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The gradual duplication of the legal system through constitutional adjudication

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Abstract

In recent years, the reorganization and completion of the democratic mechanisms of governance of society by the juristocracy has been emphasized by several analyzes. As a consequence, this caused a deep reorganization of law too and it is theoretically not sufficient to grasp the constitutional adjudication and constitutional rights as a simple complement of law. In this study, it is argued that the duplication of the whole legal system can be outlined.

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Thirty years ago at the end of the '80s, I examined the structural complexity of law based on Niklas Luhmann's study on legal dogmatics (Luhmann, 1974) and in addition, by the debate on the role of case law of supreme courts in the legal system between Karl Larenz and Josef Esser I was encouraged to go beyond the established concept of law that identified it with the legal texts and try to develop a multi-layered concept of law. [1] 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 since by the emergence of constitutional adjudiction the functioning of the legal system has already fundamentally changed and expanded until the late 1980s. Since then, there are more and more constitutional courts around the world, so I have taken the constitutional basic rights and constitutional principles as a new layer of law beyond the inspiring precursor of the formulation of a multilayered legal system and referred to it in my later studies as a layer of fundamental rights. [2]

[1] See the books of Esser and Larenz, Josef Esser: Vorverständnis und Methodenwahl in der Rechtsfindung, Athenäum, Frankfurt am Main; Karl Larenz: Methodenlehre der Rechtswissenschaft. Berlin/New York: Duncker & Humblott; and my study, Béla Pokol: Law as a System of Professional Institutions. Rechtstheorie 1990 Heft 3. S. 335-351.; and Béla Pokol: Theoretische Soziologie und Rechtstheorie. Kritik und Korrigierung der Theorie von Niklas Luhmann. Schenk Verlag. Passau. 2013.

[2] See Béla Pokol: The Concept of law: The Multi-Layered Legal System. Rejtjel Edition Budapest 2001.

In recent years, the reorganization and completion of the democratic mechanisms of governance of society by the juristocracy has been emphasized by several analyzes. [3] This is particularly true in Western democracies, but also in many parts of the world increasingly important and it makes it necessary for me to further develop my multi-layered legal concept. For, as I reflect on the consequences of constitutional adjudication, I find that my simple inclusion of the newly emerging constitutional rights in the legal system as a fourth layer of law alongside the text, dogmatics, and case law, which I considered sufficient at the beginning of the 1990s can be estimated too restrictive. This is a much deeper reorganization of the law and political will-building of the state, and so it is theoretically not sufficient to grasp the constitutional adjudication and constitutional rights as a simple complement of law. In the following, I would like to begin this rethinking in this study.

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 possible only with a high degree of consistency. This is ensured by the coheren intellectual system of legal norms. With ever-denser social relationships and ever-increasing contacts between millions of people and organizations, the systematic nature of legal norms is being allowed only by increasingly complex legal systems, contrary to the demands of forever unchanged relations of small communities living in enclosed villages at their earlier stage of development. Thus, in early medieval Europe, giving law was exclusively the task of judges, who for a long time were not qualified lawyers, and their decisions determined the law of the country for centuries as a customary law. Later, however, with the acceleration of the late 14th century, deliberate legislation began to break away from the judiciary, first through the creation of legal codes based on legal habits, later through the creation of conscious new codes, and in parallel with the development of more precise legal terms. Since the Enlightenment, the legal system has consisted of 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 function more and more as the product of three layers of law in the modern societies of recent centuries: 1) the text produced in the legislative procedure, 2) the legal dogmatics, which clarifies the meaning of the concepts, categories and provisions in the legal text and 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, and also the parliamentary laws, which became more important in the late nineteenth century, used these casuistic regulatory techniques and therefore did not recognize more abstract norms and concepts. Here in England, such abstract legal doctrines and terms as on the European continent could not be observed (see Dawson 1968). Here, the law is essentially a combination of case-specific precedents and the detailed legal provisions that are similarly tailored to specific situations - as two halves of a single legal layer of meaning.

