. According to a description, German universities are at the top of the renowned foreign law faculties for doctoral studies, and here it became almost mandatory for anyone wanting to be appointed a constitutional judge.[164] To what extent this led to the duplication of traditional branches of law, as in Germany, cannot be precisely assessed from the data, but one can find some references

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

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

in this direction, concerning the extension formulas of fundamental rights and their expanded 'scope'.[165]

1.3. The South Korean Constitutional Court

There is not such a long history of constitutional adjudication to narrate here as in the case of Taiwan in our previous section, but with the disappearance of military dictatorships in South Korea that had existed for decades, it was almost at the same time that the South Korean Constitutional Court went into operation, in 1987. Here, the longstanding situation was characterised by new military coups and the constant rebellion of already existing, half suppressed opposition parties, and the last protests against the last state leadership of 1979 were defeated amongst bloodshed, after which the military government could no longer be stabilised. The successor of the resigned president, General Roh Tae-woo, promised the opposition to work out a new constitution with them, with a direct election of a president to rule the state. The 1987 Constitution subsequently created a strong constitutional court based on the German model, and the new constitutional judges followed the exemplary Germans by extracting new fundamental rights and principles from the Constitution in order to be able to abolish unconstitutional laws to a greater extent. In addition, the Constitutional Court itself took part in the toughest power struggles, and in 2003 the constitutional judges sided with President Roh Moo-hyun, who was supported by lower social classes against the ruling power groups, and did not deprive the President of arranged power.[166] Korean constitutional judges continue to play a central

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

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

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

Of the constitutional courts in East Asia, the Koreans have the greatest authority both domestically and worldwide.[167] Regarding their decision-making statistics, the constitutional judges have made a total of around 10,000 decisions here, around a 1,000 annually, and most of these were due to constitutional complaints from citizens and private organisations. In this way, the work of this constitutional court can be characterised less by control over the political system than by control over the law. This is limited by the fact that final judgments of ordinary courts in Korea cannot be challenged by a constitutional complaint.[168] Instead, by suspending the proceedings before them, the ordinary judges can apply to the Constitutional Court for a review of the constitutionality of the legal provisions that they have to apply in the case. It also determines the competence of constitutional judges to control the laws because there is no abstract norm control – for example that on the proposal of a limited number of opposition members, an investigation into the unconstitutionality of a new law is carried out –, only concrete norm control.[169] The consequence of this concrete norm control is that constitutional judges move more from politics to law in this way, and that their entire activity has more of a legal character. Thus, the possibility of doubling the traditional branches of law through the constitutional branches of law increases.

later, and this is a good example of how democratic political struggles can be determined by the constitutional judges' decisions.

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

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

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

It is peculiar in its decision-making structure that, in addition to nine relatively short-term constitutional judges, elected for a six-year term, some rapporteur judges are appointed for a long period, even ten years. Some of these rapporteur judges join the new constitutional judges, while some of them use their specialisation in certain legal areas in centralised groups and prepare drafts for constitutional decisions.[170] This decision-making structure, partly slipped away from the constitutional judges, increases the likelihood of the emergence of an 'invisible constitution', that is, the functioning of previous constitutional court decisions as a basis for decisions. This possibility is further reinforced by that deviations from old decisions in new decisions are possible with only two thirds of the votes.[171]

Political fragmentation here has contributed to transforming South Korean constitutional adjudication into a strong juristocracy since the collapse of the military dictatorship in 1987. At the beginning of the changes, the military elite reconciled with the opposition; the three groups of the opposition had around the same quantity of votes, so they lost the presidential election and the military elite candidate won. Therefore, all three opposition groups were interested in a strong constitutional court that restricted the president's power. Therefore, the election of the nine members of the constitutional court was tied to different political forces, so that a

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

[171] Ginsburg, 'The Constitutional Court'. Of course, besides rapporteur judges, who are subordinate constitutional judges and subject to the president of the court, Korean constitutional judges can also take an independent stance on outstanding social issues, and this was demonstrated by their recent decision against a law that banned abortion. While the same part of the law was considered five against four of them as constitutional in 2012, their majority declared it 'conditionally unconstitutional' in summer 2019 after an interim exchange of constitutional judges with seven votes against two. To support more radical measures, three constitutional judges, in their dissenting opinions, insisted that women could exercise their right to abortion unconditionally in the first 14 weeks of pregnancy, and they considered this feasible by the immediate abolition of the relevant part of the law. See Jeong-In Yun, 'Recent Abortion Decision of Korean Constitutional Court'. *IACL-AIDC Blog,* July 31, 2019.

mixed decision-making body would always force internal compromises.[172] In this political situation, in addition to the political conflict, which often leads to a stalemate, the establishment of an institutional system to influence constitutional adjudication began. In this way, a juristocratic will was formed alongside the party-political parliamentary arena, in which the legal NGOs, the lawyers of the opposition parties and also other non-party political groups were involved. In this way, not only politicians but also personalities known by NGOs were brought up in the political public. Roh Moo-hyun, the would-be president, was known as such an NGO activist before his election and he flooded the ministries with NGO lawyers, his former colleagues, when he took power. In this way, not only the judicial proceedings, but also the whole executive power were penetrated by juristocracy.[173] As a result, in the case of South Korea, it can be said that above the system of democratic institutions, state power is actually organised around the judges of the Constitutional Court – with their jurist apparatus – and the ordinary Supreme Court.

1.4. The Thai Constitutional Court

In Thailand, too, the state power was dominated by permanent military coups since 1932 after the overthrow of the absolute monarchy, and here, too, the mass uprising against the last military coup at the end of the 1980s marked the beginning of attempts at multiparty democracy. The new constitution was then drawn up within a few years, and after its adoption in 1997, a strong constitutional court began its work. Here, the review of ordinary court decisions as well as the possibility of constitutional complaints from citizens were excluded from the jurisdiction of constitutional judges, but like in South Korea, ordinary judges can request a review of

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

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

the applicable legal provisions, and heads of state organisations can do the same. However, the Thai Constitutional Court has been given a greater role in resolving disputes between central authorities, and thus its real role became that of a public arbitrator in political power disputes, which in Europe only exists in exceptional cases, although it does formally exist here, too. This delicate role did not allow constitutional adjudication to function permanently here. After the struggles between the prime minister and the parliamentary opposition forces in 2001, the constitutional judges stood by the prime minister and prevented his being deprived of power. The Prime Minister's party won again in 2006, but the constitutional court declared the results of the general election unconstitutional after a Senate motion which questioned these results. In the subsequent crisis, the military seized control, the constitutional court was dissolved and a new constitution was adopted.[174] In 2007, however, a new constitution was adopted by the opposing powers and a new constitutional court was established. However, this did not change the basic situation, because in the struggle of the opposing large social forces the party of Prime Minister Thaksin Shinawatra, who had been sacked in 2006, won again, and now his sister became prime minister and started to fight the enemy political forces in the Senate. The constitutional judges then once again became the final arbitrators of this political struggle after another request from the Senate. But they already had enough experience that the military leaders were not on the side of the Shinawatra party, and they declared the prime minister's deprivation of power in 2014.[175] The situation in Thailand is therefore a strange mixture of democracy, an increasingly explosive military dictatorship and juristocracy, but despite all the volatility of their situation, the constitutional judges play a central role.[176]

174 Ginsburg, 'Constitutional Courts', 89.

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

176 In his 2008 study cited above, Tom Ginsburg describes – and also blunts – the contrast between the politicians of a democracy based on the masses of people and the chief judges who are influenced by a narrow elite, as follows: 'More broadly, however, the emergence of a *middle class*, seen to be so important in the broader process of democratization, may be a necessary condition for constitutional review to thrive. All four countries can be said to have vigorous middle class that played an important role in demanding democratic reforms. The presence of this broader middle class allows the court to have an alternative means of

This fragile duality of democracy and the juristocratic power of the constitutional court based on the dominant elite is presented by Eugénie Mérieau in her recent study as a coexistence of democracy with the 'deep state' in Thailand.[177] It is worth taking a closer look, since this can be conceived as a typical example of Asian juristocracy and the internal constellation of power. This Asian juristocracy can, therefore, be well confronted with the juristocratic power structures created in Europe, especially in the Eastern European countries from the 1990s. This is because in Eastern Europe juristocratic power structures do not have their origin in internal power constellations, and their visible organisations and agencies do not rely on internal resources either, but they have appeared here in recent decades as an import of the juristocratic institutions originating in power constellations in the U.S. While the European juristocracy is essentially a globally exported juristocracy, in Asian countries it is predominantly the organisation of its own internal power resources in a parallel deep state. In the latter case, the political forces behind the juristocracy can exist unaffectedly outside the electoral and democratic political framework. Both are trying to correct democracy, but while Europe is transforming the influence of global powers into an internal power by the juristocratic power structures, the Asian juristocracy is using the internal sources of power, which are not affected by the democratic struggle. Thailand seems to be the best example of this pattern. Let us take a closer look at that.

The category of 'parallel state' or 'deep state' outside democracy-controlled state structures first appeared in the 1950s, when Morgenthau described the structures of the military-industrial lobby organised by the CIA elite. For the conceptual expression of power structures beyond democracy in different countries around the world, the concept of deep state has become commonplace in recent years.[178] Juristocracy as an alternative system of power to democracy is a combination of several

legitimation – the court can protect itself from attack by political institutions through building up a wellspring of popular support.' Ginsburg, 'Constitutional Courts'.

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

178 Ibid. 446. Mérieau describes the structure of the deep state as follows: 'Like the regular state, the Deep State is not monolithic; various actors and networks engage in power struggles within its framework. However, the fundamental difference between the regular state and the Deep State is that the former is visible to the people it claims to serve, whereas the latter is hidden and unaccountable. The Deep State is the invisible framework under

elements, and the constitutional court and in some cases other supreme courts are only at its top. Without an established NGO system to organise mass and politically targeted applications to these courts, this cannot have a profound impact.[179] This happens either through the organisation of internal social groups with resources, as is typical for East Asian juristocracies, or as subsidiaries of global NGO networks that are built up from outside in the different countries, as is customary in Eastern European countries. Therefore, in addition to the supreme judges, their 'customer' NGO organisations are just as important for the power system of juristocracy as the political parties for democracy. In addition, the continuous production of juristocratic intellectual products and the legal training in a juristocratic spirit are indispensable elements of this power system. Creating the right concepts and methods of interpretation so that the legal system can continue to function in accordance with the goals of juristocracy is only possible by spreading these ideas through legal studies and monographs; it is important to inculcate these concepts, arguments and methods of interpretation for students in law academies, and to sensitise judges and lawyers for these ideas so that they accept the goals of the juristocracy and operate the system in accordance with them. While this was accomplished in Europe, and particularly in Eastern European countries, through the organisation of U.S. foundations representing the deep state from the early 1990s,[180] these shifts in the legal system in East Asian countries were accomplished by power groups with internal resources, who did not feel certain that through democracy their existing power resources would be converted into state power.

In Thailand, this deep state and its weight of power was built up by the elites around the broken royal power from the end of the 1990s, when ongoing military coups with bloody retaliation against the masses could

which institutional interests of unaccountable bodies and co-opted non-state networks are aggregated." Ibid. 446.

