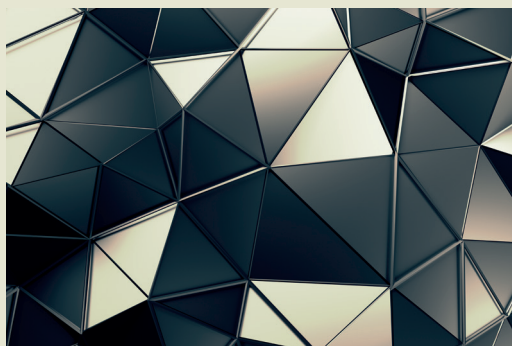


From Ideal to Idol?

The Concept of the Rule of Law



ANDRÁS ZS. VARGA

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The Concept of the Rule of Law

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Peer-reviewed by
János Erdődy
Anikó Unger

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1. Introduction: Heading Towards an Arbitrary Rule of Law?

A totalitarian state is not a good one. A state governed by the rule of law is a good one. It is little likely that anybody would seriously dispute these two short affirmations, irrespective whether the person deals with public law, social law, the science of history or just draws on everyday experience. A totalitarian state will suppress its citizens (subjects), will subordinate all its social organizations whereas a state under the rule of law will protect the liberty of its citizens and will grant considerable autonomy to accomplish their ideas – and one may continue in detailing the opposition just set. A totalitarian state or a state ruled by law; fire or ice, cold or hot, darkness or light, suppression or liberty, all stand in perfect opposition.

1.1. An arbitrary rule of law?

In vain will the author end the title with a question mark; the notion of state under the rule of law definitely needs some explanation when preceded by the word *arbitrary*. It does, since the terms constitutional state, or a state under the rule of law are attributes opposing autocracy, totalitarianism or public authority exercised arbitrarily, without limitations either in public law or political interpretation. They are meant to express accountability, legal certainty, controlled exercise of power, protection of vested rights and the right to execute and enforce contracts.¹ All this is not characteristic of a totalitarian state: moreover, a totalitarian state does not simply mean the lack of features defining a state under the rule of law; what it means is the tyrannical or arbitrary exercise of power. A totalitarian state surpasses tyranny by making its subjects vulnerable and exposed, depriving them of their liberty.² When further on we consider that terror itself is the basis necessary for sustaining limitless power characteristic

¹ GYÖRFI–JAKAB 2009, 157, 163–176, 193.

² ARENDT 1973, 470–474.

of totalitarian states,³ we should exclude the possibility of simultaneous occurrence of arbitrary and constitutional features within a state. A totalitarian state, a fascist or Bolshevik state, one led by any similar ideology cannot be a state under the rule of law, as a state under the rule of law *per definitionem* cannot be totalitarian. This disjunction does not exclude certain justice in a totalitarian state; moreover, some kind of legal norms will be referred to in a totalitarian state as well. Thus, it is not in law (application of law) itself where the difference lies between the state under the rule of law and the totalitarian state,⁴ but the institutional guaranty for the primacy of law as opposed to arbitrary exercise of power regarding legal subjects (the people, their communities, organizations, legal entities).⁵ A state under the rule of law, therefore, is inasmuch form (primacy of law as opposed to power) as content (safeguarding liberty as opposed to power). Insofar this is nothing else but a paradigm taught in courses while at the university;⁶ an axiom to highlight the apparent contradiction in the title, offering no explanation for that.

In order to provide an explanation, further distinction is needed to understand the disjunctive symmetry between the totalitarian state and the state under the rule of law: it is possible in principle, and practice also underlines that law as such (deprived from its guaranty for liberty) is formally present not only in the totalitarian state. The declaration of the principle of the rule of law does not safeguard by itself the actual limitation of power, the liberty of legal subjects or primacy of law. In other words: the rule of law can also be interpreted (such exercise of power can be established in the name of the rule of law) as a form in which legal subjects benefit from less and less liberty, and where law dedicated in principle to defend their rights and liberties will ultimately lead to their comprehensive vulnerability. In other words, an application of the principle of the rule of law can start wearing marks indicating tyranny, and, in extreme cases, marks of totalitarianism.

Now the question arises whether the rule of law bearing the marks of totalitarianism is a mere abstraction, or the totalitarian or at least arbitrary

³ Ibid. xxxiii, 473–474; see also LEHOTAY 2009, 41–62.

⁴ HALMAI 1997, 96–114.

⁵ DICEY 2013, 95–125; von MOHL 1995, 32–36.

⁶ KUKORELLI 2007, 22; PETRÉTEI 2002, 98; SÓLYOM 2001, 404; TAMÁS 2010, 244–249; PATYI – VARGA Zs. 2009, 21–26; TRÓCSÁNYI–SCHANDA 2013, 71–74; ZLINSZKY 2005, 21–23.

character is real, even more a feature currently familiar for our understanding of the rule of law. After reading the title, it might not come as a surprise that the author is convinced about being faced with the latter option. Further on, we attempt to outline and continue deliberating in further sequences of the book about our good reasons to state: the application of the principle of the rule of law as of early 21st century definitely shows arbitrary marks.

1.2. The rule of law as a constitutional regulation

When starting from the simplest, manual-style definition as above, we can say that the rule of law is nothing else but the primacy of legal norms in relation with the exercise of power; even more concisely: it is exercise of power bound to (preliminary drafted) law.⁷ The previous description of the rule of law seemingly describes a certain type of state out of the many other possible ones; specifically, the kind of state that, in case of need, will always authorize itself preliminarily to the exercise power. Despite this, as of our days, the rule of law has met a shift from a descriptive character to a normative, a prescriptive one. On the one hand, the constitution of a substantial number of countries⁸ regulates this expressly; on the other hand, international law documents expect respecting the principle of the rule of law.⁹ The rule of law as a prerequisite is also reflected in those latest written constitutions which do not simply cover the connection between law and the exercise of power, or even regulate certain (and manifold) subtleties of the exercise of power, but they expressly define themselves

⁷ GYÓRFI–JAKAB 2009, 155; BIHARI 2014, 53.

⁸ The Constitution of Austria, Art. 18 Section (1): public administration is bound by law; The German Grundgesetz, Art. 20 Section (3): the executive and the judiciary is bound by law; the Finnish Constitution Art. 2: public authority may be exercised in conformity with the law; the Greek Constitution, Art. 25, Section (81) welfare and the rule of law is guaranteed by the State; Art. 1 of the Constitution of Montenegro binds the State under the rule of law.

⁹ Decision of the UNO U.N. Doc. A/RES/60/1 (Sept. 16, 2005) 134 and Art. 2 of the TEU.

as a constitutional state or a state under the rule of law.¹⁰ Hungary is one of these countries.

As of 1 January 2012, the new Basic Law¹¹ came into force. Article B) Section (1) declares that: “Hungary shall be an independent, democratic State under the rule of law”. The content of the text has been identical in terms of relevance since the regime change (transition): Article 2 Section (1) of the interim Constitution since mid-1990 stated the same: “The Hungarian Republic is an independent, democratic state under the rule of law.” Thus, it can be highlighted that one of the constitutional attributes of the sovereign Hungarian state is the rule of law, whatever it may mean.

The content of the rule of law clause is naturally far from being an irrelevant issue. Given by the simple fact that it is the Basic Law regulating that (thus a normative notion), it is necessary to specify its meaning. Since the Basic Law offers no further clarification in this respect, we have been restrained to legal interpretation. Still, it is alleviating that our legal interpretation is not boundless and neither simple; it was the Constitutional Court in Hungary and several prestigious international organizations who made attempts to define the minimum content of the rule of law.

When looking at the domestic (Hungarian) interpretations, the most comprehensive one was given by *Tamás Győrfi* and *András Jakab*. Their work, dedicated to comment on the interim Constitution, is based on the judicature of the Constitutional Court and building on domestic and foreign legal literature; due to the fact that the two texts are completely alike, it can also be relied on as a starting point for issues regarding the Basic Law.¹² In their approach, *Győrfi* and *Jakab* rely on the interpretation by the Hungarian Constitutional Court which declared that the rule of law is “one of fundamental values of the Hungarian statehood”.¹³ Immediately following this, they highlight that the Constitution has not completed entirely the

¹⁰ For example: Afganistan (preamble), Albania (preamble), Armenia (Art. 1), Bosnia and Herzegovina (Art. 2), Bulgaria (Art. 4), Canada (first article of the 1982 Constitution), the Czech Republic (Art. 1), Montenegro (Art. 1), Hungary (Art B). See constituteproject.org: there are 102 constitutions containing the phrase *rule of law*.

¹¹ The new Hungarian constitution adopted in 2012 is generally referred to as the *Fundamental Law*. However, *Basic Law* is closer to the Hungarian original even if it is similar to the English terminology of German Grundgesetz.

¹² GYÖRFI–JAKAB 2009, 155–211.

¹³ Decision 9/1992. (I. 30.) AB.

concept of the rule of law; therefore the Court assumed this as a task in their scope. The Court started at redefining the concept of the rule of law as stated in the Constitution; it was not reckoned as a simple declaration (a statement of facts or a solemn announcement drawn as a conclusion from the other rules of the Constitution). The Court applied it as a specific norm, the violation of which in itself (even without violating any other specific rule of the Constitution) lays the grounds for unconstitutionality of a statutory provision¹⁴ (which, naturally, entails annulment of that). In certain previous decisions or rulings following fundamental decisions, the Constitutional Court formulated a number of clarifications, among others the closed system of exercise of power,¹⁵ accountability/controllability of public authority exercised on legal grounds,¹⁶ formal rule of law,¹⁷ legal certainty (the theoretical ambiguity of which will be dealt in a separate chapter) and protection of vested rights,¹⁸ prohibition of retroactive effect and the minimum prerequisites of legislation.¹⁹

Without engaging into a detailed analysis of the decisions or scrutinizing the requirements for the content as defined by the Constitutional Court, we can admit that the interpretation pertaining to the rule of law as provided by the Constitutional Court raises at least two concerns. These concerns tend towards justifying the hypothesis that our definition of the rule of law and, specifically, the case law built upon it bears the marks of totalitarianism. One of the circumstances raising concern is this: under the abstract term of the *rule of law*, the Constitutional Court considered a normative disposal meant to be the ultimate measure of any other legal instrument. Yet, this abstract term lacks deliberated, explicit content. It is easy to understand, thus, and we will deduce this in the chapter *The Rule of Law and Judicial Activism*, that this means nothing else but that the only measure of the rule of law is rule of law itself. This is anything, but a trivial circumstance and it was also noted by the authors Györfi and Jakab. On the one hand, they qualified it as a methodological mistake and drew the conclusion that the Constitutional Court “Would also refer to rule of law even if there were *lex specialis* in the text of the Constitution”.

¹⁴ Decision 11/1992. (III. 5.) AB, GYÖRFI–JAKAB 2009, 155–156.

¹⁵ Decision 48/1991. (IX. 26.) AB, CSINK–FRÖHLICH 2012, 42–53.

¹⁶ Decision 56/1991. (XI. 8.) AB.

¹⁷ Decision 31/1990. (XII. 18.) AB.

¹⁸ Decision 43/1995. (VI. 30.) AB.

¹⁹ Decision 25/1992. (IV. 30.) AB.

On the other hand, they posed the question: “Is the concept of the rule of law a tautology?” The answer they provided is quite uncertain. They admit that the rule of law is ultimately a political idea, to which, alas, legal interpretation can be attributed, as a result of which any state can be qualified as being under the rule of law (whereas all draw and apply the law); yet the authors see this approach feasible if we consider certain *content-related limitations* as implied in the rule of law;²⁰ those which provide the specifics for countries under the rule of law.

As of our view, neither do we consider the frequency of reference to the rule of law a methodological mistake, nor do we consider *content-related limitations* reassuring as an implied meaning of the concept. The first one is a preference for an abstract, normative concept lacking interpretation against elaborated and itemized rules. It does not presume a vivid imagination to understand that *content-related limitations* are not yielded by the letter of the law (as a legal rule formulated by the constituent or simply the legislative power); those limitations are *implied* from the outside, as a result of scientific deduction or a law enforcement decision, hence the result of such attribution is arbitrary. It is arbitrary by necessity, even if in practice we do this with more or less care, upon considerations based on paradigms of comparative, sometimes natural law, other times by pragmatic or theoretical toposes.

1.3. The rule of law as a magic wand of the Constitutional Court

That arbitrariness is not just a fictive threat, it is confirmed by a different threat complementing the concept of the rule of law. Both the interim Constitution and the Basic Law declared that Hungary is a state under the rule of law. This was performed as a compulsory behavioural rule; not as a goal of the state (in the manner other constitutions did, those referred to insofar). True enough that the interim Constitution and the Basic Law contain elaborated rules which demand that those entitled shall exercise public power in a manner subordinated to (or bound by) the law. They also incorporate the prohibitions of the legislation (infringement of fundamental rights, exclusion of strive for exclusive exercise of power)

²⁰ GYÖRFI–JAKAB 2009, 156–158.

moreover, the rules of interpreting the Basic Law [Article R) Section (3), Article 28] is equally covered. All these positive rules were concurred by the compulsory declaration that Hungary is a state under the rule of law. That this concurrence carries real threat is highlighted by the task interpretation posed by the Constitutional Court. When in the cited decisions the Court held that declaring the rule of law is an autonomous norm the content of which may be defined by the individual decision, then the Court actually qualified itself as a co-constituent power.

In fact, the normative declaration of the rule of law in this manner granted a magic wand for the Constitutional Court; they can shape the concept of the rule of law when and in the manner they wish and as the specific issue requires that. The Court could use this opportunity (by the granted power) to abolish capital punishment,²¹ or in random decisions on prohibiting or allowing abortion²² and euthanasia,²³ also for prioritizing certain fundamental rights as principles²⁴ and then for the restriction of the same.²⁵ As we will see, they did use it. An outstanding moment of arbitrariness granted by the magic wand was the decision on the Transitional Provisions of the Basic Law.²⁶ In this, the Constitutional Court neglected without any concern the will of the constituent National Assembly expressed in two occasions; that the Transitional Provisions are part of the Basic Law, and thus the Court annulled the substantial part of the Transitional Provisions. In this case the Constitutional Court, in the name of the rule of law, proceeded without concealment as a co-constituent forum, lacking authorization for this and neglecting the right of the constituent power provided from the rule of law: to decide in the issue of the constitution.

Thus, our Constitutional Court used the magic wand granted by the constitutional declaration of the rule of law. In every case it shaped the content to its philosophy, considering legal instruments right or wrong, in harmony or controversial with the rule of law. Further to this, it did not even spare the Basic Law as the foundation of the legal system. In this process the constitution, more explicitly, the unavoidable content of value

²¹ Decision 23/1990. (X. 31.) AB.

²² Decisions 64/1991. (XII. 17.) AB, 48/1998. (XI. 23.) AB.

²³ Decisions 36/2000. (X. 27.) AB, 24/2014. (VII. 22.) AB.

²⁴ Decisions 30/1992. (V. 26.) AB, 18/2004. (V. 25.) AB.

²⁵ Decisions 57/2001. (XII. 5.) AB, 19/2014. (V. 30.) AB.

²⁶ Decision 45/2012. (XII. 29.) AB.

hidden in the concept of law was entirely neglected, as outlined in the chapter *Legal Positivism and Constitutional Values*. This behaviour of the Justices is regularly identified as activism. Referring to the activism of the Constitutional Court domestically, for a long while it was exclusively *Béla Pokol* to have concerns about it (true to say, from very early moments on²⁷), however, activism is not that new, and even less a domestic phenomenon.

The unlimited liberty of judicial interpretation ultimately may drift into free lawmaking, depriving the constituent power of the elected legislative body.²⁸ The first warning on elevation of the judicial power above the other branches of power²⁹ came from the common law countries.³⁰ However, the same can be stated about the judicial practice of other European nations.³¹ The authors do not restrain from using harsh terminology: courts usurp political power from the legislative branch of power; they are against the majority; they adjust their arguments to results they deem to be correct; they are driven by ideological activity; they take the liberty to delimit the scope of judicial activity, undermine freedom and democracy, moreover, the rule of law, ultimately; they establish judicial dictatorship; they hide behind the lack of accountability; they demolish sovereignty; create an own orthodoxy penetrated by deep cynicism; they transform primacy of the constitution to primacy of the judiciary; they refer to manipulated values; they are utterly unpredictable; they forget about the original task they would have had to accomplish: solving real cases without too much philosophy, and so on.

1.4. The rule of law on the way of globalization

With the problems listed above we have already stepped beyond the borders of Hungary (or, in a more general context: the borders of the national state). International and supranational organizations have also recognized the benefits of unlimited (primarily judicial) extension of the rule of law clause. A most spectacular example of this is the European Union. As the

²⁷ For the first time: POKOL 1992, 150–155.

²⁸ LEISHMAN 2006, 29, 135, 208; MARTIN 2003, 7, 23, 116.

²⁹ SCHLESINGER 2011, 12–13.

³⁰ LINDQUIST–CROSS 2009, 1, 105; GOLUB 2003.

³¹ DAWSON–de WITTE–MUIR 2013; ADAMS–MEEUSEN–STRAETMANS 2013

method of unlimited judicial redrafting of law (i.e. law extension) had been proved to be working in the *van Gend en Loos*. The case pronounced the primacy of the law of the European Communities preceding all other, and it is due to this case that accountability stays at the member state level, whereas EC (later EU) law is enforced by integrationist judicial control.³² The basic document of the EU, the new Treaty on European Union (hereinafter: TEU) declared the rule of law under Article 2. Thus, among other values, the European Union is based on the respect for the rule of law. This respect for the rule of law as a value is common to the member states.³³ Complementing this with what we stated about the rule of law as formulated in the Basic Law of Hungary, we can reach no other conclusion than the following: allegedly, the ground the European Union is constructed on as a common ground with the other member states is the rule of law devised by the magic wand of the Constitutional Court, thus having an uncertain content. Standing alone, this conclusion means no more than reiterating on European Union level what we have seen in respect of Hungary. Alas, it is not a mere reiteration; due to the primacy of the Union, in terms of hierarchy it implies/infers the rule of law elevated to a higher standard. It implies that the magic wand law interpretation of the rule of law, as completed by the institutions of the Union, before all, the European Court of Justice (hereinafter: ECJ) renders member states, hence Hungary accountable as well. In case the ECJ renders an erroneous law interpretation to the rule of law, it will be this erroneous interpretation that will bind the member states. And the fact that the Union is not a state only aggravates the situation, as the law interpretation and jurisdiction pertaining to the Union cannot be held accountable. Thus, the power of the member states to legislate is vulnerable to the current interpretation of the rule of law in the Union. What danger this poses to the member states is presented under Article 7 of the European Union Treaty. Violating values under Article 2, such as respect for the rule of law entails legal proceedings initiated against the member state, irrespective of the fact that the specific legal area had not been formally yielded by the member states to the Union. Henceforth, the principle of the rule of law has become an arbitrary means of discipline due to its vague content.

³² HARLOW 2003, 95–96; CRAIG 2006, 329–343; MACCORMICK 2002, 97–122.

³³ KONSTADINIES 2017, 3, 15.

As regards Hungary, the rule of law as a mean of discipline is not a presumption, but a fact. In order to sustain this, it is enough to refer to the so-called Tavares Report,³⁴ mentioning 39 times the *rule of law*; the less one can state about this is that it is a political text in the camouflage of legal evaluation, without an endeavour for professionalism.³⁵ Declaring the rule of law in the analysed manner proved suitable to provide legal coating for political criticism construed by entirely neglecting legal methodology. The rule of law perceived in this manner is an instrument, applying it leads straight to tyranny. It is not accidental that the binding international acts do not even attempt clarifying the meaning of a rule of law state. They leave it for the so-called soft law texts edited by highly prestigious international organizations. Those texts do not lack legal aspects, yet formally, they have no legally binding force. We can find a substantial number of this kind. The reports of the United Nations Organization (UNO) will regularly give account of the efforts pursued in the interest of the rule of law, meanwhile each interpreting the rule of law individually as a value enshrined in the UN Charter³⁶ (whereas the Charter does not have a declaration of the rule of law). The Organisation for Economic Co-operation and Development (OECD) publishes a large number of evaluations relating to the rule of law; let us mention as an example the World Justice Project (containing interpretation as well) rule of law index.³⁷ The Venice Commission, the consulting body on the constitutional affairs of the Council of Europe dedicated a separate report to the rule of law, in which they try to define the minimum common content.³⁸

In the last years in Hungary, two remarkable pieces of writing revealed the mutual impact of international law and national constitutional law and quite a few consequences of that; these analyses were written by *László Trócsányi*³⁹ and *Béla Pokol*.⁴⁰ Both reinforce the results

³⁴ Report of the European Parliament, Committee on Civil Liberties, Justice and Home Affairs on the Status of Fundamental Rights adopted by Parliament on 24 June 2013, A7-0229 / 2013: Hungarian Standards and Practices.

³⁵ SCHANDA – VARGA Zs. 2013

³⁶ Available: un.org/en/ruleoflaw/ (Accessed: 18 March 2018.)

³⁷ Available: worldjusticeproject.org/what-rule-law (Accessed: 18 March 2018.)

³⁸ European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law*, CDL-AD(2011)003rev; BIHARI 2014, 53–55.

³⁹ TRÓCSÁNYI 2016

⁴⁰ POKOL 2017

of this analysis presented so far: the domestic and the EU-interpretation of the rule of law, despite the endeavour to provide legal security, yields ground for arbitrary interpretation enforceable by judicial means. Albeit, in order to recognize that arbitrariness has become tyrannical, moreover, totalitarian (as introduced in the chapter on *The Paradigm of the Rule of Law and Institutional Activism in an International Perspective*), further approaches are necessary. On the one hand, we need to analyse the way which has led to the current interpretation of the rule of law, on the other hand, we likewise need to assess the epistemological foundations of our concept of law.

1.5. The road leading to the arbitrary interpretation of the rule of law

In order to trace back how the arbitrary interpretation of the rule of law took shape and why today's interpretation shows marks of totalitarianism, we need to assess at least in broad lines an internal and an external process of development. In more detail, we will tackle the topic in the chapter *The Rule of Law and Constitutionality*.

The external process of development is a continuous endeavour to subordinate to law the exercise of power by the state. In the diverse families of law, this appears in a solution which is quite various in respect of textual representation, yet similar in consequences. Components of this set of principles are rooted within the heritage of the major legal families which can be illustrated by some examples as the French principle of constitutionalism, the English rule of law and the German *Rechtstaatsprinzip*.

It is from the above three historical threads that the fabric of today's rule of law is woven; the inevitable constituents of this (in every possible interpretation) is the separation of state powers, linking the power exercised by institutions to legal instruments, placing that under judicial control, and, as a limitation to legal empowerment, it is the guarantee for equal rights. The fabric has a hole as of today, or something has taken a background position in the course of everyday enforcement: it is one of the criteria by *von Mohl*,⁴¹ chances to accomplish reasonable human aims. This, in fact, is not identical with the protection of human rights. In

⁴¹ von MOHL 1995, 32–36.

rapport of those, it requires from the state to ensure certain freedoms of decision or action for its citizens. Human rights norms and law enforcement is less and less capable to ensure that since, as of our reference,⁴² the perception of the rule of law showing orthodoxy to a growing extent needs an enlarging scope of interference from the state. Necessarily, the result of this is narrowing possibilities for free action, i.e. actions not limited by the state, hence not ruled by either permissive or prohibitive intention. As public law implying norms on fundamental rights enlarges, there is less and less space for private law presuming individual autonomy (thus built on the substantive rights effectuated by the will of the entitled person only).⁴³

Besides the changes in the notional components, the power of branch considered as the token of the rule of law has changed in the course of the well-defined eras in the last two centuries. Legal restrictions of the exercise of power by states on the European continent (with the exception of the common law system) seemed to be granted by written constitutions and drafting of uniform norms in the early days of the rule of law, respectively between the French revolution and until the late 19th century. Consequently, the legislative power vested with people's sovereignty had a central position (in the English law codification it has not been such a strong endeavour; nevertheless, parliamentary sovereignty exercised in unity with the sovereign was decisive also here). The responsibility of the executive power, compelling force to respect the drafted laws was natural, as it was the responsibility of the courts to strictly bind themselves to the will of the legislator embodied in the acts.⁴⁴ As soon as the primacy of codified law had become general, the focus drifted to enlarging the scope of action for the executive power thus far restricted (at least in principle), nevertheless always decisive in accomplishing the political objectives. The 20th century was spent with establishing shameful results such as fascism, national-socialism and Bolshevism during the first part of the 20th century, whereas the less lucky countries spent almost the whole century in that manner. By the end of the Second World War the new century came, enshrining fundamental rights and, as an unavoidable guarantee of these, the age of courts arrived. This again happened with the exception

⁴² MARTIN 2003, xxi, 3, 23.

⁴³ LENKOVICS 2006, 107–130.

⁴⁴ MARTIN 2003, 26, 29; LINDQUIST–CROSS 2009, 35–36; LEISHMAN 2006, 23–29.

of the common law countries, as the common law doctrine of *stare decisis* restricted but also insured comprehensive judicial control over the state exercise of power from much earlier ages.⁴⁵ In the USA it was as early as the middle of the 19th century, while in Western Europe at the end of the Second World War and in the countries of Eastern and Central Europe it was with the transition of 1989–1990 that the judicial age of rule of law had its start. Historical changes unambiguously proved that the rule of law (despite its American establishment) is a typically Western European tradition.⁴⁶ Nevertheless, it need not have become arbitrary even if, in the latest decades, the principle of rule of law has been able to override every other legal rule. An internal change was also necessary for this.

The internal change was drawn by the ultimate and exclusive legal positivist concept of the rule of law and constitutionality (as it seems today) is originally based on natural law⁴⁷ which will be tackled in a later chapter entitled *The Illusion of Legal Certainty*. In that chapter we deduce that the principle was decidedly and basically erroneous. By the time social sciences, and among these, legal sciences took over the positivistic methodology, the unquestionable adequacy of that had already failed within the field of natural sciences.⁴⁸ Completeness of the law based on positivism, therefore, is more than a vague presupposition, it is a real *factio iuris*. If we insist that law and jurisdiction are complete (consistent) and certain while they are not, we accept the inevitable arbitrariness of court interpretations and decisions. The illusion leads to tautology: a final decision of a court is true, legal and correct only because it is the final decision of a court. Shortly, this is very close to a tyranny of legal positivism.

1.6. The arbitrary rule of law and its possible remedy

Our prolonged chain of thoughts can be summarised as follows: if the rule of law enhanced by human rights protection supported by state activity demands overall legal control, then we delegate an unlimited liberty of interpretation to courts. Whereas holding without any basis in accordance

⁴⁵ MARTIN 2003, 6, 23, 41, 103; PARISH 2011, 186–204.

⁴⁶ PARISH 2011, 195.

⁴⁷ G. FODOR–LÁNCZI 2009

⁴⁸ KELSEN 1934

with legal positivism that law itself is inherent and that accountable decisions exist, we do nothing else but this. In the name of the *rule of law*, we subordinate to unaccountable and thus arbitrary legal interpretation all the actions of persons, communities, ultimately all the needs, actions and the complete liberty of states. Again, all the needs, all the liberties, all the actions; we allow arbitrary control without any kind of limitations. It is not surprising, then, that it is possible to build empires⁴⁹ on this basis, as it is neither surprising that the theoretical interpretation of the magic wand of the rule of law, among others, has its origin in Marxism.⁵⁰ Whether this is true or not, it is obvious that the only measure for the rule of law is rule of law itself. The judiciary, coupled with a closed system of legal positivism and activism is not simply arbitrary, but it may become expressly totalitarian. It has turned law and the rule of law into an arbitrary one, whereas originally it was conceived to protect against autocracy. Today's rule of law is arbitrary because it no longer suffers concurring normative systems. Its own content is in principle a general agreement; in practice it is shaped according to the winning lobby groups and courts held by intellectual groups and courts of orthodox views albeit lacking any real basis, yet exclusive. The last chapter entitled *Breakaway from the Arbitrary Concept of the Rule of Law* will detail further on the reasons for this orthodoxy and its erroneous character. In contrast to this, the liberty the rule of law intends to grant will require the existence of concurrent norm systems and competing powers coming from different sources and offering checks and balances. This is the division of powers, as such. As of our days, this has disappeared: judicial power has overgrown all; its law review, consequently its exercise of power is not accountable, neither is it restrictable or controllable.

The legislative power is renewed from time to time, and the opposition (moreover, the media outside the formal scope of the exercise of power) is able to compel the governing majority to provide explanations. The executive power is either directly renewable or disposable, being politically liable. The courts cannot be compelled to provide explanation, neither can they be replaced and, against their final decisions there is no remedy or

⁴⁹ In other words: due to incompleteness, we apply conclusions in order to demonstrate a proposition which cannot be closed into formal systems, see HOFSTADTER 1999, 86–87.

⁵⁰ PARISH 2011, 187; MARTIN 2003, 21.

any other means for legal protection. While judicial power in principle is not legislative yet it is directly capable to limit legislation and execution, the latter ones *per definitionem* cannot directly restrict the judicial power; the utmost of this could be achieved indirectly, by legislation. In practice they cannot, since the courts have been controlling legislation, even the legal devices defining their competence. When it is not to their liking, they will annul those, or at least will attribute interpretation favourable to them. There are no restrictions: judicial rule of law is an arbitrary rule of law. Today's rule of law is a judicial rule of law.

Whether there is a remedy to an arbitrary rule of law is a well-reasoned question, which is relevant and so is the answer to it. It seems that, despite the totalitarian marks and all the critiques pertinent to the current operation and perception of the rule of law, there is no better appropriate device for organising society than the one based on the classical rule of law principles. There are, of course, other methods to hold together huge communities in a peaceful manner, such as the consensus-based communities in the Far East⁵¹ or world religions sometimes spreading as supra-national institutions; still these are not appropriate for replacing the rule of law model. On the one hand, they are likewise unable to uphold social peace in every circumstance, on the other hand, they operate parallel to the executive exercise of power, hence they lack real physical power (as we could see in the example of European churches⁵²) or they acquire power from outside (as in case of certain Muslim countries⁵³). As of our days, these community-sustaining methods are not alternative methods, just complementary solutions to the rule of state as opposed to the model of the rule of law. Thus, when looking for a remedy for the rule of law turned into an arbitrary one, no better solution emerges than trying to eliminate the distortions of the rule of law. Since we intend to alter an approach and exercise safeguard institutionally, the process is long and has several dimensions. Also due to the fact that history cannot be arbitrarily moulded, however noble and rational the aim may seem, there is no guarantee that the desired objectives can be reached successfully. On considering all these, this path seems to be much safer than the one chasing the latest fantasy or any utopia.

⁵¹ CSINK 2013, 1–5.

⁵² ERDŐ 2003; BEKE 2004

⁵³ PÓCZIK 2011

We have already mentioned hereby the set of devices of state power. The objective of state measures is fairly describable: it needs to reach actual workability of division of power i.e. it needs to surpass the dogmatics of judicial rule of law. Parallel to this, the extent of judicial activism needs to be decreased. The knowhow is less obvious; besides, theoretical considerations should inevitably be tackled. For good government, in addition to all practical efforts it is necessary to have something which counterbalances overestimating the rule of law. The tautology of the rule of law being the only standard for the rule of law cannot be kept. This balance cannot be the executive, otherwise we get another tautology: the controlled institution cannot serve itself as balance of the controller institution. In want of a better, we should use the legislative branch, holder of legitimacy as counterbalance.

Our hypothesis is that one or a small bunch of fundamental and, at the same time, not formal yet substantive principles could help, even if this approach is not *orthodox* as of today. Something like the Roman rule: “*salus populi suprema lex esto*” (Cicero, *De Legibus*, Liber Tertius, 8) or its Christian (canonical) version: “*salus animarum suprema lex esto*” could help us.⁵⁴ One of the modern paraphrases could be “public welfare respecting personal dignity and human rights is the fundamental, inviolable and incontestable criterion of a good government”. All this can be put in a nutshell: we need to go back to the minimal golden rule of natural law according to which everybody shall be given what it is for him or when taken from the individual side: one should measure as one would expect to be given.⁵⁵

Hungary has taken the first steps towards this. Rules of interpretation of the Basic Law, Article R) Section (3): “The provisions of the Basic Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution” and Article 28: “In their judicial activity, courts shall interpret laws primarily in accordance with their aims and the Basic Law. During the interpretation of the Basic Law and laws, it shall be presumed that they seek a moral and economic aim in accordance with common sense and public good.” They grant normative background not only to restricting the rule of law in content, but also to judicial free interpretation and judicial activism. In order

⁵⁴ Canon no. 1752 of the *Codex Iuris Canonici*.

⁵⁵ FRIVALDSZKY 2005, 16–27.

to reach that, it is necessary that courts, primarily the *Kúria* (the Supreme Court), and the Constitutional Court should be consistent in applying those. In other words, it should be a requirement that lower courts and, naturally, the Constitutional Court itself apply this legal interpretation which is in conformity with the Basic Law.

Of course, we need a new view of law and an appropriate procedure of public law implementing this substantive principle. The new view should consider law as something which is more and at the same time less than it appears in the contemporary mainstream perception: law is *more* than an interesting playground of lawyers and *less* than an absolute and mere set of rules controlling everyday life. Its rules should be perceived as descriptions of the expected behaviour of people and not being neutral. The concept of the rule of law accomplishing public good goes hand in hand with the principle that we do not perceive law as being perfect (and we do consider legal interpretation or the theoretical stages leading towards that to be less perfect).⁵⁶ Instead, we admit that public good can only be achieved by cooperation. The appropriate procedure of public law implementing the substantive principle of public good could be a permanent dialogue between legislation and the judiciary. This approach, of course, presupposes that the legislator or, in special cases, the holder of constituent power does not commit heresy when, taking into account the interpretation of courts, tries to pull the ground for the courts by amendments of law or that of the Constitution, even if it does so due to an earlier judicial or Constitutional Court ruling. Probably this is the question in connection with which those protecting orthodoxy will have a stand.⁵⁷

The rule of law as the method of good government therefore means more than arbitrary law interpretation. In this approach, however, law may seem a device: that of governing. We wish not to deny this view: if our conclusions as presented above can be sustained, then positive law as a product of governmental legislation and enforcement of that are devices, indeed. Albeit, when we do not approve of this view, then we tend to defend law more than the entitled person, even opposing that person. When we approve of this view, we admit that law in fact is actually based on an

⁵⁶ LÁNCZI 2013, 83.

