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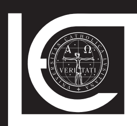
CONSTITUTIONALISM IN A PLURAL WORLD

Eds. **Catarina Santos Botelho**
Luís Heleno Terrinha
Pedro Coutinho



CONSTITUTIONALISM IN A PLURAL WORLD
CATARINA SANTOS BOTELHO; LUÍS HELENO TERRINHA; PEDRO COUTINHO
[EDS.]

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CONSTITUTIONALISM IN A PLURAL WORLD

22-23 NOVEMBER 2017

Porto Faculty of Law, Universidade Católica Portuguesa

22nd November

MORNING

AUDITÓRIO CARVALHO GUERRA

9h00 Welcome

9h30 Opening Ceremony

Manuel Fontaine Campos (Dean of the Porto Faculty of Law, Universidade Católica Portuguesa)

10h00 **KEYNOTE SPEECH: RICHARD ALBERT** (Boston College)
- "Constitutional amendment and dismemberment"

Period: 11h00-13h00

I - Constitutional Amendment
Moderator: Richard Albert
Auditorium Carvalho Guerra

- "Constitutional dismemberment" in the Portuguese transition to democracy?"

Catarina Santos Botelho (Assistant Professor, Porto Faculty of Law, Universidade Católica Portuguesa, Coordinator Council Member of ANESC)

- "Popular Constitution-Making: Towards amendment of traditional constitutional amendment provisions"

Jurgen Goossens (Postdoctoral Research Fellow at Ghent University and Assistant Professor of Constitutional Law at Erasmus University of Rotterdam – LL.M. Yale Law School)

- "Unconstitutional Constitutional Amendments in Georgia: the Constitutional Court and judicial review of constitutional amendments"

Malkhaz Nakashidze (Fulbright Visiting Scholar - Boston College Law School, USA; Associate Professor - Batumi Shota Rustaveli State University, Georgia)

- "The People's Will within the paradox of the Unconstitutional amendment processes"

Neliana Rodean (University of Verona, Italy)

- "Impact of Constitutional Amendments on Interpretation by the Georgian Constitutional Court"

Nino Kashakashvili (Ph.D. student at Ivane Javakhishvili Tbilisi State University, Georgia)

- "Constitutional amendment 95/2016 and the limit for public expenses in Brazil: amendment or dismemberment?"

Bárbara Marianna de Mendonça Araújo Bertotti (Student at the Pontifical Catholic University of Paraná, Brasil)

II - CONSTITUTIONAL DOGMATICS

Moderator: Benedita Mac Crorie

Room: Auditórium Ilídio Pinho

-"Constitutionalism and intergenerational justice: between past and future."
João Carlos Loureiro (Law Faculty of the University of Coimbra)
- "Incorporation or delegation? Sketching the constitutional implications of technical legislation"
Marta Morvillo (Post-doctoral researcher at the University of Bologna)
- "'Parametro Interposto': The Constitutionalization of International Law from an Italian Perspective"
Riccardo Perona (Lawyer and University Lecturer)
- "The distribution of power and Canadian federalism in a postmodernist analysis: critics to the partition of competences and comparisons with others federalists models"
Daniel Melo Garcia (Université Laval, Québec)
- "So that the dead cease to govern the living": the practice of constitutional evolution and intergenerational justice in plurinational Canada"
Catheryne Bélanger, *Frédéric Perreault* and *Antoine Verret-Hamelin* (Laval University, Québec, Canada)

AFTERNOON

Period: 14h00-16h00

III - GLOBAL CONSTITUTIONALISM

Moderator: Maria d'Oliveira Martins

Room: EC 105

- "Global Standards of Constitutional Law: Epistemology and Methodology"
Maxime St-Hilaire (Faculté de droit - Université de Sherbrooke - Québec)
- "The role of hierarchy in global constitutionalism"
Martinho Lucas Pires (Nova Law School of Lisbon)
- "Constitutionalism beyond the State and the Question of the Limitation of Power"
Lilian Barros de Oliveira Almeida (Lawyer; Universidade de Lisboa)

IV - FUNDAMENTAL RIGHTS AT RISK

Moderator: Sofia Pinto Oliveira

Auditorium Carvalho Guerra

- "The Rights of Older Persons"
Gordon DiGiacomo (Professor of Political Science at the University of Ottawa-Canada)
- "Protection of immigrant children and adolescents: a combination of competence, culture and protection"
*Ísis Boll de Araujo Bastos (*Doutoranda em Direito pela PUCRS)
*Sebastião Patrício Mendes da Costa (*Doutorado em Direito pela PUCRS)
- "The right to recognition: immigrants and refugees in Brazil and their right to a name"
Caio Cesar de Arruda (Faculdade de Direito de Curitiba)

Claudio Roberto Barbosa Filho (Faculdade de Direito da Universidade Federal do Paraná)

V - PROPORTIONALITY AND LEGAL REASONING

Moderator: Fátima Castro Moreira

Room EA 107

- "Another Brick in the Wall? Constitutional Dialogues with the image of Christ"

Fabio Ferrari (University of Verona, Italy)

- "Margin of appreciation and bioethics"

Benedita Mac Crorie (School of Law – University of Minho)

- "Margin of appreciation and religious freedom"

Anabela Costa Leão (Faculty of Law – University of Porto)

Period: 16h00-18h00

VI - CONSTITUTIONAL PLURALISM

Moderator: Pedro Coutinho

Room EC 105

- "Legal Pluralism in Islamic Jurisprudence"

Shams Al Din Al Hajjaji (Judge - North Cairo Primary Court)

- "Supranationalism as response to a plural world?"

Caroline Glöckle (Research assistant, University of Passau, Germany)

- "Shades of Constitutions and Constitutionalism as a 3-Dimensional Concept: National, Post-National and Co-owned Elements"

Constantinos Kombos (Law Department, University of Cyprus)

- "Constitutional Asymmetry and Multi-Tiered Multinational Systems: Shaken not Stirred. An empirical approach"
Maja Sahadžić (Researcher at the Faculty of Law, University of Antwerp, Belgium)

VII - CONSTITUTIONALISM, PUBLIC SPENDITURE AND SOCIAL JUSTICE
Moderator: Catarina Santos Botelho
Auditorium Carvalho Guerra

- "Fair public spending: taking social justice seriously"
Maria d'Oliveira Martins (Law Faculty, Lisbon School, Universidade Católica Portuguesa)
- "À propos du statut constitutionnel de l'assurance vieillesse française."
Juliano Barra (École de droit, Université Paris 1 Panthéon - Sorbonne)
- "The Intervention of the State and the Role of the Individual in the Society under the Prism of Individual Freedom"
Rui Miguel Zeferino Ferreira (Arbitrator in administrative matters - Public Contracts, at the Administrative Arbitration Center - CAAD)
- "'L'enfer, c'est les autres'. Populism today: new strategy, old formula. Can Human Rights and Constitutions outlast this old global phenomenon? The challenge of protecting Human Rights and Constitutional Guarantees through Economic Crises in an unequal country"
Ian Henrique Bertoldi (Law Student at UFPR-Brazil)

23rd November

MORNING

Period: 9h00-11h00

VIII - EUROPEAN CONSTITUTIONALISM

Moderator: Sofia Pais

Auditorium Carvalho Guerra

- “Pluralism Confined? Regulation of Political Parties – European Standards and Case Studies from Hungary”

Peter Smuk (Associate Professor - Department of Constitutional Law and Political Sciences, Széchenyi István University, Győr, Hungary)

- "Things we lost in the fire: EU constitutionalism after Brexit"

Patrícia Fragoso Martins (Faculty of Law, Lisbon School, Universidade Católica Portuguesa)

- "European Constitutionalism and the multilevel parliamentary field: towards a legisprudential role of National Parliaments?"

Luís Heleno Terrinha (Porto Faculty of Law, Universidade Católica Portuguesa)

- “Lawmaking in disputed areas controlled and influenced by EU"

Attila Nagy (Lawyer at Local Government Administration, City of Subotica, Serbia)

- “Constitutional challenges against the EU – Canada Free Trade Agreement: Canadian and European Perspectives”

Mário Simões Barata (Adjunct Professor of Law and Political Science – Polytechnic Institute of Leiria)

- "Intra-EU investment disputes: Implications for the autonomy of the EU legal order"

Marta Vicente (Invited Lecturer at Porto Faculty of Law, Universidade Católica Portuguesa)

IX - Constitutional Courts

Moderator: Paulo Pichel

Room EC 105

- "Like oil and water? Decision-Making by the Turkish Constitutional Court"
Maria Haimerl (Humboldt-Universität zu Berlin)
- "The Congress in the Court: Analysis of the use of constitutional complaints by members of Congress in Colombia 1992-2015"
Santiago Virgüez Ruiz (Universidad de los Andes, Bogotá, Colombia)
- "The Role of Turkish Constitutional Court in the Democratization Process of Turkey: From 2002 to Present"
Volkan Aslan (Research Assistant at Istanbul University Faculty of Law, Department of Constitutional Law)

X - Fundamental Rights and Pluralism

Moderator: Filipe Cerqueira Alves

Room EA 107

- "Constitutional right to conscientious objection: an adequate response to moral and religious pluralism?"
Wojciech Brzozowski (Faculty of Law and Administration University of Warsaw, Poland)
- "Beyond Judicial Protection: Empowering Minorities in a Pluralistic America"
Franciska A. Coleman (Yonsei University Law School, Seoul, Korea)
- "Democracy in crisis and political propaganda of appeal to the masses: Influence on minority rights"
Isa António (ISCET - Instituto Superior de Ciências Empresariais e do Turismo, Porto, Portugal)

Period: 11h30-13h30

XI - Judicial Review
Moderator: Luís Heleno Terrinha
Auditorium Carvalho Guerra

- “The ‘empirical turn’ in constitutional adjudication”

Leonid Sirota (AUT Law School - New Zealand)

- "International Judicial Review in a Diverse World: the Pros and Cons of Deference"

Johannes Hendrik Fahner (LL.M. M.A., University of Amsterdam and University of Luxembourg)

- "Taricco and its sons: a 'dangerous' exercise of judicial cooperation?"

Marco Bassini (Bocconi University - Law Department)

- “Judicial Activism and judicialization of politics in Brazil. How political ideologies impacts constitutional decision-making and affects the rule of law”

Allan Augusto Antonio (Presbiterian University Mackenzie, Brazil)

XII - Multilevel Protection of Human Rights
Moderator: Marta Vicente
Room EA 107

- "Values and Charter Interpretation"

Catheryne Bélanger (Faculty of Law, Laval University, Québec, Canada)

- "Bringing Human Dignity back to Light: the Case of Social Rights Protection in a Multilevel Perspective."

Antonia Baraggia (Emile Noël Fellow, New York University)

Maria Elena Gennusa (Associate Professor, University of Pavia)

- “Another brick in the wall? Shaping mutual trust between courts in the European multilevel system of fundamental rights protection”

Marco Galimberti (PhD Student in Public and International Law, University of Milano-Bicocca)

XIII - CONSTITUTIONAL REALITY AND CONTEXT

Moderator: Nuno Sousa e Silva

Room EC 105

- "Beyond Constitutional Rules: the case of the Constitution of the Portuguese Republic of 1976"

André Azevedo Alves (Institute of Political Studies, IEP-UCP)
Daniela Silva (IEP-UCP)
Inês Gregório (IEP-UCP)

- "Electoral authoritarianism and Political dominance: Foundations of unconstitutional stability and constitutional instability in Sub-Saharan Africa"

Duncan Okubasu (Advocate; Lecturer, Kabarak University)

- “'Discuss Your Own Constitution!': Soviet Dissident Writings on the 1977 USSR Constitution and Their Impact on the 1993 Russian Constitution"

Kirill Koroteev (Legal Director, Human Rights Centre “Memorial”, Moscow)

AFTERNOON

Period: 14h30-16h30

XIV - CONSTITUTIONALISM IN THE DIGITAL AGE

Moderator: Ingo Wolfgang Sarlet

Room EC 105

- "Digital Constitutionalism in the Age of Protest: The Right to Virtual Assembly"

Miguel Calmon Dantas (Professor of Universidade Federal da Bahia and of

Unifacs – Universidade Salvador)

Vitor Soliano (Professor of Unifacs – Universidade Salvador)

- “Data Protection Rights and Surveillance: a comparative perspective in the European Context”

Monica Cappelletti (Post-doc researcher at School of Law and Government, Dublin City University [DCU], Ireland)

- "The Fundamental Rights in Data Protection – A transnational problem with different approaches: a comparative study"

Sofia Felício Caseiro (Researcher at Católica Research Centre for the Future of Law - Universidade Católica Portuguesa)

XV - CONSTITUTIONALISM AND CITIZENSHIP

Moderator: Ana Teresa Ribeiro

Room EA 107

- "Building a democratic citizenship"

Luísa Neto (Law Faculty of the University of Porto, Portugal)

- "‘*Ceci est une fiction*’: Constitutional *referendums* in the federal state of Belgium. Comparative constitutionalism as a source of inspiration"

Daan Bijnens & *Stef Keunen* (PhD-researchers, Faculty of Law, Hasselt University, Belgium)

- “Sovereignty and state of exception in the refugee crisis: constitutionalism in a Europe of interdependent states”

Samo Bardutzky (University of Ljubljana)

XVI - Constitutional challenges

Moderator: Pedro Coutinho

Room EA 109

- "Symbiotic Interpretation: Reading Constitutions Through National Laws - (And Not Only the Other Way Around)"

Roman Zinigrad (Yale Law School)

- "The security and defence aspects in the Constitution of the Republic of Poland"

Malwina Kolodziejczak (Assistant, Department of Security Law, Institute of Law and Administration, War Studies University, Warsaw)

- "Freedom, security and justice area and the European Arrest Warrant: when (no) mutual trust on the conditions of detention justifies their non-implementation"

Dora Resende Alves (Universidade Portucalense Infante D. Henrique)

Fátima Pacheco (ISCAP, IPP)

XVII - Multilevel constitutionalism

Moderator: Rui Medeiros

Auditorium Carvalho Guerra

- "The role of Charter of Fundamental Rights of the European Union in the Deepening of EU Multilevel Constitutionalism"

Ondrej Hamulak (Assistant Professor at Faculty of Law, Palacký University Olomouc, Jean Monnet Chair in EU Law)

- "Cultural diversity, legal pluralism and fundamental rights: The 'multicultural jurisprudence' of Portuguese courts in comparative perspective"

Patrícia Jerónimo (Law School of the University of Minho)

- "Are territorial limits the border for fundamental rights?"

Sofia Pinto Oliveira (Law School of the University of Minho)

- "EU fundamental rights at the crossroads of EU constitutionalism"

Sophie Perez Fernandes (Law School of the University of Minho)

- "Fundamental rights protection in European legal space - Extracts from the evolution of Court of Justice of European Union and European Court of Human Rights jurisprudence"

Marija Daka (PhD candidate, University of Pecs, Hungary)

Period: 17h00-18H30

GENERAL SESSION
Moderator: Catarina Santos Botelho
Auditorium Carvalho Guerra

- "Personality Rights und their Protection in the Digital Age - The case of the right to be forgotten"

Ingo Wolfgang Sarlet (PUC-RS, Appeal Judge at Rio Grande do Sul Court of Justice)

- "Italian Constitutional Court and social rights in times of crisis: in search of a balance between principles and values of contemporary constitutionalism"

Giovanni Guiglia (Università di Verona, General Coordinator of ANESC)

- "Is Democracy Killing Constitutionalism or Constitutionalism Killing Democracy?"

Miguel Poiares Maduro (European Univerity Institute, Florence)

- "Federalism as a Constitutional Tool for a Plural World?"

Holger Hestermeyer (King's College London)

- 'We the People': Popular Sovereignty and Constituent Power

Gonçalo Almeida Ribeiro (Portuguese Constitutional Court Judge)

18H30: CLOSING CEREMONY

Catarina Santos Botelho

Luís Heleno Terrinha

Pedro Coutinho

Foreword

Richard Albert
Professor of Law
The University of Texas at Austin

The Lockean theory of constitution-making may be less relevant today than ever before. We once understood a constitution as the product of a settlement among different peoples to "enter into society to make one people, one body politic, under one 'supreme government,"[1] but today we know that this does not reflect reality, nor perhaps ever did, even in the case of the world's oldest codified constitutions. The United States Constitution, for instance, purports to speak for "We the People," but most persons at the founding were denied the privileges of participatory citizenship. And today still many remain left out of the American constitutional community, constructed to disenfranchise, marginalize, and to speak in the name of those who may not want to be spoken for.

Modern constitution-making has shown that the project of constitutionalism defies the conventional view that one people always do emerge from many peoples. *E pluribus unum*—out of many, one—is more of an aspiration than a description of what results from the formation of a constitutional consensus around a set of structures, principles, rules and rights. Any given constitutional community is composed of peoples who differ by language, religion, ethnicity, geography, identity or some other meaningful point of distinction. Any given constitutional community is composed also of winners and losers, incumbents and challengers, and governors and the governed for whom the new constitution may represent a victorious conquest or an ignominious defeat. The challenge of modern constitutionalism is to reconcile these many peoples and their interests, though not to create one single people among all of them but rather to find constructive and meaningful ways to allow all to flourish within the bounds of the rule of law.

And yet we continue to follow old teachings about concepts once thought foundational but today revealed to have stretched beyond their intended limits. Foremost among these is the theory of constituent power. Emmanuel Joseph Sieyès, an eighteenth-century French theorist, introduced this notional justification for the principle that the ultimate right of self-determination belongs to the people themselves, not to a ruling

[1] John Locke, SECOND TREATISE OF GOVERNMENT AT 47-48 (§89) (Indianapolis: Hackett Publishing Co., C.B. MacPherson ed. 1980).

hereditary or divine class of peoples.[2] No constitution can properly be adopted without the consent of the people, what he defined as the *pouvoir constituant*,[3] in translation *constituent power*, a reference to the body of people in whom absolute power resides.[4] For Sieyès, sovereignty emanates from the people, not from government nor from any other source. But just who the people are and how they are to be identified is an even deeper mystery today in our time of pluralist democratic commitments to affirmation and accommodation than in the days of Sieyès when constitution followed revolution, and victor's justice framed the logic for the construction of the state, its institutions, and the rights that some or all would enjoy.

We should instead speak of the many different peoples who gather together to create a constitution, bound not by a single nationhood but by a shared commitment to contestation and collaboration within the defined rules of the game that are in turn policed by impartial arbiters. Constituent power, then, may yet retain its relevance in our modern time of difference and diversity, recognizing that the idea of one people emanating from many is at best an aspiration and at worst a denial of the profound distinctions among us that enrich our constitutional communities.

This volume on *Constitutionalism in a Plural World* is an important step in the right direction. The papers collected here grapple in a variety of fascinating ways with the primary task of modern constitutionalism: how to manage difference and diversity consistent with our respect for the rule of law, our commitment to democratic values, and protection of fundamental rights for all, and our belief that power, in order to be legitimate, must be exercised justly and legally.

Hearty congratulations are due to the editors of this volume—Catarina Santos Botelho, Luís Heleno Terrinha and Pedro Coutinho—for their grand vision to assemble this global group of scholars, initially in an international conference held in Porto and now in this collection making available in an accessible format a representative sample of the informative, stimulating and provocative working papers presented. This is just the latest in a growing list of important scholarly initiatives organized by this trio from the Porto Faculty of Law at the Universidade Católica Portuguesa. Their ideas are innovative, their energy is boundless, and their enthusiasm for the study of constitutional law is infectious. The entire field of public law is better because of them.

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[2] EMMANUEL JOSEPH SIEYÈS, QU'EST-CE QUE LE TIERS ÉTAT? (Éditions du Boucher, 2002) (originally published in 1789).
[3] *Id.* at 53.
[4] *Id.*

People's Will before Judicial Review of (Un)Constitutional Amendments

Neliana Rodean
Research Associate and Adjunct Professor of Constitutional Law,
University of Verona

Abstract:

In modern time, constitutions usually contain rules about constitutional amendments, and in certain circumstances, "we, the people" are called to propose and/or approve any constitutional change. There is an uneasy relationship between substantive limits on amendments and democracy because, as demonstrated, democratic constitutions undermine people involvement in the constitutional amendment processes.

The paper aims to analyse the role of the people in the constitution-making or constitution-amendment processes. On the one side, it seeks to answer whether the constitutional procedures enable people to entrench good or bad constitutional changes, as well as the features of unamendability clauses, which limit the people participation in those processes. On the other side, the paper considers the serious constitutional law problem behind the judicial review of constitutional amendments when (or better, if) the people have the last word in such processes.

SUMMARY:

1. INTRODUCTION
2. THE PEOPLE IN THE FORMAL CONSTITUTIONAL AMENDMENT PROCESS
   2.1. RULES OF CHANGE AND THEIR INTERPRETATION IN THE ITALIAN LEGAL SYSTEM
   2.2. PEOPLE'S AMENDING POWER: THEORY AND PRACTICE
   2.3. (UN)CONSTITUTIONALITY AND THE ROLE OF THE CONSTITUTIONAL COURT
3. THE PEOPLE IN THE (UN)DEMOCRATIC CONSTITUTIONAL CHANGES
   3.1. THE LACK OF POPULAR WILL IN HUNGARIAN CONSTITUTIONAL REVIEW
   3.2. THE LOST *COURTOCRACY* AND THE DEFERENTIAL INTERPRETATION OF CONSTITUTIONALITY
4. CONCLUDING REMARKS

1. INTRODUCTION

John Locke's idea that a constitution should be a «sacred and unalterable form and rule of government» (LOCKE (1801), p. 198) has not found a modern following. The study of constitutional design is of interest largely because a constitution can be amended from time to time. Constitutions usually contain rules about their amendment processes, and at times people may be called to approve constitutional changes. Nevertheless, as will be demonstrated, democratic constitutions can undermine people's involvement in constitutional amendment processes.

Within a constitution, no part is more important than the rules governing its amendment. Even though the issue of the constitutional amendment has attracted increased attention in recent years, there is nonetheless limited scholarship investigating the structure of formal amendment frameworks (ALBERT (2014), p. 914), and little scholarly debate on the role of the people in constitutional change. The narrowness of the literature regarding people's capacity to strengthen constitutional rigidity is not, however, because their amendment power is irrelevant or considered secondary within democratic constitutional design (STRAUSS (2001), p. 1460; DENNING and VILE (2002), p. 274; RASCH and CONGLETON (2006), p. 323) or within the institutional structure of political systems.

The need for further discussion exists because constitutional change is a complex labyrinth of relationships and interactions between amendment procedures, political actors, and centres of authority, and these processes must be studied in depth and considered from an integrated perspective.

It is well known that a constitution is the political heart of a nation (TUSHNET (2008), p. 12); moreover, amendment rules are at the core of constitutionalism, defining the conditions under which all other constitutional norms may be legally displaced (AMAR (1994), p. 461; CONDIADES and FOTIADOU (2013), p. 418) and providing mechanisms for societies to refine their constitutional arrangements (ELKINS *et al* (2009), p. 81). Formal constitutional amendment rules consider the overall framework of the political system to dictate how constitutional change should occur (VERMEULE (2006), p. 229). Exploring and modelling constitutional change connects actors and mechanisms within a given legal order, and this process inevitably touches all areas of constitutional law and the allocation of powers. As long as amendment procedures are designated as adaptive approaches to changing circumstances, formal changes provide a means for resolving conflicts between constitutional actors, especially with regard to the allocation of amendment powers.

In recent years, scholars producing literature on constitutional amendment have particularly analysed the phenomenon of constitutional endurance (ELKINS e*t al.* 2009); GINSBURG 2011) and constitutional amendments rules (ALBERT *et al.*, 2017), the notion of unamendability and cases of unconstitutional amendment (ROZNAI, 2017) as well as abusive constitutionalism (LANDAU, 2013; DIXON 2017) and stealth authoritarianism (VAROL 2015). The study of constitutional amendments also raises fundamental questions about the legitimacy of constitutional order and the locus of sovereignty, especially in cases of legitimate processes of popular alteration of a constitution.

This paper exposes a part of a broader research on the people amendment power and the role of the constitutional courts trying to highlight the issues that arise when a(n) (un)constitutional amendment is proposed and/or adopted by the governed. In this part, it have been taken into consideration two European legal system - Italian and Hungarian –, sharing the same principles of indirect popular involvement in the amendment processes but differing in several aspects. Starting from a comparative analysis of these two different experiences, on one side, it seeks to analyse constitutional procedures that consist of popular involvement in entrenching new constitutional rules, as well as the features of unamendability clauses that limit people's power in constitutional amendment processes. On the other side, the paper scrutinizes the serious constitutional law problem behind the formal constitutional amendments, stressing the role of the courts and the judicial review of the constitutional amendments proposed in the name of "the People".

The choice of these two legal orders is not carelessly. First of all, both attempt the indirect popular consent, i.e., through the elected representatives, to bring changes to constitutional text. Secondly, any (un)constitutional amendment cannot be subject matter of a popular consultation if the Parliament adopt them with the special two-third majorities. The differences consist of the possibility of a referendum (also requested by a quota of the electors) or the indirect popular initiative that characterize Italian constitutional amendment process. Despite the supermajority, a limited rigidity is provided in the Hungarian legal order in which eternity clauses do not find space and in which an *ex ante* constitutional review of any adopted but not published Acts. Both experiences were born after a "revolution" against an oppressive regime of the liberties and sovereignty of the people, but the way in which constitutional actors, empowered to draft a fundamental law, are substantively different and mark the crossroads among constitutional and unconstitutional constitution-making processes, among liberal and illiberal democracies.

2. THE PEOPLE IN THE FORMAL CONSTITUTIONAL AMENDMENT PROCESS

2.1. RULES OF CHANGE AND THEIR INTERPRETATION IN THE ITALIAN LEGAL SYSTEM

The 1948 Italian Constitution is a product of a representative process, which characterized the constitutionalism of the post-World War II period. The Constituent Assembly, legitimized by the people through the so-called "institutional referendum" or "supra-constitutional referendum" (LOWENSTEIN (1957), p. 263) empowered to draft and adopt a new democratic constitution, has started an constitution-making process that led to a new constitutional order. On the legal level, the referendum has a fundamental value in the form of the State being the first action of constituent power in the advent of the Italian legal system. Turning the people into the main actor of the constituent proceeding, the referendum represented «the intangible sign of the restoration of the constitutional legality and the beginning of the constituent power's exercise» (BALDASSARE (1994), p. 249). Subsequently, from the setting of a clear regulation concerning the task entrusted to a representative assembly to perform an institutional choice, it is passed to a *coup d'Etat* (CALAMANDREI, (1966), p. 4) and the electoral body was called to choose between Republic and Monarchy.

In the modern world, constitutions can no longer be unalterable; they contain rules of change, mechanisms of balancing constitutional stability, and procedures of constitutional amendment. The formal constitutional amendment process drafted by the Constituent Assembly and translated in Article 138 of the Italian Constitution consists of such necessary procedures. The complex constitutional review procedure established by the abovementioned constitutional provision represents the conversion of the principle of constitutional rigidity within the framework of the sources of law, safeguarded by the constitutional judges. It is the republican Constitution that embodies the "break" from the past, and the supreme principles – among which the rigidity itself – are deemed as "logical" clauses to its "living" (FERRARI (2014), p. 4030).

The amending formula draws from the structure of ordinary legislative procedures, with necessary additional requirements to modify Italy's fundamental law or to introduce a new constitutional act. The steps that align with ordinary legal procedure involve having two readings by each Chamber with a mandatory interval of three months, and the required approval by at least an absolute majority in the second vote. However, the rigidity of the Italian amendment process extends beyond ordinary legal processes in a number of ways. First, Article 138 of the Constitution establishes that in order to pass any constitutional modification, each of the two Chambers of the Italian Parliament must vote in favour of and reach double conformity on the same text twice over a period of no less than three months; a reinforced majority is also required. According to the same article of the Constitution, the second vote is a mere approval, requiring at least an absolute majority (50 percent of the members of each Chamber plus one, regardless of the number of those taking part in the

vote). In case of a two-thirds majority, the approved constitutional amendment can then be promulgated and published, and enter into force.[1] Second, whenever a two-thirds majority is not reached in one (or both) of the two Chambers, but only the (necessary) absolute majority, within three months of the second vote, one fifth of the members of each Chamber, 500,000 voters, or at least five regional legislative assemblies can request a referendum on the text voted by Parliament[2] (GROPPI (2013), p. 206). The draft constitutional amendment is deemed passed if a voting majority approve it. However, if the constitutional draft is approved in the second vote by a majority of two-thirds of the members of each House, no referendum can be requested. In this case, promulgation of the approved draft constitutional amendment will follow either with the expiration of the three-month term or, in the case of a referendum being requested, the positive vote expressed by the citizens in favour of the constitutional amendment.

The second process, in the event that proportional electoral representation is not established, consists of an optional referendum because a supermajority could not be reached. However, the people can be called to participate in the amendment process by either proposing amendments or, within the final phase, by eventually deliberating on the constitutional amendment voted by the Parliament.

Given the complexity of the procedure, several issues remain open, especially on the general role played by the constitutional referendum within the framework described in Article 138. This particular type of referendum has been variously defined as one of "guarantee" allowing minorities to verify the alignment between the will of the Parliament and that of the People: in an "opposing" referendum, it functions to halt the constitutional amendment endorsed by the Parliament's majority; as a referendum of "control", it prevents the possible malfunctioning of constitutional legislation; and as a "confirmative" or "validating" referendum, the process strengthens the legitimacy of the same majority that supported the reform (FERRI (2001), p.153). Precisely because of the different qualification given to the constitutional referendum, the relationship between the Parliament and the people within the constitutional amendment process can fluctuate.

In this view, the Constitutional Court stated that «in [the Italian] system, fundamental choices concerning the national community and inherent in the 'constitutional agreement' are reserved to political representation, on whose decisions people cannot intervene unless pursuant to the procedure indicated in Article 138.» In the Court's view, Article 138(2) of the Constitution not only provides a referendum on constitutional law simply as optional but, in preventing popular intervention that is disconnected from the

[1] Articles 73 and 74 of the Constitution.
[2] Further profiles of the referendum procedure are governed by Law no. 352/1970; up to that year, in the absence of rules regulating the practice of the constitutional referendum, all constitutional laws had to be approved by a necessary two-thirds majority, making the procedure even more rigid.

parliamentary procedure, it circumscribes within strict time limits the people's initiative power. The third paragraph of the same article entirely precludes the possibility of popular intervention when it determines that «the referendum does not take place when the law has been approved in the second vote by a two-thirds majority of its members,» thereby confirming that the power of constitutional revision belongs, first and foremost, to the Parliament.

There is no doubt that Article 138 of the Italian Constitution places the decision-making on constitutional amendments mainly in the hands of the parliamentary representatives. In fact, within the amending procedure, the people will act either only as a "check," with conservatory and safeguarding functions, or as a confirmatory force, with regard to an already perfected parliamentary will that, in the absence of popular validation, is nonetheless able to consolidate its legal effects.[3]

2.2. PEOPLE'S AMENDING POWER: THEORY AND PRACTICE

Constitutional changes are very closely linked to the amendable nature of the provisions. Besides procedural prerequisites, amendment rules specify what is subject to or immune from formal amendment. However, a question arises vis-à-vis the limits of people's amending power as designated by the constitutions.

Since its entry in force, the Italian Constitution has been amended 14 times, and 32 out of 139 articles have been modified. Six draft constitutional amendments were repealed, and only three constitutional referendums have taken place (FUSARO (2013), pp. 218-20; GROPPI (2013), pp. 213-17).

In theory, there is no reference in the Constitution regarding the initiating power of the people, and, as mentioned above, in practice, the people have never commenced a constitutional revision procedure. Even if the Italian Constitution does not provide a clear reference to the people's power to amend it, the doctrine upholds that the same institutions empowered to introduce ordinary legislation have the power to propose constitutional amendments – that is, the government, any Member of Parliament, the regions, and the people.[4] Despite the fact that the people have never proposed a constitutional amendment, if they were to do so, which are the limits imposed to this power?

The only explicit limit on constitutional revision is provided by Article 139, according to which «[t]he republican form of the state shall not be a matter for constitutional amendment.» This is the unique "eternity clause" provided by the Italian Constitution.

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[3] Constitutional Court decision 14 November 2000, n.496 (G. U., S.S., 22/11/2000, n.48).

[4] Article 71: "Legislation may be introduced by the Government, by a Member of Parliament and by those entities and bodies so empowered by constitutional amendment law. The people may initiate legislation by proposing a bill drawn up in sections and signed by at least fifty thousand voters."

However, the Italian doctrine has traditionally stressed the existence of many other implicit limits to the constitutional amendment, principles that cannot be changed through the procedure described in the Article 138. These principles represent the "core" of the Constitution and qualify the form of the state (VIVIANI SCHLEIN (2000), pp. 1367-68). Thus, they fall within the purview of "constituent power" (i.e., constitution-making power), rather than as "constituted" (i.e., constitution-amending power). According to this assessment, a total revision of the Constitution is not allowed in the Italian legal system (GROPPI (2013), p. 210; GROSSO and MARCENÒ (2006), p. 2731).

Amending unamendable provisions in the Italian legal system is a question unlikely to get over. On one hand, scholars interpret the explicit limit to constitutional amendment provided by Article 139 in a systematic way, together with Article 1 of the Constitution: the concept of the "republican form of State" as excluded from revision would refer not only to the selection of the head of state, but also to the entire form of the state according to which «Italy is a democratic Republic [...]» (MARTINES (2011), p. 198). In other words, the explicit limit stated in the Article 139 is avowable of a limit imposed by the institutional referendum (BIN and PITRUZELLA (2017), p. 337).

On the other hand, the existence of a "core" of unamendable principles has been linked to the difference between the primary and secondary constituent power, or between the power to establish a new constitution and the power to amend it (ROZNAI (2013), p. 657; ROZNAI and YOLCU (2012), p. 175). In this respect, the revision procedure can only be used to enact minor changes to the constitution that do not affect the fundamental features of the system, while any legal option to change the fundamental text in its entirety would be excluded.

Most of the unamendable content is located within the amendment provision, inferred from its declaration of the "eternity" of the system, but unamendability also appears in other parts of the Constitution, that is, in those provisions claiming the "supreme principles". The Italian Constitutional Court explicitly[5] qualified such «supreme principles, that cannot be subverted or changed in their essential content neither by constitutional laws of revision nor by constitutional laws,» as implicit limits to constitutional amendments, and recognized its competence to review the constitutionality of constitutional laws. According to the Court's interpretation, «these principles are explicitly provided by the Constitution as absolute limits to the power of constitutional revision, as the republican form of government stated by the Article 139 as well as the principles which, although not expressly mentioned among those not subject to the constitutional revision process, belong to the essence of the supreme values upon which the Italian Constitution is founded.»

[5] Constitutional Court decision 15 December 1988 n. 1146 (G.U. 11/01/1989, n. 2).

The debate among scholars on the identification of these "supreme principles" is closely connected to the possibility of introducing a federal form of state, the direct election of the Republic's president or the prime minister, and even the possibility of amending the 12 articles under the heading "Fundamental Principles," followed by Part I of the Constitution, entitled "Rights and Duties of Citizens." Part II of the Constitution, addressing the "Organization of the Republic," and some provisional and transitional dispositions can also be deemed relevant to the debate on the identification of "supreme principles," but, as demonstrated in practice, the second part of the Constitution has been changed where the amendments did not indirectly affect principles enshrined in Part I.

A further limit to any change derives from EU Law, where the Constitution recognizes the «constitutional common traditions of the Member States.»[6] There is a substantive limit more than a formal one, insofar as Italy could leave the EU as consequence of popular will, and later change the Constitution, introducing provisions in contrast with those traditions (FUSARO (2013), p. 215).

Finally, the possibility of modifying even the amending formula, as entrenched in Article 138, is subject to academic debate. According to the scholarship, the procedure regulated by Article 138 could be revised, with the only limit being a revision that would make the Constitution less rigid (PACE (2006), p. 38; GROPPI (2013), p. 214).

Coming back to practice, most constitutional acts in the Italian legal order were passed by a large majority in Parliament. The people's involvement in the amendment process, specifically through a referendum on the constitutional amendments, has been expressed only three times: in 2001, related to the quasi-federal reform of Title V, Part II of the Constitution, with a turnout of 62 percent in favour; in 2006, regarding another attempt at a systematic revision of the Part II and strictly linked to the application of Article 138, but rejected; and in 2016, concerning «provisions for overcoming equal bicameralism, reducing the number of Members of Parliament, limiting the operating costs of the institutions, the suppression of the CNEL and the revision of Title V of Part II of the Constitution,» which also failed to garner public support.

Constitutional revision in Italy has been virtually exclusively in the hands of political parties, and the power to amend the Constitution likewise belongs to the Parliament. People's participation is only optional and is still considered controversial. The procedure established by Article 138 is closely linked to proportional representation. Any constitutional change passed by only a majority of members of Parliament should be regarded as substantively unconstitutional – this is the reason for the optional constitutional referendum at the public's request.

[6] Article 6(2) TEU.

The difference with the ordinary revision mechanism is that people, instead of being required to give their "positive approval" to proposed amendments, can choose to express their dissent by vetoing a proposed amendment – which, from a constitutional design perspective, increases their authority in undertaking amendments, but it may also create barriers to constitutional change and produce an undemocratic amendment process.

2.3. (UN)CONSTITUTIONALITY AND THE ROLE OF THE CONSTITUTIONAL COURT

Constitutions have certain entrenched constitutional provisions that are impervious to the amendment. These unamendable provisions are subject to amendment neither by the judiciary nor according to the constitutionally entrenched amendment procedure. To actually amend an unamendable provision requires much more than a discrete revision; it involves comprehensive renewal through a huge constitutional "revolution."

Many questions have arisen in the literature on (un)constitutional amendment processes. Who can declare an amendment unconstitutional? Who can determine the constitutionality of a proposed amendment? The obvious answer would be that a court should be authorized to do this (GINSBURG and GANZORIG (2001), p. 309).

Decision-making bodies – such as legislators, a citizens' assembly, or a national referendum process – could propose a constitutional amendment, and by changing the "spirit of the Constitution," alter the legal system completely. From this perspective, we return to the debate on the simple power to amend the constitution or to establish a new one – the difference between *pouvoir constitué* and *pouvoir constituant*, between primary and secondary amendment power, and between total and partial constitutional revision, which involves participatory theory and people's sovereignty.

In the Italian legal system, the 1948 Constitution ensures an original combination of representative and direct democracy, including grassroots-initiated referendums (FUSARO (2013), p. 212; GALIZZI (2000), pp. 235-41); the "eternity clause" was introduced as a natural complement to the 1946 referendum, which had abolished the monarchy. It is a theoretical matter within the unconstitutional amendment debate, as long as the people could be recalled at any time to vote on any constitutional change that could alter the legal system, as happened in Hungary. In such cases, could the Court still declare those provisions unconstitutional if the people agree with that particular change?

In any case, there are constitutional principles or liberal democratic values that should be shielded from revision, even by the most compelling legislative or popular majorities. The scholarship is divided on this argument, though (TOWNLEY (2005), p. 365; KATZ (1995), p. 199). As Albert has maintained, there are various categories for assessing constitutional change, and unconstitutionality is only a form of nonconstitutionality. He has

identified a textual model that authorizes constitutional amendment; a political model, which introduces extraconstitutional change; and a substantive model, which forbids unconstitutional amendments (ALBERT (2009), p. 12). From this perspective, the Italian constitutional text enshrines the necessary and sufficient conditions for amending it and contains a clear provision regarding that procedure. Moreover, the Italian Constitution traces the political model insofar as amendments may spring from the expression of popular will, which manifests the dualism between the political branches and citizenry.

The debate concerning the limits to the constitutional amendment in the Italian system is a very political one. Sometimes scholars and politicians who do not agree on constitutional reform concentrate their debate on constitutional legitimacy and on the inconsistency of the amendments regarding the basic principles of the Constitution. The political party, which sustains constitutional reform, can require a referendum in order to reach absolute approval from the governed body.[7] In this sense, the political model is linked to extraconstitutional change insofar as the constitutional change that occurs unbounded by the fundamental law.

Furthermore, the political model marries the written and unwritten constitutional requirements governing amendment (ALBERT (2009), p. 15). Citizens themselves, as agents of constitutional change, generate unwritten constitutional amendments that do not require judicial involvement, only judicial acquiescence (ALBERT (2009), p. 19). A public debate implies civic engagement in constitutional politics, where the representative bodies and their citizens are involved in a national dialogue regarding the future of the state. In such cases, there is no space for a judicial review of those amendments that transform the legal system. However, constitutions have overcome this issue by empowering the Courts to scrutinize the conformity of any constitutional change with the existing constitution, and this is the essence of what Albert calls the substantive model.

This is precisely the path that the Italian Constitutional Court has developed over the years. The Court has embraced its role and expanded the list of the unamendable provisions, assessing a broader theory of unconstitutionality. Regardless of the drivers of constitutional amendments, the theory of implied limits in the Italian legal system has been widely accepted by the Constitutional Court.

The Court played a significant role not only in implementing the Constitution (GROPPI (2013), p 218),[8] but also in adapting the Constitution as Italian society has changed. In many circumstances, the Constitutional Court has legislated beyond the written constitution, but in

[7] See the Constitutional Acts of 1993 and 1997, introducing an extraordinary procedure and transforming the referendum from optional to mandatory.

[8] Informal changes have been determined by the lack of implementation of the Constitution. Many laws were necessary to establish the new guarantor bodies and to limit political majorities.

some circumstances, it has also manifested a certain degree of self-restraint.[9] A constitutional amendment must be adopted without compromising the effectiveness of the written text, and the constitutional changes developed "outside" of constitutions should not alter the meaning of the provisions. However, according to the Court, an amendment is unconstitutional if it undermines Article 1, regarding the republican form of government. Based on Article 2 and interpreted as an open provision, the Court expanded the list of human rights that could be modified. Based on the Article 3, the Court has likewise addressed a range of disparate provisions that involve unequal treatment and held that an amendment stressing an "unreasonable discrimination" should be considered illegal. Furthermore, the two main parts of the Constitution are linked together, and any major change in Part II could infringe upon the implementation of Part I because values established in the former would strictly limit the possibility of amending provisions included in the first part.[10] In the same reasoning, Article 138 cannot be amended because of its link to proportional representation.

Although there is no provision regarding judicial review, the Italian Constitutional Court claims that it is its duty and right to check the constitutional legitimacy of laws revising the Constitution, no matter who has proposed the constitutional amendment (GÖZLER (2008), pp. 51-2). However, in practice, the Court has never made a decision to annul a constitutional amendment.

3. THE PEOPLE IN THE (UN)DEMOCRATIC HUNGARIAN CONSTITUTION

3.1. THE LACK OF PEOPLE IN HUNGARIAN CONSTITUTIONAL REVIEW

Unlike Italy, in Hungary, a transition to democracy took place at the turn of the millennium following the fall of the Berlin Wall and that marked the whole Eastern Europe. Initially for democratic reasons, the Hungarian constitution was based on the readjustment of the constitution of the communist period integrated by so-called "invisible Constitution" at the hands of Constitutional Court.[11] Only with the second constitution that came into force in 2012 it gets to a "break" from the past from many points of view as analysed below.

[9] Constitutional Court decision 6 September 1995, n.422 (G. U. 20/09/1995 n. 39) regarding the unconstitutionality of the reserved quota system in the electoral list, which was overcome by a subsequent constitutional amendment; Constitutional Court decision 14 April 2010 n.138 (G. U. 21/04/2010 n. 16) regarding same-sex marriage held that the intent of Italian constituents was to preclude an evolving interpretation of marriage.

[10] The parliamentary regime established by Articles 92-96 could not be amended to establish, for instance, a presidential regime.

[11] See SAJÓ, András, 1995, "Reading the Invisible Constitution: Judicial Review in Hungary", *Oxford Journal of Legal Studies,* Vol. 15, no.2, pp. 253–267.

Historically, the codification of modern constitutions and the power of constitutional amendment has rested on the theory of popular sovereignty, according to which the ultimate source of constitutional legitimacy is the consent of the governed. However, this is not the case with the new Hungarian Constitution. In 2010, Hungary voted in the right-wing, Euro-skeptic *Fidesz* party with 52 percent of the vote. Because of an idiosyncrasy in the electoral law, their slim majority translated into 68 percent of the seats in Parliament. With this parliamentary supermajority, *Fidesz* had the power to amend the Constitution. The new "*Fidesz*" Constitution came into force on January 1st, 2012, and since then, the *Fidesz* government has amended it many times. No referendum was held concerning the new constitution, which was voted through by the MPs of *Fidesz* and its alliance partner, the Christian Democratic People's Party (*Kereszténydemokrata Néppárt*, KDNP). The precarious position of the constitutive principles has found expression in the enthronement of a political sovereign who claims to speak for the people as the *pouvoir constituent*, from the Hungarian parliamentary election of 2010 (LUBELLO (2012), pp. 35-8).