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

Although it should be noted that there are still a number of legal concepts in the English legal system, this is not as widespread 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 more the role of legal dogmatics - and thus abstract code law – is characteristic in a legal system, the more the abstract rules of law with case law be supplemented. The clearest example of this is German law, but the legal systems developed under its influence, including the Hungarian one, are good examples of the legal system being divided into three layers of law. In this solution, the true meaning of legal norms slips from the legislator to the jurisprudential circles, and to the abstract law books they have created, the Members of Parliament can only contribute with little self-determination. On the other hand, the judges in the continental legal systems receive open standards and thus have a great deal of freedom in formulating the 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 the 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 confront 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 based on abstract legal norms can often offer only in each situation a vague orientation. 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.

In addition to these traditional legal strata, over the past half-century 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 fundamental principles of the Constitution, and they play a major role only where, in addition to the written constitution, the constitutional adjudication was also developed. Initially, this was only the case in the United States in the early 19th century, and since the 1950s it has occurred in several Western European countries. But more recently even in most new democracies of Central and Eeastern Europe, the constitutional adjudication was introduced. In the same way, the constitutional courts have been established on the other continents since then. [4]

The fundamental rights of the constitution originally emerged as human rights in the ideological-political struggle against feudalism with various political and humanitarian needs in the 18th century. In the 19th and 20th centuries, they were included in the new state constitutions. But when the constitutional judges began deciding the constitutional disputes on the basis of the fundamental rights and fundamental principles of the Constitution, it became clear that fundamental rights can easily be considered an abstract requirement for governmental decisions, but for the 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 and the other's preference. However, if other judges decide and prioritize another fundamental right, they will come to the opposite

[4] 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: The Global Export of the European Juristocracy, Zeitschrift für Rechtstheorie (Budapest) 2019/1, pp. 78-108.)

conclusion. Therefore, the 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 can not function under dictatorial politics. Thus, in addition to the majority in the legislature, large social groups engaged in democratic political struggle also have the opportunity to gain supremacy in the Supreme Courts and the Constitutional Court as an alternative to the upper hand. These developments started early, and in the analysis they were singled out as legalization of politics and as politicization of law.

2. Democracy pushed into the background

The debates about the juridification of politics and democracy began in the Weimar period in Germany in the 1920s, when the Constitutional Court in neighboring Austria began with the review of parliamentary decisions, but also in Germany, the Federal Supreme Court began to expand the law to the labor disputes in trade union struggles too. [5] From the early 1950s, the constitutional adjudication began in Germany and Italy, and especially in Germany it restricted democratic decision-making and, at the same time, the United States, as the birthplace of constitutional adjudication, also began a radical shift towards policy-making by the highest judge. As a result, the foundations of political decision-making in many respects shifted from the democratically elected institutions to the courts, and in courtrooms it has begun to decide the polities' struggles as constitutional disputes. [6] This expanded constitutional adjudication spread in European countries at the end of the 1970s, and where the dictatorships were wiped out, first in Spain, Portugal, and somewhat later in the Latin American countries in the 1980s, the enormously expanded constitutional adjudication was enacted. After the collapse of the Soviet empire at the beginning of the nineties it was created constitutional courts 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 world-wide dominating American political elite either as occupying power, as in Germany and Italie or as hegemoniale 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 with the self-determination to determine their own fate, but instead a normative framework was set up, which later was governed by the global world power.

But even in countries where constitutional control over legislation - and thus a juridification over democratic political decision-making - did not exist at all, a power slip began in that direction. The analysis of the Canadian political scientist Ran Hirschl focused on

[5] In his study of 1928, the German law professor Otto Kircheimer even considered the then legal regulation of employment as an unauthorized 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: uő (Hrsg.): Verrechtlichung. Königstein. 1980. 15-16. p.

[6] The advocates of this process refer to him as "cause lawyering", which sympathetically emphasizes the morally right aspects, but in this way it hides the fact that this process bypasses democratic political decision-making. See Stuart Scheingold: The Struggle to Politicize Legal Practice: A Case Study of Left Activist Lawyering in Seattle. In: Sarat, Austin/S. Scheingold (ed.): Cause Lawyering. Political Commitments and Professional Responsibilities. New York. Oxford University Press. 1998, 118-150 p.

the analysis of these processes. [7] He examined constitutional reforms in four countries, which severely curtailed unrestricted parliamentary sovereignty through the introduction of constitutional adjudication, and 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, and since these four countries had previously been governed by British legal traditions, no separate constitutional court was established in three of these countries - only in South Africa - but they followed the model of the United States and this competence was given to the highest court.