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

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

no longer help.[181] The power resources of these elites were provided by the urban entrepreneurial and intellectual elites, and these faced the millions of rural agricultural masses and their elites. Since the parliamentary elections and thus the position of prime minister could more or less only be won with the support of the rural masses, the authors of the 1997 constitution, who had already had information about the practical experience of the Eastern European juristocracy, decided to set up a constitutional court with very strong jurisdiction. The constitutional judges elected here and the judges at the supreme courts were a guarantee that the economic and intellectual elites of the cities, also supported by the military officers, will determine the life of Thailand despite their weakness in the elections.

In Thailand, the judicialisation of politics and thus the establishment of a juristocratic system of the ruling elites against a constantly developing democracy was accomplished in three steps. The first phase was the establishment of a powerful German-style constitutional court in the 1997 constitution, created by royalist lawyers from the old royal elite.[182] The second phase began in 2005 when the king, in response to increasing opposition to his elite, asked the judges to intervene to overcome the 'political impasse' and the judges enthusiastically followed the king's call.[183] The constitutional judges destroyed the results of the 2006 elections and dissolved the Thaksin Party, which had won three elections with the support of the millions of rural masses. In the new constitution, which, in turn, was created by the victorious old elite, the new constitutional judges they appointed were given even more unlimitable power. Although the Thaksin Party regained governmental power and parliamentary majority in 2010, the constitutional judges declared the unchangeability of the constitution, and only they were allowed to establish its contents and meanings. Thus the juristocracy against democracy – and behind it the deep state of Thailand, the successor of the

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

[182] Ibid.: 'They envisioned a Constitutional Court that was a kind of "insurance" against the political uncertainty of democratisation.'

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

old elite of the royal power – became the bearer of the highest state power in a formal way, too.[184]

1.5. Indonesian constitutional jurisdiction

In Indonesia, a country with 273 million inhabitants of Islam, a community of 20 million Christians, and 2-3 million Buddhist or Hindu inhabitants, a constitutional amendment around the turn of the millennium created a constitutional court.[185] While larger Islamic communities cause bloody conflicts wherever they live together with others, the largest Islamic population in the world (99 per cent Sunnis) is an exception here and religious extremism has only sporadically appeared so far.[186] Of the 23 constitutional judges so far, 20 were Muslims – 13 of them were strongly religious – but none tried to disrupt the peaceful coexistence of Islam with the state.[187] In the course of their work, 524 important decisions were made between 2003 and 2013, some of which significantly influenced the fate of the country. The weight of their decisions is also increased by the fact that the court decisions are not reviewed by the Constitutional Court, and the municipal normative rules are not assessed by them either, but rather by a lower level of the administrative courts. In this way, constitutional judges only review decisions on the national level.[188] As a result, it is rather the distribution of power that can be somewhat corrected by the decisions of constitutional court and there is less room

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

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

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

[187] Ibid. 2.

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

for influencing the internal order of law, as is the case in Europe and North America. In addition to reviewing legislation, constitutional judges also play a role in resolving public disputes between central government agencies. So far, however, this has not had the dramatic impact that we have seen in Thailand and there is no information about decisions significant in this regard. The nine constitutional judges are appointed and elected equally by the state president, the Parliament and the Supreme Court for five years. The president and vice-president of the Constitutional Court are elected for two and a half years among themselves.

It is possible for individuals and organisational bodies to petition the Court, and this has generated much NGO activity in recent years, but the extensive study I drew on did not indicate that subsidiaries of American-based global NGOs active in Europe and Africa would be active in this area, too. In any case, according to statistics, constitutional judges give priority to applications submitted by NGOs, and their arguments more often appear in the constitutional reasonings, too.[189] As an indication of the specific gravity of their respective decisions, one may mention their decision that the privatisation of Indonesian electric works is unconstitutional. Another decision declared that the ban of the existence of the Communist Party is unconstitutional. Democratic political struggles were deeply affected by the Constitutional Court decision which declared that a closed character of party lists is unconstitutional, and thereby they forced open party lists. Since the filing of only few cases in the first years, the number of cases and substantive decisions has increased, which shows the stabilisation of Indonesian constitutional adjudication.

2. Constitutional adjudication in Latin America

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

As a general characteristic, it can be said that Latin American countries have long and detailed constitutions, which are often easy to change or completely replace, so that in the 30 years from 1978 to 2008 alone,

[189] Ibid. 8.

350 constitutional changes were made across the region.[190] Especially in the Andean countries – Ecuador, Peru, Bolivia, Venezuela – it is typical to create a completely new constitution instead of making a change in the existing one. And this is not just the internal affair of the legal elite about the masses, as is the case in most parts of the world and in Europe, but it is supported by referenda with a large majority of the masses, and it promises extensive social change in most cases.[191] On this basis, it can be said that the constituent power in this region is not separated from ordinary legislation by the democratic forces. The political struggles of democracy is, therefore, only duplicated by constitutional adjudication in such a way that both are governed by the same political forces, and there is usually no separate juristocracy over democracy. However, due to the enormous tensions and inequalities in these societies (for example, indigenous ethnic groups are largely excluded from society), these easily changeable constitutions contribute to the instability of their daily functioning, which hinders the development of effective structures. However, these characterise the various Latin American countries to different degrees.[192]

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

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

[192] In his 2015 study, Roberto Gargarella analysed the creation of Latin American constitutions, which began on the model of the United States from 1820, and differentiated four

Roberto Gargarella, in his general description of Latin American constitutionalism, points out that traditional left-wing intellectual groups beyond left-wing liberals are generally skeptical about that constitutionalism and constitutional adjudication can solve the most serious social problems, while the other side is too optimistic.[193] Gargarella sees the real addition of constitutionalism in this region in that, in contrast to the other regions of the world, it focuses more on economic and social rights and, through the use of constitutional rights, the reduction of social exclusion of indigenous peoples. Constitutionalisation happened here in four phases, and it is a feature of the last phase, which began in 1980, that constitutional rights, which previously only existed formally, were placed at the centre of constitutionalism and were expanded by additional basic rights for indigenous peoples.[194] The desirable state structure and the hierarchy of fundamental rights are viewed, however, fundamentally differently by the liberal (already left-wing liberal) elite and the right-wing conservative elite. In recent years, the only consensus among them has been to reduce the influence of the millions of masses within the state and thus to limit political freedom. While conservatives sought to do this by strengthening centralised executive power, the left-liberals preferred the courts. With regard to fundamental rights, while the former have strengthened the role of religious organisations, including the Catholic Church, the left-liberal forces have preferred property and freedom of enterprise.

Joel Colón-Ríos highlighted an interesting new phenomenon in the use of constitutionalism in groups of countries in the northern part of South America (Ecuador, Venezuela, Bolivia and Peru) in a new 2017 study. The combination of two otherwise separate theories added an interesting twist in the connection between democracy and constitutionalism to distort political struggles. One was taken from the Indian constitutional adjudication, which in addition to the control of simple laws, also included the

phases of the development. The first is called the period of experimental constitutionality, while the main goal of striving for independence; the second phase between 1850 and 1917 is the period of constitutionality in which the basic structure of already independent states is established, and the third phase is the social phase between 1917 and 1980. The current final phase is named by Gargarella as the period applying a human rights strategy. Roberto Gargarella, 'Too "Old" in the "New" Latin American Constitutionalism', *Yale University Research Papers* (2015), 2–10.

193 Ibid. 2.

194 Ibid. 8.

control of constitutional changes This actually implies that a constitutional change is implicitly limited by the constitutional judges, even if a qualified majority in Parliament were achieved. However, this was linked to another theoretical contribution to the constituent power, which emphasises the role of a constitutional assembly separate from parliament, which was first developed by *abbé Sieyès* in the French Revolution and later adopted by Carl Schmitt in constitutional theory. Taken together, this combined theory also offers a new opportunity for government forces with a simple parliamentary majority. The essential thing is that while the current constitution stipulates that only a qualified majority of the parliament can make constitutional changes and new constitutions, this thesis declares, based on the theory of the 'original constituent power' of a separate constitutional assembly, the possibility of overriding the entire constitutional system. In this way, a new government, which has gained control of state power through a simple parliamentary majority, sets up a constitutional assembly consisting mainly of lawyers and confidants, and confirms its constitution through a referendum that is conducted according to its own rules. The control of the referendum process and the control of the turnout as well as the distribution of the votes are in the hands of government forces, so that they are guaranteed a favourable result. According to this procedure, all previous holders of public law positions can be removed under the new constitution despite the fact that they were appointed by qualified majority under the old constitution and could only be replaced in this way. All in all, such a constitutionalism, which was originally designed to limit simple parliamentary majority and legislation, thus becomes the instrument of this very majority and gives it the power to transform the whole of society and the political system.[195] Of course, violations, conscious lack of control of legitimacy, and manipulation make the whole thing doubtful, but if the public law system of the state to be replaced has little regional or international support (that is, you can hardly wait for it to be replaced), these legal anomalies will be forgiven. The latter developed for these Latin American countries in such a way that, when confronted with the same U.S.-centred world power, this

[195] Colón-Riós also points to the reversal of the focus change between democracy and constitutionalism in favour of the latter: 'Nevertheless, the theory has been playing a central role in the rebalancing constitutionalism and democracy that has taken place during the last decades in several countries in the region.' Colón-Ríos, 'Constitutonalism and Democracy,' 155.

instrumentalised constitutionalism could be preserved by supporting one another and receiving the support of the superpowers opposed to the United States. In the meantime, they were faced with the United States based Latin American human rights juristocracy, and Venezuela had already resigned from this human rights law because of constant clashes.

But this 'special' solution to constitutionalism, which is originally against global juristocracy, can also be used for the opposite purposes, as has been seen in Hungary in recent years.[196] It is not known what mediation brought the similar endeavours to Hungary (see the footnotes), but it is a fact that in the debate between democracy and juristocracy, in contrast to Latin America, this theory would not be used to assist democracy but to assist global juristocracy, as the latter has been suppressed by the Hungarian parliamentary majority for years.

The peculiarities of Latin American juristocracy and constitutionalism compared to those in the rest of the world can be well summarised after a study by *Jorge Esquirol* from 2018, as it discusses the issue in relation to the United States and the demands of the global constitutional oligarchy.[197] He stresses that global constitutionalists are indeed right in that constitutional changes in Latin American countries are too easy, and that constitutional adjudication is, therefore, still intertwined with the political struggles of democracy. Unlike critics of a contrary opinion, he

[196] The opposition to the Hungarian government majority, which majority has gradually become a feud with global NGO networks and the EU juristocracy since 2010, made public before the 2014 parliamentary elections that if the left-wing liberal parties came to power with a simple majority the entire public law foundation of the existing new constitution would be pushed aside because they could undo it through a referendum based on the theory of the 'original constitutional power' of citizens. According to this idea, the entire system of public law established from 2010 could be abolished, although it is not made possible by the constitution, but the 'original constitutional power' of the citizens stands above it. In the possession of ordinary government power, a constitutional assembly would be summoned the members of which would be appointed by them, and the new constitution they drafted could then be confirmed in a controlled referendum according to the rules it created. The previous system of counterweights consisting of prosecutors, constitutional courts and so on would be replaced immediately. Mátyás Eörsi, the former state secretary of the left-liberal party SZDSZ and today's opposition politician, outlined this in an evening TV program and in a weekly newspaper, e.g. Eörsi Mátyás, '2014'. *Magyar Narancs,* April 28, 2011.