A closer look at the 2011 Hungarian Constitution reveals that it is not the final entrenchment of a previously democratic constitution. Many aspects of democratic statehood have been compromised, and Hungary has become a constitutional democracy in name only. First of all, the sovereignty does not belong to the people; the provision concerning popular sovereignty, which should be defended by the State,[12]was reformulated in a restrictive sense, as well as any power of the people to initiate legislation and to participate in public life.[13] Even if Article B(2) states that the people as a «source of public power» shall exercise its power, the role of the citizenry is limited. Previously, in the Republic of Hungary the supreme power was vested in the people, who exercised their sovereign rights directly.[14] It being understood that people's sovereignty is exercised through elected representative, now, despite an avowed democratic state governed by the rule of law, the Hungarian people exercises its power directly only «in exceptional cases.»[15]

There is no change of scenery regarding the popular initiative on a proposed constitutional amendment or constitutional referendums as long as, since the post-communist regime, the Hungarian legal order never provided them. The democracy is at a crossroads; a constitutional "revolution" took place in this country, but it was by the hands of

[12] Article 5, Act XX of 1949-The Constitution of the Republic of Hungary; Article 8(3) FL.
[13] See Articles 28/B/D/E, Act XX of 1949-The Constitution of the Republic of Hungary.
[14] Article 2(2), Act XX of 1949-The Constitution of the Republic of Hungary.
[15] In the context of a national referendum upon the motion of at least two hundred thousand electors, the Parliament shall order it and the national referendum is mandatory, but the discretionary power of the Parliament to order it emerges when the referendum is demanded by only one hundred thousand electors. In any case, if it is held, "the decision made by any valid and conclusive referendum shall be binding on Parliament." (Article 8.1 FL)

representatives and not by means of popular tools.[16] In the name of the people, the governors had changed the constitution and had transformed a liberal democracy into an illegal one.

To complete the framework, it is necessary to outline the constitutional amendment process. First of all, the Hungarian system is distinguished by the lack of the eternity clauses. In line with the constitutional tradition envisaged since the Soviet constitution of 1949, there are no explicit limits for constitutional revision as there is not an aggravated amendment procedure similar to the Italian one. This is a legal order characterized by a "limited rigidity" whose constitutional review procedure provides only a single reading by the (unicameral) parliament and requires the approval of the amendments by two-thirds special majority (DEZSŐ (2010), p. 59).

The last observation in the comparatistic perspective, is the recognition of the political parties as association in which the popular will finds expression and where should be developed.[17] Thus, in regards to constitutional amendment process the popular will finds voice only through political parties and elected representatives.

Furthermore, the scope of law-making organs' constitutional control has come under the restrictive provision. The dominant role of the Constitutional Court regarding its oversight of Parliament within the state organization declined after the abolition of the *actio popularis*.[18] Now the government seems to be more powerful (SPULLER (2014), p. 656).

Understanding a constitution has various implications for how constitutional change should be interpreted, especially in the presence of an overthrown government that was evidence of the people's consent to the new regime (SUBER (1990), p. 22; ALBERT (2009), p. 16).[19] It is important to stress that an unconstitutional constitution is nonetheless rooted in a

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[16] It should be stressed that the referendum was never held for the revision of constitutional text even during the transition period. See DRINÓCZI,T Timea, 2007, "Revisione e manutenzione costituzionale nell'ordinamento ungherese" *in La "manutenzione costituzionale",* Francesco Palermo (a cura di), Cedam, Padova, pp. 437 ss. The Hungarian Electoral Commission has rejected an appeal to referendum on the new Constitution, with an argument entirely consistent with the constitutional order in force, namely stating that the constitutional matter could not be subject of popular consultation, being an exclusive competence of the Parliament. Despite the attempts made, therefore, the government party has refused to submit to a referendum in order to examine the feeling of Hungarian society and extra-parliamentary forces. See KELEMEN, Katalin, 2011, "Bid for referendum on new constitution submitted to the election office", *Politics.hu*. On the inadmissibility of any referendum on constitutional revision, see also HCC Decision. 25/1999 (VII. 7). Unrelated to the constitutional review but linked to the lack of involvement of people in such process, the Hungarian government invite electors to answer a questionnaire regarding certain provisions to be introduced in the new Constitution, some of which were transposed into the text.

[17] Article 3(2), Act XX of 1989-Constitution of the Republic of Hungary; Article VIII(3) FL.

[18] On the new competences of Constitutional Court see KELEMEN, Katalin, 2012, "La Corte Costituzionale" *in La nuova Legge fondamentale ungherese*, Giuseppe Franco Ferrari (a cura di), Giappichelli, Torino, pp. 87-100.

[19] For details on Hungarian constitutional transformations, see STUMPF, Istvan, 2014, "The Fundamental Law of Hungary", *Hungarian Review*, Vol. V, no.2, in http://www.hungarianreview.com/volume/volume_v_no_2_; PACZOLAY, Peter, FERRARI, Giuseppe Franco and TANÁCS-MANDÁK, Fanni (eds.), *Constitutional Issues and Challenges in Hungary and Italy*, Dialóg Campus Kiadó, Budapest (forthcoming).

democratic foundation and that the transition to a different form of government could take place through democratic action. But when the new regime, democratically established, changes the rules in order to limit the power of the governed, and one political institution increases its power compared to another, this transforms the government into an unconstitutional one. In this case, should the people who democratically or constitutionally accepted a constitutional democracy authorize such a political transmutation? With the adoption of the new Hungarian Constitution, there has been a constitutional counterrevolution, in which the people decide to abolish constitutional democracy in favour of a charismatic leader's promises (MURPHY (1995), p. 175). It is in this way that some democratic constitutions undermine participatory democracy (ALBERT (2009), pp. 47-8).

The notion of limiting amendment power has reached most European states, many of which include in their fundament texts explicit restraints on the constitutional amendment of certain provisions or principles, and in some states, the issue of the unconstitutional amendment has entered into scholarly debates. Amending power is also implicitly limited in scope; it has to be consistent with the nature of the system and the constitution's character (ROZNAI (2013a), p. 672), in order to constitutionally safeguard the sovereignty of the people (HALMAI (2016), p. 102). It is true that constitutional amendments with few limitations can change the whole structure and powers of the government. In Hungary, the Parliament is considered to be the sole holder of constituent power,[20] and it often incorporates into the Constitution laws that the Court had previously declared unconstitutional (SZOBOSZLAI (2000), pp. 174, 183-85). A constitutional amendment requires a one-time absolute majority, the two-thirds vote of all of the members of Parliament.[21] Further, pursuant to Article 8(3), «no national referendum may be held on a) any matter aimed at the amendment of the Fundamental Law; [...] d) or any obligation arising from international treaties.» The question arises, however: are the Hungarian people given any ultimate oversight of public power? The answer is negative: the Hungarian people, under their fundamental law, cannot express their opinion in a referendum on the Constitution, any constitutional amendment, and any modification of the international treaty invoked in Article E.

3.2. THE LOST *COURTOCRACY* AND THE DEFERENTIAL INTERPRETATION OF CONSTITUTIONALITY

The most fascinating issue concerning unconstitutional amendment is whether a constitution or amendments to it can be considered unconstitutional. The relationship between unconstitutionality and democracy is highlighted when the extraordinary action of

[20] Article 1(2)(a) FL: "Parliament shall enact and amend the Fundamental Law of Hungary."
[21] Article S FL.

amendment changes the core of a constitution. And an excellent example of this function in modern constitutions is that of Hungary.

This is not the space to devote to the analysis of the democratic nature of the procedure for adopting the new constitution, but undoubtedly, there was not a constituent power of the Parliament's majority. There was not a "gap" of legitimacy given that free elections have been held and the Parliament has adopted the Fundamental Law according to the special majority requested. In any case, if someone wants to consider the establishment of a constituent power in front of not so much the failure to comply with the constitution-making procedure rather than the actual circumstances that brought to an «abnormal strained interpretation» (PACE (2002), p. 103) of the substantive rules of the procedure, then the history will be the "pure judge" of the legitimacy of the new Hungarian Constitution (JAKAB (2012), p. .69). But we should also remember David Hume statement that once a constitution is ratified, issues of procedure simply lose their importance with time (HORKAY HÖRCHER (2012, PP.28-30).

Hungary was more nearly a country run by the Constitutional Court rather than by the Parliament (SCHEPPELE (1999), p.81; SCHEPPELE (2005), p. 44). The *courtocracy* that characterized this legal system has decayed and with the new (un)democratic regime the Constitutional Court has lost much of its relevance. Although the Fundamental Law resets the competencies of the Court providing for several procedures to initiate the review of «any piece of legislation,» in reality, due to the serious restrictions of the competences and the election system of the members and its president, the role of Hungarian Constitutional Court over the control of the legislation and the government became more difficult. Its interpretation has changed significantly towards a more deferential understanding of constitutionality (BODNÁR *et al.* (2017)).

The new Fundamental Law while limits the power of the Constitutional Court empowered it to «annul any piece of legislation or any constituent provision which conflicts with the Fundamental Law [and] with an international agreement within its competence.»[22]

Judicial review of constitutional amendments became a crucial question, linked to the problem of how far constitutional amendment powers could be seen as sovereign, in terms of changing constitutional provisions or the document's entire structure. Restricting constitutional jurisdiction points to a larger issue beyond simply protecting the Court's interests – it concerns Hungarian constitutionalism in its entirety. Critics point out the "different" contemporary Hungarian constitutionalism as long as it mirrors the legitimate components of a constitution adopted by the supermajority of conservative political forces. The balance among rights of individuals and their responsibilities, and the stronger emphasis on communitarian as opposed to individualistic values in the fundamental law seem to

[22] Article 24(3) FL.

legitimate the choices of political community. Besides, individual constitutional provisions can be defended by the counterparts in other national constitutions or even in the EU Charter of Fundamental Rights. However, the European bodies, scrutinizing the Hungarian constitutional changes and the amendments of the fundamental law, its transitional provisions, and some of the organic laws enacted under the new constitutional context, highlighted a decline in terms of European standards (VARJU and CHRONOWSKI (2015), p. 299).

Initially, the Court held illegal parts of the act on the Transitional Provisions to the Fundamental Law, which partly supplemented the new constitution. In order to keep the unity of the Constitution, Hungarian judges have considered looking at the substance of a constitutional amendment, and parts that are not transitory in nature were not be deemed to be part of the Constitution.[23] With the same decision, the Court expressed its duty and right to review the substance of constitutional amendments, and emphasized that «it is the constitutional responsibility of the Court to protect the unity of the Constitution, and to ensure that the text of the Constitution can be clearly identified.»

As a reaction to this decision, in March 2013, the MPs of the governing parties enacted the fourth amendment to the fundamental law. One part of this long amendment simply elevates the annulled non-transitory provisions of the Transitional Provisions into the main text of Hungary's basic law, in some cases with a somewhat modified formulation, while in others unchanged.[24] Another response against the Constitutional Court for a declaration of unconstitutionality was the authorization of both the legislature and government to criminalize homelessness. The Court also declared a ban on political advertisements in the electoral campaign and annulled the very definition of the family in the law on the protection of families as too exclusive. Moreover, the Court expressed constitutional concerns toward private-law limitations of hate speech, which violates the dignity of sections of the Hungarian public. The new amendment allows such limitations to protect racial and other minorities, as well as the general dignity of Hungarians who form the overwhelming majority of the population.

Additionally, there is a set of amendments related to the power of the Constitutional Court itself, as a direct reaction to the unwelcome decisions of the judges. In order to reign in the readiness of the Court to review the substance of constitutional amendments, the new

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[23] HCC Decision 45/2012 (XII. 29.).

[24] The following provisions were lifted to the constitutional rank without any alteration: the rules on nationalities; the authorization of mayors with administrative competences; the authorization of both the chief state prosecutor and the president of the Judicial Council to select another court if they think that the competent one is overloaded with cases; and the extension of the restriction of the review power of the Constitutional Court in financial matters when state debt does not exceed half of the entire domestic product for laws that were enacted in the period when the debt did exceed the limit.

text of the basic law, while allowing review of the procedural aspects of an amendment, specifically excludes any substantive review of the Constitution (HALMAI (2016), pp. 131-32).

While in the past, the Court had not considered being empowered to review constitutional amendments on substantive grounds, in its decision 45/2012 it indeed changed its opinion and took power to review future constitutional amendments for their substantive constitutionality. The fourth amendment's ban on substantive review of constitutional amendments is a direct reaction to this decision, in order to allow the government to escape review by inserting any previously declared unconstitutional provision directly into the Constitution. The Venice Commission's prediction came to fruition in the Constitutional Court's May 21, 2013, decision on the constitutionality of the fourth amendment.[25] In his petition, the Ombudsman argued that by failing to discuss parts of the suggested modification to the amendment at the plenary session, the Parliament violated the formal requirements of the amendment procedure and compromised the unity of the Constitution. The Court did not find any formal mistake in the amendment procedure and rejected the first part of the petition, arguing that there is no substantial limit to the amendment power, and consequently, it has no jurisdiction for such a review.

In its decision of 1992, the Court asserted that a constitutional state cannot be realized by unconstitutional means. The "pure revolution", according to the Court, was Hungary's proclaiming itself a constitutional state after four decades of communist tyranny. In any case, this "constitutional revolution" could not be followed by any further "revolutionary justice"; it is the Constitutional Court that must perform this revolution (LEMBCKE and BOULANGER (2012), p. 279; SOLYOM (2000), pp. 36-7).

On November 30, 2016, just one week after the seventh constitutional amendment had failed, the Constitutional Court declared in ruling 22/2016 (XII. 5.) that, by exercising its competences, it can examine whether the joint exercise of competences under Article E(2) of the Fundamental Law of Hungary (FL) infringes upon human dignity, other fundamental rights, the sovereignty of Hungary, or Hungary's self-identity based on its historical constitution.[26] The Court's decision took into consideration the state sovereignty and the identity review. The sovereignty review and the concept of "state sovereignty" is based on Article B(1) FL, which states that Hungary shall be «an independent, democratic state governed by the rule of law.» As mentioned above, despite the formula containing the

[25] Alkotmanybirosag (AB) [Constitutional Court] May 21, 2013, MK.II 648/2013 (Hung.) in www.mkab.hu/download.php?h=492. See also 2013. évi IV. Magyarorszàg Alaptòrvényének negyedik módositàsa (Fourth Amendment to Hungary's Fundamental Law) in http://lapa.princeton.edu/hosteddocs/hungary/Fourth%20Amendment% 20to%20the%20FL%20-Eng%20Corrected.pdf. See also SCHEPPELE, Kim Lane, "The New Hungarian Constitution: Unconstitutional Constituent Power", *Penn DCC*, 21.02.2013, in http://www.sas.upenn.edu/dcc/documents/Scheppele_ unconstitutionalconstituentpower.pdf.
[26] The review of the main findings of the decision is available at www.iconnectblog.com/2016/12/the-hungarian-constitutional-court-on-the-limits-of-eu-law-in-the-hungarianlegal-system.

popular sovereignty principle,[27] the power of the people is currently exercised through elected representatives, and directly only in exceptional circumstances.

In the Court's understanding, constitutional identity equates to the constitutional (self-)identity of Hungary. Constitutional content is to be determined on a case-by-case basis, based on the interpretation of the FL as a whole and its provision, which «shall be in harmony with the Court's purposes, the National Avowal [,,,], and the achievements of [the] historical constitution.»[28] According to the Court the constitutional identity of Hungary does not mean an exhaustive enumeration of values, such as the freedoms, the division of power, the republican form of state, respect of public law autonomies, freedom of religion, legality, parliamentarianism, equality before the law, recognition of judicial power, protection of nationalities that are living within the state. These match modern and universal constitutional values and the achievement of the country's historical constitution, on which this legal system rests (DRINÓCZI, (2016); KELEMEN (2017), p. 3; HALMAI (2017)).

Following the decision, it is unclear if the Court has created some (semi-)eternity clauses or immutable provisions – as, for example, identity is not created but only recognized by the FL. Consequently, it is not only EU law that cannot be applied because it would infringe upon the identity of Hungary, but formal amending power should be restricted as well. There will likely be two problems with this possible interpretation. Firstly, it does have any firm legal basis, either in the FL or the jurisprudence of the Court, despite acknowledging the legal limits of the constituent, including constitution-amending powers; eventually, (semi-)eternity clauses could "eternalize" questionable constitutional provisions (e.g., freedom of religion versus the establishment of churches; equality before the law versus the definitions of marriage and family). In this way, the Hungarian constitutional setting – which is not, in every respect, in harmony with EU and international obligations – could be carved in stone according to the will of political decision-makers.

Ultimately, the question is whether the reference to constitutional identity provides a constitutional basis for Hungary to exit the EU. The Court has not found in its competence the ability to review unconstitutional amendments until the fourth amendment makes it possible. Until the decision of 22/2016 (XII. 5.), it seemed that it had a lot of arguments to review constitutional amendments substantively, but clarifying the self-identity of Hungary was not one of them. In this decision, the Constitutional Court developed the identity review solely to limit the applicability of the EU law; it did not consider limiting the Parliament's formal amendment power.

[27] Act XX of 1989, Constitution of Republic of Hungary, Article 2(2): "In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives."
[28] Article R(3), FL

4. Concluding Remarks

There is a strong relationship between democracy and unconstitutionality. Returning to the issue of whether a constitutional amendment could be unconstitutional, the answer is positive, no matter who holds such specific amendment power. Similarly, can an entire constitution be unconstitutional? As a matter of form, substance, and from the perspective of popular legitimacy and popular participation, there are grounds upon which a constitutional court could declare an amendment unconstitutional. In light of increasing attacks on liberal democracy, as in Hungary, constitutional actors may well require the courts to take a more active role in invalidating constitutional changes that compromise the foundations of constitutional democracy.

The question of whether a constitution can be unconstitutional is rooted in democratic foundations and may be answered only in reference to the people as the ultimate source of legitimacy. The people, through their direct and indirect approval, can validate or invalidate a constitutional amendment or an unconstitutional constitution. The people could defend constitutional principles through a "revolution," a referendum, or through their representatives; under different forms of consent, people possess the extraordinary power to transform a formally unconstitutional constitution into a legitimate one. But by whom and on which grounds a constitutional amendment or a constitution may be declared unconstitutional? The answer seems obvious: by constitutional courts, based on the textually entrenched procedural requirements or by an extensive interpretation of other constitutional provisions.

The global trend, especially after World War II, is toward acceptance of explicit and implicit limitations on constitutional amendment power, no matter who holds such power. Despite recent developments in Hungary where the Constitutional Court has also rejected the notion of implicit limits, claiming that amending power is unlimited in the absence of any explicit restrictions, there is now a general acknowledgment by constitution drafters and courts that certain "supraconstitutional" principles are unamendable (i.e., that certain amendments are prohibited, and that constitutional courts have the power to review these amendments and to annul those contradicting the "basic structure" or "constitutional core"). Any constitutional amendment that compromises those principles and values can be declared unconstitutional even if the people drive such constitutional change (Roznai (2013b), p. 582).

Supreme principles are protected in various constitutions. They can be universal and common to all modern democratic societies (e.g., a state's religion or official language; the separation or integration of church and state; the rule of law; multiparty systems, political pluralism, or other democratic characteristics; territorial integrity; judicial review; the

separation of powers; sovereignty of the people; or even such general provisions as the spirit of the constitution), or reflect the specific ideals and values of a distinct political culture (e.g., the establishment of federalism). This trend is linked to the general rise of "world constitutionalism," the global spread of "supranational constitutionalism," and judicial review, which all serve to prevent the abuses of majority rule (HALMAI (2016), p. 135).

People, as holders of constitutional amendment power, have to balance their power to initiate, approve or invalidate a constitutional amendment in light of all constitutional provisions and formal requirements. They can create a "constitutional" constitution as well as an unconstitutional one. They are a fundamental component of the constitutional change processes, but where this element is marginal despite the culture of popular sovereignty, the democracy's facets change.

The people may delegate their power to write or approve a constitution to officials tasked with representing their interests, and they may or not approve a constitution directly by referendum. By their direct or indirect consent, they can validate a(n) (un)constitutional constitution. In particular, they can transform a formally unconstitutional constitution into a legitimate one anchored in democratic values (ALBERT (2017), p. 198). The various ways that a constitution or a part of it can be unconstitutional in terms of constitutionality substance and participatory democracy, lead constitutional courts, as guardians of the democracy, to consider alternative grounds and rationales upon which to declare a constitutional amendment unconstitutional or to overturn (un)constitutional changes in name of the constitutional democracy.

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(Un)Constitutional amendment 95/2016 and the limit for public expenses in Brazil: amendment or dismemberment?[1]

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Abstract
This paper intends to analyze, through a logical-deductive methodology, with theoretical and bibliographic revision, the Brazilian constitutional amendment 95/2016 (its content and impacts), in light of Richard Albert's constitutional dismemberment theory.

1. Origin and objectives of the Amendment 95

To troubleshoot an account deficit in Brazil, the president of the Republic proposed an amendment to the constitution to freeze the public investments for 20 years. The Congress approved it in 16 December 2016, that became the Constitutional amendment No. 95, implementing a new tax regime with a limit to the expenses of the federal Government for the next twenty years.

The new tax regime shall take effect as follows: the expenses of the federal Government for 2017 is limited by the available budget for the expenses of 2016, plus inflation of this year. This will take occurance over the next few years until the year 2036. Exceptionally, for education and health the base is the year of 2017. Any change in the rules can only be made from the tenth year of the duration of the procedure and shall be limited to the amendment of the annual correction index. This measure aims to keep Brazil under a permanent economic exception state.[2]

[1] I`d like to thank Eneida Desiree Salgado for the start of this idea, Leticia Regina Camargo Kreuz and Daniel Wunder Hachem (my supervisor) for the assistance of this study. Also, Felipe Balotin Pinto for the text revisions.
[2] MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gatos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. Revista de Investigações Constitucionais, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 259. For the contrary point of view, check out: VALLE, Vanice Regina Lírio do. Novo Regime Fiscal, autonomia financeira e separação de poderes: uma leitura em favor de sua constitucionalidade. Revista de Investigações Constitucionais, Curitiba, vol. 4, n. 1, p. 227-258, jan./abr. 2017.

In short: for each financial year, there shall be a fixed limit for primary total expenditure (which corresponds to the expenses that enables the provision of policies and public services to society) of the Executive, the Judiciary, the Legislature, the Court of Auditors, the Public Ministry of the Union and the Public Defender of the Union. Each one of them will have the responsibility for the establishment of your limit (article 107 of the Transitional Constitutional Provisions Acts).

The new scheme does not allow the total and real expenditure growth above the Government's inflation, even if the economy is well. The case of Brazil differs from other foreign experiences that adopted the ceiling of public spending. The main differences being as follows: the long-term (20 years), the correction of the spending ceiling only by inflation and the inclusion of the provision in the Constitution. Other countries that used the ceiling of public expenditure include Holland, Finland, Sweden, Denmark, Japan, Bulgaria, Georgia and Singapore.[3]

2. Impacts of this (un)constitutional amendment to Brazilian social policies

From the ceiling of expenses implemented, it is possible to foresee some impacts on Brazilian social policies: preventing investments necessary for the maintenance and expansion of public services, development incorporation of technological innovation, increases in pay, hiring and career opportunities, the restructuring necessary as a result of population growth. These impacts are opposed to a constituent project of the welfare State.[4]

Studies conducted by the Institute of research and applied economics to the right to health, show that the Constitutional Amendment 95 brought the following: unlinking expenditure on public health actions and services of current net revenue; loss of resources in relation to previous rules and the reduction of public spending per capita on health care (of R$ 519,00 per person in 2016, which will fall to R$ 411,00 per person in 2036. It should be noted that studies project that in 2036 the Brazilian elderly population will have doubled). Along with the disclaimers of Governments this will allocate more resources on Public Health System in contexts of economic development, which will no longer be used to finance health, goods and services. Allowing which to be shifted to other purposes such as, for example, the payment of financial expenses; more intense affectation of the most vulnerable social groups that rely on

3 EL PAÍS, 2016. Available on: <https://brasil.elpais.com/brasil/2016/11/28/politica/1480332274_865460.html>. Accessed on: 20 dec. 2017.

4 MARIANO, Cynara Monteiro. Emenda constitucional 95/2016 e o teto dos gatos públicos: Brasil de volta ao estado de exceção econômico e ao capitalismo do desastre. Revista de Investigações Constitucionais, Curitiba, vol. 4, n. 1, p. 259-281, jan./abr. 2017. p. 261.

fully of the Public Health System.[5]

3. Critical analysis: constitutional amendment or dismemberment?

The constitutional amendment 95, currently in force in Brazil since December 2016:

(i) represents a constituent political project diametrically opposed to that of 1988, which provides for a social State, centered on human dignity and on the fundamental rights and that requires State intervention for the reduction of the severe economic and social inequalities. In this sense, public investment is essential;

(ii) disrespects the political and constitutional design winner in presidential elections of 2014, to impose a new tax regime different by that endorsed by the people;

(iii) offends the "*clausulas petreas*", or stone clauses, which are, according to paragraph 4 of article 60 of the Brazilian Constitution, themes that cannot change, nor for amendments. These are like a hard core of protection unchanging: the federative form of State, the direct, secret, universal and periodic vote, the separation of powers, the individual rights and guarantees. The Constitutional Amendment 95 violates two of them: State' s federalist form (tax changes influence the autonomy of the government) and fundamental rights (with a great cutback on Brazilian's investments on public policies);[6]

(iv) removes from the next presidents the budget autonomy, and consequently, removes from the Brazilian citizen the possibility to choose the Government from their priority investment policies;

(v) to establish limits for the payment of interest and amortization of debt, generates two consequences: the money reserved for the payment of obligations undertaken by the Brazilian federal Government prevents the expansion and maintenance of public policies; and the public debt might increase considerably. In Japan, this lack of control made debt triple from the third year of validity of the ceiling;

(vi) is doing the opposite of what should be done in times of crisis, when cutting investments

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[5] VIEIRA, Fabiola Sulpino; BENEVIDES, Rodrigo Pucci de Sá. Nota Técnica no 28. Os impactos do novo regime fiscal para o financiamento do Sistema Único de Saúde e para a efetivação do direito à saúde no Brasil. Institute of Research and Applied Economics. Brasília, 2016. Available on: <http://www.ipea.gov.br/portal/images/stories/PDFs/nota_tecnica/160920_nt_28_disoc.pdf>. Accessed on: 20 dec. 2017.

[6] ROZNAI, Yaniv; KREUZ, Letícia Regina Camargo. Conventionality control and Amendment 95/2016 - A Brazilian case of unconstitutional constitutional amendment. This article will be published in 2018.

rather than improving them. Keynes, who's crisis represents lack of investment,[7] along with David Stuckler, demonstrate the negative impact of no public investment in different areas, notably in health and education;[8]

For all these consequences, the *conclusion* is that the new provisions of the Amendment 95 violate the original Constituents' project and represent the setback on fundamental rights and human dignity, going against immutable clauses.

So, in light of Richard Albert's theory, it consists of a ***dismemberment*****,** **not an amendment**, because it is radical change that transforms the fundamental values of the Brazilian Federal Constitution.[9]

Also, according to Yaniv Rosnai, concerning the violation of fundamental rights, it can be said that the Amendment 95 is an unconstitutional change of Brazilian's Constitution, because it alters the constitution's basic principles, changing its identity.[10]

4. Possible alternatives to return to the *status quo ante*

(i) *Control of conventionality of this amendment*, that is a type of control to verify if the internal legal system is in accordance with international commitments entered into by the country. So, it's possible to invalidate norms of domestic law that violate any international treaty ratified by the Government and in force in the country.[11]

Brazil has ratified some Conventions, like the UN Convention on the rights of persons with disabilities and American Convention on Human Rights (Pact of San José, Costa Rica). The new tax regime, allows for the reducing of investments on social policies, goes against human rights, violates international compromises and being subject to this kind of control.

(ii) *enactment of a new amendment*. However, the current political situation is not favorable

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[7] KEYNES, John Maynard. A teoria geral do emprego, do juro e da moeda. São Paulo: Nova Cultural Ltda, 1996. p. 15. Available on: <http://www.ie.ufrj.br/intranet/ie/userintranet/hpp/arquivos/090320170036_Keynes_TeoriaGeraldoempregodojuroedamoeda.pdf>. Accessed on: 26 dec. 2017.

[8] STUCKLER, David; BASU, Sanjay. A economia desumana – por que mata a austeridade. Portugal: Bizancio, 2014.

[9] ALBERT, Richard. Constitutional Amendment and Dismemberment (September 5, 2017). 43 Yale Journal of International Law (2018) Forthcoming; Boston College Law School Legal Studies Research Paper No. 424. Available at: SSRN: https://ssrn.com/abstract=2875931. Accessed on: 24 dec. 2017.

[10] ROSNAI, Yaniv. Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers. A thesis submitted to the Department of Law of the London School of Economics for the degree of Doctor of Philosophy. London, 2014. Available at: <http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf>. Accessed on: 24 dec. 2017.

[11] MAZZUOLI, Valerio de Oliveira. O controle jurisdicional da convencionalidade das leis. 4. ed. rev., atual. e ampl. São Paulo: Ed. RT, 2016.

to this alternative. According to the Brazilian Constitution, those who can only propose amendments are: the members of the Chamber of Deputies or of the Federal Senate; the President of the Republic; and the Legislative Assemblies of the units of the Federation. Since the amendment 95 came from a proposal by the President of the Republic, and was approved by the Senate and the Chamber of Deputies, by a significant majority, a new proposal could only come from the Legislative Assemblies. A new proposal also would have to go through a vote in both houses of Congress, which probably who not get the voted needed.

(iii) *constitutionality control of this unconstitutional constitutional amendment by the Brazilian Supreme Court*, even though it is not explicitly written in the Constitution.[12] This possibility has been recognized since 1993, "which is virtually an inherent power".[13] Despite this possibility, in practice this would never occurred.

Finally, after removing from Brazilian legal system this unconstitutional constitutional amendment, Brazil could achieve a fiscal balance making *reforms in the system of collection*, which also are able to promote a fiscal adjustment. For example, the tax on large fortunes is expected but there are no constitutional regulations.

[12] According to Brazilian Constitution of 1988, the power of the Supreme Federal Court goes only as far as the authority to invalidate 'federal or state law or normative acts' (article 102, I, a).
[13] SALGADO, Eneida Desiree. Brazilian Legislators at Work: Constitutional Amendments as Electoral Strategy. Election Law Journal. Vol. 16, Num. 2, 2017. p. 329.

Constitutionalism beyond the State and the question of the limitation of power

Lilian Barros de Oliveira Almeida[1]

Abstract

Bearing in mind that the limitation of the State's power, throughout history, has been considered one of the elements of constitutionalism, the present paper intends to expose how the limitation of the State's power in Constitutionalism beyond the State, present in the 21st century, is characterized.

1. The word "constitutionalism"

The word "constitutionalism" is somewhat recent, but, as some authors identify, it has a remote idea. Thus, authors such as Gomes Canotilho (2003, pp. 51-54) and Maurizio Fioravanti (2014, pp. 17-54), in a historical-descriptive meaning, affirm that it is possible to speak of an old or primitive constitutionalism, in which the question of the limitation of power was already present. Such constitutionalism would thus correspond to the set of written or customary principles which laid the foundations for the existence of statute rights before the monarch and which simultaneously limited his power.

Later on, came the modern constitutionalism, characterized by the revolutionary movement of universal vocation that triumphed in France with the Declaration of the Rights of Man and of the Citizen of 1789, in opposition to absolutism, with the emergence of the Rule of Law. The separation of Powers was highlighted in this context as an essential element of a Constitution.

By means of the separation of Powers theory, the limitation of State power was characterized by the attribution of the functions of legislating, administering and judging to different organs of the State, autonomous and independent of each other, no longer concentrating power in the unique hands of the sovereign (MONTESQUIEU, 2005, p. 168). It is to be noted, therefore, that the limitation of power in modern constitutionalism occurred internally, by dividing this power into different internal bodies, so that a portion of power limited the others, and vice versa.

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2. State-centered constitutionalism *versus* constitutionalism beyond the State

In view of the great transformations undergone by the State and of international life throughout the twentieth century and in the twenty-first century, state-centered constitutionalism seems to be in a paradoxical situation: at the moment it reaches its maximum extent, it also faces a profound crisis (MIRANDA, 2010, pp. 33-34). Indeed, it is to be noted that globalization, the various forms of integration between States, and the ever-greater intersection between Constitutional Law and International Law have led to the emergence of different forms of constitutionalism beyond the state, such as multilevel constitutionalism (PERNICE, 1999; 2012), transconstitutionalism (NEVES, 2013), networked constitutionalism (SLAUGHTER, 2004), and societal constitutionalism (TEUBNER, 2003; 2012).

However, in spite of moving towards overcoming State-centered constitutionalism, there is no need to speak of the neutralization of State constitutionalism by a global constitutionalism derived from a global political power. What actually happens is the re-signification, by globalization, of State constitutionalism and its characteristic elements. In this sense, it is questioned how the question of the limitation of power, in constitutionalism beyond the State, is configured.

3. Globalization as a constraint external to the sovereign internal power, in the constitutionalism beyond the State

I argue that, unlike the modern liberal constitutionalism, in constitutionalism beyond the State, the limitation to State power operates differently, in an extroversial way, with globalization as a constraint external to the sovereign internal power of the State.

Globalization can be characterized as a process of expansion and intensification of economic, social and legal relations, beyond the borders of the State (SANTOS, 2001, p. 32). Since globalization is a multifaceted and polycentric phenomenon (BECK, 1999, p. 30), it also has the peculiarity of limiting the sovereignty of States and re-signifying the functions of the State, in view of the different modalities of constitutionalism beyond the State.

4. Multilevel constitutionalism and the limitation of power

From the perspective of German professor Ingolf Pernice (2012, p. 17), the multilevel constitutionalism can be defined as that which describes the Constitution as a process of distribution, division and progressive organization of powers at various levels of competence and action, considering the perspective of the individual as a member of a local, national,

regional and global community, at different levels and for different purposes.

Thus, in the sphere of multilevel constitutionalism, I argue that the limitation of State power occurs through the imposition of restrictions on the legislative, administrative, and jurisdictional functions performed by the internal bodies of the states, given that some of these attributions, depending on the theme and the level of performance in question, can be performed at the international, regional, supranational or global level.

5. Network constitutionalism, transconstitutionalism and the limitation of power

Another modality of constitutionalism beyond the state is the network constitutionalism. American professor Anne-Marie Slaughter (2004, Chapters 1-3), in this perspective, speaks of networks of harmonization and an interweaving of legal orders for the better performance of state functions by bodies that are part of the structure of the Legislative, Executive and Judicial Branches through learning and exchanges of information and solutions to problems that have already been faced by government bodies in other States. This governmental network, according to the author, would be the peculiar characteristic of the world order of the 21st century and must be well understood and studied in order to better face the central problems of global governance.

Brazilian professor Marcelo Neves (2013, pp. 115-116), in a similar way, brought the concept of transconstitutionalism as the phenomenon that relates to the forms of relationship between the state, international, supranational and transnational (arbitral) courts for the search for solutions to constitutional problems that present themselves simultaneously in several legal orders, with no need to speak of a hierarchy between these bodies.

From the perspective of network constitutionalism and transconstitutionalism, the limitation of State power undertaken by globalization can be affirmed through the imposition of an expansion of the interaction of national bodies with the bodies of other States which also exercise legislative, administrative and judicial functions. In addition, greater harmonization of state decisions is required with decisions taken by supranational and global bodies. From the same perspective, it is observed that globalization requires that the performance of the legislative, administrative and jurisdictional functions, by the national State, take into account the international order.

6. Societal constitutionalism and the limitation of power

Finally, it is important to highlight German professor Gunther Teubner´s view (2003,

1-24), who brought the conception of societal constitutionalism as an alternative to a State-centered theory of the Constitution. The author, in view of the constitutional fragmentation in times of globalization, verified the existence of true partial civil constitutions, attributed to certain world social subsystems transcendental to the state political process, such as economics, science, health, culture and the environment. Such global social subsystems are organized in a manner similar to that provided in the State Constitutions, giving rise to the performance of state functions by private bodies.

Thus, in the context of societal constitutionalism, globalization acts as an external constraint by allowing the performance of some of the state functions by transnational private actors, under such a perspective of global societal civil constitutions.

7. External limitation of power: weakening or strengthening of the national State?

One might think that the limitations imposed by globalization, to the internal sovereignty of State power, necessarily lead to the weakening of the national State. But would that be true? Or is it possible, on the other hand, to affirm that the limitation of State sovereignty, undertaken by globalization, leads to a greater strengthening of States?

I argue that limiting the sovereignty of States to globalization does not promote the necessary weakening of the nation-State, given that, depending on the concrete situation, such limitation is essential for the achievement of the desired result, requiring that such action is not performed by the State in an isolated way, but by supranational, international or global, for the best benefit of the citizen. Consequently, such joint action between States may lead to the strengthening of each State involved.

Moreover, it is the mutant reality that shapes the essential core of sovereignty. Sovereignty, depending on the concrete situation, needs to be further limited, in order to reach relevant objectives by the State, for the benefit of national citizens themselves. Therefore, it is argued that sovereignty does not have an absolute, closed and static conceptual core and that its essence must allow it to be shaped, so that the State, in an exercise also of sovereignty, may decide to give up portions of its sovereignty, to better execute its attributions.

Conclusion

In view of the foregoing, considering globalization as an external limit to the power of the State, and considering that, historically, limitations are necessary to avoid arbitrariness and the concentration of power, it is possible to conclude affirming that globalization, if

harmonized adequately with the functions of the State, could contribute, within the framework of constitutionalism beyond the State, to efficiency and better performance of functions by the Powers of the national State, as a veritable instrument of check and balance, balancing the performance of sovereign States in international order.

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À propos du statut constitutionnel de l'assurance vieillesse française

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Abstract.
Can we affirm the existence of a constitutional regime for the French retirement system? What is the importance of the jurisprudence of the « Conseil constitutionnel »? The « Conseil constitutionnel » applies the theory of « cliquet anti-retour », authorizing the application of less favourable laws? Can basic social security pensions be perceived from the notion of property rights? The answers of the existence or not of a constitutional regime for de French retirement system can be found in the decisions of the « Conseil constitutionnel ».

Keywords. Constitutional interpretation. Pension Insurance. Retirement. Social rights. Constitutional Court. Effet cliquet. France. The principle of equality. Property rights. Constitutional public service.

Introduction

Reste-t-il possible qualifier l'assurance vieillesse française sur une optique constitutionnelle compte tenu la jurisprudence du Conseil constitutionnel, ce dernier venant en premier lieu assurer la primauté de la *norme fondamentale*[1] ?

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[1] Si nous adoptons un regard un peu plus critique et technique sur l'ordre constitutionnel, il reste inévitable de poser la question : *le Conseil constitutionnel est-il une vraie juridiction ?*
En principe oui, mais non sans des remarques. Nous notons que le propre Conseil dans la décision n° 2011-642 DC du 15 décembre 2011, concernant la loi de financement de la sécurité sociale pour 2012, s'autoproclamé une « juridiction » : « [...] 6. Considérant que l'article 41 a pour objet de modifier les règles relatives aux pouvoirs de contrôle de la Cour des comptes en matière de recouvrement des cotisations et contributions sociales ; qu'à cette fin, le 2° de son paragraphe I substitue aux trois derniers alinéas de l'article L. 243-7 du code de la sécurité sociale un quatrième alinéa dont la première phrase dispose : 'La Cour des comptes est compétente pour contrôler l'application des dispositions du présent code en matière de cotisations et contributions sociales aux membres du Gouvernement, à leurs collaborateurs, ainsi qu'aux organes juridictionnels mentionnés dans la

Dans les différentes constitutions françaises qui précédaient, aucune mention expresse au terme de « *sécurité sociale* » jusqu'à la Constitution de la Vème République de 1958[2]. Celle-ci est mentionnée à l'article 34, relatif à la répartition des compétences

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Constitution' ; qu'il résulte des travaux parlementaires que le législateur a entendu viser ainsi notamment le Conseil constitutionnel ;
7. Considérant que le Conseil constitutionnel figure au nombre des pouvoirs publics constitutionnels ; qu'en adoptant les dispositions précitées le législateur a méconnu l'étendue de sa propre compétence ;
8. Considérant qu'il résulte de ce qui précède que les mots : 'ainsi qu'aux organes juridictionnels mentionnés dans la Constitution' figurant au 2° du paragraphe I de l'article 41 de la loi déférée doivent être déclarés contraires à la Constitution ; [...] ».
La CJUE a eu l'opportunité de trancher sur ce sujet, mais elle est restée à la marge de cette analyse. Le 4 avril 2013 le Conseil constitutionnel a saisi la cour de Luxembourg par une question préjudicielle (Affaire C-168/13 PPU *J. Forrest*). Cette cour a reçu la question, mais ne s'est prononcée pas sur la nature de « juridiction » du Conseil ce qui fait admettre au moins une forme implicite l'acceptation de cette nature. La CJUE a défini par contre dans d'autres affaires (C-506/04, 19 septembre 2006, *Wilson*) que pour être qualifié comme juridiction l'entité en question doit être indépendante, ses membres ne peuvent avoir d'intérêt sur les affaires, elle doit être protégée de toute pression ou intervention extérieure et encore avoir la qualité de tiers par rapport à l'autorité qui a pris la décision contestée.
De ce fait, nous savons que le Conseil constitutionnel est composé par des anciens présidents de la République et actuellement par un ancien premier ministre (*Lionel Jospin*). S'agit-il vraiment d'une juridiction dont l'organisme qui a comme membres personnes qui peuvent juger des lois qui ont été promues et publiées lors de leurs activités politiques ? Ne serait-il pas l'heure d'une réflexion plus approfondie pour la transformation du Conseil constitutionnel en une vraie cour Constitutionnelle, principalement après la mise en œuvre de la QPC ?
[2] Pour des renseignements sur le droit de la sécurité sociale française et son régime de retraites, consulter : DUPEYROUX, Jean-Jacques, BORGETTO, Michel et LAFORE, Robert, *Droit de la sécurité sociale,* 18ème éd., Dalloz, 2015 ; EWALD, François, *L'État-providence,* Grasset, 1986, p. 261 ; ARON-SCHNAPPER, Dominique, *La révolution invisible*, Association pour l'étude de l'histoire de la sécurité sociale 1989 ; IMBERT, Jean, « Les institutions sociales à la veille de la Révolution », in IMBERT, Jean (dir.), *La protection sociale sous la Révolution française*, Association pour l'étude de l'histoire de la sécurité sociale, 1990, p. 21 ; SAINT-JOURS, Yves, DREYFUS, Michel, DURAND, Dominique, « La Mutualité (histoire, droit, sociologie) », in Y. SAINT-JOURS, *Traité de la sécurité sociale*, LGDJ, tome 5, 1990, p. 34 ; PRÉTOT, Xavier, « Les bases constitutionnelles du droit social », *Dr. soc.,* 1991, p. 187 ; GRAVRAND, Pierre, *La sécurité sociale sur le terrain,* Association pour l'étude de l'histoire de la sécurité sociale, 1992 ; REYNAUD, Jean-Daniel et CATRICE-LOREY, Antoinette, *Les assurés et la sécurité sociale. Étude sur les assurés du régime général en 1958,* Association pour l'étude de l'histoire de la sécurité sociale, 1996 ; CHAUCHARD, Jean-Pierre, « La sécurité sociale et les droits de l'Homme (à propos du droit à la sécurité sociale) », *Dr. soc.*, 1997, p. 48 ; BARJOT, Alain (Dir.), *La sécurité sociale – son histoire à travers les textes,* Association pour l'étude de l'Histoire de la Sécurité Sociale, Tome III, 1997, p. 9 ; GIBAUD, Bernard, « Les sociétés de secours mutuels », in LAROQUE, Pierre (dir.), *Contribution à l'histoire financière de la sécurité sociale,* Association pour l'étude de l'histoire de la sécurité sociale, 1999, p. 39 ; LAROQUE, Pierre, « Le plan français de sécurité sociale », in *Recueil d'écrits de Pierre Laroque,* Association pour l'étude de l'histoire de la sécurité sociale, 2005, p. 130. (Extrait original *La revue française du travail*, avril 1946, p. 10/19) ; « La sécurité sociale, élément d'une politique d'ensemble », in *Recueil d'écrits de Pierre Laroque*, Paris, Association pour l'étude de l'histoire de la sécurité sociale, 2005, p. 123. (Extrait original *Au service de l'homme et du droit – Souvenirs et réflexions*. Comité d'histoire de la sécurité sociale, 1993, p. 197) ; NETTER, Francis, *La sécurité sociale et ses principes,* Dalloz, 2005, p. 16 ; DURAND, Paul, *La politique contemporaine de sécurité sociale,* Dalloz, [reproduction en fac-similé de 1953], 2005, p. 193 ; BORGETTO, Michel, « La notion de service public constitutionnel face au droit de la protection sociale », in *Mél. Jean-François Lachaume. Le droit administratif : permanences et convergences,* Paris, Dalloz, 2007, p. 98 ; HERRERA, Carlos Miguel, *Les droits sociaux,* PUF (Que sais-je ?), 2009, p. 40 ; BORGETTO Michel et LAFORE, Robert, *Droit de l'aide et de l'action sociale,* 7ème éd., Montchrestien, 2009, p. 56 ; VERKINDT, Pierres-Yves, « La réforme des retraites. Entre le clair et l'obscur », *Dr. soc.*, 2011, p. 256. ; VERKINDT, Pierre-Yves et GRAUJEMAN, Elisabeth, *Réforme des retraites et emploi*

législatives et, plus récemment, dans d'autres passages, lorsque l'on se réfère à la loi de financement de la sécurité sociale.