Hirschl's main thesis was that in all four states at the time of the transfer of a considerable part of the parliamentary power to the highest court, a power situation had arisen when a parliamentary shift in power had already begun from the long-standing dominant political forces and it was only a matter of time to lose the parliamentary elections. Against this background, if they were confident that the majority of the elite of the Supreme Court and the university law professors around them reaffirmed their cultural and social values, a constitutional reform was caried out to give most of power to the highest judges before they were finally defeated by the incoming rival parliamentary forces. This was the case when in solemn declarations and eloquent speeches on constitutional changes in these countries was voted on to stop the priority of the Parliament and bring about its submission to the Supreme Judicial Forum.

A clear example of this was the establishment in 1992 of the Israeli Supreme Judge's control over the decisions of the Israeli parliament, the Knesset. In Israel, a largely secular Ashkenazi cultural and political elite dominated from the start every aspect, and although spoke in the early years of the Israeli public faint voices from the ranks of law professors for a division of power on the American model and constitutionalism, but by MAPAI - the predecessor of today's Labor Party - was swept with leadership from David Ben Gurion. This attitude continued into the late 1980s, but the slow decline of their dominant position began when the Sephardic Jews of lower social status were organized as a party, and both the Eastern and the Sephardic Orthodox (mostly ultra-Orthodox - haredi - religious beliefs) entered the struggles of political power. Before the power of this dominant elite in the Israeli parliament was finally disturbed, the constitutional reform in the Knesset was voted on and the Supreme Judicial Forum was given the competence to decide on the constitutionality of the laws. [8] Since then, these supreme court rulings are regularly in line with the values of the former dominant elite, and in this way the old elite has been able to retain its dominance despite the slipping of the majority in the legislature involving religious parties.

Similar power shifts were behind the 1982 constitutional reforms in Canada, of which Canada's earlier system of public law, firmly based on unrestricted parliamentary sovereignty, was replaced by the US model of judicial control. Here, the political power at the federal level by the earlier dominance of the political elite of English culture was shattered, and on the one hand, the increasing multinational immigration undermine the numerical basis of this elite, on

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[7] See „The constitutionalization of rights and the corresponding establishment of judicial review are widely received 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 sipmply as a result of societies' or politicians' devotion to a „thick" notion of democracy and their uncritical celebration of human rights." Hirschl, 2. p.

[8] See „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 as efficient way to overcome the growing popular backlash against its ideologcal hegemony and perhaps more importatnt, an effctive short-term means of avoiding the potentially negative political consequences of its steadily declining controll over the majoritarian decision -making arena." Hirschl, 51. p.

the other hand, their dominance was by the growing power of French separatists of Quebec threatened. Against this backdrop, support for constitutional reform and constitutional adjudication, which has been urgently needed for decades, has increased among the dominant parties in parliament, and a significant part of Parliament's supremacy has been transferred to the Supreme Court of Canada. The strength of the judicial review of the legislative majority has since even surpassed the strength of the Supreme Court of the United States here and in Canada have the highest judges even the competence for abstract judicial review of legislative power which was the case only so far 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 of the higher birth rate among Maori population and the masses of other Asian and Oceanic immigrants was undermined. This development brushed aside the objections to create supreme judicial control over the legislation. While the Prime Minister Geoffrey Palmer earlier when a young university lawyer, who returned from his US study tour, yet warned in 1968 before a constitutional judicial review on the American model, he was pushed into the 1980s in the face of changing parliamentary balance of power to create these constitutional amendments. [9] The continued dominance of the English elite in the judiciary, despite the more fragmented political power, has since guaranteed the unchanged power relations in New Zealand. Apart from the details of the change of power in South Africa until the mid-nineties, the same thing could be said, and the political elite of the European white minority created control of the power of parliament through the newly created constitutional court. [10]

But it is possible to go beyond the specific situations described by Hirschl and show that the transition from democracy to juristocracy was also made by the United States in the reconstruction of defeated Germany and Italy after the Second World War, especially in the case of German, which was considered dangerous by the American occupation 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, the American constitutional jurisdiction at home was only a quiet control of the democratically elected Congress, and the highest judges only occasionally intervened in the formulation of substantive content decisions. Similarly, the idea of a constitutional court, 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 US occupation forces, has given the constitutional judges the most complete right to annul the laws. This annulment could even be based on such broad and more extensible decision-making formulas, which had practically no nomatives content and in this way the democratic decision-making could be checked by the constitutional judges completely freely.