[197] Jorge L Esquirol, 'The Geopolitics of Constitutionalism in Latin America', in *Constitutionalism in the Americas,* ed. by Colin Crawford and Daniel Bonilla Maldonado (New York: Edward Elgar, 2018), 79–108.

emphasises the democratic advantages that this offers.[198] He also accepts that this is why the intensification of Latin American constitutionalism has not led to a shift in power, as the United States has done since the 1960s, but argues that it is precisely for this reason that the kind of politicisation of the judiciary that was hidden from the public in the United States could not be seen here. And Esquirol justifies the move away from global constitutionalism with the fact that this global version has actually developed according to the preferences of the global dominance, supervised by the United States and other major powers, which can be good for solving problems there, but are not transferable to specific social concerns in Latin America.[199]

However, these characteristics do not dominate in the entire Latin American region, but mainly the Andean countries – Ecuador, Bolivia, Venezuela –, and in the most important countries of Latin America, Brazil and Mexico, the Western model of juristocracy was rather implemented.[200] However, this is only the Latin American adoption of the juristocratic model known in the Euro-Atlantic area, which only colours it, but has not created a new type.

[198] Esquirol argues against an author who criticises the constitutional conditions in Latin America as follows: 'In fact, the observed malleability of Latin American constitutions, and their commonplace role within ordinary politics, seems to suggest the opposite of a lack of social mooring … greater social mooring in contexts of deep political conflict may lead to greater politicisation of the constitution and to more routine constitutional volatility.' Ibid. 98.

[199] Ibid. 104–105: 'The discussion above brings us back to the basic question of the desirability of global constitutional law in the first place. To the extent that this means a worldwide epistemic community engaged in common questions of constitutional reasoning, accepted doctrines, theoretical references, and general world view, the answer is not clear. Certainly, basic humanist propositions of intellectual sharing, dialogic intercourse across borders, the benefits of advances developed elsewhere, and other such points are of general value. However, in the arena of national legal systems, not all are equal in the global sphere. There is a recognizable geopolitics of state law.'

[200] Alberto Coddou McManus, 'Addressing Poverty through a Transformative Approach to Anti-Discrimination Law in Latin America', in *Law and Policy in Latin America. Transforming Courts, Institutions, and Rights,* ed. by Pedro Fortes et al. (London: Palgrave Macmillan, 2017), 231: 'In Latin-America, the Colombian Constitutional Court has been seen as the model agent for social change. For its part, the Supreme Court of Brazil, the Supreme Court of Nation in Mexico, the Constitutional Chamber of Costa Rica, or the Argentinian Supreme Court are sometimes seen as the main followers of this new practice of progressive neo-constitutional adjudication.'

Overall, our investigations so far have shown that it is worthwhile to differentiate two different types when it comes to the model of juristocracy, which has spread throughout the world in recent decades. At home in the United States, where it gained ground in the early 1960s, it was used in struggles between rival political forces and the powerful social groups behind them. Here it was the strategy of bank capitalist groups against industrial-productive capitalist groups to create strong constitutional adjudication and to build a broad network of NGOs for fundamental rights processes before the courts. This second political system was further developed through deeper involvement in the judiciary, and supported by its already existing media power, the creation of a 'deep state-like' formation was accomplished, involving the most diverse governments agencies (intelligence agencies and so on). As a result, the cyclic changes in presidential power had no impact on its weight, although its main base was and continues to be given by left-liberal groups from the Democratic Party. These left-liberal American groups began to spread the juristocratic model through their foundations after the political changes in Eastern Europe in the 1990s. First, their NGO networks were established in every Eastern European country as subsidiaries of their U.S. NGO networks, and a continuous coordination and central control over them was established. In the case of the Eastern European countries that have joined the EU, this system is linked to the other system run by left-liberal NGOs. On the one hand, these operate on the Brussels level, and on the other hand, they are organised around the Human Rights Court in Strasbourg. So this Eastern European model is another model of juristocracy, based on externally imposed NGO networks, and it is in competition with democratic forces based on internal sources of power. This exported model of juristocracy is present in all of Eastern Europe and it receives strong support from the European and American left-liberal mainstream media. In addition, these global NGO networks, mostly based in America, have been able to infiltrate the central management bodies at EU level in recent years. There is also an externally exported juristocracy in Latin America that uses the original model of the U.S. 'deep state' juristocracy, but this is also used here in some countries by internal power groups to build an alternative power over the power of the opposing groups successful in the election. In this way, the results of democratic election can sometimes be modified by this juristocracic system. Thus, Latin American juristocracy is an

instrument of power that is partly exported and maintained externally, but also partly used internally against opposing election victories.[201]

In contrast, the juristocracy of East Asian countries from the 1990s – in India from the early 1970s – has no resemblance to the juristocracy of Eastern Europe, but rather to the pattern of the deep state in the USA. This means that, opposed to the institutional system of established democracy, this power strategy was adopted by powerful power groups with large internal resources in some East Asian countries, who, however, lacked a mass electoral base. This has been the most clearly shown in Thai developments in recent years, but is also present in other East Asian juristocracies, albeit not so visibly. In other words, while Eastern European juristocracy can be described as a model that is built and maintained through the export of global left-liberal American juristocracy, the political system of some East Asian countries can be portrayed as an internally duplicated system in which, in addition to democracy, a juristocracy is organised on its own internal power base. Ultimately, the Latin American Andean model of juristocracy differs from both and can be seen as a doubling of democratic will in addition to democratic legislation, which, in a way, might also be described as 'democratic juristocracy'. Of course, the term 'democratic' cannot only be interpreted as positive here, because in this system the democratic struggles and forces of deep social tensions, which are constantly creating new constitutions, also unsettle the foundations of societies. In any case, based on the examination of the local constitutional systems, it can be determined that the constitutional state could not be transformed here into a dual state structure in which a higher state power of juristocracy would have formed over democratic decision-making. In contrast, other Latin American countries – particularly Colombia and Brazil – belong to this dual-structured state model.

Before I turn to the analysis of the legal mechanisms of individual Latin American countries, it makes sense to consider the organisation of human rights jurisdiction across the continent, which is considered the

[201] According to this typology, Ran Hirschl's originally highlighted juristocratic shift of the four states (Canada, Israel, South Africa and New Zealand) represents a special case of internally rooted juristocracy, in which the highest state power is delegated to the Constitutional Court / Supreme Court by the previous ruling party when (1) their long stable parliamentary rule was shaken by the emerging new electoral groups, and on the other hand (2) it has strong positions in the judiciary and is thus able to determine the main directions of state politics despite their election defeat.

equivalent of the ECHR in Strasbourg. Only 25 of the 35 signatory states have submitted to the Human Rights Court established by the 1969 American Convention on Human Rights, and the two largest, the United States and Canada, have signed but not ratified the convention. Apart from them, the small Caribbean island states with an English colonial history classified this convention as a catholic Latin American affair and they remained outsiders. The convention entered into force in 1978 with the eleventh ratifying state, and the seven judges at the Inter-American Court of Human Rights (IACHR) in San José, Costa Rica, made their first decisions in the early 1980s. In contrast to the European model, one has to turn to the Inter-American Commission on Human Rights before the IACHR procedure and this Commission can be described as a preliminary dispute settlement forum, which initiates the procedure. Only if the Commission is unable to agree with the state accused of human rights violations to make amends and reorganise its legal system will this body initiate legal proceedings. The Commission is headquartered in Washington and its entire operation is influenced by the United States.[202] Beyond the Commission, only states can make a complaint before the IACHR against each other, and not private parties – as before the ECHR –, but indirectly, individuals can also initiate human rights proceedings before the IACHR through the Commission. For NGOs, who are actually the driving force behind such procedures everywhere, this is only a small detour.

Another difference from the ECHR is that, in addition to making decisions on applications for human rights violations, the judges also have an advisory role, which in practice means that laws or even constitutional changes in the Member States are reviewed based on the American Convention and the case law of the IACHR. The latter thus represents a comprehensive Latin American constitutional court and doubles the otherwise broad constitutional adjudication, which exists almost everywhere here. And the IACHR judges, who exercise an admittedly activist and most broad

[202] Although the United States has not ratified the Convention itself, and is therefore not under the jurisdiction of the IACHR, the text of the Convention has been modified so that any citizen of a country in the Organization of American States can be a judge, even if that state has not signed the Convention. In this way, from the beginning in 1979 to 1991, the United States was able to bring in one of the leading judges, Buergenthal, who was even president of the IACHR for four years.

interpretation of this advisory power, have tried in recent years to control the entire internal legal system of the states. In the case of the ECHR, the model provider, attempts have been made to do this, but only with the help of the Venice Commission, and they have not tried to determine the constitutional order of the European states. By early 2010, the IACHR judges had made a total of 120 judgments and 20 advisory decisions, but the number of judgments has been increasing in recent years.

Several Member States have objected to the IACHR – which was in fact converted from an international human rights court to a constitutional court – since the turn of the millennium, and have rejected this type of decision-making as an unauthorised interference with their sovereignty. In essence, it is seen as an instrument of the United States, which, despite failing to comply with the Convention, is trying to shape the internal politics and legal system of the Latin American states through its global concept of power. Venezuela withdrew from the agreement in 2013 and several countries have initiated the withdrawal procedure in recent years.

In the following, I will first deal with the case of Colombia and Brazil, which is at the forefront of the juristocratic turn, and then the situation in Chile and Argentina, which is more or less against it. Between the two I will examine Mexican constitutional adjudication which represents a middle position, because the Mexican constitution shows a strong juristocracy on paper, but the actual practice of the Mexican Supreme Court has not driven this towards an activist juristocracy. I would also like to point out that Venezuela, Ecuador and Peru were originally included in this juristocratic group, but as seen above, they left this system after President Hugo Chávez's political turn in 1998. However, in the absence of suitable materials, I cannot analyse them in detail, and in case of the most dominant Venezuela, it does not even make sense to examine it now at a constitutional level, due to the chaotic conditions there approaching a civil war,

To conclude the general presentation, the general characterisation by a researcher of the region, Francisca Pou Giménez, should be highlighted, which focuses on Latin American neo-constitutionalism versus a democratic legislative state. It is worth our while since it shows what an intellectual climate surrounds any opposition against juristocracy. Giménez is almost horrified to describe the characteristics of a 'legislative state' where judges who are subject to the law are forced to make a limited decision and are governed not by principles but by rules, while in the finally established neo-constitutionalist state the judges are

directly under the constitution, and they can make decisions based on the constitution:

> For long, variably (dis)empowered Latin American judges would carry out their job as described under the 'legislative state' paradigm … they would put rules – not principles – at the center of law, they would assume disputes were to be resolved by applying statutes – not the constitution – and they would assume a relatively detached relationship between the constitution and the wider legal system. Years later, both legal theorists and sociologists … signal Latin America as a champion of legal 'interpretivism', or of 'neoconstitutionalism', understood a version of the 'constitutional state' paradigm. Under this paradigm, law is made of principles, values and rules, the constitution directly applicable and paramount in judicial adjudication, and basic constitutional rights and principles invade and daily orient the wider legal system…[203]

Such a sharp contrast between a democratic legislative and a juristocratic state would likely be favoured by many European theorists and NGO supporters, but would tactically reject its public announcement.