⁵⁷ MOLNÁR–NÉMETH–TÓTH 2013

(interpersonal) relationship, thus it is impossible to exclusively interpret it as a manifestation of an oppressing power system.⁵⁸

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Just leaving and not finishing the above stream of ideas, the author is to recognize that an intricate methodology and probably a quite voluminous monography would be necessary to complete sustaining the hypothesis of an arbitrary rule of law. To such dimensions of the work the author does not commit himself. Therefore, the book is not a monographic description in the classical specification of the genre. The chapters present drafts of individual approaches (historical, comparative law, legal dogmatics, sometimes philosophy). The author has already published fragments of this work as a result of several years' contemplation in studies, working papers or conference presentations. Passages lifted and revised from those works appear in this book, a first version of which was published in Hungarian some years ago at the Századvég Publishing House for which the writer wishes to thank the publishers of the mentioned works for their contribution.

⁵⁸ FRIVALDSZKY 2008, 5–29; FRIVALDSZKY 2007, 412–418.

2. The Rule of Law and Constitutionality

2.1. The rule of law – from a principle to a binding regulation

As presented in the introduction, Article B) Section (1) of the Basic Law, effective since 1 January 2012 declares that “Hungary is an independent democratic state under the rule of law”. Also, we have noticed that this wording is essentially identical with the text under Section 1, Article 2 of the interim Constitution, which was in effect from mid-1990 and as of which “The Hungarian Republic shall be an independent, democratic state under the rule of law”.

It is tempting and possibly, would be rewarding to deal with the political constraints of the changes in the text since 1989.⁵⁹ Averting this, suffice it to say that in Hungary the rule of law is constitutional. Within this, it is a normative, basic category, which appeared in a certain moment of our history of law, namely at the time of the regime change (transition), particularly in the content of the interim Constitution. Later on, the actual grammatical environment has faced several changes. It is worth considering what grounds the state and the legal system relied on before this period, when defining themselves.

Immediately before the transition, the socialist version of the Constitution (amended multiple times) was the foundation of the legal system. Pursuant to Article 2 of the socialist Constitution (in the last version of the text), the People’s Republic of Hungary was a socialist state designating the working people not only as the source of power but also exercising power. Within the concept of “working people”, the leading class, the proletariat was meant to exercise power in alliance with the agricultural population, gathered in cooperatives, the “progressive” intellectuals and other layers of the working people. The internal stratification of

⁵⁹ VARGA 2007

the working class was regulated by the constitution when (under Article 3) it declared that the working class of the Marxist–Leninist party was the leading power of society.⁶⁰ If any of this had been related to the rule of law, then perhaps it would be worth analysing the normative concepts, such as leading class, leading power, the alliance, and (exercising power) together. Yet none of these had any relation to the rule of law. The socialist Constitution failed to hold a single substantive element due to which a rule of law state might be feasible, as we will see in the following chapters. It did not regulate division of powers, respect for fundamental rights or judicial control over the exercise of public power. This era, therefore, can be neglected when presenting the history of the rule of law in Hungary.

Retrospectively, when talking about the age before socialism and also for the sake of simple treatment, we rely on the approach by Professor *Móric Tomcsányi*, one of the last authors providing explanation for historical constitutionality in his monograph as of 1943. Elaborating on public law, *Tomcsányi* begins with explaining the role of the state and what statehood means. The state identified with the (political) nation, more exactly conceived as “the superior level corporation” of that, is obviously a political approach as seen by him. The fundamental criterion to define the state is sovereignty (possession of the supreme power) as *Tomcsányi* puts it; hence he deduces the relation between the individual and the nation, and the ways of exercising power. By analysing the establishment of the latter, his thoughts reach the concept of constitution. Let me quote his interpretation of constitution: “In a nutshell and quite generally speaking, it is not less than the establishment of the state in its own sovereignty”. He considers that the constitution that he identifies as an establishment, is a result of legislation. He makes distinction between the historical and a written constitution. The author draws attention that clearly shaped versions do not exist for constitutionality. He highlights the endeavour of the constitution for stability in order to guarantee an antidote, a remedy for the possible detrimental effect exercised by “common laws”. From among the constitutional institutions which need to be protected, he lists certain fundamental rights and freedoms. He also mentions (as an institution not known in Hungary) the constitutional courts. Further on, he analyses the following: the hierarchy of legal instruments as a content element of constitutionality and its guarantee by judicial power; the denial

⁶⁰ GYÖRFI–JAKAB 2009, 130–133.

of retroactive effect; equality before law; and the fundamental rights and freedoms originating from the “general freedom of individuals” as “one of the deepest lying fundamental strata of law” and he searches for methods to protect them.⁶¹ We should not forget that the era the work was published in was that of the anti-Jewish laws; therefore, the substantial content grew more and more far-fetched from the rule of law and constitutionality.

Tomcsányi did not use the concept of the rule of law and, let us dare to formulate the opinion that nor did the public law literature of the era. This was due to the absence of a normative description of the concept. On the other hand, when describing public law, constitutionality and constitution, he defined their elements, according to what we interpret today the rule of law concept. Therefore, in Hungary constitutionality is a preliminary model of the rule of law; as of our days, the two concepts either compete with or merge into each other.

2.2. The need for fairness of law and constitutionality as a realisation of fairness

A positive description of law does not provide sufficient answers for the content issues on the nature of law even in theory. Positivistic legal theories provide exclusively denials for the question whether there is any kind of general or external limitation to the content of law. In a different context, the question is whether there is such content which by no means can become a part of law. All this is due to the perspective of positive legal methodology; examining law as if being autonomous, irrespective and independent of any other aspects, such as ideology, religion, natural law or political context.

Albeit law is not a self-serving establishment but an aggregate of behavioural rules specifically referring to persons’ (primarily natural persons’) behaviour. These rules accumulate the minimal, logical and necessary mission: to create a standard of minimum effect for co-existence in the society. Considering this and trying to answer also the question what law should be like, we necessarily turn law into a category holding value. For an answer, we have to take into account several constituents besides others, the rules of our surrounding physical world as it would be

⁶¹ TOMCSÁNYI 1943, 9, 11–23, 47–48, 51–52, 74, 78–79, 164–165, 168.

irrational to formulate any law conflicting these rules. Then, we consider the human being posing requirements as a person. In earlier times, natural law defined these; nowadays they appear as fundamental principles of constitutionality. The next consideration is that people live together in an organized manner (society and the needs coming from this circumstance), and finally, it is the manifest (uttered) demand of human society. Having considered these factors, the minimum requirement posed to law can be formulated as fairness or justice.

Naturally, the requirement for fairness or justice does not equal the need to suffice everybody and all; yet it is (and that is a must-needs) for law to make endeavours towards being just. The requirement for the law to be just or fair is an antique relic (viz. the *Celsian* opinion about law: “*ius est ars boni et aequi*”) which, in principle, positive law tried to banish.

The theoretical contradiction within positive law was first justified by the fate of national-socialism as a self-defined legal system. After the Second World War, the well-known judgement by the victorious nations' community over war criminals decided that they did not recognise the legal quality of the national-socialist norm system (and this reiterated in Germany when the Bolshevik establishment in Europe collapsed). The theory of law needs to answer the question how a set of rules can retroactively lose legal quality when earlier it had been considered to be law. Within the theoretical framework of positive law, this question cannot have an answer since that precludes, in principle, any aspect outside the scope of formal legal rules.

Currently, the theoretical answer is known as the formula of *Radbruch*. The positivistic lawyer, *Radbruch* holds that it would be necessary to have an initial point from the positivistic sense of law. This means that law is the order of the Sovereign to which, besides one restriction, the content could be anything. Accordingly, a norm can be unjust to somebody or aimless, other times *incorrect*; but even the erroneous norm is part of the legal system. It may happen, however, that the norm is so much in opposition with justice or fairness that it can no longer be considered law. This occurs when law no longer strives to be just “where equality which is the seed of justice is wilfully denied by positive legislation”.⁶² In this case, law is not only incorrect but also a camouflage in the robes of law for lawlessness. In *Radbruch's formula*, the original, positivistic and unlimited character of

⁶² RADBRUCH 1946, 105–108; see also LIGETI 1997, 91.

law (as an order of the sovereign) was broken by the requirement of justice, even in theory.

More sophisticated definitions of justice can be elicited. It is a fact in legal history that the most relevant legal provisions related to the operation of the state (such as: the persons by which the sovereign exercises its power; whether there is a limitation to the exercise of power; the empowerment of the legal subjects in relation with each other and the sovereign; all these and the like) have emerged from among the norms. A part of these is outstanding even in a positive legal approach, as they define the legal order. It is due to such legal norms that the Magna Charta Libertatum, the Petition of Rights, the Bill of Rights, or in Hungary St Stephen's rules, some monarchic letters of privileges or the *Bulla Aurea* have been effective to our days.

Owing to their general theoretical and practical references, the above rules served as basic social rules, or as a constitution. They contained and enshrined fundamental rights and guarantees of liberty. On analysing these rights and freedoms, we notice that their bases lead to what we have stated in relation to the requirement of justice posed to law; the equality of the persons before law. The requirement for justice therefore sustains theoretically the experience proved by legal history. According to this, rights and freedoms and the guarantees of those as limitations of the exercise of power have been formulated as a content requirement of constitutionality. Therefore, constitutionality formally implies the existence and efficiency of fundamental rules pertaining to legal order. Whereas, in content, it means safeguarding justice as a theoretical requirement just like guarantees for rights and freedoms aimed at limiting the exercise of power.

The short detour above describing constitutionality has presented several theoretical components appearing in the history of constitutionality.

These requirements formulated on a theoretical level appear as *principles of constitutionality* within an autonomous branch, the constitutional law. Let us mention certain constitutional principles held indispensable as of our days:

- a) sovereignty of people (representation of people) as a source of power;
- b) separation and balance of the branches of power;
- c) rule of law;
- d) equality before the law;

- e) safeguards for human rights;
- f) cooperation with international organisations;
- g) real enforceability of the constitution (constitutional justice).⁶³

It is clear at first glance that there is an overlap between the principles of constitutionality and the principle of rule of law as introduced in the first chapter. On the other hand, we can assume that rule of law is part of constitutionality. The explanation is obvious when we recognise that the rule of law and constitutionality search an answer for the same question. This question is double-fold: does law have a pre-conceived content, or, are there any limitations to the state exercising its powers? The principle of rule of law approaches the question from the aspect of the state and answers it relying on legality; constitutionality reaches a similar answer by starting from the intrinsic characteristics of law. It is also remarkable that both concepts are mostly theoretical (dogmatic); they are simple wording of a sophisticated system of requirements.

This is the theoretical recognition which shall be applied for Article B) of the Basic Law according to which Hungary shall be an independent, democratic state under the rule of law. By declaring the rule of law, the Basic Law somehow *oversecures* those provisions which detail the principles of constitutionality (it is convincing that in the English translations of its first decisions, the Constitutional Court used the notions of rule of law and constitutionality as synonyms). At the same time, it also devises quite an abstract and general navigation for several cases, e.g. when there is no obvious answer offered by an actual provision of the Basic Law. Unfortunately, this navigation device is far from being accurate and even its content is largely uncertain. In order to prove this, we have to complement the approach offered by the history of constitutionality by remarks on the history of the rule of law as a concept.

2.3. Constitutionality – rule of law I

Limitations in the exercise of power, specifically those of the executive power have always been an issue in legal thinking when elaborating on the features of law and the state. The major premise is as follows. The

⁶³ TAKÁCS 2007, 27–29.

sovereign, the holder of supreme state power has no power above him; in an opposite case he would not be sovereign. However, a question is still pending: does the sovereign have any outside limitation binding his exercise of power?

Natural law (*ius naturale*), also known as a system meticulously elaborated by Augustine and Thomas Aquinas states that the system of principles recognisable by humans as deriving from God's law (*ius divinum*) has a supreme position over the law created by human beings (*ius humanum*). This concept gave a suitable answer for a long period. Due to this supremacy, natural law was a limitation to legislation and the powers exercised by the state (the sovereign).⁶⁴ Christian natural law lost ground as a foundation for legal theory in everyday argumentation, hence the *answers* valid before also got lost; yet the questions stayed. Those questions could be answered by relying exclusively upon sovereignty designated by territorial jurisdiction. Ultimately, natural law continued to survive in the argumentation of the states covertly, by an implied meaning.⁶⁵

As shortly tackled in the introductory chapter, at least three new solutions appeared at different geographical sites and different types of discourse for limiting law and state power exercise. Yet the consequences have been similar, and their elements appear in today's paradigm of the rule of law. These new solutions are the French *constitutionnalisme*, the English *rule of law* and the German *Rechtsstaatsprinzip*.

French constitutionalism (*constitutionnalisme*) found a device to curb the exercise of state power in public administration and administrative jurisdiction separated not only from legislation, but from ordinary courts, as well. This solution was institutional; for content, it appeared feasible as a token for protecting fundamental freedoms, due to the support of the judicial panel and its institutional effect. The effective Constitution of France envisaged by Charles de Gaulle is also founded on that. It presents the protection of individual rights and freedoms as a substantive content; it is more transparent, since the original text is identical, basically, with the Declaration of the Rights of Man and Citizen from 1789 (precisely, the original text was improved by an earlier version of the constitution from 1946). It is worth noting that the Declaration formally is not part of the French Constitution, yet the preamble makes a reference to it:

⁶⁴ FRIVALDSZKY 2007, 132–139.

⁶⁵ JAKAB 2007b, 45, 48.

“The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946 and the commitment to the rights and obligations defined in the Environmental Charter as of 2004.”⁶⁶

This is an important characteristic even if the French Constitutional Council recognised it as part of the Constitution, thus it has a binding effect indeed.⁶⁷ Article 16 of the Declaration clearly states the basic premise referring to constitutionality:

“A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all.”

The doctrine of strict separation of legislative and executive powers was reflected in the dual judicial system complemented mostly by the Constitutional Council preponderantly performing preliminary norm control.⁶⁸ The dual system consists of the ordinary courts and the administrative tiers ruled by the *Conseil d'État*. Before engaging to present these, we draw the reader's attention to a relevant particularity of the Constitution: rule of law as a normative concept does not figure in it. The French solution, therefore, is not based on the principle of the rule of law formally but on the principle of constitutionality.

2.4. Excursus: Drafting the theory on the separation of powers

The theory on the separation of powers is the part of French constitutionalism that has become an unavoidable conceptual element of today's constitutionality; despite this, we will not discuss it in more depth in the further chapters. Its importance, however, requires that we should draw in broad lines the major characteristics of it.⁶⁹

⁶⁶ BROWN–BELL 2003, 13.

⁶⁷ SÜLYÖK–TRÓCSÁNYI 2009, 90.

⁶⁸ BROWN–BELL 2003, 13–24, 44–50; SZIGETI–TAKÁCS 2004, 171–211.

⁶⁹ CSINK 2014

Separation of powers as a limit to the exercise of power is limited itself. Since the power divided between the branches of power is part of the supreme state power, it is a must that the exercise of the divided powers shall be in harmony. On the one hand, this requirement is logical; the legal regulations pertaining to execution and justice shall be created. This is part of the legislation, hence legislation has its influence on the other two branches of power. This is true from the opposite side as well: creating unenforceable norms or norms not applicable by jurisdiction would be senseless. Jurisdiction in principle means application of legal norms, often the simultaneous application of different level norms, sometimes conflicting each other. As a consequence, the judiciary is entitled to decide about the applicable norms in view of the relevant facts. At the top of the system there is norm control implying judicial exercise, i.e. constitutional judiciary.⁷⁰ All in all, this leads to the inference that the reciprocal impact of the state powers cannot be excluded, i.e. the branches of state power not only need to be separated but they need to be balanced, as well. The key concept for all these is the clear definition of the scope of competence, as mentioned before.⁷¹

In the era of Enlightenment bringing forth the philosophical mainstream, it was Locke who clearly formulated the distinction between the individual institutions: legislation, execution (dealing with justice as part of execution), as well as the institution exercising federal power (the latter with the task to take decisions about war and peace and the right to create and manage relations between nations).⁷² The classical distinction is attributed to *Montesquieu*, who defined the well-known triad of legislation, execution and the judiciary by stating that these must be separated both by institutional and personal relations.⁷³ This distinction by *Montesquieu* is elegant; yet it did not bring along a solution for the harmonious exercise of power by the state or for concerting the principles of democracy and separation of powers. *Constant* introduced a fourth player into this system, the king; albeit not autonomous in exercise of power, yet behaving as a neutral player among the members of the triad, the king

⁷⁰ BRAGYOVA 1994, 58–67.

⁷¹ KUKORELLI 2007, 44–46; PETRÉTEI 2002, 101–102.

⁷² LOCKE 1824, 216–218.

⁷³ de MONTESQUIEU 2000, 245.

sometimes became superior to them.⁷⁴ By this, a theoretical solution was created for the controversies between the separated branches of power (some) and the major state power (one) exercising power in a democratic way. A model for the principle of separation of powers, a standing establishment in practice is provided by the US Constitution, specifically in the *Montesquieu* version. The American Constitution regulates the bicameral legislation created upon the principle of direct democracy, the presidential executive power and the judiciary, with the president and the members of the Senate at the top of the hierarchy. The most significant mark of it is the fine-tuning of the balance between the individual branches of power.⁷⁵

A concept contrary to the division of powers was given by the birth of the two kinds of socialisms constituted upon the unity of power. Fascism or national-socialism subordinated to the central will the exercise of power concentrated in corporations. Bolshevik socialism even declared its opposing the principle of division of powers by the unmistakable self-determination or autonomous rule of the working class.⁷⁶

When we assess either the American version or its model established in other countries, we can see that the principle works, yet it does not entirely correspond to the original theory of the division of powers; further on, new elements appeared in the system of the exercise of power, ultimately certain components have become more accentuated. Most visible is that the exercise of power by the state, all the branches, respectively, the executive (and, as part of it, the administration) is dominated by law. To some extent, it is a growing tendency that the individual exercise of power may be performed as prescribed by legal norms, otherwise the actual decisions also take a legal format. It is also notable that it is not only the common law countries but also legal systems pertaining to the German legal family in which the role of the courts becomes defining as a general protective umbrella. As a matter of fact, every state decision may be challenged, therefore, in certain ways it comes to effect before courts. This is complemented by norm control becoming general due to the practice performed by the constitutional court on top level. Hence, limitation by fundamental rights in the exercise of power is unavoidable either in legislation, or in the course of judicial practice. External

⁷⁴ CONSTANT 2003, 183–193.

⁷⁵ JANDA–BERRY–GOLDMAN–SCHILDKRAUT 2013, 28–41.

⁷⁶ KUKORELLI 2007, 35–41.

limitation as a growing tendency regarding the exercise of power is also relevant; the (auto) limitation of sovereignty as a consequence of being part of international organizations. For us the most relevant of them are the United Nations Organisation, the North Atlantic Treaty Organisation, the European Union or the Council of Europe, which are also based on the division of power as a principle. In this case, the subordinated subjects are not or not primarily natural persons but states. Auto-limitation of the exercise of power regarding states can be easily complemented retrospectively, pursuant to the decisions concluded by the judicial-type organisations in individual federal systems.

It is not only due to the pertinence of a state to international organisations but it is also notable within a state that, beside the classical horizontal principle of division of power, a vertical territorial division is also present. The method is that central-territorial tiers composed of two or more elements, known in every form of state, gain constitutional weight. This means that organizations operating in one or more territorial tiers are attributed scope of authority and competence protected either by law or by the constitution. This is implied in their name in Hungary: local governments. Within the local governments, the principle of the division of powers can also be perceived to a certain extent. Finally, we also have to mention that an increasing number of organisations which are independent of the state, or at least do not exercise state power directly, gather considerable weight in a sociological context (the electronic media, international corporations, and within that scope, the managerial level or that of the NGOs).⁷⁷

Naturally, in order to consider the triad of the division of powers valid also for parliamentary systems, we need to make adjustments in the wording. In the manner presented above and as originally formulated, the principle meant separation of state powers from an *institutional* perspective, which means that it was built on the idea of one type of power – one single organisation. When we wish to apply the principle in today's constraints (as in Hungary), then the division of power should be interpreted in a *functional* meaning. We should terminate applying adamantly the principle of a certain kind of power concentrated with one single organisation. Instead, we need to examine which organisations share the legislative, the executive (administrative) or the judiciary (control) functions

⁷⁷ BIBÓ 1994; POKOL 1994b, 11–41; SÁRI 2007, 48–49.

and whether these organisations are separated by appropriate guarantees. Consequently, none or not only one of the branches of power can be linked exclusively to one single organisation; specifically, one organisation does not exercise one kind of power only. At the same time, the statement continues to be valid further on: one person or one organisation shall not bear or possess major state power in its entirety.⁷⁸

In Hungary the Constitutional Court, whose interpretation is legally binding for everybody, consistently talks about the classical three branches of state power; moreover, it has also defined their relation to each other.⁷⁹ The interpretation of the Court lies on two pillars: first, it holds the classical triad of power valid; secondly, it interprets autonomy of the separate constitutional institutions independent of this. And this is how interpreting the separation of powers from a functional perspective becomes a compulsory approach. However, the issue needs to be completed with one more pillar. The two most important decisions relating to the President of the Republic in terms of constitutional law consider the President of the Republic outside the branches of state power, albeit an institution ensuring balance to those branches.⁸⁰ These decisions were brought under the effect of the interim Constitution, however there is no reason to presume that they would not be governing as of our days. The Basic Law did not change the principles of the state establishment.

Concluding those said so far, the Constitutional Court considers the triad valid, complemented with the neutral power of the President of the Republic; in fact, it applies the interpretation of *Constant*. We have a further argument to sustain all this by approving *Weber's* definition. According to that, the essence of power is the capacity by which the holder of power is able to enforce and gain effect to its will despite opposition.⁸¹ So to say, the enforcement of will can be split into three moments: declaration of will, ensuring (personal and substantive) conditions for its enforcement and the actual enforcement (breaking opposition). These three moments exactly cover the triad of legislation (declaration of will), execution (ensuring the conditions) and justice (enforcement).⁸² The neutral power of the head of

⁷⁸ TAMÁS 2010, 197–178.

⁷⁹ Decisions 8/1992. (I. 30.) AB, 48/1991. (IX. 26.) AB, see also 17/1994. (III. 29.) AB.

⁸⁰ KUKORELLI 2007, 345–353.

⁸¹ WEBER 1978, 53.

⁸² EREKY 1939, 79.

state is what is *left* after the separation of the three state powers (provided that the executive power did not *inherit* the prerogatives and rights of the head of state.)

2.5. Constitutionality – rule of law II

To the same question, that is the limitation of the exercise of power and the possible means for that, common law provides a substantially different answer than French constitutionalism does. The theory of the English approach presented by *Albert Venn Dicey* in his great work, *Introduction to the Study of the Law of the Constitution*⁸³ also signifies that the English method does not build merely on the existence of the institutions (status), but on the idea or the concept of law as an instrument limiting the exercise of power.

In *Dicey's* system, the English state is characterized by two basic traits: sovereignty of the Parliament and the supremacy of law over the real (factual) eligibility of power. These two basic traits are in correlation since the sovereignty of the Parliament promotes the efficiency of the rule of law. Let us see these three circumstances in more detail.

Sovereignty of Parliament, the *sovereignty of the King/Queen in the Parliament* is the token of English constitutionality.⁸⁴ In *Dicey's* wording, the essence is that the Crown (the Sovereign as the Head of State), the elected House of Commons and the hereditary peerage in the House of Lords (then still purely hereditary) create written law by consensual will. Three players' common will: this requirement itself is a limitation of power. Yet we need to mention that the system has significantly changed since *Dicey's* time. The House of Lords has been losing influence (*Parliament Act, 1911*), its structure has changed (*House of Lords Act, 1999*), and so did the rules pertaining to the delegated legislation (*Statutory Instruments Act, 1946; Regulatory Reform Act, 2006*). After adopting the Human Rights Act (1998) aimed at safeguarding the binding force in the legal practice of the European Court of Human Rights, which is a guaranty for the efficiency of the European Convention on Human Rights (hereinafter:

⁸³ DICEY 2013, 21–31.

⁸⁴ CRAIG 2008, 4.

ECHR), the Parliament substantially limited its own sovereignty.⁸⁵ It does not exercise executive power, however it keeps the government exercising this power under permanent political control. Therefore, the Parliament, in its fundamental features, still remained the most important guarantee against autocratic exercise of power.

Accordingly, this is where the first component of the rule of law by *Dicey* comes from. *The government has no arbitrary/autocratic power*, law is primary as opposed to power and this needs institutional guarantees. This institutional guarantee is provided by the second component i.e. the principle according to which *everybody is subject to the law applied by the ordinary courts*. This principle is much larger than the principle of equality before the law – originally applied as the rule for equal treatment referring to natural persons only. Originally, this principle excluded strict delimitation between private persons and the power, private law and public law. While the first branch of law regulated legal relations between private persons and their contentious cases, public law was primarily pertinent to relations between private persons and the state. This is the reason that Englishlaw had been for so long reluctant to admit administrative law as an autonomous branch of law. This feeling was more particularly strong towards administrative courts commissioned with the task to solve public law disputes. On the other hand, this principle offered the legal guarantee formulated towards the power-bearers: state officials do not have immunity from being accountable in front of ordinary courts, either. Again, we need to be more specific about this; responsibility based on equal rights has never been clearly applied or has never taken effect. Owing to administrative decisions, there were the particular forms of complaint, the torts to be applied⁸⁶ in these particular debates. Besides ordinary courts, specifically English, arbitrary tribunals operated.⁸⁷ Formerly known as the Queen's Bench Division, later on the Administrative Court did come to exist formally as part of the High Court (not the highest level, though).⁸⁸

Finally, the third component linked the previous two principles; according to this, *general rules of constitutional law derive from the*

⁸⁵ CRAIG 2008, 24, 89, 551, 719, 728.

⁸⁶ Certiorari, prohibition, mandamus, injunction or (after the reform at the late 1990s) quashing, prohibiting, mandatory orders, declaration and injunction. See CRAIG 2008, 790–794, 829–835.

⁸⁷ PATYI 2002, 77–81.

⁸⁸ CHRONOWSKI 2007, 180.

common law of the country i.e. the constitution is the result of fights for the individual rights in front of the courts. This latter idea needs certain explanation. Namely, that *common law* is considered to be the source of law; consequently, sources of the constitutional custom and freedoms are recognized and consistently applied by courts. Therefore, in this system the constitution containing rights and freedoms is not *a present* from the Sovereign and neither is the result of a single decision of the legislation.

Dicey's theory represents why parliamentary sovereignty together with a particular role of developing (more precisely: acknowledging) law in courtrooms safeguarded the rule of law. This is the reason why the exclusive character of parliamentary legislation has never become arbitrary. It is because of the law-attesting function of the courts who have always been watching over that written law (or the legislation) should never limit arbitrarily *ordinary law* considered to be the source of constitutionality. *Hart's* interpretation is most expressive and easily intelligible: Parliament does create law. Nevertheless, the content of a legal instrument will be communicated by the court; i.e. courtroom application is ultimately an instrument of validation for the law created by the Parliament.⁸⁹

Specific traits regarding limitations of exercise of power can be found in the German approach on the rule of law (*Rechtsstaat*). German literature for *Rechtsstaat* has numerous ramifications, therefore even listing the most important pieces of work is little possible. When we wish to highlight some of the oldest sources, we refer to the description by *Robert von Mohl*, who thought that a state built on law (*Rechtstaat*) is governed by reasonableness; it sustains its legal order, gives opportunity for its citizens to reach their reasonable goals and guarantees equality before the law and exercise of fundamental rights and freedoms. As a contributor of the great spiritual efforts in the first half of the 19th century (leading to social movements later on), *von Mohl* gave such an interpretation to the rule of law which has had an impact to our days.

His premise is that the existence of the state exercising the supreme power is a necessity, as it is only through this that order in society can be sustained. Law is the device for maintaining order; hence the primary task of the state is safeguarding the enforcement of its own legal order. The state governed by law, i.e. the establishment of the *Rechtsstaat* is not immediate, therefore it is not by necessity. It either appears by development

⁸⁹ HART 1994, 200–210.

or by conscious transposition of existing forms. As opposed to the French solution or the English one (also established in earlier days, nevertheless written later), *von Mohl* neglects on principle to connect the idea of the rule of law to a specific kind of institution or government. His approach, on the one hand, takes into consideration historical development. On the other hand, he takes the role fulfilled by law as universally recognised (independent of the historical establishment of a state).

At the same time, *Rechtsstaat* as defined by *von Mohl* has certain content constituents which appear in the catalogue of the French catalogue of rights; yet, formally, they are not part of the English rule of law concept even if ultimately the English customary law guarantees the same. These content elements are equality before law, fundamental freedoms of the private person by which the persons may strive to reach goals utterly not forbidden by law, and *Rechtsstaat* shall warrant it. Similarly, an indispensable component of *Rechtsstaat* is to ensure for any subject of law with sound mind the right to take part in the management of public affairs (by fulfilling official positions and by the right to suffrage) i.e. contribution to democratic legitimacy. These are also complemented by guaranteed freedoms, out of which personal liberty, the freedom of speech, the right to free exercise of religion, the freedom of movement and the freedom of assembly are highlighted.⁹⁰ Probably the most important element of the German *Rechtsstaat* concept is stressing the substantive components, i.e. the right of legal subjects to decide and act freely.

When analysing simultaneously and in correlation the approach of French, English and German constitutionality, the rule of law and *Rechtsstaat* respectively, we can get utterly different responses for the fundamental question of limiting the exercise of power. By radical simplification, we may probably declare that the French answer is the institutional solution (division of power), the English independent law-applier seeks (in principle) unlimited disputability before courts as a procedural aspect, while the German answer sees the enforcement of substantive rights and freedoms as indispensable. Today's constitutional concept is a kind of summary by considering all the three basic elements to be equally necessary. The chapter *The Concept of the Rule of Law in Hungary* will present in detail the development of the rule of law concept after the transition. Yet, in order to sustain our statement, it will probably suffice to refer to the

⁹⁰ von MOHL 1995, 32–36.

common values declared under Article 2 of the Treaty on European Union as mentioned in the introductory chapter:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”

These values are not a simplified, common set of answers for constitutionality as provided by the individual nations or, in legal approach, by legal families; this is an aggregate of individual answers for the approaches on the exercise of power. However, those written so far raise further questions. Firstly, the source of value regarding constitutionality, secondly, the correlation between the rule of law and further constitutional values. We will see that this relationship has been formed quite arbitrarily.

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3. Legal Positivism and Constitutional Values

The previous chapter was dedicated to approaches appearing in the three big families of law, after which we drew the conclusion that all three have contributed to the formation of today's concept of constitutionality. Before analysing how this has led to certain interpretations following the transition period in Hungary, first we have to give a quick scan to the concept of constitutionality in terms of inherent value and sources. In lack of this, today's domestic explanations might seem quite randomised (accidental). Anticipating our conclusions as hypotheses, we will see that values of constitutionality are partly invariant and stem from the specifics of law as a concept. A different part of these values is specific of the individual path of the national law development, as reflected in the variety of French, English and German solutions. Our demonstration, therefore, is an endeavour to prove that we can equally recognise universal values besides our own (national) traits as components of constitutionality. If our attempts bring success, these will substantially contribute to sustaining the idea that the obligation to respect these largely different constitutional identities is a fundamental legal value itself.

It is worth beginning by clarifying the method to deal with constitutional values. 25 years spent in the re-establishment of our constitutionality offer a dogmatic approach as it has been shaped by the constitutional court case law based on the interim Constitution, and later, on the normative text of the Basic Law enshrining fundamental rights, state aims, fundamental principles and immanent values. Obviously, this is well grounded, moreover, it is ultimately inevitable; nevertheless, this method has a side effect: being bound by the text, it tackles constitutional values as if they were facts. That is, besides presenting them one by one or as a system, it leaves the most important questions unanswered: why these are the characteristics of our legal order, and to what extent these may be regarded invariant. In other words, despite all the benefits of the dogmatic method built on textual positivism (exactness, structured manner), it is the conclusions describing the random quality and also the necessity of the values which are underplayed. Our assessment, therefore, starts with a method offering

less obvious and probably less spectacular results. We try to define the conceptual context in which it is possible to reveal constitutional values in general, i.e. not as represented in the text of a specific constitution.

3.1. About constitutional values in general

A common element of the Hungarian approach regarding constitutional values is emphasising the role of the transition period.⁹¹ Just an example: clearly and unequivocally, *János Zlinszky* introduces the essence of constitutional values by a quite unusual idea. He does not consider the former text, Act XX of 1949 a *precursor* of the 1989 Constitution. Instead, he regards our *forgotten* historical constitution as the real precursor.⁹² By this, in fact, he projects his view about the Bolshevik party-state establishment; he does not consider it to be constitutional. As he later on explains, he does not hold the Bolshevik state to have been under the rule of law. And, due to this lack of the rule of law, he does not consider interpreting constitutionality to be even formally possible. That is, he narrowed the legal continuity between the party-state and the rule-of-law-state to positive legal layers. As declared in writing, he continues to express the relevance of respecting the constitution instead of amending that, although he reinforces the idea that the Constitution was interim. Positive legal continuity is unsustainable between the party-state system and the Constitution of the state under the rule of law (which is) in continuity with the historical constitution. His premise referring to the value content of the constitution is simple and clear.

“...the state under rule of law is a value-bearing category. Establishing that is not a question of liking or disliking but a question of necessity in social interest. Its fundamental values cannot be modified upon the will of the majority since their value-bearing feature is independent. It is only the rule of law which can be modified, eradicated or replaced by a somewhat or seemingly similar organization when the

⁹¹ ÁDÁM 2006, 11–23; KOVÁCS 2004, 60–76; WIENER 2003, 24; SÓLYOM 2001, 686–706; HORKAY HÖRCHER 2003, 62–72; KUKORELLI 2006, 11; Decision 11/1992. (III. 5.) AB.

⁹² ZLINSZKY 2005, 3.

political majority denies, refuses, de-emphasizes or wishes to replace its values.”⁹³

Two further considerations make *Zlinszky's* point of view clear. If questions, these would sound as follows. Is a constitution a fundamental norm limiting the field of activity in the political arena (and of legislation) or is it a set of rules for how to play the game, which is agreed to momentarily, thus open to be altered any time on principles of utility? Firstly, he explains proceeding from two random definitions of the constitution; he holds the stricter one to be more acceptable. On the other hand, as a verification of his viewpoint, (though unuttered) he relies on the essence of *Weber's* definition of power⁹⁴ (which can also be perceived in *Waldo's* definition of administration.⁹⁵) Power as a real social phenomenon is a chance for enforcing somebody's will despite opposition. His opinion on how to exercise power in an acceptable way coincides with *von Mohl's* opinion:⁹⁶ the essence of the rule of law is that, while upholding a formal legal order, it allows for accomplishing reasonable human goals. This is why it acknowledges equality of persons before the law and safeguards exercising rights and freedoms. An important element of *Zlinszky's* interpretation is personal and collective responsibility without which a state governed by the rule of law is inconceivable, he deems. At this point he highlights democracy and the subject of that: the nation creating democracy and also bearing responsibility for that democracy.