The limited democracy of the Germans - which has since been included in the official narratives as a true and elevated "democracy of the rule of law" - served as a model for the global dominant world power, the United States, of which global events can be most often influenced. Following the overthrow of dictatorships in the late 1970s, this model was

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[9] See „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 „". Idézi Hirschl i. m. 87. p. „But two decades later, when the white bourgeoisie's controll over New Zeland's major policy-making arenas was challenged, that same speaker – now Sir Geoffrey Palmer - in his capacity as Minister of Justice in the term Lange Labour government (1984-89) and later Prime Minister (1989-1990) initiated and championed the empowerment of the New Zeland's judiciary through the enactment of the 1990 New Zeland Bill of Rights Act." Hirschl, 51. p.

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

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, there is an activist constitutional style in Spain, even more so than in Germany. An example of this is that Spanish constitutional judges are even prepared to judge against a literal provision of the constitution, which can not be observed in the case of the German constitutional judges. [11] The radicalization of activist constitutional adjudication in the case of Spain was then a good tool for the US to build the similar constitutional model in Latin American Hispanic countries. The means for the US to do so were their subsidies and aid, which were tied to creating this model. In this way, a large part of Latin America was made the most important legal basis of juristocracy. The enormous powers of the constitutional courts and of the highest courts, which imitate their style of decision making, make it possible to achieve the determination of fundamental sociopolitical decisions in these countries largely only with the help of the juristocracy.

In the dissemination and radicalization of the constitutional adjudication, the process analyzed by Hirschl can also be integrated in the 1980s and 1990s, which, of course, differed from the spread of juristocracy on a global level by the fact that this strategy in the countries analyzed by him was shrinking from the parliamentary parties and it were voluntarily introduced in order to retain their political power even in minority in the parliamentary arena. This strategy was continued and after the dissolution of the Soviet empire in the early 1990s, it was used to provide democracy as well as the juristocracy in the newly created countries. At that time, the South American experience of the German-Spanish model of constitutional adjudication was already available, and the Americans, who controlled the transition and regime change here fairly directly, did not recommend the modest model of the Austrian constitutional court for the newly independent Central European states and the successor states of the dissolved Soviet Union, but the German-Spanish model with the broadest control over parliamentary democracy. If, after all, a constitutional court with limited powers, such as in Poland, was set up, after a few years this model was changed to a model of the barely restricted constitutional court, which was described as a "true democracy" in the global narrative. These constitutional courts, with their vast powers, are very unlike the picture Hans Kelsen had once thought of as a thin framework on democracy, and rather represent one of the highest powers in the state. And that power of the strong constitutional courts finds its rationality for the globally dominant American power elites in the possibility, to integrate gradually the constitutions of each country into a unified global constitution, putting them in a common global footing by the American foundations, intellectual think tanks, and local legal elite that they support constitutional conceptual framework. As a result, since the late 1980s, a close-knit global constitutional oligarchy has been progressively organized over the parliaments of formally independent states. The emergence of a "juristocracy instead of democracy", which was analyzed by Hirschl, can be seen more comprehensively and then further cases of juristocracy can be uncovered.

[11] 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 concluded 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: The Decision Styles of the Constitutional Courts in Europe (in Hungarian). Journal of Legal Theory (Budapest) 2015/3.