2.1. The constitutional adjudication of the superjuristocracy

2.1.1. Colombian Constitutional Court

Considering the developments in the above discussed regions of three continents – Eastern Europe, East Asia and Latin America –, the strongest role of juristocracy over democracy in the past decades can be observed in the case of three countries in Latin America, namely Colombia, Mexico and Brazil. The constant juridical control of everyday political life that has been implemented here cannot be seen in Europe. Even in East Asia, although the government can be overthrown by the power groups behind it through juristocracy, the juristocratic mechanisms cannot play such a role in everyday politics, possibly with the exception of the Indian constitutional adjudication. Among the three, the Colombian Constitutional Court has achieved the greatest role in power. In a 2017 study by Daniel M Brinks and Abby Blass, the authors report that the

[203] Francisca Pou Giménez, 'Supreme and Constitutional Courts: Directions in Constitutional Justice', in *Routledge Handbook of Law and Society in Latin America,* ed. by Rachel Sieder et al. (London: Taylor & Francis, 2017), 12.

outstanding juristocratic model of Latin America was created through external help of billions and ongoing efforts, and that Colombia was at the forefront.[204] In this case, it is also suspected that – similarly to Mexico – the country's leading elites were susceptible to pan-American human rights justice and its reinforcement with internal constitutional adjudication because of the intensified fighting of drug gangs in the 1980s brought the country to the brink of civil war and the state organs were helpless against the greatest atrocities. On the one hand, hope of the judicial remedies spontaneously led people in this direction. On the other hand, leading politicians voluntarily accepted the control by constitutional adjudication and human rights justice in order to regain the rest of their reputation abroad.[205] While this was often formal in Mexico and, under the surface, the judiciary acted actually more within the boundaries of law, this constitutionalisation of state power along with the marginalisation of democracy in Colombia was actually carried out and Colombia became one of the model states for global constitutionalism or neo-constitutionalism (these are the typical terms for juristocracy in the narratives).

In Colombia, this superjuristocracy began with the constitution passed in 1991, when the struggle of the government of the former elite – which was alternately liberal and conservative – against the drug gangs emerging in the 1980s became hopeless. With the help of the United States, the previous non-parliamentary opposition tried to create a new state structure through a constitutional assembly to replace the former state. A powerful constitutional court was created, but when César Gaviria, one of the leaders of the constituent power, later became head of state, he and his government were surprised at what the constitutional judges were capable of.

[204] 'Over the last century, scholars have documented the expansion of judicial power and the consequent judicialization of politics. … No more region has been more active in this respect than Latin America, and billions of dollars in international aid flowed into the region in support of reforms to insulate and strengthen judges.' Daniel M Brinks and Abby Blass, *The DNA of Constitutional Justice in Latin America. Politics, Governance, and Judicial Design* (Cambridge: Cambridge University Press, 2018), 296–297.

[205] For the almost forced signing of the human rights convention under President Uribe see Alexandra Huneeus, 'Constitutional Lawyers and the Inter-American Court's Varied Authority', *Law and Contemporary Problems* 79 (2016), 189: 'During the Uribe administration, the "almost compulsive ratification" of human rights treaties formed part of an executive strategy to project the image of a government that takes human rights seriously despite the presence of terrorists within the territory. It behooved the executive, and it was part of Colombia's foreign policy, to demonstrate a strong adhesion to human rights.'

The Colombian constitutional judges, who had socialised themselves in the largely left-liberal doctrines of the intellectual circles of the United States, declared the prohibition of hard drugs unconstitutional in the mid-1990s. Since drug use is only a problem for drug users, they argued, it would be state guardianship if the state wanted to protect them from themselves, and the right to free personality development must include free drug use:

If each individual is the owner of his or her own life, then that person is also free to care or not care for his or her health. If one wishes to do so, he or she may deteriorate to death. The free development of personality is the recognition of the person as an autonomous individual. The first consequence that derives from autonomy consists in that it is the person (and not a self-appointed surrogate) who should give a sense to his or her existence and harmony with his or her course.[206]

The nine-member Constitutional Court made this decision five to four, which shows that this almost unprecedented level of ultra-liberalism in the world has not penetrated the entire Constitutional Court, but looking back over the past almost 30 years, it can be said that this ultra-liberalism and the strong control of over the respective head of state and his government, including the destruction of a multitude of laws, has continued in Colombia since then.

This is also made possible by the fact that the 1991 Constitution most fully opened the right to appeal to constitutional judges in order to mobilise their tremendous powers, creating two ways to do so. On the one hand, everyone can apply to the ordinary court with an *Acción Tutela* application if they consider that their fundamental right has been violated by one of the state authority's measures or that they have been harmed by a state omission in defence of their right. This has priority over any other judicial decision, and in the event of unsatisfactory handling, the petitioner can immediately refer the matter to the constitutional judges, who will make the final decision. The other form is the *Acción Popular* – which was also known in Hungary as *'populáris akció'* until 2012 – and anyone can submit it without personal interest if they believe that a new law or regulation contradicts the constitution. And with these two forms of application, the Constitutional Court is given a superpower, because

[206] Summary of some arguments of the Constitutional Court decision (May 5, 1994) by Luz Estella Nagle, 'Evolution of the Colombian Judiciary and the Constitutional Court', *Indiana International and Comparative Law Review* 6, no 1 (1995), 85–86.

thousands of applications per year have enabled control over the entire legal system and every state measure.

In addition, Colombian constitutional judges have also been allowed to oversee all state powers very widely through using the IACHR's *constitutional bloc doctrine,* according to which the constitution of each country must always be interpreted together with the rights of the human rights conventions and the interpretation of those rights by the human rights courts, and these together constitute the constitution of each country in Latin America. This doctrine has been the most widely accepted by Colombian constitutional judges, and in their decisions they usually refer not only to their own constitution, but also to the American Convention on Human Rights and IACHR decisions. These decisions not only destroy simple laws, they also control constitutional changes and thus the entire state.

2.1.2. Brazilian constitutional adjudication

In Brazil, a new constitution was created in 1988 with the consensus of the elites, although the direct cause of the new constitution was that the previously opposing forces came to power in 1985. The new parliamentary majority wanted to put governance on a new footing and secure a strong role of human rights and constitutionalism, the protection of which was entrusted to the Supreme Court, following the example of the United States.[207] This inter-party consensus on constitutional issues has existed since then, and this explains why, although an amendment of the constitution requires a three-fifths majority in parliament, it has been carried out 99 times in the past thirty-some years. This happened despite that a constitutional amendment requires even the approval of the Supreme Court judges, who declared this right to control based on the arguments of Indian Supreme Judges; this control is similar to that of the Colombian constitutional judges.[208] The frequent constitutional amendments, which have taken place on average four times a year, have thus become part of everyday political struggles in

[207] Francisca Pou Giménez, 'Constitutionalism and Rights Protection in Mexico and Brazil: Comparative Remarks', *Revista de Investigações Constitucionais* 5, no 3 (2018), 233–255.

[208] Ibid. 237: 'The Supremo Tribunal has asserted its power to review the constitutionality of constitutional amendments (even ex ante, before their formal passing), thus slowing down change and further securing institutional control of higher-level legal change.'

Brazil, in which supreme judges functioning as constitutional judges act on an equal footing – and even as supervisors – with parliamentary groups. As a researcher of the issue, Francisca Giménez emphasises, the judges were politically rather neutral for a while after the 1988 constitution was passed, but they and their successors gradually became politically more active judges with the above mentioned decision-making style.[209] The eleven members of the body are elected by the parliamentary forces for life, but must retire at the age of 65. This long term tenure is particularly beneficial for their role as the highest controller.

The Brazilian Supreme Court's constitutional adjudication goes well beyond the U.S. model, and based on European models, there is also the possibility of abstract control over these laws, which can be filed directly against a law. In addition, an application can be submitted not only in relation to an expressed violation of the constitution, but also because of an unconstitutional omission of protection of a fundamental right or a constitutional value.[210] Due to the easy way of applying, an average of 70,000 applications reach the supreme judges each year, most of which have to be dealt with in a shortened procedure, but also the substantive decisions can only be tackled with by a division into two chambers.[211] Finding all the relevant issues in the mass of applications, they can easily mobilise their enormous power to decide all fundamental questions of government and politics. An example of their 'free' decision-making style, which literally deviates from constitutional provisions, is their permission of same-sex marriage, although the Brazilian Constitution explicitly only allowed marriage between woman and man.[212]

[209] Ibid. 246: 'Right after the enactment of the Constitution, the Supremo Tribunal Federal exhibited a sort of professionalized, politically temperate outlook, but over time it has asserted a strong degree of independence and has incredibly enlarged its powers and public presence. As scholars have repeatedly noted, it is difficult to think of a court having changed so radically in one or two decades.'

[210] Ibid. 238.

[211] Ibid. 239.

[212] Fábio Condeixa, 'Parallels between Judicial Activism in Brazil and Australia: A Critical Appraisal', *The Western Australian Jurist* 3 (2012), 114–115: 'But the most controversial instance of judicial activism has occurred during a recent decision by the *Supremo Tribunal Federal* involving a case related to family law. The court legalised same-sex civil unions explicitly violating the *Brazilian Constitution*. In art 226, paragraph 3, the *Brazilian Constitution* states: "For the purpose of governmental protection, it is recognised the civil union (only) between

Thus the 1988 Brazilian Constitution increased the role of fundamental rights in governing society to the detriment of traditional legislation, while enhancing the political role of judges and, more generally, jurists. A 2016 study by Bryant Garth thoroughly investigated the extent to which this role of Brazilian jurisprudence was taken over from left-wing liberal law professors from the United States, based on models of the U.S. fundamental rights revolution of the 1960s, with massive grants from major liberal U.S. foundations.[213] While this left-wing liberal human rights activism was pushed back in the United States, it survived more in Brazil and became the centre of politics through the 1988 constitution. Another difference between the two university elites was demonstrated, according to which Brazilian law professors focus less on scientific research than on activities of a legal reformist nature.[214]

2.1.3. Mexican constitutional adjudication

Mexico followed the U.S. pattern in its 1824 constitution and established a three-tier federal judicial system (district court, circuit court and Supreme Court), but at its head, the Supreme Court centralised the whole system and the lower courts were closely subordinated to the highest level. This

a man and a woman as a family entity, thus having the legislation to facilitate its conversion into legal marriage.'"