La jurisprudence du Conseil constitutionnel, d'après l'arrêt *Liberté d'association* du 16 juillet 1971, a inauguré ce que la doctrine appelle le *bloc de constitutionnalité*. Il s'agit du *Préambule de la Constitution du 4 octobre 1958*, qui renvoie au *préambule de la Constitution du 27 octobre 1946* et à la *Déclaration des droits de l'homme et du citoyen du 26 août 1789*. Une loi constitutionnelle en 2004 a modifié le préambule de la Constitution de 1958 afin d'y introduire un renvoi à la *Charte de l'environnement*, laquelle fait désormais partie de ce bloc. La sécurité sociale, il est vrai, n'a pas été mentionnée dans les dispositions dudit bloc, ce qui n'a pas empêché, en revanche, que certains principes fondamentaux fussent interprétés en son faveur[3].

Sur le préambule de la Constitution de 1946, par exemple, les alinéas suivants sont retenus par le Conseil constitutionnel en matière de sécurité sociale. Son alinéa 5 dispose que « chacun a le devoir de travailler et le droit d'obtenir un emploi. Nul ne peut être lésé, dans son travail ou son emploi, en raison de ses origines, de ses opinions ou de ses croyances ». L'alinéa 10 dispose que « la Nation assure à l'individu et à la famille les conditions nécessaires à leur développement ». L'alinéa 11 dispose que la Nation *« garantit à tous, notamment* à l'enfant, à la mère et *aux vieux travailleurs*, la protection de la santé, *la sécurité matérielle*, *le repos* et les loisirs. *Tout être humain qui, en raison de son âge*, de son état physique ou mental, de la situation économique*, se trouve dans l'incapacité de travailler a le droit d'obtenir de la collectivité des moyens convenables d'existence* ».

Il est possible de déduire de ce fait certains éléments qui donnent un *statut* constitutionnel à l'assurance vieillesse considérant qu'elle doit assurer aux vieux travailleurs et aux personnes âgées le droit de repos ainsi comme le droit d'obtenir les moyens appropriés pour sa subsistance à la charge de la collectivité, conformément à l'alinéa 11 du préambule de la Constitution de 1946.

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des seniors, éd. Liaisons, 2e éd. refondue et mise à jour, 2012 ; KESSLER, Francis, *Droit de la protection sociale,* 5ème éd., Dalloz, 2014 ; BEC, Collete, *La sécurité sociale. Une institution de la démocratie,* Ed. Gallimard, 2014, p. 85 ; CHARPENTIER, François, *Retraites complémentaires. Histoire et place des régimes Arrco et Agirc dans le système français. 75 ans de paritarisme,* Economica, 2014, p. 17/18 ; PETIT, Franc, *Droit de la protection sociale,* 2ème éd., Gualino éditeur, 2014, p. 33/34 ; CHAUCHARD, Jean-Pierre, « Les retraites. Avant-propos », *Dr. soc.*, 2014, p. 588 ; MORVAN, Patrick, *Droit de la protection sociale,* 7ème éd., LexisNexis, 2015 ; PRETOT, Xavier, *Droit de la sécurité sociale,* 14ème éd., Dalloz, 2015.

[3] « Le droit de la sécurité sociale imprègne la vie de tous les individus depuis leur conception jusqu'à leur dernier souffle ». LAROQUE, Pierre, « Sécurité sociale et vie publique », *Dr. soc.,* 1960, p. 665.

Nous pouvons noter dès lors l'importance de cet encadrement constitutionnel d'assurance retraite et l'observance du *principe de l'égalité* (**1**). Cela n'empêche pas que le Conseil constitutionnel admette des changements de législation dans un sens moins favorable aux assurés, en repoussant la formulation de la théorie du *cliquet anti-retour* (**2**), ainsi que la notion de prestation de retraite comme étant un *droit de propriété* (**3**).

01) Le principe de l'égalité et les retraites

Le *principe d'égalité* est « l'une des pierres angulaires, pour ne pas dire la véritable colonne vertébrale, du droit public français »[4]. On constate ainsi que le Conseil constitutionnel établit que la sécurité sociale a un rôle assez important dans *la redistribution et la promotion d'égalisation des conditions dignes d'existence*. Sa jurisprudence a consolidé en raison de ce principe une prohibition de discriminations tenues pour injustifiables ou injustifiées[5]. Ainsi, par exemple, les *Sages* ont jugé qu'en principe l'employeur peut mettre à la retraite tout salarié ayant atteint l'âge ouvrant le droit au bénéfice d'une pension de retraite à taux plein. Dans ce cas, le législateur, en adoptant l'article L. 1237-5 du Code du travail, n'a fait qu'exercer la compétence que lui dévolue l'article 34 de la Constitution pour mettre en œuvre le droit pour chacun d'obtenir un emploi, tout en permettant l'exercice de ce droit par le plus grand nombre. Il s'est fondé sur des critères objectifs et rationnels en lien direct avec l'objet de la loi. Dès lors, d'après le Conseil *il n'a méconnu ni le cinquième alinéa du Préambule de 1946 ni le principe d'égalité devant la loi*[6].

Le Conseil a également précisé que les salariés liés par un contrat de travail de droit privé relèvent, au regard de la législation sur les retraites, de régimes juridiques différents de celui, respectivement, des agents de droit public, des travailleurs indépendants et des non-salariés agricoles. Par conséquent, les articles 7 et 10 relatifs au *dispositif de*

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[4] BORGETTO, Michel, « Égalité et protection sociale », *RDSS*, 2013, p. 377.

[5] Le principe d'égalité est mentionné dans le préambule et dans les articles 1er, 2, 3, 72-2 et 72-3 de la Constitution du 4 octobre 1958 ; les articles 1er et 6 de la Déclaration des droits de l'homme et du citoyen ; les alinéas 3, 5, 12 et 13 du Préambule de la Constitution de 1946.

[6] Cons. const., 2010-98 QPC, 4 février 2011, Journal officiel du 5 février 2011, p. 2355, texte n°90, cons. 5.
En appliquant la hausse du taux de contribution employeur sur les « retraites chapeau » aux seules rentes versées au titre des retraites liquidées à compter du 1er janvier 2013, le législateur a entendu ne pas remettre en cause le taux de contribution applicable aux rentes versées au titre de retraites déjà liquidées ou qui le seraient d'ici le 31 décembre 2012. S'agissant de pensions de retraite, *le choix du législateur de faire dépendre le taux de contribution de la date de la liquidation de ces pensions ne méconnaît pas le principe d'égalité.* Cons. const., 2012-654 DC, 9 août 2012, Journal officiel du 17 août 2012, p. 13496, texte n° 2, cons. 62.
Contraire au principe d'égalité devant les charges publiques, consulter Cons. const., 2012-662 DC, 29 décembre 2012, Journal officiel du 30 décembre 2012, p. 20966.

pénibilité prévus par la *loi garantissant l'avenir et la justice du système de retraites* (Loi n° 2014-40 du 20 janvier 2014) sont conformes à la Constitution. Ils ont été déclarés applicables aux salariés de droit privé ainsi qu'au personnel des personnes publiques employées dans les conditions du droit privé. C'est-à-dire que le législateur pouvait ne pas appliquer ces dispositifs aux agents de droit public qui relèvent de régimes juridiques différents au regard de la législation sur les retraites. L'article 7 complétait ainsi le dispositif existant relatif à la fiche de prévention de la pénibilité. L'article 10 créait le compte personnel de prévention de la pénibilité qui renvoie à cette fiche. Parmi les salariés de droit privé, sont seuls exclus de ce dispositif ceux qui sont affiliés à un régime spécial de retraite comportant un dispositif spécifique de reconnaissance et de compensation de la pénibilité. Par la suite, le législateur n'a pas traité différemment des personnes placées dans une situation identique, ne s'agissant pas de violation du principe d'égalité dont ces arguments ont été écartés[7].

Un autre exemple en matière d'égalité serait la décision qui a apprécié la constitutionnalité du paragraphe I de l'article 9 de la *loi de financement rectificative de la sécurité sociale pour 2014*, lequel *a suspendu l'application de la règle de revalorisation annuelle des pensions de retraite servies par les régimes de base de sécurité sociale en 2014*[8]. Par dérogation, les dispositions du paragraphe II du même article prévoyaient l'application de cette règle de revalorisation lorsque le montant total des pensions de vieillesse était inférieur ou égal à 1.200 euros par mois au 30 septembre 2014. Elles prévoyaient également, pour les assurés dont le montant total des pensions était supérieur à 1.200 euros et inférieur ou égal à 1.205, une revalorisation de la pension de retraite servie par le régime de base selon un coefficient annuel réduit de moitié. Elles prévoyaient enfin l'application de règles de revalorisation similaires pour les régimes de retraite dont tout ou partie de la pension était exprimé en points. Ainsi, d'après le Conseil, le législateur a entendu préserver les faibles pensions de retraite. Dès lors, l'article 9 n'a pas créé de rupture à l'égalité devant les charges publiques et leurs dispositions seraient conformes à la Constitution. Par contre, cette même loi de financement rectificative de la sécurité sociale, aux fins

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[7] Cons. const., 2013-683 DC, 16 janvier 2014, cons. 24, JORF du 21 janvier 2014 page 1066.

[8] « Et on est confronté à un paradoxe : dans ses phases de construction, et alors même qu'elle réalisait de façon assez étendue les promesses de l'égalité, la protection sociale n'a eu nul besoin des droits constitutionnels et des protections qui leur sont attachées ; et c'est au moment précis où l'égalité et le corollaire qu'en constituent les droits sociaux sont nettement affirmés et dotés d'instruments destinés à les garantir que s'installent de profonds débats sur le sens et la portée de cette protection. Cette égalité et ces droits sociaux sont-ils en mesure de cadrer les prétentions, d'ordonner les débats et de conduire à l'établissement de compromis sociaux et politiques féconds ? Pour l'heure, si l'on considère la résistance du modèle hérité de sécurité sociale, on pourrait répondre positivement à cette question ; mais si l'on insiste au contraire sur les évolutions plus contestables qu'il a connues, on pourrait incliner à un certain pessimisme. C'est que, finalement, les principes se découvrent en général après qu'on les ait incarnés et qu'en revanche, il reste douteux qu'ils aient une portée suffisamment prescriptive pour déterminer ce qui adviendra ». LAFORE, Robert, « L'égalité en matière de sécurité sociale », *RDSS*, 2013, p. 379.

d'augmenter le pouvoir d'achat des salariés dont la rémunération était modeste, *aurait institué une réduction dégressive des cotisations salariales de sécurité sociale des salariés dont la rémunération « équivalent temps plein » était comprise entre 1 et 1,3 salaire minimum de croissance*. Toutefois, dans le même temps il a maintenu inchangée, pour tous les autres salariés, l'assiette de ces cotisations. De ce fait, en considérant l'article 6 de la Déclaration des droits de l'homme et du citoyen de 1789 et du fait que « le *principe d'égalité* ne s'oppose ni à ce que le législateur règle de façon différente des situations différentes ni à ce qu'il déroge à l'égalité pour des raisons d'intérêt général, pourvu que, dans l'un et l'autre cas, la différence de traitement qui en résulte soit en rapport direct avec l'objet de la loi qui l'établit », le Conseil Constitutionnel a jugé que les dispositions de l'article 1er de la loi en référence méconnaissaient le principe d'égalité et ont été déclarées contraires à la Constitution[9]. Le principe d'égalité est alors un principe constitutionnel des plus puissants en matière de retraites. La solidarité poursuit cette même tendance.

02) Le principe de la solidarité nationale et de l'intangibilité des droits : une non-régression des droits à partir d'une réflexion sur la jurisprudence du cliquet

La législation sur le système de retraites peut subir des changements qui contiennent, par exemple, des conditions plus strictes pour l'éligibilité à une prestation ou une augmentation du taux de cotisation sociale. À travers *la décision n° 86-225 DC du 23 janvier 1987*, le Conseil constitutionnel a reconnu la possibilité au législateur de subordonner à une durée de résidence en France aux fins de recevoir une prestation sociale, à condition que cette condition ne mette pas en cause le « droit de chacun à des moyens convenables d'existence ». Toutefois, les *Sages* ont tranché qu'il est totalement admis que le législateur vienne établir d'autres conditions supplémentaires à la prestation, *même plus restrictives*, sans que cela soit qualifié comme un fait qui méconnaisse l'alinéa 11 du Préambule de la Constitution de 1946. Le considérant 17 a ainsi établi « qu'il incombe, tant au législateur

[9] « 13. Considérant [...]; qu'ainsi, un même régime de sécurité sociale continuerait, en application des dispositions contestées, à financer, pour l'ensemble de ses assurés, les mêmes prestations malgré l'absence de versement, par près d'un tiers de ceux-ci, de la totalité des cotisations salariales ouvrant droit aux prestations servies par ce régime ; que, dès lors, le législateur a institué une différence de traitement, qui ne repose pas sur une différence de situation entre les assurés d'un même régime de sécurité sociale, sans rapport avec l'objet des cotisations salariales de sécurité sociale ; qu'il résulte de ce qui précède que les dispositions de l'article 1er de la loi déférée, qui méconnaissent le principe d'égalité, doivent être déclarées contraires à la Constitution ; [...] » (Cons. const., 2014-698 DC, 6 août 2014, JORF du 9 août 2014 page 13358).
Sur ce sujet, consulter également : GAY, Laurence, « L'égalité et la protection sociale dans les premières décisions QPC du Conseil constitutionnel : un bilan mitigé », *RDSS*, 2010, p. 1061 ; KESSLER, Francis, « Égalité et protection sociale complémentaire », *RDSS*, 2013, p. 392 ; AKANDJI-KOMBE (dir.), Jean-François, *Égalité et droit social,* IRJS Éditions, 2014.

qu'au Gouvernement, conformément à leurs compétences respectives, de déterminer, dans le respect des principes proclamés par le onzième alinéa du Préambule, les modalités de leur mise en œuvre ; qu'il suit de là qu'il appartient au pouvoir réglementaire, dans chacun des cas prévus à l'article 4 de la loi, de fixer la durée de la condition de résidence de façon à ne pas aboutir à mettre en cause les dispositions précitées du Préambule et en tenant compte à cet effet des diverses prestations d'assistance dont sont susceptibles de bénéficier les intéressés ; que toute autre interprétation serait contraire à la Constitution »[10].

Même plus restrictives ou avec des conditions d'éligibilité moins favorables, c'est au législateur d'opérer cette pondération entre l'intérêt public et l'existence de droits acquis, dont cette altération ne serait pas admise en cas d'atteinte portée à l'exercice d'un droit ou d'une liberté ayant valeur constitutionnelle[11]. Sur la question relative au principe de l'intangibilité des droits à retraite liquidés, le Conseil s'est déjà manifesté en estimant qu'aucune règle ni aucun principe constitutionnel ne le garantissait[12], ce qui accorde au pouvoir public une très large marge d'appréciation[13].

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[10] Cf. *Cons. const.*, décision n° 86-225 DC du 23 janvier 1987.
« [...] 12. Considérant que l'article 4 de la loi a pour objet d'introduire une condition de durée minimale de résidence sur le territoire français, dans des conditions fixées par décret, pour l'attribution de l'allocation spéciale prévue par les articles L. 814-1 et suivants du code de la sécurité sociale, de l'allocation supplémentaire du fonds national de solidarité régie par les articles L. 815-1 et suivants de ce code et de l'allocation aux adultes handicapés visée par les articles L. 821-1 et suivants du code précité ;
[...]
18. Considérant que sous les réserves ci-dessus énoncées l'article 4 de la loi n'est pas contraire à la Constitution ; ».

[11] « A. La protection limitée des droits acquis
La faiblesse de la protection constitutionnelle des droits acquis est révélée par la reconnaissance de la prévalence de la mutabilité législative : 'le législateur ne peut lui-même se lier [et] une loi peut toujours et sans condition, fût-ce implicitement, abroger ou modifier une loi antérieure ou y déroger'. *Une exception générale à cette possibilité existe cependant : une loi ne peut en abroger une autre 'si cette abrogation [a] pour effet de porter atteinte à l'exercice d'un droit ou d'une liberté ayant valeur constitutionnelle*'. Cette exception n'en est pas réellement une, car l'interdiction de porter atteinte à une exigence constitutionnelle pèse toujours sur le législateur, que ce soit ou non à l'occasion de l'abrogation ou de la modification d'une loi antérieure. *Quoi qu'il en soit, les lois qui en modifient ou en abrogent d'autres sont considérées comme poursuivant un intérêt général actualisé, qu'il n'appartient pas au Conseil constitutionnel d'apprécier, et la pérennité des lois antérieures ne saurait de ce fait leur être opposée* ». VALEMBOIS, Anne-Laure, « La constitutionnalisation de l'exigence de sécurité juridique en droit français », *Cahiers du Conseil constitutionnel n° 17*, mars 2005. Disponible sur http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-17/la-constitutionnalisation-de-l-exigence-de-securite-juridique-en-droit-francais.51965.html. Accès le 14/04/2015.

[12] Cf. *Cons. const.*, décision n° 94-348 DC du 03 août 1994. Loi relative à la protection sociale complémentaire des salariés et portant transposition des directives n° 92/49 et n° 92/96 des 18 juin et 10 novembre 1992 du conseil des communautés européennes.
« [...] 4. Considérant qu'aux termes de l'article 34 de la Constitution, la loi détermine les principes fondamentaux 'du droit du travail, du droit syndical et de la sécurité sociale' ; qu'il est loisible au législateur, dans le domaine de compétence qui est le sien, de modifier, compléter ou abroger des dispositions antérieures ; qu'il lui incombe seulement de ne pas priver de garanties légales des principes constitutionnels ; [...]

De ce fait, dans sa décision du 9 novembre 2010, le Conseil constitutionnel a décidé que l'exigence constitutionnelle résultant du onzième alinéa du Préambule de 1946 implique la mise en œuvre d'une *politique de solidarité nationale* en faveur des travailleurs retraités[14]. Toutefois, il est possible pour le législateur, afin de satisfaire cette exigence, de choisir les modalités concrètes qui lui paraissent appropriées. En particulier, il lui est à tout moment loisible, statuant dans le domaine qui lui est réservé par l'article 34 de la Constitution, de modifier des textes antérieurs ou d'abroger ceux-ci en leur substituant, le cas échéant, d'autres dispositions. Il ne lui est pas moins loisible d'adopter, pour la réalisation ou la conciliation d'objectifs de nature constitutionnelle, des modalités nouvelles dont il lui appartient d'apprécier l'opportunité[15]. Cependant, l'exercice de ce pouvoir ne saurait aboutir à priver de garanties légales des exigences de caractère constitutionnel[16].

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13. *Considérant que les sénateurs, auteurs de la saisine, soutiennent qu'en ne rendant obligatoire que la constitution de provisions correspondant aux engagements nés après l'intervention de la loi, celle-ci méconnaît 'le principe de l'intangibilité des droits à retraite liquidés' ; qu'ils affirment aussi que le principe d'égalité est méconnu à l'encontre de certains salariés faute pour eux de bénéficier de la qualité de créancier privilégié lorsque leurs droits sont garantis au bilan de l'entreprise ; qu'enfin, ils font valoir qu'est également contraire au principe d'égalité le dernier alinéa de l'article L. 941-2 dès lors qu'il exonère totalement certaines institutions de retraite de l'obligation de garantir leurs engagements ;*
14. Considérant en premier lieu qu'aucune règle ni aucun principe constitutionnel ne garantit 'l'intangibilité des droits à retraite liquidés' ; que par suite ce grief ne saurait qu'être écarté ; [...] ».

[13] Le législateur a par exemple changé les conditions pour l'ouverture des droits sans être censuré par le Conseil constitutionnel : « [...] 127. Considérant d'autre part que le législateur a subordonné le bénéfice des autres formes d'aide sociale à la régularité du séjour des personnes concernées ; que toutefois il a confié au ministre chargé de l'action sociale la responsabilité de déroger à cette règle générale ainsi qu'à la condition de résidence prévue s'agissant de l'aide médicale à domicile pour tenir compte de circonstances exceptionnelles ; que cette disposition doit être entendue comme destinée à assurer la mise en œuvre effective des principes énoncés par les dispositions précitées du Préambule de la Constitution de 1946 ; que sous cette réserve d'interprétation, les dispositions contestées ne sont pas contraires à la Constitution ; [...] ». *Cons. const.*, décision n° 93-325 DC du 13 août 1993. Loi relative à la maîtrise de l'immigration et aux conditions d'entrée, d'accueil et de séjour des étrangers en France.

[14] Consulter, PRÉTOT, Xavier, « L'alinéa 11 du Préambule », in COGNAC, Gérard, PRÉTOT, Xavier, TEBOUL, Gérard, (dir.), *Le préambule de la constitution du 27 octobre 1946,* Dalloz, 2001, p. 261.

[15] « 9. Considérant qu'en adoptant la loi déférée, *le législateur a voulu préserver le système de retraite par répartition, confronté à d'importantes difficultés de financement ; qu'il a notamment tenu compte de l'allongement de l'espérance de vie* ; qu'au nombre des mesures qu'il a prises figure le report à soixante-deux ans de l'âge légal de départ à la retraite, applicable, de façon progressive jusqu'en 2018, tant aux salariés du secteur public qu'à ceux du secteur privé ; qu'il a prévu ou maintenu des possibilités de retraite anticipée au bénéfice des personnes ayant eu des carrières longues, de celles ayant un taux d'incapacité de travail fixé par voie réglementaire, de celles exposées à des 'facteurs de pénibilité' et atteintes d'incapacité permanente, des travailleurs handicapés ou des personnes exposées à l'amiante ; *que, ce faisant, il a pris des mesures qui visent à garantir la sécurité des vieux travailleurs conformément au Préambule de 1946 ; que ces mesures ne sont pas inappropriées à l'objectif qu'il s'est fixé* ; [...] » *Cons. const.*, 2010-617 DC, 9 novembre 2010, JORF du 10 novembre 2010, p. 20056, texte n° 2, Rec. p. 310. Dans le même sens, *Cons. const.*, 2011-123 QPC, 29 avril 2011, Journal officiel du 30 avril 2011, p. 7536.

[16] « En dépit de l'obligation jurisprudentielle du Parlement de ne pas priver des exigences constitutionnelles de garanties légales, le Conseil constitutionnel admet clairement la possibilité, pour le législateur, de supprimer une garantie légale sans pour autant y substituer une autre. La canalisation de l'action du pouvoir législatif permet donc une relative régression. Il suffit pour cela que

Dans une autre décision, le Conseil constitutionnel a tranché que l'exigence constitutionnelle résultant du onzième alinéa du Préambule de 1946 implique également la mise en œuvre d'une politique de *solidarité nationale* en faveur des travailleurs retraités. Il appartient au législateur de choisir les modalités concrètes qui lui paraissent appropriées. En instaurant un régime de retraite anticipée pour les professionnels libéraux reconnus inaptes au travail en conformité à l'article L 643-5 du CSS, le législateur a mis en œuvre, sans le méconnaître, les exigences constitutionnelles précitées du onzième alinéa du Préambule de 1946[17].

Dans sa décision n° 2003-483 DC du 14 août 2003 portant sur la *réforme des retraites*, loi du 21 août 2003, le Conseil constitutionnel a maintenu cette jurisprudence qui a mis en évidence l'intérêt de la solidarité nationale conjointement à la possibilité de mutabilité des droits sociaux par convenance et opportunité du législateur : « [...] 7. Considérant que l'exigence constitutionnelle résultant des dispositions précitées implique la mise en œuvre d'une politique de solidarité nationale en faveur des travailleurs retraités ; qu'il est cependant possible au législateur, pour satisfaire à cette exigence, de choisir les modalités concrètes qui lui paraissent appropriées ; qu'en particulier, il lui est à tout moment loisible, statuant dans le domaine qui lui est réservé par l'article 34 de la Constitution, de modifier des textes antérieurs ou d'abroger ceux-ci en leur substituant, le cas échéant, d'autres dispositions ; qu'il ne lui est pas moins loisible d'adopter, pour la réalisation ou la conciliation d'objectifs de nature constitutionnelle, des modalités nouvelles dont il lui appartient d'apprécier l'opportunité et qui peuvent comporter la modification ou la suppression de dispositions qu'il estime excessives ou inutiles ; que, cependant, l'exercice de ce pouvoir ne saurait aboutir à priver de garanties légales des exigences de caractère constitutionnel ; 8. Considérant que, du point de vue de son économie générale, la loi déférée a mis en œuvre l'exigence constitutionnelle précitée sans la priver de garanties légales ; 9. Considérant qu'il résulte de ce qui précède que le grief doit être rejeté ; [...] »[18].

On retiendra pourtant que le Conseil constitutionnel a admis la possibilité de changer les critères des prestations de retraite, même si ces changements sont moins

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l'exercice du pouvoir législatif n'aboutisse pas à priver de garanties légales les principes ou les exigences constitutionnelles. Dans la stricte limite de ne pas priver les exigences constitutionnelles de telles garanties, la loi peut mettre fin à une disposition ou une mesure législative sans faire l'objet d'une censure de la part du juge ». MOLLION, Grégory, « Les garanties légales des exigences constitutionnelles », *RFD const.,* n° 62, 2005, p. 262.

[17] Cons. const., 2011- 170 QPC, 23 septembre 2011, Journal officiel du 24 septembre 2011, p. 16017, texte n° 78, cons. 4 et 6.

[18] *Cons. const.*, décision n° 2003-483 DC du 14 août 2003. Loi portant réforme des retraites.

favorables. Ce positionnement peut être vu comme un contrepoids à la jurisprudence de plusieurs cours constitutionnelles étrangères désignée sous le nom « d'obligation de non régression des droits sociaux ». En France nous aurions la jurisprudence du « cliquet *anti-retour* », laquelle a été introduite par la décision du Conseil constitutionnel 84-181 DC, 10 octobre 1984. Cette jurisprudence prétendrait établir que des dispositions législatives qui reviendraient sur des droits reconnus dans une loi déjà existante seraient censurées par les gardiens de la Constitution si les conditions prévues ne fussent pas maintenues. Ainsi, une nouvelle législation pourrait être seulement valide si elle est apte à rendre plus effectif un droit, évitant ainsi les régressions d'une garantie précédemment consacrée. Ce même Conseil, par contre, en 1986, a changé sa position permettant au législateur de faire des changements qui pourraient être qualifiés comme en mouvement descendant, soit « moins favorable », avec la remarque que « l'exercice de ce pouvoir ne saurait aboutir à priver de garanties légales des exigences de caractère constitutionnel »[19].

Le Conseil constitutionnel a déjà autorisé en plusieurs reprises des changements et réformes considérables dans le système de protection français[20]. Cela met en évidence le relativisme d'une argumentation pure et simple d'un soi-disant *droit social acquis* à tel ou tel régime juridique de protection. Cependant, nous pensons qu'en considération de l'actuel contentieux constitutionnel, une reformulation de la théorie sur l'existence d'une « obligation de non-régression » des droits sociaux à partir des jurisprudences *Encliquetage* ou *standstill* du droit belge[21] ou même une relecture de la jurisprudence *cliquet* dans le droit français, ne seraient pas totalement exclus à l'avenir[22]. Ce raisonnement serait fondé sur la théorie du

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[19] [...] 2. Considérant qu'il est à tout moment loisible au législateur, statuant dans le domaine qui lui est réservé par l'article 34 de la Constitution, de modifier des textes antérieurs ou d'abroger ceux-ci en leur substituant, le cas échéant, d'autres dispositions ; qu'il ne lui est pas moins loisible d'adopter, pour la réalisation ou la conciliation d'objectifs de nature constitutionnelle, des modalités nouvelles dont il lui appartient d'apprécier l'opportunité et qui peuvent comporter la modification ou la suppression de dispositions qu'il estime excessives ou inutiles ; que, cependant, l'exercice de ce pouvoir ne saurait aboutir à priver de garanties légales des exigences de caractère constitutionnel ; [...] ». Cf. Cons. const. 86-210 DC, 29 juillet 1986, Rec. p. 110. Voir aussi Cons. const. 2009-577 DC, 3 mars 2009, JO 7 mars 2009, p. 4336 et Cons. const. 2009-588 DC, 6 août 2009, JO 11 août 2009, p. 13319.

[20] « L'instabilité est de l'essence même des systèmes de Sécurité sociale », conforme DUPEYROUX, Jean-Jacques, « Le plan Juppé », *Dr. soc.*, 1996, p. 753.

[21] HAUMONT, Francis, « Le droit constitutionnel belge à la protection d'un environnement sain État de la jurisprudence », *Revue juridique de l'environnement*, nº Extra 1, 2005. p. 41-52. V. décision de la Cour constitutionnelle belge : Arrêt 5/2004 R.G. 2618. Obligation de *Standstill* déduite de l'article 23 alinéa 3, 2°et 4° de la constitution belge en matière d'aide sociale. Consulter également les arrêts n° 169/2002, 5/2004 et n° 123/2006 de la Cour d'arbitrage belge ; HACHEZ, Isabelle, *Le principe de standstill dans le droit des droits fondamentaux : une irréversibilité relative*. Bruylant, Athènes, Sakkoulas, Baden-Baden, Nomos Verlagsgesellschaft, 2008.

[22] « Cet aspect de la conception des libertés est moins développé chez le juge constitutionnel français mais il existe à travers la jurisprudence dite de l''effet cliquet'. Le Conseil constitutionnel considère le législateur ne saurait modifier ou abroger des dispositions législatives touchant une liberté comme la liberté de communication qu''en vue d'en rendre l'exercice plus effectif'). Il ne s'agit pas à proprement parler d'une obligation positive mais c'est une forme d'action positive en faveur d'une protection de la

« non-retour » lié à la formulation d'un « contenu minimal » ou « essentiel » pour la jouissance de droits constitutionnellement prévus.

Bien que la Haute Cour ait déjà jugée de façon contraire dans sa décision n° 385 DC du 30 décembre 1996[23], nous sommes d'avis que ne pourrait être totalement écartée une nouvelle appréciation, an niveau d'une *Question prioritaire de constitutionnalité – QPC,* par exemple, de partir d'une (re)lecture du *principe de confiance légitime* lequel est présent dans la jurisprudence du *droit allemand* et utilisé également par la CJUE[24]. Ce principe porte, pour l'essentiel, que dans le cas où le législateur supprime tel ou tel élément de l'ordre juridique, il doit au moins prévoir des conditions d'accompagnement ou des mesures transitoires en faveur des personnes qui ont naturellement une *espérance légitimement fondée.* Cela serait commun en matière de retraites comme le cas d'un assuré qui entre jeune dans un régime étatique et obligatoire de retraites et après des années de cotisations et

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liberté. Ce souci de faire prévaloir certaines libertés se traduit aussi dans la création de la catégorie des objectifs de valeur constitutionnelle sans que celle-ci ne crée une véritable obligation à la charge du législateur. Significative à cet égard est la consécration comme objectif de valeur constitutionnelle de 'la possibilité pour toute personne de disposer d'un logement décent' ». ANDRIANTSIMBAZOVINA, Joël, « La conception des libertés par le Conseil constitutionnel et par la Cour européenne des droits de l'homme », *Nouveaux Cahiers du Conseil constitutionnel, n° 32 (Dossier : Convention européenne des droits de l'homme),* juillet 2011. Disponible sur http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-32/la-conception-des-libertes-par-le-conseil-constitutionnel-et-par-la-cour-europeenne-des-droits-de-l-homme.99053.html. Accès le 25/02/2014.

[23] « 14. Considérant qu'ils allèguent également que la 'spoliation organisée par le législateur' constituerait une violation d'une part du principe de liberté contractuelle, qui protégerait les partenaires sociaux contre toute remise en cause de leur capacité de négociation, et d'autre part d'un principe de 'confiance légitime', dès lors que serait remis en cause par un prélèvement brutal de 40 % l'équilibre d'un système géré depuis longtemps avec l'accord des pouvoirs publics ; [...]

18. Considérant que, dès lors que le prélèvement contesté n'a pas davantage pour effet de porter atteinte à la capacité de négociation des partenaires sociaux, il ne méconnaît pas la liberté contractuelle et que par suite le moyen manque en fait *; qu'aucune norme constitutionnelle ne garantit par ailleurs un principe dit 'de confiance légitime'* ; [...]». *Cons. const.,* décision n° 96-385 DC du 30 décembre 1996. Loi de finances pour 1997.

[24] « En France, l'expression 'droit à' n'a évidemment pas un sens aussi fort. Elle ne désigne pas un droit individuel mais un droit collectif. Si elle est 'justiciable', c'est au niveau de la norme, d'où l'expression de 'justiciabilité normative'. *Cela signifie que si un État ou la Communauté européenne a reconnu un 'droit au logement', c'est-à-dire en pratique un droit à l'aide au logement, l'autorité qui l'a accordée ne peut plus le retirer ni même le réduire.* C'est en somme une '*clause de non régression'. En cas de régression, ceux qui en sont victimes peuvent s'en plaindre devant le juge des normes, qu'il s'agisse d'une juridiction constitutionnelle ou internationale.* J'avais choisi l'exemple suivant : si la Commission décidait de réduire ou de supprimer certaines formes d'aide au logement social, au nom de la concurrence, cette mesure pourrait être censurée par la Cour de justice des Communautés européennes comme contraire au droit à une aide au logement reconnue par l'article 34.3 de la Charte. Cette disposition est strictement encadrée : 'Afin de lutter contre l'exclusion sociale et la pauvreté, l'Union reconnaît et respecte le droit à une aide sociale et à une aide au logement destinées à assurer une existence digne à ceux qui ne disposent pas de revenus suffisants, selon les modalités établies par le droit communautaire et les législations et pratiques nationales'». BRAIBANT, Guy, « L'environnement dans la Charte des droits fondamentaux de l'Union européenne », *Cahiers du Conseil constitutionnel* n° 15 (Dossier : Constitution et environnement), janvier 2004. Disponible sur : http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-15/l-environnement-dans-la-charte-des-droits-fondamentaux-de-l-union-europeenne.52002.html. Accès le 25/02/2014.

d'affiliation, sans ne pas encore être accompli toutes les conditions pour la prestation, le Parlement approuve une loi qui prolonge la période d'assurance ou augmente l'âge pour le droit à liquidation des prestations. Il n'existerait pas un droit acquis à proprement parler, mais une espèce de *droit cumulé* et, dans ce « contrat social » existant entre générations, le maintien d'un pacte de confiance est essentiel pour stabiliser les relations sociales et assurer la sécurité juridique nécessaire[25].

De toute façon, à l'aune de la parcimonie et de l'encadrement de la jurisprudence du Conseil constitutionnel aujourd'hui, cette « révolution » jurisprudentielle devra atteindre un peu plus de temps pour revenir. Il appartient au législateur de choisir les critères d'un potentiel changement. L'argumentation d'une non-régression sociale seulement pourrait être retenue actuellement en cas d'abrogation totale d'un régime ou d'une prestation essentielle comme des prestations de retraite, mais cela à condition de vérifier quels sont les principes et valeurs constitutionnels en jeu, spécialement les valeurs d'ordre public et d'intérêt public.

Avec la mise en place du contrôle de constitutionnalité a posteriori par le biais de la Question prioritaire de constitutionnalité – QPC, un nouveau visage pourrait et peut encore être donné à la jurisprudence constitutionnelle française en matière de non-régression des droits sociaux. Sur *l'effet cliquet*, cela a déjà été tenté d'être fait à plus de dix reprises en saisissant le Conseil constitutionnel[26]. Toutefois, les *Sages* restent très rattachés à la jurisprudence actuellement applicable. La question est de savoir alors s'il faut arriver à une situation extrême comme en Grèce où les retraites ont été coupées à hauteur de 40% pour que le Conseil constitutionnel français se prononce de manière claire sur le principe de non-régression en matière de droits sociaux. Nous ne pouvons pas oublier que le raisonnement « la France est une République sociale », (article premier de la Constitution de 1958 «La France est une République indivisible, laïque, démocratique et sociale ») n'a jamais connu de

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[25] « II nous paraît donc plus prudent de ne pas opérer un tel choix, et de nous en tenir à la réserve manifestée jusqu'à présent par les juges français face à la pression des requérants. Il nous semblerait tout au plus possible d'envisager que, ponctuellement, les acteurs du droit positif français tiennent compte explicitement — s'agissant, par exemple, des questions relatives aux droits fondamentaux, à la responsabilité, à la rétroactivité, aux mesures transitoires, ou aux droits acquis —, notamment dans le cadre du 'principe' de proportionnalité — qui mériterait peut-être une consécration digne de son importance pratique —, des 'intérêts privés de confiance' des personnes. Cela paraîtrait d'autant plus faisable que '[...] derrière la défense des droits acquis et du principe de la non-rétroactivité, se trouve, à l'état latent, le souci humain et très justifié de la sécurité individuelle'. 'La considération, pour ne pas dire la conviction, qu'il est nécessaire de concilier les prérogatives de l'administration avec les droits et intérêts des administrés est trop naturelle pour être une innovation. Elle apparaît dans les termes mêmes de l'arrêt [Blanco] fondateur du droit administratif. Mais elle est, à notre époque, beaucoup plus présente et ne cesse de se traduire par de notables renforcements des droits et garanties des administrés' ». CALMES, Sylvia, *Du principe de protection de la confiance légitime en droits allemand, communautaire et français,* Nouvelle Bibliothèque de Thèses, Dalloz, 2001, p. 662/63.

[26] BOYER-CAPELLE, Caroline, « L'effet cliquet à l'épreuve de la question prioritaire de Constitutionnalité », *AJDA*, 2011, n° 30, p. 1718/172.

véritable portée pour permettre de déclarer une loi comme non-conforme au texte constitutionnel[27].

Il faut reconnaître en effet que le Conseil constitutionnel admet présentement que le législateur a la prérogative de poser des conditions plus restrictives à l'octroi d'une prestation sociale. Il est également libre de réduire la protection en amont accordée aux droits sociaux constitutionnels sous réserve, toutefois, de ne pas les priver de toute garantie légale. La doctrine parlerait dans ce cas alors d'« *effet de seuil* » du fait que le législateur ne pourrait descendre en dessous d'un certain seuil de protection[28]. À notre avis, ce concept, si proche de *l'effet cliquet*, serait cependant un « *effet cliquet souple* », qui n'a pas le même potentiel anti-retour[29].

Une autre position de la doctrine qui nous semble être abordable et qui remettrait à ces deux principes, *de non-retour et de respect d'un seuil*, est soutenu par le professeur Michel Borgetto [30] pour qui certains droits sociaux qualifiés de *services publics constitutionnels,* dont la protection sociale ferait partie, ne pourraient être supprimés « sans qu'intervienne au préalable une révision corrélative de la Constitution »[31]. Cette position peut être confirmée à partir d'un raisonnement du propre préambule de la Constitution française[32], dont la source protectrice des droits sociaux est évidente, de manière qu'il « ne fait guère de doute qu'une loi qui se proposerait de supprimer un service public

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[27] En faveur d'une interprétation plus extensive de *l'effet cliquet,* consulter également BORGETTO, Michel et LAFORE, Robert, *Droit de l'aide et de l'action sociale,* 7ème éd., Montchrestien, 2009, p. 56 et ROUSSEAU, Dominique, *Droit du contentieux constitutionnel,* 7ème éd., Montchrestien, 2008, p. 436. En considérant cette jurisprudence *cliquet* seulement pour fins de droits-libertés, voir PRÉTOT, Xavier, « Les bases constitutionnelles du droit social », *Dr. soc.,* 1991, p. 187.

[28] MATHIEU, Bertrand et VERPEAUX, Michel, *Contentieux constitutionnel des droits fondamentaux,* LGDJ, 2002, p. 497/98.

[29] « *Peuvent toutefois être considérées, à certains égards, comme des tempéraments au principe de mutabilité législative les jurisprudences dites du 'cliquet' et du 'seuil'*. La première, qui a été abandonnée, interdisait toute régression au niveau des garanties légales données aux sujets de droit concernant leurs libertés publiques, voire imposait un exercice plus effectif de ces libertés grâce à la loi. *La seconde implique plus modestement que le législateur ne prive pas de garanties légales des exigences constitutionnelles* ». VALEMBOIS, Anne-Laure, « La constitutionnalisation de l'exigence de sécurité juridique en droit français », *Cahiers du Conseil constitutionnel n° 17,* mars 2005. Disponible en http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-17/la-constitutionnalisation-de-l-exigence-de-securite-juridique-en-droit-francais.51965.html. Accès en 14/04/2015.

[30] BORGETTO, Michel, « La notion de service public constitutionnel face au droit de la protection sociale », in *Mél. Jean-François Lachaume. Le droit administratif : permanences et convergences,* Dalloz, 2007, p. 98.

[31] DUPEYROUX, Jean-Jacques, BORGETTO, Michel, et LAFORE, Robert, *Droit de la sécurité sociale,* 18ème éd., Dalloz, 2015, p. 352.

[32] V. *Cons. const.*, décision n° 86-207 DC des 25-26 juin 1986, Rec. 61 ; v. aussi décision n° 86-217 DC du 18 sept. 1986, Rec. 141 et décision n° 88-232 DC du 7 janv. 1988, Rec. 17.

constitutionnel s'exposerait au risque d'être considérée par ce juge comme étant non conforme au texte suprême »[33].

Il nous semble alors que dans le champ du contentieux constitutionnel, la théorie de non-régression des droits sociaux ne serait pas totalement épuisée et elle peut et doit d'une certaine façon être renouvelée désormais. Le caractère dynamique des droits sociaux, ajouté à des futures réformes qui seront certainement envisagées par le législateur, devra toujours faire l'objet d'une attention certaine de la part du juge dans le but de la défense d'une France indivisible, laïque, démocratique et sociale[34]. Dans l'optique constitutionnelle, le juge aborde également la question du droit aux prestations de retraite par le prisme du droit de propriété.

03) Le droit à la prestation de retraite et le droit de propriété

À la différence de la jurisprudence de la Cour suprême allemande et de la Cour EDH[35], le Conseil constitutionnel maintient son avis dans le sens que les prestations de retraite n'ont pas de nature juridique de bien, et donc n'est pas qualifiée comme une propriété dans la conception privatiste du terme[36]. Cette jurisprudence a comme base la

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[33] DUPEYROUX, Jean-Jacques, BORGETTO, Michel, et LAFORE, Robert, *op. cit.,* p. 352.

[34] « Ce type de raisonnement qui permet au législateur, au nom de principes sociaux ayant une valeur constitutionnelle (droit à la santé, droit à l'emploi, droit au logement) de porter atteinte aux libertés fondamentales constitue une très grande originalité des pays européens vis-à-vis des pays anglo-saxons. Jouant une fonction essentielle dans la jurisprudence des Cours constitutionnelles européennes, ce type de raisonnement totalement étranger, par exemple, à la jurisprudence de la Cour suprême des États-Unis, traduit un équilibre très différent entre l'intervention de l'État et la protection des libertés. Ce conflit, ou en tout cas cette tension permanente entre les droits-créances et les droits-libertés est au cœur du modèle social européen ». DUTHEILLET de LAMOTHE, Olivier, « Les normes constitutionnelles en matière sociale », *Cahiers du Conseil constitutionnel,* n° 29, octobre 2010. Disponible en http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-29/les-normes-constitutionnelles-en-matiere-sociale.52733.html. Accès en 18/01/2015.

[35] « [...] l'article 1er du Protocole n° 1 ne comporte pas un droit à acquérir des biens. Il ne limite en rien la liberté qu'ont les États contractants de décider s'il convient ou non de mettre en place un quelconque régime de sécurité sociale ou de choisir le type ou le niveau des prestations devant être accordées au titre de pareil régime. Dès lors qu'un État contractant met en place une législation prévoyant le versement automatique d'une prestation sociale – que l'octroi de cette prestation dépende ou non du versement préalable de cotisations –, cette législation doit être considérée comme engendrant un intérêt patrimonial relevant du champ d'application de l'article 1er du Protocole n° 1 pour les personnes remplissant ces conditions ». CEDH, *Stec et autres c. Royaume-Uni* [GC], (déc.) n° 65731/01 et 65900/01, par. 53; *Rasmussen c. Pologne*, n° 38886/05, arrêt du 28 avril 2009, par. 71.