3. Doubling 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 operated by the elections of millions of citizens, with its multiparty system and the legislation of the parliamentary majority, remains, but by the system of constitutional court decisions, which is based on a few dozen abstract rules and principles of the constitution brought about a second system of governance of society. In this second system, the decisions for social governance are not taken as the result of open political decision-making but are presented neutrally as simple results of judicial interpretation and as a simple derivation from the rules of the constitution. In fact, these decisions are completely open to their results and, therefore, in the countries of comprehensive Western civilization, several intertwined legal groups have been created, trying to create a common vocabulary for constitutional interpretation. This common line of interpretation favors certain possible interpretations and prohibits others. This includes setting up a network of constitutional law teachers, international lawyers and legal theorists from different countries, organized by the global foundation networks. The permanent participants in these networks regularly consult each other at conferences and then summarize the proposed constitutional interpretations and formulas of the "profession" in English-language books. This includes setting up various international advisory bodies, which will then provide assistance in each country for the "professionally-recommended" interpretations of global constitutional networks and, if they find a problem, may impose various economic sanctions, such as withdrawal of subsidy funds or, in the case of EU countries, with restraint from 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 narrowest scrutiny of the public law of the Member States (especially the Eastern Europeans).

On the one hand, this dual political system intertwines the democratic rule of the social elites that dominate the country and, on the other hand, the power aspirations of the global ruling circles (mostly groups of global money capital). 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 transfers to the duplication of the legal system. This duplication could not properly be deduced from the formulation of constitutional law as a simple fourth layer of law which was made earlier by me and that’s was the reason for me to rethink the structure of law again. The constitutional text, which is at the center of the constitution-based law, has extensive constitutional court rulings, 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 systematized by a constitutional dogmatic layer. In other words, in addition to the three traditional layers of legal law, constitutional law also required the construction of a three-layerd structure. In this way, the constitution proclaimed on a solemn occasion not only remains a celebrated document, but on the basis of constitutional adjudication it becomes a living part of the legal system. Obviously, the constitutional adjudicaiton is therefore doubling the political system and, in addition to democracy, is building up mechanisms of power for the judiciary, and then the legal system is also driving towards a doubling.

However, if the analyst gets it in his mind that in Hungary the constitutional adjudication was introduced in 1990 in such a way by controlling only the legislation, but not the judges, and only by the new Constitution, which came into force in 2012, was created the possibility of constitutional review of judgments of ordinary courts, then the possibility arises of the analytical resolution of the duplicated nature of politics and law. Even political power struggles are hardly doubled by the introduction of the constitutional adjudicaiton, as the Polish Constitutional Court showed at the beginning of the 90s, when the unconstitutional law could be reaffirmed by the Polish Parliament, the Sejm. Essentially, therefore, the Constitutional Court's activities could only be understood as non-binding legal advice, but the Constitutional Court could not be established as a second political center in this way. On the other hand, a constitutional adjudication was reached in Hungary between 1990 and 2011, which, while not reviewed ordinary judicial rulings, exercised the most extensive constitutional control over the legislation and the government. As a result, while there has been no tendency in Hungary for 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, the power position between the parliamentary majority and the left-wing socialist opposition bloc crystallized behind constitutional judges was characteristic. And inspite of its minority position, the latter could triumph over the country's policy by destroying the most important laws of the parliamentarys 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, the 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 based on it.

4. Differences in the three-layered structure between constitutional and legislative law

The question is, 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 of all countries in this area is that the dominance and normative content of the text layer are incomparably lower in constitutional law than in the traditional law produced by legislation. While in the case of constitutional law, there are hardly a dozen of provisions, declarations, and principles that guide the decisions of constitutional adjudication, there are hundreds of measures in the traditional legislative law, and even thousands of subordinate ordinances which give a very precise definition of 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 weighting is much more based on the textual layer.

2.The next difference is that while legal dogmatics in the traditional three-layered structure of legal law has dominance over the supreme court judgments, and only the centuries-old formation of this dogmatic layer has allowed the creation of law books even in the nineteenth century, in the case of constitutional law, it is only a modest conceptual dogmatics. In addition, this modest constitutional dogmatics was shaped under strong political point of views due to the high degree of normative openness in constitutional declarations and constitutional principles. As a result, it is not possible in this area to adopt a politically neutral conceptual apparatus, as is the case with traditional legal dogmatics. Therefore, only in the individual countries there is a constitutional dogmatics that can be isolated in the justification of the decisions of the constitutional judges and the local jurisprudential writings, but no comprehensive European or even more comprehensive professional consensus in this respect. 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 organized by global powers to limit the constituent power of sovereign states 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 impart global rule and can not be observed as a neutral normative order. Within the European countries, it is therefore welcomed by the part of the legal and political elite that is more closely interwoven with the global powers, 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 has consistently ensured that special rules tailored to the situation prevail over the more general rules and that the hierarchy always respects the specific intentions of the legislature.[12] However, with the emergence of constitutional adjudication, all constitutional law itself has reversed this principle in recent decades, and the constitutional provisions with lex generalis nature are always enforced before more specific rules of law. However, this reversal and the new priority of lex generalis does not stop at the border of subordinate legislative law, but continues in the field of constitutional law itself, and the more specific constitutional rules have no priority over the general declarations of the constitution, which have very few normative content. In this way, the 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 between the Constitutional Courts of the world in this regard, but my previous empirical investigation showed that, for example, the situation was in Lithuania similar to Hungary, and the judges of the constitutional court base their decisions on the general formulas of the Constitution, rather