The role of the Transition, the adoption of the interim Constitution is a core element despite the various bases of approaches, either materialistic or idealistic, and different interpretations ranging from positivistic, even natural law or legal sociology. This is nothing peculiar when we think about the interim Constitution as the symbolic product of the transition period which, at the same time, is the bearer of it. When the interim Constitution or the Basic Law are scrutinized for value, it definitely needs to be mentioned what circumstances these were born in. Whereas, when analysing in depth the ideas presented before, we need to mention that the quoted authors do not attribute importance to values resulting from the

⁹³ Ibid. 4–5, 12–13, 81.

⁹⁴ WEBER 1978, 77.

⁹⁵ WALDO 1955, 6.

⁹⁶ von MOHL 1995, 32–36.

transition period and values represented in the interim Constitution or the correlation of those owing to their mere sequence in time.

The authors attribute relevance first to the factuality of the transition period and to the legal circumstances of its occurrence. Overtly or covertly, it makes allusions to the fact that the transition period, consequently the interim Constitution are the result of opting for values. This is primarily derived from defining the reference point for legal continuity (i.e. denial or refusal of the establishment based on a party-state system). It will be hidden in the attributes: *constitutional* and *under the rule of law*.⁹⁷ We will deal with this idea further on. As for now, we can declare that, by this solution, the system of values of the interim Constitution is actualised; in any legal assessment it is considered a fact. This conclusion may not come as a surprise when we observe that the Constitutional Court stated the same by considering the state under the rule of law a fact, all in all, a program.⁹⁸ Hence, it has already accepted the factual character of the selected value even in a positive legal approach.

Furthermore, the transition period and its selection of values affects our legal assessment regarding the value system of the interim Constitution and even of the Basic Law. This is true not only for the transition period itself, but also for a larger or narrower context of ideas.

The larger context is the historical aspect of the system of values.⁹⁹ As for legal continuity, we need to emphasize the role of the (legal) tradition, i.e. the importance of the fact that the transition period and the interim Constitution (new by that time) did not appear as absolute origos. They referred to former values to accredit their legality. We will discuss in detail the theoretical importance of this and its influence on the constitutional system of values, in connection with the nature of law. Anyway, it is history that manifests in the impact of the transition period exercised on the fundamental (constitutional) rules connected to individuals and the community, which is highlighted by the constitutional importance of fundamental rights and the inherent values held.

History itself reflects the importance of the answer as provided by the Basic Law to the question of historical constitutionality. The Basic Law itself appears to be a written constitution. Whereas Article R) Section (3)

⁹⁷ PÉTERI 1994, 213–268.

⁹⁸ Decision 11/1992. (III. 5.) AB.

⁹⁹ KUKORELLI 2006; PÉTERI 1991, 32–47; BALOGH 2006, 39–42.

imbeds it into the historical constitution by ruling that the Basic Law shall be interpreted with attention to the aims of its provisions, to the National Avowal comprised in it, and in harmony with the achievements of our Historical Constitution. This is an utterly new legal phenomenon. During the preparation works for drafting the Basic Law, some held that bringing the Historical Constitution into effect anew would be a good solution. This is nonsense, as 50 or 60 years are impossible to be deleted from the history of law. Another approach envisaged that the new constitution should be really brand new, a clearly written *product* of legislation. However, some of the conditions necessary to do so were not available. Something had to be done about the issue of legal continuity. The solution finally chosen by the Parliament is wonderful because it overcomes the either/or solution. By *reviving* the hermeneutical layers of the Historical Constitution, it lays the basis and provides a background for the Basic Law on top of statutory law hierarchy. As a model, we could represent this by a sand-clock, laying statutory law on the bottom, Basic Law above that (about the middle of the sand clock), and on top of all, the Historical Constitution which will be embedded (again) into the statutory law through the Basic Law. It might be that the real novelty of the Basic Law lies in making this possible to happen.

3.2. The transition period as a constitutional discontinuity

It is impossible to neglect an inherent nature of law even when starting from a very simple interpretation: by perceiving law as an aggregate of compulsory behavioural rules for persons (legal subjects), as created or at least recognised by the state, and ultimately enforced by the state.¹⁰⁰ We speak in particular of this feature: a compulsory rule of behaviour may not be perfectly immutable, however, without a kind of permanency it will lose its specific legal trait. A rule of behaviour in continuous change, in fact, is impossible to be classified as compulsory. Obviously, that “legal subjects shall have real opportunity to adjust their behaviour to legal specifications” was also taken into account by the Constitutional Court when they considered this (the quote) as a collateral of the rule of law, by necessity. “For this aim, statutes should not impose responsibilities for

¹⁰⁰ SZILÁGYI 1992, 159–163; ERDŐ 2003, 47.

the date preceding their promulgation; specifically, some lawful behaviour should not be qualified as illegal by retroactive validity.”¹⁰¹ However, it is also due to the concept of law that its character is changeable. Law as a set of norms is a phenomenon presuming relative steadiness while being exposed to change. This relative consistency, parallel with its changing character, is definitely true for the constitution, as well.

The question is whether, in function of intensity or extent, it is possible or necessary to make distinctions regarding certain changes in law, specifically in a constitution. Naturally, the answer will not be incorrect when we start from the following idea: provided that the constitution as the foundation of the positive legal system changes in its entire length, and a new constitution replaces it, the change is complete in the content. In the moment of shifting the effect, intensity is also maximal. Such a change is definitely different in its importance than amendments affecting just a few provisions. The *old* constitution losing effect and the new constitution becoming effective creates a break in the continuity of the legal order. This is a clear-cut counterpoint in the complete stability and unbroken continuity, a breaking point.¹⁰² The question arises: when do the changes between the two poles (i.e. the partial ones) reach the specific depths of content and intensity to create a breaking point? Actually, a chapter which was meant to be short is not appropriate for a detailed and refined evaluation. Yet, there is no reason to presume that a significant change in the exercise of power as regulated by the constitution could not be assessed as a breaking point. We can declare as such the changes in the form of state or government, i.e. the more significant changes in the division of power. Albeit such changes may also occur in the tier of the fundamental rights defining the content of the relation between the state and its citizens. It is a fact, however, that the constitutional revision of 1989 was a breaking point in Hungary, and so was the share of powers emerging from sovereignty as of 1 May 2004 between Hungary and the European Union (the terminology of both the interim Constitution and the Basic Law call it transfer of scope of competencies).

Reasons for the emergence of the breaking point might be various: external circumstances (war and its aftermath, joining a federal system, etc.) and internal ones (extinction of a dynasty, economic collapse and

¹⁰¹ Decision 25/1992. (IV. 30.) AB.

¹⁰² GRUDZINSKA-GROSS 1994

dissatisfaction among the citizens, reforms generated by the elite, etc.) may have a share in it; however, from a legal approach, these do not have too much relevance. It is much more relevant as a circumstance whether the change occurs by respecting the previous legal order or the constitutional breaking point brings about total refusal or neglect of the legal order. When we attribute importance to national (peoples') sovereignty,¹⁰³ it is not irrelevant whether the breaking point, better to say the new order following the breaking point meets the support of the social majority. *Legality and legitimacy*, therefore, can be considered defining features of the breaking point.

When we combine legitimacy and legality, we get four possibilities for describing the constitutional breaking points. The change can be: a) legal – legitimate; b) legal – illegitimate; c) illegal – legitimate or d) illegal – illegitimate. (In this model we project the moment of the breaking, which means that legality shall be understood according to the interpretation as of the previous legal order.) Wishing to illustrate the differences between the four quarters shaped by the four pairs of concepts, we can give an empirical model for each: a) change of power by reconciliation; b) coup d'état; c) revolution; d) foreign occupation.¹⁰⁴

Legality and legitimacy may appear as limits to each other; if we take one of them as given (i.e. we discuss the legal or legitimate breaking points only), it is unimaginable that the other one may take effect in an unlimited manner. To continue with the previous examples, when we imagine the change within the framework of the standing constitutionality, that may reasonably not be by force or aggression, and vice versa. If we view admissibility as a defining feature, then all the relevance of legality is lost when the ruling power loses overall support. Admitting this will lead further to the conclusion that the new order formed after the breaking point will be by all means historically bound. The way of the breaking point described by the two conceptual characteristics will define the characteristics of the new order. Following this, it is unavoidable to have an assessment about the value of these two theoretical concepts defining the breaking point and attributing a historical bond to the constitution. We also need to analyse how much interdependent those are.

¹⁰³ TAMÁS 2010, 209–212; PETRÉTEI 2002, 98–103.

¹⁰⁴ GLATZ 1988; JÁSZI 1989; HOBBSAWN 1964; SARLÓS 1987

3.3. From legitimacy through national (people's) sovereignty to national solidarity

We hold that national (people's) sovereignty is a principle of constitutionality by necessity. We hold that the actual manifestation of that (i.e. effective real support of the new order) has to be interpreted as bound to history. If legitimacy is not used in its primary, sociological meaning but one reflecting admissibility and support of the *legal order* in its entirety, then the legitimacy of the new constitution from after the breaking point (and that of the new legal order) is congruent with the exercise of national (people's) sovereignty. It is the subject of constitution (the constituent power, the source of sovereignty) who drafts the new constitution. Therefore, of necessity, it legitimates the new constitution and the new state establishment, the legal order built upon that. Legitimacy in this approach is the (subjective) side of the new order, whereas the reason for the breaking point is the decision taken by the subject of the constitution to discontinue the former order.

From the above stream of arguments, the following statements are concluded. Primarily, that it is impossible to interpret a standing constitution, constitutional order or legal order separated from the subject drafting it, i.e. from the sovereign. Entirely objective constitutions or constitutional orders and legal orders may exist as theoretical constructs only; as such, these may certainly become subjects of legal research. But every existing constitution belongs to an identifiable sovereign and every constitutional order belongs to an identifiable sovereign, as well as a legal order belongs to an identifiable sovereign. Coming back to Hungary's interim Constitution and the Basic Law, we can see that these are not just positive legal norms which, by chance, have normative effect for the Hungarian citizens, for natural and legal persons acting on the territory of Hungary. They are the *own* constitution of Hungary, the *own* constitution of the Hungarian sovereignty. We hold that this conclusion can be justified by the method of *reductio ad absurdum*: if the constitution and the legal order built upon it was not seen as the sovereign's *own* (but a compulsory norm to observe by those staying randomly on the territory of Hungary), then we would not find an explanation for the reason that this same legal order should bind the citizens staying outside the territory of Hungary.

What we have described is (could be) applicable of course to legal orders based on monarchs as sovereigns (to the relation between the

subject and the monarch); yet the theory of national (people's) sovereignty raises further questions. Before all, the question is *who the subject of sovereignty is*. Unless our previous argumentation is all mistaken, we need to find an answer for this question, as the subject is a defining element of the constitution; consequently, this is also true for the values in the constitution.

Within the system of public law subjects in the Basic Law, we will probably find five concepts denominating the source of power relating to sovereignty. These are the following: *the people* (Article B) Section (3) defines it as the source of power), *the nation* (the unity of which is represented by the President of the Republic as of Article 9), *the Hungarians* (and they must be living inside the territory of Hungary if Article D) provides for those living outside the territory of Hungary). Last but not least, *the national and ethnic majority* (which, pursuant to Article XXIX, it is *the nationalities*, while in the terminology of the interim Constitution, *together with the national and ethnic minorities* represent factors of constituting the state). In this conceptual chaos it is difficult, moreover, excluded that there would be a clear logical and close order to establish; and the present study does not target that. Therefore, without clarifying appropriately these concepts¹⁰⁵ or identifying them with any of the ideas from the Basic Law (not even with the concept of nation), in what follows, we consider the nation the owner of sovereignty and the subject of drafting a constitution. By doing so, we accept the argumentation of *János Zlinszky* for the priority of the concepts *people* and *nation* as they occur in public law.¹⁰⁶

As of our interpretation, the nation is the bearer of sovereignty (in this approach, it is identical with the concept of people pursuant to Article B) of the Basic Law). According to this interpretation, the definition of the nation appears in two different qualities in our system of ideas. First, as the source and *abstract* bearer of power from the moment following the adoption of a constitution; it is due to the provisions of the Basic Law that it is the legal foundation of sovereignty. On the other hand, in the moment of adopting the constitution it is the *actual* bearer of sovereignty; and this is the reason why it has the capacity to adopt the constitution.

¹⁰⁵ GYURGYÁK 2007; KÁNTOR 2004

¹⁰⁶ ZLINSZKY 2005, 15.

The circumstance that the nation is equally present in these two-fold qualities has substantial relevance. Neglecting the moment of adoption of a constitution, apparently it is only the legal nation which *exists*. This occurs most particularly in societies/legal orders with an unchanged constitution. In the moment when a new constitution is adopted, the *factual* nation and the *legal* nation observing the old constitution do not overlap any longer. As a consequence, it may seem that the subjects of the nation are connected by nothing else but the provisions of the law, i.e. the nation is equal with the totality of its citizens, and this idea can be strengthened unlimitedly by the positivistic approach (the political concept of the nation).¹⁰⁷ It must be that this impression, whether realistic or not, still attributes importance to the (legal) nation, as power is exercised in the name of the nation. Whereas, if, for any reason, the constitutional order (the legal grounds for power) becomes disputable and a new constitution is going to be drafted, the question asking who the actual nation is gains immediate prominence. This may occur by either failing to re-define itself, which is characteristic of the legal-legitimate breaking point, or by re-defining the (national) identity.

By all means, it is necessary to clarify what connects the members of the nation, once the previous constitutionality no longer does so and since the reason for a breaking point is denying the old constitution. Obviously, the actual power is part of the binding force; albeit admitting that the totality of the affected individuals exercise power together; i.e. *the others* accepted as subjects exercising power presumes that *We* as a subject has a sense; that *We*, one by one, are members of something.¹⁰⁸

Joseph Ratzinger seems to attribute special content to the concept of *We*. When he stresses the importance of law, he especially points at three elements granting the survival for thousands of years of the Jewish people as of the Old Testament. These are: the cult, the law and the *ethos* (the customs).¹⁰⁹ Usually, the law and the customs are subjects of legal studies, but we draw attention to the third element, namely the cult. Accentuating the lay character of the state, separated from any kind of cult, seems to prove that a legal nation can exist without common religious exercise. Reality, however, shows the opposite. Three different authors and three

¹⁰⁷ KÁNTOR 2004, 7–17.

¹⁰⁸ SCRUTON 2004, 9–11.

¹⁰⁹ RATZINGER 2002, 16.

different approaches reach the same conclusion: without transcendence the nation does not exist.

The first one is *Paul Johnson*:

“President Eisenhower, himself the archetype of the generalized *homo Americanus religiosus* asked the nation only for ‘faith in faith’. He told the country in 1954: “Our government makes no sense unless it is founded on a deeply-felt religious faith – and I don’t care what it is.”¹¹⁰

The second one is *György Matolcsy*:

“America has become religion itself. Belonging to the American nation and the American flag demand from and give to multitudes of Americans devotion near to cultic.”¹¹¹

The third one is *Samuel P. Huntington*:

“Protestant beliefs and the American political Creed encompassed similar and parallel ideas and came together. [...] The American Creed, in short, is Protestantism without God, the secular credo of the ‘nation with the soul of a church’.”¹¹²

Coming back to Hungary, it can be concluded that without certain common agreement based on experienced unity, the Basic Law cannot fulfil even the role of a *social minimum*. In order for this to be achieved, there are other things needed besides rational admittance, positive legal certification, strict scientific proofs and admittance manifested in social action actually secured by force. What is needed is more than this. It is an emotional or even spiritual identification, the belief that things go well and the basis for that is *our* standing constitutional order.¹¹³ Therefore, it is not true that the value of the Basic Law lies in itself; it must be oriented towards something. Unless the intrinsic values of the Basic Law are

¹¹⁰ JOHNSON 2012, 556.

¹¹¹ MATOLCSY 2004, 84.

¹¹² HUNTINGTON 2004, 69.

¹¹³ FUKUYAMA 1999, 33.

generally accepted and, due to this, legal order does not have the necessary minimum of admittance, which shall be manifested in voluntary law observance, then constitutional order is not upheld by public agreement but exclusively by force, as a potential manifestation of power. Provided that our initial premise is true, it necessarily leads to a breaking point.

Without *solidarity*, therefore, constitutionality and legal order may only seem to be a surface to cover sheer physical power and not a foundation for a law common to the nation. Solidarity interpreted in the above manner necessarily bears the historical definition for the new order: the new constitutional order does not exist *a priori* but as *the constitutional order of an existing nation*.

3.4. From legality through the intrinsic values of law to personal dignity

A second fundamental conceptual feature of the constitutional breaking point is *legality*. In a first approach, it is nothing else but an extrinsic characteristic of the old and/or the new constitutional order. In a most simple approach, it is (nothing else but) the totality of compulsory behavioural rules clad in legal robes (at least formally) and enforced by the standing power, ultimately.

When we wish to interpret law from a positivistic angle of approach,¹¹⁴ then a simple answer can be given regarding the legality of the breaking point. It is exclusively the change performed by respecting the rules of the old system which is legal, and no other form is so. This primary approach still bears historical bonds. The new order will bear and preserve the marks of the circumstances in which it came into existence: it can define itself only in relation with the former legal order. The question is whether there are further inner limitations or barriers to the new legality born after the breaking point. Therefore, the question is a perseverant one throughout the history of legal thinking: *could there be any a priori normative content* which should be attributed to it, or vice versa? Is there any kind of notional content which the norm cannot actually hold? Further on, we apply simplification again, i.e. we do not scrutinize the individual solutions as answers

¹¹⁴ FRIVALDSZKY 2007, 51; POKOL 1991b, 113–130.

for this question. Instead, we admit the answer mostly approved as of our days, just presented in the previous chapter.

The answer we deem to find in *Radbruch's* formula is this: the requirement for justice built on the equality of the legal subject (people) is posed as a content limitation on formal legality (as an indispensable limitation in the interpretation of our legal concept). We think that it is just a semantic difference when we replace the equality of natural persons with equal dignity affecting even their existence. Even if applying clear legal theory most meticulously, we cannot reach the absurd conclusion that law would refer to subjects who are not alive. (This is impossible to happen because in our case *Sollen* is incoherent.¹¹⁵) Accordingly, the equality of legal subjects shall be enforced in their lifetime. Similarly, we cannot make an abstraction from their will because actions lacking voluntary character cannot be legal grounds for legal consideration. It is exactly due to the potentiality of the will that we deem equal legal subjects those incapable of expressing their will in reality. Judging their interests or behaviour means that we do not challenge their being legal subjects.

Recognising the natural equality of people's will derived from the concept of law is nothing else but *equal dignity*; in other words, it is the general rights of personality or the right to the free development of personality, the person's general right to act freely, all in all, the right to self-determination. Whereas equal dignity, irrespective of the different terminology, is the token of other rights.¹¹⁶

We have to say that without recognising *personal dignity*, constitutionality and legal order will be again mere semblance covering sheer physical power (as we have witnessed regarding solidarity), but no grounds for law. With reference to the wording by *Zlinszky*: when personal dignity is not recognised, the system of norms just looks like law. Recognising the dignity coming from the person's nature therefore is fundamental, *universal* and objective, a feature not existing due to its own determination, but a necessity coming from the requirement of legality. Ultimately, this is nothing else but recognising the natural limitation of law. In a much simpler context: perhaps against his own will, Radbruch smuggled natural

¹¹⁵ KELSEN 1934, 12.

¹¹⁶ Decisions 8/1990. (IV. 23.) AB, 27/1990. (XI. 22.) AB, 57/1991. (XI. 8.) AB. See also SÓLYOM 2001, 452–459.

law back behind positive law. The above argumentation can also be performed from the aspect of legal philosophy.¹¹⁷

3.5. The balance between solidarity and personal dignity: subsidiarity

On analysing the two specific features, the legality and legitimacy of constitutional breaking points, we have to remark that those counteract each other to a certain extent or, they define legal order by reciprocal limitations, to say the least. This reciprocal impact is obvious with legitimate and illegal discontinuities, when mass dissatisfaction brings into existence the new legal order by countering a former one. That is a trivial case, and it has a *match*: the illegitimate and legal breaking point. In other variants, such as legitimate and legal or illegitimate and illegal, this is less obvious. When excluding from our perspective the previous ones, the illegitimate and illegal breaking points by which none of the features gain effect, we have to analyse whether counteraction is by all means effective for legitimate and legal breaking points.

About *legitimacy* we have proved that it presumes *solidarity* as the inner cohesion of its bearer (the *nation*), by which it is historically bound in each real occurrence. Consequently, legitimacy expresses the *singularity* of the legal order, its unique character. As regards its match, we have seen that the *individual's* (person's) *equal dignity* appears as an intrinsic (conceptual) limitation of *legality*. Therefore, it bears the traits of *natural law*, it takes effect as a *universal* component of the legal order. The counteraction of the two concepts is even more accentuated if matching their inner constituents in pairs:

	LEGITIMACY	LEGALITY
Bearer/inner limitation:	nation	dignity (of the person)
Source or origin:	historical	natural law
Appearance (taking effect):	singular	universal

¹¹⁷ FRIVALDSZKY 2007, 412–418.

Moreover, it can be declared as a postulate that it is not only true for the legitimate and illegal or illegitimate and legal discontinuities (when this is obvious), but also for the legitimate and legal ones that the historically bound singular solidarity of the nation is in counteraction with the universal character of the individual's equal dignity originating from natural law. Solidarity and the individual's dignity counteract each other, still they need to take effect simultaneously. We considered that it is a conceptual particularity of the law to regulate the relationship between individuals, hence it cannot be interpreted by merely relying on the individuals. In the opposite case, we meet a logical contradiction since the concept of law loses value by neglecting the relationship between the persons. Or, the interpretation of the individual's dignity denying solidarity (or *leaving that out* from the interpretation) not only suppresses (historical) singularity in favour of (natural law) universality, but ultimately neglects legitimacy as such. Neglecting historical bonds, however, is dangerous due to its quite realistic character, as it may result in real illegitimacy. Thus, solidarity is indispensable in case of legitimate and legal discontinuities. We witnessed the same in an opposite situation. Firstly, neglect for the defining role of the individual, again, conflicts the concept of law in logical terms, since, in this case, it is not a behavioural rule pertinent of interpersonal relationship. Secondly, mingling the individual's dignity with national solidarity makes everybody *vulnerable*; therefore, it is of necessity (even by neglecting the logical contradiction) that it should entail illegality in the exercise of power. Recognising the equality of the person's dignity should also be treated as a necessity in case of legitimate and legal constitutional discontinuities.

To put it in a nutshell: without simultaneous recognition of solidarity and personal dignity, the legitimate and legal breaking point (discontinuity) does not exist. Let us remark that solidarity and personal dignity are obviously important not only because of the breaking points, but also in the everyday life of the new constitutional order following the break. However, the two components do not necessarily appear together spectacularly in the everyday life of a normal legal order. In the exercise of national (people's) sovereignty (elections, referenda), solidarity is the highlighted feature; the individual (the person's vote and dignity) withdraws into the background. While applying law on a voluntary basis or by exercising power, it is necessary to make decisions about the individual's rights and obligations. Meanwhile solidarity is implied in the legal order

as the grounds for the decision. However, if the component *drawn into the shadow* behind the other one will be neglected continually, that will cease either legitimacy or legality, leading to a breaking point.

Solidarity and personal dignity have to be effective and present simultaneously in a legal order. Their right ratio cannot be defined by the methods applied so far. What can be stated with certainty is that the two final points, i.e. one quality disappearing and the other quality becoming exclusive, equals denying law. *Legitimacy and legality of constitutionality presupposes the existence of subsidiarity between solidarity and the person's dignity*. Subsidiarity interpreted in this manner is a very flexible concept. Except for the *extreme values* of the two components, any ratio is *acceptable*. This is true not only for the historically limited ratio for solidarity – individual dignity represented in the system of concepts as a static *screenshot* in the moment of constitutionalizing. It is also true for the innumerable other ratios built on that, emerging in justice. Only the two final points are denied.

Balancing solidarity and individual dignity by means of subsidiarity is not a new idea. Furthermore, interpreting law from a sociological aspect entails unconditional choice. *János Frivaldszky* clearly presents how the basic principle of subsidiarity (also rooted in natural law) has become an own basic principle of the European Union. This basic principle was taken over in the sense interpreted by *Pope Pius IX* in his encyclical *Quadragesimo anno*, and it is manifested in the everyday practice of the European Union institutions.¹¹⁸ In a different work of his, *Frivaldszky* demonstrates how law has a relational (interpersonal) character as a consequence of a definition we also accepted. Hence it is impossible to interpret that exclusively as a manifestation of power relations.¹¹⁹ What we hope to add to this is presenting how validity of the triad solidarity–personal dignity–subsidiarity can also be deduced from the dogmatic interpretation of law.

Subsidiarity, respectively validity of the triad could be similarly deduced from the analysis of the concept as approached by positive law. The principle of necessity appears in the norms pertaining to social security, social grants and in laws on taxation, particularly as related to Article XIX and 40 of the Basic Law. The right to social security and the

¹¹⁸ Ibid. 422–433.

¹¹⁹ FRIVALDSZKY 2008, 5–29.

obligation to shoulder public burdens is nothing else but the positive legal representation of the dogmatic requirement regarding subsidiarity.

Consequently, subsidiarity is represented not only in the supranational relation of the European Union¹²⁰ as a balance for the loyalty of each member state and for fundamental freedoms¹²¹ but also within the framework of the constitutionality in effect. Loyalty based on membership presumes reciprocity between the nation state and the person. Whereas membership is an expression of general legal capacity and citizenship based on human quality. This reciprocity is expressed by subsidiarity also manifested on the level of positive law as a principle, which compels self-limitation equally binding the nation (the state) and the individual (the person).

3.6. What does the framework of concepts bring about?

Assessing the values of a constitution within the conceptual framework of solidarity–personal dignity–subsidiarity triad brings about further consequences. On the one hand, it is obvious that the enforcement of the exclusive character of solidarity (i.e. the source of power, more exactly, the will referring to this) while neglecting the personal dignity of the individuals excludes the possibility that justice, thus any legal value could be effective.¹²² A unilaterally communitarian state therefore will never be under the rule of law since that *per definitionem* raises autocracy, whereas values cannot even be defined while based on autocracy. On the other hand, exaggerating the role of the individual, excluding loyalty, solidarity and unity from the interpretation of power or law is nothing but presuming co-existence of persons, independent of each other, living in a chaotic multitude. The relationship between such individuals could not be interpreted otherwise than as the result of individual wills meeting randomly, without a priori limitations. When we try to build law upon this, it will only become arbitrary due to the lack of *a priori* limitations. Again; *per definitionem*, if there is nothing else but the individual will, then any kind of limitation regarding that can be nothing but arbitrary.

¹²⁰ KENDE–SZÜCS 2002, 510–520.

¹²¹ KENDE–SZÜCS 2002, 162, 429, 484, 515, 545, 583–603.

¹²² SCRUTON 2004, 25–26.

It is obvious that one cannot talk about values in this case, again, for two reasons. We either accept those values as a totality of the individuals' subjective values (which will necessarily lead to elements excluding each other), or as a common minimum of subjective values. Besides, this is accidental as there may or may not be common elements in the totality of subjective values. On the other hand, this will necessarily approach 0 (null); if any of the individuals does not consider his/her own just one element of these values, it needs to be left out of the common minimum. Moreover, such an approach regarding values would continuously change in the meaning, hence it may not gain legal value again. Our assessment/interpretation might impact the means of limiting fundamental rights by rehabilitating the normal use of the concept of *adequate* exercise of rights. In vain was the transition period reluctant to recognize this, it may not be neglected that human or fundamental rights are still rights. That is, they may become effective only by relationship, when meeting other rights and the rights of other persons; this is the only way it makes sense. It is within the framework of a community only that one may talk about the right of the individual. Without this it can be defined as personal interest, and by no means as a right.¹²³

On the other hand, when we accept subsidiarity as a reciprocal limitation of solidarity and personal dignity, we cannot approve unlimited pluralism as grounds to interpret legal values. The universal character of personal dignity as an *a priori* value excludes certain kinds of accidentally unanimous interests from the hierarchy of values (in fact, all those denying the person's dignity as an *a priori* value). In its historical appearance, solidarity (also an *a priori* value) safeguards the existence and stability of law, ultimately providing the self-defence of the source of sovereignty. Of course, this approach contradicts in general the pluralism of values which has been the reference since the Age of Enlightenment; however, originally it was nothing else but an ideology to confront the existing establishment.¹²⁴ Therefore, viewing it as a fundamental concept of legal values was an erroneous approach from the very beginning.

Naturally, it follows from our view that distinguishing between facts and values cannot be identified by differentiating objectivity from subjectivity. Legal value is objective even if it is not factual. In some

¹²³ SÓLYOM 2005, 44–49.

¹²⁴ SCRUTON 2004, 41–46.

of the cases, objectivity might be bound materially. Yet, this is brought about by solidarity, ultimately. It must be something superior to this in the interpretation relying on the concept of law. It may have an invariant content, respectively, the recognition of the person's dignity, which shall be effective, irrespective of any kind of interest. Let us reinforce: this is an inherent quality originating from the content of law as a concept. Regarding the objectivity of legal values, whether or not we apply the approach of *Radbruch* or its application to the Hungarian transition by *Zlinszky*, there is a measure of values below which law, hence the state under the rule of law (*Rechtsstaat*) loses its own legal quality. And this one is pending on the presence of real value content in the actual legal order, as well as legal practice.

All these have an immediate theoretical and a practical consequence to draw. The theoretical consequence is that the above basic values of law are indispensable and that the binding force of law can be derived only from those.¹²⁵ The practical consequence, on the other hand, is this: without the triad of solidarity–personal dignity–subsidiarity interpreted clearly and factually, a legal text will be something different than “*our*” constitution. It will be a positive legal instrument, controlling to a certain extent the exercise of power, the factual grounding of which is rather arbitrary. On the other hand, such an arbitrary instrument may contain certain intrinsic values which may emerge accidentally, and which might be easily left out from a new version of the text. Therefore, it is much more likely than vice versa that an utterly new constitution is even more deficient in values than the one preceding it in effect. This is true unless the new constitution is the result of a constitutional breaking point i.e. when, under the binding constraint of the circumstances, we reinterpret the components of the triad.

It is what lack of “compelling circumstance for adoption of a new constitution” means:¹²⁶ without a breaking point, certain provisions of the constitution can be altered. Yet the attempt to radically renew the law regulating relations between the individual and the community might sound senseless; you cannot find a nation to match your constitution, it is only the nation who can have a (matching) constitution. (This is what the constituent power in Hungary recognised in 2011 and this is reflected

¹²⁵ COING 1996, 122; FRIVALDSZKY 2007, 470–471; HART 1994, 121.

¹²⁶ TRÓCSÁNYI 2006, 45–46.

in the Basic Law.) We think that, even if by abstract arguments, we succeeded to justify the hypothesis drafted at the beginning of this chapter. Albeit, we still have not found an answer for how the plurality of values, the obligation to respect constitutional identity refer to the concept of the rule of law as of our days. This is the next issue we attempt to discuss.

4. Concepts of the Rule of Law in Hungary

In order to understand the interpretation of the rule of law in today's Hungary, repeatedly, we have to return to the topic of the transition period. On previous occasions we have proved that, while the Historical Constitution was in effect in the monarchic Hungary, public law literature was built on the concept of constitutionality and not on the principle of the rule of law. By this consideration we do not assume that the idea of the rule of law was not present for a substantial time in the Hungarian Kingdom. It is only that self-determination of the state was not characterized by the attribute of the rule of law. After the Bolshevik seize of power, rule of law was obviously not an option as the new system was built expressly on the denial of that.¹²⁷

4.1. Public law in the Bolshevik power-state

Several months following the end of the Second World War and the re-establishment of the civil administration, the National Assembly (using the empowerment given by itself), drafted the so-called *small Constitution*. Accepted on the 1st of February, and promulgated as Act I of 1946, this law provided rules regarding the form of state (republic), the head of the state and the exercise of the executive power. In its preamble, therefore not by direct normative force, it declared the respect for human rights. Expressing accidental political opinions regarding the new form of state was impossible as Act VII of 1946 on the Criminal Law Protection of the Democratic Order of the Republic ordered to punish not only the perpetrator of the act aiming to overturn the state order created by the small constitution, but also the initiator, the material supporter, participator, leader of a movement or organisation with such an aim. The row was continued with those to be punished for stirring revolt against

¹²⁷ BEÉR 1968; KOVÁCS 1962; BIHARI 1984

the state order instigating for the change of the republic, hatred, despise and endeavour to diminish international respect. Moreover, all this was accompanied by a threat of an obligation to report, and failure to do so was again punishable. The law allows for the assumption that the introduction of the new establishment was primarily founded by/on force and this was confirmed by the posterior political trials.

The Parliament¹²⁸ started debating the proposal for a new constitution on 17 August 1949; the next day, on 18 August they passed Act XX of 1949 on the Constitution of the Hungarian People's Republic. The new constitution, which is an almost direct translation of Stalin's Soviet Constitution of 1936, transformed in every detail the state organisation and the administrative structure as part of it. Alone, the new change in the name of the state from Hungarian Republic to Hungarian People's Republic may not have necessarily meant a radical change. However, later on this name has become an emblem of the whole era.

Even the preamble indicated that the country, breaking with constitutionality or the rule of law, treads on the path designated by the new Soviet Union (beside(s) the presence of the Soviet Red Army within the territory of Hungary):

“By the lead of our working class who have gained endurance in fights of decades, enriched by the experience of the socialist revolution in 1919 and relying on the Soviet Union, our nation started to lay the foundations of socialism and our country progresses towards socialism on the path of the new people's democracy.”

The Constitution clearly and utterly broke with the principle of equality before the law when in Article 2 it defined the state as that of the workers' and the peasants'. Whereas, in safeguarding the fundamental rights it made a distinction between due rights of the *citizens* of the People's Republic and those of the *workers*. The most important change in the fundamental principles is the break with the theory of the division of

¹²⁸ In Hungarian there were different terms for *Parliament*. The former term *Nemzetgyűlés* [National Assembly] was changed by Act XXII of 1947 on the parliamentary elections to *Országgyűlés* [State Assembly]. Both denominations have been traditional in Hungary, perhaps the reason for the change in 1947 was due to the ignorance of any reference to the nation.

powers. An essential element of the Bolshevik state establishment was the principle of the unity of power as a principle upon which the constitution of the Hungarian People's Republic was quite evidently built. According to the provisions of Article 10:

“The Parliament exercises all the rights stemming from the people's sovereignty.”