[36] « La conception extensive de la protection constitutionnelle du droit de propriété n'est toutefois pas sans limite. Le Conseil a ainsi, à plusieurs reprises, refusé de reconnaître le caractère de droit de propriété au sens de l'article 17 de la Déclaration de 1789. Il en est allé ainsi:
- des autorisations d'exploiter des services de transport publics de personnes ;
- de certains droits à pension de retraite ;

décision du 16 janvier 1986, n° 85-200 DC, sur la loi relative à la limitation des possibilités de cumul entre pensions de retraite et revenus d'activité[37]. Les sénateurs et députés auteurs du contrôle de constitutionnalité préalable (*a priori*) estimaient que cette loi obligeait les retraités à se priver de leur prestation de retraite. Ainsi, ils auraient dû alors recevoir une indemnisation selon l'article 17 de la Déclaration des droits de l'homme et du citoyen de 1789[38] (privation du droit de propriété à condition d'une indemnité juste et préalable) et une autre indemnité provoquée par la suppression d'un droit acquis. Les *Sages* ont rejeté les arguments sur l'analogie existante parmi les prestations de retraite de base et le droit de propriété. Les considérants suivants démontrent cet aspect pour déclarer la loi conforme à la Constitution : « 2. Considérant que, selon les auteurs des saisines, ces dispositions méconnaissent le droit au travail garanti par le Préambule de la Constitution du 27 octobre 1946 et *le droit de propriété dont la privation doit, en vertu de l'article 17 de la Déclaration des droits de l'homme et du citoyen de 1789*, être assortie d'une juste et préalable indemnité ; que les sénateurs auteurs de l'une des saisines estiment, en outre, qu'elles portent atteinte au principe d'égalité et à la liberté d'entreprendre ; [...] 5. Considérant que les députés auteurs d'une saisine soutiennent que la loi, en obligeant certains retraités à renoncer momentanément à percevoir leur pension pour éviter les charges excessives de la contribution de solidarité, aboutit à les priver de leur retraite ; qu'ils estiment que la pension de retraite est une rente viagère, constituée à titre onéreux, et que la loi ne saurait, sans méconnaître les garanties constitutionnelles du droit de propriété énoncées par l'article 17 de la Déclaration des droits de l'homme et du citoyen, priver les retraités du paiement de leur pension sans juste et préalable indemnité ; ». Toutefois, aux yeux du Conseil constitutionnel,

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- du monopole des officiers ministériels qu'il s'agisse des courtiers interprètes et conducteurs de navires ou des avoués, l'indemnisation de la perte du droit de présentation du successeur s'analysant à l'aune du principe d'égalité devant les charges publiques garanti par l'article 13 de la Déclaration de 1789 et non de son article ». de MONTGOLFIER, Jean-François, « Conseil constitutionnel et la propriété privée des personnes privées », *Cahiers du Conseil constitutionnel n° 31 (Dossier : le droit des biens et des obligations)*, mars 2011. Disponible en http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-31/conseil-constitutionnel-et-la-propriete-privee-des-personnes-privees.96753.html. Accès en 17/04/2015.

[37] « S'il s'agit de désigner la première décision qui s'est référée formellement à l'idée de solidarité, il convient de citer la décision n° 85-200 DC du 16 janvier 1986 : le juge ayant alors considéré, dans la mesure où il revenait au législateur 'd'organiser la solidarité entre personnes en activité, personnes sans emploi et retraités et de maintenir l'équilibre financier permettant à l'ensemble des institutions de sécurité sociale de remplir leur rôle', que rien ne s'opposait à ce que les règles régissant les régimes de vieillesse aient « pour objet de permettre une contribution au financement de régimes défavorisés par la situation économique ou sociale ». BORGETTO, Michel, *La Fraternité,* ACCPUF éd., 2004, p. 286.

[38] « Art. 17. La propriété étant un droit inviolable et sacré, nul ne peut en être privé, si ce n'est lorsque la nécessité publique, légalement constatée, l'exige évidemment, et sous la condition d'une juste et préalable indemnité ».

les droits à pension ne peuvent pas être « civilisés » et ne font pas l'objet du droit de propriété[39].

Nonobstant cette jurisprudence, la Cour de cassation, quelques années après, est venue trancher l'affaire *Consorts X c/ Procureur général auprès de la cour d'appel de Basse-Terre* et a donné un avis différent de celui des *Sages de la rue Montpensier* en considérant les prestations sociales comme une catégorie des biens, conformément à la jurisprudence de la Cour EDH[40]. Le Conseil d'État également a déjà rendu des arrêts en qualifiant les prestations sociales de biens, à l'exemple de la décision prise en 27 mars 1997, *Département de la Saône-et-Loire et Centre communal d'action sociale de La Rochelle,* laquelle s'est appuyée sur le caractère civil du droit à l'aide sociale[41]. Nous constatons aussi que le Conseil d'État dans l'arrêt du 5 mars 1999, *M. Rouquette et Mme Lipietz et autres*, les arguments des demandeurs ont été déboutés, retenant ainsi la nature civile de ces prestations[42]. Le Conseil d'État a rendu une autre décision importante à l'occasion d'arrêt « *Diop* » du 30 novembre 2001 par lequel a été reconnu le caractère discriminatoire du « gel » des pensions versées aux fonctionnaires civils et militaires des ressortissants des ex-colonies françaises. Par cet arrêt la Haute juridiction a validé la décision de la cour administrative d'appel de Paris du 7 juillet 1999 dans le sens que les pensions civiles et militaires « constituent des créances qui doivent être regardées comme des biens au sens de l'article 1er du premier Protocole additionnel à la

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[39] PRÉTOT, Xavier, « La protection sociale est-elle soluble dans le droit de propriété ? », in ALFANDARI, Elie (Mél.), *Drôle(s) de droit(s)*, Dalloz, 2000, p. 163 ; COURSIER, Philippe, « La révision d'un accord de retraite supplémentaire et ses conséquences », *Dr. soc.*, 2002, p. 874.

[40] *Cass. civ.* 3, 1997-02-04, 95-10639, inédit. Pour plus renseignements, consulter MICHELET, Karine, « La conception européenne du droit à des prestations sociales et la jurisprudence administrative », *Dr. soc.*, 2002, p. 760.

[41] « [...] Considérant que la décision attaquée, par laquelle la commission centrale d'aide sociale, saisie par la voie de l'appel, a statué sur le refus de prise en charge des repas de Mlle X... au foyer-restaurant pour personnes âgées géré par le centre communal d'action sociale de la Rochelle, a le caractère d'une décision juridictionnelle qui, relative à une prestation d'aide sociale, tranche une contestation sur des droits et obligations de caractère civil au sens des stipulations précitées de la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ; [...] ». CE, Section, du 27 mars 1998, 161659, publié au recueil Lebon.

[42] « [...] Considérant qu'aux termes de l'article 14 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales : 'La jouissance des droits et libertés reconnus dans la présente convention doit être assurée, sans distinction aucune, fondée notamment sur (...) la fortune' ; qu'aux termes de l'article premier du premier protocole additionnel à la convention : 'Toute personne physique ou morale a droit au respect de ses biens;

Considérant que le législateur, en subordonnant à une condition de ressources le bénéfice des allocations familiales, a entendu maintenir l'équilibre financier de la branche famille de la sécurité sociale, qui est un objectif d'utilité publique, et s'est fondé sur des critères objectifs et rationnels en rapport avec les buts de la loi ; que, dès lors, les requérants ne sont pas fondés à soutenir que les dispositions de l'article L. 521-1 du code de la sécurité sociale porteraient une atteinte disproportionnée au droit au respect de leurs biens ou méconnaîtraient le principe de non-discrimination dans le droit au respect des biens qui résulte des stipulations combinées de l'article 14 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et de l'article premier du premier protocole additionnel à la convention ; [...] ». CE, Assemblée, du 5 mars 1999, 194658 et 196116, publié au recueil Lebon.

CEDH » compte tenu du fait qu'il s'agit « des allocations pécuniaires, personnelles et viagères auxquelles donnent droit les services accomplis par les agents publics [...] jusqu'à la cessation régulière de leurs fonctions »[43].

Tout compte fait, la jurisprudence du Conseil constitutionnel serait-elle contraire à celle de la Cour EDH qui a pris la notion de bien aux prestations sociales à partir de la lecture de l'article 1er du protocole 1er de la CEDH[44] ? À notre avis, en principe, non, car que la Cour de Strasbourg précise bien que la Convention ne consacre aucun droit intrinsèque à percevoir la moindre prestation de sécurité sociale, en même temps que dans le cas de la reconnaissance comme un bien ce droit ne saurait pas être interprété comme conférant au bénéficiaire le droit de percevoir une pension d'un montant particulier (même si une réduction substantielle pouvait être considérée comme affectant l'essence même du droit), ce qui autorise les États à modifier les montants versés dans le cadre de sa politique économique[45].

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[43] « [...] Considérant [...] qu'en vertu des stipulations de l'article 1er du 1er protocole additionnel à cette convention : 'Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international. Les dispositions précédentes ne portent pas atteinte au droit que possèdent les États de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes'.
Considérant qu'en vertu de l'article L. 1 du code des pensions civiles et militaires de retraite, dans sa rédaction issue de la loi du 20 septembre 1948, applicable en l'espèce, les pensions sont des allocations pécuniaires, personnelles et viagères auxquelles donnent droit les services accomplis par les agents publics énumérés par cet article, jusqu'à la cessation régulière de leurs fonctions ; que, dès lors, la cour n'a pas commis d'erreur de droit en jugeant que ces pensions constituent des créances qui doivent être regardées comme des biens au sens de l'article 1er, précité, du premier protocole additionnel à la convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales ; [...] ». *Conseil d'État*, Assemblée, du 30 novembre 2001, 212179, publié au recueil Lebon.

[44] *La Cour interaméricaine de droits de l'homme* a fait également cette relation entre le droit à une pension et le droit de propriété, Cf. CIDH, ,01 juillet 2009, aff. *Acevedo Buendía y otros ("Cesantes y Jubilados de la Contraloría") vs. Perú*) : « 85. En un caso similar al presente, esta Corte declaró una violación del derecho a la propiedad por la afectación patrimonial causada por el incumplimiento de sentencias que pretendían proteger el derecho a una pensión – derecho que había sido adquirido por las víctimas en aquel caso, de conformidad con la normativa interna. En esa sentencia el Tribunal señaló que, desde el momento en que un pensionista paga sus contribuciones a un fondo de pensiones y deja de prestar servicios a la institución concernida para acogerse al régimen de jubilaciones previsto en la ley, adquiere el derecho a que su pensión se rija en los términos y condiciones previstas en dicha ley. *Asimismo, declaró que el derecho a la pensión que adquiere dicha persona tiene 'efectos patrimoniales', los cuales están protegidos bajo el artículo 21 de la Convención*. Consecuentemente, en aquél caso el Tribunal declaró que al haber cambiado arbitrariamente el monto de las pensiones que venían percibiendo las presuntas víctimas y al no haber dado cumplimiento a las sentencias judiciales emitidas con ocasión de las acciones de garantía interpuestas por éstos, el Estado violó el derecho a la propiedad reconocido en el artículo 21 de la Convención. [...]
91. *Por todo lo anteriormente expuesto, la Corte reitera que el Estado violó el derecho a la protección judicial reconocido* en el artículo 25.1 y 25.2.c de la Convención Americana (supra párr. 79) *y también violó el derecho a la propiedad privada reconocido en el artículo 21.1 y 21.2 de dicho instrumento*, todo ello en relación con el artículo 1.1 del mismo tratado, en perjuicio de las doscientas setenta y tres personas indicadas en el párrafo 113 de la presente Sentencia».

[45] Cf. CEDH, 8 décembre 2005, *Dumanovski c. « l'ex-République yougoslave de Macédoine»*, n° 13898/02 ; CEDH, *Domalewski c. Pologne* (déc.), n° 34610/97, CEDH 1999-IV.

Ce positionnement peut être représenté, par exemple, par l'arrêt *Koufaki et Adedy / Grèce* du 7 mai 2013 où la Cour EDH a conclu par la non violation du droit à la propriété de l'article 1er du Protocole n° 1er de la CEDH en décidant que « les États partis à la CEDH jouissent d'une ample marge d'appréciation quant à la détermination de leur politique sociale et économique puisque leurs autorités se trouvent mieux placées qu'un tribunal international pour choisir les moyens appropriés et pour fixer les priorités quant à l'affectation des ressources limitées de l'État. Ainsi, il y a lieu d'accorder une importance particulière au rôle du législateur national. Étant donné que les priorités susmentionnées tombent sous la notion de 'l'utilité publique', visée à l'article 1 du Protocole n° 1, les choix politiques et sociaux des États sont respectés par la Cour EDH sauf s'ils se révèlent manifestement dépourvus de base raisonnable et si les ingérences qu'ils causent ne sont pas proportionnelles au but légitime poursuivi »[46]. Ainsi, le Conseil constitutionnel français autorise le législateur à modifier des textes antérieurs ou à abroger ceux-ci en leur substituant d'autres textes pour la réalisation ou pour la conciliation d'objectifs de nature constitutionnelle, dans les attentes de l'intérêt public[47]. Il n'y a alors pas de « conflit » jurisprudentiel entre les deux juridictions[48].

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[46] CEDH, 7 mai 2013, *Koufaki et Adedy / Grèce*, n °s 57657/12 et 57665/12. Par contre, le Comité européenne de droits sociaux –CEDS a déclaré les réformes des retraites grecques en non-conformité avec la Charte sociale européenne. Cf. CEDS, 7 décembre 2012, IKA-ETAM (*Fédération des Pensionnés Salariés de Grèce*), réclamation n°76/2012.
Consulter aussi l'affaire da *Silva Carvalho Rico c. Portugal* (requête n° 13341/14), dont la Cour EDH a déclaré, à l'unanimité, la requête irrecevable. *La requérante invoquait la violation de l'article 1 du Protocole n° 1 (protection de la propriété) à la Convention européenne des droits de l'homme*, se plaignait de la réduction du montant de sa pension en 2014, alléguant en particulier que la CES (contribution extraordinaire de solidarité) n'était plus une mesure temporaire dès lors qu'elle était appliquée à sa pension depuis 2013.
La Cour de Strasbourg a rappelé que l'article 1 du Protocole n° 1 ne crée pas un droit à acquérir des biens. Il ne garantit donc, en tant que tel, aucun droit à une pension d'un montant donné. Elle conclut, en effet, que compte tenu des intérêts généraux qui étaient en jeu au Portugal à l'époque considérée (plan d'austérité) et du caractère limité et temporaire de l'application de la CES à la pension, les mesures prises au Portugal étaient proportionnées au but légitime qui consistait à obtenir un redressement économique à moyen terme.

[47] « [...] 55. *Considérant qu'il est à tout moment loisible au législateur, statuant dans le domaine de sa compétence, de modifier des textes antérieurs ou d'abroger ceux-ci en leur substituant*, le cas échéant, d'autres dispositions ; que l'exercice de ce pouvoir ne doit cependant pas aboutir à priver de garanties légales des principes de valeur constitutionnelle ; [...] ». *Cons. const.,* décision n° 2000-433 DC du 27 juillet 2000. Loi modifiant la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication.
« [...] 4. Considérant qu'aux termes du dixième alinéa du Préambule de la Constitution de 1946 : 'La Nation assure à l'individu et à la famille les conditions nécessaires à leur développement' ; que, selon son onzième alinéa : 'Elle garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé, la sécurité matérielle, le repos et les loisirs...' ;
5. *Considérant qu'il incombe au législateur*, comme à l'autorité réglementaire, conformément à leurs compétences respectives, de déterminer, dans le respect des principes posés par ces dispositions, *les modalités concrètes de leur mise en œuvre* ;
6. Considérant, en particulier, *qu'il est à tout moment loisible au législateur*, statuant dans le domaine qui lui est réservé par l'article 34 de la Constitution, *d'adopter,* pour la réalisation ou la conciliation d'objectifs de nature constitutionnelle, *des modalités nouvelles dont il lui appartient d'apprécier*

Malgré ces apports de la jurisprudence permettant de rapprocher certaines prestations sociales de la qualification du droit de propriété, le fait est qu'en France ces prestations « ne revêtent pas le caractère de droits patrimoniaux au sens du droit civil, mais sont de nature statutaire, c'est-à-dire attachées à des institutions et des mécanismes publiques »[49]. Le caractère du principe de solidarité, très rattaché au *régime de retraite français*[50], fournit un raisonnement dont la proportionnalité entre ceci et le droit de propriété fait, qu'au moins dans une approche constitutionnelle de la question, la nature institutionnelle statutaire prévaut sur la nature patrimoniale de la prestation ou de la cotisation sociale[51].

Les retraites publiques du régime général sont d'ordre légal, statutaire, et ont la solidarité nationale comme fondement essentiel[52]. Ils n'ont pas le contrat comme source de

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l'opportunité ; que, cependant, *l'exercice de ce pouvoir ne saurait aboutir à priver de garanties légales des exigences de caractère constitutionnel* ; [...] ». *Cons. const.,* décision n° 99-416 DC du 23 juillet 1999. Loi portant création d'une couverture maladie universelle.

[48] Cf. Cons. const., 2010-617 DC, 9 novembre 2010, JORF du 10 novembre 2010, p. 20056, texte n° 2, Rec. p. 310.

[49] DUPEYROUX, Jean-Jacques, BORGETTO, Michel et LAFORE, Robert, *Droit de la sécurité sociale,* 18ème éd., Dalloz, 2015, p. 351.

[50] La question de la solidarité a un poids et est placée au cœur du régime français. Regardons par exemple, en matière d'assurance chômage, la création d'une *prime transitoire de solidarité* en 2015 pour les demandeurs d'emploi bénéficiaires de l'allocation de solidarité spécifique ou du revenu de solidarité active nés entre le ler janvier 1954 et le 31 décembre 1955. Cette prime sera versée mensuellement, sous conditions, à ces demandeurs d'emploi ayant *atteint l'âge de 60 ans et qui ont validé le nombre de trimestres requis au titre du régime d'assurance vieillesse pour l'ouverture d'une pension de retraite à taux plein à l'extinction de leur droit à l'allocation d'assurance chômage*. Pour bénéficier de cette prime, les demandeurs doivent bénéficier de l'allocation de solidarité spécifique ou du revenu de solidarité active et avoir été indemnisables au titre de l'allocation d'aide au retour à l'emploi, de l'allocation spécifique de reclassement, de l'allocation de transition professionnelle ou de l'allocation de sécurisation professionnelle au moins un jour entre le 1er janvier 2011 et le 31 décembre 2014. Cf. Décret n° 2015-860 du 15 juillet 2015 - JORF du 16 juillet 2015.

[51] « En ce qui concerne l'assurance vieillesse, où jouait néanmoins déjà une logique d'articulation des contributions avec les pensions, et bien que l'ensemble ait été inscrit dans un cadre solidariste, on note au long des réformes des années 2000 une individualisation des systèmes dans lesquels on recherche de plus en plus l'établissement d'un lien entre d'un côté, la carrière professionnelle de chaque assuré et, de l'autre, l'âge de départ et le montant de sa pension.
Au final, qu'elle l'impacte directement en sa qualité de service public ou qu'elle intervienne comme une conséquence de la mise en œuvre des droits sociaux consacrés par le juge constitutionnel, l'égalité dans le champ de la sécurité sociale est au cœur des défis qu'elle affronte depuis une vingtaine d'années : quelles formes pour la ou les solidarités, quel équilibre entre solidarité et responsabilité individuelle, quels modes d'organisation entre le service public et les logiques marchandes ? ». LAFORE, Robert, « L'égalité en matière de sécurité sociale », *RDSS*, 2013, p. 379.

[52] « [...] À défaut d'être remplies, l'assuré ne peut obtenir le bénéfice des prestations. S'il en est ainsi, c'est parce que le droit à prestations est, à titre principal, *un droit contributif* : en échange du versement de cotisations, l'assuré social acquiert un droit à prestations qui se réalisera lors de la survenance du risque.
Il est aussi *un droit statutaire*. Les règles du droit de la sécurité sociale qui le mettent en œuvre s'imposent aux bénéficiaires comme aux organismes gestionnaires et aux cotisants. Les conditions d'octroi des prestations étant remplies, l'organisme de sécurité sociale est tenu de verser les prestations correspondantes sans pouvoir d'appréciation (sauf exception). Autrement dit, les assurés

droits et la nature de la prestation ne peut pas être rattachée aux droits de propriété. Nous avons vu que le législateur est porteur d'un large pouvoir pouvant réaliser des changements dans la législation sans que la notion de *bien* puisse venir être donnée à la prestation de retraite[53].

Enfin, Jean Jaurès, en 1895, dans le contexte de la loi sur les retraites ouvrières et paysannes, a prononcé « qu'il n'y avait plus là une organisation de charité, mais comme la reconnaissance du droit »[54]. La retraite passerait donc à être un droit par excellence, subjectivement exigible et saisissable, qui pourrait différencier les propriétaires des non-propriétaires et permettrait ainsi à ces derniers d'accéder à une sorte de *propriété sociale*, conformément au raisonnement de Robert Castel, dont la « reformulation de la question sociale va consister non pas à abolir cette opposition propriétaire-non propriétaire, mais à la redéfinir, c'est-à-dire à juxtaposer à la propriété privée un autre type de propriété, *la propriété sociale*, de sorte que l'on puisse rester en dehors de la propriété privée sans être en manque de sécurité »[55].

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se trouvent dans une situation légale et réglementaire à l'égard de la caisse de sécurité sociale, leurs droits et leurs obligations respectives étant déterminés selon les lois et les règlements applicables lors de la demande de prestations. Il en résulte que cette dernière, qui incombe à l'assuré, ne peut se faire que pour les risques dont la loi a organisé la prise en charge et aux conditions qu'elle a fixées. Ainsi, le droit aux prestations est un droit légalement institué. Encore faut-il qu'une loi ait agi en ce sens », CHAUCHARD, Jean-Pierre, « La sécurité sociale et les droits de l'Homme (à propos du droit à la sécurité sociale) », *Dr. soc.,* 1997, p. 48.

[53] Plus récemment la Cour constitutionnelle a maintenu sa jurisprudence sur l'inexistence de violation au droit de propriété en matière de droits à pension, cette fois-ci en appréciant une Question prioritaire de constitutionnalité – QPC :
« [...] 2. Considérant que, selon la requérante, en habilitant le pouvoir réglementaire à organiser des régimes spéciaux de sécurité sociale, au nombre desquels celui des mines, le législateur a méconnu l'étendue de sa compétence ; qu'en privant de garanties légales le droit à la protection sociale et le droit à la vie privée des personnes affiliées à ces régimes spéciaux ainsi que *leur droit de propriété sur les prestations sociales*, cette méconnaissance par le législateur de sa compétence affecterait les droits ou les libertés garantis par le onzième alinéa du Préambule de la Constitution de 1946 et les articles 2 et 17 de la Déclaration des droits de l'homme et du citoyen de 1789 ; [...]
4. Considérant qu'aux termes de l'article 34 de la Constitution : 'La loi détermine les principes fondamentaux ... du droit... De la sécurité sociale' ; qu'en vertu du onzième alinéa du Préambule de 1946, la Nation 'garantit à tous, notamment à l'enfant, à la mère et aux vieux travailleurs, la protection de la santé, la sécurité matérielle, le repos et les loisirs. Tout être humain qui, en raison de son âge, de son état physique ou mental, de la situation économique, se trouve dans l'incapacité de travailler a le droit d'obtenir de la collectivité des moyens convenables d'existence' ; qu'aux termes de l'article 2 de la Déclaration de 1789 : 'Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté*, la propriété*, la sûreté et la résistance à l'oppression' [...]
Toutefois, en l'espèce, la méconnaissance par le législateur de sa compétence ne prive pas de garanties légales les exigences découlant du onzième alinéa du Préambule de 1946. Elle n'affecte par elle-même aucun droit ou liberté que la Constitution garantit. Par suite, le grief tiré de la méconnaissance par le législateur de sa compétence doit être écarté ». Cons. const., 2012-254 QPC, 18 juin 2012, Journal officiel du 19 juin 2012, p. 10179.

[54] Cf. http://www.jaures.eu/.

[55] CASTEL, Robert, *Les métamorphoses de la question sociale : une chronique du salariat,* coll. Folio, éd. Gallimard, 1999, p. 483/84.

La thèse de la *propriété sociale* toutefois, pour les privatistes classiques, resterait plus dans une dimension sociologique que dans la sphère du droit. Nous trouvons par contre que face aux éventuelles offensives contre les droits de la retraite, la théorie de la propriété sociale pourrait être un fil conducteur pour un raisonnement alternatif à la notion classique de *bien*. Les retraites publiques françaises, de toute façon, en considérant son caractère légal, non contractuel, ne peuvent pas être synonymes d'un droit de propriété classique.

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Voir encore du même auteur : « Seconde manière de qualifier cette transformation décisive : les membres de la société salariale ont eu *massivement accès à la propriété sociale* qui représente un homologue de la propriété privée, une *propriété pour la sécurité* désormais mise à la disposition de ceux qui étaient exclus des protections que procure la propriété privée. On pourrait caractériser la propriété sociale comme la production d'équivalents sociaux des protections qui étaient auparavant seulement donnés par la propriété privée. Soit l'exemple de la retraite. En termes de sécurité, le retraité pourra rivaliser avec le rentier assuré par son patrimoine. La retraite apporte ainsi une solution à l'une des manifestations les plus tragiques de l'insécurité sociale, la situation du vieux travailleur qui ne pouvait plus travailler et risquait la déchéance totale et le recours obligé à des formes infamantes d'assistance comme l'hospice. Mais la retraite n'est pas une mesure d'assistance, elle est *un droit construit à partir du travail.* Elle est la propriété du travailleur constitué non pas selon la logique du marché, mais à travers la socialisation du salaire : une part du salaire fait retour au bénéfice du travailleur (salaire indirect). C'est, pourrait-on dire, une propriété pour la sécurité, qui assure la sécurité du travailleur hors travail », CASTEL, Robert, *L'insécurité sociale. Qu'est-ce qu'être protégé ?,* Seuil, La république des idées, 2003, p.31/32.

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Pluralism Confined? Party Law Case Studies from Hungary

Peter Smuk[1]

Abstract

Legal regulation pertaining to political parties may guarantee pluralism in various fields of a political system. In the first part of my paper[2], I intend to overview the main purposes of party regulation, the regulated party functions – and the optimism towards political parties shining from relevant laws and documents. In the second part I investigate several changes in the Hungarian legal system in the light of the European standards. The main case studies include the regulation of political parties in the new Fundamental Law, the campaign finances, media and campaign tools. Main issues of concern are the pluralism guaranteed by party regulation and financing; the re-regulated public sphere of party competition and the nature of political parties in the 21st century. The question has been raised whether political parties and party systems are still the same as the framers of these regulations perceived them in the 20th century. As literature suggest that they are not, but can we trace this development in the recent Hungarian cases of party regulation?

Key words: political party, party finance, political pluralism, media law, election campaigns

1. Introduction – on regulation pertaining to political parties

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1.1. Levels of regulation

Given the political efficiency of organized politics, parties became inevitable actors in democratic systems; and given their – at least formal – existing can veil anti-democratic features, they are often tolerated organizations even in authoritarian regimes. Existence of (real) political parties can be funded by guaranteeing the fundamental rights, freedom of association and freedom of expression; while several constitutions provide explicit guarantees for establishing political parties and party pluralism. Following some disgust of public law, parties became recognized by law and their establishing as well as functioning are usually guaranteed by constitutions and legal provisions.[3] For this paper, I accept the definition of political party, drawn up by Venice Commission as follows: 'a free association of persons, one of the aims of which is to participate in the management of public affairs, including through the presentation of candidates to free and democratic elections.'[4]

Legal sources of party law range from constitutions and laws to parliamentary rules and the legal practice of (constitutional) courts. Issues of legislation affect different fields of party functions; i.e. creation (establishing) and registration of parties, certain internal organisational and operational rules, certain rights/duties of membership, supervision of legitimacy or constitutionality, participation in electoral procedure (nomination of candidates and party lists, electoral commission membership, etc.), financing of campaign and party organisation (rules on private and state financing, spending, accounting, transparency, control, etc.). All European legal systems – including the EU law – include laws regulating political parties[5], even those whose constitutions do not.

1.2. Party functions

General functions of political parties show that parties play inevitable role in representative democracy; and understanding these functions may help to understand the aims (and concerns) of party regulation. Political parties perform the following functions in democratic processes.

[3] BIEZEN (2014) p. 93-94.
[4] *Guidelines on Political Party Regulation*. By OSCE/ODIHR and Venice Commission. Adopted by the Venice Commission, 2010. CDL-AD(2010)024. p. 8.
[5] These are often not specifically acts on parties but only touch upon certain aspects, e.g. financing, candidates in election campaigns, etc.

Formation of public opinion and political will of the people.[6] Political parties are intermediaries between state and citizens. They circulate information on democratic processes, legislative agenda, proposals, public issues, etc., while gathering information from the citizens and transforming it for political procedures. Freedom of expression and flow of information thus creates the "lifeblood of democracy"[7], which is reinforced many times by the European Court of Human Rights as well. As the United Nations Human Rights Committee also pointed out,

> *"the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas."*[8]

Intermediaries. Political parties canalize, integrate and represent conflicts, interests, information and endeavours of different nature from and towards society. Parties also need to mobilize citizens for their own support at elections when the former performance and future ideas of parties and candidates are to be assessed. In a representative democracy, voters and members of the political community entrust and mandate representatives with carrying out political functions (decision making, governing, daily management of public affairs). The idea of a totally politics-involved society implies serious and substantial problems; as far as privacy and public life has been separated and citizens can rarely undertake the costs of daily engagement in politics. Introduction of certain corrections of representation and elements of direct, participatory or grassroots-democracy is an evergreen popular demand; even the contribution of political parties thereto could be institutionalized too.

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[6] According to the German Grundgesetz Art. 21.1.*"Political parties shall participate in the formation of the political will of the people."; echoed by the new* Fundamental Law of Hungary Art VIII.3.: *"Political parties shall participate in the formation and expression of the will of the people".*

[7] The words of Lord Steyn are cited in: Turpin–Tomkins (2007) p. 773.

[8] Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996). par. 26.

Recruiting leaders. Electing and training better leaders in higher or lower positions increase not only the efficiency of state organs and political system but also contributes to the legitimation of political processes. On the one hand political career-routes lead to higher public positions usually via political parties; on the other, a party intending to govern a country shall demonstrate its capacities in terms of personnel too. Parties mainly carry out this function by their core functioning (experience may be obtained by internal politics and management) or via training or other scientific programs, scholarships, etc. usually organized and financed by party foundations. It is rather rare to reach high public offices without any assistance of political parties; these offices are those that are incompatible with party membership or are of professional nature (e.g. ordinary judges).

Decision making, governing. Decision-making functions are carried out in internal organs of parties and also in state bodies of representation (legislatures, local governments); parties on government and also in opposition perform these functions. They must give programs or direction to society and should show ability to implement them if they intend to obtain governing positions. Capacities in terms of personnel, policies, expertise must be build up for this sake. Oppositional parties are also in decision-making position for example in the case of issues that are to be resolved by a qualified majority voting. While in opposition, parties basically compete for the attention of citizens, creating and offering alternatives, policies, etc.[9]

Scrutiny. Party competition itself guarantees that racing parties control each other and exploit the faults or illegal acts of others as intensively as possible. By its very nature the competition often creates more effective scrutiny as investigations performed by state authorities.

1.3. In parties we trust (?)

Constitutional recognition and public funding of political parties are strong statements over their functions; the preconception and the expectation behind these recognition have the implicit message that the abovementioned (and some other) functions are favourable *and* ineluctable in democratic systems.[10] On this basis –

[9] See CDL-AD(2010)025-e "Report on the role of the opposition in a democratic Parliament, adopted by the Venice Commission"
[10] See for further justifications MERSEL (2006) pp. 89-91.

considering historical experiences too – several organs of constitutional and/or political nature have declared the necessity and benefits of political parties in democratic systems.

The *German Constitutional Court* was in the position to decide on the role of political parties – in the light of protecting democracy against radical parties – as early as in the 1950s. In the case of the Socialist Reich Party in 1952 it summarized its standpoint deduced from the *Grundgesetz*.

> *"German constitutions following World War I hardly mentioned political parties, although even that time … political parties to a large extent determined democratic constitutional life. The reasons for this omission are manifold, but in the final analysis the cause lies in a democratic ideology that refused to recognize groups mediating between the free individual and the will of the entire people composed of the sum of individual wills and represented in Parliament by parliamentarians 'as representatives of the entire people' … The Basic Law abandoned this viewpoint and, more realistically, expressly recognizes parties as agents – even if not the sole ones – forming the political will of the people. The Basic Law's attempt to regulate political parties encounters [a] problem [that] relates to the principle of democracy, which permits any political orientation to manifest itself in political parties, including – to be consistent – antidemocratic orientations. … In a free democratic state … freedom of political opinion and freedom of association – including political association – are guaranteed to individual citizens as basic rights. On the other hand, part of the nature of every democracy consists in the people exercising their supreme power in elections and voting. In the reality of the large modern state, however, this popular will can emerge only through parties as operating political units. Both fundamental ideas lead to the basic conclusion that the establishment and activity of political parties must not be restrained."*[11]

The *European Court of Human Rights* established in several decisions that "political parties had essential role in ensuring pluralism and proper functioning of democracy". The Court held, protecting wide scope of party activities and programs, that "a political party, is not excluded from the protection afforded by the Convention simply

[11] 2 BVerfGE 1 (1952), translation and citation in: Kommers–Miller (2012) p. 286-287.

because its activities are regarded by the national authorities as undermining the constitutional structures of the State and calling for the imposition of restrictions".[12]

The role of political parties – although "at European level" – in this development and in democratic process in general has been declared in Article 191 of the Treaty establishing the European Community: "Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union."[13] The Council and the Parliament of the European Union adopted a new regulation in 2014 on the funding of political parties on the European level, in which it reiterates the Union's concept on the favourable features of cross-European party co-operations and the development of the European (level) political system:

> *"Truly transnational European political parties and their affiliated European political foundations have a key role to play in articulating the voices of citizens at European level by bridging the gap between politics at national level and at Union level. European political parties and their affiliated European political foundations should be encouraged and assisted in their endeavour to provide a strong link between European civil society and the Union institutions, in particular the European Parliament."*[14, 15]

2. Case Studies from Hungary

2.1. Novelties in Hungarian constitutional law

When turning to certain cases in Hungary, an overview on the constitutional level of regulation may help to frame the recent developments of party law. First, I will focus on the particularities and novelties of party regulations in the Fundamental Law of 2011. It should be noted that the Fundamental Law of Hungary and further pieces of legislation affecting political parties and introduced below were adopted without

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[12] Socialist Party and Others v. Turkey (1998)

[13] Later in Art 10.4 TEU also declares that "Political parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union."

[14] Regulation No 1141/2014 *on the statute and funding of European political parties and European political foundations*, Preamble (4)-(5).

[15] We have to note here that this optimism of the preamble of this EU regulation is a bit surprising. We need to look at the public opinion surveys to see the political parties in the eyes of the society; the trust in political parties was significantly below the trust in the European Parliament between 2002 and 2013. According to Eurobarometer results, see in context: ALONSO SÁENZ DE OGER (2014) p. 17-24.

substantial consent among the political parties. These reflect the ideas of the governing party "Fidesz" as it had 2/3 majority in Parliament, it did not find it necessary to seek compromise for the new regulations with the opposition.

Party regulation appeared in the previous Hungarian constitution, in the Act XX of 1949 in 1972 (3. §) saying that "*the Marxist-Leninist party of the working class is the leading force of society*." This political declaration was an indirect reference to single-party political system.[16] In Hungary "due to historical development"[17] the emergence of political parties or multi-party system in public law was not possible until 1989.[18]

Preamble of the Fundamental Law of 2011. A striking difference between the preambles of the two constitutions is that while the introduction of the transitional constitution of 1989 by mentioning multi-party system and parliamentary democracy lifts up the elements of pluralism as core values, the *National Avowal of 2011* does not even imply political freedoms especially parties, party system and representative democracy.

Core values. Regarding the foundation of democratic political system and the Hungarian constitutionality, the main ideas are principally similar in both constitutions, however, the functional definition of parties can be found in the chapter on fundamental rights in the Fundamental Law and not the chapter on Foundation. We can note here that the prohibition of activities aiming at violent acquisition or exercise and exclusive possession of power as well as the resistance clause are taken over by the Fundamental Law; as now this Hungarian constitutional axiom spanning over moments in the history.

The last article, U of Foundation enacted by the Fourth Amendment in 2013 mentions the state party of the previous regime by its name ("The Hungarian Socialist Workers' Party and its legal predecessors) declaring its non-lapsing responsibility for the historical crimes enumerated. It also adds that "Political organisations having gained legal recognition during the democratic transition as legal successors of the Hungarian Socialist Workers' Party continue to share the

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[16] KOVÁCS-TILK (2009) p. 271

[17] A phrase from János Kádár, leader of the communist state-party between 1956 and 1989.

[18] The text brought by the amendment of Constitution during the course of the change of the political regime in 1989 proved to be lasting for decades. SÓLYOM (2004) p. 15-26 gives an adequate summary of the creation of relevant rules of the new constitution of 1989 and party laws, see also HALMAI (1993).

responsibility of their predecessors as beneficiaries of their unlawfully accumulated assets.” On the latter responsibility clause we can make two notes: 1) it does not include any reference to explicit prohibition of the reorganisation of the communist party, 2) present “legal predecessor” party/parties is/are not unconstitutional merely by fact that they “share” some responsibilities of the state party. Defendants of the need to do justice in relation with crimes of the state party are rather the “possessors of power” and some leaders of the communist dictatorship as well as those who committed certain crimes.

Regulation of fundamental rights. Relating to parties the chapter of the Constitution on fundamental rights besides the freedom of association included only that armed organisation with political objectives may not be established on the basis of the freedom of association, furthermore, detailed regulation required a majority of two-thirds. The chapter of the Fundamental Law on fundamental rights parallely discusses the freedom of association with those functions of political parties which were in the Foundation of the Constitution. When reading these provisions we can note some fine differences:

Constitution 3. §	**Fundamental Law Article VIII**
(1) In the Republic of Hungary political parties may be established and may function freely, provided they respect the Constitution and laws established in accordance with the Constitution.	(3) Political parties may be formed and may operate freely on the basis of the right to association.
(2) Political parties shall participate in the development and expression of the popular will.	Political parties shall participate in the formation and expression of the will of the people.
(3) Political parties may not exercise public power directly. Accordingly, no single party may exercise exclusive	Political parties may not exercise public power directly.

control of a government body.

In the interest of ensuring the separation of political parties and public power, the law shall determine those functions and public offices which may not be held by party members or officers.	**Article XXXIII** (8) … the law shall determine those public offices which may not be held by party members or officers.

The Fundamental Law abandons the phrasing "provided they respect the Constitution and laws established in accordance with the Constitution", which does not provide too much normative surplus anyway[19] because it has been specified elsewhere that these sources of law are obligatory for everyone. We can add that this rule is not an obstacle to parties taking (democratic, legal) political actions to alter laws or even the constitution and exercising their rights provided otherwise.[20] The Fundamental Law also abandons the prohibition of the control of government bodies, which must have referred to "direct" control since indirect influence in the case of government bodies is an obvious constitutional situation (e.g. the influence of parliamentary representative groups was provided by the Constitution in certain cases). Concerning rules on separation of the state's public power and parties, the Fundamental Law now implies the creation of incompatibility rules besides the right to hold public offices.

Secondary regulation. Article 63.§ (3) of the Constitution prescribes qualified majority to adopt acts on both the freedom of association and the management and operation of parties, in the Fundamental Law, however, only party regulation comes under cardinal acts.[21] This creates a new situation in that certain rules of party establishing derive from the right of association therefore with respect to certain statues a two-third "protection" is not provided. Authorisation relating to the specification of incompatible public offices are mentioned above.

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[19] KOVÁCS-TILK (2009) p. 275, footnote 15.
[20] KOVÁCS-TILK (2009) p. 276.
[21] Worth to note this Act XXXIII of 1989 *on the Operation and Financial Management of Political Parties* is one of the oldest acts still in force since the regime change (although amended several times). Available (in English as of 2011): http://www.partylaw.leidenuniv.nl/party-law/4dd27714-1b94-4e59-a9b1-089884e5412d.pdf .

Parliamentary parties. Although the Constitution mentioned "the deputy groups of parties with representation in the Parliament" several times in a sporadic and irregular manner but still supporting the parliamentary work of parties.[22] This dimension is not implied by the Fundamental Law at all, only mentioning deputy groups without connecting them to political parties.

Incompatibilities. Besides authorisation for legislation the constitutional level itself specifies offices that cannot be held by party members. According to both texts such offices are constitutional judges, ordinary magistrates, prosecutors and professional staff members of the Hungarian Defence Forces and the national security services.[23] The new rule at constitutional level is that it includes the commissioner for fundamental rights and his or her deputies. In their cases previous regulation (article 5.§ (1) of Act LIX of 1993) excluded only political offices and roles. The same phrasing is applied in the constitution texts with regards to the President of Hungary.[24]

It can be noted that (both) our constitutions follows post-communist constitutional models in terms of their regulatory approach. The regulation, however, does not include parties' roles and (specific) rights concerning the electoral system, the possibility of state financing, the expectation of the internal organisation to be democratic and also the possibility to prohibit unconstitutional parties or the possibility of investigation by Constitutional Court. The latter, of course, does not mean that the Hungarian legal system and authorities are incapable to take action against "anti-system" organisations or organisation violating the limits of freedom of association and party establishing prescribed. It is true that in the first place the application of forms of responsibilities of other areas of law comes to the foreground in connection with activities of party members and leaders in the system of "militant democracy", however, dissolution of associations violating "the rights of others" is not without precedent.[25] Court decisions on the existence of parties can even reach the Constitutional Court through lodging a constitutional complaint.

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[22] Article 19/B. § (2), article 28. § (5), article 32/A. § (5).

[23] The limitation of "political activities" of police officers has been scrutinized and approved by the European Court of Human Rights; see the case *Rekvényi v Hungary* (1999).

[24] The office of the president of Hungary is incompatible with any other political offices (article 12, similarly, article of the Constitution 30.§); though it does not imply an explicit prohibition of party membership, see VIRÁG (2009) p. 1019.

[25] Instruments in the Hungarian legal system and marginal cases of (extreme right) organisations against democratic order are summarised by UITZ (2009) p. 147-181; and also see *Vona v. Hungary* case *(2013).*

2.2. Campaign finances

The regulation pertaining to campaign financing has been reshaped significantly before the 2014 elections.[26] Since 1990 Hungarian political parties may receive annual state funding for their regular operation in case they obtained 1% of votes at the previous elections. On obtaining mandate(s) or reaching the parliamentary threshold (5%) they are entitled for further assistance – these aspects of party financing are still in force. While the previous rules provided only 100 Million HUF for *all* the candidates, the new regulation is rather generous. In campaign, each individual candidate may receive 1 Million HUF public support for their electioneering, but they must repay it if they fail to obtain 2% of votes casted in their constituency (except the candidates of political parties that receive annual funding from the state budget). The effect of the generosity can be observed on the increasing number of candidates running for the mandates, this number is significantly above the previous figures (double in several constituencies). Candidates may waive to use this support in favour of their political party. Those political parties that were able to stand national party list for the elections and have candidates in each of the single-member constituencies are entitled to receive further funding – an extra 60% of the amount that can be spent legally (the number of obtainable mandates multiplied by 5 Million HUF).

Candidates and political parties by their candidates may spend 5 Million HUF on their own campaign activities. It is necessary to note that the campaign spending of different organizations ("independent" or "civil" associations, legal persons) and the government is not regulated, so there is no rule to forbid or at least to limit (or calculated together with the candidates' costs they are campaigning for) these kind of campaign costs. The rule pertaining to political advertisement in media services incorporated in the Fundamental Law aimed[27] to make campaigns cheaper.

> *Article IX (3) In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.*

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[26] See the new regulation: Act LXXXVII of 2013 on the transparency of the campaign costs of the election of the members of the Parliament.

[27] Transparency International supported this effort, see: *http://transparency.hu/PART_ES_KAMPANYFINANSZIROZAS*.

The effect of this provision resulted in an economic rationality, private media service providers did not broadcast any political ads, TV and radio campaigning was reduced to public service media in 2014.

Still lacking substantial[28] control on campaign spending, Hungarian NGO watchdogs made efforts to calculate the finances of major political parties in 2014.[29] If spending of government and "third party"[30] civil organisations has been taken into consideration too, it is a manifest result that political parties – especially the governing ones – exceed the spending ceiling. This obviously denies the expectation that justified the increased amount of campaign support: political parties will not respect spending ceilings in case they have more comfortable public financial benefits.