213 Garth cites Javier Couso: '"The inspiration came from the scores of Latin American legal academics who started to pursue graduate training in law in the United States in the late 1970s, where they were socialized by their liberal North American law professors in the virtues of the legendary Warren Court … a final indicator of the rising influence of neo-constitutionalism in Latin America can be seen in the enormous interest law has sparked in some of the most prestigious law schools of the region … financial support from U.S.-based foundations … built a powerful network."' Bryant G Garth, 'Brazil and the Field of Socio-Legal Studies: Globalization, the Hegemony of the US, the Place of Law, and Elite Reproduction'. *Revista des Estudos Empíricos em Direito* 3, no 1 (2016), 19. Garth points out that while in the past the Ford Foundation was the chief exporter of left-liberal legal ideas in Latin America, more recently, the Soros Foundation has been doing the same in partnership with the MacArthur Foundation.

214 Ibid. 15: 'One difference from the U.S., according to the authors [Lopes and Freitas Filho], is that the researchers in legal sociology in Brazil mostly "do not rely on firsthand social inquiry … the studies concentrate on the efficiency of institutions and possible reforms to their regulatory framework".'

system was maintained in the 1917 Constitution which is valid to date, and while the judiciary's external independence from other branches of power is now guaranteed, the inner independence, that of individual decisions by judges, remains problematic to this day.[215] In 1994, however, under the pressure of international markets, a far-reaching constitutional reform in the judiciary was carried out to better attract capital investment, and the Supreme Court's abstract constitutional review of laws was introduced along European lines. The former 25-member court was reduced to 11 members, the decision-making process was standardised, making the Supreme Court function as a constitutional court. A profile cleanup was carried out in parallel, but despite the cleanup, the number of applications could not drop below 7,000 a year.[216] Most decisions are made in two chambers, but when it comes to abstract constitutional review, the plenary session decides and the chambers decide on the enormous mass of *amparo* (constitutional complaint). However, this heavy workload is made bearable by the fact that the top Mexican judges have perhaps the largest staff in the world, each top judge is supported by at least ten employees and may even employ additional assistants.[217] It is important to note that while legal interpretation throughout the Mexican judiciary towards the Supreme Court has remained centralised to date, the Supreme Court itself is more decentralised than the European constitutional courts. Here, the president of the court is elected by the judges for a short time and he/she only deals with administrative matters. The appointment of the rapporteur, for example, is decided randomly and is not the responsibility of the court president.

After the constitutional reform of 1994, the Mexican supreme judges did not change their style of decision in the first decade, but they began to exercise this power more. It can be said that they essentially acted as

[215] Francisca Pou Giménez, 'Changing the Channel: Broadcasting Deliberations in the Mexican Supreme Court', in *Justices and Journalists. The Global Perspective,* ed. by Richard Davis and David Taras (New York: Cambridge University Press, 2017), 209–234: 'The strong hierarchical fingerprint of the Mexican judiciary – which has remained to this day – assured the smooth top-down transmission of the style of judging extremely deferential to the political gestures of the day. The situation remained like this for almost seven decades.'

[216] According to Giménez's calculations, 8,000 cases were received by the Supreme Judges in 2008, and 7,000 in 2014. Ibid. 14.

[217] 'Each of them is aided by a staff of at least ten clerks (plus assistants), who serve at the pleasure of the Justices.' Ibid. 15. The author states that she herself was a clerk of a judge between 2004 and 2011.

arbitrators of disputes and struggles among the branches of power. Miguel Schor's analysis shows that the Mexican Supreme Court primarily plays the role of the Marshall Court of the United States of the 1800s and not the activist style of the Warren Court of the 1960s. This latter style, crossed with the model of the activist German constitutional adjudication, created a system of powers that largely suppressed democratic legislation. Unlike the Mexican judges, the Colombian Constitutional Court adopted this style, and Schor compared the two courts as follows:

> The Mexican Supreme Court facilitates democracy by effectuating vertical and horizontal separation of powers whereas the Colombian Constitutional Court primarily deepens the social bases of democracy by effectuating rights. Why the Mexican Supreme Court plays a role akin to the one played by the Marshall Court in the early American republic and why the work of the Colombian Constitutional Court bears a familial relationship to the Warren Court is a puzzle. … The Mexican Supreme Court is primarily an umpire that handles disputes between the different branches of government while playing only a limited role in effectuating rights.[218]

The lower extent of constitutional adjudication related to fundamental rights in Mexico is also confirmed by another, already cited researcher, Francisca Giménez, who argues that the role of 'support structure' is less developed here than in Colombia: she mentions 'the impeding role of the *amparo* in Mexico, coupled with the absence of supporting structures'.[219] Expressed in a less veiled manner, this means that the NGO basis which actually execute fundamental rights litigation in the juristocratic countries, and as its means, track down those who were violated in their rights – or who can be persuaded to have been violated (sensitivisation) –, is absent in Mexico. But the other requirement of juristocracy, the network of university jurists ('epistemic community'), is very much present in Mexico. It was created within the law department of UNAM, an autonomous university in Mexico, where it is the centre for the dissemination of left-liberal neo-constitutionalism, and in the past few decades, several activist judges and presidents of the Inter-American Court of Human Rights, the IACHR, came from here. So it seems that while neo-constitutionalism in

[218] Miguel Schor, 'An Essay on the Emergence of Constitutional Courts: The Cases of Mexico and Colombia' [Abstract and outline], *Revista de Economia Institucional* 16, no 1 (2008), 41–42.

[219] Giménez, 'Constitutionalism', 235.

Latin America gets most of its ideas from Mexico, these theorists cannot be 'prophets' in their own country.

However, the deeper meaning of this difference is that Mexican constitutional adjudication remained more a defender of the original constitutional state, in which the guardian of the constitution only protects the frameworks amid the struggles of democratic forces, and does not attempt to derive the whole normative system of law itself from the constitution, using the fundamental rights as a means. So there is no dual state here – a democratic one at the bottom, a juristocratic one at the top –, and no doubling of the legal system with a hierarchically higher constitutional law and the constitutional branches of law. Mexican constitutional adjudication is thus a middle ground between Chilean and Argentinean constitutional jurisdiction and the superjuristocratic Colombian one, the latter closely approached by the Brazilian.

2.2. Minimising juristocracy

In the following discussion, I will only briefly point out the differences from the superjuristocratic pattern, and provide a contrast for the constitutional court's complete exercise of power, which can be seen especially in Colombia. I am concerned with the constitutional adjudication of the Argentinian and Chilean Supreme Judges, who mostly only guard the constitutional framework and do not replace it by creating its own 'invisible constitution'.

2.2.1. Argentine constitutional adjudication

After frequent military dictatorships, it was only in 2003 that democratic governance in Argentina enabled a stable judiciary, that still exists today. Constitutional adjudication is carried out here by the Supreme Court, and although any lower court, on the model of the United States, can review, the constitutionality of the applied law – and put it aside, if necessary –, it is for the supreme judges to make a final decision. Five judges are the members of the Supreme Court, and the choice of judges is in the hands of the head of state. However, only with the approval of the Senate with a two-thirds majority will the position be won for a lifetime, but only up to the age of 75.

The difference between the Argentinian supreme judges and those of the Latin American countries inclined to superjuristocracy is also reflected in their distance from IACHR decisions, which they supported with the argument that the Argentine constitution's public law principles should be reserved for the country's sovereignty and, in this way, they stand above international conventions.[220]

In contrast to the Colombian and Brazilian constitutional courts, which want to play a broad role in governance of the whole society, Argentine judges deliberately advocate a minimalist regulatory role in norm control and intend to limit the impact of their decisions to individual cases instead of forcing structural changes.[221] This may be a major crime for supporters of activist neo-constitutionalism, but it can only be positive for a democracy-friendly stance, especially in Latin America, where in most countries the dominance of juristocracy can be demonstrated.

The activity of Argentine supreme judges also differs from the superjuristocratic model in terms of the control of constitutional amendments, although the constant resistance of other branches of power has played a role in this. Because here, in Argentina, there is stable public administration, this leads to the conclusion that the Latin American superjuristocracy is generally shaped by the chaotic state and social conditions, while its supporters tend to create a favourable picture and highlight super constitutionality and human rights (as seen before in Francisca Giménez). At one point,

[220] 'The Court ruled that the Constitution's public law principles define a "sovereign reserve sphere", to which international treaties – and the construction of derived legal obligations – must adjust.' SCA' s decison in 'Ministerio', para. 16, cited by GIDES, *Argentina's Supreme Court and the Covenant* (CESCR – International Covenant on Economic, Social and Cultural Rights 61 Pre-Sessional Working Group [09 Oct 2017 – 13 Oct 2017]). Thus, before that, the Argentine chief judges also strated from the human rights convention incorporated into their constitution, and accepted the thesis of constitutional bloc. María Gracia Andía, *Disadvantaged Groups, the Use of Courts and Their Impact: A Case Study of Legal Mobilization in Argentina* [PhD dissertation] (Boston: Northeastern University, 2011), 90

[221] Martin Oyhanarte, 'Public Law Litigation in the U.S. and in Argentina: Lessons from a Comparative Study', *Georgia Journal of International and Comparative Law* 43 (2015), 470: 'Using this minimalist approach, the Argentine Supreme Court has issued favorable decisions and satisfied the specific claims asserted by individuals or groups who brought the complaint but without demanding any structural change in public policies or the existing administrative dynamics. Within the framework of this second scheme, the Supreme Court is often very careful to underscore the singularity of the facts and circumstances of the case in order to prevent the decision from being only too readily relied upon and applied by other courts.'

the Argentinian Supreme Court controlled and annulled a controversial constitutional amendment in the midst of a political struggle in 1998, but this surge of power over the other branches of power did not become a standard. It would also be difficult here because, as in the case of the United States, the Argentine president can increase the number of Supreme Court judges by a simple parliamentary majority, and thus turn the majority of the court in his favour, as President Menem did it in 1990. He then increased the number of Supreme Court judges from five to nine, and it was not until 2006 that the original five were reinstated.[222]

2.2.2. Chilean constitutional adjudication

Since the outbreak of mass demonstrations in Chile in 2019, it has been decided that a new draft constitution should be submitted to a referendum in 2021. Since these mass demonstrations were organised by left-wing radical groups against right-wing President Sebastián Piñera and his government, the constitution and constitutional adjudication are likely to move in the direction of left-liberal neo-constitutionalism that is already prevalent in Latin America, as we have already seen in Colombia and Brazil.[223] In a few years perhaps, today's Chilean minimalist juristocracy will only be seen as part of history and it will already be a thing of the past.

The process of democratisation in Chile that started in 1990 laid the foundations for the still functioning version of constitutional adjudication with a thorough constitutional reform in 2005. This was determined by the fact that the main role was played mainly by moderate constitutionalists,

[222] Diego Werneck Arguelhes and Evandro Proença Süssekind, 'Building Judicial Power in Latin America: Opposition Strategies and the Lessons of the Brazilian Case', *Revista Uruguaya de Cienca Polit́ca* 1, no 27 (2018), 13.