Within the structure of the Constitution, one seems to recognise organisations formally bearing legislative, executive and judicial functions (the Parliament, the Council of Ministers, the courts), yet the legal status, scope of tasks and mostly the relation with each other was not as usually applied in constitutional states, but as adjusted to the principle of the unity of power. The unity of power and the new type of division in the organisation of the state was the result of a longer process even in the development of the Soviet Union. According to a monograph from 1962 by *István Kovács*, the reflection of the theory on division of powers was still visible in the Soviet public law literature until 1940; it was the Soviet Constitution from 1936 to show that a new interpretation was needed.¹²⁹

The Constitution of 1949 (mostly a translation, as mentioned before) shows exactly that the organisation of the state is grouped in four types of authorities. These are the *organs of the state power* (the Parliament, the Presidential Council of the People's Republic elected from the members of the Parliament, as well as the local councils replacing the local governments); *the organs of public administration* (the Council of Ministers replacing the Government (*Kormány*), the *centrally subordinated* ministries, and the state administrative organs of *national competence*, the councils and the executive committees of these); *the courts* and the *prosecution*. These four types of organs did not represent separated branches of power. They merely bore certain functions allocated by work-share in exercising state power which was an organisational structure of uniform hierarchy. Within real political decision-making (classically interpreted as government), the only player was the Bolshevik party. In the period immediately following the war, it was the Hungarian Communist Party; after passing the constitution and integrating, more exactly merging the Hungarian Social Democratic Party, it was the Hungarian Working

¹²⁹ Kovács 1962, 256–257.

People's Party. After the restoration period following the 1956 revolution, it was the Hungarian Socialist Workers' Party. The organisation of the state served only the execution of the political (i.e. governmental) decisions of the communist party. Even on the highest level, the Parliament was a tool of the party.

In fact, the *organs of state power* did not perform their former tasks either (legislation); they were the most important institutions of the uniform state administration because, in principle, they were established by election as direct manifestation of the people's will.

State power did not mean an attribute, a power of branch. Neither did it signify the most relevant institution of decision-making. It simply covered the formal way of acquiring the commission. Irrespective of its denomination, as of the dogmatic legal definition it was an institution fulfilling administrative tasks, executing on the highest level the compulsory decisions of the communist party. This was also manifested in the fact that the secondary literature of the later decades (those of the 1950s, 1960s and 1970s) clearly attributed a leading role to the Parliament, towards the Council of Ministers or the local councils. Albeit, in the classical approach of public law, central supervision is an activity characteristic of the administrative competence of the executive power. This central supervision or leading function of the Parliament is also proved by the fact that every other state organisation fell under the competence of the Parliament. This was true even for the judicial courts and judges who were not appointed by the Minister of Justice, but elected by the Parliament; the judges were withdrawable.

All in all, it can be stated that the state organisation of the People's Republic was indeed a monolithic administrative structure, its every single organ was uniform and organised in a linear hierarchical chain. Legal literature did not treat this as covert information even in the era of the totalitarian state. Later descriptions will only deal with technical typology and not one reflecting the division of power: the Parliament, the Presidential Council and the Council of Ministers were separated for dividing the workload. In reality they used to work in subordination with each other. In relation with the citizens, the primary authority of exercising power were the Council of Ministers and the local councils under the direction of the Council of Ministers.¹³⁰

¹³⁰ SCHMIDT 1976, 243, 402.

The operation of the system and the totalitarian state establishment was safeguarded by the secret police, the State Protection Authority which gradually became *independent* from the police i.e. one directly following the indications of the communist party. After the Constitution was passed, decree 4353/1949 of the Council of Ministers issued on 28 December 1949 absolved the State Protection Authority from the direction of the Minister of the Interior and placed it under the direct order of the Council of Ministers. The State Protection Authority aggregated the usual secret police tasks (intelligence, counter-intelligence and the respective military services). Its power was a particular scope of activity covered by the concept of *internal intelligence*. It performed comprehensive control, and exercised influence over private persons and their organisations. An example for this are the churches as institutions uniquely tolerated and exempted from communist direction in that era. Needless to explain why it was necessary to eliminate the administrative courts before passing the constitution or why the term *public administration* was simplified to *state administration* in those days.

Being lawful, if ever considered to be relevant in those days, being bound by law meant nothing more than the need to integrate (sooner, to interpolate) a legal instrument between a politically defined decision and executing it. The local councils, the Council of Ministers and the Presidential Council were able to provide that quickly. It was not by chance that a certain dogmatic concept gained ground in that area and survived for quite a long time. It was a particularity of public administration: to create law executed by itself. When it was not necessary to get adjusted to the limitations of the division of powers, indeed there was an opportunity for that. The established organization of state was extremely rational in the logic of the regime. Each of the higher institutions directed a limited number of subordinated units. Therefore, without special data gathering or analysing activity, it was controllable whether the execution of the political decisions was timely and in harmony with the expectations of the communist party.¹³¹

Despite this, in the last years of the era a substantial change was initiated in the reciprocal direction. A sign for this, one to be recognized immediately was the Parliament *resuming* its legislative function. This was visible in the Parliament accepting a list of topics that formerly could

¹³¹ HORVÁTH 2010, 359–374.

be regulated only by an act of the Parliament and not by lower level instruments, e. g. decrees. The number of statutes increased; moreover, the legislative process was regulated by a new statute which was without precedence. A less strict management of the planned economy was to be witnessed and the private sector of the economy was given a niche, though gradually. Simultaneously, a new taxation system appeared to ensure the expenditure of the state budget, pursuant to legal provisions. Certain important rights and freedoms, such as the freedom of the press, the right of assembly, the right of association – all these gained in effect after being regulated by parliamentary legislation; likewise did, to a certain (fairly low) measure, the limitation of state intervention.

Parallel to this process, though strange enough, the literature on administration and administrative law found a way to save theoretical values from before the Second World War, first treating them with critique, nevertheless presenting them in detail.¹³² The literature of constitutional law bears hardly any trace of that. Constitutional law followed subserviently the actual soviet models. Hence, theoretical paradigms were available for the transition period in order to re-establish or restore the public administration of the rule of law, whereas constitutional law was in a delay.

4.2. The concept of constitutionalism in the transition period

The numbness of the constitutional law facing the processes of transition is clearly referred to by several circumstances. Firstly, that the Hungarian Academy of Sciences chose to commission *Géza Kisényi*, a lawyer dealing in public administrative law, with the preparation of the transition. As the Director of the Programme Office for Research in State Studies of the Hungarian Academy of Sciences, *Kisényi* drafted several studies aiming to further elaborate a new constitution.¹³³ The importance of this circumstance has consequences reaching farther than just keeping account of it as a peculiarity of the Hungarian legal history. The theory of administration and the theory of constitutional law are areas akin (in their subject

¹³² SZAMEL 1977; MARTONYI 1960; LÓRINCZ–NAGY–SZAMEL 1976; SZAMEL 1988

¹³³ BÁNDI 2006, 9; SOMOGYVÁRI 2006, 400.

they both deal with public law). Meanwhile, constitutional law is much more open to theoretical questions, while administrative law concentrates on the practical application of all those. This is to be witnessed in the literature of public law from after the transition, moreover in the interim Constitution, as well. It disregarded such basic issues as values, scientific integrations or embeddedness, correlations with legal history and it primarily concentrated attention on the individual institutions. Taking into account the information available at that time, this was not incorrect, since the interim Constitution was meant to serve for a short term; it is a new peculiarity that, despite this, it remained effective for more than two decades.

Indisputably, those professors teaching constitutional law have made serious efforts in theoretical research to establish the new public law; they wrote comprehensive monographs, but each was pertinent to a specific legal institution only.¹³⁴ A comprehensive assessment on restoring constitutionality was omitted and, within this, so was the concept of the rule of law in Europe reaching the threshold of the 21st century. Let me show by an example how grave this omission was. Even after the transition period, the largest legal department of Hungary, the Faculty of Law and Political Sciences of Eötvös Loránt University in Budapest, still had a manual in use in which a single passage was dedicated to the concept of the rule of law. (N.B. The manual was published in cooperation with the Hungarian Socialist Workers' Party Central Committee Social Policy Department). Listing "The requirements of civil constitutionality", under the subheading "The rule of legal norms, safeguarding constitutionality" the passage had this to say:

"A fundamental requirement of civil constitutions is the guarantee for legality, and for this aim, establishing constitutional institutions (constitutional justice, the ombudsman, and the administrative courts). The requirement for the constitution to be a fundamental law is part of the philosophy of civil constitutionality (even in its form, this is a special law; amending that pends on stricter rules and it is a fundamental law in its content, either)."¹³⁵

¹³⁴ For example FÜRÉSZ 1989; KUKORELLI 1989

¹³⁵ KUKORELLI-SCHMIDT 1989, 15.

Even more illustrative is the fact that the third edition of the book in 1994, even later editions in 2002 and the last one as of 2007, are identical in content, almost word by word.¹³⁶ It is quite characteristic of the era, of the rapid sequence of political events leading to changes in public law that even the most relevant suggestions by Professor *István Kukorelli* were published in daily papers, not exclusively in scientific public journals.¹³⁷

With a preview to the description of the rule of law paradigm during the transition period, one can draw the conclusion from those described above that the Hungarian public law literature (constitutional law and administrative law together) lay the foundations for the regulation of the indispensable institutional components of the rule of law. This regulation was completed by the Parliament partly in advance to the transition period, such as Act XI of 1987 on legislation, Act II of 1989 on the Right of Association and Act III of 1989 on the Freedom of Assembly in the aggregated package of norms of the transition, before all, by Act XXXI of 1989 on the Amendment to the Constitution, Act XXXII of 1989 on the Constitutional Court, Act XXXIII of 1989 on the Operation and Financial Management of Political Parties, Act XXXIV of 1989 on the Election of Members of Parliament.

What consequences were brought about? Firstly, that the new Hungarian public law establishment as of 1989 and the token of that, the interim Constitution contained all the rules of public law required from a rule of law establishment.¹³⁸ The establishment came to life when *the concept of the rule of law* had not been elaborated yet, and the legal literature had not put forward a theoretical requirement for that rule of law concept to be declared in the interim Constitution. This, on the other hand, infers that declaring the rule of law in the self-determination of the state was not a public law prerequisite. Public law requirements were not fulfilled by the interim Constitution by declaration, but by its content constituents of the rule of law. These appeared and took effect in the normative provisions. Hungary was again a state under the rule of law, not because of declaring to be one, but because of the interim Constitution which bore this value in its detailed regulations.

¹³⁶ KUKORELLI 2007, 30.

¹³⁷ KUKORELLI 1991

¹³⁸ SZALAY 1989, 254–264.

Let us therefore risk the conclusion that the declaration of the rule of law under Article 2 Section (1) of the interim Constitution had no relevance in public law; its relevance was exclusively of a political character. The date of the formal turning point in public law marking the transition was 23 October 1989. Before this, according to the self-determination of the People's Republic Constitution Article 2 Section (1): "The Hungarian People's Republic is a socialist state." This was refined as a result of the National Roundtable Talks by the Parliament dominated by the communist party. It was the formula already referred to:¹³⁹ "The Hungarian Republic is a democratic state under the rule of law in which the values of civil democracy and those of the democratic socialism equally prevail."

Following the free elections marking the political turning point of the transition and the new constitutional amendment as enacted by the new, multi-party Parliament, after 25 June 1990 the formula was abridged to "an independent, democratic state under the rule of law". This ideological background is also inferred by the ministerial justification of the constitutional amendment in 1989:

"We must remove from our Constitution the provisions referring to state-socialism, to the leading role of the Marxist-Leninist party. [...] At the same time, it is necessary for the Constitution to declare the nature of the Republic. In this scope, the Proposal endeavours to declare fundamental values, such as independence, democracy and the rule of law. Our Constitution does not require the citizens to approve of civil or socialist values exclusively; different and common values of the two value systems share equal constitutional recognition."

We deem that the justification reinforces what we have stated with reference to the legal literature: it had prepared the means for regulating those institutions which make a certain state constitutional (under the rule of law); whereas the interim Constitution contains the fundamental regulatory provisions pertaining to these. From the aspects of the legal system, therefore, the normative conditions were created for a constitutional state under the rule of law. Declaring all these under Section 2 of Article 2 was exclusively meant to specify the selection of values, even more, the break

¹³⁹ BIHARI 2006, 69–92.

with the former unilateral Bolshevik system of values. This selection of values was set forth in the Preamble of the interim Constitution.

“In order to facilitate a peaceful political transition to a state under the rule of law, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country’s new Constitution is adopted.”

The Preamble was an appropriate locus for this; yet Section (2) of Article 2 is an immediately binding normative provision of the Constitution which has led to unexpected results. But before attempting to deal with this, it is worth revising the relevant approaches to the concept of the rule of law as reflected in the legal literature.

4.3. Different approaches to the concept of the rule of law

The rule of law has become a normative concept which, however, does not mean that there would not be important differences in its interpretations by the different authors. Let us illustrate this by a few examples:

Professor *András Tamás*, reflecting on domestic public legal events among others, approaches the rule of law as a value category of German origin. Later on, this became a general principle of interpretation, finally a normative concept. Ten legal principles are part of this, in majority present in the text of the interim Constitution as of 1989. These can be listed as follows: the legal system is hierarchically built, with the constitution on the top; legislation is constitutionally bound; the scope of the subject area in legislation is defined in the acts of the Parliament; a statute cannot have retroactive effect; law safeguards fundamental human rights; government and public administration operate by subordination to acts, in the course of which rights must not be infringed; legal certainty; in the legal relationships of public administration, individual rights are safeguarded by the administrative judiciary; in the course of court jurisdiction any individual deserves the principle of reliance (i.e. the individual cannot be considered by the state a potential violator of law); the guarantee of constitutionality

lies in constitutional judiciary (for it is constitutional court practice to turn the Constitution into *lex perfecta*).¹⁴⁰

The typology by public administrative lawyer *Tamás* is remarkable from several aspects. First of all, because it is a *typology*, i.e. he does not use the rule of law as a label, but decomposes that to its exact constituents. These constituents reflect (as he thoroughly deduces in his work) certain elements retraceable to certain families of law. By this he proves that the rule of law paradigm is complex, with provenance from several sources. His typology, furthermore, is extremely clear; the terms *constitutionality* and *rule of law* are not mixed up in it. By that he signals that the rule of law is just one constituent of the basic values of constitutionality, even if it is unavoidable. Finally, he unmistakably refers to the fact that the legal system of the interim Constitution is based on the rule of law not because it holds this self-definition; certain provisions in it make it so. His approach in fact is also unique in the literature of the transition period because it is based on the interpretation of the Constitutional Court for the concept of the rule of law.

Another well-known approach on the rule of law can be read by Professor *József Petréttei* who, relying on the interpretation of the Constitutional Court, summarises his views as follows. Starting from one of the decisions of the Constitutional Court (which we intend to deal with later on), he states the premise that those written under Article 2 of the interim Constitution [as we have seen, it is similar to Article B) Section (1) of the Basic Law in effect], shall be understood and treated simultaneously, as a statement of facts and as a program. Based on this, he differentiates four features of the rule of law:

- a) In his view, the defining principle of the *rule of law and public power* is the exercise of public power upon democratic legitimacy by transparency and by the limitation pursuant to the constitution. In our view, it is a flaw of this approach that democratic legitimacy is undoubtedly a constitutional value, yet it is not derived from the rule of law. On the contrary: the rule of law is a limiting constituent for democratic legitimacy. On the other hand, certain elements of constitutional limitation in the exercise of power can be connected to the rule of law.

¹⁴⁰ TAMÁS 2010, 209–212.

- b) In relation with the *rule of law and division of powers*, the author highlights that the power cannot be concentrated; that legislation and execution are separated at least in the division of the scope of competences, whereas the judicial power shall actually be exercised in a manner separated from the other branches of power. The uncertainty of the approach, in our view, is the same as in the previous case. The division of powers by itself is a significant constitutional value; still not a direct consequence of the rule of law. Real separation is particularly problematic because there are several constitutional establishments fulfilling the conditions of law and order, as well as the rule of law with a certain connection between the judicial courts and the other two branches of power (e.g. in the United States, federal judges are nominated by the President; in the United Kingdom, prior to the *Blair Reform*, the House of Lords had judicial powers.)
- c) In relation with the *rule of law and legislation*, the following are remarkable: availability of the legal norms, appropriate timeframe allowed for preparation before they enter into force, and respecting the limitations of legislation shall be emphasized. This and the next particular of *Petrétei's* system are the ones to link it quite clearly to the rule of law characteristics. We need to remark that he lists a number of elements neither clearly comprised in the interim Constitution, nor in the Basic Law. (We will see that all these were deduced from the declaration of the state under the rule of law by the Constitutional Court.)
- d) As regards the *rule of law and legal certainty*, the most important principles are: the predictability of the effect of a norm, the foreseeability of legal consequences and the protection of vested rights.¹⁴¹

Summarising the system built by *Petrétei*, it can be confirmed that the clear basis he constructs upon is the interpretation of the concept of the rule of law as provided by the Constitutional Court. It is reasonable to understand this regarding the last two elements. During the People's Republic, it was not the communist Constitution but the Legislative Act (from 1987) as an ancillary of the Constitution which comprised certain rules pertinent

¹⁴¹ PETRÉTEI 2002, 98–103.

to legislation. This is why, after the transition, the Constitutional Court had to raise the relevance of provisions lifted from a lower level act (Act on Legislation) by attributing them constituent relevance, as the Constitutional Court had deduced that from the declaration on the rule of law. We have a similar case with the division of powers which was not a separate provision in the interim Constitution, even if certain rules referring to constitutional institutions did reflect that clearly.¹⁴² Finally, it is redundant to deduce democracy (the democratic legitimacy of the exercise of powers) from the concept of the rule of law, since the interim Constitution held clear and detailed rules referring to these, starting with Article 2 declaring Hungary not only a state under the rule of law but also an independent and democratic one.

Notwithstanding those written above, the rule of law concept in *Petrétei's* approach is coherent and illustrative. It is most relevant in this approach that it builds specifically on the case law of the Constitutional Court rendered to the constitutional declaration of the rule of law. There is just one more approach defining the rule of law which (naturally and duly) follows this even more strictly: the monograph written by the first President of the Constitutional Court (and later President of Hungary), Professor *László Sólyom*. As opposed to those written above, *Sólyom* makes a distinction between components *clearly* belonging to the concept of the rule of law; i.e. he treats separately the concept of the rule of law from constitutionality. Rendering the rule of law concept in Hungary to the exercise of the Constitutional Court, he sees those specifics in the following three premises.

- a) The political transition was carried out within the framework of legality; as a consequence, from this date on, all acts enacted prior to 23 October 1989 should be in compliance with the new (interim) Constitution enacted on that very day (which, as a bottom line, refers to the effective Constitution ever).
- b) A basic conceptual element of the rule of law is legal certainty.
- c) Formal legal certainty precedes material justice: “the rule of law cannot be established against the rule of law” i.e. there is no

subjective (individual) right to material justice. Individual rights are related to the affected individual attempting to reach that in a fair procedure.¹⁴³

Instead of commenting the approach of *László Sólyom*, we have two reasons to recur to certain assumptions of the Constitutional Court derived from the declaration of the rule of law. On the one hand, this is due to the fact that in later chapters we will deal with the first decisions of the Constitutional Court in detail. On the other hand, because the viewpoint by *Sólyom* is declared to have been based on the case law of the Constitutional Court.

4.4. The rule of law as interpreted by the Constitutional Court

As we have demonstrated above, there was a long way from the classical phrasing to the present concept of the rule of law; however, it is practical to analyse the terminology applied by the Constitutional Court due to its empowerment making their interpretation compulsory for everybody (*erga omnes*). Let us start this analysis by making reference to certain fundamental decisions of the Constitutional Court. Even these few decisions indicate that the declaration of the rule of law had assumed individual life and that was interpreted by the Constitutional Court broadly at their discretion. This liberty was as broad as a redundant ideological label would allow for interpretation.

As a starting point, we can state that the method of declaring the rule of law in the constitution, i.e. the general self-definition of the state abstracted from any other law has influenced both the interpretation of the interim Constitution (also affecting the Basic Law by lifting the text) and those of the statutes. Moreover, it is appropriate to influence the methodology of legislation and justice, defining method, direction and aim not only in an abstract manner but also in a case-by-case approach. The Constitutional Court assessed the doctrine of the rule of law in several decisions and this interpretation has become normative in fact for every subject of legislation and judicial organisation.

¹⁴³ SÓLYOM 2001, 686–738; SCHANDA 1996, 219–235.

It was in the first years of the Constitutional Court exercise to rule a decision stating:

“...the Constitution establishes a closed order for practicing state power: none of the authorities holds exclusive, uncontrolled power. In a state governed by rule of law, public power exercise is strictly and unambiguously limited besides protection of individual freedoms at the largest.”¹⁴⁴

Accordingly, the Constitutional Court took the decision that it is impossible to have a loophole in a state governed by the rule of law; i.e. every single detail of state power shall be laid on constitutional norms.¹⁴⁵ The Constitutional Court albeit drew conclusions which are indisputable in any approach of the rule of law concept: declaring the rule of law as a fundamental constitutional value¹⁴⁶ entails consequences.

Thus, a fundamental criterion is that

“...public authorities exercise their activity among institutional frameworks and in the operational order established by law, respecting the legal limitations available and predictable for citizens.”¹⁴⁷

Beyond enshrining the abstract meaning of the rule of law in a decision, the Constitutional Court likewise assessed the content of the concept in a number of its decisions. They reached to the conclusion that:

“Declaring rule of law in Hungary [...] can be comprehended only in a formal sense, and in substantive matters it has further references to other, specified constitutional rights. The principle of rule of law may be directly called up only if there is no other specific right regulated within the Constitution.”¹⁴⁸

¹⁴⁴ Decision 48/1991. (IX. 26.) AB.

¹⁴⁵ CSINK-FRÖHLICH 2012, 42–53.

¹⁴⁶ Decision 11/1992. (III. 5.) AB.

¹⁴⁷ Decision 56/1991. (XI. 8.) AB.

¹⁴⁸ Decision 31/1990. (XII. 18.) AB.

In fact, the wording of the Constitutional Court is quite uncertain. Firstly, it elevates the rule of law above other (substantive) provisions (*formal* rule of law). Secondly, the rule of law is assumed to be a subsidiary rule (further reference to nominated rights). Thirdly, it is presumed as a mysterious (secret) substantive rule from which, in the absence of other provisions, individual constitutional rights can also be deduced. In a different decision, this multi-fold character is further enhanced (true enough, for normative acts only). Further principles having the rule of law quality shall always be assessed in harmony with other actual provisions of the Constitution (presently, those of the Basic Law); nevertheless, the principle of the rule of law

“...is not a mere auxiliary rule, nor a mere declaration, but an independent constitutional value, the violation of which is itself ground for declaring a law unconstitutional.”¹⁴⁹

In another decision,¹⁵⁰ the Constitutional Court found that the most relevant element of the rule of law is legal certainty, which, at the same time, is the foundation for protecting vested rights. This decision was followed by a sequence of the same kind. Legal certainty is perceived in other Constitutional Court decisions as a principle inherently connected to the rule of law,¹⁵¹ as an indispensable criterion,¹⁵² as an essential element of the rule of law,¹⁵³ or the most important element of constitutionality.¹⁵⁴ In terms of its substantive content, as found by the Constitutional Court, legal certainty requires that

“– rights and duties of citizens are regulated in laws available for everyone and promulgated in conformity with legal provisions;
– there is a real opportunity for subjects of law to follow the legal regulations, in order that these legal norms may not set up duties to

¹⁴⁹ Decision 11/1992. (III. 5.) AB.

¹⁵⁰ Decision 43/1995. (VI. 30.) AB.

¹⁵¹ Decision 34/1991. (VI. 15.) AB.

¹⁵² Decision 7/1992. (I. 30.) AB.

¹⁵³ Decision 9/1992. (I. 30.) AB.

¹⁵⁴ Decision 5/1997. (II. 7.) AB.

periods before their promulgation, and no legal behaviour may be declared illegal with a retrospective effect.”¹⁵⁵

Legal continuity as well as the criterion for a uniform application of constitutional measure are related to legal certainty. In its later decisions, the Constitution Court itself quotes some of their previously phrased principles.

“From the beginning, the Constitutional Court has not differentiated in its constitutional review between laws enacted before or after the constitutional amendments [...] Irrespective of its date of enactment, each and every valid law must conform to the new Constitution. Likewise, constitutional review does not admit two different standards for the review of laws. The date of enactment can be important insofar as previous laws may have become unconstitutional when the renewed Constitution entered into force.”¹⁵⁶

In another decision, the Constitutional Court stated that legal certainty has several components:

“One of these is limitation of interference by the state, hence the unlimited state interference keeps legal subjects – both physical and legal persons – in a permanent legal uncertainty thus it is incompatible with the core of the principle of the rule of law.”¹⁵⁷

Further on,

“Legal certainty compels the State – and primarily the legislature – to ensure that the law on the whole, in its individual parts and in its specific legal rules, shall be clear and unambiguous and that their addressees find their operation ascertainable and predictable. Thus, legal certainty requires not merely the unambiguity of individual

¹⁵⁵ Decision 25/1992. (IV. 30.) AB.

¹⁵⁶ Decision 11/1992. (III. 5.) AB.

¹⁵⁷ Decision 32/1991. (VI. 6.) AB.

legal norms but also the predictability of the operation of individual legal institutions.”¹⁵⁸

In a similar manner, a criterion stemming from the rule of law is the clarity of the norm. That no arbitrary decisions shall be made during the public law procedures, this means that

“...legal regulations are clear, unequivocal, predictable in their effects, and foreseeable for their addressees.”¹⁵⁹

This sequence could be continued further on. Nevertheless, the above examples have shown how the declaration under Article 2 of the interim Constitution has provided grounds for a wide range of criteria in the legislative and judicial branch or about the status of certain institutions. It is particularly visible how, from the principle of the rule of law, the Constitutional Court emphasized the relevance of legal certainty, elevating that to become the source for the most various constitutional requirements under various qualifiers. Thus, legal certainty was the clue to open any legal dogmatic lock: the Constitutional Court could deduce almost anything from this principle, meanwhile its individual decisions enlarged the concept, enhancing further this discretion. From here on, the Constitutional Court has been entitled to do anything. In the chapters to follow, we present in detail certain debated decisions based on the declaration of the rule of law, upholding the view how easily a normative declaration could lead to arbitrary decisions.

¹⁵⁸ Decision 9/1992. (I. 30.) AB.

¹⁵⁹ Decision 35/1994. (VI. 24.) AB.

5. The Rule of Law and Judicial Activism

In the previous chapter, we drew a schematic outline of the development of the rule of law in Hungary. However, at the end of the chapter we were close to proving that the normative concept of the rule of law made the interpretation by the Constitutional Court not only possible but a necessity. Inner limitations missing, the interpretation had been at the discretion of the Constitutional Court. *László Sólyom* summarizes the legal assessment yielding the interpretation in his voluminous monograph on the *Beginning of the Constitutional Court Practice in Hungary*. It is worth quoting this part in its full length:

“The starting position of the Constitutional Court was that the declaration of the rule of law may be interpreted only in formal sense, in substantive issues it refers to specific constitutional rights. It is only in the case when the Constitution does not know those rights that we can refer directly to ‘the principle of rule of law’.¹⁶⁰ The Constitutional Court recognized as a principle that ‘the infringement of the rule of law as fundamental value provides itself a ground for unconstitutionality of a law’,¹⁶¹ when the substance and technical test of rule of law was already elaborated. Associating legal certainty to rule of law was a policy of the Constitutional Court far beyond the measure of constitutionality, and in the first instance it concerned the interpretation of the transition, but it became decisive also on technical level that after the commencement in 1991, from 1992, legal certainty itself became an independent and the most often applied measure of constitutionality.¹⁶² Besides the application of legal certainty, some of its components as technical tests also gathered independence and served as ground for important decisions: first of all, the clarity and unequivocal

¹⁶⁰ The footnote of the quotation: “21 This thesis was explained within a concurring opinion to Decision 31/1990. (XII. 18.) AB, ABH, 1990, 141.” SÓLYOM 2010, 404.

¹⁶¹ The footnote of the quotation: “22 Firstly in the decision on abolition of legality protest: 9/1992. (I. 30.) AB, ANH 1992, 65.” SÓLYOM 2010, 404.

¹⁶² The footnote of the quotation: “23 Early cases: ABH 1991, 35.; 736.; further on clarity of norms and predictability of practice of institutions in Decision 9/1992. (I. 30.) AB.” SÓLYOM 2010, 404.

formulation of norms.¹⁶³ From a simple technical test that had been used to regulate the entry into force of laws, the Constitutional Court got to recognize protection of legitimate expectations as measure of constitutionality.¹⁶⁴ Particular causes of unconstitutionality are the different situations of retroactivity; especially, prohibition of establishment of obligations with retroactive effect.¹⁶⁵ Further ramifications of legal certainty as a measure are a series of decisions that declared the free discretion of the authorities regarding exercise of fundamental rights to be unconstitutional.¹⁶⁶ Thus, the content of rule of law was unfolded within the service of protection of fundamental rights.”

5.1. The Constitutional Court in the process of transition

László Sólyom summarises in a single, outstandingly concise paragraph how the normative concept of the rule of law had become a magic wand

¹⁶³ The footnote of the quotation: “24 It served as ground (among others) for declaration of unconstitutionality of the first law on time-limitation of punishability [Decision 11/1992. (III. 5.) AB, ABH 1992, 77.], and on property of trade unions [Decision 26/1992. (IV. 30.) AB, ABH 1992, 142.], from recent decisions for example: transmission of property of gas works to local governments [Decision 36/1998. (IX. 16.) AB, ABH 1998, 292., 293.], and abortion II. [Decision 48/1998. (XI. 23.) AB, ABH 1998, 347.]” *SÓLYOM* 2010, 404.

¹⁶⁴ The footnote of the quotation: “25 As inadequate time for preparation to application of a new regulation, yet as specific test in the first Bokros-decision [Decision 43/1995. (VI. 30.) AB, ABH 1995, 190-192.]. Protection of already exercised rights is cognate of protection of legitimate expectations, but it hadn’t become individual measure, infringement of already exercised rights was adjudicated by the Constitutional Court using the usual measures.” *SÓLYOM* 2010, 404.

¹⁶⁵ The footnote of the quotation: “26 Apart from the well-known criminal cases – on lustration – the Constitutional Court had to clear the misunderstandings concerning the notion of retrospective legislation. The applicants perceived any change regarding existing legal relations as retrospective legislation. Even in the most recent cases: Decisions 30/1997. (IV. 29.) AB, ABH 1997, 141.; 17/1998. (V. 13.) AB, ABH 1998, 158.” *SÓLYOM* 2010, 405.

¹⁶⁶ The footnote of the quotation: “27 The Constitutional Court annulled mostly procedural regulations: for example, intervention on free discretion of public prosecutors in civil cases [Decisions 1/1994. (I. 7.) AB, ABH 1994, 29.; 20/1997. (III. 19.) AB, ABH 1997, 85.]. The basic decisions were: 9/1992. (I. 30.) AB, ABH 1992, 59.; and 59/1993. (XI. 29.) AB, ABH 1993, 358. [Article 130 Section i) of the Code on Civil Procedures, even if it was not referred and it has not an own test.]” *SÓLYOM* 2010, 405.

in the hands of the Constitutional Court. Nevertheless, in order to understand how this could take place, moreover, why it was a necessity, even unavoidable to interpret Article 2 of the interim Constitution from an activist approach, we need to draw attention to a few circumstances.

The first essential circumstance was the *transition* itself. As we have already presented, the interim Constitution declaring Hungary as a state under the rule of law was unprecedented. Whereas, on political considerations it was an answer (a reaction) to the state establishment and the concept of law of the former period ruled by ideology. Quoting *István Kukorelli*,¹⁶⁷ the interim Constitution was officially adopted by the last *ancient* Parliament; even if in content it was prepared by the National Round Table composed by the former Communist party (the Hungarian Socialist Party of Workers – Magyar Szocialista Munkáspárt, MSZMP), the new democratic movements forming a block as Opposition Round Table as well as the third side, the so called non-aligned organizations. The spirit of the interim Constitution was given by the Opposition Round Table.¹⁶⁸ After long negotiations, the National Round Table replaced the top of the legal system, the constitution, and they created the rule of law formula as a cornerstone of the interim Constitution. But the legal system under the interim Constitution remained in fact unchanged. It was in this condition, waiting for the free elections, for constituting the Parliament and the new Executive, that their operation, primarily within the framework of the Constitution, was considered to be *under the rule of law*. Nobody could doubt the implacable controversy between the Constitution and the inherited legal system. These were controversies for the solution of which the Constitution institutionalized a strong Constitutional Court, in power to annul statutes. It was the Constitutional Court which, albeit with a temporary membership of five judges and led by a temporary vice-president, commenced functioning before the political implementation of the transition. It was by the time when legislation and execution were still under the rule of the Hungarian Socialist Party of Workers (MSZMP).

The actual situation and the constitutional empowerment both demanded that the Constitutional Court should speed up *clearing the law* by using their means; once an initiative reaches them, they shall apply the order securing the primacy of the Constitution, when needed, even

¹⁶⁷ KUKORELLI 1991, 11–18.

¹⁶⁸ BRUSZT 1990, 160–166.

pre-empting the Parliament in action, or even the first free elections. 1989–1990 was not a time to provide clear answers for the know-how. Fact it was, however, that the transition took place either without a collapse in the operation of the state establishment or due to legal statutes having lost effect. Therefore, no state institution had to face demands from a revolutionary governing or those entailed by exonerating or constructing a statehood built on law. A solution that would formally declare in a succinct manner that the entire legal system is anti-constitutional due to the interim Constitution, and it would remain in effect merely by necessity and temporarily, may sound feasible only posterior to 1990, yet unrealistic of that time. And that also refers to legal reality.

The interim Constitution did not rule about this. Whereas, declaring the formally effective law to be invalid could be an expectation posed to a constitution promising new bases if so demanded by the constituent power. (N.B. Now let us benevolently neglect the fact that formally, in a normative understanding, the Hungarian Socialist Party of Workers (MSZMP) dominated the Parliament as the constituent power; therefore they certainly did not wish to declare the actual law null and void). A question not less important is this: besides the package of acts making the transition possible, other acts and legal regulations were in parallel effect. Those which had been created in the socialist environment for the sake of it, and in its interest. Declaring the legal system invalid might have led as far as questioning the validity of the free elections. On the foundations of the Constitution declaring the rule of law, the Constitutional Court would definitely not assume this risk. Somehow, the Constitutional Court had to solve the contradiction between the Constitution declaring the rule of law and laws which had been created mostly independent of the principle of the rule of law (even opposing it) yet in effect. This circumstance was aggravated by the impossible character of declaring something invalid haphazardly. The possible direction for a solution was set; yet the question might arise whether the Constitutional Court had set up the limitations in the appropriate manner.