The new Hungarian regulation on campaign financing raised two further issues as matters of principle. First, it provided generous support for the candidates. It could be welcomed in terms of enhancing equal chances; but in practice it produced an increased number of candidates having no chance to get the mandate. Thus, as the opposition criticized the regulation, the funding resulted a pluralism that frittered the possible votes for the oppositional candidates. On the other hand, political ads disappeared from the most popular media services[31], from the eyes of 90% of the voters, for economic reasons.

The argumentation of the ombudsman of Hungary in 2013 is worth mentioning here. He requested the Constitutional Court to declare the previous campaign financing regulation unconstitutional. Regarding the small amount of public support (only 100 Million HUF to be distributed among all the candidates), he stated that this tiny support forces candidates and political parties to violate laws, as it is simply impossible to carry out a decent campaign from this money. On the other hand, the small amount means that parties already in parliament are in a significantly better financial position compared to small and new parties. The Court did not deliver a judgment on the merits because the regulation changed right in that time.[32] But the merit of this constitutional argumentation is that there *shall* be financial support

[28] I.e. that goes beyond the reports of the parties on their own spending.
[29] See: http://kepmutatas.hu/kampanymonitor-2014/
[30] "...money might ... be channelled through party-related foundations, which are usually not subject to the same restrictions as political parties with regard to the size and origin of donations. They are therefore convenient instruments for 'legalizing' money obtained from publicly owned enterprises, foreign donors or large corporate sponsors." See: FALGUERA-JONES-OHMAN (2014) p. 190.
[31] Campaign could be followed in news programs though.
[32] See: Res. 3213/2014 of CC.

from the state for candidates. It is not only *acceptable* or justifiable that state provides financial funding to parties and candidates, but we can also *require* the state to do so. In order to meet the constitutional requirements stemming from the principle of equality (and pluralism and informed electorate and so on), does public budget have to spend on funding of parties and candidates? Is there a constitutional minimum for party funding? We could say that this shift would be a new stage in public financing of political parties. So far constitutional law did not ignore the fact that parties are created by citizens on the basis of freedom of association. The compulsory funding of parties would mean that parties become more than political organizations competing for public power, but the somewhat clear distinction between state and parties would fade away; new political organizations were destined to obtain public financing. That's why campaign funding prior to elections is usually matched with posterior accounting, and in case any threshold of efficiency is not met by the financed candidate, public money shall be paid back. For smaller ones, this is almost as cruel as receiving nothing. With broad margins, the Venice Commission argues:

> *"Public funding, by providing increased resources to political parties, can increase political pluralism. As such, it is reasonable for legislation to require a party to be representative of a minimum level of the electorate prior to receipt of funding. However, as the denial of public funding can lead to a decrease in pluralism and political alternatives, it is an accepted good practice to enact clear guidelines for how new parties may become eligible for funding and to extend public funding beyond parties represented in parliament. A generous system for the determination of eligibility should be considered to ensure that voters are given the political alternatives necessary for a real choice."* [33]

2.3. Political message carriers – media airtime and street billboards

As "contemporary societies are mainly 'information' societies: elections are fought in a very particular context, so that access to mass media is possibly the best instrument for parties to transmit their message to electors."[34] Venice Commission also found

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[33] CDL-AD(2010)024, 190.
[34] CDL-AD(2006)025, 34.

that "While the allocation of free airtime on state-owned media is not legally mandated through international law, it is strongly recommended that such a provision be included in relevant legislation as a critical means of ensuring an informed electorate."[35] Providing the service free of charge (which is a form of campaign financing) might promote the media appearance of small or new parties and the channelling of their opinions into the democratic discourse. Anyway, democratic processes are harmed by the outcome of the elections being basically determined by the amount of capital used to finance campaign activities. Regulations on election campaigns and the media generally provide for airtime or transmission time free of charge on public service (state) channels.[36]

In general, Venice Commission underlined the special status of the public service media: "While all media are expected to offer responsible and fair coverage, it is particularly incumbent upon state/public media to uphold more rigorous standards since they belong to all citizens."[37] The division and allocation of the limited airtime/transmission time should be made in a fair and non-discriminative manner based on transparent and objective criteria. Distribution must not result in discrimination of certain political views.[38] In practice, equality refers both to the amount of time given and the timing and nature of such air-time allocations.[39]

In this framework in Hungary the regulation of political advertising has taken several different ways recently due to amendments to the Fundamental Law adopted in 2013 and the new Act on Electoral Procedures implementing them (Fundamental Law Article IX (3), Electoral Procedures Act, Article 147). First, the constitutional provision stipulated that political advertising can only be published free of charge

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[35] *Guidelines on political party regulation*. By OSCE/ODIHR and Venice Commission, Venice, 2010. CDL-AD(2010)024, 147.

[36] In a Central European perspective see: Latvia (Act on Campaigns, Articles 3-5), Lithuania (Act on Elections, Article 51), Poland (Election Code, Article 117), the Czech Republic (Act of Elections, Article 16 (4)), Romania (Elections Act, Article 38 (1)), Slovenia (Act on State Radio and Television, Article 12 (1)).

[37] CDL-AD(2009)031, 22.

[38] Anti-system, antidemocratic or other extreme, unconstitutional parties may be uncomfortable for political community, but this issue should be handled by different methods. Where applicable, the loss of a registration can be a sanction against these parties, followed by as a consequence the loss of the capacity to obtain public funding. CDL-AD(2010)024, 224. It is worth mentioning that Article 5 of the *Regulation (EC) No. 2004/2003 on the regulations governing political parties at European level and the rules regarding their funding* provides that in case these supra-national parties do not respect the fundamental values of the European Union (see Art. 2 of the TEU), the financial support may be withdrawn from them. But this regulation will be replaced by a new one from 2017, which provides that a European political party breaching the fundamental values of the Art. 2 of the TEU shall be removed from the register of the European political parties, and as a result, will lose the capacity to receive financial support [Art. 27 of the *Regulation No. 1141/2014*].

[39] CDL-AD(2010)024, 181.

and the advertisements of organisations establishing a national list were to appear only in public service broadcasting. Later, the Parliament abolished this limitation with respect to public service media. The Hungarian Constitutional Court, as well as the Venice Commission, criticised the prohibition contained in the first version because depriving larger parties of the opportunity to buy advertising time in commercial channels results in diminishing the opportunities for the opposition in an environment where the government naturally has more chances to appear in the news. The Hungarian Constitutional Court concluded that the ban on commercial media in reaching the largest number of viewers is an unconstitutional (unfounded, unjustified) limitation of the freedom of voters to obtain information, as well as the freedom of political opinion during elections.[40]
The rules of electoral procedure corresponding to the new solution were adopted only at the end of 2013 by the Parliament (few months before the 2014 elections). The Fundamental Law Art IX (3), as we saw above, states that political advertisements may only be published in media services free of charge. The new Articles 147 and 147/A–147/F of the Electoral Procedure Act contain provisions on the obligations of the public and private media to broadcast political advertisements. These obligations include the obligation of commercial media service providers and press products to announce their advertising intentions and price lists by a deadline, otherwise they are not allowed to publish campaign advertising. Public service channels are to provide 600 minutes of airtime free of charge, which is distributed by the National Elections Committee. A practical criticism of this solution is that although publishing campaign materials by commercial service providers is not prohibited, the offer of advertising airtime free of charge is likely to be limited for economic reasons.

Following a significant decline of the political advertisements in electronic media, a passionate blossoming[41] of the giant posters carrying political messages started on the streets in Hungary. Not only political parties but NGOs and in a quite robust way the Government featured too; not only in campaign periods but also between elections. It has raised several questions (NGOs postering in favour of certain parties or reviling others does not count when respecting campaign spending limits) and

[40] Constitutional Court Decision No. 1/2013. (I.7.), 93-100: it annulled Article 151 of the new Act on the Electoral Procedure and the rule included in the Fundamental Law was adopted in response to this decision. The Venice Commission commented on the latter (CDL-AD(2013)012, 37-47.), saying that the European examples cited by the government do not constitute appropriate justification for the ban.
[41] See for ex. the campaign about the refugee crisis: Kiss (2016).

became an impressive battlefield of politics; so it was not surprising that the governing side turned to the re-regulation this section of advertising market. The first proposal aimed simply to ban any political billboards outside the election campaigns, but the governing side was not able to meet the qualified majority requirements (necessary because of the relevance to party finances); so the regulation has been enacted into the law on protection of townscape.[42] The new financial regulation pertaining to contracts on billboards carrying political messages affects the public financed organisations (i.e. the major part of their incomes comes from public funding), so also the relevant political parties in the Hungarian political arena. These organisations will be able to contract for giant poster places according to previously and publicly reported prices. This rule aims to abolish the possibility of hidden party financing (in the form of specially applied 'discount' prices); and actually it may be connected to a certain relationship of an oppositional party and a billionaire financing it. What is more interesting that civil organisations (NGOs) are not subjects of this regulation. This obviously re-shapes the billboarding habits in Hungary, however, also making party finances more transparent.

3. Concluding remarks. Political parties and party systems in change – What pluralism? What democracy?

The constitutional status of political parties as we saw above is determined by their role played in democratic process and in general in the political system, or more precisely, by the perception thereof accepted by the constitutive power. It is quite evident that we have to consider the fact that political parties participate in the constitution-making process; and while influencing directly the daily business of legislation they are able to define themselves too.[43] Though, legislation affects the role of parties and legal regulation pertaining to their functions may cumulate to various – pleasant or unexpected – results. Concluding and evaluating the party

[42] Law LXXIV of 2016, Art. 11/G. The method is at least controversial; its constitutionality has been challenged at the Constitutional Court (case id. no. II/01483/2017, still pending).
[43] BORZ (2016) p. 5.

regulations and the Hungarian case studies, our findings may be sorted into the following three, partly competing theses.

a. The regulation is adequate. Parties are benefactors of democracy, European standards of party regulation are guarantees for the quality of democracy – we only need to follow and implement them in the adequate manner. It is necessary and sufficient to fix these rules in order to handle dysfunctions and malpractices.

Certain sources of regulation perceive the role of political parties in a quite positive way. This optimistic attitude is obviously reflected in the rules (over)preferring political parties (i.e. privileges of presenting candidates and party election lists) and in sustaining public financing thereof (see the justification advocating that we cannot expect parties to respect rules in case of 'too low' public funding). From the perspective of constitutional values, we can raise two questions on this approach.

First, even if the regulation aims and reaches the adequate objects and the political parties perform favourable democratic functions; does party regulation have under the domain of this paradigm immanent deficiencies or mistakes? A problem of this kind could be the setting up of the thresholds to obtain party funding or other benefits. These thresholds may result in a closed circle or club of privileged ones. Similarly, 'militant' actions against anti-system parties may constitute interference of democratic values; the legal system need proper means to abolish anti-democratic organisations. The Hungarian legal order provides only indirect tools pursuing these goals.

On the other hand, we should be suspicious of the extensive system of financing and regulation: hasn't it altered the fundamental profile of political parties?[44] Intense state funding and legal regulation of the internal democratic procedures intended to pacify party struggles by 'nationalization' of parties. This method may keep (relevant) parties under the domain of the paradigm, but may also distort legitimacy and democratic process. Even though political parties function to integrate the political system, the participating citizens and the processes of interest advocacy, limitation (or exclusion) of these participants and processes will fuel the struggles and

[44] BIEZEN (2004) pp 701-722.

frustrations of grass root movements and populist narratives. This in turn will corrode the fundaments of democratic polity.

b. The regulation is inadequate. Political parties are substantially different now than they are perceived by the legal norms and standards formulated in the 20th century.

If we look at political party development nowadays, it may leave us with the disquieting impression that constitutional standards of party law, as results of 20th century polemics, are already left behind. Thus, legal regulation is inappropriate to reach its goals, as it aims wrong (different) objects. Rules pertaining to political parties concentrates to mass parties, as they were in the middle of the 20th century. Based on the freedom of association, perceiving parties as private organisations emerging from civil society for the sake of obtaining political power, regulation requires internal democracy for masses of membership. But this is actually over. Instead of thinking about them as mass organisations, we should rather think about political party as a political venture or a 'firm'. This is based on the decline of party membership[45]; and the experience that the otherwise traditional party functions, co-ordination of democratic process can be carried out by political entities organized around political leaders. These entities apply internal discipline, external efficiency and strict (campaigning, communicative, decision-making, recruiting, etc-etc.) strategies.[46] Internal democracy as a requirement against them were justified by the presumption that public power and government can be carried out in democratic manner only by organisations that are built up and function democratically. This presumption seems to be disproved.[47]

c. Outsourcing party functions. Role of political parties in a democracy can be performed by other entities as well; moreover, regulation limiting party functioning is itself that steers development in this direction.

Finally, we can refer to pieces of the American literature lamenting on the results of the 2016 election, namely the rise (and unexpected success) of candidates that did

[45] BIEZEN – MAIR – POGUNTKE (2012); MAIR (2008).
[46] Among the parties in Hungary, the governing „Fidesz" is high above the others in this sense.
[47] KATZ (2014) p. 33-34.; and ORR (2014).

not follow the 'usual' road to candidacy inside and alongside political parties. Samuel Issacharoff introduces the results of the 'anti-party' legislation as unpleasant outcome of limiting party functions by legal means. He argues that political parties played important role in the political system when stabilizing and structuring democratic process. They "managed divergent interests by control over three critical political functions: access to campaign funding, delivery of patronage governmental positions, and control over the nomination process." These fields may be dangerous in corrupting representation and governance but – according to Issacharoff – limiting parties' abilities to manage them resulted the absence of the coordinating role of the party, so "politics becomes more atomized, rhetoric hardens, and governance becomes more complicated".[48]

Taking over party functions may be partly difficult because of the regulation concerned here, and may be partly an evident result of political reason and necessity. Below I summarize the possibilities of this direction in the Hungarian party system and legal order. Here, we need to consider shortly another *topos* from party literature. The observation of *'cartel party'* hypothesis elaborated and re-instated by Katz and Mair[49] is not a task of public law, rather of political science. Still, on Hungarian cases we can verify the aspect of the thesis pertaining to the development that legal regulation of parties pulls them closer to the state. They are elevated from civil society by regulation (see privileges and frames in media law, campaign activities) and overwhelming public funding (available for everyday operating of party organisation and for campaign activities, as it amounts to 75-90%[50] in an average Hungarian party budget). Concluding remarks may be gathered into the following three parts, into the three fields of operation of parties. As a result, we can only partly

[48] ISSACHAROFF (2017) pp 845-880.
[49] KATZ – MAIR (1995), and KATZ – MAIR (2009)
[50] *Revenues of parties represented in the Hungarian parliament (in million HUF) in 2015:*

Party	*Membership fees*	*Donations*	*Public subsidies*	*Total revenue*	*Position*
Fidesz	142	56	876	1,083	On government
KDNP	7.3	14	152	174	On government
Jobbik	4.5	60	476	545	Opposition
LMP	2.85	16	174	200	Opposition
MSZP	22	106	427	774	Opposition
MLP	0.152	2.7	58	61	Opposition
DK	25.8	29.8	132	205	Opposition

[Source: Report on the financial management of political parties in 2015, published in 2016 in the official journal of Hungary (Magyar Közlöny).]

prove the hypotheses of 'cartel party' or 'outsourcing of party functions' in Hungary; what is more eye-catching is how the playing ground of party politics transformed or has been transformed in the recent years.

Parties and campaign. In several legal orders political parties cannot be overtaken or substituted regarding the presenting of candidates or party (electoral) lists, and the influence of the party centre is decisive in that selection. In certain cases, independents may be competitive candidates, i.e. in case of a direct presidential election.[51] As we introduced above the new system of campaign finances introduced in 2013 resulted in a multi-player campaign but turning up many candidates having no chance at all. Outsourcing of campaign functions of political parties emerged due to deluding of limitations in campaign finances; as these limitations are still blind to NGOs' spending, even in case this spending obviously supports a certain candidate or party.

Parties and representation. Parties in parliament are over-disciplined compared to those that are outside. Relevant political parties are 'inside' and so their party elite too. These elites – represented in legislative and in important governmental positions, well-financed by public budget – are not dependent any more on private donors of parties and also from the party membership. Of course life is more difficult in opposition; but further findings cannot be drawn in Hungary as private donors disappear due to lack of transparency. The Hungarian party system is otherwise determined by the limited scope of alternative interest advocacy and direct democracy tools. A party at the Constitutional Court[52] has challenged the 'closing club' of major parties successfully, nevertheless, achieving only the application of the 1% threshold of public funding to party foundations; while the decision strengthened the efficiency principle and the existence of the threshold itself.

Parties and governance. Patronage system could offer relevant profit for parties and their supporters in case of winning the elections. In Hungary, it is quite difficult to identify the limits of the spoils-system on the basis of public law and regardless the certain experiences of elections and government-changes. However, observing these experiences we can find patronage rich in culture and means; that supports the stable positions of political parties. In case of technocracy and 'expert' (instead of political)

[51] Or in case of a mayor, see STARTIN (2001).
[52] Decision no. 63 of 2008 (IV. 30.) Const. Court.

governance, as well as the strengthening of the constitutional positions of the prime ministers we can notice a relative distancing of party and government structures. Political strategies built around the Prime or strong leader[53] need stable political party organisation only to secure some kind of electoral and legislative background; as other channels of human and capital resources are available for public policy decisions and recruitment of personnel.

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[53] HLOUŠEK (2015); MANDÁK (2009) pp 57-62.

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Independence in disputed areas controlled and influenced by the EU: The forbidden comparison of Kosovo and Catalonia

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Abstract

The focus of this work will be on the EU neighborhood region and especially on Kosovo and one of its areas which is popularly known as North Kosovo. We will explain the recent political outcomes which concern this region and its majority, Serbian population. Also a parallel situation which occurred on the territory of Spain, where Catalonia its region on the North has declared independence, quoting and supporting its claim by the case of Kosovo's recent independence declaration. We are aiming to explain this triangle of an independent Kosovo, the future special status of North Kosovo as it is stated in the Brussels agreement of 2013 and the future status of Catalonia, in or outside of Spain. We will explore how such decisions affects people, their lives and future, also the future of such territories and similar agreements if we take their purpose and applicability to future cases and similar situations in the sense of independence, secession and sovereign rights.

Keywords: Kosovo, Catalonia, Independence declaration, EU recognition, conflict management

1. Introduction

In some recent cases and disputed areas controlled and influenced by EU it is visible that law is being made by some factor from outside the area, usually it is the EU and its officials. The laws serve a very specific purpose and we will deal with their application and the will of people to accept and apply them. Considering the idea of subsidiarity present in the EU law we are facing a problem which is hard to approach from a legal point of view. The International community made a Constitution for the ruined country of Bosnia and Herzegovina, on the end of the 20th century it brought to an end a long conflict. By this given solution the conflict has ended, but in a similar case where much different social groups confronted each other on the territory of

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Kosovo a similar decision has been made by the EU in Brussels to pacify. This agreement has a similar background and is protected by the authority of a broad International Community, but unfortunately it did not bring the conflict to an end. Social groups just got more far from each other and a frozen conflict situation has been created.

The aim of this work is to discover how we should shape law outside of the well known system of democracy where the majority rules and decides. It is not always possible to achieve that stadium where democracy can be used and its system activated in order to make law and decide. Keeping in mind the different ways of misusing the democratic procedures, as seen in previous cases in history, Nazism, Communism and similar off springs today. Certainly the democratic procedures imply that people vote from time to time, usually in a period of four to five years so they shape democratic institutions in a way which they expect them to make laws and policies.

Knowing that decisions are sometimes not made by using voting or other similar democratic procedure where people decide, we in turn try to understand how and where from such decisions get their authority and legality. It is very interesting that such decisions can not have a long lasting power, since they are forced from above what is never good for democracy, stability of societies and prosperity. Also the power to conclude such agreements could be disputed and we will also approach the question of mandate and what could happen if people decide not to accept the decision and boycott them. The case of North Kosovo gives us a perfect example of people boycotting and not recognizing decisions and laws coming from the International community and the situation is even more interesting now. The sole purpose of the Brussels agreement concerning mainly North Kosovo is to bring to an end this situation, but will it succeed? People somehow felt left aside from the International community earlier during some historic misunderstandings on this territory, now they have some not bright feelings towards their former state, Serbia as well. The problem now looks formally solved, but what will change, will the people respect and apply changes. There is also a question what this solution hides, it could imply that by this agreement people have to agree to much more than it is written on the paper and stands in the agreement. Some details are pending and could change and influence people lives in many other aspects as well.

But in fact who cares about people when everyone has its own interest. "The United Nations Secretary General voiced his opposition to attempts by his Special Representative to convey the impression that the role of the United Nations was to establish an independent Kosovar state."[1] If so, why they would like to establish an independent Kosovo state, states sovereignty is very important in the international relations and the UN system. Obviously some have an interest to make a new state, which is in the case of Kosovo very easy, excluding the Serbian sovereignty. Kosovo people in fact never went that far to be fully independent, they either wanted to join Albania forming a big Albanian state in the region or remain in Serbia as a special entity having similar rights as a republic in a federation. Cutting Kosovo to its present, small form, was not really an idea or solution. This way it is obviously more vulnerable considering the size of Serbia and other regional factors, like extremism both Muslim and Christian and the long lasting wish to from a unique Albanian national state. "This precedent draws on the advisory opinion, but it additionally can point to the political and diplomatic encouragement given to Kosovo to become an independent state, including by the style and substance of the UN administration ever since 1999."[2] So it was not only the Advisory opinion of the ICJ[3] which has made Kosovo independence partially legal, it was the power of some influential states to dare to recognize it and confront the Security Council mechanism. Even if the majority in Kosovo lives a dream of independent state the puzzle is missing one part, North Kosovo Serbs. They do not agree to this situation and have won a very interesting hybrid solution in the sense of post conflict state building. "Who are the participants in the dispute whose presence is indispensable to an effective process with a realistic prospect of a satisfactory outcome? This question is especially crucial when key players have not received international (UN) recognition."[4] In other words, why would an independent state, as Kosovo, ask Brussels and even more Serbia about how to administer on their sovereign territory. Then we come back to the question of administration, in Kosovo it is done according to Security Council Resolution 1244 by

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[1] Max Hilaire, 2005, *United Nations Law and the Security Council* (Ashgate) p. 138

[2] Richard Falk, 2011, "The Kosovo Advisory Opinion: Conflict Resolution and Precedent", *The American Journal of International Law*, Vol. 105, No. 1, pp. 50-60

[3] International Court of Justice, 2010, *ACCORDANCE WITH INTERNATIONAL LAW OF THE UNILATERAL DECLARATION OF INDEPENDENCE IN RESPECT OF KOSOVO, ADVISORY OPINION OF 22 JULY 2010,* < http://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> accessed on 25 February 2018

[4] Christine Chinkin, 1998, 'Alternative Dispute Resolution under International Law', in Malcolm D. Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart) pp.123- 140

UNMIK and EULEX so has nothing to do with the Kosovo government. "The diplomatic tensions that preceded the drafting of Resolution 1244 demonstrated that the only way to avoid a Russian veto in the Security Council was to insert vague language affirming Serbian sovereignty even though the states favouring humanitarian intervention expected and wished that Kosovo would be severed from Serbia in the future."[5] This division from the Security Council has spread and figured the most important role in the recent 20 years history of Kosovo and its people. Definitely the Brussels agreement from 2013 was not an intention years ago, but as situation has changed it evolved from it. This is why it is important to research it and thus understand the similar situations and demands, from which we will now only deal with Catalonia. Catalonian independence is now not possible, but is it democracy and how can we, the EU, Spain or anyone prevent it from happening in the future?

2. Definitions of Independence with Independent Facts

After the wave of independent states has it the European continent with the fall of communism many believed that the picture is done. However all the claims for independence arising from many other historic and regional claims are not set in stone. The federalist forms of government present in many European countries are facing independence claims regularly in various times in history. "When a new version of group identity is created, a new group territory is likewise required."[6] As we have stated it earlier, Kosovo has never been an independent country, but has been a part of other various forms of federalist governments back in time. The very hybrid term of Kosovo Albanian has been created thus people belong to one common Albanian nation. Why would one nation stream to get two states in the neighborhood? It is unnatural and by seeing the case of East and West Germany united it can not be normal in the European point of view as well. "Put another way, dividing power among ethnic communities represents an acceptance of the logic of nationalism, applied at the (nominally) substate level. This is the paradox at the heart of western efforts to achieve viable political settlements to ethnic conflicts in Bosnia, Kosovo, and other deeply divided societies."[7] So the artificial division done in the

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[5] Richard Falk, 2011, "The Kosovo Advisory Opinion: Conflict Resolution and Precedent", *The American Journal of International Law*, Vol. 105, No. 1, pp. 50-60

[6] George W. White, 2004, *Nation, State, and Territory: Origins, Evolutions, and Relationships* (Vol 1, Rowman&Littlefield Publishers) p.56

[7] Jane Stromseth, David Wippman and Rosa Brooks, 2006, *Can might make rights? Building the rule of law after military interventions* (Cambridge University Press) p. 117

Balkans is just temporary, just as it has been done many times in history. At this point we will not aim to explain how such a division has to be done, but to explain what steps not to follow. “The Macedonia peace agreement demonstrated Nato’s cautious approach to dealing with situations in the Balkans. The agreement was a victory for ethnic Albanians, who made political gains that would not have been realized on the battlefield.”[8] By gaining rights, and not territory in Macedonia, Albanians have somewhat failed the idea of making greater Albania happen in practice. Having majority in Kosovo they already have two states on the Balkans, same as Serbs having Republic of Serbia and Republika Srpska as an entity in Bosnia, some might argue Montenegro as well. Some could argue that this hybrid situation has been done exactly to match the future development and prosperity needs of local people. State or independence is not a prerequisite for development, or it is? “By saying this we can see that the territory of Kosovo could be recognized by the WTO as a separate country even though we know that Kosovo struggles to get a seat in the UN...” [9] As the author has described earlier many viable political solutions can be agreed for what the Kosovo membership in CEFTA (Central European Free Trade Agreement) is also an evidence, being a member via its UNMIK mission. “Solutions often have to be imaginative: precedents may have to be set or created, rather than found ready-made elsewhere.”[10] Without boosting its trade potential and waiting for political decisions to be done Kosovo would just stay partially independent just as it is now. Similarly to Kosovo, Catalonia will stay unhappy in the framework of the Spanish state if its economic status is not strengthened more. The extreme condition and standpoint of the Spanish government not to lighten the economic burden on Catalonia has created the same extreme answer in Catalonia, with the request for independence. “A well-designed federal system may defer secession-perhaps into the indefinite future.”[11] Such a system in the case of Spain would strengthen its position and sovereignty as well. The fall of the established federal system in Yugoslavia, where Kosovo was an Autonomous province with broad rights in all spheres of live, has after some years culminated in its separation from Serbia.

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[8] Max Hilaire, 2005, *United Nations Law and the Security Council* (Ashgate) p. 170

[9] Attila Nagy, 2015, “Kosovo as a future member of the WTO” 1 Eurasian Forum on Law and Economics, p. 43

[10] David Anderson, 1998, ‘Negotiation and dispute settlement’, in Malcolm D. Evans (ed), *Remedies in International Law: The Institutional Dilemma* (Hart) pp. 111-121

[11] Will Kymlicka, 1998, ‘Is federalism a viable alternative to secession?’, in Percy B. Lehning (ed), *Theories of secession* (Routledge), pp. 111-150

3. Kosovo and its Independence

After the initial surprise that Kosovo has dared to proclain independece it become a common topic for discussion for many legal scholars. Even the ECJ has supported this discussion with its ambiguous definition of independence declaration. Although Kosovo declared independence Kosovo did't want to get rid of everything, exept Serbias sovereignty over it. „We welcome the international community's continued support of our democratic development through international presences established in Kosovo on the basis of UN Security Council resolution 1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Ahtisaari Plan, and a European Union-led rule of law mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leadership role of the international military presence in Kosovo and to implement responsibilities assigned to it under UN Security Council resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo institutions are capable of assuming these responsibilities. We shall cooperate fully with these presences to ensure Kosovo's future peace, prosperity and stability."[12] So practically nothing has changed just the vocabulary considering Kosovo representation inside and in some countries outside will be treated as „independent". As the war with Serbia has enden many years before the legal war with the Serbian minrity in Kosovo was just about to begin. The chaos and incapability of Kosovo institutions has pushed the Serbs towards their own institutions which were strongly supported by Serbia. This was very specific to North Kosovo where Serbian governmental structures except Police existed in various capacities, although their capacity varied from full to limited. All this was possible until the Brussels agreement of 2013 was not reached where the Serbian and Kosovo representatives agreed to discontinue the presence of Serbian structures of any form. This agreement is contrary to the Serbian constitution just as it is unapplicable into the Kosovo's present legal order. The Brussels agreement of 2013 was never contested by the Serbian Constitutional Court while the Kosovo court has given an argument supporting it, while it calls it the First Agreement since in it the signatories agreed about more agreements to come. "TO HOLD that the Association/Community of the Serb majority municipalities is to be established as provided by the First Agreement,

[12] Assembly of Kosovo, 2008, *Kosovo Declaration of Independence*, Prishtina on 17 February 2008 <http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf> accessed on 20 February 2018

ratified by the Assembly of the Republic of Kosovo and promulgated by the President of the Republic of Kosovo”[13] The future Kosovo Serbs relation to the central authorities will be now transferred to this A/C and make a new chain of communication starting from municipalities via this A/C all the way up to the government. To stay with the topic of independence, by this solution Kosovo has given up its main sovereign rights to decide alone about the most important questions related to its society and brought back the Serbian state will making this legal gap. The formation of the A/C will be the biggest legal challenge since the Kosovo declaration of independence, again not just for Kosovo but for EU as well. EU support to Kosovo is vital and at the moment Kosovo can't say no to EU in any sense. But on the other hand EU shows its appreciation for this as well, it has signed the Stabilization and Association Agreement with Kosovo, by this Kosovo has got rights and opportunities which are not less than the ones hold by other countries in its neighborhood as related to the EU. „Cooperation and dialogue shall aim at ensuring the further development of a professional, efficient and accountable public administration in Kosovo, building on the reform efforts undertaken to date in this area, including those related to the decentralisation process and to the establishment of new municipalities. Cooperation shall notably aim to support the implementation of the rule of law, the proper functioning of the institutions for the benefit of the population of Kosovo as a whole, and the smooth development of relations between the EU and Kosovo.“[14] As one of the request by EU to Kosovo decentralization is set as priortiy, so it might give a place to the future formation of the A/C. Still it is not serious to expect any kind of serious decentralization in a post-conflict country where the separation of powers, legislative, executuve and judiciary, is still not fully achieved. In fact, Kosovo has more laws on power now than it has capacity to fully enforce even with the generous help of the EU administration on field.

A) Kosovo's limited sovereignty and its future prospects

Without the vital support of the EU Kosovo would not be able to support its stance as a state. Apart from the administrative support it depednds on EU economically as

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[13] Constitutional Court of The republic of Kosovo, *Judgment in Case No. KO 130/15* < http://www.kryeministri-ks.net/repository/docs/Constitutional_Court_of_the_Republic_of_Kosovo_-_Judgment_in_Case_KO_130-15.pdf> accessed 18 February 2018

[14] EU, Stabilization and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part [2016] OJ L 71/3

well. Its economic development is lagging far behind EU standards for what the recent emigration crisis serves as evidence, many young Kosovo Albanians started illegaly emigrating to the EU. They did not want to wait more for EU standards to come to Kosovo so they went on route. "A market economy with free competition is the basis of the economic order of the Republic of Kosovo." [15] Still the economy and administration is poisoned with corruption and nepotism what even the 20 years long international presence could not battle in Kosovo. The situation is not much better on North Kosovo, just that the Serbian state is having huge budget expenditures to maintain the social welfare of citizens, but in this case mainly Serbs and Roma people. Without this support Serbs would have no chance to stay even for a single day in Kosovo since the majority of them works in the government sector. To be able to continue this practice Serbia will have the A/C and its future headquarter which will be most likely in the already established administrative center of Kosovo Serbs in Kosovska-North Mitrovica. „ ...The substantial autonomy of the Autonomous province of Kosovo and Metohija shall be regulated by the special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution. New autonomous provinces may be established, and already established ones may be revoked or merged following the proceedings envisaged for amending the Constitution. The proposal to establish new, or revoke or merge the existing autonomous provinces shall be established by citizens in a referendum, in accordance with the Law... "[16] So as the present *de facto* situation shows everything is set but the *de iure* situation is just about to begin with, most probably, a new Serbian constitution or at least its core revision. As we can see economical considerations necessary for survival always find the path but it is far from sustaining a serious market economy. One of the biggest challenges for Kosovo today is the rule of law. Even with the establishment of Kosovo Specialist Chambers[17] the whole legal order is far from being in line with basic human rights standards as present in EU. The lack of rule of law in Kosovo and the immense support the Kosovo legal system has got is unprecedented in Europe at least, but it is not the Kosovo government to blame since they are the ones who asked for help. UNMIK and EULEX support to the rule of law

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[15] Constitution of the Republic of Kosovo, adopted by the Decision of the Assembly of the Republic of Kosovo No. V-027 dt. 9 April 2008, in force from 15 June 2008, art 10, page 3

[16] Constitution of The Republic of Serbia, Official Gazette of the RS no. 98/2006 from 10 November 2006, art. 182

[17] Kosovo Specialist Chambers and Specialist Prosecutor's Office ,2018, *Background*, < https://www.scp-ks.org/en/background > accessed 20 February 2018

has failed and one of the ways out found after some 20 years is the establishment of the Kosovo Specialist Chambers. The SPC will try to solve the most burning inter-ethnic issues, but it will be hard since one Serbian opposition leader, Oliver Ivanovic, has been killed in front of his office in North Mitrovica. His case was one of the last cases considering war crimes from Kosovo being judicated in Kosovo before the work of the SPC has started. The failure of the judiciary system in Kosovo has numerous reasons. "Appointed to most, but not all, war crimes and other sensitive cases, including ethnic crimes and high-level organized crime, the international jurists initially had little impact: they were in the minority on judicial panels and were invariably outvoted by Kosovar Albanian judges."[18] Even if many cases have been finished some will arise in front of the SPC, it is hard to say why after so many years and how they will find evidence at all. Also it is hard to say that such cases will be newly found ones, more likely they are coming as a pressure on the Kosovo ruling elite and thus again limiting Kosovo sovereignty. The political elite in Kosovo is again more than ready to accept compromises and deals which otherwise would be hard to accept, therefore the international community even thought is having a chance to serve justice, it will again, most likely, make some deals and force Kosovo and its politicians to accept the "unacceptable". "All in all, international judges and prosecutors have made a valuable contribution to Kosovo's justice system."[19] We have to say so since without them the Albanians and their absence from the official Serbian institutions would never provide enough experience and ability to establish any form of court system which would respect human rights.

B) Administrative structure of Kosovo with its future prospects

Our comparison of Kosovo and Catalonia is now coming to the most important point where the outcome of the Serbian and Kosovo government talks has produced a very interesting solution namely they agreed to establish the A/C. Both states have dived deep into their sovereign rights and agreed on the highest level to establish this new administrative form, which is very interesting in the sense of public administration and protection of minority rights. "In accordance with the First Agreement, the Association/Community will have as its main objectives in delivering public functions

[18] Jane Stromseth, David Wippman and Rosa Brooks, 2006, *Can might make rights? Building the rule of law after military interventions* (Cambridge University Press) p. 276
[19] Jane Stromseth, David Wippman and Rosa Brooks, 2006, *Can might make rights? Building the rule of law after military interventions* (Cambridge University Press) p. 238

and services to:”[20] Serbs in Kosovo and in specific on North Kosovo has never used, or been in a position to fully use the services of Kosovo states. They have widely used and continue to use the services of the Serbian state administration, to mention the most notable ones: schools, healthcare, courts and documents like passports or IDs. At the moment in all the mentioned aspects Serbian system is much more advanced than Kosovo and it is hard, if not impossible, for the Kosovo state to provide such quality services to citizens on North Kosovo. In any case they will have a chance to try since with the establishment of the A/C Kosovo will have a chance to exercise its sovereign right, providing services which are a duty of every state. „Local self-government is based upon the principles of good governance, transparency, efficiency and effectiveness in providing public services having due regard for the specific needs and interests of the Communities not in the majority and their members.“[21] The lack of state support in important fields is something very typical for Kosovo, its economy is undeveloped and the biggest state enterprises which kept the social peace are long time gone. Kosovo Albanians are unemployed and many say that the whole story of independence has costed lot more after the conflict than before and during it. Serbs would not risk to get to that position in Kosovo and if the Serbian government support would not be provided to them they would empty Kosovo and leave the international community efforts from the past pointless. Therefore a genious solution has been found, lets try to balance the interests of people and bring them as close as possible. “There will be an Association/ Community of Serb majority municipalities in Kosovo. Membership will be open to any other municipality provided the members are in agreement.”[22] Serbian municipalities in Kosovo are not present just on the North, there are many others in South Kosovo which are called by the locals “enclaves”. Enclaves are something what was not typical for Kosovo during the Yugoslav era when Serbs and Albanians lived together in particular in the biggest cities Kosovo wide. Now the inter-ethnic Kosovo state could not proud itself of such

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[20] Federica Mogherini, 2015, *Association/Community of Serb majority municipalities in Kosovo-general principles/main elements* (European Union External Action, Bruxelles on 25 August 2015) <eeas.europa.eu/statements-eeas/docs/facilitated-dialogue/150825_02_association-community-of-serb-majority-municipalities-in-kosovo-general-principles-main-elements_en.pdf> accessed 20 February 2018

[21] Constitution of the Republic of Kosovo, adopted by the Decision of the Assembly of the Republic of Kosovo No. V-027 dt. 9 April 2008, in force from 15 June 2008, art 123, par. 4

[22] Brussels Agreement, *First agreement of principles governing the normalization of relations*, in Kosovo Law No.04/L-199, <https://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20ratification%20of%20agreement%20-normalization%20of%20relations%20between%20Kosovo%20and%20Serbia.pdf> accessed 20 February 2018

freedoms therefore this A/C will just legally envisage the actual situation present for last 20 years. “In accordance with the competences given by the European Charter of Local Self Government and Kosovo law the participating municipalities shall be entitled to cooperate in exercising their powers through the Community/ Association collectively. The Association/ Community will have full overview of the areas of economic development, education, health, urban and rural planning.”[23] Such broad rights are not very often given to minorities even in the EU and thus they guarantee to a very high extent the satisfaction of many minority demands. Certainly other minorities in EU among which are the Catalans would not mind having the same rights, so it is hard to understand why EU has never offered them to achieve the same outcome with the Government in Madrid. Spain’s constitution can be changed in order to accommodate such an agreement and lock the conflict not just with the Catalans, but with the Basques as well. For now the Brussels Agreement is fully legally binding on Kosovo and has a status of law. Also its constitution has to be now more widely interpreted. „Establishment of municipalities, municipal boundaries, competencies and method of organization and operation shall be regulated by law.“[24] How much of sovereign righst will be taken from Kosovo if we know that the enforcement rights via Kosovo Police is already in its hands. Now the justices from North Kosovo have been transferred from the Serbian system to Kosovo and on the end when the A/C gets its final form it will all close the circle. So why such decission could not be achieved years before or even before the confict, when we say conflcit we think about Catalonia and other similar regions present now and in the future. “Another issue is that with this agreement it is very clear that the Kosovo state got divided with a sharp division line between the Northern municipalities including some Serbian municipalities from other parts of Kosovo. This division line was very strong previously but with this agreement it got a specific status which will certainly not be changed in the near future. Also the future of Kosovo as multiethnic state is now under revision and could be a state of multiple nations since it is hard to imagine

[23] Brussels Agreement, *First agreement of principles governing the normalization of relations*, in Kosovo Law No.04/L-199, <https://www.kuvendikosoves.org/common/docs/ligjet/Law%20on%20ratification%20of%20agreement%20-normalization%20of%20relations%20between%20Kosovo%20and%20Serbia.pdf> accessed 20 February 2018

[24] Constitution of the Republic of Kosovo, adopted by the Decision of the Assembly of the Republic of Kosovo No. V-027 dt. 9 April 2008, in force from 15 June 2008, art 124, par. 2

that Serbian municipalities will ever consider Kosovo as their homeland."[25] The A/C is of course not a perfect solution and its life will show us where the mistakes have been made and serve us with more answers in „managing" inter-ethnic conflicts in the future.

4. Catalonia and its struggle for independence

It is hard to understand claims for self-determination but it gets much easier to look at them when we take into consideration economic factors and not minority rights as some would say. When people start losing money and thus their usual standard of life they are going to blame someone. If it's not their own national government to blame then it's the present one, in the case of Catalonia its Madrid. "This economic edge is the result of Spain's uneven pattern of economic development, which gives Catalonia an edge over most other Spanish regions."[26] Catalonia is more developed but its advantage disappears with the economic crisis which has hit Spain more than some other countries. But would Catalonia be able to dodge this effect if it would be independent? The answer is yes, to a certain extent, since it would make decision which would be in favor of Catalonia and not against it as the Madrid government does usually. For now Catalonian economy stays in the hands of Madrid. „In the exercise of the right to self-government recognized in section 2 of the Constitution, bordering provinces with common historic, cultural and economic characteristics, insular territories and provinces with a historic regional status may accede to self-government and form Self-governing Communities (Comunidades Autónomas) in conformity with the provisions contained in this Part and in the respective Statutes."[27] As we have discussed earlier such forms of self-government can have different levels of independence which directly depends on the standpoints of the current government. Self-government of Catalonia can be as flexible as is the formation and future responsibilities of the similar entity in Kosovo, the A/C as we have mentioned it previously. In Kosovo they will shape an entity which will accomodate the needs of both sides so it is unclear why such an attempt has failed in Spain. „Since the approval of the Spanish Constitution in 1978, Catalan politics has played a key role, displaying an exemplary, loyal and democratic attitude towards

[25] Attila Nagy, 2014, "North Kosovo as a Political and Administrative Phenomenon" 42 Revue des Sciences Politiques p. 25
[26] Gershon Shafir, 1995, *Immigrants and Nationalists: Ethnic Conflict and Accommodation in Catalonia, the Basque Country, Latvia, and Estonia* (State University of New York Press) p. 80
[27] Spanish Constitution of 1978, section 143, par 1.

Spain, and a deep sense of State. The Spanish State has answered this loyalty with the refusal to recognise Catalonia as a nation; and allowing a limited and constantly re-centralising autonomy, more administrative than political; with profoundly unjust economic conditions and with cultural and linguistic discrimination."[28] It is even more interesting when we know that Spain is a member of the EU and the application of various norms regarding minority rights and regional development should be of high importance and exemplary to others. So in this case, and maybe some others as well, Kosovo should serve as a positive example but not to go far we will just mention Bosnia and Herzegovina where a very careful balance has achieved between various nations. The European Union has therefore in the sense of human and minority righst achieved much bigger success in its neighborhood than in some EU regions e.g. Catalonia. "When interviewing in Catalonia, people with different political allegiances would once and again cite the lack of response to demands for greater autonomy for Catalonia (never secession, at the time), they would also point at the suspension of parts of the 2006 Statute of Autonomy after it had already been adjusted to fully comply with the Constitution and sanctioned in a referendum (18th June 2006) and to Catalonia's fiscal deficit with the Central Administration in Madrid"[29] The status of Catalonia now is typical to the one when people would start demanding more, including secession, anywhere else in the world. The level of interference of EU institutions in Catalonia is much less than their interest in the same areas in Kosovo. Of course that Spain has its sovereign right to deal with its internal affairs, but Kosovo don't have it, also Serbia don't have it now as neither it had in 1999 during the NATO intervention. „The Statute of Autonomy, approved by the Catalan Parliament and the Spanish Congress, and in a referendum by the Catalan people, should have been a steady and enduring new framework for bilateral relations between Catalonia and Spain. However, this political agreement was demolished by the Constitutional Court and resulted in new demands from citizens."[30] The same Constitutional court, in the sense of constitutional jurisdiction, has declared a consensus unconstitutional in Spain whereas its counter part court in Kosovo has

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[28] The legitimate representatives of the people of Catalonia, 2017, *Declaration of the Legitimate Representatives of Catalonia*, Barcelona on 10 October 2017 <http://www.cataloniavotes.eu/wp-content/uploads/2017/10/27-Declaration-of-Independence.pdf> accessed on 20 February 2018

[29] Montserrat Guibernau, 2014, "Prospects for an Independent Catalonia", *International Journal of Politics, Culture, and Society*, Vol. 27, No. 1, pp. 5-23

[30] The legitimate representatives of the people of Catalonia, 2017, *Declaration of the Legitimate Representatives of Catalonia*, Barcelona on 10 October 2017 <http://www.cataloniavotes.eu/wp-content/uploads/2017/10/27-Declaration-of-Independence.pdf> accessed on 20 February 2018

accepted a similar vague agreement and the Serbian court has remained silent to it. This brings us to a preliminary conclusion that making compromises is much easier outside of EU then inside it. “Madrid responds to Catalan complaints by claiming that Catalonia receives special assistance from the Spanish government, outside money from the national budget, in the form of ad hoc loans to make payments not previously planned for. (The central government is in fact its only lender, since Spanish law blocks access by the autonomous communities to shop for loans on international markets.)”[31] The dependence on the Spanish monetary policies was not so problematic before the economic crisis of 2008 and the last 10 years of mismanagement of such situation has culminated on the streets of Barcelona where Catalans have crashed with the Spanish police. This clash has produced a picture which is not very typical in the EU and its inter-ethnic relations, it is although more typical to Kosovo where it happened many times before. Our comparison is depicting two pictures in two different countries but with a very similar connotation, an inter-ethnic conflict with a lack of dialogue. “It seems that the majority of the residents of Catalonia feel at home both in Spain and in Catalonia”[32] This feeling which was gained and maintained after many years of cohabitation should not be ruined just because of some stubborn decisions. As EU has put Kosovo high on its foreign political agenda it should do with Catalonia as well and help find a solution acceptable by all. In the political sense Catalonia does not have the chance as Kosovo to get acceptance to its declaration of independence, but it has more chance to survive on economic grounds and be more independent than Kosovo which is depending on foreign support. “Catalans, in sum, manage the majority of all enterprises, including multinational companies, in Catalonia.”[33] They are strongly a part of the common EU market and this position can’t be lost easily, in particular since its economic activities are on the rise on the global level and not to forget tourism in Barcelona.