[223] This is all the more possible since the outbreak of the mass demonstrations itself was largely due to decisions by American human rights organisations, including the IACHR, which criticised the failure to repair the human rights violations during the time of the former Chilean dictator Pinochet, and also criticised government action against rioters at the mass demonstrations: 'The decline in the legitimacy of the Piñera government in the eyes of the population has been intensified by the serious criticisms of the Inter-American Commission on Human Rights, the Human Rights Commission of Chile and the OAS General Secretary for violation of human rights by the government to suppress protests.' Ariela Ruiz Caro, 'The Dramatic Fall of Chile as Latin America's Neoliberal Role Model', *Counterpunch,* February 5, 2020.

who have heavily criticised superjuristocracy by U.S. human rights judges and its export to Latin America. For example, Francisco Zúñiga called the concept that sees all norms of the entire legal system as readable from the constitution 'constitutional fetishism': 'There is an enchantment with the Constitution and its "material of values" ("perennial philosophy"), and an epistemic disposition that we call *constitutional fetishism,* which transform the Constitution (sacred text, interpreted, reinterpreted to infinity) in the source of all the answers, which supports a misunderstanding restrained judicial activism (and with it a marked epistemological elitism), a kind of inexhaustible material law and that also constitutionalizes all law.'[224] With this idea, Zúñiga was able to express the nature of the distortion of the constitutional state into a dual state (democratic below but juristocratic above), because the constitution in a constitutional democratic state only provides the framework for the formation of democratic political will. Within this framework, the norms of the legal system are determined by the laws made by the majority in parliament, while in the case of neo-constitutionalist juristocracy, the entire legal system is viewed as derivable from the constitution. This minimises the democratic component and gives the juristocratic state a dominant role. Zúñiga does not spare the role of human rights IACHR and sees this as the culmination of a superjuristocracy within the countries that have a democratic deficit in their way of working: 'This neo-constitutionalism has a correlate in the inter-American system and in culture of continental law in that true paroxism of judicial arbitration that is the "control of conventionality" exercised by an Inter-American Court in an interstate environment which is by no means a supranational political space, a system with defendant democratic deficit'[225] And Zúñiga has become one of the protagonists of this constitutional reform and has shaped Chile's democratic constitutionality in recent years.[226]

[224] Francisco Zúñiga Urbina, 'Nueva Constitución y constitucionalismo en Chile', *Anuario de Derecho Constitucional Latinoamericano* 173 (2012), 175.

[225] Ibid.

[226] Alexandra Huneeus writes about the role of Zúñiga and another conservative constitutional lawyer in the 2005 Chilean constitutional reform as follows: 'Francisco Zúñiga, who played the most influential role in the process, deems neoconstitutionalism to be a type of "constitutional fetishism" and describes the IACtHR's doctrine of conventionality review as a "paroxysm" of judicial discretion lacking in democratic grounding. Fermandois, a political conservative close to the Right, has argued that the IACtHR's rulings are not binding within

3. The dual state and the duplication of law. Summary

First, I summarise the previous investigations from the perspective of state theory and then I summarise the analyses of the doubling of the legal system, which could be seen in detail in the first chapters of the volume.

3.1. Dual state: democratic below, juristocratic above

The conclusion of my research can be summarised as follows. State power, which has existed since ancient times, became a constitutional state by the early 19th century in the United States, but the model of this constitutional state, which later became widespread, had gradually changed from the second half of the 20th century, and this change led to a state model that can be described as a dual state. This model originated in the United States when the constitutional adjudication of the Supreme Federal Court was rebuilt in the 1950s as a second centre of power alongside the congress and the president. In parallel, it was transferred to defeated Germany by the Americans after World War II, and from there it spread to a number of countries around the world until the turn of the millennium. The different versions of this dual-state model have evolved according to the requirements of a number of different functions, and the main versions have been crystallised through global interactions. In terms of law, the main impact of the dual state has been that traditional legislative law and its branches of law (private law, criminal law, and so on have doubled with the constitutional court's constitutionalised legal material, and gradually new, 'constitutionalised' branches of law appeared, such as constitutional criminal law, constitutional finance law, constitutional labour law and so on. Let us look at this process in detail.

In the intellectual and political struggles of the Enlightenment, the idea of the constitution gradually developed from the theory of the social contract as a framework and foundations of state power. This was realised for the first time in history by the constitutions of the North American colonial states. After getting rid of English colonial status, their own state structures were formed and in 1787 the United States was founded as a federal state with its

Chile. Significantly, the reform did not alter or further specify the status of international human rights law domestically.' Huneeus, 'Constitutional Lawyers', 193.

federal constitution. This constitution contained only the framework of state power, but after the French revolutionaries proclaimed the human rights in 1789, they were incorporated into the U.S. constitution as fundamental rights. These fundamental rights served only as a guideline for the purposes of state power at the time and that did not change when the United States' Supreme Court ruled in 1803 that it had the competence and jurisdiction to declare federal or member state laws unconstitutional and to prohibit their use. This was when the idea of constitutional adjudication was born, and at that time it was only a question of compliance with the two-tier division of competence between the federal government and the member states, which was enshrined in the federal constitution.

This began to change gradually from the middle of the 19th century when the political struggle over the abolition of slavery broke out between the northern and southern states because the northern states wanted to abolish the institution of slavery due to the constitutional fundamental right to human equality, but the federal judges opposed it through their decisions in accordance with the will of the southern states. When the civil war that broke out between the northern and southern states ended, the abolition of slavery was incorporated in the Constitution, and then constitutional adjudication began to extend judicial review of the law and to use the constitutional rights to review the content of the law too. At the turn of the 20th century, it gradually emerged that what some political forces in the Federal Congress or in the member states with a majority could enact as law, could then be annulled by the opposing political forces with the help of the federal judges. According to political camps, the general picture until the end of the 1930s was that conservative supreme judges declared the laws of the liberal democratic political camp unconstitutional, and the liberal democratic intellectual camps were outraged about the constitutional adjudication of some old judges that restricted democracy. However, with the support of foundations from large banking families in their vicinity, certain groups in the liberal political camp who suffered from constitutional adjudication have started to organise fundamental rights movements in support of the African-American minority – and later other minorities and feminist efforts – in order to achieve their political goals through litigation policy. Ultimately, this led to success at the U.S. Supreme Court for the first time in the 1950s, after pressure from President Roosevelt and the appointment of supreme judges had turned the majority of the judiciary to the liberal side. Then, in the 1960s, there was almost a fundamental

rights revolution in the United States, and what the liberal democrats were unable to make law because of the conservative majority in Congress and state legislatures, that could now be achieved by means of fundamental rights through their litigation policy before Supreme Court judges. With this change, the former constitutional state has been transformed into a dual-structure state in which the lower level of political decision-making is determined by millions of citizens through democratic elections, but above this level, there is a higher level of state power which is exercised on the basis of constitutional adjudication and fundamental rights.

However, this model of a double state has been fundamentally strengthened by the fact that after the Second World War, in defeated Germany the lawyers of the U.S. occupation authority created a constitutional structure which fundamentally increased the power of constitutional adjudication over legislation and the government. The aim of this was to prevent millions of Germans from being able to re-elect a new Hitler, and therefore an unprecedentedly powerful constitutional court was established over the parliamentary system.

This was largely filled with their own confidants, and in later years, when the German chancellor and his government tried to oppose extensive scrutiny by the constitutional judges in the name of democracy, the constitutional judges were joined by the American lawyers and foreign policy leaders and defended the argument that this arrangement of state power is one of the necessary features of the rule of law. Due to this, the German constitutional judges developed formulas to expand competences and developed ways of interpreting the constitution, moving away from the constitutional text, and their otherwise far-reaching powers could be made almost unlimited. This shift of the centre of power from democracy to a higher constitutional adjudication in this dual-state structure and the transfer of power from democracy to juristocracy posed no problem for millions of otherwise wealthy Germans, and thus this power structure became a model valid for the elites of the United States and great powers in general, and exportable to anywhere in the world.

Later, in the 1960s, the pattern of the American fundamental rights revolution was heavily mixed with the elements of the German model of constitutional adjudication, which achieved a far greater freedom of interpretation and power than that of the American judges, and it is this mixture that European, East Asian and Latin American countries began to take over. In addition, the American global power elites consciously tried to transfer

this dual-structure state model that mixes the German and the U.S. models to the countries that were under their influence. From below, this model shows the democracy of society, but from above, a second constituent of the state is added, that tries to extract the entire legal system and the content of governance of the whole society directly from the constitution, especially its fundamental rights. The German model was adopted in Spain and Portugal when they were liberated from dictatorship at the end of the 1970s, and particularly in Spain, the separation of constitutional adjudication from the constitutional text was even more realised than in the case of the German model. This model of constitutional adjudication, radicalised by Spain, was adopted in the Spanish-speaking countries of Latin America from the end of the 1980s with the support of the foundations of the U.S. left-liberal elites, and after the collapse of the Soviet empire, this model was also introduced in the liberated Eastern European countries.

At the same time, there have been shifts towards a dual-state structure in some East Asian countries, with some U.S. foundations promoting this, but some of the local elites themselves have also tried to import it, for other reasons. As early as the early 1970s, some elite groups in India enhanced the use of supreme court juristocracy against the majority parliamentary government by adopting the constitutional interpretation method of the 1960s American left-wing liberal supreme judges. They also went on to radicalise it even more and drew up further interpretations. The previously organised but lame Taiwan Constitutional Court began its real work in 1987, and from then on the constitutional judges regarded the German activist constitutional adjudication as a model, as did the South Korean constitutional judges, who also started their work in 1987. The Thai constitutional court came into force only a little later, and its judges also saw the style of the German constitutional adjudication as a model. Because of this loose connection to the constitutional text, the constitutional judges in Thailand were able to rise completely above the other branches of power, and the leader of the party that won the elections has twice been removed from office of prime minister.

In Eastern Europe the model of the dual state structure, which is democratic in the lower part and juristocratic above, shows the structural elements of this dual state structure to a certain extent. Let us look at this and point out just the bigger differences when summarising the similar issues in other parts of the world. It is important to emphasise that the juristocratic state structure was built here after the regime change around

1990 and was exported to the Eastern European states by the left-liberal elite in the United States. The NGO networks of their global foundations have been organised here as subsidiaries in every single country, and here their trusted individuals created strong central coordination and control over them. In addition to central coordination among the Eastern European countries, this juristocratic state structure was supported by a previously established coordination mechanism, which from the late 1940s aimed to bring about the plan of certain Western European elites for the creation of the United States of Europe. This was ultimately reduced to the creation of a European Convention on Human Rights and has been preserved to this day in the human rights jurisdiction associated with this convention in Strasbourg and in the loose cooperation between the member states in this jurisdiction. With the collapse of the Soviet empire and the integration of the Eastern European states, this formerly humble human rights court came to life and in 1999, with a supplement in the protocol, the signatory states were given the opportunity to accept subjection to proceedings brought against them by their own citizens in the event of a human rights violation. This accession was strongly recommended and was not just a discretionary option for Eastern European countries waiting to join the EU. But international pressure has also made this accession obligatory outside the circle of these countries, for example Russia, too, signed the protocol after a while. In this way, the global U.S. NGO networks, which had already been deployed in Eastern European countries, were able to influence political decision-making not only through the constitutional adjudication of the domestic dual state structure, but also through litigation in the Strasbourg human rights judiciary, with the Eastern European subsidiaries of the global NGO-s suing the Eastern European states. In the meantime, research into this litigation activity has shown that the vast majority of applications in Strasbourg are submitted by subsidiaries of American NGOs, and it has also become public that 22 of the 100 Eastern European judges who have been deployed to Strasbourg in the past 20 years have been recruited from Soros Open Society NGOs. Other studies have shown that it is not really the judges who make the decision there, but this is done by a carefully selected permanent human rights apparatus (registry lawyers), and that the role of the judges is simply to proclaim the decisions. Unfortunately, no study into the personal connection between these registry lawyers and the specified global NGOs has been carried out yet, but it is very realistic to assume that if in the case of the publicly more visible judges the proportion

of NGO people involved is so high, then it can be even bigger in the more hidden apparatus. This supranational European infiltration in the center also exists alongside the EU bodies in Brussels, as recent information on the enormous influence of the networks of the George Soros Open Society Foundation on the decision-making process has shown here.