[12] The solution of the dilemma between lex generalis and lex specialis was elaborated by Baldus de Ubaldus 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 Jurisitic Rules to Legal Maxims. Edinburg: at University Press. 1966. 154. p

than on more specific constitutional rules. [13] In this way, the detailed will of the constitutional authority is not protected. While 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 prioritize 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 are preceded by the more general constitutional principles and formulas, but they may also argue that some of the most common constitutional or constitutional principles, such as the rule of law or human dignity, are the most important. 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 politicization of these legal circles. Because the majority of constitutional law teachers are not neutral analysts, but mainly interested lawyers of NGOs or at least have a socialization by the NGOs and only later they were university professor. Therefore, the majority of constitutional judges in a given country can always decide without being constrained by the underlying professional guidance, whether the detailed constitutional rules they interpret take precedence over purely declarative general constitutional principles, or vice versa, and in this way the more specific constitutional law provision tailored to the case, in fact be overruled.

4. There is another significant difference in the case of the constitutional law in relation to the creation of case law as opposed to the traditional law. This means that the case law of the 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 US in the 1980s, when he stated that the highest rule in the US Constitution was the "Five Rule ". This means that the stipulated provision of the constitution is always the one pronounced by the votes of five judges of the nine-headed SCOTUS. Like the constitutional judges, the judges of SCOTUS can not 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, the case law in which the constitutional text is concretized have a far greater weight than in the structure of the traditional law. So 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 will be addressed not resolved by constitutional law. First and foremost, an unsolved problem is the change in the case law of constitutional adjudication, which, as we have seen, is the most important layer of law here. Namely, the later applicability of the normative arguments, which were once set out in decisions, in particular in the explanatory statement, remains in similar cases, even though in the meantime a later majority of the Constitutional Court put forward a normative argument in the polar opposite 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

[13] In analyzing the decision-making style of the European Constitutional Courts, in addition to domestic practice in Hungary, I have also found a tendency, in the case of the Lithuanian constitutional judges, very often to 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 Béla Pokol: Decision Styles of the Constitutional Courts in Europe (in Hungarian) Journal of Legal Theory (Budapest) 2015/3.)

to be taken, so that the solution can only be achieved if the incentive threshold of the comprehensive legal and political elites is already sufficiently disturbed to solve this problem by amending the Constitutional Court Act in Parliament.

This question has not yet been resolved, because even in the case of a constitutional amendment or a completely new constitution, it has disputed whether the case law of the Constitutional Court based on the earlier constitutional text is applicable or not applicable. Due to the indecision of this issue, after the entry into force of the constitutional amendment or the new constitution, there is 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. But not only this question 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? [14] 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, in their studies, some of Hungarian researchers and scientists in constitutional law have again pointed out that constitutional courts can review the constitutionality of constitutional amendments and even declare them unconstitutional. This control could be exacerbated by the fact that some domestic researchers in Hungary also argue 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 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, once established, arguments in constitutional decisions can constantly return, even though another constitutional majority later stated otherwise. Thus, arguments that have shifted back and forth for many years all remain valid as the content of living case law and they can be used in turn by constitutional court decisions. Of course, this is an anomaly, but since the university lawyers of constitutionl law are mostly politicized lawyers or former NGO lawyers, they only protest if a constitutional ruling does not follow their political line and values, but if they do, they even celebrate the Constitutional Court's ruling most against the constitutional text.