The second important circumstance was the normative concept of the *rule of law*. Ex post 1989–1990 there have been a number of aspects to assess this. However, at that time it was a legally relevant issue. Mostly so, when an initiative was submitted and the Constitutional Court needed to face this and was supposed to give certain interpretation, too. Again, we need to say that theoretically it might have been possible to take the

decision that Article 2 has no immediate legal effect. However, this would be a nonsense both legally and logically, even as of our days. To dispute the normative force regarding one of the symbolic provisions of the interim Constitution might have entailed that the legislator and, later on, the Constitutional Court would select at liberty from the array of provisions of the Constitution. The Constitution existed, it was *not* the Constitutional Court who drafted it; however, it was them to interpret it.

How to handle Article 2, essentially, was pending an underlying decision of the Constitutional Court (maybe unuttered): whether the Constitutional Court considers the Constitution a text which is binding legally or merely a political declaration. Naturally, our approach aims to demonstrate that this was not a decision requiring actual consideration. The sheer existence of the Constitutional Court made it obvious that the Constitution is a norm; it is the fundament of law. The scope of task for them was to safeguard the legal efficiency of the Constitution as a legal statute. But how to fill the content of the rule of law, what is allowed to do and what shall be done; such information was not available by any live, domestic model. We did have a model from before the Second World War which was, to a certain extent, applied by the Parliament in legislation. Albeit, for interpreting the legal system, for everyday law enforcement the public law pattern of the monarchic Hungary was not up-to-date enough. Generations of lawyers have been brought up without detailed knowledge in this respect, and institutions, which had been familiar in former times, appeared as unknown, whereas legal continuity was not even an issue. The two circumstances dealt with so far connect at this point: the transition and the rule of law just declared. But there was no living Hungarian way of interpretation of the new situation. This lack of actual Hungarian practice caused that the two phenomena, the transition and declaration of the rule of law required the consideration of foreign models.

Behind the interpretation of the English *rule of law*, there has been the high esteem for the judges and the judicial practice of several centuries. This is the practice by which the operation of the state establishment was rendered by the principle of parliamentarism and which created the principles of *natural justice* as public rules for relations between the state and its citizens. In a nutshell, the logic of this is the following: since not every situation is predictable in the practice of jurisdiction in which the order of the Parliament, the law itself shall be applied, the executive power enjoys a large scope of empowerment for elaborating the detailed regulations and

actual enforcement of those. In this, it is merely limited by respecting the statutory framework of the empowerment which, on the other hand, can only be controlled by the judiciary. Therefore, the judicial control is *ultra vires*, primarily controlling whether the executive power (and part of it, the public administration) has been operating within its framework.¹⁶⁹ The importance of this approach can be probably clarified by a reciprocal approach: if the executive power does not step beyond its limits, it may not be rebuked by judicial control. This is underpinned by one particularity of the English judicial practice; it is not the most spectacular one, but all the more important. Traditionally, the scope of competence for control does not encompass factual issues; assessing or evaluating facts, appropriateness of an administrative judgement and its compliance with the targeted aim used to fall beyond judicial control.¹⁷⁰ Thus, torts originally serving as means for judicial control of administrative decisions were aiming to provide remedies for *substantive law* infringements. This is also inferred by the fact that, in taking a decision (also applicable when formal illegality is lacking), the final measure is reasonableness, known as the *Wednesbury* test (upon the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1947*). According to this, the decision of the administrative court is unacceptably unreasonable if none of the administrative officers taking reasonable decisions decides so.¹⁷¹ The procedural side was supplied by the rules of natural justice: proceedings shall be fair, part of which is the right of the party to be heard; excluding the personal interest of the authority; compliance with due behaviour in general.¹⁷²

For a similarly long period, though upon an entirely different state establishment philosophy, French constitutionalism has created its well-balanced architecture of its constitutional institutions, as well as the regulation and control of daily state administration for a similarly long period, however on a different philosophy regarding state establishment. In quite a number of aspects this, however, shows similar solutions to the English one, which is a consequence of non-codified administrative procedures. The situation upgrading the role of the judges has been formed despite the fact that French law has offered numerous sample codes to

¹⁶⁹ CRAIG 2008, 4–6; KÜNNECKE 2007, 25, 71.

¹⁷⁰ CRAIG 2008, 437, 475.

¹⁷¹ CRAIG 2008, 532, 615; KÜNNECKE 2007, 15–16; PATYI 2002, 84–86.

¹⁷² CRAIG 2008, 286, 371, 417; KÜNNECKE 2007, 138–145.

Europe (starting with the most famous *Code Civil*, better known as the *Code Napoléon*, continuing with the *Code d'Instruction Criminelle* or *Code Pénal*). In contrast to this, the administrative procedure records (*droit administratif*) until recent years was not a code, albeit it was guided by legal principles having been shaped in the judicial practice. However, there is a kind of legal proceeding to be initiated upon the statement of relevant facts.¹⁷³ According to the classification by *Édouard Laferrière*, four kinds of administrative trials can be distinguished; litigation on claim for annulment (*le contentieux de l'annulation*), litigation on unfounded claim (*le contentieux de pleine juridiction*), which can also be based on facts; litigation on claim for legal interpretation (*le contentieux de l'interprétation*), litigation for retaliatory action (*le contentieux de la répression*).¹⁷⁴ Again, these claims ensure judicial control over the administrative decisions primarily on grounds of substantive law.¹⁷⁵

Even the new German *Grundgesetz*, established at the end of the Second World War and after the total collapse of the state establishment, could benefit from the available experience of several former decades of the *Rechtsstaat*. The grounds for the German judicial control as compared to the English and the French solutions has initially been less formal and more accentuated within the accuracy of the merits (in substantive law). By the end of the 20th century the substantive character of judicial control had gained importance in every legal family. The primary reason for this is a shift in emphasis which has brought about fundamental changes in the character of legal relations between the state and its citizens; namely, that the approach concentrating on fundamental rights has become decisive. In contrast with the previous two models, the German administrative procedures are codified, laying down the basic principles of the administrative procedure at the same time. A formal procedure can exclusively be performed pursuant to the provisions of the statute. The procedure is basically informal i.e. carried out at discretion, inquisitorial, that is performed *ex officio*. This feature is counterbalanced by the legal obligation to provide information and explanation for the litigant, also the litigant's right to be heard and the court's obligation to provide justification of its decision; the main method is an investigation carried out mostly by

¹⁷³ BROWN–BELL 2003, 2; STEINER 2010, 260.

¹⁷⁴ BROWN–BELL 2003, 177–180; STEINER 2010, 268–272; AUBY 2002, 77–80.

¹⁷⁵ SZAMEL–BALÁZS–GAJDUSCHEK–KÖI 2011, 501–502.

relying on documents and deeds.¹⁷⁶ Similarly to the French model, the court supervising an administrative official procedure and decision has been separated from the *ordinary* courts; whereas the grounds for supervision or control, though *ultra vires* in nature, are even more delimited than the French solution.¹⁷⁷ Abstract fundamental principles appear from the beginning, such as constitutionality, formal legality due to which the judicial control of German administration is based on merits; it may be grounded not only on formal illegality but also on the expediency of the decision, on appropriateness (*Zweckmäßigkeit*).¹⁷⁸

Such solutions were not available for the Constitutional Court. Under these circumstances, the reason why the Constitutional Court turned towards *Karlsruhe* was not only the historical tradition that linked the Hungarian legal thinking to the German legal family, not even the *Verfassungsgericht* itself as an institutional model. It was the similarity of establishing the German and Hungarian Constitutional Courts and the first years of their history. Both were established under non-rule of law circumstances, and could not be based on unlimited sovereignty. Despite these, both were bound to protect and enforce the foundation of the whole legal system, the *Grundgesetz* and the interim Constitution, respectively. Thus, the German model was not only a source at hand, but it also provided unavoidable assistance.

The third essential circumstance was the *Council of Europe*, the ECHR, as well as the European Commission of Human Rights and the European Court of Human Rights ensuring the enforcement of the Convention. Joining the Council of Europe was an obvious endeavour. Therefore, from the very beginning it was undoubtable that the Hungarian Constitutional Court cannot neglect the legal practice of the European Court of Human Rights.

Hence, in light of the German and European legal practice, we can reiterate those stated before, when assessing the determination of the transition period. Not only in fulfilling its tasks but also while answering the emerging questions it was evident what direction the Constitutional Court might follow. The question could be whether the Constitutional Court delineated appropriately the scope of its tasks as well as the limitations in

¹⁷⁶ SINGH 2001, 74–80.

¹⁷⁷ SZAMEL–BALÁZS–GAJDUSCHEK–KÖI 2011, 501–502.

¹⁷⁸ SINGH 2001, 124–150.

the liberty of interpretation, as provided by the interim Constitution. We must answer this trying not to lose sight of the differences between the time of 1989–1990 and 2018: the Constitutional Court may have merely envisaged the consequences and effect of its decisions; as for us in 2018, we have become aware of these already.

5.2. The rule of law: formal order of law

As of the summary quoted by *László Sólyom*, the initial standpoint of the Constitutional Court was, before all, that declaring the rule of law in the Interim Constitution could be interpreted exclusively in a formal sense, in other words *as a formal order of law*. Meanwhile, in questions regarding content, he further refers to specific rights included in the Constitution. “It is only when the constitution does not know such rights in that topic that we can refer directly to the *principle of the rule of law*.”¹⁷⁹ The original footnote of the quoted text also remarks that this standpoint was ab ovo part of the *official* reasoning of the Constitutional Court decision 31/1990. (XII. 18) AB. It was part of the concurring reasoning annexed to that.¹⁸⁰ Then it was also the author’s personal opinion. Meanwhile, the author of the concurring reasoning was *Sólyom himself*, who later (as presented in his summary) succeeded to convince the majority of the Constitutional Court to approve of his opinion; it is worth spending some time over this decision.

In his motion, the Minister of Finance requested simultaneous interpretation for the principle of the rule of law and those of the fundamental rights and obligations in general, as described in Chapter XII of the interim Constitution. His reason for doing so was to assess whether the above principle, rights or obligations might have been breached. The issue was a (statutory) rise in the interest of the loan contracts of preferential rate (also limited by statute). The motion was rejected by the Constitutional Court for reasons of formal irregularities. The Court held that, due to its content, it was not a question of legal interpretation but a motion for preliminary norm control, which, however, the Minister of Finance was not eligible to submit. This decision was complemented by *László Sólyom*

¹⁷⁹ SÓLYOM 2001, 404.

¹⁸⁰ STUMPF 2014, 238.

(President of the Constitutional Court by then) on submitting a concurring reasoning. In that he argued that the rule of law could not be interpreted due to the social problem described in the motion, since Article 2 of the Constitution does not use the attribute of *social* in the self-definition of the state. This is from where he drew the conclusion already quoted.

The parallel reasoning has stepped beyond the scope of the *official* decision. According to the practice of the Constitutional Court founded in those times and still standing in our days, the official decision is approved by the majority of the votes of the judicial body. Thus, in case of a dispute this means a solution by compromise. Justices, however, are in power to deliver their own concurring reasoning in support of the operative part of the decision, i.e. to support the legally binding decision. Or, sometimes this own opinion, complementing the solution based on compromise, is different from that. Justices remaining in minority in the course of a decision sometimes have a different opinion about the operative part as well; in this case they are also eligible to express their dissenting opinion attached to the decision.

Formally, therefore, (and this is most relevant regarding the binding force) neither the concurring reasoning, nor the dissenting opinions hold the 'official' *ratio decidendi* of the Constitutional Court. They do not reflect the opinion of the Constitutional Court but the opinions of their authors and, as such, they are legal literature in character. This is the fact by which we evaluate *Sólyom's* concurring reasoning attached to Decision 31/1990 as of 18 December. It was not a decision of the Constitutional Court, it was not part of the 'official' decision either. In terms of its content, it has no correlation with that. The Constitutional Court, however, in the decision refused the motion as inappropriate on a formal basis. Whereas they refrained from assessing the content of the motion and from answering the question formulated in it. The concurring reasoning did not dispute that, neither did it contain complementary reasoning to support the official reasoning or eventually a different one. It formulated what decision should have been brought when judging on merit. Despite this and apart from its legal literature trait (see above), *Sólyom's* point of view later on *sublimed* into other decisions of the Constitutional Court.

Before stepping further, it is essential to affirm that approaching the concept of the rule of law as a formal rule in itself is indisputable. The origin and history of the concept presented in the previous chapters clearly indicates that the three components of the rule of law, the factual

exercise of power and connecting it to statutes does not bear substantive content, basically. This holds true even if the French and the German approach recognise fundamental rights or reasonable human endeavours as components of the concept of the rule of law. In fact, these do not mean the protection of some specific fundamental rights, but they mean the protection of rights in general, instead. The fundamental right component fits the concept of the rule of law as a limitation of that: without this fundamental right component, the rule of law, the formal law and order would mean nothing but the enforcement of statutes with arbitrary content. This becomes obvious when we make a distinction between *the rule of law* and *rule by law* concepts.¹⁸¹ The latter one, i.e. law and order without components protecting fundamental rights, those dividing power or those protecting judicial rights barely mean the unconditional enforcement of the statutes as the order of the sovereign.¹⁸²

The interpretation of the Constitutional Court for the rule of law has stepped beyond this necessary approach in three aspects. On the one hand, (and we will deal with this later on), they used it as an autonomous ground of reference; as a source for such unavoidable components, which the Constitution did not hold autonomously. One example regarding statutes is the prohibition of retroactive effect or the appropriate time ensured for preparation before entering into force of a statute. On the other hand, however, the Constitutional Court equally used the principle of the rule of law to widen the fundamental rights with certain elements not present in the Constitution itself. Nonetheless, relying on the self-empowerment established to widen, it has also taken decisions opposing enlargement, i.e. they limited the enforcement of fundamental rights present in the Constitution by referring to the rule of law.¹⁸³ Therefore, the source for the previous two scopes of decision was self-empowerment laid on formal law and order. This process is highlighted in certain junctions as follows.

It was not long before formal interpretation of the rule of law became an official standpoint for the Constitutional Court. On its session as of 4 November 1991, the Parliament passed a law on the prosecution of serious criminal offences committed and not prosecuted due to political reasons between 21 December 1944 and 2 May 1990. Upon the motion

¹⁸¹ JOWELL 2011; WINSTON 2005

¹⁸² CHEESMAN 2014, 96–114.

¹⁸³ POKOL 2017, 70–75.

of the President of the Republic for preliminary norm control, in its decision 11/1992 (III. 5) AB, the Constitutional Court declared the act unconstitutional, due to which it did not come into effect. The reasoning of the decision gave an interpretation for the Hungarian legal system, the Constitution and the rule of law correlation, which was defining for a considerably long time and in which all the three kinds of interpretation for enlargement appear.

The Constitutional Court specified hereby the enlargement necessary for enforcing the rule of law, the indispensable components which were not specified in the constitution:

III. “4. A fundamental principle of the constitutional state is the certainty and predictability of the law. Legal certainty demands, among other things, the protection of rights previously conferred, non-interference with the creation or termination of legal relations and limiting the ability to modify existing legal relations to constitutionally-mandated provisions. [...] Thus, from the principle of legal certainty, it follows that established legal relations cannot be constitutionally altered either by enactments or by invalidation of existing law, neither by the legislature nor by the Constitutional Court.

An exception to this principle is permissible only if a constitutional principle competing with legal certainty renders this outcome unavoidable, and provided that in light of its objectives it does not impose a disproportionate harm [...] however, the unjust outcome of legal relations does not constitute an argument against the principle of legal certainty.”

By prohibiting any change regarding the terminated legal relationships, the Constitutional Court limited the effect of certain fundamental rights. Primarily, the right to property, despite the fact that the Court considered the legal relationships to be closed by the nationalization of property. By so doing and by codifying in the Constitution the rule of law as an absolute principle, the Constitutional Court instated the transition as an initial point of a time series. In terms of logical approach, this would sound reasonable or acceptable, unless the Constitutional Court had not approved the principle of legal continuity at the same time. Albeit it did so when, in the course of reasoning, the Court clarified the relationship between legal

statutes before the transition and that of the Constitution of the rule of law, and they firmly stated:

III. “1. That Hungary is a constitutional state is both a statement of fact and a statement of policy. The constitutional state becomes a reality when the Constitution is truly and unconditionally given effect. For the legal system the change of system means, and a change of legal systems can be possible only in that sense, that the Constitution of the constitutional state must be brought into harmony – and so maintained, given new legislative activity – with the whole system of laws. Not only the regulations and the operation of the state organs must comply strictly with the Constitution but the Constitution’s values and its “conceptual culture” must imbue the whole of society. This is the rule of law and this is how the Constitution becomes a reality. The realization of the constitutional state is a continuous process. For the organs of the State, participation in this process is a constitutional duty. [...]

3. The change of regime proceeded on the basis of legality [...] politically revolutionary changes adopted by the Constitution and the fundamental laws were all enacted in a procedurally impeccable manner, in full compliance with the old legal system’s regulations of the power to legislate, thereby gaining binding force. The old law retained its validity. With respect to its validity, there is no distinction between “pre-Constitution” and “post-Constitution” law. The legitimacy of the different (political) systems during the past half century is irrelevant from this perspective; that is, from the viewpoint of the constitutionality of laws, it does not comprise a meaningful category. Irrespective of its date of enactment, each and every valid law must conform to the new Constitution. Likewise, constitutional review does not admit two different standards for the review of laws. The date of enactment can be important insofar as previous laws may have become unconstitutional when the renewed Constitution entered into force.”

In order to make the interpretation applicable for all relations, the Court affirmed (and thereby settled it) that none of the injustices recorded during the former regime can have a remedy (notwithstanding under the reference

of protecting the fundamental rights enshrined in the Constitution) if it had been closed at the time of the former, non-rule of law establishment.

III. “5. Within the framework of the constitutional state, and in order to further its development, the given historical situation can be taken into consideration. However, the basic guarantees of the constitutional state cannot be set aside by reference to historical situations and the requirement for justice of the constitutional state. A state under the rule of law cannot be created by undermining the rule of law. Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice. In its preceding decisions, the Constitutional Court has already given effect to this principle.”

It is impossible to interpret this otherwise than the way the Constitutional Court insured protection, with reference to the rule of law, to legal infringements committed under autocracy. Moreover, this was partly reiterated in a next passage of this reasoning:

IV. “In the Constitutional Court’s opinion, in a constitutional state the violation of rights can only be remedied by upholding the rule of the law. The legal system of a constitutional state cannot deprive anyone of legal guarantees. These guarantees are basic rights belonging to all. Wherever the value of the rule of law is entrenched, not even a just demand can justify the disregard of the constitutional state’s legal guarantees. Justice and moral argument may, of course, motivate penal sanction but its legal foundation must be constitutional.”

In the end, the Constitutional Court stated in the reasoning of this decision the empowerment granted by themselves: to complement the Constitution in the course of the interpretation:

IV. “1. The provisions of the Constitution describe in detail the fundamental value of the constitutional state but they do not fully account for its content. Accordingly, interpretation of the concept of the constitutional state is one of the Constitutional Court’s important duties. In reviewing laws, the principles which constitute the basic values of the constitutional state are evaluated by the Constitutional

Court on the basis of their conformity with specific constitutional provisions. But the principle of the constitutional state, in comparison with these specific constitutional provisions is not a mere auxiliary rule, nor a mere declaration, but an independent constitutional value, the violation of which is itself a ground for declaring a law unconstitutional.”

When reading the previous two quotes attentively, the reader is to notice that self-empowerment offered unlimited liberty to the Court in two aspects. On the one hand, it elevated the rule of law above other constitutional provisions, that is it allowed for the limitation of particular fundamental rights with reference to the rule of law. In addition, it attributed fundamental force to the rule of law when phrasing its guarantees in this manner. This argumentation, however, was not presented in a concurring reasoning but in an *official* decision.

5.3. The rule of law as an abstract fundamental right

The influence attributing traits of fundamental rights is the one that *Sólyom* refers to in the second part of his summary. The way he puts it, the rule of law clause is seemingly secondary to fundamental rights since it can be referred to only when the constitution *does not mention any other fundamental right*. However, behind this interpretation it was implied, again, this fundamental-right-trait of the rule of law; its possible application as a source of fundamental rights without nominating those. This is certainly beyond the interpretation to which the Constitutional Court has been empowered by the Constitution, and which cannot be perceived as a result of necessary interpretation, either. Legal certainty turned into a fundamental right has become therefore the source of judicial activism.

This process is understandable when we observe decision 23/1990 (X. 31.) AB declaring the capital punishment unconstitutional and annulling the pertinent provisions of the criminal code. The decision was reasoned by the Constitutional Court as follows:

IV. “The Constitutional Court found that the provisions in the Criminal Code concerning capital punishment and the quoted related regulations came into conflict with the prohibition against the limitation

of the essential contents of the right to life and human dignity. The provisions relating to the deprivation of life and human dignity by capital punishment not only impose a limitation upon the essential meaning of the fundamental right to life and human dignity, but also allow for the entire and irreparable elimination of life and human dignity or of the right ensuring these.”

In his concurring reasoning attached to the decision, *László Sólyom* brought forward a viewpoint providing substantial supplement to the reasoning of the Constitutional Court. He described the idea of an *invisible Constitution* as part of this reasoning:

“The Constitutional Court must continue its effort to explain the theoretical bases of the Constitution and the rights included in it and to form a coherent system with its decisions in order to provide a reliable standard of constitutionality – an «invisible Constitution» – beyond the Constitution, which is often amended nowadays by current political interests; and because of this “invisible Constitution” probably will not conflict with the new Constitution to be established or with future Constitutions. The Constitutional Court enjoys freedom in this process as long as it remains within the framework of the concept of constitutionality.”

The idea of an *invisible Constitution* has brought about several consequences. First, it connected the ideas of the rule of law and constitutionality; we referred to these in previous chapters describing the historical development in terms of the relationship between the two concepts. In itself, this is laudable as it has made feasible connecting old and contemporary dogmatic considerations. This process was concluded later by the Basic Law qualifying the results of our historical constitution as basic principles of interpretation. A more direct empowerment is the one which the Constitutional Court needed and granted to itself. Even if originally it was a concurring reasoning, in fact it was granting the Constitutional Court free interpretation, at the discretion of the Court, restricting or enlarging the interpretation, a certain kind of co- or preliminary-constitutionalizing role. *László Sólyom* did not even deny this, and the concurring reasoning formulates the expectation that, in an attempt to adopt a new constitution, the would-be constituent power should adjust

itself to the *invisible Constitution* elaborated upon the Constitution as a product of the Constitutional Court. Hence it projected the debate which, after two decades, would be ignited by the adoption of the Basic Law.¹⁸⁴ Finally, by referring to the *invisible Constitution*, the Constitutional Court could select freely from among certain fundamental rights nominated in the Constitution, the relationship between those and the possible interpretations.

Compared to this, it seems of minor importance the impact (also mentioned in the summary by *László Sólyom*) pursuant to which breaching the rule of law clause lays the foundations of unconstitutionality by itself. The first clear definitions in this topic appear in 1992, just like the discourse on handling the rule of law as a fundamental right, as a source of law. In Decision 9/1992. (I. 30.) AB the Constitutional Court ruled that the legal institution granting discretionary rights for certain administrative leaders to appeal on legitimacy grounds against final decisions was unconstitutional. Therefore, they quashed the pertinent provisions of the code on civil and criminal procedure. According to the reasoning of the decision:

V. “2. The principle of the rule of law is expounded in further detail by other provisions of the Constitution, although these provisions do not comprise the whole content of the fundamental value, and hence the interpretation of the rule of law is one of the Constitutional Court’s important tasks. The principles comprising the fundamental value of the rule of law are expounded by the Constitutional Court on a gradual, case-by-case basis. Although in the process of a constitutional review of a legal rule the Constitutional Court primarily examines the compatibility of the challenged regulations with specific provisions of the Constitution, this does not mean that the general provisions are seen as formal declarations and that the fundamental principles are consigned to a secondary, mere auxiliary role. The violation of the fundamental value of the rule of law enumerated in the Constitution is in itself a ground for declaring a certain legal rule unconstitutional.”

¹⁸⁴ JAKAB 2011a; MOLNÁR–NÉMETH–TÓTH 2013; ABLONCZY 2011; SZÁJER 2014

It was again in this decision that the Constitutional Court emphasized the role of legal security mentioned at the end of the previous chapter of this book.

V. “3. Legal certainty is an indispensable component of the rule of law. Legal certainty compels the State – and primarily the legislature – to ensure that the law on the whole, in its individual parts and in its specific legal rules, are clear and unambiguous and that their addressees find their operation ascertainable and predictable. Thus, legal certainty requires not merely the unambiguity of individual legal norms but also the predictability of the operation of individual legal institutions. It is for these reasons that procedural guarantees are fundamental for legal certainty. Only by following the formal rules of procedure may a valid legal rule be created, only by complying with the procedural norms do the legal institutions operate in a constitutional manner.”

This is revealed from Decision 11/1992. (III.5.) AB referred to earlier, which was brought several months later and dealt with the issue of legal security in an absolutistic manner by attributing an outstanding role to it:

III. “4. As the Constitutional Court’s Decision [Dec. 9 of 1992 (I.30) AB (MK 1992/11)] stated, in part, ‘the demand of the constitutional state for social justice may be effected subject to remaining within the institutional safeguards for legal certainty;’ and further, ‘the attainment of social justice [...] is not guaranteed by the Constitution...’”.

Resulting from the simultaneous interpretation of the two decisions, one may reach the conclusion that the Constitutional Court, on the one hand, had given up the endeavour towards the doctrine of substantive justice, which, according to *Radbruch’s* famous formula, is at least hazardous. Further on, it elevated legal certainty above all, specifically dealing with the requirement for the *clarity of norms*. Highlighting that the breach of the requirement for the clarity of norms can be uttered for almost every statutory provision, poses no challenge. At least two different interpretations that do not overlap can be formulated any time. Yet the situation is more complicated; a legal provision allowing for a single, exclusive interpretation, consequently legal certainty dealt with in an absolutistic manner

is a dangerous illusion. Why an illusion, will be presented in a later chapter. And why dangerous, it is demonstrated by the practice of the Constitutional Court from the first two decades. The doctrine, which has been deprived of all natural law bases and necessary constitutional values (viz. chapter *Legal Positivism and Constitutional Values*), when attributed positivistic legal approach and free power of discretion, by reference to legal certainty, has granted arbitrary power to the Constitutional Court. The rule of law has become a measure by itself and for itself (*norma normans non-normata*); hence any legal regulation can be annulled any time, provided an appropriate motion initiates that. It is not by chance that the analysts of the Constitutional Court practice, *András Jakab* and *Tamás Györfi* referred to in the first chapter remarked the fact that “the Constitutional Court refers to the rule of law even when *lex specialis* could be localized in the text of the Constitution”.¹⁸⁵

5.4. The unlimited power of the Constitutional Court

Based on the interpretation for the normative concept of the rule of law presented above, the Constitutional Court has granted unlimited power for itself over the legislative power. It might be a less obvious argumentation, however reasonable that the same unlimited power has been attributed to the Court over the executive power, as well.

We have already assessed legality and legitimacy as basic legal categories. Later on, in this chapter we also dealt with legitimacy in relation with the practice of the Constitutional Court. We could also see how the Court expelled legitimacy (even in its legal relation preceding the transition) from the range of principles to be taken into account when interpreting the Constitution. This was a mistake. In states of absolutistic establishment, the source of legality and legitimacy is equally represented by the sovereign ruler. In countries of constitutional establishment, however, the requirement posed to governing is separation of the branches of power. Two separate branches of power are dedicated to watching over the main constitutional requirements taking effect: the Parliament safeguards legitimacy as the owner of legislative power, the courts control the legality

¹⁸⁵ GYÖRFI–JAKAB 2009, 156.

of governmental activity through their rulings. Expelling legitimacy is in fact disputing the importance of the Parliament.

The operative government activity is accomplished by the third branch, the executive power.¹⁸⁶ Thus, at least from a legal aspect, the activity of the executive power supervised by the other two branches of power is only appropriate when lawful and legitimate: if it does not breach any law and if it does not counter the people's will (in a more elevated tongue, the nation's will). Simultaneously, legality and legitimacy of the executive power does not suffice on the long run since its role is to execute laws and the will of the people. Therefore, the third measure for the executive power is *efficiency*.

The efficiency of the executive power, more precisely, that of the public administration has a vast literature. In this work, we are satisfied with a simple, everyday definition. When the normative and practical actions of the governing apparatus are valid and comply with the public will since they are based on statutes, then the outcome of governmental activity is positive. In an opposite case, if the governmental activities conflict the law, courts will annul them, or the people will not accept them, then they have a negative effect and the action does not fulfil its aim. In a nutshell: besides the requirements of legality or legitimacy, the executive power has to face the requirement of efficiency as well.

When we wish to summarize what requirements are posed to the government of a constitutional state under the rule of law built on the separation of powers, we cannot neglect the triple factor of *legality, legitimacy and efficiency*. All three arise in respect of the executive power: if a government intends to operate properly, it needs to act legally (i.e. under judicial control); it needs to observe the legitimate will of the people (besides the control of the Parliament) and it needs to be effective (otherwise, despite being legal or formally legitimate, it will lose support). Putting in practice the triad of legality, legitimacy and effectiveness is not simple, however. The Parliament and the courts are not only devices of the control over the executive power; by their own criteria, due to legality and legitimacy they are obstacles in the way of effectiveness. We can further enhance the description of the aggravated situation regarding governments: legality and legitimacy do not act parallel to each other, countering

¹⁸⁶ EREKY 1939, 79; CRAIG-TOMKINS 2006, 5; LOUGHLIN 2003; TOMKINS 2006, 16; YOUNG 2006, 164–170.

efficiency. They do so from reciprocal directions. In other words, legality and legitimacy not only brake effectiveness, but they also counteract each other. It is impossible for the executive power, in a broader sense, for the government to be legitimate, legal and effective simultaneously; the triangle of requirements will tend to one of the directions, one side being always overweight.

In a constitutional system built on the rule of law, it is legality which usually becomes the overweighed side, the consequence of which is the capacity of Constitutional Courts to expressly block effectiveness. In other cases, it is the concern of legitimacy which is left out. There is a quite simple explanation for this situation: courts of final and unappealable authority for legal interpretation are forums dedicated not only to judging in the scope of a litigation; likewise are they the decisive and exclusive supervisors of the executive power, or even, in a broader sense, of the whole governing apparatus at a time. If it is courts, and courts only, to exercise control over the execution, and other aspects of liability and accountability, such as political reasonableness, economic utility or social acceptance are just falling behind,¹⁸⁷ then the only measure taking effect in reality will be legality. By this, the executive power will be subordinated to abstract legal interpretation in a peremptory manner. This is what happened in Hungary.¹⁸⁸

5.5. Correction: Constitutional Court case law based on the Basic Law

The above considerations show that the normative declaration of the rule of law lacking any substantive background in the interim Constitution granted a magic wand for the Constitutional Court. They were able to shape the rule of law concept as circumstances and moments required, better to say as the answers did. The question arises whether the autocratic rule of law, i.e. the rule of law turning into arbitrariness has any antidote. It seems it does have; the constitutional practice relying on the Basic Law might be appropriate to curb the signs indicating totalitarianism.

¹⁸⁷ HARLOW 2003, 79–102.

¹⁸⁸ STUMPF 2014, 239–244.

The guarantee for this is The National Avowal as a token bearing the system of values for the Basic Law and the whole constitutional order, as well as the rule of interpretation, that is Section (3) of Article R) as cited before. Albeit before the Constitutional Court would have commenced reinterpreting its practice relying on those mentioned before, it had challenged the ultimate limits. By methods built upon the interim Constitution, it had grown beyond the separation of powers and had appeared as a co-acting constitutive power.

Almost one year after the Basic Law entered into force, the Constitutional Court annulled the majority of the Transitional Provisions of the new Basic Law.¹⁸⁹ The Transitional Provisions had been adopted by the Parliament, Hungary's constitutive power, just a few days before the Basic Law entered into force on 1 January 2012. Creating the Transitional Provisions was made possible by the Closing Provision 3 of the Basic Law: "The transitional provisions shall be adopted separately by the Parliament..."¹⁹⁰

Undoubtedly, a controversial situation was formed; on the one hand, the Parliament inserted substantive provisions of merit and not just temporary rules among the Transitional Provisions. On the other hand, by Article 31 Section (2) of the Transitional Provisions, it was stated that the Transitional Provisions constitute a part of the Basic Law.

However, originally no similar provisions were found in the text of the Basic Law. The Basic Law ordered merely the obligation to accept the Transitional Provisions, without defining those as part of the Basic Law. As a result of the first debates upon the nature of the Transitional Provisions, the Parliament amended the Basic Law (First Amendment, 18 June 2012). In harmony with Article S) on the method of approval and amendment, the First Amendment was incorporated into the text of the Basic Law as a new Closing Provision, under number 5. This stated that "Transitional provisions of the Basic Law (31 December 2011) adopted in conformity with point 3 constitute part of the Basic Law." At the same time, the last clauses of the Basic Law, the *Postamble* remained untouched:

¹⁸⁹ Decision 45/2012. (XII. 29.) AB.

¹⁹⁰ Reason of reference to Point 2 is that the interim Constitution was in force when the Basic Law and its Transitional Provisions were adopted by the Parliament. Point 2 of the Closing Provisions of the Basic Law prescribed observation of procedural rules of the interim Constitution.

“We, the Members of the National Assembly elected on 25 April 2010, being aware of our responsibility before God and man and in exercise of our constitutional power, hereby adopt this to be the first unified Basic Law of Hungary.

May there be peace, freedom and accord.”

Due to the above mentioned First Amendment, the Basic Law and the Transitional Provisions have formulated a kind of legal *catamaran*; two corpuses interlinked, which should be handled as the foundation of the legal system:

- a) the *Postamble* declared that the Basic Law is *unified*;
- b) following the First Amendment, Closing Provision 5 found that the Transitional Provisions are *part of* the Basic Law and the Transitional Provisions also state that;
- c) the constituent power did not unify in the same text the Transitional Provisions with the Basic Law; hence, formally speaking, those form two separate corpuses of the Hungarian legal order whereas
- d) Article R) of the Basic Law stated that “(1) The Basic Law shall be the foundation of the legal system of Hungary”.

Obviously, the *catamaran* was not easy to interpret, the consequence of which was that the Constitutional Court, upon the request of the Commissioner for Fundamental Rights analysed the Transitional Provisions from the aspect of their legal nature, and *found* that the substantive legal rules in the Transitional Provisions do not harmonize with the Basic Law. Accordingly, the Court annulled those with retroactive effect starting from the 31st of December 2011. The argumentation of the Constitutional Court for this was the following. The new substantive legal statutes in the Transitional Provisions still cannot be considered the *foundation of the Hungarian legal system* since the Postamble states that the Basic Law is *integrated*; consequently, it cannot have *external* parts containing statutes of merit, such as the Transitional Provisions. Based on this reasoning, it came as a conclusion that any new rule should be incorporated in the text of the Basic Law. In an opposite case, due to their dual structure (as we call it, the *catamaran*), the Transitional Provisions may become a *law elevator pitch* by which newer and newer provisions might be levelled with the Basic Law.