5. Future independence declarations

A) Lessons from Kosovo

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[31] Xavier Vilà Carrera, 2014, “The Domain of Spain: How Likely Is Catalan Independence?”, *World Affairs*, Vol. 176, No. 5, pp. 77-83

[32] Gershon Shafir, 1995, *Immigrants and Nationalists: Ethnic Conflict and Accommodation in Catalonia, the Basque Country, Latvia, and Estonia* (State University of New York Press) p. 68

[33] Gershon Shafir, 1995, *Immigrants and Nationalists: Ethnic Conflict and Accommodation in Catalonia, the Basque Country, Latvia, and Estonia* (State University of New York Press) p. 76

The dissolution of Yugoslavia has brought up many legal challenges for the International community of which some were never successfully solved. The field for legal inventions was wide opened and while some genious solutions have been made, some problems remained vogue. Bosnia and Herzegovina as a sovereign state serves a much brighter example, in the legal point of view than Kosovo. Unfortunately many stick with the Kosovo independence example which is problematic in so many aspects. "The political shaping of Southeastern European society by external managers tends to degrade the entire political process, highlighted by the hollowing out of the opportunities for domestic debate and engagement, encouraging the collaboration of political elites and external administrators against the wishes and aspirations of citizens of these states."[34] As the Dayton peace agreement was made without the consent of the people t still contained many acceptable solutions, from which many today serve the basis of peace keeping in Bosnia. The Brussels Agreement of 2013 was also made without the consent of people, but interestingly it puts both the Kosovo Serbs and Albanians into loosing position. Whereas the Dayton peace agreement has somehow maximized the gains of all three nations making a perfect balance of accept their most important demands. Both the BA and the Dayton agreement could be widely applied, also in Catalonia where some change should be made in order to calm down the situation and stabilize it on a long term. As the BA is not yet fully developed and stays unclear about its most important aspect, the formation of the Association/Community of Serbian municipalities. We should aim to understand it and other cases by the Bosnian example, once a peaceful and agreeable solution is set, no one should aim to change them, but preferably develop them further by consent and cooperation. "The text of the constitution contained certain fundamental principles that did not mean much in practice at first, and in fact were barely noticed, but which could be built upon later as the political situation stabilized and matured."[35] The issue of sovereignty is not that important to people and their everyday activities, in Bosnia sovereignty is divided more than in any other country, still has little influence on economy, welfare and other everyday issues. Bosnia and Kosovo are in fact controlled by EU from inside, overseeing and influencing its decision making processes. In Bosnia people do not want to suppress the EU

[34] David Chandler, 2010, *International statebuilding: The rise of post-liberal governance* (Routledge) p.112

[35] James C. O'Brien, 2010, 'The Dayton Constitution of Bosnia and Herzegovina', in Laurel E. Miller with Louis Aucoin (eds), *Framing the state in Times of Transition* (United States Institute of Peace) pp. 332-349

presence whereas in Kosovo they want to, in fact it has proved not to be possible in many occasions. “To all intents and purposes Bosnia is a member of the European Union; in fact more than this, Bosnia is the first genuine EU state where sovereignty has in effect been transferred to Brussels.”[36] In Bosnia other nation states from its surrounding, like e.g. Serbia, have very little official influence on its political life, but in Kosovo its surprisingly high as compared to any other independent state. Serbia, through its minority influences many aspects of the Kosovo political life what would be impossible to do it Bosnia, legally. “Kosovo will never return to Serbia: it will be some kind of self-governing entity, even if various fictions are employed, as with Taiwan or Macedonia, to deny it full international statehood.”[37] Obviously the intention of some great powers was to reduce the Serbian presence and influence on the Balkans, as it dominated once the area now its position is being taken by some other nations which were in an inferior position until now. The idea of Greater Serbia was confronted with the idea of Greater Albania, both would be an impossible idea to stand on a long run, so the Kosovo state with all its exceptions balances between this two ideas. “Double standards apply here. America did support the Kosovar struggle for self-determination. It will never support the Chechens against the Russians or the Muslim Uighurs against the Chinese government.”[38] On the global level such divisions would not be possible and powerful states will never accept the weakening of their position, so is EU and Spain refusing to accept the idea of division which would decentralize a very centralized governments both in Madrid and Brussels as well. EU would never weaken its position even when it keeps the agenda of human and minority rights very high, in contrast to Russia and china where such rights are even officially subordinated to the power and interest of the state. Struggling to keep a dominant position in many aspects of international relations makes unacceptable any secession ideas from such states. Secession weakens a state and therefore it is not encouraged as a solution in many circumstances, it is rather an exception than a rule. “They suggested that, where attempts had been made to achieve a consensual settlement and where the permanent members of the Security Council are divided, the imperative of not letting disputes remain frozen for too long may justify, as a last

[36] David Chandler, 2010, *International statebuilding: The rise of post-liberal governance* (Routledge) p.114

[37] Michael Ignatieff, 2003, *Empire Lite, Nation-building in Bosnia, Kosovo and Afghanistan* (Vintage) p. 71

[38] Michael Ignatieff, 2003, *Empire Lite, Nation-building in Bosnia, Kosovo and Afghanistan* (Vintage) p. 70

resort, a unilateral settlement."[39] A unilateral declaration should be again as much as possible be agreed on the highest level, preferably the UN and its Security Council, what was again not the case with Kosovo. Russia and China oppose this unilateral declaration and Russia has already used the same pattern in dealing with two Georgian secessionist regions. The problems caused by the Kosovo unilateral declaration came back as a boomerang and the BA is the intention to remedy this situation. "Some alternatives to complete independence that may avoid some of the significant problems posed by independence include the creation of an international protectorate, conditional independence, and the division of Kosovo along ethnic lines. Such alternatives may avoid many of the problems caused by the sudden Kosovar independence while offering just and durable solutions for this volatile region."[40] As we have seen Kosovo independence is such that it never had full sovereignty, its dependence on the USA and EU is very high and serves as a stabilizing factor for Kosovo and the region. Accordingly Kosovo is not an independent state, in fact it is depending on foreign support and presence for now already 20 years. Therefore unilateral declaration, as the one from Kosovo or Catalonia, have no legal effect and are not being taken seriously by the UN which is still the only reputable organization dealing with sovereign states.

B) Lessons to Catalonia

What to teach Catalonia and what it could learn from Kosovo after it followed its example and declared independence. The Catalan independence declaration has caused not much to happen from the legal point of view but it had caused much more distress in the security sense. In Kosovo security is one of the biggest challenges since the conflict has ended, in particular considering minorities. Kosovo police, justice and the security forces are supported by various international forces, sometimes with overlapping mandate. "The OSCE mandate and its focus in everyday work largely overlap with that of the EULEX"[41] EULEX mission is a new form of support to the rule of law outside of EU and it is hard to imagine that something similar could be

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[39] Ralph Wilde, 2011, "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", *The American Journal of International Law*, Vol. 105, No. 2, pp. 301-307

[40] Milena Sterio, 2010, "The Case of Kosovo: Self-Determination, Secession, and Statehood Under International Law", *Proceedings of the Annual Meeting (American Society of International Law), Vol.104, International Law in a Time of Change*, pp. 361-365

[41] Attila Nagy, 2015, "OSCE and its role in resolving the interethnic conflict and the implementation of rule of law in Kosovo" Forty years since the signing of the Helsinki Final Act, p. 489

sent out to Catalonia. There are in fact many lessons Kosovo could teach Catalonia and one of them is also how to declare independence what Catalonia has followed unsuccessfully. “So, while there is no Kosovo "precedent" in international law (as of yet), there is now, based on the reactions of other secessionist entities, as well as Russia, a Kosovo argument in international diplomacy.[42]” An argument started long time ago during the crisis in Georgia and has now ended up in Europe, causing much struggle to the already divided EU societies which can’t agree about Kosovo independence. It is of course not Kosovo independence what causes problems, it is the non-flexible treatment of minority and territorial problems by countries in the EU. “Only non-territorial forms of federalism are able to bring the national culture close to every individual. For a nation to be autonomous, it is not required to have its own state. What is required is that every individual has access to and is educated in the national culture.”[43] By proudly exporting know-how on intercultural cohabitation for decades EU countries have recently failed to stand and defend basic human rights. A notable example is the refugee crisis where immigrants travel across EU in very bad conditions which is against any standard already guaranteed by EU legislation and the Dublin Regulation. The EU showed that it is unable to coop with the refugee crisis and EU countries got different viewpoints in this regard, same as Kosovo independence. The Catalan problem has showed low interest in EU and compared to the current problems EU is facing like BrExit and the refugee crisis it is really low on agenda. “Up to this point, the issue of Catalonian independence has been given the silent treatment by international organizations, which have made it clear that they regard this as an internal Spanish affair.[44]” So one the end the ignorance of this problem as a minority and human rights problem on the EU territory can lower the future standards in these area and lower the threshold which was set and successfully maintained for decades in EU. Independence is, as we can see, more a foreign policy issue than an internal issue of a single country. Without wide international recognition of a secession it has only a chance to end up in headlines and not much opportunities to gain a seat in the EU on the end. “Secession may exist as a fact, but it

[42] Christopher J. Borgen, 2008, “Introductory note to Kosovo’s declaration of independence”, *International legal materials,* vol.47, no. 4, pp. 461-466
[43] Piet Goemans, 2013, ‘National cultural autonomy: Otto Bauer’s Challenge to Liberal Nationalism’, in Ephraim Nimni, Alexander Osipov and David J. Smith (eds), *The Challenge of Non-Territorial autonomy, Nationalisms across the globe* (Vol 13. Peter Lang) pp.25-39
[44] Xavier Vilà Carrera, 2014, “The Domain of Spain: How Likely Is Catalan Independence?”, World Affairs, Vol. 176, No. 5, pp. 77-83

cannot be claimed as a right or remedy."[45] On the end nations are left to live or suffer under a rule of other nations and even if it is not going to change under present circumstances we can not predict what the future will bring. In order to secure future peace and prosperity we highly recommend peace talks, innovations and positive comparative examples to be taken into consideration before we end up in a conflict situation. The efforts invested into Kosovo to build strong and stable local community have failed and therefore discredited both the UN and EU missions in Kosovo, neither would take a similar risk in Catalonia or any other place at present circumstances.

6. Conclusion

The comparison of two independence declarations in very difficult political backgrounds has proved to bring completely different outcomes. We have concluded that the "right" for self-determination can never be claimed in states which are strong or came out as winners from recent conflicts. Self-determination is more a light enforcement of power by winners where they claiming human and minority rights serve the sentence over the loosing country, so is the case with Kosovo or Georgia. On the other hand EU is hesitating to enforce such rights on its territory or is granting the possibility to do so when it is sure it will not happen, at least by using democratic procedures. "The case of Catalonia stands in sharp contrast with those of Quebec and Scotland. According to the Constitution, Spain is a single "demos" formed by "all Spaniards"; the Catalans are regarded as a part of that single "demos" and this automatically deems any attempts to hold a referendum on self-determination in Catalonia illegal."[46] In any case Kosovo, apart from independence, has not served with many positive examples in the most important fields, such as economy, development or standard of living. It would be hard to say that such an outcome surprises anyone who is familiar with the circumstances present in Kosovo. Independence or not, it has not changed much in the political and economic situation in Kosovo and there are no predictions the future will bring any change. "Normal life will not return to Kosovo until the local economy begins to function in a more regular

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[45] Christopher J. Borgen, 2008, "Introductory note to Kosovo's declaration of independence", *International legal materials,* vol.47, no. 4, pp. 461-466

[46] Montserrat Guibernau, François Rocher and Elisenda Casanas Adam, 2014, "Introduction: A Special Section on Self-Determination and the Use of Referendums: Catalonia, Quebec and Scotland", *International Journal of Politics, Culture, and Society*, Vol. 27, No. 1, pp. 1-3

fashion."[47] The lack of investments and the absence of strong economic considerations also put Kosovo and Catalonia to different starting points, in fact both should and want to advance their position. The Kosovo path is not the one to be followed by Catalonia and the focus has to be on freedoms which can be achieved, from Spain, without compromising its constitutional system. "At present, 'emancipatory nationalism' includes the quest for independence within the European Union as one of its novel and distinctive features"[48] Even if EU is a very strong economic union it is more proud of its human and minority rights and standards. Unfortunately the sudden change of such standards by many EU states and their partial enforcement has challenged EU much stronger than the economic crisis did some 10 years ago. We can conclude that the Catalan independence has not concerned EU states much and neither the Catalan people outlined problems have got much interest by the EU. So saying it ended up in a similar position like Kosovo, some recognized it and some didn't whilst it remained the same undeveloped country as it was before.

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[47] Gareth Evans, 2001, *After Milosevic: A Practical Agenda for Lasting Balkans Peace* (International Crisis Group Press) p. 106

[48] Montserrat Guibernau, 2014, "Prospects for an Independent Catalonia", *International Journal of Politics, Culture, and Society*, Vol. 27, No. 1, pp. 5-23

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Constitutional challenges against the Canada – EU free trade agreement: Canadian and European perspectives

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Abstract

At the end of October of 2016, Canada and the European Union (EU) signed the Comprehensive Economic and Trade Agreement (i.e., CETA). However, the agreement has generated political and legal controversy. Constitutional challenges have been filed in Canada, Germany, France, and CETA will also be reviewed by the Court of Justice of the European Union (CJEU). Therefore, the agreement faces various legal hurdles before it fully enters into force. This article seeks to briefly outline and analyse some of the "constitutional" concerns that have been expressed against the Agreement in the cases that have been filed in the Courts in Canada and Europe.

Key words: Free trade agreements; Canada; European Union; Court of Justice of the European Union; Competences

I – Introduction

On October 30 of 2016, Canada and the European Union (EU) signed the Comprehensive Economic and Trade Agreement (i.e., CETA) in Brussels, Belgium. However, the agreement has generated a significant amount of political and legal controversy. Constitutional challenges have been filed in Canada, Germany, France, and CETA will also be reviewed by the Court of Justice of the European Union (CJEU), following a request articulated by the Kingdom of Belgium. Therefore, the agreement faces various legal hurdles before it fully enters into force. This article seeks to briefly outline and analyse some of the "constitutional" concerns that have been expressed against the Agreement, particularly those relative to the Investment

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Court System, in the cases that have been filed in the Courts in Canada and Europe, as well as in the legal and academic literature.

II – Germany

Earlier that month, the British Broadcasting Corporation (BBC) reported the following: «German top Court backs EU – Canada trade deal CETA». The top Court in the news headline is the *Bundesverfassungsgericht* (i.e., Federal German Constitutional Court) and the real question is the following: did the German Constitutional Court really back the Agreement?

Firstly, the decision rendered was not about whether CETA was compatible with the German Constitution. On the contrary, the ruling referred to an injunction proceeding that sought to prohibit the German Government from signing the Agreement. Secondly, the Federal German Constitutional Court emphasized that it only issued injunctions in cases of irreparable damage. Therefore, it would have to be obvious that the Treaty (i.e., CETA) would irreversibly violate the German Constitution. Furthermore, this possibility had to be weighed or balanced against the importance of the matters covered by the Treaty.

The German Constitutional Court decided not to issue the injunction and provided several reasons for doing so. Amongst those was the following observation: The Court noted that the signing of the CETA by Canada, the EU and the Member States would only result in the provisional application of the Agreement. This consequence was underlined by the Court in Karlsruhe. In other words, the Treaty would only fully enter into force upon the ratification of all the parties. Until then, the German Government could terminate the application of the Agreement at any time, by means of a simple declaration to that effect. Therefore, the Court sustained that the signing of the Agreement did not irreparably violate any constitutional right.

Nevertheless, the Court manifested that it had doubts relative to the competence of the EU in relation to investor protection in certain areas. Concretely, the Court referred to the dispute settlement system on portfolio investments, international maritime transport, mutual recognition of professional qualifications, and labour protection (i.e., worker's health and safety regulations). In other words, these matters do not fall under the competence of the EU. On the contrary, competence lies with the Federal Republic of Germany.

The Federal Constitutional Court also expressed serious doubts relative to the proposed Investor State Dispute Settlement (ISDS) mechanism. In this sense, it questioned «whether the EU can lawfully transfer "sovereign rights in relation to judicial and quasi-judicial dispute resolution systems" to other systems (i.e., to the proposed ISDS "court" mechanism) ». In the Court's opinion, it is «not completely unconceivable» that the revised ISDS mechanism (i.e., the Investment Court System) could be held to violate the principle of democratic legitimacy.

The German Federal Constitutional Court also manifested the opinion that there are certain aspects of CETA that might encroach on the constitutional identity of Germany protected by Article 79, section 3, of the German Constitution. These aspects relate to the system of committees and particularly their competences and procedures. In other words, the Court frowned upon the power that these committees will have to produce binding decisions that could violate the autonomy of the *Bundestag* (i.e., German Parliament) to make law, and questions the solution's conformity with Articles 38(1) and 20(1)(2) of the Basic Law.

However, the Federal Constitutional Court considered that a number of risks could be prevented if the German Government took various steps which included: declarations issued by the European Council which would ensure that the signing of the Agreement does not entail its full application; non-implementation of certain parts of CETA during its provisional application; demand that any decisions by the investment dispute resolution court obtain the unanimous agreement of the EU Council; and finally the utilisation, in the last resort, of Germany's right to terminate the Agreement.[2]

In sum, the observations made by German Federal Constitutional Court as well as the conditions that it imposes on the Federal German Government do not back or clear the deal. On the contrary, CETA faces a major obstacle in the main proceeding and the fate of the Investment Court System may lie in the German Constitutional Court's final decision on the Agreement.

III – Canada

[2] See the *Bundesverfassunsgericht* Press Release nº 71/2016 of 13 October 2016 relative to the Applications for a Preliminary Injunction in the "CETA" Proceedings Unsuccessful. Reference: 2 BVR 1368/16, 2 BVR 1444/16, 2 BVR 1823/16, 2 BVR 1482/16, and 2 BVE 3/16. The Press release is available at: http://www.bundesverfassungsgericht.de

In Canada, a statement has been filed at the Federal Court of Canada claiming that CETA is unconstitutional. The Plaintiff's central challenge is four-fold, namely that:

«(1) the federal government does not have the constitutional authority to sign, execute and implement treaties without the express prior authority of Parliament through an Act of Parliament;

(2) the vast majority of the CETA articles and their impact encroach on exclusive Provincial spheres of jurisdiction protected by the division of powers under the **Constitution Act, 1867;**

(3) the CETA guts and extinguishes the constitutionally protected Judiciary in Canada by creating foreign tribunals to determine property and legal issues in Canada without any judicial oversight or jurisdiction of the Canadian Courts over the disputes; and

(4) various articles of the CETA violate constitutional enshrined rights in the **Charter of Rights and Freedoms**, *and over-rides Charter guarantees that ground Canada's ability to mount public programs on Health, Education, Social Services, and public utilities including the elimination of subsidies, monopolies, and state enterprises for public welfare*. In short, the Treaty places the rights of private foreign investors over those of the Canadian Constitution and Canadian citizens».

The Plaintiffs also defend that the federal government breached their right to vote consecrated in section 3 of the **Canadian Charter of Rights and Freedoms. This argument is based on the understanding that the right to vote is** inseparable from the constitutional right of «no taxation without representation» because the Agreement (i.e., CETA) was not properly debated and authorized by Parliament.

However, the case is not limited to the question of clarifying the constitutional authority of the Canadian government. The Plaintiffs also seek interim injunctions to prevent the federal government from signing, ratifying, and implementing the Agreement.[3]

[3] See Statement of Claim filed in the Federal Court of Canada on 21 October 2016 by Lawyer Rocco Galati, on behalf of the Honorable Paul Helleyer, PC, FRSA, Ann Emmett, Dr. George Cromwell *versus* The Right Honorable Justin Trudeau, Prime Minister of Canada, His Excellency David Johnston, Governor General of Canada, The Attorney General of Canada, Honorable Chrystia Freeland, Minister of International Trade, and Her Majesty the Queen. The Statement can be found at the following website: http://www.comer.org/content/CETA.pdf

Presently, the Canadian courts have not ruled upon the dispute. However, the Canadian government tabled a bill to approve the Agreement in Parliament during the month of May 2017 and it has received royal assent (i.e., the last step in the legislative process before official publication). Consequently, the Canadian Parliament has probably quashed two of the four main arguments against the Agreement (i.e., the argument referring to the government's lack of authority to implement the Treaty as well as the argument relative to the judicature since Parliament has the power to create tribunals according to section 101 of the Constitution Act of 1867. The section in question states that «the Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada».

However, constitutional questions regarding provincial jurisdiction and conformity with the Charter of Rights and Freedoms may unravel the Agreement. In relation to jurisdictional questions, the Canadian Courts will probably undertake an analysis of CETA and rule on its compatibility with the Constitution. According to the Canadian Constitution, making treaties is a prerogative of the federal government and requires no legislative approval. However, treaty implementation may require the approval of federal and provincial legislation in accordance with the constitutional norms that regulate the jurisdiction of each sphere of government and in line with the leading case in this matter: The Labor Conventions case that was decided by the Judicial Committee of the Privy Council (JCPC) in 1937.[4]

IV – France

A third obstacle has arisen in France where the French Constitutional Court has launched a full investigation into the EU-Canada free trade deal following a request in February of 2017 by 153 elected politicians, including 53 Members of Parliament, in accordance to Article 54 of the French Constitution.

The Agreement's opponents argue that it violates the principle of equality (i.e., through the creation of specific rules for foreign investors to bring claims before an Investment Court); it undermines the essential conditions for the exercise of national

[4] See Rainer Knopff and Andrew Saywers, 2005, p. 125 and 126.

sovereignty (i.e., Parliament's power to legislate and control); and does not contemplate the respect for the principle of precaution, particularly in matters relating to food and health.[5]

Opponents of CETA in France argue that it violates the constitutional principle of equality. This argument derives from the fact that CETA allows foreign investors (and only these investors) to file a claim before a highly specialized international court (i.e., the investment court) that was specifically tailored to protect foreign investment. The Court in question will rule upon the compatibility of Member State and European Union measures with CETA and the multiple rights that this Agreement recognizes as well as award damages. Therefore, critics argue that this mechanism introduces an inequality before the law between national and foreign investors. To mitigate this aspect of the Agreement, Canada and the European Union agreed to a Joint Interpretative Statement that states the following: «CETA will not result in foreign investors being treated more favorably than domestic investors». However, various organizations have pointed out that a procedural inequality in treatment persists. For example: foreign investors can resort to a special means to protect their investments that is not available to national investors. In other words, foreign investors may bypass national courts and file legal proceedings in a parallel international court created by CETA.

A second set of questions that are raised in France are related to the exercise of national sovereignty. In relation to this particular aspect of the Agreement, critics argue that CETA transfers questions regarding the administration of justice from the national to the international arena and modifies the conditions in which parliamentary powers are exercised, especially its legislative and control functions as well as the powers of the administrative authorities. In other words, CETA has a negative impact on national sovereignty. This argument can is based upon the fact that the Agreement sets up several Committees (Joint Committee and specialized committees) that have important decision-making and interpretative powers. However, the rules regarding the constitution of these committees do not foresee Member-State representation. Consequently, CETA opponents sustain that these Committees interfere with a State's power (as well as the EU's power) to legislate and regulate.

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[5] See the statement released by Foodwatch that can be found at the following website: http://www.fondation-nature-homme.org/sites/default/files/ceta-anticonstitutionnel.pdf

A third question that is raised by those seek to prevent the entry into force of the Agreement is tied to the principle of precaution. This principle allows for the adoption of measures and seeks to protect citizens from potential risks, particularly in the areas of health and food. In France, the principle of precaution is consecrated in the Constitution since 2005 and can be found in Article 5º of the Charter for the Environment. The norm in question establishes that:

> «Upon the realization that a damage, even one that is uncertain in terms of scientific knowledge, may seriously and irreversibly affect the environment, the public authorities, by applying the principle of precaution and in their applicable domains, shall oversee procedures for the assessment of risk and adopt proportionate and provisional measures to avoid causing such damage».

In addition to this legal reference, Article 9º of the same Charter states that this principle inspires French action at the European and international levels. The same principle can also be found in European primary law. According to Article 191º of the Treaty of the Functioning of the European Union (TFEU), European Union action is based upon the principle of precaution and preventive action in the environment as well as in the areas of food and health (human, animal, and vegetable).

Although CETA disciplines many questions related to the environment, the Agreement does not foresee any measure that guarantees the respect for the principle of precaution in accordance to the understanding of this principle that was articulated by the French Constitutional Council in 2008. Furthermore, the Joint Interpretative Statement does not refer to the principle of precaution. It only refers to precaution. In sum, critics argue that the meaning of this principle varies from one legal order to the next (for example: law relating to the World Trade Organization; European Union Law; French Constitutional Law).

On July 31 of 2017, the French Constitutional Council rendered its decision on CETA and concluded that the Agreement did not violate any clause in the French Constitution. In other words, the Court did not find that the Agreement violated the principle of equality, the conditions for the exercise of national sovereignty and the

principle of precaution consecrated in the French Constitution.[6] Consequently, in the absence of any unconstitutional clauses, international agreements – therefore CETA - may be ratified.[7]

V – European Union

A final obstacle or judicial hurdle that must be surpassed by the Agreement resides in the triggering of Article 218, 11, of the Treaty on the Functioning of the European Union (TFEU) that permits any Member-State, the European Parliament, the Council or the Commission to request that the Court of Justice of the European Union (CJUE) renders an Opinion on the compatibility of CETA with the European Treaties (i.e., "basic constitutional charter").

During the better part of 2017 it was expected that Belgium, following a compromise deal with the regional government of Wallonia in late 2016, would request such an Opinion due to the fact that the Investment Court System in the Agreement does not guarantee the respect for the autonomy and unity of EU law. There were also reports that Slovenia might ask the CJEU for an opinion relative to CETA's compatibility with the European Treaties.

This possibility was confirmed by the Kingdom of Belgium on the 6th of September of 2017. On that day, the Deputy Prime Minister and Minister of Foreign Affairs Didier Reynders submitted Belgium's request to the CJEU for an opinion on the compatibility of the Investment Court System (ICS) – i.e., the reformed system of dispute settlement between States and investors, that was introduced in CETA, with the European Treaties.[8]

VI - CETA and European Union Law

[6] An English language version of Decision nº 2017-749 DC is available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2017-749-dc/version-en-anglais.149908.html
[7] On the powers of the French *Conseil Constitutionnel* relative to international agreements see Francis Hamon and Michel Troper, 2017, 805.
[8] See the press release published on the 6th of September of 2017 on the Kingdom of Belgium's Foreign Affairs, Foreign Trade and Development Cooperation website: https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta

The Canada European Union Trade Agreement contains 30 (thirty) chapters and is supplemented by a common interpretative instrument, declarations and annexes that make up an integral part of it. In Europe, academic criticism against the Agreement has been directed towards the potential violation of the Charter of Fundamental Rights of the European Union and the legal norms that underpin the EU's judicial system.[9] However, this section will focus upon the latter perspective.

The Agreement creates two different dispute settlement procedures. The first one can be found in Article 29 of the CETA. This is a general procedure designed to resolve disputes between Canada and the European Union relative to the interpretation of the Agreement. In addition to the general procedure, the Agreement foresees a second procedure consecrated in Article 8 that refers to direct foreign investment and it establishes an international investment court system (ICS), a permanent and institutionalized double-instance court constituted by a Tribunal and an Appellate Tribunal which is seen by several authors as constituting an improvement in relation to past investor state dispute settlement mechanisms based upon arbitration.[10]

However, the new solution designed to resolve the legal disputes that may arise between private investors and States has drawn significant criticism from the legal doctrine in Europe. Specifically, it is the question of the powers of this Court that have motivated the objections to the solution laid down in the Agreement. Critics argue that the Investment Court's powers pose a significant risk to the autonomy and unity of European law. This issue derives from the fact that the Investment Court system foreseen in the CETA was instituted to allow investors to challenge EU acts and decisions based on those acts but also national acts that implement EU law. This means that an ICS tribunal «would have to interpret and give meaning to EU law». In other words, «the Tribunal and Appellate Tribunal to be established under CETA would have the power to decide whether EU law violates the investment protections under CETA».[11] Therefore, there is a possibility of overlap due to the fact that Article 19 of the Treaty of the European Union (TEU) confers the power to interpret the European Treaties upon the CJEU, through the preliminary reference procedure

[9] For example, Ernst-Ulrich Petersmann raises important questions regarding the right to effective judicial protection and the principle of proportionality consecrated in the Charter of Fundamental Rights of the European Union. See Petersmann, 2017, pp. 17 and ff.
[10] For example, Arnaud de Natreuil, 2017, 243; Fernández-Pons, X, R. Polanco and R. Torrent, 2017, 1354.
[11] Heppener, 2016, 62.

consecrated in Article 267 of the TFEU. According to the more sceptical observers, the Investment Court System will «encroach on the powers of the EU courts to rule on questions of EU law». This observation is further reinforced by the fact that the Investment Court System in CETA does not require the prior involvement of the CJEU regarding questions of EU law. In other words, Article 8 of the Agreement does not regulate the possibility of obtaining an interpretation on EU law by the Court of Justice in Luxemburg.[12]

According to the academic literature, the Commission was aware of this potential problem and sought to address it in Article 8.31 (2) of the Agreement. The norm in question states that the ICS tribunals may consider domestic law as a matter of fact and affirms that in «doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party (...)». However, various authors question the sufficiency and clarity of the solution. On the one hand, Laurens Ankersmit raises an interesting question regarding the prospect of considering the law as a matter of fact when the law is in the author's words «a social construction».[13] On the other hand, Erin Biel, Mattie Wheeler and Sonja Heppner raise the possibility of an investor questioning the interpretation of a host state's courts or authorities and make a point regarding the case where no prevailing interpretation exists. The Article in question does not offer any solution for this situation. In other words, CETA does not regulate this hypothesis.[14]

Similar arguments are used in relation to the power of the Appellate Tribunal to review a Tribunal's award based on manifest errors in the appreciation of the facts including the appreciation of relevant domestic law. This power consecrated in Article 8. 28 (2) (b) is also criticized by some authors due to the risks that this poses to the unity of EU law. The risk derives from the power that the Appellate Court must determine the prevailing interpretation given to domestic law by the courts or authorities of the relevant party. However, Heppner points towards the case where no prevailing interpretation exists or if two dominant positions exist. The risks are even greater when one thinks about the possibility of the Appellate Tribunal developing its own jurisprudence regarding the prevailing interpretation and following it over time.

[12] See Laurens Ankersmit, 2016, 52 as well as the author's post on October 31, 2016 on the "Investment Court System in CETA to be judged by the ECJ" at European lawblog.eu
[13] See Laurens Ankersmit's post on October 31, 2016 on the "Investment Court System in CETA to be judged by the ECJ" at European lawblog.eu
[14] See Heppener, 2016, 62.

Consequently, Heppner defends that this power is likely to fail the compatibility test with EU law.[15] [16]

A third question raised by the legal doctrine relative to the Agreement refers to the Tribunal's responsibility to determine the proper defendant or respondent to a claim. In this sense, the Tribunal must choose between the European Union and one of its Member-States. However, this decision might displace the CJEU's exclusive jurisdiction to determine the division of competence between the European Union and the Member States. This situation has already been analyzed by the CJEU in Opinion 2/13. In that Opinion, the Court observed that the European Court of Human Rights (ECtHR) would have to rule or determine whether the EU or a Member State would be responsible under international law for a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). According to the CJEU, this determination is equivalent to the determination of whether the EU or a Member State has the competence to take a specific measure. Consequently, this would allow the ECtHR «to take the place of the Court of Justice to settle a question that falls within the latter's exclusive jurisdiction». Likewise, under the CETA, a claim may be filed against the Union or a Member State. According to Article 8, 21 (3) of the Agreement, the European Union shall make a determination regarding who will be the respondent. However, if the Union does not decide within 50 days, the Tribunal will rule upon the question regarding the respondent, and the Agreement provides some broad rules to guide the Tribunal in its ruling. In sum, the Tribunal must determine whether the measures identified in the notice are exclusively measures of a Member State or if they include measures of the European Union. This may lead to an assessment of the rules of EU law governing the division of powers to determine the exact respondent. Consequently, the CJEU may find that this aspect of the Agreement to be incompatible with the European Treaties.[17]

In sum, Fernández-Pons, X, R. Polanco and R. Torrent, argue that the Investment Tribunal in CETA applies to the European Union and this mechanism «allows a company established in a Member State and controlled by Canadian nationals or companies to escape

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[15] *Idem.*
[16] Similar arguments are made by Ankersmit, 2016, 57.

[17] See post by Erin Biel and Mattie Wheeler on December 1, 2016, The Uncertain Future of the European Investment Court System" on the Yale Journal of International Law webpage: www.yjil.yale.edu/2016/12

the Jurisdiction of the ECJ».[18] This possibility, according to the authors, is «manifestly contrary to the EU Treaties».[19] Consequently, the questions regarding the compatibility of the investment court system with role and the powers of the CJEU need to be examined. Therefore, the triggering of Article 218, 11 of the TFEU by the Kingdom of Belgium is justified from an EU law perspective even though this will delay the full entry into force of the Agreement for several years.[20]

VII – Conclusion

In sum, the full entry into force of CETA may be years away considering the legal challenges that have already been filed in the Courts and their outcomes have the potential to consolidate or trigger the renegotiation of the Agreement, particularly the legal norms underpinning the highly contested Investment Court System mechanism, and consequently shape the European Union's future public policy relative to investment and free trade agreements.

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[18] Fernández-Pons, X, R. Polanco and R. Torrent, 2017, 1355.
[19] *Idem*, 1357.
[20] In this sense, see Cécile Rapoport, 2017, 209.

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The Role of Turkish Constitutional Court in the Democratization Process of Turkey: From 2002 to Present

Volkan Aslan[1]

Abstract

Since its establishment in 1961, the Turkish Constitutional Court has been seen as the guard of democratic principles on the one hand but also one of the main obstacles for the democratization process on the other. Nevertheless, it was seen mostly as the protector of democratic values and ideals –by contrast with its past- between the years of 2002 and 2015. In this context, the Court dramatically changed its "state-sided" rights attitude and dissolution practice towards political parties. After the incorporation of individual application procedure into Turkish legal system in 2010, the Court even started to undertake protective role and gave sensational decisions which made tremendous impressions and were applauded by various political and non-political actors. However, this practice started to change in the other way around after 2015. The Court started to decline from its protective role and choose a passive attitude towards the protection of the basic rights and freedoms.

Keywords: Turkish Constitutional Court, State of emergency in Turkey, Dissolution of political parties, Constitutional complaint in Turkey, Judicial review, Twitter ban, YouTube ban, Arrested deputies, Emergency decrees in Turkey.

A. Introduction

In the paper, the changing approach of the Turkish Constitutional Court (the Court) and its effects on Turkish democracy will be analyzed by citing examples from the judgments given in the period between 2002 and 2017. The reason behind the selection of this time period is clear: Since 2002, Justice and Development Party (JDP) has been governing Turkey as a ruling party and the trend concerning the development of democracy shows non-uniform characteristics in this period.[2] It is important to state that, apart from the legislative-

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[2] According to the Democracy Index prepared by the Economist Intelligence Unit, democracy ranking of Turkey was much better before 2013 and this ranking got worse in the following years. In his regard, Turkey was 88th in 2007, 87th in 2008, 89th in 2010, 88th in 2011 and 2012, 93th in 2013, 98th in

executive relations, political parties and other political entities, the Constitutional Court played a central role in this conflictual progress. In this sense, changes on the Court's approach since 2002 are, *inter alia*, much related to such instable democratization/anti-democratization process in Turkey.

As democracy requires free and fair elections, ensuring the plurality in politics, effective protection of basic rights and freedoms, rule of law and supervision of the use of public force, the judgments which have positive and negative effects on these areas are examined in this paper. Since it is impossible to analyze all the important judgments of the Court that were given in fifteen years, only a few judgments of the Court will be discussed. Therefore, such selection reflects rather subjective perspective of the writer.

According to the articles 69 and 148 of the Turkish Constitution[3], the Court oversees the constitutionality of statutes, decree laws and internal regulations of the National Assembly, settles the cases about dissolution of political parties and gives judgments on the individual applications.[4] In line with this arrangement, the judgments and their effects are examined under three sections: individual applications to the Court, dissolution of political parties and constitutional supervision of legislative and executive activities. While the judgments given for the individual applications generally have positive effects on the democratization, judgments regarding the constitutional supervision had impacts on the other way around. Lastly, we could describe the judgments of the Court given within the frame of dissolution of political parties as "mediocre".

B. Individual Applications to the Court

After the incorporation of individual application/constitutional complaint procedure into Turkish legal system with constitutional amendments in 2010, the Court started to receive applications from persons and legal entities in 2012. According to the amended article 148 of

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2014, 97th in 2015 and 2016. See https://www.eiu.com/home.aspx. Similar direction could be followed from the freedom ranking reports of the Freedom House: 4,5 points in 2002, 3,5 in 2003 and 2004, 3 between the years of 2005-2012, 3,5 between the years of 2013-2016 and 4,5 in 2017 (1=Best, 7=Worst). See https://www.freedomhouse.org/.

[3] Turkish Constitution has been amended more than 15 times since its entry into force in 1982. Although some amendments are aimed to make difference on state structure and relations between state organs, most of the amendments aimed improvements on basic rights and freedoms. Desire to join European Union fostered such improvements and amendments after 2001 could be addressed within this framework in particular. See ÖZBUDUN, GENÇKAYA (2009), pp. 43-71; İNCEOĞLU (2015), pp. 162-163; GÖNENÇ (2004), pp. 89-109; YÜKSEL (2007), pp. 153-165; YÜKSEL (2009), pp. 122-124; YÜKSEL (2012), pp. 345-346.

[4] Apart from these, the Court has other duties such as financial audit of political parties, hearing the cases regarding the crimes committed by high state officials regarding their duties or supervision of the resolution of the assembly regarding the termination of the capacities or immunities of deputies. See the articles 69, 85, 146-153 of the Constitution.

the Constitution, everybody has the right to apply to the Court alleging that his/her basic right or freedom was violated by public force. In order to apply to the Court, the right or freedom in question must be protected both by the constitution and the European Convention on Human Rights. Moreover, other domestic remedies should be exhausted before making an individual application to the Constitutional Court. As it will be seen below, judgments given in individual applications mostly reflect the change of the Court's attitude from its past and generally served for the improvement of basic rights and freedoms. Indeed, adoption of such procedure enhanced human rights score of Turkey and contributed to the protection of basic rights and freedoms in this respect.[5] Since it would be impossible to mention about all the judgments of the Court from 2012 to today[6], it would be wise to select decisions which affected the rights and freedoms in a considerably extend. In this regard, the judgments of the Court about blockade of Twitter and YouTube, availability of the usage of maiden names by married women and detention of deputies were *inter alia* prominent ones which were praised by other human rights actors as well.

1. Judgments Regarding Twitter and YouTube

Due to not carrying out the decisions of Turkish courts regarding deleting posts which violate personal rights and rights of privacy, access to social media site Twitter was blocked by Telecommunication and Communication Authority (TCA) in Turkey. Although there was a lower court's temporary restraining order against the TCA's decision, individual complaint was accepted by the Constitutional Court on the ground that such order was not carried out immediately. According to the Court, despite TCA has 30 days to implement temporary restraining order[7], such duration is an utmost period for such order. Because of not implementing the order immediately, the Court said that TCH failed to fulfil its obligations. Thus, the Court gave admissibility decision, despite the non-exhaustion of other remedies: "There is no doubt that, news and thoughts which are shared in social media and relate certain events and facts lose their actuality, value and influence over time. Since the uncertainty regarding the access to the internet site lasts, application to the lower court cannot be accepted as an efficient way with respect to removing the violation and its negative effects."[8] After giving such "revolutionary" admissibility decision, the Court gave its judgment regarding the merits. According to the Court, as the decision of TCH lacks statutory

[5] For more information about the individual applications in Turkey see GÖZTEPE (2015), pp. 485-506; YILDIRIM, GÜLENER (2016), pp. 269-294.
[6] Since 2012 the Court gave more than 45000 judgments. The data was taken from the official internet site of the Court. See: http://www.anayasa.gov.tr/files/bireyselbasvuru/istastik-31122016.pdf.
[7] According to the Administrative Procedure Act (Numbered 2577, art. 28), in order to comply with administrative courts' temporary orders and judgments, administrations have to act without delay. Duration for implementation of such orders or judgments cannot exceed 30 days.
[8] Turkish Constitutional Court, Application No: 2014/3986, Date: 02/04/2014.

authorization and the lower court decisions which were used as a justification to block Twitter were not about blockading the whole site, but rather some URL addresses, the interference to freedom of expression is not authorized[9] and violated the constitution. Thus, just 8 days after the lower court's order, the Constitutional Court gave its judgment and blockade on Twitter was abolished.

In the case regarding the blockade of access to YouTube[10], the Court judged in a similar fashion. According to the Court, despite the temporary restraining order from lower court existed, the uncertainty regarding the access to the internet site lasted and application to the lower court could not be accepted as an efficient way. In the merits, the Court ruled that, as the scope and limits of statutory authorization given to the TCH is not clear, the intervention to the freedom of expression does not meet the requirements of lawfulness. Since there is not a valid statutory basis, such intervention has violated the constitution.[11]

2. Judgments Regarding Maiden Names

According to the Turkish Civil Code (TCC), women can use their maiden names with their husbands' surnames, but it is not possible for them to use only maiden names after the marriage.[12] The applicant who wanted to use her maiden name without her husband's surname brought proceedings in Turkey to use her maiden name alone, but her request was dismissed by the first instance and then appeal courts respectively. After this process, the applicant applied to the Court by claiming that, the inability to use her maiden name alone violates her right to private life and right to family. According to the Court, European Convention on Human Rights (ECHR) is directly applicable in Turkish Law and European Court of Human Rights had found violations of article 14 in conjunction with article 8 of the convention in the applications regarding the inability of women to use their maiden names in

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[9] According to the article 13 of the 1982 Constitution, basic rights and freedoms could be restricted only by statutes subject to the reasons specified for each right or freedom in relevant article. Such restrictions cannot harm essences of rights. The restrictions also cannot be contrary to the wording and spirit of the constitution, the requirements of the order of democratic society and secular republic and the principle of proportionality. Such restriction system of basic rights and freedoms was introduced with constitutional amendments in 2001. Before the amendments, it was possible to restrict a right for unspecialized and general reasons which can be named as cumulative restriction system. After the amendments, basic rights and freedoms can only be restricted not generally but according to specific reasons contained in each article about basic rights and freedoms. Such a system is progressive restriction system rather than cumulative one. In doing so, principle of proportionality was also explicitly stated in article 13 of the constitution. In line with such system change, amendments were made to articles especially by adding reasons for restriction in specific basic rights and freedoms.

[10] Turkish Constitutional Court, Application Number: 2014/4705, Date: 29/05/2014.

[11] Also see GÖZTEPE (2015), pp. 514-516.

[12] According to the article 187 of the Turkish Civil Code, "Women take their husbands' surnames after the marriage. However, they can also use their maiden names with their husbands' surnames after applying in written form to marriage registry or later to civil registry."