6. The next difference to traditional law is that, in the area of new constitutional law, specialization in various fields of law has not been resolved, even though the material of the normative arguments of the decisions of the constitutional court comprises tens of thousands of pages. It should also be noted that it is not self-evident that such a comprehensive constitutional law is created, which overlaps with the whole law of traditional legal areas. The human rights that were transformed into constitutional rights at the end of the eighteenth century, were originally just the guarantees for the citizens. However, during the years of constitutional adjudication, a lot of decisions were made that went beyond these guarantee points and increasingly examined the entire traditonal 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 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 were gradually included in the constitutional review. Similarly, decisions on constitutional property rights guarantees began to controll progressively the full ownership and, moreover, most parts

[14] After the new Constitution, which came into force in 2012, these struggles led Hungary to declare that the constitutional legislator, in its 4th Amendment to the Constitution, would overturn previous constitutional court decisions. But the majority of constitutional judges finally declared in decision no. 13/2013 the applicability of these old precedents.

of private law. Some private law theorists already speak of a separate constitutional private law, as well as some criminal law teachers have extended the criminal guarantees in the text of the Constitution in order to design a constitutional criminal law. And this process goes on to the constitutional financial law, labor law, criminal and civil procedural law, family law and all these constitutional legal branches are accompanied by thousands of pages of decision-making material of the domestic constitutional courts, and in addition also by the decisions of the German constitutional judges or the Supreme Court of the United States.

On the one hand, these extensions are fueled 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 a majority of constitutional judges for his or her ambitions, it will be mutually extended to other branches of the traditional law. These ambitions are gradually driving constitutional case law to duplicate the traditional areas of law. However, at least as strong is the force of legal opposition from certain ordinary courts and law professors to the current government policy of the parliamentary majority and these are then voiced in constitutional complaints and lawsuits, and they urge the constitutional judges to anull certain criminal, labor, private law provisions made by government policy, and replace them with 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, but in the area of this doubling there has been no division of jurisdictions and specialization of constitutional judges and their preparatory staff. The solution of the German constitutional judges is to a certain extent a notable exception, since the system was created in Germany, that the new constitutional judge is included always as judge for the preparation of future draft decisions in certain legal branches (inherited the areas of his predecessor) and thus, a certain specialization in a certain field of law is achieved. Since the newly elected constitutional judge for a while inherits the trained staff of his or her specialized predecessor, so that they can also be specialized in the fields he is in charge of. In this way, specialization can also be reproduced to some extent in the new constitutional law. 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 able to see through all partially specialized areas of law, if he wants to remain authentic. However, this is just an option and, as an alternative, it is to hand over most of the content-related decision-making to its experienced employees. To summarize, the difference in the division of jurisdictions into ordinary law and constitutional law has had 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 yourself the hard work of becoming a true constitutional judge.

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

More and more countries around the world have in recent decades created the constitutional adjudication by either establishing a separate constitutional court or rebuilding the Supreme Court based on US pattern. [15] Constitutional adjudication under the US model leads, in the

[15] While there were only three functioning constitutional courts in Europe at the end of the 1970s - German, Italian and Austrian - 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 Europe the constitutional adjudication was set up.

first place, to a doubling of the law, but as a competing political machinery for democracy, this form can not be seen. But as the events of the sixties in the United States have shown, the decade-long aspirations of such social groups, which 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 creation of a competitive political center. 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 results in thousands of constitutional complaints a year, and thus the constitutional judges have less time to control the legislation. This was recognized in Russia by the dominant political forces during the restructuring of the Russian Constitutional Court in 1992, and 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 ordinanary courts, and by this new workload, the political ambitions of the constitutional court judges was quickly erased. [16] However, it could also have played a role in Hungary in the reorganization of the constitutional court of 2012, which was previously exercised by that court's most active political role, and since then its main task has been to review the ordinary court decisions.