The argumentation of the Constitutional Court is correct, clear and understandable. It is without doubt also, that the decision was underpinned by the rule of law concept presented above. That this is impossible to sustain becomes clear when we recognize that similarly correct, clear and understandable arguments could lay the basis of the Constitutional Court declaring quite the opposite of those stated above; some of them appeared in concurring reasoning of the constitutional court and in dissenting opinions.¹⁹¹ They could have considered the Transitional Provisions as a separate, non-incorporated part of the Basic Law, which would be sustained by the quite substantial basis that the Parliament as a constituent power meant to approve of the Transitional Provisions as part of the Basic Law.

Thus, the Constitutional Court reinforced the integrated shape of the Basic Law; in our judgement, the arbitrary character of the decision can hardly be doubted. Our Constitutional Court, therefore, used the rule of law as a magic wand, taking the liberty granted for them by the declaration of the rule of law in the Basic Law. They shaped the definition of its content according to their discretion, and considered statutes to be correct or incorrect, in harmony or in disharmony with the rule of law; moreover, they did not spare the Basic Law itself as the foundation of the legal system.

By doing so, in fact, the Court compelled the constitutive power to amend the Basic Law, which was completed by the Fourth (25 March 2013) and the Fifth Amendment (26 September 2013). The Fourth Amendment, among others, lifted annulled provisions of the Transitional Provisions into the Basic Law, pursuant to the ruling of the Constitutional Court. An even more relevant order is the one completing the Closing Provisions of the Basic Law by a new point 5, according to which:

“Constitutional Court rulings given prior to the entry into force of the Basic Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.”

As a matter of fact, the new provision forced the Constitutional Court not to refer automatically to principles and doctrines shaped during the interpretation of the interim Constitution, but to apply the provisions of

¹⁹¹ Concurring reasonings by justices András Holló and István Stumpf, dissenting: justices István Balsai, Egon Dienes-Oehm, Barnabás Lenkovics, Péter Szalay and Mária Szívós.

the Basic Law. Naturally, former decisions were applicable; however, their application had to be reasoned also with regard to the Basic Law. A formula was created for this as early as 2013:

“In new cases the Constitutional Court may apply the arguments, principles and constitutional interpretations elaborated in its former decisions if the content of a regulation of the Basic Law matches that of the Constitution, and it is contextually in conformity with the whole Basic Law, if the rules of interpretation of the Basic Law and the actual circumstances of the case do not prevent it and if incorporation of the former clauses into the new decision seems necessary.”¹⁹²

The new doctrine completed a process started earlier; it reversed the tendency of turning the rule of law principle into a specific fundamental right. This may have happened owing to the institution of constitutional complaint, which, contrary to earlier regulations, allowed for the supervision of ordinary non-constitutional judicial rulings. In accordance with the commonly accepted practice of interpretation of the Court, a constitutional complaint cannot normally be based on a claim stemming from the violation of the rule of law. Altogether, there are two cases when the Constitutional Court accepts complaints based only on the violation of the rule of law: in the scope of motions on legislation with retroactive effect and motions based on lack of preparation time.¹⁹³ These two principles are unavoidable components of the concept of the rule of law, nevertheless they are not nominated rules in the Basic Law. Development and individual application of these, therefore, raises much less concern than the previous solutions.

Albeit not immediately after the Basic Law entered into force, the Constitutional Court obviously seems to have changed the direction of its interpretation, which had placed the rule of law above fundamental rights, above the need for the law to be just, ultimately, above law and legal subjects. It has terminated the practice of interpreting arbitrarily, by measuring the rule of law to the rule of law itself, and accepts the primacy of the constituent power.

¹⁹² Decision 13/2013. (VI. 17.) AB.

¹⁹³ Decision 3062/2012. (VII. 26.) AB.

Even if not without debates,¹⁹⁴ the era of activism seems to halter and stop, and the Constitutional Court seems to be capable of the protection of the Basic Law instead of protecting its own interpretation. Definitely, this is not a bad direction when we take into consideration that Hungary has its own constitutional identity enshrined in the Basic Law, which connected Hungary's contemporary legal order with our historical constitution by inserting the law from the decades following the moment when continuity had broken. Enacting the Basic Law had definitely brought about the moment when the transition period substantiating activism ended. Whereas this means that the courts, consequently the Constitutional Court as the supreme judicial forum shall stick to the letter of the law. This is a must even if it might be conflicting with the conviction of the court members, or the actual legal fashions. This is a must as long as it does obviously not conflict the natural, unconditional and always respected fundamental principles of law, with freedom, people's equal dignity and unalienable rights.

The Basic Law clearly defines the scope of tasks for the Constitutional Court and the framework of its operation: it shall bring decisions as a body; when deciding, it shall interpret the provisions of the Basic Law in harmony with the aims of those, with the National Avowal enshrined in the Basic Law and with the results of our Historical Constitution. This list does not comprise temporary, fashionable legal arguments or political expectations, opinions of the Justices or any other persons. And neither does it hold absolutistic interpretation of the normative principle of the rule of law, which leads to its arbitrary application.

Finally, the Hungarian Constitutional Court found its role in the protection of the Basic Law and not of an *invisible constitution* by treading on the path shown by the German *Bundesverfassungsgericht* in the famous *Solange* decisions. By its Decision 22/2016. (XII. 5.) AB the Constitutional Court stated that:

“[It] interprets the concept of constitutional identity as Hungary's self-identity”: “The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components [are] identical with the constitutional values generally accepted today. [...] These are, among others, the achievements

¹⁹⁴ DRINÓCZI 2016, 63–98; SZENTE–MANDÁK–FEJES 2015; DRINÓCZI 2014, 87–106.

of our historical constitution, the Basic Law and thus, the whole Hungarian legal system is based upon them. [...] The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Basic Law – it is merely acknowledged by the Basic Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State.”

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6. The Paradigm of the Rule of Law and Institutional Activism in an International Perspective

In the previous chapter we could see how the declaration of the rule of law had been concentrated in Hungary to the primacy of formal legal certainty as interpreted for the whole legal system, by way of activist Constitutional Court practice. This result can be disputed, on the one hand, because the dichotomy of formal legal-certainty/substantive-justice, and deciding about this for the benefit of formal legal certainty, is evident only in a procedural legal relationship, where opposing interests and partial truths collide, out of which, as a rule just one can win. On the other hand, if (in the name of the rule of law) we look at formal legal certainty in an absolutistic manner and we apply it also for non-procedural legal relations (thus for the whole legal system), then we make selection from different legal strata possible, even from among the constitutional rules. This raises concerns since the rule of law means respecting law as a whole, law built on formal values (division of power, disputability of state decisions) and substantive values (fundamental rights or substantive rights ensured by legal sources below the constitution). Judicial protection (including constitutional courts) hence is not for the rule of law but for law (for the entire legal system), which ultimately protects the person through the person's rights. If this circumstance is left out of consideration, and the principle of the rule of law protects itself instead of the whole legal system, then both the principle of the rule of law and the law itself become vain and self-serving. In such a case, the rule of law falls back to the state practice it had been dedicated to surpass: the arbitrary interpretation of law and arbitrary practice of power.

In respect of the above process, as we endeavoured to present in detail, the Hungarian Constitutional Court was to follow an inescapable path on the one hand, and on the other, it was its own practice that confirmed the models available. In this chapter, *the rule of law/Rechtsstaatlichkeit* will be dealt with in a larger, international context.

6.1. From legislative to judicial rule of law

Characterized by a high regard for the rule of law and for its essential component, legal certainty, this type of constitutional court practice can be called the European type.¹⁹⁵ This model is followed also by Hungary's Basic Law, and it is not by chance that it came into being in this shape. The 19th century was the era of the great codifications.¹⁹⁶ It is without doubt that, starting from the Middle Ages, there have been attempts for collecting and systemizing norms regulating specific legal relations, such as *Decretum Gratiani*¹⁹⁷ or *Sachsenspiegel*¹⁹⁸ (or *Werbőczy's Tripartitum*¹⁹⁹ of 1514 in Hungary). The great codes built on normative principles and uniform dogmatic background start, however, with Napoleon's *Code Civil*²⁰⁰ and through the Austrian *Allgemeines Bürgerliches Gesetzbuch*²⁰¹ they culminate in the *German Bürgerliches Gesetzbuch*²⁰² (in Hungary the *Csemegi-code* on criminal law or the Civil and Criminal Code of Procedures). We can say that in the 19th century the legal concept of *Rechtsstaat* was based on the primacy of legislation. It seemed that the antidote for decisions at random and those which might have borne autocratic traits were the sources of law available for everybody, discussed at large, then codified by the legislative bodies.

This process of development was met by the 20th century, overturning states by bloodshed and giving birth to new states. A legal precipitation was the demand of the new states to organize themselves; on the legal side, this was performed by the written constitutions.²⁰³ The newly written constitutions needed validation; an appropriate forum for this appeared to be *Kelsen's* new Constitutional Court in Austria, which, after World War II spread in many countries as a continental model.²⁰⁴ As revealed from a work by *Béla Pokol* almost 25 years before, constitutional court practice

¹⁹⁵ BALOGH 2013, 373–406.

¹⁹⁶ VÉKÁS 2014

¹⁹⁷ ERDŐ 1998, 165–178; SZUROMI 1998, 36–46.

¹⁹⁸ KÜNSSBERG 1933

¹⁹⁹ MÁTHÉ 2014

²⁰⁰ VÉKÁS 2014

²⁰¹ BRAUNEDER 2011, 127–135.

²⁰² VÉKÁS 2014

²⁰³ PÓCZA 2012, 123.

²⁰⁴ PACZOLAY 1995

could not be commissioned to ordinary courts in the 1920s.²⁰⁵ It could not be expected from the judges of the courts having unconditional respect towards the famous codes that, in case a debate arises, putting aside the time-resistant code, they should bring judgement upon an abstract constitutional norm which had been shaped in the course of political debates. This is why establishing a constitutional court was a necessity. *Kelsen's* truth is confirmed by the fact that the German imperial courts were incapable to protect the *Weimar Constitution*,²⁰⁶ while the Austrian Constitutional Court resisted.

Therefore, the model proved to be appropriate not only for other countries but also for other ages. It is not by chance that, after the fall of the dictatorship, several countries deemed necessary to instate this kind of constitutional court; so did Hungary. Nevertheless, these dictatorships (in Western Europe in the first half of the 20th century, in Central Europe almost all through the century and until the transitions of 1989–1990) were based on the exclusive character of the executive power. Therefore, in the new systems, the constitutional court practice not only concentrated on the legislation to be necessarily in conformity with the constitution. Properly, it also endeavoured to limit the operation of the executive power and adjust that to the principle of the division of powers.

Paralleling all these and starting from the mid-20th century, powerful international and supranational institutions were established: the United Nations Organization, the Council of Europe and the European Community, later on forming the European Union. Effectiveness in the new, supranational institutions was guaranteed by the establishment and operation of the courts, independent of the member states (in The Hague, Strasbourg and Luxembourg). These strong institutions, however, were mere legal communities, and their establishers, their members could ensure rights and powers for them, but no political or social values.²⁰⁷ Side effect of this was that the courts of high power could observe nothing but their own substantive law and no other values; whereas their decisions had a substantial impact on the law of the respective institutions legally binding everybody. Hence they had a reflexive effect to the law of their establishers. We have already made allusions to the fact that the benefits

²⁰⁵ POKOL 1991b, 47–53; POKOL 1994b, 35, 94–95.

²⁰⁶ de VISSER 2014, 63.

²⁰⁷ PÜNKÖSTY 2014

of free judicial impact exercised on law has been recognized by the international and supranational institutions, as well. A spectacular example of this is the *Van Gend en Loos* case in 1963, when the Luxembourg Court pronounced the primacy of the law of the European Union law (by that time, of the European Community). We have already remarked the aftermath of declaring this primacy: political accountability has remained as a burden upon the member states; however, the freedom to decide has been substantially decreased after the law of the European Union became bounding and enforceable by way of integrationist judicial control.²⁰⁸

It was this judicial model into which the Hungarian Constitutional Court was born into. In this period the model was strengthened by the outstandingly activist practice of the Supreme Court of the United States.²⁰⁹ It was the time when the current concepts and practice preferred the judicial rule of law.²¹⁰ Our domestic experience shows that the model of the activist judicial rule of law seems to be appropriate and might be an efficient device for the protection of the Constitution for shorter periods. On the long run, however, it is as unsustainable as any other state model constructed upon the dominance of a single branch of power. It may likewise lead to autocracy, all the more so for constitutional courts where this danger is particularly strong, as there is none, and there can be no control exercised over them. It is exactly this uncontrollable status which requires that, except for short transitional periods, the constitutional courts should voluntarily integrate (or adjust) themselves to the system of division of powers. Indeed, the division of powers means that none of the branches of power can have unlimited power, hence the courts cannot either. This requirement for balancing appears gradually in conjunction with international institutions; even in the philosophy of the Venice Commission.²¹¹ The latter circumstance is important because it is this particular institution nominated as spokesperson of the Council of Europe for the rule of law.

²⁰⁸ HARLOW 2003, 95–96; CRAIG 2006, 329–343; MACCORMICK 2002, 97–122; KENDE–SZŰCS 2002, 559–561.

²⁰⁹ LINDQUIST–CROSS 2009, 3, 47, 105.

²¹⁰ POKOL 2017, 72–75.

²¹¹ CDL-AD(2012)026-e.

6.2. The Venice Commission: for the rule of law

The Venice Commission, by its official name: the *European Commission for Democracy through Law* was founded on 10 May 1990 for a period defined in 2 years. It was established by the Committee of Ministers for the European Council as a result of a Partial Agreement reached by the cooperation of ministers from the 18 member states. The Venice Commission is formed by experts nominated by each of the establishing States' government or experts delegated from non-member states, with the agreement of the Committee of Ministers. The main aim of the Venice Commission was cooperation by and between the member states of the Council of Europe and other, particularly Eastern- and Central European states, by that time having no membership. The special aims were: learning reciprocally about the countries' legal system, approaching those systems, understanding the diversity of legal cultures and solving the problems arising in the operation of the democratic institutions, as well as development of their operation. During its operation, the Commission was primarily dedicated to safeguarding primacy to constitutional, legislative and administrative fundamental principles and methods in order to enforce the democratic institutions' efficiency and reinforcement of the rule of law, as for the protection of the fundamental rights, public activity of the citizens and the principle of self-government.²¹²

The foundation document was revised by the Committee of Ministers in 1992; as a result, this activity of the Venice Commission is continued for an unlimited period. The foundation document in effect was approved as of 21 February 2002. To a certain extent, the text is different from the original one, thus "*promoting the rule of law and democracy*"²¹³ has become more accentuated.²¹⁴ Among the members of the Commission, besides the delegates of the Council of Europe we find representatives from Brazil, Chile, Israel, South Korea, Mexico, Morocco, Peru, Tunisia and the United States of America. An associated member is Belorussia and members of observers' right are Argentina, Canada, the Holy See,

²¹² Resolution (90) 6 on a Partial Agreement establishing the European Commission for Democracy through Law (adopted by the Committee of Ministers on 10 May 1990 at its 85th Session).

²¹³ CDL(2002) 27, Resolution Res (2002) 3.

²¹⁴ POLAKIEWICZ-SANDVIG 2016, 115–121.

Japan and Uruguay; exceptional status is granted as a participant to the European Union, the Palestine National Authority and South Africa.²¹⁵

Due to the number of participants, the Commission has become more and more respectable and its opinion unavoidable which could be witnessed in Hungary as of recently.²¹⁶ In order to properly weigh this, it is a must to have a look at the actual rules of operation. Pursuant to Article 3 of the Statute in effect, the Commission can formulate an opinion on a request from the Committee of Ministers, the Parliamentary Assembly, the Congress of the Local and Regional Authorities, the Secretary General of the Council of Europe, a member country or an international organisation represented in the Commission. This opinion is not legally binding; it is a *soft* instrument. Yet the latter circumstance, i.e. having non-binding force does not mean that it could be neglected. This is, on the one hand, due to the respect of the institution; the weight of certain occurring critique (which is also marked by the fact that even more powerful institutions demand due respect for it.) On the other hand, as the Commission acts similarly to a court upon a claim, the soft opinion does not mean a general requirement for all the member states. Firstly, the opinion is pertinent to whom it may have been concerning; secondly, it makes a distinction between the *old* and the *new* democracies/member states from the very beginning. We will tackle this in detail further on.

For the member state affected by an opinion, the reverse Solange effect by *von Bogdandy* is also valid before the Venice Commission: the criticised member state cannot refer to the fact that its legal system (or a certain legal solution of it) is quite identical with or similar to that of another, non-assessed member states' legal system.²¹⁷ A soft opinion, therefore, will not only mean the absence of an immediate legal consequence; but, in lack of a common substantive legal basis, it also means the unpredictability of the measure.²¹⁸

Article 3 cited already strengthens the unpredictable character of the soft opinion as such, from another aspect. Without affecting the authority of the institutions of the Council of Europe, the Commission may pursue

²¹⁵ Available: venice.coe.int/WebForms/members/countries.aspx (Accessed: 18 March 2018.)

²¹⁶ CSINK-SCHANDA – VARGA Zs. 2012; TRÓCSÁNYI 2016

²¹⁷ von BOGDANDY et al. 2012, 489–519.

²¹⁸ TRÓCSÁNYI 2016, 123–124.

researches on its own initiative. If it is justifiable, it may prepare studies, drafts of guidelines, statutes and international agreements which the legislative bodies of the Council of Europe may debate and approve of.

The Commission, further on, cooperates with the constitutional courts and courts of similar authority of member states. To serve that, it is entitled to establish a common council with the participation of its own members and those of constitutional court representatives. From the circle of texts compiled on own initiative, reports and compendiums are to be emphasized. These in general are the summaries of individual opinions (such are the summaries regarding courts,²¹⁹ constitutional amendments,²²⁰ constitutional courts,²²¹ ombudspersons,²²² the rule of law,²²³ judicial independence,²²⁴ the composition of constitutional courts,²²⁵ the stability of the election system,²²⁶ or participation in national elections for those living abroad.²²⁷ By forming a coherent system of the aggregated ad hoc opinions of the Commission, both kinds of methods are suitable to become a foundation of later opinions.

This system is very efficient: since, in theory, the outcome of the activity is soft, such an opinion does not compel even the country it refers to; hence the Commission can freely shape its foundations. In practice, this appears as the elaboration of the Commission's own substantive legal grounds. Doubtlessly, the Commission cannot and will not pass over the framework of binding legal instruments (international agreements, the case law of the European Court of Human Rights) or those formally shaped legal tools (the recommendations of the Committee of Ministers or those of the Parliamentary Assembly). However, within this framework, the Commission benefits from actually unlimited liberty. The only fix, yet informally influential factor is the background activity of the constitutional courts in the member states. Naturally, the latter one influences by its own practice: if that is activist, then so is its effect on the Venice

²¹⁹ CDL-JD(2008)001.

²²⁰ CDL-DEM(2008)001.

²²¹ CDL(2011)048.

²²² CDL(2011)079.

²²³ CDL-AD(2011)003rev.

²²⁴ CDL-AD(2010)004, CDL-AD(2010)040.

²²⁵ CDL-STD(1997)020.

²²⁶ CDL-AD(2005)043.

²²⁷ CDL-AD(2011)022.

Commission. New soft canons stemming from this reflect that; and it is this that is mirrored in later opinions. The member state affected by the opinion is not eligible to criticise this, of course; for, on what grounds could it do so?

With regard to almost every single sensitive constitutional issue, this freely-shaped canon of the Venice Commission might be subject to scrutiny; yet the text pertaining to the rule of law only, is going to be analysed.

6.3. Excursus: an example for the activism of the Venice Commission

Preceding the events of the last decade and a half before, Western European thinking had not shown signs of interest for the constitutional status and scope of tasks for prosecution services. Instead, it was simply acknowledged that the Napoleonic model had become widespread (monarchic Hungary had also followed this²²⁸). Works dealing with the prosecution services were seeking answers for how (and when) a charge shall be brought to the courts. In the recommendation referring to prosecution activity Rec(2000)19, even the Council of Europe held the opinion that the prosecution services are decisive actors of criminal jurisdiction, even if the *Explanatory Memorandum* mentions the fact that in certain countries prosecutors may also fulfil relevant activities in other fields, such as commercial law and civil law areas. Despite this, following the turn of the millennium, the examination of extra criminal prosecutorial activities took place. On its 4th session in 2003, in Bratislava,²²⁹ a key actor, the Conference of Prosecutors General of Europe (CPGE) brought forth the necessity²³⁰ of supervising extra criminal prosecutorial activity. In the 5th Conference the next year, in Celle, Germany the thorough assessment of this issue was decided, then the first report was completed for the 6th Conference in Budapest. This finding was left almost unnoticed, as the Consultative Council of European Prosecutors (CCPP) established by this conference demanded a wholly new scientific report.²³¹ This was

²²⁸ NÁNÁSI 2011, 12–14, 28–34.

²²⁹ CPGE (2003) 11.

²³⁰ VARGA Zs. 2006, 43–70.

²³¹ CCPE-Bu (2008)4rev.

submitted in the name of the Council of Europe and discussed during the Conference of Prosecutors convened for a single occasion at St Petersburg in 2008.

According to the conference from St Petersburg, the total absence of prosecutors' tasks beyond criminal law is usual in *common law*, as well as in the Scandinavian countries. However not exclusive, yet strong coincidence can be perceived in both French (Latin) and German legal families, the prosecutors of which are granted more or less non-penal tasks, albeit these are restricted to procedures before courts. On the contrary, this determination based on legal families is not characteristic at all to countries whose prosecutorial authority is the most powerful. In their case, however, the presence of another characteristic can be recognized; specifically, that, for a prolonged time, these had been under the rule of authoritarian (dictatorial) governments in the 20th century.²³² In this conference, the representative of the Venice Commission was presenting strong arguments to support total cessation of activities beyond the scope of criminal law.²³³

The Consultative Council requested the Committee of Ministers to work out the common fundamental principles. The result of this was CM/Rec(2012)11 on the role of public prosecutors outside the criminal justice system adopted on 19 September 2012. The most relevant rule of the new recommendation is, in general, pertinent to the tasks of the prosecution for public interest protection.

“Where the national legal system provides public prosecutors with responsibilities and powers outside the criminal justice system, their mission should be to represent the general or public interest, protect human rights and fundamental freedoms, and uphold the rule of law.”²³⁴

By comparison, the Venice Commission in its standards on prosecution²³⁵ based on former opinions, in fact, demand absolute rejection of powers

²³² The correlation between authoritarian past and detailed regulation is not special: NOLTE–KRIEGER 2003, 23–30.

²³³ CDL-AD(2005)014 and SUCHOCKA 2008.

²³⁴ CM/Rec(2012)11, Section 2.

²³⁵ CDL-AD(2010)040.

beyond the criminal law and also the hierarchical prosecutorial model. The Commission demands the prosecutors' (personal) independence, which is continuously suggested regarding each new law on prosecution. In references, CM/Rec(2012)11 is not a highlighted one, whereas a former recommendation of the Parliamentary Assembly²³⁶ is the more so.²³⁷ In the latest opinions, the position of the Commission appears to bear no contradiction.²³⁸

6.4. The Venice Commission as a source of law for the European Union?

The protection of the rule of law, as described before, is a paradigmatic principle providing several sources and several components which has become a normative rule; several countries, finally the European Union applied this solution. The constitutive attempt of the European Union resulting in the document signed on 29 October 2004, the Treaty establishing a Constitution for Europe²³⁹ ruled about the Union's values under Article I-2.

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

The European Constitution failed on the French and Dutch referendum, although several elements (mainly those constituting the indispensable reform of the Union) were taken over by the Treaty of Lisbon in 2007, and were integrated into the TEU and the Treaty on the Functioning of the European Union (TFEU). As mentioned and partially analysed in

²³⁶ Recommendation 1604 (2003) on the role of the public prosecutor's office in a democratic society governed by the rule of law, Parliamentary Assembly.

²³⁷ Regarding Hungary see POLT–GERENCSÉR – VARGA Zs. – NAGY–KÖPF 2013, 445–471.

²³⁸ CDL-AD(2012)019-e, CDL-AD(2015)005.

²³⁹ Official Journal C/310, 2005.

the introductory chapter, the article on the values of the European Union became, without any adjustment, Article 2 of the TEU, and legally binding after the entry into force as of 1 December 2009. We can state that the rule of law has become a normative concept for the European Union.

It would be worthwhile to dedicate a separate interpretation to how the first and second sentences of Article 2 relate to each other: the six fundamental values considered to be common, as well as the system of concepts of other six attributes of the countries assuming these fundamental values as their own. Yet, as of our topic it is sufficient to highlight the concept of the rule of law, and present how the European Union handles this with special emphasis, indeed.

Due to the differences in terms of use, it seems appropriate to mention that the different terms (all of them official): e.g. the rule of law, *Rechtsstaatlichkeit*, *État de droit* (and *jogállam* in Hungarian) are more than a linguistic feature. The instability of terms opens up space for arbitrary interpretations (now we can generously not consider that the European Union is certainly not a state at this moment, but in many languages it is based on the value of *Rechtsstaat*). The TEU, therefore, stipulates without any conceptualization that one of the basic values is the rule of law or *Rechtsstaatlichkeit* or *État de droit* or *jogállam* (in Hungarian). As a result of Article 2, the same thing happened to the Union as it was brought about in Article 2 of the interim Constitution of Hungary. Raising the principle of the rule of law to normative rank opens a gate that would probably never be closed: a tool for the EU bodies that can be used without restrictions.

Without conceptual clarification, the Lisbon Treaty therefore stated that one of its fundamental values, the rule of law or *Rechtsstaat* should mean in every language (and not only in the three big European languages) a different content in principle. Article 2 of the TEU, together with Article 7 threatens the member states that do not respect the undefined principle of the rule of law. Pursuant to Article 7, the values of Article 2, thus infringement of the rule of law entails proceedings initiated against the member state. The phenomena triggered by Article 2 in the Union parallel those in Hungary, those occurred around Article 2 of the interim Constitution; by elevating the abstract principle of the rule of law to normative rank, a gate was opened which might not be possible to close again. It created a device that can be used unlimitedly by the bodies of the European Union. The power is vested ultimately to the ECJ, a court that is *per definitionem* beyond political (i.e. democratic) control. In comparison with Hungary,

the situation is more aggravated in the European Union as the member states did not cede to the Union their constitutional identity, self-definition of the state and their fundamental values and establishment. However, they accepted a seemingly solemn formula as part of the most relevant source of law. Due to this, their constitutional establishment and the control over its details has finally fallen, within the scope of EU institutions.

It is a fact that the Court has not yet used this device against a member state but this does not mean that the process leading towards it has not been commenced already. According to *Armin von Bogdandy et al.*, Article 2 and 7 create a certain reverse Solange situation. Starting from the premise that the rule of law and all other values enshrined by Article 2 are shared by all the member states, the institutions of the EU may refrain from assessing the constitutional issues of the member states until (Solange) a well-based doubt arises about the harm of the fundamental values. If such doubt arises, then a member state found to have infringed the rule of law would probably refer without any result to procedures applied by similar rules or practices in other member states. For, if no doubt arises in conjunction with *another* member state, then the Union will refrain from assessing that member state.²⁴⁰ Accordingly, the rule of law can become an arbitrary means of discipline due to its content which is not delimited.

Fact is also that applying Article 7 would demand a political decision, which is possibly difficult to reach. This is also suggested by the fact that the rehearsal, i.e. the preparation to apply that has failed. In fact, the Tavares Report²⁴¹ charging Hungary with violation of human rights can be perceived as testing the applicability of the rule of law as a whip. Applying Article 7 emerged as a serious intention in 2017. In fact, many players may initiate the procedure (vis-a-vis the procedure of the Commission and the Parliament which, as of their nature, are political and rely on an initiative of a restricted circle of actors). Hence an abstract decision could become soon applicable with regard to other member states as well, as it happened regarding Poland in December 2017. If the ECJ attributes a wrong interpretation to the rule of law, it is this wrong interpretation that will ultimately bind the member states.

²⁴⁰ von BOGDANDY et al. 2012, 6–22.

²⁴¹ Report of the European Parliament Committee on Civil Liberties, Justice and Home Affairs on the Status of Fundamental Rights adopted by Parliament on 24 June 2013, A7-0229 / 2013: Hungarian Standards and Practices.

Soon a device was born, one appearing softer, therefore much easier applicable. Upon the request of the Council and the Parliament, by 2014 the European Commission elaborated a new device entitled: *A new EU framework to strengthen the Rule of Law*²⁴² which, in fact, is partially a political and partially a legal procedure. The main characteristic of the framework is elevating the concept of the rule of law from Article 2. This concept is protected with special emphasis in every single case when “some kind of systemic threats are imposed against rule of law” (4.1) that need to be handled. We think that this wording leaves no doubt that the uncertain content of the rule of law leaves space to formulate charges of violation without difficulty; albeit it is worth throwing a glance at the situations listed as examples for violation:

“The political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists, must be threatened – for example as a result of the adoption of new measures or of widespread practices of public authorities and the lack of domestic redress. The Framework will be activated when national “rule of law safeguards” do not seem capable of effectively addressing those threats.”²⁴³

If any doubt might be lingering about the arbitrary applicability, it will certainly vanish by the reference to the constitutional courts: no EU prescription exists which would require the establishment of such an institution, but if a member state has an operating constitutional court, not even a new legislation can *threaten* it. We draw the attention that, due to the primacy of the EU law, the member states’ constitutions do not enjoy priority over the EU; as a result, any change affecting the constitutional courts, whether by constitutional amendment or by passing a new constitution, may trigger the application of the *framework*. Hence, applying the *framework* is a norm control procedure applied against the law of a member state or part of that, the member states’ constitution.

²⁴² Communication from the Commission to the European Parliament and the Council. A new EU framework for strengthening the rule of law, COM(2014) 158 final.

²⁴³ Ibid. Section 4.1.

Pursuant to the framework, the device as a remedy for the injury of the rule of law is exchange of information between the affected member state and the European Commission. The phases of the so-called structured information exchange are the assessment by the European Commission, a recommendation, and the follow-up of the latter one (Section 4.2.). In case the member state is not cooperative, the European Commission may use harder devices, such as the procedure applied for breach of obligation, or the mechanism as of Article 7 (Section 4.1.)

A procedure for breach of obligation that can be filed upon prejudice to the rule of law, initiated by the European Commission and pursued by the ECJ, is little favourable for the member state. In fact, it exposes the country to an activist procedure, ultimately, to an unpredictable one. If anybody were in doubt about this, the 2/13 opinion²⁴⁴ formulated in the session of the Grand Chamber of the ECJ as of 18 December 2014 would probably convince them. Pursuant to the TEU Article 6 Section (2):

“The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Treaties.”

The TEU lays down unambiguously that the Union *accedes*. The sentence formulated in indicative mode is obviously prescriptive of accession. With regard to this, the Commission, in their draft of the accession treaty asked for an opinion from the ECJ. The ECJ took the stance that the EU has a newly formulated legal order, which enjoys priority with regard to the legal orders of the member states. It protects the fundamental rights via the Charter and this protection (the content analysis of the rights) shall remain within the autonomy of the EU law. Accomplishing the process of integration is the fundamental aim of the Union. The European Court of Human Rights (ECtHR) would be able to undermine the autonomy of the EU law, this is the reason why the draft version of the accession of the EU to the European Convention on Human Rights is not in harmony with Article 6, Section (2) of the TEU.²⁴⁵ It is difficult to interpret this otherwise than the ECJ having rewritten the TEU, i.e. the rule enshrined in the

²⁴⁴ Avis 2/13 – Avis au titre de l’article 218, paragraphe 11, TFUE.

²⁴⁵ Avis 2/13 – Avis au titre de l’article 218, paragraphe 11, TFUE, 158, 166, 168, 170, 172, 194.

international treaty passed and ratified by each of the member states.²⁴⁶ This is the very Treaty the ECJ is meant to protect. It seems that the same happened at the level of the EU, i.e. what we saw happening around the Hungarian Constitutional Court. The ECJ opposed the unambiguous provision of the TEU and there is no legal device to counter its decision, due to the ECJ's unaccountability. The arbitrary decision is surprising, mostly in the light of the presumption that in the name of the value of the rule of law, the ECJ would never accept similar opposition with the ECtHR from the member states.

It would be worth mentioning the so-called *Jóri v. Hungary* decision²⁴⁷ of the ECJ. As of the statement of relevant facts in the verdict, on 29 September 2008 the Parliament elected Mr András Jóri for the position of Data Protection Commissioner for six years pursuant to Act 1992. As prescribed by Article 16 of the temporary provisions in the Basic Law, his commission was terminated on 31 December 2011 and his scope of task was handed over to the National Authority for Data Protection and Freedom of Information. The EU Commission had initiated a proceeding for breach of obligation against Hungary supported by the European Commissioner for data Protection. In the proceeding Hungary defended herself by stating that "it was the constituent power who had decided to establish an organization operating as an authority to replace the commissioner and relating that to terminate the appointment of the commissioner; also, that the new regulation was based on the Basic Law." On the contrary, the ECJ's standpoint was that the election of the commissioner had taken place pursuant to the Act on data protection of 1992, hence termination of his appointment could have taken place pursuant to the same act of 1992; all in all, Hungary breached guideline 95/46 on data protection.²⁴⁸ By doing so, the ECJ not only declared that the law of the EU has primacy over the constitution of the member states (with regard to the scope of authority transferred to the EU, this is undoubtedly true). By so doing, the ECJ also questioned the Basic Law in its constitutional quality. The only way the decision can be interpreted in is this: the Basic Law as a new constitution should have been adjusted to the provisions of the Act on data protection as of 1992. It means that the constituent power should have

²⁴⁶ FINCK 2014

²⁴⁷ Judgement C-288/12.

²⁴⁸ Judgment C-288/12, 40, 57, 59, 61–62.

been adjusted to the legislative power. To take such a decision, that is to question the constitutional quality of a source of law (even if that was due to simple lack of attention) nobody ever empowered the ECJ. Alas, the decision was this – naturally, with the aim to protect the value of the rule of law principle.