With regard to the juristocracy of the European states, its double character has to be highlighted: on the one hand, the central part in Strasbourg, and on the other hand, the juristocratic organisation of the top domestic judiciary, in particular the constitutional judges. As we have seen, both parts were created through the export of American left-wing global NGO networks and their European subsidiaries. It is important to emphasise, however, that although this also applies to the judiciary of Western European countries, it has only been fully achieved with regard to the Eastern European countries, since the more consolidated Western European legal systems and their legal experts did not open up so easily to them.

This European juristocratic system, which is based on judges and networks of NGOs, has yet another element, and this is the network of university jurists that provides the intellectual background.[227] It also exists in U.S. law faculties, and the worldwide dissemination of studies on constitutional law, legal theory, and international law has given the opportunity to export the juristocratic state structure around the world. These studies use and propagate the activist interpretative formulas that have gone far beyond the previous American activist constitutional interpretation in the field of constitutional adjudication in Germany and other countries in recent decades. The EUI (European University Institute) in Florence is one of the best-known centres that coordinate intellectual activities of the European juristocracy. The EUI has an abundance of doctoral scholarships for young jurists, who have already been selected and examined by shop stewards in the law faculties, and they have the opportunity to join NGO networks

[227] This is commonly referred to as the 'epistemic communities' of the academic and scientific world, but it hides the fact that, under the disguise of science, it is often just an actual political organisation of intellectual people. This is important mostly in the legal and social sciences, since this knowledge can be converted directly for political purposes. For a summary see: Mai'a K Davis Cross: 'Rethinking Epistemic Communities', *Review of International Studies* 39, no 1 (2013), 131–145. And in particular for the role of legal professors in the dissemination of the global juristocracy, see Margaret E Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca [US-NY] – London: Cornell University Press, 1998).

and participate in their legal work through shorter or longer study trips. Regular conferences with common English-language volumes are organised by the Soros Open Society networks, and this has gradually established permanent groups of university jurists who are closely associated with this pan-European juristocratic organisation. Czech, Hungarian, Polish, Romanian, Slovenian, Slovak, and Romanian scholars of constitutional law proper, international law and legal philosophy, as well as Western Europeans such as Germans, Dutch, English and Americans are regularly involved. Just as the organisers of the NGO networks of the various countries are publicly known, so are the members of the circles of university jurists in each country's academic life, and also the central leaders in Europe. For example, the former EUI director Joseph Weiler has to be mentioned, who has been one of the leading figures in the organisation of the academic elite of European juristocracy for decades. There is also Armin von Bogdandy and George Daly, who can almost always be found when such European juristocratic university activity appears, and Daly also appears as an organiser of such activity on other continents.

There are intertwinings, overlaps and exchanges between these three elements (top judges/constitutional judges, network of NGOs and university jurists) not only at the level of human rights jurisdiction in Strasbourg, but also within individual countries. In Hungary, for example, there were a dozen advisors of the Constitutional Court who later joined the Soros NGO networks, and one of them even became the president of the Hungarian Soros Foundation; most of them have held senior teaching positions in the teaching of legal theory and constitutional law in various law faculties.[228] It can only be assumed that this could also happen in other Eastern European countries, and that in addition to the offices of constitutional judge or chief judge held by them, the juristocratic part of the dual state structure could function with the background of the NGOs and the group of university jurists behind them. As in the case of Strasbourg, much of the petitions

[228] This also applies to the Inter-American Court of Human Rights (IACHR), as shown by a study by Alexandra Huneeus which portrays the role of the neo-constitutionalists as the main disseminators of global juristocracy and their infiltration in the organisation as follows: 'But part of the power of epistemic communities is that their members can work across national borders and play a role in shaping international as well as domestic institutions… This part shows that neoconstitutionalists have increasingly taken leadership roles on the IACtHR as judges and clerks, and that neoconstitutionalist ideas and practices have permeated the Court.' Huneeus, 'Constitutional Lawyers', 202.

submitted to the Constitutional Court are submitted in a very coordinated manner by NGO networks or by law firms associated with them, possibly in a common text form. This juristocratic conglomerate is also supported by a common media background both within each country and on a general European level, mediating important news about the actions of their organisations from all countries. Nowadays, these media activities concentrate on high-traffic Internet portals and they increase the effectiveness of an NGO campaign or disseminate a new study by a university jurist in a coordinated way. Conversely, they are able to organise attacks aimed at discrediting the professional reputation of a constitutional judge or chief judge or legal professors whom they judge to be opponents.

It is important to note that while constitutional courts and other supreme courts are at the centre of this juristocratic state structure, which is in many respects against democratic organisation, if a sufficient parliamentary majority is reached for a constitutional change, then this majority in parliament can gradually fill the ranks of juristocratic institutions with followers of their own democratic values. This can lead to a unique situation in the internal relations of European juristocracy, which is essentially regulated and operated by American left-liberal forces. If a right-wing conservative party receives a majority that is sufficient to change the constitution, the majority of the constitutional court can ultimately be converted with new appointments and the election of new constitutional judges, and the previous juristocracy will be changed from the left-liberal direction toward a conservative trend. This turn will largely affect the effectiveness of their left-liberal NGO network and the group of university jurists. This has been happening gradually in Hungary since 2011 and in Poland since 2015. As a result, the frequently heard attacks by NGO lawyers and university jurists against the new constitutional judges and other supreme judges can be understood, and their attacks are disseminated in the journals of these countries (at home and abroad) and in the left-liberal online media. However, this can only be a provisional situation, because if the majority government that caused the overthrow is changed for a new government majority that has a friendly relationship with juristocratic organisations, then even if it has no constitutional power, it can try to reverse the power relations even with a political coup, because the supporting dominant western left and left-liberal political forces will angrily demand this both at home and abroad. It must be seen that the case of Hungary and Poland is a case of juristocracy 'cut in two'.

If we turn to the constitutional courts of East Asian countries, we have to look at how the patterns we know in Eastern Europe work there or how they differ. One difference is that there is no comprehensive human rights jurisdiction in all of East Asia, unlike in Latin America and Africa, where this juristocratic organisation could be imported. There is, therefore, no uniform global juristocracy over the individual states in the East Asian region. There is also no indication that subsidiaries of global American NGO networks would have been set up here, which would move the constitutional adjudication of individual states here. The main difference is that it is a juristocratic organisation based on social groups with internal sources of power alongside a democratic organisation and not an exported, externally built juristocratic power system. While some NGO networks appear to have external roots, these seem to be the exceptions here in East Asia.

However, this does not mean that these juristocratic organisations do not have external connections, since in the case of the Indian Supreme Court, its constitutional interpretation pattern imitated the activist interpretation of the U.S. Supreme Court from the 1960s and later the acceptance of litigation of public interest or the recognition of the importance of working with the self-created pro bono law firms arose from the experience about the United States. However, these were merely ideological takeovers dictated by internal incentives and not the consequences of the infiltration by external global powers, as was seen in Eastern Europe. Similarly, in the case of the constitutional judges in Thailand, Taiwan and South Korea, the very close connection to the constitutional models and argumentation formulas of German activist constitutional adjudication can be regarded as a result of internal political power differences, and this connection cannot be understood as an acceptance of submission to a world power.

All in all, the system of constitutional adjudication in East Asia and the juristocratic system based on it represent a parallel power organisation in addition to the democratic organisation in several states and the political power struggle is thereby doubled. As a result, the wills of the state and the legal system in these countries are doubled, and in addition to the laws created by parliamentary legislators, there is a constitutional legal material, too. With regard to the constitutional adjudication of the Latin American countries, one can see an intermediate position here. This position is between the externally exported and maintained Eastern European juristocracy and the East Asian model of using juristocracy for the internal doubling of power. Most of the states here have gone toward

superjuristocracy, led by Colombia, Brazil, Costa Rica, and partly Mexico, but the continued ideology and settlement of U.S. NGO networks have ultimately been linked to internal pluralism as an alternative form of power and have been used for groups who are weaker in democratic elections but otherwise have power resources. So it is not just a juristocracy maintained by the external organisation of the left-wing liberal forces of the United States, as observed in Eastern Europe, but the expression of a permanent internal duality of power, as we have seen it in East Asia.

3.2. The double state and the doubling of the legal system

The fact that I have spent most of my days in the decision-making process of the Constitutional Court over the past eight years as a constitutional judge has probably also contributed to the fact that in the past few months I have seriously considered the proposal to correct my original concept of the legal system with four layers of law. A criticism of my concept has claimed that the legal system has five layers instead of four – contrary to what I established at the end of the 1980s. As a starting point at that time, I used the concepts of law of formerly prominent German authors, a context where law was mainly understood as a combination of the text layer, legal dogmatics and supreme judicial case law. I supplemented this combination with the fundamental rights layer, which obviously already existed at the end of the 1980s and had great importance. My critic, *Csaba Cservák* started to correct this and wrote in 2015 that there is a fifth layer of law and this is the dogmatics of fundamental rights.[229] When I thought about it, I noticed that he was right, and the deeper I dug into research with this in mind, I immediately noticed that there is yet another, sixth, legal layer with which I have actually spent most of my days for years, namely the case law of constitutional courts. Because I had adopted and expanded Ran Hirschl's thesis on juristocracy, in 2015 I have come to the conclusion that constitutional adjudication, under certain conditions, duplicates the state's democratic system by building up a juristocratic structure on democracy. And this means that there are not simply six layers in the legal system, but this system has doubled, and just as the traditional legal system of text layer,

[229] Csaba Cservák, 'A jurisztokrácia aggálya és az ellentmondások feloldása', *Jogelméleti Szemle* no 4 (2015), 55–61.

legal dogmatics and case law was built up, the duplicated part of law also has these three layers. In this arrangement, the new constitutional level of law takes precedence over traditional law, and my experience has shown that this has led to a constant struggle with the bearers of traditional legal layers, as is the case of legislative text layer with MPs from the ruling parties, as well as the case of legal dogmatics with professors of traditional branches of law, and with the judges of the Supreme Court, although the degree of this struggle varies from country to country.