The next question to be clarified is that if the constitutional adjudication has already been drawn into the internal processes of applying law by reviewing the ordinary court decisions, then what components are decisive is how fast the extension of the doubling of traditional legal layers (textual layer, dogmatics, case law) 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 by reviewing the judgments of ordinary courts. However, the extent to which this case law takes over the weight in the reasons for the decisions of the constitutional text is very different for the individual constitutional courts. In analyzing the decision-making style of the European constitutional courts, I found in an earlier study that the widespread suppression of the constitutional text in favor of previous judgments of the constitutional court can not be observed only in Hungary, but this practice can also be observed in case of the Spanish and Lithuanian constitutional courts. On the other hand, this practice could not be observed in the case of the Slovene, Croatian and Romanian constitutional courts, and here the constitutional judges based their arguments on the constitutional text. In the case of the Poles and the Czechs, this is somewhat more the case-law, but does not reach the strength that can be seen in Hungary, Spain or Lithuania (Pokol 2015: 127-129). In Hungary, this style was created by the constitutional judges of the first constitutional court cycle of the constitutional court, which began in 1990, and in my experience it is almost impossible to change it and put the weight back on the constitutional text once it is established. 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, etc. - 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 the own constitutional arguments over the constitution text, safe connections for the creation of a constitutional

[16] 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/Alexei Trochev: Russia's War between Courts: The Struggle over the jurisdictional Boundaries between the Constitutional Court and Regular Courts. The American Comparative Law. (Vol. 55.) 2007. 381–352. p.

dogmatics over the traditional dogmatics can be uncovered. 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 the constitutional dogmatics will have less weight in the legal system of the respective country and the doubling force of the entire constitutional law can only gain less weight than the three-layer structure of the 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.

References

Burnham, William/Alexei Trochev: Russia's War between Courts.: The Struggle over the jurisdictional Boundaries between the Constitutional Court and Regular Courts. The American Comparative Law. (Vol. 55.) 2007. 381-352. p.

Cservák Csaba (2015): A jurisztokrácia aggálya és az ellentmondások feloldása. Jogelméleti Szemle 2015/4. sz. 55-61. p.

Cservák Csaba: (2018): Az alapjogokat érvényesítő intézményrendszer. Licium - Art Kiadó. Debrecen, 2018.

Dawson, John P. (1968): The Oracles of the Law. Ann Arbor, Universty of Michigan Law School. 1968.

Esser, J. (1956): Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Tübingen: Mohr.

Esser, Josef (1970): Vorverständnis und Methodenwahl in der Rechtsfindung, Athenäum, Frankfurt,

Hirschl, Ran: Towards Juristocracy. The Origins and Consequences of the New Constitutionalism. Harvard University Press. Boston. 2004,

Larenz, K. (1960): Methodenlehre der Rechtswissenschaft. Berlin/New York: Duncker & Humblott.

Luhmann, Niklas (1974): Rechtssystem und Rechtsdogmatik (Kohlhammer Verlag,Stuttgart, 1974)

Pokol Béla (1990): Ajog rétegei. Jogtudományi Közlöny 1990/4. sz, 201-209.p.

Pokol Béla (2001): A jog elmélete. Rejtjel Kiadó 2001.

Pokol Béla (2005): Jogelmélet. Társadalomtudományi trilógia II. kötet. Századvég Kiadó. 2005.

Pokol Béla(2015): Alkotmánybírósági döntési stílusok Európában. Jogelméleti Szemle 2015/3. sz. 107-129. p.

Pokol Béla (2017): A jurisztokratikus állam. Dialóg Campus Kiadó. Budapest 2017.

Pokol Béla (2019): Az európai jurisztokrácia globális exportja. Jogelméleti Szemle 2019/1. sz. 78-108 p.

Scheingold Stuart: The Struggle to Politicize Legal Practice: A Case Study of Left Activist Lawyering in Seattle. In: Sarat, Austin/S. Scheingold (ed.): Cause Lawyering. Political Commitments and Professional Responsibilities. New York. Oxford University Press.

1998, 118-150 p.
Stein, Peter (1966): Regulae Iuris. From Juristic Rules to Legal Maxims. Edinburgh: at University Press. 1966.
Varga Zs. András: Eszményből bálvány? A joguralom dogmatikája. Századvég Kiadó. Budapest. 2015.
Voigt, Rüdiger (1980): Verrechtlichung. In: uő (szerk.): Verrechtlichung. Königstein. 1980.
Zsugyó Virág (2017): Az alkotmányellenes alkotmánymódosítás egyes elméleti kérdései az alkotmányosság tükrében. Állam- és Jogtudomány 2017/3 99-122. p.