Turkey.[13] In accordance with article 90 of the constitution, statutes which clash with conventions concerning fundamental rights and freedoms have no ability to be implemented.[14] In the Court's view, as article 187 of the Turkish Civil Code is clearly contrary to the ECHR, court of first instance and appeal court should directly apply the ECHR pursuant to the article 90 of the constitution. In this respect, the application of Turkish Civil Code rather than the ECHR means that the intervention to right has no legal basis and violates the constitution.[15] Thanks to this decision women started to use their maiden names without their husbands' surnames in Turkey. Such decision was also an interesting shift on the Court's jurisprudence regarding the usage of maiden names: Yet just two years ago the Court ruled on the constitutionality of article 187 of the TCC and found it constitutional. The interesting point is that, while deciding on the constitutionality of such regulation the Court saw no relation between the article 187 of TCC and the article 90 of the constitution.[16] It might be thought that article 187 is contrary to ECHR but not to the constitution and in any case it is superseded by the ECHR thanks to the constitution. Indeed, despite not seeing any connection between maiden names and article 90 of the constitution, it is surprising to see the judgment on violation on the ground of the same regulation just two years later. In any case, the Court's judgment was a positive step towards the development of human rights in Turkey.[17]

3. Judgments Regarding Arrested Deputies

Judgments which are given after individual applications of arrested deputies are also good indicators of the role Constitutional Court played in democratization process in Turkey. After being elected as a deputy in 2011, Mr. Balbay, who was arrested in alleged plot to overthrow the government two years ago, requested to be released as the constitution provides immunity for deputies. However, his request was rejected on the grounds of article 83 of the constitution. According to the article 83 of the constitution, a deputy who is alleged to have committed a crime before or after elections could not be detained, interrogated, arrested or tried without a decision of the Assembly, but it sets two exceptions to such immunity: in cases where a deputy is caught in *flagrante delicto* which requires severe

[13] See Case of Ünal Tekeli v. Turkey, Application No: 29865/96, Judgment, Strasbourg, 16 November, 2004; Case of Leventoğlu Abdülkadiroğlu, Application No: 7971/07, Judgment, Strasbourg, 28 May 2013; Case of Tuncer Güneş v. Turkey, Application No: 26268/08, Judgment, Strasbourg, 3 September, 2013; Case of Tanbay Tüten v. Turkey, Application No: 38249/09, Judgment, Strasbourg, 10 December 2013.

[14] In 2004, an additional sentence was added to the article 90 of the constitution which recognized superiority of international agreements in case of a conflict between an agreement and a national statute regarding basic rights and freedoms.

[15] Turkish Constitutional Court, Application Number: 2013/2187, Date: 19/12/2013.

[16] Turkish Constitutional Court, E: 2009/85, K: 2011/49, Date: 10/03/2011.

[17] Also see GÖZTEPE (2015), pp. 519-523.

punishment or in cases subject to article 14[18] provided that investigation stage has already been started before the election. As Balbay's situation was evaluated in scope of article 14, his request for release was rejected. Then he applied to the Constitutional Court with the claims that, his detention *inter alia* violates his right to be elected. According to the Court "… while the decision for the continuation of detention was handed down, proper balance between the public interest expected from such continuation and applicant's right to be elected and right to engage in political activity was not ensured."[19] As the tenure of deputies is five years and Mr. Balbay spent more than two years of that term in detention, the Court decided that his right to personal liberty and also right to be elected were violated. In this context, rather than using another protection measures, continuous use of detention measure was accepted as disproportionate. After the Court's finding, Mr. Balbay was released in a few days. Furthermore, other arrested deputies were also released after similar judgments[20] given by the Court. Thanks to the Court's these judgments, arrested deputies managed to attend to the meetings of the National Assembly and performed their duties. Since they were deputies from opposition parties, such releases were also contribution to the protection of democratic plurality in the National Assembly. Nevertheless, recent inadmissibility decisions[21] of the Court regarding arrested deputies could be accepted as signs that, the Court is going to take more passive stance in individual applications as well. However, it might also be early to jump to such conclusion since the recent judgments are about the arrests which have differences in comparison with aforementioned ones in terms of basis, detention time and other facts.[22]

[18] Article 14 (Prohibition of Abuse of Basic Rights and Freedoms) of the Constitution: "None of the rights and freedoms in the Constitution could be used as tools which aim to damage the indivisible integrity of State with its land and nation and aim to abolish the democratic and secular republic based on human rights. None of the provisions of the Constitution could be interpreted in a way which enables State or individuals to demolish basic rights and freedoms recognized by the Constitution or restrict them in a wider manner than stated in the Constitution. The sanctions to be applied against those who behave contrary to these provisions shall be regulated by statute."

[19] Turkish Constitutional Court, Application Number: 2012/1272, Date: 04/12/2013.

[20] See Turkish Constitutional Court, Application Number: 2013/9894, Date: 02/01/2014; Turkish Constitutional Court, Application Number: 2013/9895, Date: 02/01/2014; Turkish Constitutional Court, Application Number: 2014/85, Date: 03/01/2014; Turkish Constitutional Court, Application Number: 2014/9, Date: 03/01/2014. Also see GÖZTEPE (2015), pp. 528-530.

[21] See Turkish Constitutional Court, Application Number: 2016/25189, Date: 21/12/2017; Turkish Constitutional Court, Application Number: 2016/40170, Date: 16/11/2017.

[22] After the constitutional amendment (see provisional article 20 of the Turkish Constitution), which stipulated the abolishment of parliamentary immunity for a certain period, was accepted in May 2016 deputies from the opposition parties were arrested. Although just after the amendment, some parliamentarians assumed that such amendment is contrary to law, the Court refused to hear the case regarding the legality of constitutional amendment which prescribed abolition of parliamentary immunity for the members of Turkish National Assembly: According to the Constitution, the supervision of constitutional amendments is possible only regarding to form and such supervision is possible after the application of minimum 110 deputies or the president. Since only 70 deputies applied to the Court for annulment the case was dismissed by the Court. Although the applicants asserted that such amendment is like lifting of the immunities of deputies and constitutes

C. Dissolution of Political Parties

After having banned more than twenty political parties that were mostly conservative or leftist mainly due to seeing them threat to national security, territorial integrity or the secularity of the state, the Court changed its dissolution practice towards political parties as well. Since 2002, only two political parties were dissolved by the Court and one party has been punished with the deprivation of state aid. Given the fact that 22 political parties had been dissolved between 1970[23] and 2002, such statistic seems quite optimistic. Between 1982 and 2002, three parties were dissolved because of the activities seen contrary to secularism and ten parties were dissolved due to activities seen detrimental to the territorial integrity of the state and the unity of the nation.[24] In addition to dissolving political parties for just having the expression of "communist" in their names, the Court also banned the parties which mentioned Turkish and Kurdish people as separate entities in their programs. After the constitutional amendments in 1995[25] the Court started to ground its judgments on the article 68 of the constitution rather than Law on the Political Parties[26] which has much more restricting regulations[27] about political parties. Thanks to such amendments and partly because of changing its attitude towards political parties, the Court ended its practice to dissolve parties just because of their names or programs. In this regard, criteria of clear and imminent danger, calling for violence and relationship with terror organizations started to be basis of dissolving political parties. For instance, despite having the statement "We believe that if governments of Turkey defend the same claims, which they defend for the Turks in Cyprus, Bulgaria, Greece, Kosovo and other similar countries, for Kurds living in Turkey, the problem will be solved." in its party program, Rights and Freedoms Party was not dissolved by the Court in 2008. According to the Court, there is no proof that the political party in question would implement any method contrary to the constitution and imposing sanction to a political party for only expressions in its program would constitute unbalanced intervention

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parliamentary resolution which is normally subject to Court's supervision under article 85, the Court dismissed this claim. See article 83, 85, 148 of the Constitution and the judgment of Turkish Constitutional Court, E: 2016/54, K: 2016/117, Date: 03/06/2016.

[23] From the foundation of the Court in 1961 until 1970, only one political party had been dissolved by the Court. In sum, 25 political parties have been dissolved by the Court. Statistics were taken from the official site of the Court. See http://www.anayasa.gov.tr/icsayfalar/istatistikler/genelkurulistatistik.html

[24] In addition to these parties, four other political parties were also dissolved in this period due to not meeting procedural requirements or using the same names with formerly dissolved parties. For more information see EREN (2009), pp. 30-31; ÖRÜCÜ (2008), pp. 264-265; ÖDEN, ESEN (2016), p. 142; HAKYEMEZ (2008), pp. 136-137; UZUN (2010), pp. 384-386; KOÇAK, ÖRÜCÜ (2003), pp. 407-418.

[25] With the same amendments in 1995, bans on political parties to establish abroad offices, woman and youth branches were abolished. Also, ban on university scholars and students to be a member of a political party and ban on the non-governmental organizations' ability to cooperate with political parties were repealed. Also see YÜKSEL (2012), p. 345.

[26] It should be indicated that, having a special statute on political parties is not a widespread feature in comparative law. See EREN (2009a), pp. 45-71.

[27] See UYGUN (2000), pp. 256-272; BULUT (2003), pp. 535-562; YOKUŞ (2001), pp. 107-109.

to its freedom of expression and association.[28] There is no doubt that, the fate of aforementioned party would be other way around, if the case was hold by the Court not so more but about ten years ago. However, "the red line" of the Court regarding the calls for violence and relationship with terrorist organizations is still in use. Indeed, Democratic Society Party was dissolved on these grounds in 2009.[29]

On the other hand, the case law of the Court regarding the dissolution of political parties on the ground of being contrary to secularism had a transformation within this period as well. In this context, judgment on the request for the dissolution of Justice and Development Party (JDP) which has governed Turkey since 2002 serves as a good example for such transformation. In this judgment, despite confirming the fact that JDP has become center of activities which violate paragraph four of article 68 of the constitution, the Court contented with punishing JDP with deprivation of state aid rather than dissolution. In this regard, the Court concluded that considering all of JDP's activities with the absence of call for violence, it was decided to deprive the party in question of state aid rather than dissolution.[30] The difference of this judgment from the previous ones was that, although JDP was seen as a center of activities which were contrary to the principles of democracy and secularism, the party in question was not dissolved. Although the lack of call for violence affected the Court's judgment in a considerably extent, the parties which also had not called for violence had been dissolved on the grounds of secularism earlier. However, it would also be wise not to overlook the constitutional amendments in 2001 which raised the quorum of decision for the dissolution of political parties to 3/5 of all members of the Court.[31] Since six members of the Court voted for the dissolution, 4 members voted for the deprivation of state aid and one member voted for the dismissal of the case, the quorum was not reached and JDP was punished with deprivation of the half of the annual state aid.[32] Therefore, JDP could have had the same fate with its predecessors, if such amendments had not been made so.

[28] Turkish Constitutional Court, E: 2002/1, K: 2008/1, Date: 29/01/2008.
[29] Turkish Constitutional Court, E: 2007/1, K: 2009/4, Date: 11/12/2009.
[30] The Court reached this judgment by evaluating JDP's activities. According to the Court such activities didn't endanger the democratic values and didn't have the potential to harm the harmony in the society. In this regard, the positive steps taken by the government for the democratization and modernization of country constituted important factors for the Court.
[31] With the constitutional reform in 2001, the Court was also enabled to punish political parties with partial or complete deprivation of state aid rather than dissolving them. With the same reform the quorum of decision for the dissolution of political parties was raised to 3/5 of all members of the Court. In 2010, aforesaid quorum was raised to 2/3 of participating members of the Court. Also see ÖZBUDUN, GENÇKAYA (2009), pp. 49-63; GÖNENÇ (2004), pp. 89-109; YÜKSEL (2007), pp. 153-165; YÜKSEL (2009), pp. 122-124; YÜKSEL (2012), pp. 345-346.
[32] Turkish Constitutional Court, E: 2008/1, K: 2008/2, Date: 30/07/2008.

D. Constitutional Supervision of Legislative and Executive Activities

Judgments which are given on the constitutional supervision of legislative and executive acts like statutes have significant effects on the democratization and protection of human rights in Turkey as well. Yet unlike individual applications, such judgments have generally adverse impacts: In addition to blocking constitutional amendments which aim to improve fundamental rights[33], the Court also interfered legislative activities such as the election of president since 2002. While this "excessive interventionist" attitude of the Court damaged the democratization process before 2010, the "excessive inaction" of the Court which hit the top after 2016 has also damaged such process as can be seen below. Within this context, we are going to examine the judgments regarding the election of the president and supervision of emergency decrees in a more detailed way.

1. Judgment Regarding the Election of the President in 2007

According to the 1982 Constitution the parliament has the competence to adapt its decisions in the forms of statute or resolution. Although statutes are subject to supervision of the Constitutional Court, only three resolutions of the assembly are subject to such supervision:

1. decision to lift parliamentary immunity of any member,
2. decision on the loss of membership,
3. amendments to the rules of procedure.

Apart from these, the other resolutions of the assembly are not subject to supervision of the Court. However, in order to overcome such limitation, the Court uses its old-fashioned but a unique jurisprudence which can be named as supervision of *de facto* amendments to rules of procedure. The reasoning is persuasive: As amendments to the internal regulations of National Assembly is subject to revision under 1982 Constitution, the resolutions which are taken in violation of such rules correspond to *de facto* amendments to the rules of procedure and could be revised and annulled. Although this practice dates back to the early years in

[33] In 2008, the Court annulled the constitutional amendments which aimed to lift headscarf ban in universities. Article 148 of the constitution states that Court could only supervise procedural aspects of the constitutional amendments in terms of quorum and double debate requirement. However, the Court also supervises constitutional amendments whether they are compatible with unamendable articles of the constitution or not. In this regard, the Court annuls the amendments which it sees contrary to such articles. In the headscarf issue, the Court found such amendments contrary to the secularism principle which is designated as unamendable principle in Turkish Constitution and annulled them. See Turkish Constitutional Court, E: 2008/16, K: 2008/116, Date: 05/06/2008. Also see ÖZBUDUN, GENÇKAYA (2009), pp. 106-109; YÜKSEL (2012), pp. 348-350.

1960's[34] the result of the landmark 2007 decision had an unrivalled impact on Turkish constitutional order.

According to the former 102th article of Turkish Constitution, the National Assembly used to elect the president of the republic with the votes of at least two-thirds of all members by secret ballot. In the event of not ensuring two-thirds majority (367), it was possible to elect the president with majority of all members in the third round.[35] As the term of office of President Sezer was about to end in 2007, Turkish National Assembly convened to select the new president on April 27th of 2007. Before holding the first round of elections, one of the deputies raised question regarding the quorum and asserted that two-thirds majority was not only required for election, but also for quorum of meeting. However, this objection was denied by the speaker of the assembly and such denial was approved with the resolution adopted by members. In view of the assembly, the general rule about quorum of meeting, which equals to 184[36], was applicable to that case and there were more than 184 deputies present. After candidate Gül received 357 votes from the votes cast (361) in the first round, main opposition party namely Republican People's Party (RPP) applied to the Constitutional Court in order to invalidate the first round of elections. In order to annul the first round of elections RPP brought forward the same argument about the quorum. The Constitutional Court gave its judgment just four days later and invalidated the resolution of National Assembly about the quorum: Since two-thirds majority is a constitutional requirement for both meeting and election and such requirement is also necessitated by internal regulations[37], contradictory resolution of the assembly is equal to *de facto* amendment to the rules of procedure and violates the constitution. Consequently, such resolution was annulled.[38] The most interesting point of the decision was that, two-thirds majority as a quorum of meeting requirement had never been sought in former presidential elections. Since the constitution went into force in 1982 three presidents had been elected by the National Assembly until 2007. What's more striking was that, during the election of 8th president in 1989, less than two-thirds of deputies were present in all rounds and Mr. Özal had been selected with 263

[34] See GÖZLER (2000), pp. 394-398.

[35] If the president was not elected in the third round it was also possible to elect the president in the fourth round among the two candidates who received most of the votes in previous round. In the event of not electing the president after the fourth round, the immediate renewal of elections to National Assembly was mandatory pursuant to the former 102th article.

[36] According to the former 96th article of Turkish Constitution, unless otherwise stated in other articles, the National Assembly convenes at least with one-thirds of its members.

[37] According to the article 121 of internal regulations, president of the republic was elected in conformity with the article 102 of the constitution.

[38] Turkish Constitutional Court, E: 2007/45, K: 2007/54, Date: 01/05/2007; Also see KÖKER (2010), pp. 332-333.

votes[39] in the third round. At that time, none of the objections regarding the constitutionality of quorum of meeting were brought before the Constitutional Court, even by the opposition parties[40] which boycotted the election.

The judgment of the Constitutional Court, which was heavily criticized by different actors and mainly by the governing party JDP, constituted a milestone for the constitutional future of Turkey. As the election of president was deadlocked, governing party called for early elections to the parliament and proposed amendments to the constitution which foresaw, *inter alia*, the election of president by popular vote of people.[41] After the proposed amendments were approved by the national assembly, they were submitted to referendum by president Sezer. Then, everything went in the right direction for the JDP: In addition to securing the first place again in early parliamentary elections in July, former candidate Gül was elected as the new president thanks to the Nationalist Movement Party's (NMM) ensuring of quorum of meeting by participating in presidential elections. Furthermore, the constitutional reform was ratified (%68,95) by referendum in October 2007.[42]

As one can see that, not only failing to block the election of the president subsequently, the controversial judgment of the Court also caused to quick and unprepared change to Turkish constitutional system. Just after the election of new president by people in 2014, actual use of presidential power started to be out of line with related articles of the 1982 Constitution which initially prescribed a "supra-political" role for head of state. With the intend of harmonizing *modus operandi* with norms, a new constitutional reform, which aimed to transform dual executive into unilateral one, was proposed by governing party JDP and was also supported by one of the opposition parties namely NMM. Such reform was ratified with %51, 41 votes cast in referendum in April 2017.[43] This meant a radical shift from parliamentary system to *sui generis* Turkish presidential system. In other words, it was a death-warrant of the long standing parliamentary system in Turkey. Apart from gaining only half of the population's support and having other handicaps regarding time and other formal issues, the constitutional reform in question was also heavily criticized in terms of context. According to the Venice Commission "... the substance of the proposed constitutional

[39] Before the constitutional amendment in 1995, the National Assembly was composed of 450 members. With the aforementioned amendment, total number of members was raised to 550. Therefore, two-thirds majority was equal to 300 in 1989.
[40] Between the general elections of 1987 and 1991 there were only three political parties in the National Assembly. Among these Motherland Party (MP) was the ruling party. Because of the boycott, only MP as a political party participated in the election of president.
[41] With 2007 amendments, term of office of deputies were also reduced to four years from five years (Art. 77) and general rule regarding the quorum of meeting was extended to all activities of assembly including the elections (Art. 96).
[42] See ÖZBUDUN, GENÇKAYA (2009), pp. 97-103; GÖNENÇ (2008), pp. 518-521.
[43] As such amendments were made under the state of emergency, a lot of criticism was made regarding the timing.

amendments represents a dangerous step backwards in the constitutional democratic tradition of Turkey."[44]

In sum, the Court's controversial decision was one of the biggest reasons for the increase of severe political polarization which resulted with an adoption of a new government system in a conflicting rather than a consensual process. This also meant the end of hopes towards an inclusionary, plural and consensus-based constitution making process which is a long-waited wish in Turkey, at least for now.

2. Judgments Regarding the Emergency Decrees

According to the article 148 of the 1982 Constitution, decrees having the force of law which are issued during the emergencies could not be brought before the Constitutional Court with the plea of unconstitutionality. In this context, it is possible to apply to the Court after the parliament approves or amends an emergency decree and publishes it in the official journal. Thus, it is not possible to supervise an emergency decree until the parliament takes an action. Despite such restraint, the Court circumvented the prohibition by handing down rights-sided judgments in early 1990s. In its first judgment regarding the issue the Court stated that:

"... Inasmuch as the Constitutional Court cannot be contingent upon the description of a norm which is brought before itself with the plea of constitutionality, it has to describe such norms derived from legislative or executive organ on its own. As a consequence, the Court has to supervise norms which are made under the name of "emergency decrees" whether they constitute valid emergency norms in a way the constitution stipulates or not. If the norms which are named as emergency decrees do not fulfil such constitutional requirements, they have to be supervised by the Court, since they do not constitute real "emergency decrees". In this regard, article 148 of the constitution prevents only the supervision of real emergency norms."[45]

Beginning with aforementioned reasoning, the Court supervised so-called emergency decrees which are brought before it with the plea of constitutionality and invalidated lots of emergency norms on the basis of such reasoning. Indeed, the related articles of the constitution mandate that, emergency decrees could only be issued for the issues necessitated

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[44] European Commission for Democracy Through Law (Venice Commission), Turkey, Opinion On The Amendments To The Constitution Adopted By The Grand National Assembly On 21 January 2017 and To Be Submitted To A National Referendum On 16 April 2017, adopted by the Venice Commission at its 110th Plenary Session, Venice, 10-11 March 2017. Available at: http://www.venice.coe.int/webforms/documents/default.aspx? pdffile=cdl-ad(2017)005-e.

[45] Turkish Constitutional Court, E: 1990/25, K: 1991/1, Date: 10/01/1991.

by emergencies.[46] In this respect, the Court overruled the norms which exceeded necessities, especially on the grounds of location, subject and time. For instance, the Court invalidated the emergency norms which are designed to be applied also in territories in which state of emergency is not in effect.[47] Moreover, the Court also invalidated emergency rules which provided amendments to ordinary statutes. According to the Court, the norms which provide amendments to ordinary statutes cannot be accepted temporary in nature and they fail to fulfil requirements emergencies necessitate.[48] In the following years, the Court maintained this approach regarding the emergency decrees.[49]

Nevertheless, the Constitutional Court reversed its case-law concerning the supervision of emergency decrees and denied the suits regarding the constitutionality of the emergency decrees issued after the coup attempt in July 2016. In doing this, the Court acknowledged its previous "oversteps" as well:

"While judging a case on hand, the Court evaluates its former judgments and pays attention to the balance between maintaining its case law and the need for the development or change of its case law. In this regard, when the Court changes its case law it should explain the reasons behind that change and ground its new argument... Taking into account of the wording of article 148 of the constitution, the purpose of the constituent power and related legislative documents it is understood that, emergency decrees cannot be subject to judicial supervision. A judicial review which is contrary to such provision conflicts with the articles 6 and 11 of the Constitution and these articles express superior and binding nature of the constitution and prohibit the use of power which doesn't originate from the constitution... For these reasons, requests for the annulment of the rules on hand must be rejected due to lack of jurisdiction."[50]

The state of emergency was declared because of an unprecedented event in Turkish history and it is prevalent on the whole country for the first time since the 1982 Constitution took effect. For this reason, it is understandable and rational to evaluate the reasons and results of the emergency regime more different than previous ones. However, the Court should have made such evaluation by examining emergency norms rather than rejecting the

[46] Articles 121 and 122 of the 1982 Constitution.
[47] Turkish Constitutional Court, E: 1991/6, K: 1991/20, Date: 03/07/1991.
[48] Turkish Constitutional Court, E: 1990/25, K: 1991/1, Date: 10/01/1991; Turkish Constitutional Court, E: 1991/6, K: 1991/20, Date: 03/07/1991.
[49] See Turkish Constitutional Court, E: 2003/28, K: 2003/42, Date: 22/05/2003.
[50] Turkish Constitutional Court, E: 2016/166, K: 2016/159, Date: 12/10/2016; Turkish Constitutional Court, E: 2016/167, K: 2016/160, Date: 12/10/2016; Turkish Constitutional Court, E: 2016/171, K: 2016/164, Date: 02/11/2016; Turkish Constitutional Court, E: 2016/172, K: 2016/165, Date: 02/11/2016; For critiques of these decisions see ESEN (2016); CAN, AKTAŞ (2017), pp. 31-39; KÖYBAŞI (2017), pp. 216-220. As the constitution prohibits the supervision of emergency decrees, Gözler finds the decisions of the Court right. See GÖZLER (2017), pp. 18-20.

cases on the sole ground of wording of the article 148 of the constitution. Indeed, in comparison with ordinary times, the requirement for the supervision of decrees is higher in emergencies. Interesting point is that, such belief is agreed by the Court while rejecting the supervision of emergency decrees as well:

"... Since basic rights and freedoms are more restricted in emergencies, it might be said that emergency decrees should be subject to judicial supervision in compliance with the rule of law. However, such opinion does not affect the existence and implementation of constitutional norms which prescribe exemption to judicial supervision."[51]

As one can see, although admitting the necessity of supervision of decrees in times of emergencies, the Court renounced its rights-sided case law in a self-contradictory manner. Consequently, all the savings regarding the supervision of emergency decrees went away.[52] Taking into consideration that, some of the provisions of current emergency decrees such as provision regarding "winter tires"[53] are not necessitated by the emergency, decrees are used also for the issues not necessitated by emergencies. As the National Assembly has also the duty to supervise emergency decrees, its efficiency to substitute judicial supervision is doubtful.[54]

E. Conclusion

As it is understood from the sample judgments, it is difficult to say that the Turkish Constitutional Court had a consistent approach regarding the democratic values and protection of human rights in Turkey, at least in the last fifteen years. For the dissolution practice, the performance of the Court remained moderate. In this regard, the Court contributed to the improvement of dissolution practice of political parties even if just a bit, along with the improvements of regulations regarding the political parties.[55] On the other hand, we saw contrasting but more apparent attitudes concerning individual applications and judicial reviews of constitutionality. While rights sided decisions are given especially on the area of individual applications, is it difficult to say the same for the cases regarding the constitutionality of executive and legislative acts. This argument could also be supported with inconsistent approaches of the Court regarding the same regulation in Turkish Civil Code as it was stated above.

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[51] Turkish Constitutional Court, E: 2016/166, K: 2016/159, Date: 12/10/2016.

[52] See ESEN (2016); KÖYBAŞI (2017), pp. 216-220.

[53] See Emergency Decree, Number: 687, Date: 09. 02. 2017.

[54] According to the internal regulations of the parliament, emergency decrees should be negotiated within 30 days after the submission. However, parliament neglects this rule and such negligence has no sanction. From July 2016 up until today, 31 emergency decrees have been issued. Only five of them have been negotiated by the parliament.

[55] Also see ÖDEN, ESEN (2016), pp. 142-148; ARSLAN (2002), pp. 9-25; ALGAN (2011), pp. 809-836.

Before 2010, the Court had always tried to push its limits by interpreting the constitution and its powers widely and this attitude was subjected to heavy criticism by political and non-political actors.[56] In spite of receiving similar criticisms for the judgments in some controversial cases like Twitter or YouTube cases after 2010, the Court was generally praised as it contributed to the protection of basic rights and freedoms. However, the Court started to renounce from this role especially after 2015. After the coup attempt and declaration of state of emergency in July 2016, the Court even abandoned its previous case law which was on the side of protection of basic rights even in national emergencies. Bearing in mind the passive stance adopted by the Court and considering the continuance of national emergency more than one year in Turkey, such lack or deficiency of supervision has the potential to damage pluralistic democracy which is already in menace.

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[56] Oder describes the roles of the Court as "game broker", "populist" and "popular" from 1970s up until today. See ODER (2017).

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Democracy in crisis and political propaganda of appeal to the masses: Influence on the rights of minorities

Isa António[1]

Abstract
0. Meaning of the expression "democracy"; 1. Democracy and its axes of implementation; 2. The role of democracy given the challenge of protecting the human rights of minorities; 3. Representative democracy and minorities: the dilemma of the "majority dictatorship";
4. The failure of democracy to defend minorities

Keywords: democracy at risk, political propaganda, appeal to the masses, protection of the human rights of minorities, the current role of States.

0. Meaning of the expression "democracy"

Lincoln advocated that democracy consists of "government of the people, by the people, for the people"[2], and the political model of the Western States consists of representative democracy, whereby people freely elect their representatives in periodically held elections, on the basis of universal and secret vote.

The political power exercised in democratic states results from the political commitment made between the representative and the people who freely elected him/ her, during a certain period of time, after which the people "sanction" their ruler for their poor performance by abstaining or by voting in the political opposition.

Within this "social pact"[3], there is a continuous dialectic to transfer power from the people to those who will be mandated to represent the collective will (read: majority) and at the end of this political mandate, power returns to the hands of people who will again decide to whom delegate their sovereignty.

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[2] See Reinhold Zippelius, *Teoria Geral do Estado [General Theory of the State]*, Lisbon: Fundação Calouste Gulbenkian, 1997, p. 230.

[3] Expression of Jean-Jacques Rousseau.

Representative democratic sovereignty consists, in summary terms, in the core power that resides in the people, which "entrusts the elected representatives to express their will on their behalf"[4].

It is important to emphasize that the matrix of *true* democracy is the freedom that allows the elements of the people - not a certain social class or caste - to be eligible and not just to be elector, enabling the people itself to actively exercise representative power in a national assembly (e.g. parliament), that is, to be ruler. The political power of representative democracy isn't the one that resides in the political elite sphere but, on the contrary, the one that is exercised by all *citizens* in conditions of full equality.

1. Democracy and its axes of implementation

The achievement of democracy is accomplished through the implementation, in the Constitutions of States, of a collection of fundamental principles and axiological supra-legal values[5].

The following elements are indispensable to a Democratic Constitutional State, among others: 1. Separation of powers as an authoritarian principle that binds state acts to a constitutionally defined competence; 2. Principle of the administration legality; 3. Independence of the courts (institutional, functional and personal); 4. The judge bound to the law; 5. Citizens shall be guaranteed access to the law, courts and effective judicial protection. We observe, therefore, that a multiplicity of principles and sub-principles arise from the Democratic Constitutional State, which simultaneously orient it, as well as the principle of a Democratic Constitutional State, the principle of equality, the principle of universality, the principle of the separation of powers and the principle of legality.

The "stepping-stone" values of a Democratic State are those of equality, freedom and solidarity, and it should be emphasized the imperativeness of defending the citizens' human rights from these States through their cataloging in the respective Constitutions, as well as the creation of the respective mechanisms of implementation. These human rights, when enshrined in the States Constitutions[6], are referred as "fundamental rights" of citizens and are rooted to the human condition itself.

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[4] See Reinhold Zippelius, *Teoria Geral do Estado [General Theory of the State]*, Lisbon: Fundação Calouste Gulbenkian, 1997, p. 231.

[5] See J.J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição [Constitutional Law and Constitution Theory]*, 7th edition reissue, Coimbra: Almedina, 2015, p. 280 and following pages.

[6] For example, in the Constitution of the Portuguese Republic (CRP) there are so-called "rights of freedom" (rights, freedoms and guarantees) and "social rights" (economic, social and cultural rights), with many other fundamental rights enshrined in the Fundamental Law.
cf. "Direitos Humanos: sobre a universalidade rumo aos Direitos Internacionais dos Direitos Humanos [Human Rights: on the universality towards the International rights of Human Rights]", in http://www.dhnet.org.br/direitos/brasil/textos/dh_univ.htm (retrieved 07 30, 2016)

Democracy as a structuring principle of a State unfolds in several multifaceted axes: a) political rights, such as the right to elect (vote) and to be eligible, but also to create parties and associations of a political and civic nature; b) "freedoms" of the people, such as freedom of demonstration, assembly and expression; c) social rights, such as the right to equal access to education, justice and health.

More specifically, in 2000, the United Nations Human Rights Commission set up a collection of assumptions, for the guidance of its Member States, which are decisive for a free political system and conducive to the implementation of policies which constitute the core of democracy[7]. We emphasize in particular the importance of the following measures: a) respect for human rights and fundamental freedoms; b) freedom of association; c) freedom of expression and opinion; d) access to power and its exercise, according to the pattern of a State of Law; e) free, honest and periodic elections by universal and secret vote; f) multiparty; g) separation of powers; h) judicial independence; i) transparency and accountability of justice administration; j) free, independent and pluralistic media.

2. The role of democracy given the challenge of protecting the human rights of minorities

There is a correlation between democracy and human rights since one depends on the other, and the United Nations clearly assumes that the two main impediments to respect human rights are the "democratic deficits" and the "weakness of institutions"[8].

The direct relation between democracy and human rights is expressly enshrined in article 21 of the Universal Declaration of Human Rights (hereinafter, UDHR): "*The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures*".

The values of freedom, the respect for human rights and the transparent and periodic elections acts, which are part of the UDHR and embodied in the International Covenant on Civil and Political Rights (ICCPR) as well as in the International Covenant on Economic, Social and Cultural Rights (ICESCR), are internationally accepted and proclaimed as pillars of democracy.

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[7] cf. "Democracia e Direitos Humanos [Democracy and Human Rights]", in https://www.unric.org/pt/a-democracia-e-a-onu/29048-democracia-e-direitos-humanos (retrieved 07 30, 2016), p. 2.
See, in this regard, Fernando Baptista Pavan, "O direito das minorias na democracia participativa [The right of minorities in participatory democracy]", in Prisma Jurídico, São Paulo, n. 2, 2003, p.196.

[8] Thus, see "Democracia e Direitos Humanos [Democracy and Human Rights]", in https://www.unric.org/pt/a-democracia-e-a-onu/29048-democracia-e-direitos-humanos (retrived 07 30, 2016), p.2.

The establishment of the human rights enshrined in these international diplomas and legal instruments for the protection of minorities are essential to democracy itself[9].

The first obstacle to the protection of the minorities is the definition of "minority"[10]. In the international context, the main authors on Human Rights offer diverse conceptualizations around "minority".

Francesco Capotorti preconizes an understanding about what "minority" is: "A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the remaining population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language."[11]

Deschênes envisaged "minority" as: "A group of citizens of a State, constituting a numerical minority and in a non-dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and law."[12]

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[9] In this sense, see "Democracia e Direitos Humanos [Democracy and Human Rights]", in https://www.unric.org/pt/a-democracia-e-a-onu/29048-democracia-e-direitos-humanos (retrived 07 30, 2016), p.1.

[10] The definition of "minority" may have *terminological changes*, depending on the nature of the analysis and study perspective, be it juridical, sociological, political or ideological or even vary according to the international instrument that refers to it. Whereas a juridical, sociological and ideological perspective, the terminology referring to a "minority" will appear in terms such as "communities", "social groups", "natural classes", "nationalities", "collectivities", "groups", "national minorities", inter alia. Among the main objective criteria we can list the following: 1. Distinct groups; 2. Numerical factor; 3. Non-dominant; 4. Existence in the state; 5. Nationalities. The subjective criteria are fundamentally: 1. Sense of community; 2. Objective; 3. Self-identification. "Distinct groups" comply with the fundamental definition of minority when such group is objectively distinct from the rest of the population, under one or more perspectives, simultaneously, such as "*ethnic, religious or linguistic characteristics differing from those of the rest of population*".

The recognition of minority implies an analysis of its very own and specific aspects, guided by a "selection" that allows the concept of minority do not include groups that are not minorities just because they are in "numerical inferiority ". According to article 27 of the ICCPR, such a distinction must necessarily be based on ethnic, religious and linguistic factors. The so-called "numerical factor" or "numerical inferiority" implies that the group in question is numerically inferior to the rest of the State community. However, it should be noted that a numerically inferior group does not always constitute a "minority" in the true meaning of the term. The members of a "true" minority are banned from rights of citizenship and human rights that are recognized to the remaining population of that specific State. Thus, see Isa Antonio, "Autodeterminação e Independência das Minorias: Mecanismos de Salvaguarda Internacional. Problemáticas [Self-Determination and Independence of Minorities: International Safeguard Mechanisms. Problematics]", in *Revista Lex Humana [Lex Humana Magazine]*, Petrópolis, v. 7, n. 1, 2015, p. 58-78.

[11] Thus, see Athanasia Spiliopoulou Akermark, Justifications of Minority protection in International Law, The Hague, 1997; Dinstein, Yoram e Tabory, Mala, The Protection of Minorities and Human Rights, Dordrech, Boston, London, Martinus Nijhoff Publishers, 1992.

[12] See Athanasia Spiliopoulou Akermark, Justifications of Minority protection in International Law, The Hague, 1997.

From the two concepts mentioned above, we can infer some common elements, such as: 1. the size of the group; 2. its numerical ratio with respect to the whole population; 3. its geographical concentration or dispersion; 4. citizenship; 5. the sociological nature of the group and its relation with other sectors of the population; 6. its legal position within the State; 7. other aspects such as motivation, collective will and collective aspirations.

The role of democracy in the minority rights defense should be based on the introduction of policies, laws and mechanisms for the *preservation of individual freedom*. Democracy should not be seen exclusively as a form of liberal government which results in "free elections".

The ambition to protect the minorities will only be achieved when the instruments to defend the interests and well-being of *all* members of a political community are created, "whether or not the members are represented in the categories of power"[13].

Universal rights[14] and instruments shall be acknowledged to the minorities, allowing them to establish their distinctive identity in the face of the dominant group identity. Furthermore, minority groups shall be called to the negotiation that characterizes the democracy political outlook, and with an active role, negotiate the interests that will shape the State policies.

Preserving minorities is essential to democracy continuity. In accordance with the basic principles of tolerance and respect for human dignity, it is important the acknowledgement of civil and political rights, the establishment of wealth redistribution systems, the access to public services (e.g. justice, education and culture) and to benefits based on equity or material equality[15] leading to the integration in society (measures of positive discrimination).

Above all, every "Democratic Constitutional State" shall establish in the constitution the defense of dignity and value of the person, as well as the derived supra-positive rights, since: "The majority is not omnipotent. Above it, in the moral realm, stands humanity, justice and reason; in the political world, legal rights"[16]–[17].

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[13] Thus, see Fernando Baptista Pavan, "O direito das minorias na democracia participativa [The right of minorities in participatory democracy]", in Prisma Jurídico, São Paulo, n. 2, 2003, p.196.

[14] cf. "Direitos Humanos: sobre a universalidade rumo aos Direitos Internacionais dos Direitos Humanos [Human Rights: on the universality towards the International rights of Human Rights]", in http://www.dhnet.org.br/direitos/brasil/textos/dh_univ.htm (retrieved 30 de julho de 2016)

[15] See, for further details, Reinhold Zippelius, *Teoria Geral do Estado [General Theory of the State]*, Lisbon: Fundação Calouste Gulbenkian, 1997, p. 453 and following pages.

[16] Thus, Fernando Baptista Pavan, "O direito das minorias na democracia participativa [The right of minorities in participatory democracy]", in Prisma Jurídico, São Paulo, n. 2, 2003, p.200, footnote number 8, on a Tocqueville reflection.

[17] On the rights of minorities, see United Nations, *Os Direitos das Minorias [The Rights of Minorities]*, Informative Sheet n. 18, Rev.I, 1995|2004, p.9 and following pages. See also, Reinhold Zippelius, *Teoria Geral do Estado [General Theory of the State]*, Lisbon: Fundação Calouste Gulbenkian, 1997, p. 432 and following pages. See, Tocqueville, Alexis de, *A democracia na América [Democracy in America]*, vol.1, translation: Eduardo Brandão, São Paulo: Martins Fontes, 2005 and, from the same author, *A democracia na América [Democracy in America]*, vol.2, translation: Eduardo Brandão, São Paulo: Martins Fontes, 2004.

3. Representative democracy and minorities: the dilemma of the "majority dictatorship"

Regardless of the breadth of meaning we assign to the expression "minority", the main problems remain. On the one hand, any concept of "minority" will always be provided by the "majority" in power and, on the other hand, this "majority" will decide on mechanisms to enable and protect the rights recognized to the "minority". Therefore, the legal and political situation of the elements of a minority is "in the hands" of the majority will and inevitably in a position of significant vulnerability[18].

This "democratic dilemma" is known as "tyranny of the majority"[19–20] (Tocqueville) and is very well illustrated in the words of Fernando Baptista Pavan: "If, in representative democracy, the power delegated by the majority obliges all, including minorities excluded from the decision-making process, then the will of the majority prevails over that of minorities, regardless of being fair or unfair, good or bad. One can even assert further: if the desire of the majority is to exterminate a minority of any social community, it will have legitimate powers to execute this action, without violating the positive law, because it is the majority, in indirect democracy, through its elected representatives, who elaborates and changes these laws and the Constitution itself."[21]

After the French Revolution, in order to people effectively exercise political power, Sieyès considered the representative democracy model a better option than the Rousseau's "direct egalitarian democracy" model.

At first sight, one might think that the will of the people would be better assured through a formula of direct deliberation. However, as R. Zippelius points out, the collective will of the people cannot in practice be constituted by the "sum of all individual wills"[22], as for in a society with a large number of citizens it turns out to be impossible to carry out a meeting where citizens can confront directly their individual perspectives and interests. Thus, the majority will shall prevail through the election of a representative[23]. Any government represents the "collective will" and not the "natural will" of each element of the people, and there is the pressing danger of "manipulation of the masses".

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[18] cf. Hannah Arendt, *As origens do totalitarismo [The origins of totalitarianism]*, Alfragide: Dom Quixote Publisher, 3rd edition, 2004.

[19] See, about the mater, Valquirio Cubo Junior / Helena Esser dos Reis, "A democracia e os direitos da minoria em Tocqueville [Democracy and minority rights in Tocqueville]", in UFG Law School Magazine, v. 31, n. 1, oct. 2010, p. 235-240.

[20] See, Tocqueville, Alexis de, *A democracia na América [Democracy in America]*, vol.1, translation: Eduardo Brandão, São Paulo: Martins Fontes, 2005 e, do mesmo autor, A democracia na América [Democracy in America], vol.2, translation: Eduardo Brandão, São Paulo: Martins Fontes, 2004.

[21] In this sense, see Fernando Baptista Pavan, "O direito das minorias na democracia participativa [The right of minorities in participatory democracy]", in Prisma Jurídico, São Paulo, n. 2, 2003, p.199.

[22] In this sense, see Reinhold Zippelius, *Teoria Geral do Estado [General Theory of the State]*, Lisbon: Fundação Calouste Gulbenkian, 1997, p. 231.

[23] In this sense, see Fernando Baptista Pavan, "O direito das minorias na democracia participativa [The right of minorities in participatory democracy]", in *Prisma Jurídico*, São Paulo, n. 2, 2003, p.197.

In this regard R. Zippelius in the wake of Michels states that: "The danger of direct democracy lies in the fact that it provides political efficacy and legal straightforwardness to demagogic influences: a popular assembly is always in danger of being tamed and uprooted by the power of speech. It is easier to dominate the masses than a small circle of listeners, since their approval is more impetuous ... and they, once influenced, do not easily tolerate dissention of small minorities or even of some individuals ... A large crowd is always more susceptible to panic, exaggerated enthusiasm, etc."[24] (emphasis added by the author)

It is also worth remembering the words of Hannah Arendt on totalitarian propaganda: "Because they exist in a world that is not totalitarian, totalitarian movements are forced to resort to what we commonly call propaganda. (...) indoctrination, inevitably allied with terror, grows in the direct relation of the force of the movements or the isolation of the totalitarian rulers that protects them from external interference. If propaganda is an integral part of "psychological warfare", terror is even more inherent to it."[25]

By taking into account the growing tendency towards immediateness and "spectacle" around political campaigns, as well as the ruler interest in pleasing his/ her voting masses, it is appropriate to consider that, as Robert Dahl points out, it may be difficult (or impossible) to attain full or perfect democracy, which finds itself in a constant improvement achieved through the "continuous correspondence between the performance of the rulers and the aspirations of the governed"[26], *including the governed in minority*.

4. The failure of democracy to defend minorities

Considering the regional and international socio-political context, we highlight the following factors as the main challenges of democracy[27] and human rights, especially for the minorities: a) the increasing poverty; b) unequal access to justice and education; c) the lack of transparency and accountability mechanisms of political governments (e.g. impunity and corruption); d) the increasing armed conflicts; e) the diplomatic response failure against terrorism; f) the Syrian refugees scourge; g) the fallacy and artificiality of the national political speech used in the international scene, poorly suited to the human and socio-

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[24] See Reinhold Zippelius, *Teoria Geral do Estado [General Theory of the State]*, Lisbon: Fundação Calouste Gulbenkian, 1997, p. 232 and following pages and Hannah Arendt, As origens do totalitarismo [The origins of totalitarianism], Alfragide: Dom Quixote Publisher, 3rd edition, 2004, p.451 and following pages (454-455).

[25] About propaganda and its effects on the masses, see Hannah Arendt, *As origens do totalitarismo [The origins of totalitarianism]*, Alfragide: Dom Quixote Publisher, 3rd edition, 2004, p.451 and following pages (454-455).

[26] In this sense, see Fernando Baptista Pavan, "O direito das minorias na democracia participativa [The right of minorities in participatory democracy]", in *Prisma Jurídico*, São Paulo, n. 2, 2003, p.204.

[27] In this sense, see "Democracia e Direitos Humanos [Democracy and Human Rights]", in https://www.unric.org/pt/a-democracia-e-a-onu/29048-democracia-e-direitos-humanos (retrieved 07 30, 2016), p.2.

economic reality that it lectures about; h) the globalization associated with neoliberal economic policies[28].