After I got to that point, I looked at foreign literary sources to see if I had a brand new idea with this insight, or just repeated other claims that were already made by others. It immediately occurred to me that what I now do concerning the expansion of the concept of law was discussed by the Germans under a different name from the 1980s, especially around 2000, and the phenomenon of an expanded constitutional law was contrasted with the traditional branches of law as simple law. Although this was not explicitly called a doubling of the legal system, it has been discussed like this from some aspects. Then I rethought this treatment of the topic as an alternative formulation of my doubling thesis, which is contained in Chapter III of the volume. At the same time, it was good to see that since I did not only looked at law as a whole, but also as divided it into layers I was able to better confront and compare the traditional layers of law with the layers of the new constitutional law. This made it easier to see how the role of individual legal layers of traditional law had changed on the level of the new constitutional law. This raises a number of questions that could not be raised by the German focus on constitutional law proper versus simple law. (I am only referring to the six important differences between the layers of traditional law and the layers of constitutional law that I presented in the first chapter.)

However, a lot can be learned from this comparison, since the Germans have already started to study the tendency of doubling due to the expanded version of constitutional law, but also because the rest of the world is based on the Germans in this regard, either as an example to emulate or to criticise. In the case of constitutional private law, the degree of British and Italian constitutionalisation based on the German model has shifted to the recognition of direct effect after the indirect effect had been recognised earlier, while in this regard the USA has remained at a lower level of constitutionalisation. Similarly, in the case of constitutional criminal law, the solutions developed here by the German criminal law professors, which

aimed at the constitutionalisation of all traditional criminal law, were a good basis for classifying the degree of actual constitutionalisation of criminal law on a scale in various countries. It was, therefore, clear in this comparison that the German constitutional court went as far as to completely reject the constitutionalisation of criminal law in a decision in 2008 in this regard and that the criminal law provisions of Basic Law were only interpreted as constitutional guarantees. This has also been done in the United States, in contrast to the Supreme Court in Canada, which enthusiastically began to constitutionalise criminal law. After that, it was instructive to compare the constitutionalisation of criminal law based on foreign examples by the Hungarian constitutional judges in the 1990s, since it turned out that the Hungarians could even have won a world championship in the 1990s. Because what the constitutional judges in countries all around the world did not do – and even the Supreme Judges of Canada have only approached since 2000 – the newly created constitutional court in Hungary did without scruple in the early 1990s. What the German criminal law professors could not achieve at home – they only dreamed of having their proposals applied in German constitutional adjudication – was done without hesitation by the majority of Hungarian constitutional judges in the 1990s, and they annihilated a number of criminal law provisions as violations of the *ultima ratio* principle.

On this basis, I have summarised my comparative analysis as follows: two degrees can be distinguished in the constitutionalisation of the various branches of law. This can happen to a lesser extent if it is only a question of constitutional guarantees, but it is also possible to a greater extent, if the constitutionalisation can potentially fundamentally rewrite the entire scope of the legal norms of a traditional legal branch together with their legal dogmatics. This happens in the area of criminal law if, in addition to the constitutional guarantees of criminal law, a general formula is established as the standard for the constitutional examination, based on which all criminal facts and rules can be checked and destroyed. As such general formulae were the categories of legal interest *(Rechtsgut)* and *ultima ratio* developed by a group of criminal law jurists in Germany, as well as combinations of other categories in Canada. In the area of private law, the recognition or refusal of the horizontal influence of fundamental rights between private parties is the turning point that determines the degree of constitutionalisation in a particular country and thus the degree of doubling of the legal system.

As I continued my research in the issue, I became aware that because of the proliferation of constitutional adjudication over the past few decades, the number of existing constitutional courts or supreme courts with constitutional jurisdiction has increased from three (in the late 1970s) to more than 100. Here the memory of Savigny came to my mind, who fought against the French-based written legislation at the beginning of the 19th century, and although he pointed out real problems, in retrospect it can be said that he unsuccessfully sought to prevent the rise of a new evolutionary legal level. Given the unstoppable spread of constitutionalisation over the past 40 years – well beyond Kelsen's modest notion, constitutional adjudication as a guardian of the frameworks – I have now come to the conclusion that this duplication may be still another level of law, and I have been fighting against this in vain, using the formula of activist constitutional adjudication against it. This undoubtedly destroys democracy to a certain extent, and also destroys the dogmatic conceptual order of traditional branches of law, but it may be a 'productive destruction' in the name of a new and higher function or more functions of law that was not previously considered. So far, I have focused on the specific reasons why the supremacy of democratic legislation in some countries has been replaced by constitutional courts and other supreme judges, and these have been rather prosaic political and power reasons, as Ran Hirschl wrote in his 2004 book *Toward Juristocracy*. Indeed, it is completely independent of the concrete causes of a newly created institution whether it will survive or disappear afterwards. According to the evolutionist functionalist theory of history, what is crucial in this respect is whether or not a permanent function or functions can be performed by such a new institution. So the question is whether such a permanent function could be demonstrated in relation to constitutional adjudication that is becoming more widespread in the world.

Since I am only at the beginning of my analysis in this area, I have only included two functions in the preface to my volume here that could mean this. I repeat: 'In my opinion, a possible permanent function is that conscious legislative activity in the form of political legislation and the subordinate ministerial regulations can only take into account the rights and obligations of individuals from an instrumental point of view. In contrast, due to its focus on individual rights and obligations in the course of its case-specific work – at least in relation to the review of the constitutionality of court decisions and the legal provisions they apply – constitutional adjudication can correct the lower legal levels by referring to the new legal level of the

rights of individuals. In this way, the emerging new legal level can enrich the evolutionary additions of the previous legal levels, just as conscious legislation enriched earlier, and legal dogmatics could improve the legal system too with the introduction of a strict logical order. Or like the deliberate legislation above the judiciary has gone further by enriching the legal system with draft laws drawn up by the ministry's expert apparatus.'

So that would be a function, but another function also appeared for me, I quote: 'The analysis of the widespread application of the new legal level of constitutional adjudication above the legislation around the world can also find its lasting function in the fact that in this way democracy based on millions of voters ultimately becomes institutionally linked to the law corrections of the elite and they coexist. In this way, according to Rousseau's idea, what the French revolutionaries of the Enlightenment have fought for in the form of popular representation, can coexist with the power realities of the elites. From a pessimistic point of view, this is a limitation of democracy – as has often been described against constitutional adjudication – but from an optimistic point of view this may be the only way to maintain mass democracy, at least in this form, despite the unbridled dominance of the elite.'

It is up to everyone to decide whether the functions highlighted here are worthy enough for the consequences of constitutionalisation, the undermining of democracy and traditional dogmatics, to be viewed as 'productive destruction' and to support them. Or you can search for other legitimate functions. In any case, after almost half a century, I see little chance of a reversal of the trend and a constitutional adjudication that simply keeps the traditional legal system within the frameworks of guarantees, as Kelsen dreamed of.

The specification of these functions is still largely hypothetical and must be proven by analyses and studies of others. For the second, I have already found a full analysis by Robert Bork that almost did this justification of the hypothesis. I quote from him: 'A judge inserting new principles into the Constitution tells us their origin only in a rhetorical, never an analytical, style. There is, however, strong reason to suspect that the judge absorbs those values he writes into law from the social class or elite which he identifies. It is a commonplace that moral views vary both regionally within the United States and between socio-economic classes. It is similarly a commonplace that the morality of certain elites may count for more in the operation of government than that morality which might command the allegiance of

a majority of the people. In no part of government is this more true than in the courts. An elite moral or political view may never be able to win an election or command the votes of a majority of legislature, but it may nonetheless influence judges and gain the force of law in that way. That is the reason judicial activism is extremely popular with certain elites and why they encourage judges to think it the highest aspect of their calling. Legislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment.'[230]

At the end of my summary, I would like to briefly address the anomaly that arose in the horizontal division of traditional law, which came about due to constitutional law and the doubled legal system. In the continental European legal systems, the division of law has existed for more than 150 years and it also divided the legal profession in narrower legal branches as private law, criminal law, procedural law and so on. A further division is the separation of the judiciary, the prosecution, the bar, the public administrative jurists and the university jurists. This second separation does not affect the fact that after graduation from university, every continental European jurist is forced to specialise in a branch of law in order to advance his career. The judges of the Supreme Courts, the law professors, the members of the prosecutors' elite and the lawyers' elite are all specialised jurists who have only nostalgic memories of other branches of the legal system that they once learned as a law student, but have not used it for decades. In contrast, the judiciary in the United States has retained a generalist legal competence, and because they are largely university jurists, they train the next generations of jurists with a comprehensive view of law. This comprehensive legal perspective has gradually disappeared on the European continent, which makes it difficult for specialised jurists here to take on the task of generalist constitutional adjudication originating from America.

In my opinion, constitutional law, which is promoted by generalist constitutional adjudication and which causes the doubling of the legal system, requires the institutionalisation of a generalised branch of law 'lying above' the horizontal division of traditional branches of law and at least one major subject in law studies should be devoted to it, under the name 'constitutional law'. It follows that the designation 'constitutional law' proper *(Verfassungsrecht)*, which has been identified with the old branch of state law *(Staatsrecht)* in recent decades, must be rejected as an inappropriate name.

[230] Bork, *The Tempting of America,* 17.

This misidentification led to the formation of constitutional law departments dealing with constitutional private law, constitutional criminal law and international constitutional law, but the material of the former branch of state law *(Staatsrecht)* was handed over to political scientists. However, they have little legal knowledge to gain a deeper understanding of the relations. In other words, my suggestion in terms of branches of law and legal education is that *state law* should regain its material and name, and a 'constitutional law' as a new generalist branch of law should include today's various constitutional fields, such as constitutional criminal law and so on. It is true that the consolidation of different constitutional fields of law at a higher level could simultaneously lead to new rivalries. But since they also exist today, hidden and unmanageable, this open institutionalisation over the traditional branches of law might be more appropriate from this point of view.

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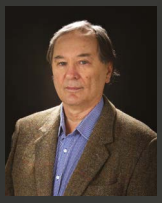
The chapters of the book analyze the changes in law and state observed in recent decades, duplicating on the one hand the democratic formation of the will of the state with the formation of law based on the constitutional court and other higher courts. This has also happened in most European countries and other continents, where there is a wide range of constitutional adjudication. In this process, in addition to the traditional areas of law (private law, criminal law, etc.), separate research has been established for the analysis of private constitutional law, constitutional criminal law, and constitutional labor law. In the context of these changes, a series of books and studies have been published in recent years in many countries under the name of constitutional private law, constitutional criminal law, etc. to explore dual system of law. This study aims to provide a general theoretical framework for these new trends.



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During the parliamentary cycle between 1998 and 2002 he was elected Member of Parliament, and he acted as the chairman of the Parliamentary Committee of Constitutional and Justice Matters.

His main works are *Trilogy on Social Criticism* (Századvég, 2004–2006), *Medieval and Modern Jurisprudence* (Dialóg Campus, 2008), *Authentic Theory of Law* (Dialóg Campus, 2010), *Speculations on Moral Theory* (Kairosz, 2010), *The Last Days of Europe. The Consequences of the Demographic Collapse* (Kairosz, 2011), *The Juristocratic State* (Dialóg Campus, 2017).