Returning to the communication of the EU Commission establishing the rule of law framework, there is another surprise to meet:

“The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis.”²⁴⁹

The question whether the member state violates the value of the rule of law is not necessarily assessed by the European Commission. It might happen that the European Commission takes over the findings by the constitutional consulting body of the Council of Europe, the Venice Commission assessed by informal procedures. The framework states that although the approach to the rule of law might be different *on the national level*, the decisions of the ECJ and of the ECtHR, as well as the documents compiled by the Council of Europe “building notably on the expertise of the Venice Commission [...] define the core meaning of the rule of law as a common value of the EU”. This definition, the actual rule of law paradigm is the following:

“Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.”²⁵⁰

The Commission attached several appendices to the communication out of which the first one details the sources of the rule of law paradigm: the decisions of the ECJ (with special attention to the decisions regarding the EU Charter of Fundamental Rights), further on remarking that the

²⁴⁹ COM(2014) 158 final, Section 4.2.

²⁵⁰ Ibid. Section 2.

Council of Europe and the ECHR do not define the concept of the rule of law. It refers in detail to the report of the Venice Commission from 2011. The definition in this report is almost literally identical with the quoted paradigm of the framework. This serves as a spectacular proof that the normative text of the rule of law brings about exactly the same consequences on a supranational level as it was the case with Hungary: the courts may utilise it as a magic wand even in an arbitrary manner, when so deeming.

6.5. Venice Commission: on the rule of law

The supranational, yet not-state European Union linked its mechanism to protect the rule of law with the soft-opinion based legal practice of the Venice Commission, a consultative body for the Council of Europe on constitutional issues, a Pan-European organisation with much broader scope of membership (47 member states).²⁵¹ This solution is surprising; however it cannot be called either accidental or one without precedence. It is not by chance that all the member states of the Union are also members of the Council of Europe. It is not without precedence since in 2011 the Venice Commission formulated a fundamental document (formally a report) on the protection of the principle of the rule of law concept.²⁵² The immediate precursor was the Decision in 2007 of the Parliamentary Assembly on the principle of the rule of law,²⁵³ as well as the Overview on the rule of law discussed in 2008 by the Committee of Ministers of the Council of Europe.²⁵⁴

The Decision of the Parliamentary Assembly is short and concise. It highlights that the rule of law is one of the fundamental values of the Council of Europe which stems from several sources and bears different meanings in the different languages, whereas its desirable content is not formal application but the actual rule of law as implemented: “a formalistic interpretation of the terms ‘rule of law’ and *État de droit* (as well as of *Rechtsstaat*) runs contrary to the essence of both ‘rule of law’ and *prééminence du droit*”. It

²⁵¹ Available: coe.int/en/web/portal/47-members-states (Accessed: 18 March 2018.)

²⁵² CDL-AD(2011)003rev.

²⁵³ Parliamentary Assembly, Resolution 1594 (2007).

²⁵⁴ Ministers’ Deputies, CM(2008)170.

deems necessary, therefore, to define the concepts of the *rule of law* and *prééminence du droit* more precisely, also taking into consideration the practice of the ECtHR with the assistance of the Venice Commission.

As regards its content, the Overview of the Committee of Ministers is quite the opposite of the Decision: it is quite long, providing many details and analyses; as a matter of fact, it is quite unusual that government politicians would debate analyses in such depth. The Overview is of primary importance because it defines the relationship of the rule of law to the other two main pillars of the Council of Europe: democracy and human rights. It establishes that the three pillars, which in pairs, partly overlap have a certain common set. This common cluster consists, before all, of the equality of the legal subjects and their being free of discrimination. Whereas shared values of democracy and human rights are those of the rule of law, the principle of fair proceedings and human rights, the right to freedom of speech and the right to assembly. Further on, there are values characteristic of just one pillar, such as the right to free movement (Section 25–26). This function expresses mutual dependence of the three pillars.

“There can be no democracy without the rule of law and respect for human rights; there can be no rule of law without democracy and respect for human rights, and no respect for human rights without democracy and the rule of law.”²⁵⁵

The Report of the Venice Commission adopted in 2011 on the rule of law was built on this background. In contrast with the Decision and the Overview, the Report does not assess in general how the rule of law evolves in the individual legal systems. Instead, it highlights three of them: the rule of law, *Rechtstaat* and *État de Droit*. Analysing scientifically the English, German and French concepts by references to monographs (mentioning the works of Dicey, *von Mohl* and *Carré de Malberg*), the Report draws the conclusion that the individual legal systems have used the concept in different interpretations. These, however, shall be distinguished from action via formal obedience of statutes (rule by law²⁵⁶), covering only the arbitrary activity of the governments, yet it does not reflect the content

²⁵⁵ Ibid. Section 27.

²⁵⁶ The Report refers to three important papers: JOWELL 2011, TUORI 2011 and WENNERSTRÖM 2007.

of the rule of law concept. For clear distinction, it is the French concept of *prééminence du droit* held to be correct as an equivalent of the rule of law concept instead of *État de droit*. The relevance of this cannot be underestimated with regard to Hungary: in Hungarian translation, the rule of law or *prééminence du droit*, when translated word by word into Hungarian, sooner means *joguralom* (rule by law), yet as of its content, *Rechtsstaat* is much closer. More exactly, it is the interpretation utilised by the Constitutional Court already discussed in the previous chapters.

The formula defining the substantive content as a meaning for the rule of law is highly relevant. According to this, the rule of law as a necessary constituent of democratic societies requires that the decision-makers shall treat everybody rationally, with regard to their dignity, equality and shall respect the letters of the law. They shall make it possible to challenge those decisions breaching the law before independent and impartial courts conducting fair procedure. The rule of law conceived in this manner refers to the state and the individuals under the power of the state. This new wording, however, when compared with preliminary meanings, also infers the impact of globalisation and state deregulation, as well as the impact exercised upon persons and states by private and international, also supra-national public actors. The report holds that the application of the rule of law shall be enlarged to encompass the latter actors (Sections 15–16).

The Report takes into account the different concepts of the rule of law as used in the policy of different international organisations [the institutions of the Council of Europe, among them the ECtHR, the UNO, the OSCE, the OECD, the EU, the Commonwealth, the International Commission of Jurists (ICJ), the International Association of Lawyers (UIA)], and the terminology applied in the constitutions and constitutional rules of certain member states. After this short overview, the Report deliberates about legality in the socialist era which it considers much more equalling the content of the *rule by law* than that of the rule of law (Section 33).

The thesis sentence of the Report is Tom Bingham's definition of the rule of law:

“...all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly

made, taking effect (generally) in the future and publicly administered in the courts.”²⁵⁷

Relying on Bingham’s definition, the Report distinguishes eight conceptual constituents for the rule of law: accessibility of law, which includes comprehensibility, clarity and foreseeability, securing substantive rights by grounding these on statutes instead of discretionary decisions; equality before the law (statutory), exercise of the state power in a legal, fair and rational manner, protection of human rights, safeguarding solutions for legal disputes without unfair costs and defaulting, fair court trialling as well as respect for the rights and obligations of the states both stemming from domestic and international law (Section 37). This cluster of concepts is compared with the German material concept of the rule of law (*materieller Rechtsstaatsbegriff*), concluding that a consensus can be reached among the different approaches.

This rule of law paradigm resting on a consensus, as described in the Report, is composed of six components (partly different from Bingham’s definition):

- legality, which comprises transparent, accountable and democratic legislation
- legal certainty
- forbidding autocracy
- insuring legal proceeding by independent and unbiased courts, including the judicial control of administrative decisions
- respect for human rights
- equality before the law and the condition of being free from discrimination (Section 41)

Within the scope of this work there is no room for presenting a detailed analysis and interpretation obviously rich in conclusions, this would not be congruent with the aims of this chapter. However, we need to draw attention to a few circumstances hereby. First, we refer to the fact that the six components are almost literally identical to the enumeration listed a few pages before, as phrased by the European Commission for the so-called framework to protect the rule of law. This is an evidence by itself for the process by which the rule of law concept has become

²⁵⁷ CDL-AD(2011)003rev. Section 36, reference in the Report: Bingham 2010.

a normative one; later on, its conceptual (theoretical) background and the necessity of protecting it have also been formulated. Finally, the process of shaping the integrated institutional structure of the rule of law has been commenced.

As a result, we are witness to an unprecedented institutional networking (the European Commission + the Venice Commission, then the ECtHR + the European Parliament + the ECJ) which allows for the magic wand interpretation and utilisation of the rule of law. This is achieved through the normativity of the rule of law paradigm and by lifting it from the scope of other fundamental values. The result of this is the applicability of the paradigm as opposed to any internal or international legal specification. Member states thus falling under the suspicion of breaching the rule of law *on a systemic level* are compelled to multiple-front defence in which, though, the accusers' activity is interoperable and concerted. We remind the reader that the concept of the *systemic level* communicated by the European Commission with reference to the *framework* is relevant as it allows for implied arbitrary *accusation*. It is not necessary to find a large number or serious infringements of individual rights and thus to assess breach of the rule of law either for a member state or an international court; it is sufficient for a certain recommendation by the Venice Commission that is a *soft* result of an informal assessment to infer that, even one initiated upon political claim.

The arbitrary practice of the Constitutional Court presented as of Hungary is repeated, this time on international and EU level. The principle of the rule of law, originally and by its conceptual components meant to safeguard foreseeability, equity and rationality, becomes a device for autocracy. An overt tool for this is the formal distinction between the *old* and *new* democracies enhancing vulnerability. From among constitutional rules pertinent of courts, for instance, it is firmly declared that certain rules might be applicable in the *old* democracies that are inadmissible in the *new* democracies.

“In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.

New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies, explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges.”²⁵⁸

Irrespective of the fact whether this differentiation is sustainable at all, the arena of action is clearly different as outlined for the two groups of countries: the new ones are not eligible to refer to the rules applicable in the practice of the older ones because one can do what the other cannot. The new ones’ own traditions may serve even less as a reference since, in the *new* democracies, the tradition is obviously uninterpretable.

After finalising the manuscript of this book, the European Parliament adopted the so-called Sargentini Report (on the 12th of September 2018; A8-0250/2018). The text of this report and the parliamentary debate confirms our findings. The result of public law debates, acceptance and consequent implementation of court decisions against Hungary were not taken into consideration, only the situation *ex ante* that lead to the court proceedings. The amended texts of the Basic Law and of laws suggested by the Venice Commission and the European Commission were not taken into consideration, only the prior texts that were criticised by these institutions. The principle of the rule of law served as an instrument of repression not as a very legal requirement in this report.

By this, the rule of law, created to be a fair antidote of autocracy, has been replaced by an arbitrary, if not a totalitarian rule of law.

²⁵⁸ CDL-PI(2015)001, 2.2.3.1. with reference to CDL-AD(2007)028, 2–3, 59, 12–17.

7. The Illusion of Legal Certainty

With the previous chapter, in fact, the book would have reached its end. We strove to present in detail those domestic and international public law processes according to which the following premises can be admitted. The rule of law or *Rechtsstaat* or the concept of constitutionality gaining normative character, then its protection classified as absolute detaches it from its original meaning. It detaches the concept from safeguarding the enforcement of legal regulations and of individual rights, whereas reference to its protection has become a tendency showing arbitrary traits. Still, a more detailed approach to legal certainty, one of its components is worth the trouble.

While analysing the case law of the Hungarian Constitutional Court, we could see that legal certainty has been cast the role of a magic wand; when reference is made to violating it, practically any statute might be declared anti-constitutional. Presently, the European Commission and the Venice Commission do not attribute such weight to legal certainty, however the practice of the latter institution had it in several earlier instances, yet without denominating the phenomenon. Whereas the Report on the rule of law implies even more emphatically opportunities for its application. Sections 44–45 of the Report interprets legal certainty in a manner similar to that of the Hungarian Constitutional Court:

“45. The need for certainty does not mean that discretionary power should not be conferred on a decision-maker where necessary, provided that procedures exist to prevent its abuse. In this context, a law which confers a discretion to a state authority must indicate the scope of that discretion. It would be contrary to the rule of law if legal discretion granted to an executive was expressed in terms of unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness.

46. Legal certainty requires that legal rules are clear and precise, and aim at ensuring that situations and legal relationships remain foreseeable. *Retroactivity* also goes against the principle of legal certainty, at least in criminal law (Article 7 ECHR), since legal subjects have to know the consequences of their behaviour; but also in civil and administrative law to the extent it negatively affects rights and legal interests. In addition, legal certainty requires respect for the principle of *res judicata*. Final judgements by domestic courts should not be called into question. It also requires that final court judgments should be enforced. In private disputes, enforcement of final judgments may require the assistance of the state bodies in order to avoid any risk of ‘*private justice*’ contrary to the rule of law. Systems which allow for the quashing of final judgments without cogent reasons of public interest and for an indefinite period of time are incompatible with the principle of legal certainty.”

This chapter relies on the traits of law, thus the topic will be elaborated in a more abstract manner than in the previous chapters. We will discuss why legal certainty, unless based on common sense, is an illusion; as a consequence, it is unavoidable that it will turn into an arbitrary source of reference, a magic wand when applied in practice.

7.1. Law and legal theory

In order to introduce legal certainty, we need to discuss different contexts of interpretation that are characteristic of legal theory and of application of law. As regards doctrinal methodology, we cannot avoid answering several preliminary questions arising. We need to clarify the subject of methodology, whether we can talk about jurisprudence in the sense of “*science*” of law, and where to position it amid other scientific areas. Answering this question is anything but easy. Unfortunately, this is only the second question to answer, as first and foremost we need to clarify the subject matter of “*science*”, i.e. what we mean by the concept of law. The answers we expect to get for this will be similarly complex. Once answering these two fundamental questions, we may have a chance to draw a schematic outline on the most important methods.

Defining law is difficult due to the post-modernist gloom characterizing also the “*science*” of law.

“It is a particularity of contemporary science as such that physicists do not pose the question what material is, neither do biologists ask what life is or psychologists what soul is supposed to be...”²⁵⁹

Legal theoreticians are more and more reluctant to ask the question *What is law?* Browsing superficially the most well-known works,²⁶⁰ we will see that they are more willing to answer *What is law like?* or *What law should be like?*²⁶¹ Still, if we endeavoured to analyse the concept of law, the result would very often be formulated as a criticism to responses given by other authors. Thus, the best answer to get is *What law is not – or is not in its entirety?*²⁶²

This symptom of the contemporary era carries danger as it allows for elaborating uncertain theories. A prototype of this is the scope of “*grand unifying theories*“, also called metaphylosophy, which is seemingly a kind of new metaphysics.²⁶³ However hard we would try to avoid defining it, law has an unavoidable characteristic, namely, that it is a social reality. When we draft, apply or research law, explicitly or implicitly, we must (and we do) accept a certain type of work definition. We have already mentioned the one utilized by us: law is the totality of compulsory behavioural rules pertinent of persons (legal subjects) created or at least recognized and ultimately enforced by the state.²⁶⁴ As of the declaration by *Péter Erdő* referring to canon law: this reality of positive law is based on institutional guarantees.²⁶⁵ In order to study secular law, however, transforming the definition of law to a certain extent, we need to use it by relying on state recognition rather than on institutional guarantees. We need to notice that our simplification seems less and less correct, as today’s law is less and

²⁵⁹ Carl Friedrich von Weizsacker referred by LÁSZLÓ 1996, 49.

²⁶⁰ In Hungarian: VARGA 2004, PESCHKA 1988, the basic opuses are KELSEN 1934 and HART 1994.

²⁶¹ JAKAB 2011b, 757–784.

²⁶² VARGA 2013

²⁶³ For example: LÁSZLÓ 1996; VARGA 2005 (this author is not Professor Csaba Varga referred to in previous footnotes).

²⁶⁴ SZILÁGYI 1992, 159–163; PETRÉTEI 2002, 119; KUKORELLI 2007, 77.

²⁶⁵ ERDŐ 2003, 47.

less connected to *the* state, rather to *a* single state, or even a group of states. It is more often connected to other institutions formally not disposing of power of legislation. Let us remember the opinions issued by the Venice Commission which we have already analysed and which are enforced as law. Hence the definition by Erdő based on *institutional guarantee* describes law in a more accurate manner than the version constructed upon state origin.

However, with this definition we have a starting point. So to say, we can consider positive law by necessity a conceptual element of law. Notwithstanding, we have no answer for where law ends. This question, however, leads to the second preliminary question of what legal “*science*” is. Out of the numerous probable answers for the question where law ends, that is what the subject matter of legal “*science*” is, let us emphasize three possible approaches:

- a) Positive law is only the one that constitutes law.
- b) Analysis of inner concepts behind positive law, legal theory itself is law.
- c) Real legal theory does not analyse the positive law but legal practice.

Why did we mention these three as particular ones? It is because theoretical works describing the nature of law and the binding force of law usually identify them into certain schools of major approaches to law. Accordingly, these diverse approaches are usually presented as certain trends. These trends include among others natural law (rooted in Christianity), neo-Kantian positivism; sub-branches of Hegelian or later Marxist approach, as well as dogmatic *Begriffsiurisprudence*, or the different sociological approaches, such as pragmatic or realistic approach.²⁶⁶ The three typical answers formulated for the subject of theory (“*science*”) of law are characteristic of three fundamental approaches: the positivistic, the dogmatic and the sociological definition of law. Each of the three ideologies applies specific methodology. Separating them (which is quite a general method) and starting from the premise that these approaches are subject to free choice, we come to methodological exclusivity. However, there is an approach to legal science which is able to blend these; particularly, the theory of legal layers by *Béla Pokol*. In his theory, the fundamental

²⁶⁶ SZIGETI-TAKÁCS 2004, 31–35; COING 1996.

approaches are viewed in uniformity, meaning that the methods applied by each and every approach are considered admissible.

Regarding the theory of legal layers, positivistic, dogmatic and sociological aspects are distinct. Simultaneously, they exist as collateral strata of a behavioural rule of legal nature, or the entirety of the legal system. Specifically, they exist as own approaches of the separate (professional) institutions. By necessity, textual positivism results from the legislator's approach. Dogmatics is the method researching the particularities of the norm. Being trained on theoretical concepts and their analysis, the judiciary adds to this the particular sociological projection while applying the text of the norm to real life situations. Thus, the dogmatic legal interpretation coupled with the judicial one will narrow the semantic contents of the norm originally created by the legislator as possible, later on becoming actual.²⁶⁷

Positivistic, dogmatic and sociological approaches therefore stem from the collateral layers of law, and they cannot be chosen at liberty and dealt with in singularity (as single existent ones). According to this theory, we do have an answer for where law ends: ultimate boundary of law is jurisprudence, which is a real life situation adjudged upon bases of positive law. The subject of theory, the "*science*" of law is statutory (positive) law as its application and, natural or theoretical (or conceptual) self-reflexion of legal methodology.

Interpreting law as an existing reality, as a social reality, precisely as guaranteed compulsory behavioural rules it follows that we should be able to state exactly what rule shall apply to a specific human behaviour for a certain moment. We need to be able to define whether a certain human behaviour is correct or incorrect according to law. In the course of the history of mankind, particularly the past 200 years approximately, the quantity of these rules has been continuously growing for the last decades it was a leap forward. On the inner boundaries of law, when applying norms to real life attitudes, we do not face simple situations. This is not the case when we would have a rule supposed to be really known and a unique real life situation; and we would have to address the matter by relating them via a simple syllogism, thus gaining immediate "*legal*" or "*illegal*" responses. It is the case when we need to perform complicated notional analyses even when defining what the rule is.

²⁶⁷ POKOL 1991a, 155–190; POKOL 1994a; POKOL 1999, 641–649; JAKAB 2007a, 47–51.

The benefits of the theory of legal layers lie in this: it does not compel us to decide whether law is a fundamental “*science*” or an applied one; or that it does not qualify to be science as such, much sooner it is practice. Instead, it makes all of these interpretable as partial-sciences related to certain manifestations, and strata connected to specific partial science.

7.2. About the methods of legal “science”

After the previous, rather prolonged introduction now focusing on more scrutinized assessment of legal theory, we may declare without further explanation that the specific trends and branches apply partly common and partly particular methods. This depends on the exact subject and on what supports the analyses: general logical, historical or linguistic methods or just relying on formerly achieved results in legal “*science*”.

As of our days, one of the most general methods is modelling. To fit the framework of our aim and to avoid further lengthy argumentation, let us define modelling by an analogy. To use a similar line of reasoning, the same can be stated about modelling in legal theory to those written by *Avery Dulles*: models are “*images*”, artificial descriptions of reality which help to understand reality by theoretical means. For one element of reality several models can be created, depending on the characteristic of the reality the researcher puts under scrutiny. At the same time, it is difficult if not impossible to create a supermodel that would answer every question. Instead one should chose to harmonise the models in a manner in which the models complement, not extinguish each other.²⁶⁸ In fact, this application of multiple, partly overlapping models is also recommended by the theory of legal strata. Therefore, after so many allusions, what follows is presenting the methodological particulars of the three models. Within one model, further collateral or opposing sub-models gain effect.

Recently, the core feature of the positive legal models most frequently applied has been considering law a text written or at least inferred, construed from on the case legal decisions; then, this text is *per se* treated as the subject of legal “*science*”. Within the frame of the positive legal model, the subject of analysis is the text itself whereas the aims of analysis are multiple. These aims can be: discovering the legal quality of the text,

²⁶⁸ DULLES 2002, 11, 15–16.

its validity, binding force in a given moment, its effect and ultimately, the relationship of the textual elements to each other. The axiomatic particularity of the model is that the analysed legal texts are treated individually; alone or with other legal rules, they are treated as logically *closed, however entirely cognisable systems*. This presupposes that legal texts have a stable meaning: their own, individual semantics which can be revealed. Therefore, the supposition is that it is possible to define one, exclusively correct meaning of any legal text. Accordingly, the positive legal method is *analytic*: it gradually narrows the cluster of legal texts, finally reaching to the analysis of a single notion as its aim (*Begriffsjurisprudenz*).

Recently, the positive legal method has integrated the comparative legal methodology. This is attributable to the legal harmonisation and integrative impact of international law, and mostly to the European Union. The standard description of this method, uniformly approved of domestically and in foreign legal environment, originates from professors *Zweigert* and *Kötz*. The comparative method searches similarities and discrepancies in the different legal systems for the same or similar questions. For this, it strives to strip the individual solutions from irrelevant particulars attached to them and it compares the relevant elements of a legal institution or notion.²⁶⁹ To a certain extent, yet only as of its individual purposes, the positive legal model applies analysis of legal development and historical changes. We close the discussion on positive legal model with two statements:

- a) For the research of legal branches (e. g. civil or criminal or financial law), the positive legal model and its particular methodology are necessary. Since it searches the answer for specifically formulated questions, such as: *What rule applies for a certain life situation?* or *What is the exact meaning (the semantic margin of interpretation) of this rule?* No other solution than the analysis of notions is available.
- b) However, the positive legal model immediately reveals its limits; it does not as it cannot give answers to questions such as whether law is indeed a closed system, or whether the exact content of the text can be revealed entirely and with certainty, whether the rules for interpretation and deduction we have alluded to are correct or not. These questions can be answered by legal dogmatics as

²⁶⁹ ZWIEGERT–KÖTZ 1998, 30, 34; FEKETE 2011.

fundamental (doctrinal) theory conceived for the entirety of law. The existence of limitations in methodology is also sustained by the fact that positive law relies more and more on the (sociological) interpretation formulated by the specific jurisprudence of courts. Or, as a subsidiary theorem, it applies sometimes even contradictory formulas as *lemmas* – *toposes*.²⁷⁰ Doctrines usually do not question the correctness of *toposes*, yet *toposes* are not rated as axioms either. For example, let us mention just one: *lex speciali derogat lege generali*. This special *topos* deteriorates the effect of the general one; parallel to this it holds that fundamental principles (utterly general rules) are mandatory to observe.

The theory of law, which is self-reflection of law, raises the concern that the positivistic legal method analysed above seems to be exclusive. As a matter of fact, two circumstances lead to a situation when this correct method of legal research (modelled in applied researches) could be used as a method of fundamental research. One of the circumstances is that codified (statutory) law became widespread from the second half of the 19th century, then becoming general by the second half of the 20th century. This circumstance pushed in the background questions such as where we can find law and how law changed in the course of its history, since clusters of legal rules were available, drafted as to be applicable. Instead it was revealing the meaning of the rules or discovering the relation between the rules that became of primary importance.

There is, however, another, more general circumstance in the history of science which led to the overestimation of positive methodology. The episteme of the universe dating back to the earliest written records of human thinking started cracking in the middle of the second millennium. The first sign was the appearance of the *duplex veritas* principle, according to which the divine-revealed truth in itself is not violated when human mind, the empirical (scientific) truth seems to be deviating from that. As long as further research manages to create a harmony between them, the

²⁷⁰ POKOL 1991b, 145–156.

two kinds of truths may exist collaterally.²⁷¹ The episteme of the world was further shaken, and due to *Descartes'* primacy of the mind, a schism appeared between natural science and social sciences. While positive research, (laboratory) truths helped by empirical methods shaped natural sciences, social sciences followed these methods more and more often in scrutiny of the social reality. All that fell outside this scope was chased out of the sphere of science. This affected ultimately the theory ("*science*") of law, and it was *Hans Kelsen* who declared the positive method to be correct exclusively, as the method of legal theory. Through this, any other approach, such as natural law, the history of law or the anthropological approach seemingly lost ground. Nowadays, however, we have to consider that the positive method viewed in exclusivity was an erroneous conviction.

The theory failed first when tested in practice. The positive legal model holds that the only essential characteristic of law is: being mandatory as the will of the Sovereign. As such, nothing binds its content and there have been no *a priori content* requirements to be posed. Albeit in vain did we exclude all the circumstances outside the scope of law, even the concept of justice, from the research of law, it has led to unsustainable results. The contradiction between positive law and social reality was first emphasized by the fate of the national socialist set of rules, considering itself to be law. After the Second World War, the community of the victorious Nations *did not recognise the legal nature* of the national socialist system of norms. The theory of law needed to give an answer for the question how the legal nature of a set of norms which had been considered law may be lost with retroactive effect. Within the constraints of legal positivism, this question cannot be answered.

The theoretical answer was given by *Radbruch's* formula presented in the previous chapters. In our view, this formula is nothing else but a latent restoration of the natural law doctrine behind positive law. This formula means that there is, because there must be a general or fundamental rule behind positive law to which the latter one cannot be contrary. It serves the same aim, therefore, as *Kelsen's* famous hypothetical *Grundnorm*; albeit

²⁷¹ FÁBRI 2006. Others think that the principle of *duplex veritas* goes back to Averroës: LENDVAI–NYÍRI 1981, 96–98; NYÍRI 2001, 197, 245, 335; RUSSELL 1961, 527; GILSON 2000, 14–15; BOROS 2007, 730–732, 740, 853; BOLBERITZ–HOSSZÚ 2004, 129, 136, 171, 182; SIMONYI 2011, 295.

Radbruch's formula is not hypothetical but it is realistic. Moreover, this *Grundnorm* makes the theoretical construct of law actual social reality. It compensates for the specific *Grundnorm* neglected by positive law, which can never be substituted by teleological interpretation; inference from the text based on utilitarianism. This may even lead to arbitrary interpretation. As we have already made allusions to, real *Grundnorm* existed in Roman law already, and exists in canon law, as well: *salus populi*, and *salus animarum suprema lex esto*. Founding positive law on natural law may be resolved more elegantly when we accept the necessity of this. We may refer to *János Frivaldszky's* writings²⁷² with the premise that law cannot be separated from those whom it was created for: man and human society.

As a method, legal positivism, thus, is appropriate to describe in an abstract manner the inner system of law or an existing legal system. Nevertheless, by itself, it is far from being the only veritable “*science*” of law. The reason for this lies not only in the indispensable character of natural law methods. Positivism in natural science currently is not in the same way true as it seemed to be in the 19th century, and it does not sustain exclusivity to legal positivism either. Before starting an in-depth analysis, let us talk first about the sociological method.

Legal sociology is also an independent method of legal theory. It is the actual analysis of applying law, often abstracted from the legal text itself. The method of legal sociology differs from the positive model of law in that it does not try to find an answer via the rules of logical rationale for the possible semantic contents of law. That is, it does not rely on the conceptual abstraction of the text; instead it analyses law empirically, and draws axiological conclusions from it.²⁷³

There is, however, a different approach to the sociological analysis of law; a narrower one, interpreted in *Pokol's* theory of legal layers. This is the own stratum of law analysing changes in the meaning throughout jurisdiction, or cases when the judge of other law interpreter advances as co-legislator. The process how legal sociology has advanced from a basic method to an individual legal stratum, furthermore, a method indispensable for the analysis of that, is not independent of the changes pertaining to legal positivism.

²⁷² CARTABIA-SIMONCINI 2015, 1–29; FRIVALDSZKY 2005, 15–27; FRIVALDSZKY 2011; FRIVALDSZKY 2010a; FRIVALDSZKY 2012, 96–128.

²⁷³ FRIVALDSZKY 2011, 142.

International law has been the area where courts appeared applying (enforcing) the particular norms independently, which is a new element to previous establishments and practice in which the device of enforcement was the international community's dissent or war. This was enhanced by the Council of Europe to empower an own court with the enforcement of its law after the ECtHR started its jurisdiction, and by the European Union doing so since the establishment of its institutional predecessors (the Communities). Moreover, *ab ovo*, the latter one considers fundamental principles formulated in the court practice sources of law.²⁷⁴ Recognizing the case law of the international or supranational courts as sources of law entailed parallel implicit or declared recognition of the case law of high courts (constitutional courts, cassation courts, supreme courts) as sources of law. Institutions applying “*soft*” legal consequences relate to these, out of which we discussed in detail those pertaining to the Venice Commission.

As a consequence, the positive legal model adopted and interiorized judicial case law as its own method: the analysis of the sociological reflection of positive law. This process did not necessarily result in a sounder foreseeability of law. The final, unreviewable judicial decision is necessarily arbitrary, inasmuch as the opposite decision could be sustained by arguments in most of the cases.²⁷⁵ Meanwhile the decision-maker is not bound by other devices. It is the opposite case when the legislator is in question; the possibility for correction is inherent (by modifying the law drafted).

7.3. The limits of positivism

Legal certainty has been emphasized by the Hungarian Constitutional Court and, as expected, by international practice. The methodological background of legal certainty has escalated from a method to a model, which is legal positivism interpreted pursuant to those discussed above. Yet, why legal positivism is incorrect as a model, we have partly presented above, and hereby we continue to do so. The detailed discussion of why

²⁷⁴ VÁRNYAY-PAPP 2002, 174–175.

²⁷⁵ VARGA 1992

legal certainty based on legal positivism is an illusion can be summarized as follows.

The biggest defect of the model of legal positivism is its anachronistic feature; by the time social sciences and among them, legal science accepted the positive method and promoted it as a model, the unquestionable quality of that had just failed in the realm of natural sciences.

Although characterized by the trust in the uncompromising applicability of cause–effect correlation, the physical model of the world based on Newtonian mechanics had been shaken by late 19th century. The same can be said about the undoubtable applicability of mathematical logics in natural science.²⁷⁶ *John Lukács* describes expressively the process as a result of which physics has become more insecure than ever before about the micro-nature of its own subject.²⁷⁷ *Heisenberg*, with his famous principle of uncertainty ($\Delta x \Delta p \geq h/4\pi$) described that a subatomic particle cannot be defined as of its exact position and speed.²⁷⁸ Two fundamental consequences can be summarized about the impact of Heisenberg’s findings on the scientific world view.

Firstly, it delineated the limits of cognition in physical, positive natural science. Secondly, which is a more shocking consequence for the positive world model, below the limits of the Planck-size, the objective (analysed) reality cannot be separated any longer from the subjective spectator (analyst). In a different wording: the person analysing the reality exercises impact on the analysed object, which happens below the limits of the Planck-size. Therefore, the result of the measurement cannot be separated from the impact of the spectator on the analysed object; that is to say, the result of the measurement cannot be *cleared of the disturbing* impact of the spectator exercised on the measurement: *in the course of cognizance we alter the reality we wish to discover.*²⁷⁹

Honorable doctor of Pázmány Péter Catholic University *John Lukács*, living in the USA, demonstrated that the collapse of the Cartesian natural science world model is no longer the *inner matter* of this branch of science; it also affects social sciences, and closer, the study of history as well. Despite the convincing argumentation, however, the social science

²⁷⁶ FEHÉR 2007, 1312–1313; SIMONYI 2011, 295–296.

²⁷⁷ LUKÁCS 1968, 363–364.

²⁷⁸ GELLERT et al. 1979, 610–611, 916; SIMONYI 2011, 455.

²⁷⁹ SIMONYI 2011, 465–471.

based on the principle of uncertainty may have even remained a genuine idea of a single scientist, albeit it happened otherwise. Forty years after the first issue of *Lukács's* work, another scientist living in America, *George Soros* demonstrated that the method based on the principle of uncertainty is applicable and is to be applied in economic studies. In his work on the crisis of 2008,²⁸⁰ he starts from the premise of our possible, dual interaction with the world: the cognitive function (aimed at understanding) and the manipulative function (aimed at influencing) the world, at this point warning of the *temptation* to separate the two functions.²⁸¹ In his viewpoint (which is very similar to *Lukács's* view and which he also builds upon *Heisenberg*), in social sciences “the views of the players also connect to the occurrences”. An interaction is shaped between the two kinds of functions, hence the players will have an impact on the turn of the events.²⁸²

As a consequence, (and with reference to neuroscience), he concludes that our understanding is not perfect as we are part of the reality.

“Our mind formulates a picture based on the absorbed information, not in a direct way.”

Moreover, a thought is part of the reality, therefore the process of cognition is reflexive in its character. Thus, it is unquestionably false to separate the reality into subjective and objective realities as it was done after the Enlightenment. This kind of erroneous thinking entails the separation of cognitive and manipulative relation to the two kinds of realities; later on, by neglecting the latter one, there is practically open grounds yielded to unlimited manipulation.²⁸³

After drawing this pessimistic picture, *Soros* will also offer a break-away; he suggests integrating the uncertainty into our way of thinking. Despite recognizing that the objective cognition of the world (“*perfect cognition*”) must be excluded as a possibility, we still have a chance to shape a possible best approach to it. For this, we must recognize and admit that “understanding the reality is primary to manipulating that”. The

²⁸⁰ KJAER–TEUBNER–FEBBRAJO 2011, 391–392, 430.

²⁸¹ SOROS 2008, 3–4.

²⁸² *Ibid.* 7, 11.

²⁸³ *Ibid.* 26, 28, 31, 38, 40.

methods of natural science prove inappropriate (even) to discover social reality. Therefore, we are advised to consider from the beginning that reflexive processes also “integrate the interaction between the players and regulators” (the author highlights those of the stock market). This seems to be the highest probability to avoid errors.²⁸⁴ Let us give here the simplest example: “the momentary price of the stocks and the dynamics of the prices cannot be learned at the same time, since expectations will change the future.”²⁸⁵

The above examples each demonstrate that applicability of dual concepts, such as objective versus subjective, natural science versus social science, positive or scientific approach versus speculative approach has been questioned, moreover, outdated. However, in the first quarter of the 20th century, a further, perhaps even more serious uncertainty emerged within the realm of positive science. It was spotted among the results of mathematics, specifically, in mathematical logics providing the foundation of positive science. The essence of *Kurt Gödel's* first theorem of incompleteness²⁸⁶ states that in each theory free of contradictions, statements exist that can neither be justified nor disproved.²⁸⁷ According to his second theorem complementing the first, it is also impossible to prove that the theory itself would be free of contradictions.²⁸⁸

The theorems of incompleteness can be presented in the simplest way by an analogy applying Tarski's translation into *spoken language* instead of the original formal description. The initial point is that a logical system is complete (free of contradictions) when it can be decided (demonstrated) that each of its statements is true or not. These statements are built on axioms, which are accepted to be true even without a demonstration. As of the first theorem, there is no such system; there will be statements, by necessity, about which it cannot be decided whether they are true or false. The reason is that demonstrating either will lead to a contradiction. A digestible example for this is the island of knights and knaves.

The elements of the logical system are knights and knaves. The starting axioms say that a) everybody on this island is either a knight

²⁸⁴ Ibid. 43, 77.

²⁸⁵ MATOLCSY 2009

²⁸⁶ GÖDEL 1931

²⁸⁷ HOFSTADTER 2005, 17.

²⁸⁸ SMULLYAN 2003, 1–2, 121.

or a knave; b) knights always tell the truth; c) knaves always tell lies. However, there are sentences which *hang out* of this system as neither knights nor knaves can say them. If they still do, then the system is not free of contradictions, that is, its completeness is overturned. Hence the sentence “I am not a knight” can neither be uttered by a knight nor a knave because a) if a knight says so, then the statement will be false, however a knight can only tell the truth; b) if a knave says so, then it becomes true, whereas a knave always tells lies. Following this logical pattern, countless further sentences can be formulated on this analogy.²⁸⁹

7.4. The limits of legal positivism – the illusion of legal certainty

Considering those presented above, it can be demonstrated that the theory of uncertainty by *Heisenberg* and *Gödel’s* theorem of incompleteness²⁹⁰ can also be formulated as legal principles. The consequence is this: the theorem of exclusive applicability of the positivistic legal method based on the analysis of notions must be considered disproved.

If it is only within the simplest logical system that is one based on a minimum number of axioms, where there are statements which can neither be proven nor denied, further on, if not even the quality of being free of contradictions can be proven about a system, then it is easy to admit that it is also applicable in less simple systems. The more axioms a system supposed to be complete (logically closed) is based on, the more statements can be formulated. Statements that cannot be proven while even the system itself cannot be proven to be complete.²⁹¹ Without detailed demonstration, this circumstance leads to the conclusion that, for a *positivist* legal system built on a large number of axioms (in other terms upon norms as fundamental legal elements) incompleteness is true: there is always going to be a statement the *true* or *false* value of which cannot be resolved on the basis of legal norms. In a less complicated wording, there

²⁸⁹ Ibid 136.

²⁹⁰ We have to mention that the connection between the two theories by Heisenberg and Gödel was also considered by John Lukács regarding negation of an absolute mathematical truth. LUKÁCS 1968, 370.

²⁹¹ HOFSTADTER 2005, 53–54.

is going to be a claim which cannot be solved within the framework of the given statute (not considering, of course, such a case when the claim is unlawful). Nor can remedy be given to any injury within the same circumstances (whereas the lack of injury can neither be proven).²⁹²

Similarly, when deciding about the validity of legal positivism as legal theory, it is remarkable that *Kelsen* published his *Pure Theory of Law* only 4 years after the epistemological conference in Königsberg where *Gödel's* theorem was pronounced for the first time. In his above mentioned work, *Kelsen* names the particularity of being free of contradictions as a fundamental prerequisite of the legal system. In *Gödel's* view this, however, cannot be proven; therefore, it is not a circumstance which is securable. Undoubtedly, *Kelsen* himself remarked that every rule of a statute needs interpretation, which also serves to ameliorate incompleteness (that is the lack of contradictions in theory).²⁹³ However, it cannot be neglected that, as demonstrated by *Gödel*, the statement regarding the unambiguous (free of contradiction) character of any logical system is mere illusion. So is the case (with or without *Kelsen's* views) pertaining to legal systems or jurisdictions.

Justification relating applicability of the uncertainty principle needs more sophisticated consideration, even if *Kelsen's* findings on the need of the interpretation of legal norms are applicable at this instance. The latter can be considered the rule of uncertainty reflected upon its own subject of legal theory, the one most conceived in the requirement of logical thinking. Initially, the rule of uncertainty does not hold positive law to be a system capable of answering all the particular questions emerging in the course of jurisdiction. We pursue to demonstrate that legislation, besides observing *Kelsen's* limitation, is uncertain, even more dubious than he had thought. It is because a number of impacts prevail which by themselves deny whether it is possible to give exact answers based on legal norms. This is impossible because there is no way to define the exact meaning of norms when we wish to meticulously interpret every semantic detail of a norm. Similarly, we present that jurisdiction also creates even more uncertainty, because in the course of applying the subtleties of both substantive and procedural law, distortions appear as bias: the statement of facts admitted is substantially altered in relation to the events supposedly occurred.

²⁹² Ibid. 86–87.

²⁹³ KELSEN 1934, 50.

There have been positive signs for the applicability of the principle of uncertainty in legal science. *Marianna Nagy*, similarly to *George Soros* has demonstrated via neuroscience results that behavioural models play a more powerful role in our decision-making than we had thought before, as executing our decisions often precedes awareness. A considerable number of our decisions, mostly when induced by visual stimuli, is performed through the activity of the emotional-instinctive zone (the limbic system) and not by that of the cognitive brain region (cortex).²⁹⁴ The consequences as such are remarkable regarding the rationality of decisions exercised upon our approach to the doctrine of responsibility. Again, it will be indispensable to take into account the relevance of behavioural models in conjunction with certain liberties (mostly in the scope of communication rights). In our approach, it is a primary issue whether the principle of uncertainty is applicable in formal legal procedures (e.g. administrative legal remedy).

Therefore, it is part of self-reflection of law to recognize, moreover, to sustain the recognition of the centuries: it is impossible to draft and/or research law by neglecting the pertinence of law to a specific group of persons. The specific legal institutions and norms cannot be separated from the circumstances of their coming to existence; these cannot be separated from the reasons and necessities for which each of these endeavoured to offer a solution. Taking a scrutinizing look will lead to the recognition that it is impossible to reinvent everything. This gives account for those mentioned before, particularly, that the positive legal model makes use of the historical analysis of law; simultaneously, the history of law is an autonomous model of fundamental science.²⁹⁵ As such, it makes use of all the methods (text interpretation, comparative assessment) usually pertinent to the science of history.

After a schematic overview of legal methods, several general conclusions can be drawn. First, that the methodology of researching law is divergent. Text analysis methods, logics and historical discovery, comparison as well as social impact analysis will also be found in this series. This conclusion can be further sustained because there is an escalating tendency to investigate interference between law and the adjacent sciences; this involves cumulated methodology and joint application of

²⁹⁴ NAGY 2011, 116–119.

²⁹⁵ VARGA 2013

these in sociology, politology, psychology, philology, and information technology.

Our second conclusion is this: when looking for a distinguished, specifically legal method, it is impossible to avoid legal positivism, which is a model as well as a method. Indeed, as a method, it particularly belongs to the scope of legal theory, since law is a normative text, holding compulsory behavioural rules; hence not even legal theory can make an abstraction from these. Recently, legal positivism as a model has posed itself a demand for exclusivity, which is rather debatable as nothing sustains its recognition as orthodoxy.

A third conclusion relates here; today's model of legal positivism is far less *clear* than it used to be when formulated by *Kelsen*. It needs to admit more and more often what originally it wished to avoid: recognizing that law is a social reality. Consequently, statements made by legal theory are valuable *in vitro*, on condition that they keep in touch, at least in principle, with their subject: the law enforced *in vivo*. Recognizing this has led to integrating the sociological model among the own methods of the positive legal model.

The fourth conclusion is a sequel to the first one: admitting more or less tacitly (without confessing) that, while looking for the limits of law and for an ultimate grounding, the positive legal model must-needs have recourse to arguments rooted in natural law. By this we wish not to forecast a near-future formal re-recognition of Christian natural law. Albeit we do wish to declare that, while grounding the positive legal model, a certain reflection of this can be perceived in the primacy of fundamental principles, even in lack of positive legal wording; recognizing the individual reality of a human person.

Finally, our fifth conclusion is that certain elements of vague transcendence can be recognized more and more clearly embedded in the text of the law, specifically, in its legal science format. Accepting the binding force of law drafted formerly, the unavoidable demand of justice, the inseparable character of the people from their fundamental rights, recognizing the importance of communities, before all, the nation as togetherness of persons living in the past, in the present and to live in the future, or the responsibility of legislators and law enforcers, those living in the present, to respect the interests of future generations are examples pointing to the fact that the methods of legal theory might be analytic. However, regarding the formation of the subject and aim of the research performed with

these methods, law is equally connected to the person as a unique physical, mental, spiritual and social reality.

When neglecting this, we strive to reach legal certainty based, or rather restricted to positive legal rationality; in fact, we open the gates to arbitrariness as we have already forecasted in the introductory chapter.

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8. Breakaway from the Arbitrary Concept of the Rule of Law

Tracing back how the rule of law may have become arbitrary, therefore utterly contradictory to its original aim, we need to admit that the picture drawn for a possible breakaway is gloomy. It is reasonable to ask the question whether the current paradigm can be averted from becoming permanent, or whether there is a breakaway, some hope looming that this approach to law and the rule of law may change. Despite those presented in the previous chapters, the author is optimistic in this respect. It is not only because developing a legal school to oppose the orthodoxy of legal positivism, decreasing the dimensions and intensity of judicial activism, and the political arena of devices offered by international relations might be technically appropriate for counterbalancing. It is also because, contradicting the current trends of approach, law is not perfect; consequently, mechanisms for its protection cannot be perfect either. As of its inner nature, law is responsive and its semantic domain is limited. It is responsive since it gives answers to conflicts, already escalated or envisaged. Therefore, law is in change, together with the situations it is supposed to react or give responses to. Its semantic domain is limited because it has components which it does not shape at liberty.

In this last chapter we will draw a picture about the circumstances and solutions offered by these. In contrast with the routine followed in the previous chapters, this last one will be less demonstration-focussed, but one following a more relaxed, essayistic style.

8.1. Recognizable totalitarian symptoms of the rule of law

The chapters read so far can be summarised as follows. In the course of shaping the current domestic and international approaches to the rule of law, an idol has been carved from it. Originally, however, law used to be an instrument: that of good governing and peace in society. A crucial step of the process of idolisation was the rule of law becoming normative, and

its characteristic momentum was lifting it out from other fundamental values, such as democracy and respect for human rights. The phraseology used in the Overview of the Ministerial Committee of the European Council (presented in a previous chapter) pronounced that the rule of law, democracy and the respect for human rights are reciprocally conditional. This has induced the situation in which the latter two are protected only as part of the rule of law, or at least by the rule of law. Due to its new status of an idol, the rule of law has grown over its components rationally comprehensible and applicable in actual situations: it has lost contact with reality. It can be summoned in any case, without reasoning or explanation, it is an argument by itself and it has become inviolable, endowed with transcendent value.

Let us remind the chapter dealing with constitutional values, specifically the opinion of *Joseph Ratzinger* explaining what makes a nation. We can recognise why creating such an idol was practically unavoidable in the present Europe. By the 21st century it is only law that has remained from the conditional triad of law–custom–cult by *Ratzinger*. Even the law is not the own set of behavioural rules of the community, searching answers for the demands and finding them step by step. It is not the one which, albeit imperfect, is still appropriate for correction. Law has become an outwardly, construed system of rules, gradually shaping a vehicle of uniformity in an empire. Moreover, the features of an empire have been projecting the need for exclusivity (as opposed to the Roman law recognizing *ius gentium* besides *ius civile*, or the law of the Holy Roman Empire tolerating particular legal customs). The other two values, custom and cult have been exiled from public life, withdrawing to private life. Forging cohesion has become difficult in these communities thus deprived of two cohesive factors. As opposed to hopes for progression, this is why we can witness: not even the Pan-European sense of community can replace national cohesion. Obviously, the large number and mostly technical rules of common law, separated from the community, are not sufficient. In lack of other binding power, however, it was law which had to be made appropriate for this, and the rule of law elevated to the position of an idol seems to be a proper solution as it fills the space created by the missing cult and common habits.²⁹⁶

²⁹⁶ Thomas Molnár explains spectacularly why a community needs a myth of origin. MOLNÁR 2009, 16.

If transcendence is interpreted as rationally unprovable, as a collateral of its quality of an idol it compensates for the lack of substantive value. The idol of the rule of law, stepping into the place of *salus rei publicae* is an auxiliary rule which, if accepted by an interpretative body, most usually a respectable court, can justify any semantic content. There is an allusion to this in the introductory chapter and it is mentioned as orthodoxy of interpretation;²⁹⁷ for example, anything can be questioned with reference to freedom of expression, except the freedom of expression.²⁹⁸ The current paradigm of the rule of law has its relevance however, protected under orthodox phraseology, its content is not primary, and it is appropriate to justify random answers given to random questions. The reason is a kind of logical compelling: a paraphrase of Gödel's theory of incompleteness. It starts from the premise that no set of elements is element of itself. Consequently, the rule of law cannot justify itself. If we still try to do so, the logical circulus vitiosus results in arbitrariness by necessity. If the only valid formula is $a = a$, ("the rule of law is good because it is the rule of law"), then any x value combined with the formula, such as $ax = ax$ becomes true; ("rule x approved on observing the rule of law is good because it doesn't contradict the rule of law"). If we recognise this, then we can risk drawing the conclusion that the idol of the rule of law in fact mingled the methods of the *rule of law* and those of the *rule by law*: initially aspiring to give protection against arbitrary exercise of power, it has become the instrument of arbitrary exercise of power in the meantime.

We witness this self-certification in the process of the continuous enlargement of human rights. A new demand for guarantee has been gaining the character of a fundamental right due to the mere fact that we deem it so, with reference to the rule of law. Again, the process rests upon Gödel's theory. Within a formal system based on preliminary axioms (i.e. fundamental statements declared and accepted without proving them) and operations, a theorem (that seems impossible to demonstrate) becomes true if, instead of demonstration, we elevate it to the rank of axioms. (By formal transcript: it may be true that a theorem X cannot be proven in a system built on axioms S, T, U , albeit it is true without demonstration

²⁹⁷ See opinions referred to in the introductory chapter of Golub, Leishman, Martin, Lindquist, Cross, Dawson, de Witte.

²⁹⁸ SCHAUER 1992, 853–869.

for the system built on S, T, U, X axioms.²⁹⁹ Asking about what we do in such a case, the answer might be annoying. In fact, the system, which was supposed to be closed and in which we wished to demonstrate the theorem, is not closed but open if the theorem can be lifted among axioms without any obstacle. In a fiction built on law as a closed system, whereas in fact it is open, the device lifting the theorem (to be demonstrated) to the rank of an axiom is the absolutistic principle of the rule of law itself.

However, it needs be remarked that law has always had its presumptions (statements which are demonstrable or not, albeit considered to be true as long as the demonstration takes place), and fictions (statements demonstrable to be untrue, still considered to be true). For the first one, an example is the presumption of innocence, for the second: the fiction of the legal persons or the state as existing and acting in its reality. Presumption or fiction is employed by the law only when this is unavoidable. It is a question whether the particularity of law, its being a closed system can be considered a presumption or a fiction. Despite the best of our knowledge, is it unavoidable to presume the opposite of probability or even that of truth? If looking at law as a device for human social life (necessary, though imperfect in its every manifestation), probably there is no need for it. When we wish to use it as the only measure for individual, community, state and international action, then there is a need for it. A current manifestation of this is the idol of the rule of law, the role of which can be sustained only if we stick to the fiction of law as a closed system.

Finally, the rule of law elevated to the status of an idol has another consequence: it becomes more important than its subjects, the persons themselves the behaviour of whom law is mandated to control and protect. This is what we have been attempting to demonstrate on the pages of this book: the idol of the rule of law is jealous (it does not recognize any other value than itself), therefore it is totalitarian: it must-need control everything. This entails a lot of consequences, certain everyday examples for it are quite well-known. On the one hand, the differentiation between the various unlawful acts is getting whitewashed, its symptoms are everywhere: administrative sanctions are sometimes more serious than the criminal ones. Criminal perpetrators' rights are guaranteed in their trials, while those committing light misdemeanour are almost fully exposed to the authorities. On the other hand, termination of lawsuits filed

²⁹⁹ FRAZÉN 2013, 47.

for unlawful acts is more and more tedious; sometimes they may transform into an action for compensation initiated against the court adjudging. Thirdly, the system built upon the exclusivity of law is unable to consider human limitations. It needs to consider that the immense number of regulations can be simultaneously observed. In this system, therefore, the image of a human being is based on a kind of legal perfection. Anyone incapable to be so will not just violate law but also commit heresy against the idol of the rule of law. Most unmerciful is the idol with those (public actors, states, institutions, communities) who do not simply violate law, but seem to raise doubts about the adequacy of the idol. There is no excuse for this, and, as presented in the chapters before, the arsenal of measures for protection of the idol has been already set up.

Still, there is a solution to avert the power of the idol of the rule of law. We state this on views based on the nature of law. We demonstrate our statement using the model of equal dignity of persons, the innermost core of law as discussed previously. The procedure bears risk as the idol of the rule of law attempts to acquire the concept of dignity as well, disputing the validity of an unorthodox approach.³⁰⁰ For the time being, however, this acquisition has not come to an end, orthodoxy is not exclusive; therefore, the risk can be assumed.

8.2. Dimensions of law and its range of interpretation

We based our analyses on the statement that, before all, law is the totality of behavioural rules. Again we use this ground for what follows. If we try to seize equal human dignity as a legal basis, we have no other option to start with but the relationship between the human being (person) and his/her dignity. On the account of universal acceptance and respect, it is appropriate to cite here the first sentence of the Universal Declaration of Human Rights formulating this relationship:

“...recognition of the inherent dignity and of the equal an inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

³⁰⁰ SHULZTINER–CARMİ 2014, 461–490.

Building on the recognition enshrined in the preamble of the declaration, Article 1 declares:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

If the morphological structure of the text used the form “has the right to”, then the interpretation of dignity could be nothing different from that of any simple legal concept. Specifically, it would play the same role as property, contract, crime, etc. in other kind of provisions. It would be a quality, value, protected legal object construed by the legislator or the jurisdiction, one that can be taken into account by law and which is connected to a legal subject; in our case, the human being. In a different phraseology: a human being as a person should have been treated as a natural fact, whereas dignity as an external legal characteristic of a human being. Albeit the Declaration does not use any of the phrases “has dignity” or “possesses dignity”, it uses utterly different phraseology: it states that human beings “are born [...] equal in dignity”. This simple verb, “be born” defines the possible interpretation of Article 1: if dignity is connected to the human being as a person from birth, then this dignity is inalienable by any further norm of positive law.

This pristine character of dignity does not mean that positive law would not be entitled to regulate its different manifestations in various legal situations; yet it has a consequence by necessity. No interpretation of dignity can ever result in the fact that different people should gain different levels of dignity. Within this limit, the concept of dignity, naturally, needs interpretation. For this interpretation, first it is necessary to define the dimensions of dignity. Otherwise legal rules would not be apt to safeguard its protection. Just like with any other legal concept, the scrutiny of dignity can be twofold: it can be separated from other legal institutions, and it can be examined with regard to its role within the framework of the legal system. These two distinctions define the two basic dimensions of the interpretation: while the one reflects dignity exclusively to its bearer, to the human person, the other attempts to comprehend the impact of this absolute feature of dignity on legal relations. In other words, it is the manifestation of dignity within a community.

We deem that dignity has a third dimension, a transcendent one. This third dimension needs more extensive deliberation. We saw that the phraseology of Article 1 of the Declaration, according to which all human beings are born free and equal in dignity and rights, makes dignity pristine for the positive law. This quality of being untouchable means the transcendent dimension of dignity. The existence of a human being involves a lot of consequences: existence itself is, before all, a fact. It involves its physical characteristics, its genetic and genealogical traits. These are circumstances nature science is able to understand and analyse by its methods. Social sciences applying the positive method, obviously, the science of law itself are able to draw conclusions based on the single fact that a human being, a person exists as a member of the society.

As opposed to these factual questions, untouchable dignity has neither physical nor social foothold. Natural sciences and positive methods of analysis of social sciences can be applied only when the assessed phenomenon is measurable or at least comparable with other phenomena. Thus it is doubtless that a human person's existence as a member of society can be conceived as a statistical datum, and in this approach, it can be an object of analysis. However, this does not help us understand dignity, since handling a person merely as a statistical datum is genuinely contrary to what the phrase "born [...] in dignity" expresses.

It is the unique and absolute character of dignity which is a particular value, elevating dignity from the level of person–community interpretation. The latter is the semantic dimension of positive sciences. The question *Why everybody is equal in (absolute) dignity?* cannot be answered upon positive (factual) bases. The simple answer stemming from the Declaration, however, is not less factual: because man is born so. The inseparable and unquestionable dignity since birth is what yields its transcendent quality. Since the concept is confusable, it is necessary to clarify that the theological connotation of transcendence is prolific,³⁰¹ yet those fall beyond the scope of our semantic domain.³⁰² In the present work

³⁰¹ BENEDICT XVI 2009, 15, 18, 32, 43–44, 53; HEUN 2009, 87–90; von BOGDANDY–DELLAVALLE 2015, 33–45.

³⁰² This self-restraint does not mean that theology has nothing to add to our thinking. For example, equal dignity was not discovered by the UN Declaration, the notion appeared in the teaching of one of the first popes of the middle ages (often called dark), Saint Gregory the Great, who stated that every human is equal by nature. See BABURA 1927, 34–36.

we use the concept of *transcendence* exclusively as an unreachable quality for rational explanation, the positive analysis. Transcendence interpreted in this manner obviously has consequences upon legal interpretation, likewise for dignity, as we continue to discuss below.

Before that, let us throw a glance at the other two dimensions. From these, personal dimension is easy to seize as it places the human being in the limelight separated from any other person, as a personality. If we wish to understand this dimension of dignity, we need to apply the analytic method; it is not the unique and exclusive character that we need to find; it is the components of the concept. The result will be static, theoretically relevant, although artificial, since it divides dignity into the totality of liberties and rights. By a plausible comparison, it is as if we would transform light by a prism into a rainbow. Interpreting the community dimension is less spectacular. This, as such, is the traditional approach of law, dealing with the dynamics of dignity instead of the *anatomy* of the concept. It deals with the interaction between a person of equal dignity and other persons of equal dignity.

Finally, it is necessary to recognize that all three dimensions of dignity stem from the text of the Declaration itself. Its text binds equal dignity, rights and freedom to the birth of all human beings. Whereby *all* stands for the community dimension, *human being* for the personal dimension, and *be born* binds to the transcendent. It is important to note that the original text uses simple present passive, not simple past passive for the fact of birth; this implies the repetitive character and permanent validity of the statement, similarly to the laws of physics or norms.

8.3. Dignity as it appears in certain legally binding texts

The only fault in the above discussion is that the declaration lacks binding force; however, it is easy to recognise its impact on the legally binding norms. Barely half a year later after passing the Declaration, Article 1 of the German *Grundgesetz*³⁰³ ruled:

“(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

³⁰³ STAFF 1998, 15, 40.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.”

Grundgesetz does not apply the formula *are born*, albeit it declares the inviolability of dignity, together with the inviolability and inalienability of human rights. We usually perceive the connection between dignity and the individual human rights as the *mother-right* of other fundamental rights.³⁰⁴ Or, as the next article of *Grundgesetz* states, dignity is often perceived as personal autonomy or as the right for free manifestation of the personality. Otherwise, the untouchable character of dignity, its transcendence manifests in Article 79 Section 3 protecting Article 1 against being amended (eternity clause). This means that it declares dignity to be an everlasting legal and social value.

Soon the road starting with the Declaration and continued with the *Grundgesetz* went no further. The European Convention on Human Rights, signed just a few months earlier by the founding states, became oblivious of the legal protection regarding dignity. Whereas in the Preamble it mentions the Declaration, it does not mention dignity. Article 1 ruling over rights and liberties is followed by rules pertaining to individual liberties: the right to life, prohibition of torture and inhuman or degrading treatment. The latter presumes the recognition of dignity, otherwise it would be senseless; yet the style is particularly legalistic. It is much more an actual rule of conduct (abstinence) that every member and institution of society shall follow than the recognition of dignity as an innermost human trait. In other words, the ECHR is indifferent towards the transcendent dimension of dignity. Instead it focuses on the individual and community manifestation of rights and liberties. The right to life may not be conceived as a substitute for dignity, since the right to life may be sooner interpreted as a prohibition to extinguishing life; moreover, it lacks the elevated style of the Declaration.

From the two legally binding International Covenants considered to be sequel documents to the Declaration, the one stipulating over civil and political rights renounces to the sheer wording read in the ECHR. In its

³⁰⁴ SÓLYOM 2001, 442, 446, 452; POKOL 2017, 72–75.

preamble not only does it refer to the Declaration in general terms, but expressly makes reference to "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" that serves to be the foundation of freedom, justice and peace in the world. It also refers to rights protected by the treaty which "derive from the inherent dignity of the human person". Notwithstanding, this step is insecure, since the itemised provisions of the treaty renounce to dignity; Section 6 mentions no more than the inherent right to life. Due to the adjective (inherent), this formula is still stronger than the one under Article 1 of the ECHR. The inherent quality allows for the conclusion that life has a transcendent dimension. Even this interpretation will result in this quality being that of life (the right to life) and not the quality of dignity. Without doubting that life and dignity have a common semantic domain of interpretation, we think that the two concepts cannot be treated as synonyms.

The Hungarian interim Constitution from the transition period used a different word coinage under Article 54 Section (1):

"In the Republic of Hungary, everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights."

The text places side by side the concepts of dignity and right to life. Under decision 23/1990. AB on declaring capital punishment unconstitutional, the Constitutional Court interpreted this as follows:

"Human life and human dignity form an inseparable unity and have a greater value than anything else."³⁰⁵

Whereas Article II of the new Basic Law of Hungary returned to the German solution and complemented these with the life of the foetus, ruling that:

"Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; foetal life shall be subject to protection from the moment of conception."

³⁰⁵ Decision 23/1990. (X. 31.) AB, Justification V. 2.

The text of the interim Constitution allowed for insecure interpretation only, since the notions *right to dignity* and *dignity* are not identical. The Basic Law speaks clearly in this respect: the statement mentioning dignity returns to the way the Declaration and *Grundgesetz* took. By this, it opened the gate to interpret dignity (qualified as inviolable) towards a transcendent dimension as well.

8.4. Dignity and community

When we analyse the appearance of dignity as drafted above, in different legal documents, we may draw the conclusion that the more we tend to forget about the transcendent dimensions of dignity and formulate it as just an important fundamental right, the more we enclose it into the dimension of personal interpretation. The right to dignity, moreover so the right to life acquires real importance only in relations of absolute character, such as public law, relations between the state and its subjects. When exiting public law relations, the right to dignity (together with the right to life) is gradually fading the aspect of mother law, and the specific fundamental rights derived from it (such as the right to express opinion, the right to self-expression, the protection of personal data) will gradually overshadow it.

As a result, we will get a faulty effect of a bug's-eye view: different positive law provisions can seize the person only through his/her particularities manifested in partial situations. Then, these partial entitlements (particular rights) appearing in legal relations (separated as above) must be treated as a whole. As it were, *pars pro toto*, the part stands for the whole; as a result, the personality of the person born equal in dignity and rights is either lost (losing relevance in legal context) or is lowered to a simple bearer of his/her partial rights, as deduced by Frivaldszky.³⁰⁶

Our deduction should clarify the message: narrowing dignity to a *plane* or level defined by transcendental and personal dimensions entails that the value of dignity decreases, and in an extreme case, it may even be lost. If we want to avoid this, then legislation, judicial practice and even legal theory must give up the desire to appear in the cast of the creator of

³⁰⁶ FRIVALDSZKY 2010, 41.

values.³⁰⁷ It should restrain its role to protecting values existing irrespective of the law. Public law must, among others, regulate those relationships in which dignity might be violated, with particular attention to the punitive power of state or that of the power of restricting rights. However, it must not step beyond its limits of operation. Whereas the dignity of the person manifested must be left within its natural environs as the community of individuals born to be free and equal in rights and dignity.

The second *plane* or level formed by the transcendental and community dimensions is also appropriate to enlarge and deepen the interpretation of dignity. This, again, is the own domain of interpretation of public law. However, it is relevant due to sovereignty, which is necessary for constitutionality. The nation as a community formed of individuals of equal dignity (*We*) is the source of state power and its legal basis. Without recognizing this, no law or constitutionality may exist; the National Avowal of the Basic Law of Hungary expresses that. The constitution as a token of law is not just a rule; “It is a living framework which expresses the nation’s will, and the form in which we want to live.” This is also reflected in the constitution of the United States of America.³⁰⁸ This *We* is really endowed with a transcendent aspect (already discussed in a previous chapter). Society as a community is not the multitude of statistical individuals; togetherness yields the common dignity that members share, stemming from the personal dignity of its members.

Finally, we reached to the third *plane* or level defined by the personal and the community dimensions. Upon the previous considerations, it is clear that transcendence does not appear on this level. If it does, it is background knowledge. It is a circumstance the existence or relevance of which we do not question, do not measure and neither do we dissolve it into partial entitlements. Human beings appear here to be free, equal in their rights and dignity; yet for the question why so, we do not provide an answer on this *plane*.

The role of law as a human creation is hidden in this equality: law is not more nor less than the totality of compulsory rules which regulates the connections between persons of equal dignity. This can also be stated as a rule: law shall regulate legal relations and not transcendent

³⁰⁷ SCHANDA 2010, 8, 55.

³⁰⁸ SCRUTON 2004, 9–11; FUKUYAMA 1999, 33; SPALDING 2010, 28–33, 37–38.

circumstances.³⁰⁹ In a different phraseology, positive law should be restricted to where it belongs: its natural role is regulating interpersonal relationships.

8.5. The source of hope: reality and law

Human dignity and the dignity of the community built upon this are elements of reality, whereas respecting these is a trait of law. Both were capable to survive the most brutal attacks: Nazism and Bolshevism. They will also survive the totalitarian rule of law. We may draw the inference that this is perhaps the innermost trait of human reality. When we remember the formula by *Radbruch*, we can also understand that it is not the perfection of crafting and drafting law or its technical faultlessness which gives value to law. Much sooner, the value of law is given by recognition of its limits and by endeavour to be just within this limitation.

It is not by chance that we emphasized the transcendent character of human dignity and, due to its being a fundamental value, that of the law defined by it. We wished to demonstrate that if law stays within its own domain of interpretation (personal–community), and if it does not crave towards transcendence, if it does not attempt to answer questions which are rationally impossible to answer (e.g. choice between life and life; dignity and dignity); if instead it withdraws in such situations (as it does when it accepts the soldier killing the enemy or when accepting that the person attacked can kill the aggressor), then law is suitable to be the instrument of social peace, good governance, and the means for reaching reasonable personal aims.

Emphasizing transcendence is suitable for something else as well. Namely, to present that law is utilised as a camouflage, and that an idol will be construed if natural transcendence is artificially usurped. This happens by making the rule of law absolutistic when this idol becomes not more than ground of reference, yet it is unable to assist law fulfilling its original destination and will neither be able to protect itself. Usurping

³⁰⁹ TAKÁCS 2009, 3, 40–42.

transcendence entails that concepts will become void and empty, and the most respectable legal fora building the idol will become cynical.³¹⁰

This is what we experience when the European Commission, forgetting the principle of subsidiarity, wishes to revise the constitutional establishment of member states in the name of the (idol of) rule of law. It is when the judicial service replaces the protection of the inviolable personal dignity with the protection of spontaneous ideas, in the name of autonomy. By this it simplifies the person's identity to a random series of the person's whims, punishing the person for any of these when he/she is caught on *heresy*. It is when, in the name of legal certainty, a number of legal instruments never seen before do flood the everyday life of the citizens to-be-protected. It is not only the number but the complicated legal language and drafting of the text that also excludes the chances for the user to clearly understand these. This is when everything can be turned into law and the uncontrollable common agreement can elevate anything to be value for a random period.³¹¹ Within the system of the idol of the rule of law, for the sake of combatting political arbitrariness, we behave as if democracy was not one of the fundamental values to be protected. Yet, after certain institutions gain influence by simply avoiding democratic weighing, we yield way to their diffuse and confusing political endeavours camouflaged as legal values.³¹²

However, the nature of law is something else. The principle of the rule of law stemming from several sources used to rest on the realistic nature of law. And, where the foundations and framework are stable for the judicial interpretation, it does happen without doubt that it is the court who tells what law is (what the contents of the parliamentary will is). But where changes in the law take place permanently, and the institutional framework is unstable, this path leads to arbitrariness.³¹³ At the same time, it is also historical experience that even if after eras of immeasurable suffering and sacrifices, dictatorships opposing the dignity of the human being have always and everywhere disappeared. There is a device to

³¹⁰ See opinions of Golub, Leishman, Martin, Lindquist, Cross etc. in the introductory chapter.

³¹¹ BENEDICT XVI 2009, points 43–44: if law is based only on agreements, it can be changed any time.

³¹² PARISH 2011, 23, 208, 217, 266.

³¹³ SCRUTON 2010, 134.

combat the tendency in which the one-dimensional man by *Marcuse*³¹⁴ is further lowered, depriving human beings even of that one dimension.³¹⁵ It is possible to diverge from the fashion trend which, in the name of safeguarding the rule of law, it transforms the rule of law to an idol. The domination of the idol of the rule of law and its priests can be turned back, should we only accept the natural reality of law. The natural reality of law is more powerful than the idol of the rule of law.

The way towards the rule of law is not via creating its idol. The rule of law is much more important.

³¹⁴ MARCUSE 1991

³¹⁵ SÉVILLIA 2005, 5–8; SCHMIDT 2010, 298–300.

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A totalitarian state is not a good one. A state governed by the rule of law is a good one. It is little likely that anybody would seriously dispute these two short affirmations. But it is not in law (application of law) itself where the difference lies between the constitutional state under the rule of law and the totalitarian state, but the institutional guarantee for the primacy of law as opposed to arbitrary exercise of power. A state under the rule of law, therefore, is inasmuch form (primacy of law as opposed to power) as content (safeguarding liberty as opposed to power). But under certain circumstances, interpretation of the rule of law may lead to arbitrariness. Now the question arises whether this is a mere abstraction, or the arbitrary character is real. This book attempts to answer this question based on the actual paradigm and practice of the principle of the rule of law.

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