This socio-political configuration favors the emergence of policies that denies the "right to have rights"[29] for groups in a weaker position and minor democratic representation.

The States governments' ineptitude to achieve consensus and solutions for the disclosed challenges leaves us perplexed and at odds with these times that peak in international, regional and national legal instruments that enshrine the so-called "human rights" or "fundamental rights".

Paradoxically, political governments and international organizations were never this blatantly passive upon human rights abuse, carried out by governments over their own citizens, may they belong to the minorities or to the majority.

There's a lack of effective and pragmatic operational mechanisms able to completely react against minorities rights violations, which end up victims of the democratic system that replicates the will of the majority.

When political governments fail, all citizens fail, as they hold co-responsibility by choosing the government and accepting its policies.

Thus, our position follows Winston Churchill path, who stated "*democracy is the worst form of government, except for all others that have been tried*".

The epitome of the failing "democracy (power) of the weak" is in the equality, freedom and fraternity[30] values' nihilism, demonstrated in the violation of human rights and in the persecution of minorities, still happing in the 21st century.

Regarding minorities, John Randolph believes the "different" is essential to be ensured and, *prima facie*, the society to be democratized: "The democracy utopia is far from being achieved when the minorities' rights are considered. The inequalities reduction and the tolerance to dissension are, in this case, as important as to ensure the fundamental freedoms. The route encompasses democratic institutions perfecting and taming the power. After the State democratization, the society democratization shall follow"[31].

We conclude our excursion with a thought from Hannah Arendt about the persecution of the Jewish minority, which we consider to be extensive to all minorities and to be accurately at the present time: "*Once they left their homeland they remained homeless, once they left their*

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[28] cf. "A ONU e os direitos humanos [UN and human rights]", in http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0103-40141995000300014 (retrieved 07 30, 2016).

[29] Expression of Hannah Arendt, in *As origens do totalitarismo [The origins of totalitarianism]*, Alfragide: Dom Quixote Publisher, 3rd edition, 2004.

[30] See Reinhold Zippelius, *Teoria Geral do Estado [General Theory of the State]*, Lisbon: Fundação Calouste Gulbenkian, 1997, p. 444 and following pages.

[31] In this sense, the Robert Dahl quote, see Fernando Baptista Pavan, "O direito das minorias na democracia participativa [The right of minorities in participatory democracy]", in *Prisma Jurídico*, São Paulo, n. 2, 2003, p.204.

state they became stateless; once they were deprived of their human rights they were rightless, the scum of the Earth"[32].

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[32] See Hannah Arendt, *As origens do totalitarismo [The origins of totalitarianism]*, Alfragide: Dom Quixote Publisher, 3rd edition, 2004, p.353.

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Another brick in the wall? Shaping mutual trust between courts in the European multilevel system of fundamental rights protection

Marco Galimberti[1]

Abstract: The paper seeks to shed some light on the principle of mutual trust in terms of judicial interaction within the European multilevel fundamental rights protection. In this regard, Section 1 briefly illustrates the key role played by the unwritten principle of mutual trust in the European Union's Area of Freedom, Security and Justice. In the following Section, it is explored the cross fertilization that has been under way, over the last few years, between the Court of Justice of the European Union and the European Court of Human Rights in the context of the Dublin Regulation and the European Arrest Warrant. Lastly, in Section 3 the author argues that the recent European case law on mutual trust has positively impacted on the dialogue among Luxembourg, Strasbourg and national judicial authorities.
KEYWORDS: Mutual trust – mutual recognition – European Arrest Warrant – Dublin Regulation – fundamental rights – European Union – Court of Justice of the European Union – European Court of Human Rights.

1. Setting the framework: the principle of mutual trust in the Area of Freedom, Security and Justice[2]

The principle of mutual trust is neither defined nor expressly mentioned in the Treaties of the European Union[3]. In spite of this lack of codification in any primary

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[2] List of quoted abbreviations:
AFSJ = Area of Freedom, Security and Justice;
CJEU = Court of Justice of the European Union;
EAW = European Arrest Warrant;
ECHR = European Convention on Human Rights;
ECtHR = European Court of Human Rights
EU = European Union;
EUCFR = Charter of Fundamental Rights of the European Union;
TEU = Treaty on European Union;
TFEU = Treaty on the Functioning of the European Union.
[3] See PRECHAL (2017), p. 76; LENAERTS (2017), p. 813; MARIN (2017), p. 142.

legal provision of the EU, mutual trust has become increasingly relevant in the context of the EU integration process and especially within the Area of Freedom, Security and Justice (hereinafter AFSJ). In fact, the literature has identified mutual trust as founding principle for the enforcement of mutual recognition[4], described by the Tampere European Council Conclusions of 1999 as "the cornerstone of judicial cooperation in both civil and criminal matters within the Union"[5]. To borrow the words used by Mitsilegas, mutual recognition "has been the motor of European integration in criminal matters for the past fifteen years. Its application in the field of criminal law was premised upon the uncritical acceptance of presumed mutual trust between – and in – the legal systems of the Member States"[6].

In the silence of the Treaties, where the principle of mutual recognition is, by contrast, explicitly enshrined[7], mutual trust has been spreading across both the EU secondary legislation and the jurisprudence of the Court of Justice of the European Union (CJEU)[8]. As mentioned above, the AFSJ is by far the area in which various EU legislative instruments[9] and the CJEU make reference most frequently to the notion of mutual trust[10]. For instance, this principle was embraced by the CJEU in *Gözütok and Brügge* (2003), when the Court held that the operation of *ne bis in idem* necessarily entails that the Member States have mutual trust in their criminal justice

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[4] For instance, cf. MAJONE (1995), pp. 1-33; STORSKRUBB (2016), p. 15; MORARU (2016), p. 38; BOVEND'EERDT (2016), p. 112; CAMBIEN (2017), p. 114. With regard to trust as a precondition and a justification for mutual recognition in the context of judicial cooperation, see WISCHMEYER (2016), pp. 354-360.

[5] Tampere European Council of 15-16 October 1999, dedicated to "the creation of an area of freedom, security and justice in the European Union". According to Klimek, mutual trust may not have been mentioned in the Tampere Conclusions because, at that time, the European Council found it obvious that the Member States trusted each other's criminal justice systems. See KLIMEK (2015), p. 76.

[6] MITSILEGAS (2016), p. 23.

[7] The notion of mutual recognition is expressed in Title V of the TFEU, concerning the Area of Freedom, Security and Justice. In particular, art. 67 TFEU introduces the concept of mutual recognition of judgments in civil and criminal matters. Art. 81 TFEU makes then clear that the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. As regards judicial cooperation in criminal matters, art. 82 TFEU specifies that it shall be based on the principle of mutual recognition of judgments and judicial decisions. Furthermore, the goal of facilitating full application of the principle of mutual recognition is referred to in art. 70 TFEU.

[8] MORARU (2016), p. 38.

[9] Interestingly, mutual trust is embedded in the preamble of some EU legislative instruments, such as Regulation 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation), or Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (as amended by Council Framework Decision 2009/299/JHA). In this respect, Cambien has pointed out that mutual trust "has become a sort of 'buzz-word', permeating the whole legal system". Cf. CAMBIEN (2017), p. 97. See also PRECHAL (2017), p. 76; BROUWER (2016), p. 60.

[10] CAMBIEN (2017), p. 96.

systems[11]. This ground-breaking acknowledgment drew on the related Opinion of Advocate General Ruiz-Arabo Colomer, according to which mutual trust is to be considered as "an essential element in the development of the European Union"[12].

Similarly, in the following years, the principle of mutual trust has been emerging in the case law of the CJEU concerning the Dublin Regulation and the European Arrest Warrant (EAW). In the asylum case *N.S.* and *M.E.* (2011), the CJEU affirmed that the *raison d'être* of the EU and the creation of an area of freedom, security and justice are grounded on mutual confidence and on a presumption of compliance, by other Member States, with EU law and, in particular, fundamental rights[13]. As regards the EAW[14], the landmark judgment *Melloni* (2013)[15] emphasized the priority given by the CJEU to the effectiveness of mutual recognition, based on presumed mutual trust, over national constitutional law providing a higher level of fundamental rights protection[16].

The elevation of mutual trust to the status of constitutional principle of EU law[17] reached its peak with the well-known Opinion 2/13 on the accession of the EU to the

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[11] Court of Justice, judgment of 11 February 2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33: "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied". See WISCHMEYER (2016), pp. 355-356.

[12] Opinion of Advocate General Ruiz-Arabo Colomer delivered on 19 September 2002, cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 124. In particular, Advocate General specified that mutual trust means "trust in the adequacy of one's partners' rules and also trust that these rules are correctly applied". Nonetheless, Montaldo has pointed out that, in its first judgments on the *ne bis in idem* principle, the CJEU failed to attach a clear legal definition to the concept of mutual trust, "or provide it with a solid theoretical background". See MONTALDO (2016), p. 969.

[13] Court of Justice, judgment of 21 December 2011, joined cases C-411/10 and C-493/10 , *N.S. v. Secretary of State for the Home Department* and *M.E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, para. 83. For a critical assessment of the case, see COSTELLO (2012), pp. 83-92; LIEVEN (2012), p. 223; CANOR (2013), pp. 383-422.

[14] With regard to the European Arrest Warrant and the related case law of the CJEU, see MITSILEGAS (2012), pp. 323-330; BROUWER (2016), pp. 911-916.

[15] Court of Justice, judgment of 26 February 2013, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*. For a thorough study of the case, see, among the others, BESSELINK(2014), pp. 531-552; TORRES PÉREZ (2014), pp. 308-331.

[16] Cf. MITSILEGAS (2015), pp. 11-12; MITSILEGAS (2016), pp. 28-30; MORARU (2016), p. 46; MONTALDO (2016), p. 976. Moraru has highlighted that in *Melloni* the CJEU does not reject the possibility of limiting mutual trust in favour of a more extensive protection of human rights, but permits such a limitation, as long as the primacy, unity and effectiveness of EU law are not compromised. See MORARU (2016), p. 43.

[17] On the constitutional dimension attached to the principle of mutual trust by the CJEU, cf. BROUWER (2016), p. 896; MITSILEGAS (2016), p. 36; MORARU (2016), p. 45; LENAERTS (2017), pp. 806-813; DÜSTERHAUS (2017), p. 26; CAMBIEN (2017), p. 113; SPIELMANN (2017), p. 13. For a detailed assessment of the potential of trust as a renewed EU constitutionalism, see GERARD (2016), p. 70.

European Convention on Human Rights (ECHR)[18]. Building upon its previous rulings *N.S.* and *Melloni*, in Opinion 2/13 the CJEU confirmed the crucial importance of mutual trust between the Member States in EU law for the creation and maintenance of an area without internal borders[19]. On the basis of the fundamental premise that all Member States uphold a set of common values on which the EU is founded, Opinion 2/13 stressed that the principle of mutual trust "requires each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law"[20].

In the light of this definition of mutual trust, the CJEU inferred that Member States, when implementing EU law, are prevented from demanding a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU[21]. The Court argued, therefore, that in so far as the ECHR would require a Member State to scrutinize whether another Member State has safeguarded fundamental rights, even though EU law imposes an obligation of mutual trust, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law[22].

All in all, the centrality of mutual trust endorsed in Opinion 2/13[23] reveals the structural problem of conciliating the application of that principle with the need for ensuring effective fundamental rights protection in the AFSJ. In this regard, some scholars have criticized the greater value accorded by the CJEU to the paradigm of mutual trust than to the rights of affected individuals and, as a result, have envisaged the risk of a collision course on this issue between the CJEU and the European Court

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[18] Court of Justice, Opinion 2/13 of 18 December 2014. The Opinion included mutual trust among the core reasons to deny the compatibility of the draft Treaty on ECHR accession with EU law. For an in-depth analysis of Opinion 2/13, see PEERS (2015), pp. 213-222; SPAVENTA (2015), pp. 35-56; EECKHOUT (2015), p. 955-992; GENNUSA (2015), pp. 189-192; HALBERSTAM (2015), pp. 105-146; LAZOWSKY, WESSEL (2015), pp. 179-212; LOCK (2015), pp. 239-273.

[19] Opinion 2/13, para. 191.

[20] *Ibid.*, paras. 168 and 191. In particular, the CJEU found the legal basis of the principle of mutual trust in art. 2 TEU. See MONTALDO (2016), pp. 969-970.

[21] *Ibid.*, para. 192. As regards the two negative obligations formulated in Opinion 2/13 and imposed on the Member States in relation to fundamental rights, see LENAERTS (2015), p. 530; LENAERTS (2017), pp. 813-814; PRECHAL (2017), p. 81-82.

[22] Opinion 2/13, para. 194.

[23] In this sense, Mitsilegas has spoken of "deification" of mutual trust by the CJEU in Opinion 2/13. Cf. MITSILEGAS (2016), p. 31.

of Human Rights (hereinafter ECtHR)[24]. Nonetheless, the recent jurisprudence of the CJEU on the Common European Asylum System and the EAW shows that the presumption of full respect of fundamental rights by all EU Member States is by no means absolute, thereby sending encouraging signals in the direction of convergence between the two supranational courts.

2. The recent "domino-effect" between Luxembourg and Strasbourg in the context of the AFSJ

In the context of asylum law, the first cracks in the façade of automaticity for the system of mutual trust on which the Dublin Regulation is based arose with the aforementioned *N.S.* case[25]. As a matter of fact, the CJEU ruled for the first time that the presumption that the Member State primarily responsible for an asylum application observes the asylum seekers' fundamental rights is rebuttable[26]. In particular, the transfer of an asylum seeker to the responsible Member State may be precluded only in cases of systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers that imply a real risk of being subjected to inhuman and degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union (EUCFR)[27].

What is interesting to note is that in *N.S.* the CJEU extensively referred to the earlier judgment delivered on the same subject by the ECtHR in *M.S.S. v. Belgium and Greece* (2011)[28]. In that case, involving the transfer of an asylum seeker from Belgium to Greece, the ECtHR held that Belgium had infringed Article 3 of the ECHR by exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece, since the Belgian authorities knew or were supposed to know

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[24] For instance, see PEERS (2015), p. 221; SPAVENTA (2015), p. 52; EECKHOUT (2015), p. 970; MONTALDO (2016), p. 965 *et seq.*; SPIELMANN (2017), p. 13.

[25] See *supra*, note 12.

[26] *N.S.*, cit., paras. 99-104. Cf. MITSILEGAS (2012), pp. 355-358; BRIBOSIA, WEYEMBERGH (2016), pp. 485-487.

[27] *Ibid.*, para. 94. Article 4 of the Charter, which corresponds to Article 3 ECHR, prohibits torture or inhuman or degrading treatment or punishment.

[28] European Court of Human Rights, judgment of 21 January 2011, no. 30696/2009, *M.S.S. v. Belgium and Greece*. In this ruling the ECtHR found for the first time that mutual trust between Member States applying the Dublin Regulation is not automatically justified. Cf. BROUWER (2017), p. 907; MONTALDO (2016), p. 979; HALBERSTAM (2015), pp. 127-128. For a comment on the case, see also MORENO-LAX (2012), pp. 1-31; GRAGL (2012), pp. 123-139; LARSEN (2012), pp. 148-149.

that he had no guarantee that his asylum application would be seriously examined by the Greek authorities, and by knowingly exposing him to conditions of detention and living condition that amounted to degrading treatment in the receiving country[29]. Remarkably, in *N.S.* the Luxembourg Court translated into the EU legal order the "systemic deficiencies" and "real risk" criteria laid down by the ECtHR[30]. Moreover, the CJEU extrapolated from *M.S.S.* that there existed in Greece, at the time of the transfer of the applicant, systemic flaws in the asylum procedure and in the reception conditions of asylum seekers[31].

Later on, in *Tarakhel v. Switzerland* (2014) the Strasbourg Court went a step further and clarified its approach with respect to the Dublin system[32]. In this case, which dealt with the transfer of a family of asylum seekers with minor children from Switzerland to Italy[33], the ECtHR reiterated from *M.S.S.* that the presumption of compliance with Article 3 of the Convention can be rebutted[34]. However, in *Tarakhel* the European Court set aside the "systemic deficiencies" threshold in favour of a case-by-case assessment of the fundamental rights implications of the execution of a removal order. Thus, the ECtHR made clear that, when the risk of inhuman or degrading treatment is established, the State is not exempted from carrying out a "thorough and individualized examination" of the situation of the person concerned in the State of destination[35].

As some critical voices in the literature have underlined, this stricter criterion of an individual real risk analysis introduced by the ECtHR would be at odds with the

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[29] *N.S.*, cit., para. 88, referring to paras. 358, 360 and 367 of *M.S.S. v. Belgium and Greece*.
[30] MITSILEGAS (2016), pp. 31-32; MONTALDO (2016), p. 979.
[31] *N.S.*, cit., paras. 89-90. In particular, the CJEU referred to a set of public source that the ECtHR relied on, such as reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the Commission reports on the evaluation of the Dublin system and the proposals for recasting the Dublin Regulation. Cf. LENAERTS (2017), p. 829; MITSILEGAS (2012), p. 358.
[32] European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland*. Cf. COSTELLO, MOUZOURAKIS (2014), pp. 404-411.
[33] Switzerland is bound by the Dublin system by an agreement between the EU and the Swiss Confederation.
[34] *Tarakhel v. Switzerland*, cit., para. 103.
[35] Accordingly, the ECtHR ruled that "in view of the situation as regards the reception system in Italy, and although that situation is not comparable to the situation in Greece which the Court examined in *M.S.S.*, the possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together". See *Tarakhel v. Switzerland*, cit., paras. 104 and 120-121.

stance taken by the CJEU on mutual trust and EU autonomy in its earlier EAW case law and, one month later, in Opinion 2/13[36]. The additional test set out in *Tarakhel* has been read as a source of diverging standards between Luxembourg and Strasbourg, since the principle of mutual trust as conceived by the CJEU would run the risk of resulting into a lower fundamental rights protection within the EU legal system in comparison to the level of protection ensured by the ECtHR[37].

In the area of EAW, it appears that this latent tension between the two systems has been eased with the judgment delivered in 2016 by the CJEU in joined cases *Aranyosi* and *Căldăraru* (hereinafter *Aranyosi*)[38]. The CJEU confronted the question of whether the execution, in Germany, of two arrest warrants could be suspended where there are strong indications that the detention conditions in the prison system of the issuing Member States, namely Hungary and Romania, would infringe the fundamental rights of the person concerned. At the outset, the Court reiterated from Opinion 2/13 that the principles of mutual trust and mutual recognition, due to their fundamental importance in EU law, can be subject to limitations only in exceptional circumstances[39]. Departing from this premise, the CJEU pointed out that prohibition of inhuman or degrading treatment or punishment under Article 4 EUCFR is indeed absolute and constitutes one of the fundamental values of the Union and its Member States[40].

Accordingly, the Court held that in order to strike a balance between, on the one hand, the functioning of mutual trust and, on the other hand, fundamental rights concerns, the executing judicial authority is required to conduct a two-stage analysis. Firstly, it must verify whether there is evidence of a real risk that the detention conditions in the requesting Member State might breach Article 4 of the Charter. The determination of that risk must be based on objective, reliable, specific and properly updated information demonstrating the existence of systemic or generalised

[36] MITSILEGAS (2016), p. 32. Interestingly, Brouwer argued that "this individual approach to 'mutual trust' by the Strasbourg Court may have triggered the aforementioned conclusions of the CJEU on mutual trust and the autonomy of EU law in Opinion 2/13".

[37] Cf. MITSILEGAS (2015), p. 16; MORARU (2016), p. 47; VICINI (2015), pp. 50-72; PRECHAL (2017), p. 88. In this sense, Halberstam spoke about "a strong warning signal to Luxembourg that the CJEU's standard better comport either in words or in practice with what Strasbourg demands or else the Dublin system violates the Convention". See HALBERSTAM (2015), p. 129.

[38] Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*. For a critical assessment of the decision, see GASPAR-SZILAGYI (2016), pp. 197-219; BOVEND'EERDT (2016), pp. 112-121; BARGIS (2017), pp. 192-207; LAZZERINI (2016), pp. 445-453.

[39] *Aranyosi*, cit., paras. 78 and 82.

[40] *Ibid.*, paras. 85-87.

deficiencies in detention conditions in the issuing Member State, or deficiencies which may affect certain groups of people, or which may affect certain places of detention. Such information may be obtained from judgments of international courts, especially rulings of the ECtHR, judgments of courts of the issuing Member States, as well as decisions, reports and other documents produced by international bodies[41]. Secondly, the executing judicial authority is bound to make a concrete and precise assessment as to whether, in the individual case, there are substantial grounds to believe that the person concerned, following the surrender to the requesting Member State, will be exposed to the real risk of inhuman or degrading treatment[42].

It can be said that the judgment delivered in *Aranyosi* marks a turning point in the case law of the Luxembourg Court within the AFSJ. Talking about deficiencies "which may be systemic or generalised" of the detention conditions, the CJEU seems to suggest a less stringent parameter in judicial cooperation in criminal matters as compared to the "systemic deficiencies" required in the asylum case *N.S.* for rebutting the presumption of equivalent protection of fundamental rights[43]. Furthermore, one may argue that the reasoning of the CJEU in *Aranyosi*, reading between the lines, draws inspiration from the ECtHR's ruling in *Tarakhel* inasmuch as it focuses on the individualized real risk of inhuman or degrading treatment[44].

The question of whether the CJEU would apply the two-step test deployed in *Aranyosi* also in its asylum case law[45] has been replied in the affirmative by the recent judgment delivered in *C.K.* (2017)[46], involving the transfer of Syrian nationals from Slovenia to Croatia pursuant to the Dublin III Regulation[47]. *Inter alia*, in that

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[41] *Ibid.*, para. 89.

[42] In this passage the CJEU made clear, in particular, that "the mere existence of evidence that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, with respect to detention conditions in the issuing Member State does not necessarily imply that, in a specific case, the individual concerned will be subject to inhuman or degrading treatment in the event that he is surrendered to the authorities of that Member State". As a result, where the executing judicial authority finds that there exist the real risk of inhuman or degrading treatment, "the execution of that warrant must be postponed but it cannot be abandoned". Cf. *Aranyosi*, cit., paras. 92- 98.

[43] HALBERSTAM (2016); PRECHAL (2017), p. 88.

[44] BARGIS (2017), p. 202; GASPAR-SZILAGYI (2016), p. 217.

[45] Bovend'Eerdt concluded his analysis of the joined cases *Aranyosi* and *Căldăraru* by wondering: "Will *Tarakhel* influence the CJEU to also opt for the two-staged test, with both a general and an individual assessment, in its asylum case law?". See BOVEND'EERDT (2016), p. 119.

[46] Court of Justice, judgment of 16 February 2017, case C-578/16, *C.K., H.F., A.S. v. Republika Slovenija*.

[47] Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person.

case the CJEU stated that Article 4 EUCFR is to be interpreted as meaning that, even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker can take place only in conditions which exclude the possibility that that transfer might result in a "real and proven risk" of the person concerned suffering inhuman or degrading treatment[48]. The CJEU rejected the argument of the systemic deficiencies devised in *N.S.* but, relying on its previous ruling in *Aranyosi*[49], it held that the national judicial authority must assess the risk that the transfer would worsen the health conditions of the asylum seeker[50].

This emphasis placed on the specifics of the case and the individualized risk analysis is emblematic, on the one side, of the transposal of the standards set forth in *Aranyosi* into the case law of the CJEU concerning the Dublin Regulation. On the other side, *C.K.* can be considered as the latest step of a steady alignment of the Luxembourg jurisprudence with the Strasbourg case law and, particularly, with the judgment issued by the ECtHR in *Tarakhel*. Departing from this recent case law of the two highest European Courts, it is now possible to briefly look, in more general terms, at its implications with regard to the multilevel system of fundamental rights protection.

3. Bridging the gap: a preferential channel for dialogue among courts

Over the last few years, the decisions *N.S.*, *Aranyos*i and *C.K.* have paved the way to a deviation of the CJEU from its long-established interpretation of mutual trust, showing that this principle does no longer imply "blind" trust[51]. In fact, the CJEU has opted for a more nuanced paradigm of mutual trust[52], which rests on a "symbiotic" relationship with fundamental rights protection[53]. This gradual shift from automatic and blind mutual trust to a greater attention to human rights is liable to influence

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[48] *Ibid.*, para. 96.
[49] In particular, the CJEU referred to its judgment delivered in *Aranyosi* at paras. 59 and 75 of *C.K.*
[50] *Ibid.*, paras. 75, 76 and 91. According to the CJEU, whether those precautions are not sufficient to ensure that the transfer will not determine a real risk of a significant and permanent worsening of the state of health of the asylum seeker, the authorities of the Member State concerned must suspend the execution of the transfer. *Ibid.*, para. 85.
[51] Cf. ANAGNOSTORAS (2016), pp. 1675-1704; LENAERTS (2017), pp. 806-817; PRECHAL (2017), p. 85; CAMBIEN (2017), p. 103.
[52] Remarkably, Marin has spoken about "the emergence of a temperate mutual trust, i.e., a mutual trust which is placed in a dialectic relation with the need to protect fundamental rights". See MARIN (2017), p. 144 *et seq*.
[53] The expression "symbiotic relationship" in relation to mutual trust and fundamental rights is taken from MITSILEGAS (2015), p. 1 *et seq*.

both the interplay between CJEU and national courts and the dealings between CJEU and ECtHR.

As to the "vertical" dimension, i.e. the interrelation between the Luxembourg Court and national judicial authorities, the recent trend of the former strengthens the reciprocal supervisory role of the latter in the AFSJ[54]. In this sense, the domestic judiciaries of a Member State are now empowered to scrutinize the existence of deficiencies of any sort – not only systemic deficiencies – in the level of fundamental rights protection ensured by the other Member States. Moreover, their assessment must take into account, in the cases at hand, the concrete situation of the persons concerned.

The current case law of national judicial authorities, in turn, has continued along the path indicated by the CJEU. This is all the more true if one looks at the case of Italy. In late September 2016, the Italian Council of State delivered a judgment that prevented for the first time the transfer of an asylum seeker to Hungary[55]. Following the decisions of its peers in other Member States, such as Austria and the Netherlands, the Highest Italian Administrative Court ruled that there are "systemic flaws" in Hungary's asylum procedure and reception conditions, which result in a "real risk" of inhuman or degrading treatment within the meaning of Article 4 EUCFR[56].

On the same day, three separate judgments of the Council of State quashed the decision to transfer asylum seekers to Bulgaria, on the ground that the country is unsafe[57]. Expressing concerns about the current asylum system in Bulgaria and, more generally, the climate of cultural intolerance and discrimination towards refugees, the Council highlighted the real risk that the applicants be subject to treatment contrary to humanitarian principles and Article 4 EUCFR if they were to be transferred to that country[58].

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[54] MARIN (2017), p. 150. In this sense, with regard to the process of "horizontal Solange" framed by Canor and recalled by Marin, see CANOR (2013), pp. 383-422.

[55] Italian Council of State, judgment of 27 September 2016, no. 4004/2016.

[56] Interestingly, the Council of State defined Hungary as an unsafe country for asylum seekers on the basis of the recent developments occurred in Hungarian political and legal system. The Court pointed especially at the controversial migration law approved by the Hungarian Parliament in July 2015 and at the planned construction of an "anti-migrant" wall, that represented the cultural and political climate of aversion to immigration and to the protection of refugees. *Ibid.*, para. 5.1 *et seq*.

[57] Italian Council of State, judgments of 27 September 2016, no. 3998/2016, 3999/2016 and 4000/2016.

[58] The Council of State referred, in particular, to the fifth report on Bulgaria of the European Commission against Racism and Intollerance (ECRI), 16 September 2014.

On 15 May 2017, the Italian Council of State confirmed its previous position, annulling the transfer to Hungary of an asylum seeker under the Dublin Regulation[59]. The ruling held that the situation in the country has deteriorated to such an extent that asylum seekers' fundamental rights are strongly compromised and their reception conditions do not meet the minimum standards of protection under international and EU law[60]. As a consequence, the Council reaffirmed that the evident systemic shortcomings in Hungary's asylum procedure and reception conditions entail the real and concrete risk that the applicant would be subject to inhuman or degrading treatment.

Most recently, in November 2017 the Council of State suspended the transfer of an asylum seeker to Bulgaria[61]. Despite the acknowledgment that substantial improvements have been made in the Bulgarian asylum system especially in the recent months, the Council argued that it was not fully reassured that the conditions faced by asylum seekers would not amount to inhuman or degrading treatment. Interestingly enough, in this judgment the Council of State relied also on decisions from other national courts, such as the Constitutional Court of Austria, which recognised the existence of deficiencies in the Bulgarian asylum system[62].

Some scholars have pointed out that this decentralized review over fundamental rights protection consolidates the position of the domestic judicial authorities as first European courts, but at the same time enhances the role of the CJEU as ultimate adjudicator in case of questions on the dialectical relationship between mutual trust and fundamental rights[63]. In a broader perspective, the openness of the CJEU to national courts goes in parallel with the deference of the Luxembourg Court, as noted above, to the fundamental rights standards laid down by the ECtHR.

As to this "horizontal" interplay between the CJEU and the Strasbourg Court, it appears that the "temperate"[64] vision of mutual trust fostered by the former

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[59] Italian Council of State, judgments of 15 May 2017, no. 2272/2017.

[60] The Council of State relied on international sources regarding the human rights situation in the context of Dublin transfers, such as the reports released by the UNHCR and the ECRE. Importantly, the assessment of the Court looked at both the legal framework *in abstracto* and the factual situation in Hungary.

[61] Italian Council of State, judgments of 3 November 2017, no. 5085/2017.

[62] More specifically, the ruling of the Council of State referred to Administrative Court of Appeal of Bordeaux, judgment of 30 January 2017, no. 16BX03424; Administrative Court of Luxembourg, judgment of 5 April 2017, no. 39356; Federal Administrative Court of Switzerland, judgment of 5 September 2017, no. E-305/2017; Constitutional Court of Austria, judgment of 9 June 2017, no. 484.

[63] MARIN (2017), p. 150; TORRES PÉREZ (2016), pp. 191-216 ; MONTALDO (2016), p. 993.

[64] *Supra*, note 51.

represents a major step closer to the stance taken by the latter in the AFSJ[65]. The judgments delivered in *N.S.*, *Aranyosi* and *C.K.* suggest, as underlined by Halberstam, that "the CJEU is not only speaking, but also listening"[66] in the dialogue on human rights the two supranational courts are constantly engaged in. Therefore, it would not be an overstatement to argue that, more than in the past, the Luxembourg Court views the ECtHR's case law as a key reference point in the EU system of fundamental rights protection[67]. This proactive approach of the CJEU sounds at odds with Opinion 2/13, which expressed between the lines a certain distrust towards the ECtHR, based on the suspicion that after the accession the Strasbourg Court would not continue to apply to the EU the so-called *Bosphorus* presumption of equivalent protection[68].

For its part, the ECtHR has contributed to averting this possible scenario[69] by implementing the *Bosphorus* doctrine – for the first time after Opinion 2/13 – in *Avotiņš v. Latvia* (2016), a judgment issued less than two months after *Aranyosi*[70]. In this ruling, which dealt with the recognition and enforcement in Latvia of a Cypriot decision in civil matters, the ECtHR held that it remains mindful of the importance of mutual trust in EU law for the construction of the AFSJ[71]. Yet, quoting the relevant case law of the CJEU[72], the ECtHR stressed that the principle of mutual trust must not be applied automatically and mechanically to the detriment of fundamental rights. Accordingly, if a serious and substantiated complaint is raised before national judicial authorities to the effect that the protection of an ECHR right has been manifestly

[65] HONG (2016), p. 562.
[66] HALBERSTAM (2016).
[67] MONTALDO (2016), p. 995. It is interesting to note that the ECtHR is also defined by Lenaerts as a "valuable ally" for national judicial authorities in identifying the existence of a real risk of violating Article 4 of the EUCFR, since that provision corresponds to Article 3 of the ECHR. The author stressed, in particular, that the case law of the ECtHR "not only provides useful guidance as to the content that should be given to Article 4 of the Charter, but is also a valuable source of information with regard to the actual existence of deficiencies in the level of fundamental rights protection ensured by the issuing Member State". See LENAERTS (2017), p. 839.
[68] The *Bosphorus* doctrine was framed in European Court of Human Rights, judgment of 30 June 2005, no. 45036/98, *Bosphorus v. Ireland*, para. 154; judgment of 6 December 2012, no. 12323/11, *Michaud v. France*, para. 106.
[69] More generally, according to Glas and Krommendijk, three basic scenarios became possible after Opinion 2/13: the ECtHR could continue to implement the *Bosphorus* presumption, overturn it or continue to apply it but in a more rigorous manner. See GLAS, KROMMENDIJK, (2017), pp. 567-587.
[70] European Court of Human Rights, judgment of 23 May 2016, no. 17502/07, *Avotiņš v. Latvia*. For a critical assessment of the case, see GRAGL (2017), pp. 551-567; DÜSTERHAUS (2017), pp. 388-401; BIAGIONI (2016), pp. 579-596.
[71] *Avotiņš v. Latvia*, cit., para. 113.
[72] *Ibid.*, paras. 46-48.

deficient and this situation cannot be remedied by EU law, such courts cannot refrain from examining that complaint[73].

As a result, the confirmation of the *Bosphorus* presumption (even though in a more rigorous interpretation), the emphasis placed on mutual trust (and the limits thereto) and the need for a more active role of national courts in fundamental rights protection reflect a substantial alignment of the reasoning underpinning *Avotiņš* with the principle of mutual trust framed by the CJEU in *N.S.*, *Aranyosi* and *C.K.*[74]. What can be inferred, thus, from the rationale underlying *Avotiņš* is that the ECtHR is also willing to keep alive the cooperative dialogue it started in *M.S.S.* with the Luxembourg Court.

Overall, a joint reading of the case law developed by the two supranational jurisdictions suggests that, in the aftermath of Opinion 2/13, they have extended an olive branch to each other, managing to reduce the distance between their respective positions. Despite the strains arising out of the troubled negotiation on EU's accession to the Convention, it can be argued that the CJEU and the ECtHR have sought not only to "avoid open conflict"[75], but even to reconcile their standards of fundamental rights protection in the context of the AFSJ. This ongoing process of dynamic harmonization appears liable, therefore, to fuel the "spirit of cooperation and mutual trust" that, according to the Opinion of Advocate General Sharpston in *Ruiz Zambrano v. ONEm* (2010), governs the relationship between the CJEU and the ECtHR[76].

While waiting for further jurisprudential developments, it cannot be denied that a considerable risk of future frictions still remains whenever the Luxembourg and the Strasbourg Courts are called to strike the delicate balance between mutual trust and fundamental rights. For instance, it must be verified if the case law of the CJEU, as it did in *Aranyosi* for the EAW, will follow the solution adopted by the ECtHR in *Avotiņš* as to the recognition and enforcement of foreign judgments in civil matters. Similarly, it is to be assessed whether and to what extent the jurisprudence of the ECtHR will set further boundaries to the operation of the *Bosphorus* doctrine. Nonetheless, given the current state of affairs, the increasing cross fertilization under

[73] *Ibid.*, para. 116.
[74] LENAERTS (2017), pp. 828-829.
[75] SPIELMANN (2017), p. 17.
[76] Opinion of Advocate General Sharpston delivered on 30 September 2010, case C-34/09, *Ruiz Zambrano v. ONEm*, para. 147.

way within the European community of courts and, last but not least, the growing involvement of national judicial authorities in this dialogue seem to reveal virtuous potentials for strengthening a truly consistent and harmonized multilevel system of fundamental right protection.

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The Interconstitutionality and the Interjusfundamentality of the Legal System of the European Union – In Search of a Theory on the Protection of Fundamental Rights in the EU

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Abstract: In the European Union, the concept of constitutionalism has expanded beyond its traditional boundaries and evolved into a new meaning in a post-national dimension. The purpose of this article is to shed light on how EU constitutionalism should be framed when it comes to the protection of fundamental rights. In this respect the article provides a summary on how the protection of fundamental rights has evolved over time in the EU. Then, the article deals with the theory of multilevel constitutionalism and its shortcomings as well as it analyses the theory of interconstitutionality as an alternative approach to the topic. Furthermore, some opinions are devoted to the *Taricco* saga and to the efforts of the European Court of Justice, which are required for achieving the objectives of the European integration project and the necessary standard of protection of fundamental rights within a plural constitutional framework. Finally, this article focuses on the need of developing a proper inter-judicial dialogue in the European Union as of attaining the highest standard of protection.

Keywords: Theory of Interconstitutionality; Multilevel Constitutionalism; Protection of Fundamental Rights in the EU; *Taricco*; Inter-judicial Dialogue between National Courts and the ECJ; Principle of Highest Standard of Fundamental Rights Protection.

1. Introduction: The Protection of Fundamental Rights in the EU

Originally, there was no bill of rights in the European supranational legal system. The reason for such a gap is that, according to the original plans, European integration in economic matters was meant to be just a part of a much broader project that included a

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European Defence Community Treaty and a European Political Community Treaty. The latter had as its first aim to contribute towards the protection of human rights and fundamental freedoms in the Member States and incorporated the rights and freedoms contained in the European Convention on Human Rights (ECHR). However, both those treaties were abandoned in 1954, as the French national assembly would not ratify the former.[1] This explains why the protection of fundamental rights was absent from the founding treaties and why in the fifties and in the sixties, the European Court of Justice (ECJ) ruled out the possibility to recall the principles of national constitutional law as a possible ground to complain the validity of a decision, even with regard to principles concerning the protection of fundamental rights. This position was first expressed in *Stork*[2] and then confirmed in some subsequent cases.[3]

However, it did not take long before national constitutional courts started criticizing this approach to the matter. In *Solange I*, the German Constitutional Court held that the protection of fundamental rights was an inalienable, essential feature of the Basic Law of the Federal Republic of Germany while at the time, the Community lacked a codified catalogue of fundamental rights, whose substance was reliably and unambiguously fixed for the future. Thus, as long as this form of legal certainty was not achieved in the course of the European process of integration, in the event of a clash between Community law and fundamental rights guaranteed under the Basic Law, the latter should have taken precedence.[4] In *Frontini*, the Italian Constitutional Court ruled that the supranational institutions had been granted the power neither to violate the fundamental principles of the Italian legal system nor the inalienable rights belonging to the individual.[5]

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1 SPAVENTA (2014), p. 227-228.

2 Case 1/58 *Stork* EU:C:1959:4, para 4.

3 See Joined cases 36, 37, 38-59 and 40/59 *Präsident Ruhrkohlen-Verkaufsgesellschaft* EU:C:1960:36, para 2, and Case 40/64 *Sgarlata* EU:C:1965:36, para 1.

4 See *Internationale Handelsgesellschaft* (*Solange I*) [1974] 2 Common Market Law Review 540. In *Wünsche Handelsgesellschaft* (*Solange II*) [1987] 3 Common Market Law Review 225, the German Constitutional Court took into account the developments in the ECJ's case law and held: 'so long as the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights as against the sovereign powers of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the Basic Law'.

5 Italian Constitutional Court, judgement of 18 December 1973, *Frontini*, para 9. For what concerns the positions expressed by some other courts, see for instance Declaration 1/2004 of the Spanish Constitutional Court (European Constitution) and Alonso García, 'The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy' [2005] 6 German Law Journal 1001; Judgment K 18/04 of the Polish Constitutional Court (Accession Treaty) and KOWALIK-BANCZYK, (2005), p. 1355; Decision Pl. ÚS 19/08 of the Czech Constitutional Court (Lisbon) and BRIZA (2009), p. 143. For an introduction to the ongoing issues, especially for what concerns the position expressed by the Danish Constitutional Court

Thus, the ECJ, inspired by the constitutional courts, discovered the fundamental rights enshrined in the general principles of Community law. That happened in *Stauder*[6] and then in *Internationale Handelsgesellschaft*, where the Court held that respect of fundamental rights, inspired by the constitutional traditions common to the Member States, formed part of the general principles of law protected by the Court itself.[7] In *Nold*, the ECJ considered as follows:

As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law

and then recalled the European Convention for the Protection of Human Rights and Fundamental Freedoms[8].

Afterwards, in *Wachauf* and *ERT*, the ECJ highlighted that the Community could not accept national measures, which were incompatible with the observance of the human rights recognized and guaranteed by the constitutional traditions common to the Member States and the international treaties for the protection of human rights of which the Member States were parties.[9] Subsequently, the Court clarified that when implementing a regulation or a

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and the UK Supreme Court after Brexit, see GARNER (2017). On the judicial clash between the ECJ and some national constitutional courts, see CRAIG; PLIAKOS and ANAGNOSTARAS; and WEILER (1998).

6 Case 29/69 *Stauder / Stadt Ulm* EU:C:1969:57, para 7.

7 Case 11/70 *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* EU:C:1970:114, para 4.

8 Case 4/73 *Nold KG / Commission* EU:C:1974:51, paras 12-13. Shortly after *Nold*, the ECJ recalled the ECHR in Case 36/75 *Rutili / Ministre de l'intérieur* EU:C:1975:137, para 32 and Case 44/79 *Hauer / Land Rheinland-Pfalz* EU:C:1979:290, para 15. With regard to the constitutional traditions common to the Member States, it must be remembered what the ECJ stated in *Hauer*: 'the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community' (para 14).

9 Case 5/88 *Wachauf / Bundesamt für Ernährung und Forstwirtschaft* EU:C:1989:321, para 17, and Case C-260/89, *ERT / DEP* EU:C:1991:254, para 41. However, in *Wachauf*, the Court underlined that 'the fundamental rights recognized by the Court are not absolute [...] but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community

directive, the Member States have to exercise their discretion in a manner that is consistent with the protection of fundamental rights[10] and definitely confirmed that

> the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. In this respect the Court has already observed that it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law. On the other hand, if such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.[11]

Furthermore, the respect of fundamental rights is a condition of the legality of European Union (EU) acts,[12] including EU measures that give effect to resolution adopted by other international organizations.[13] This also applies to the case of national measures implementing EU law.[14]

Finally, it should be remembered that over time, the ECJ has had the chance to highlight the importance of some fundamental rights, freedoms, and principles such as human dignity,[15] freedom of expression,[16] right to property,[17] right to an effective judicial control,[18] right to a fair legal process,[19] right to respect for family life,[20] the principle of legality of crimes and punishments,[21] and the principle of *ne bis in idem*,[22] just to name a few.

For what concerns the normative side of the issue, on 7 December 2000, the Charter of Fundamental Rights of the EU (the Charter) was proclaimed. While codifying existing rights, it had no legally binding effects, which raised some issues with regard to its

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and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights' (para 18).

10 Case C-144/04 *Mangold* EU:C:2005:709, Case C-555/07 *Kücükdeveci* EU:C:2010:21, and Joined Cases C-411/10 and C-493/10 *N.S. and Others* EU:C:2011:865.

11 Case C-617/10 REC *Åkerberg Fransson* EU:C:2013:105, para 19.

12 Case C-249/96 *Grant v South-West Trains*, EU:C:1998:63, para 45, and Case C-25/02 *Rinke* EU:C:2003:435, para 26.

13 Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat Foundation* EU:C:2008:461, para 326, and Joined cases C-399/06 P and C-403/06 P *Hassan and Ayadi* EU:C:2009:748, para 71.

14 Case C-107/97 *Rombi and Arkopharma* EU:C:2000:253, para 65.

15 Case C-36/02 *Omega* EU:C:2004:614, para 34.

16 See *ERT* (n 9) and Case C-368/95 *Familiapress* EU:C:1997:325, para 24.

17 Joined cases C-20/00 and C-64/00 *Booker Aquaculture* EU:C:2003:397, para 67.

18 Case 222/84 *Johnston* EU:C:1986:206, para 18.

19 Case C-411/04 P *Salzgitter Mannesmann* EU:C:2007:54, para 40.

20 Case C-60/00 *Carpenter* EU:C:2002:434, para 41-42.

21 Joined cases C-74/95 and C-129/95 *X* EU:C:1996:491, para 25.

22 Joined cases C-187/01 and C-385/01 *Gözütok and Brügge* EU:C:2003:87.

application.[23] However, the entry into force of the Treaty of Lisbon solved the problem: in fact, under Article 6(1) of the Treaty on the European Union (TEU), the Charter has the same legal values as the Treaties.

Thus, the protection of fundamental rights has gained in importance over time, both from a jurisprudential and a normative point of view. This raises the problem of developing a theoretical framework that makes it possible to understand how that protection works in the relation between the EU and the Member States. The purpose of this article is to try to provide some hints to that theoretical framework by refusing the classic approach to the topic – meaning, the theory of multilevel constitutionalism – and building on an alternative approach – the theory of interconstitutionality. Therefore, the following paragraphs are devoted to explain both theories (para II and III) and provide some reasons to adopt a different approach (para IV). Some words are devoted to the *Taricco* saga as it represented a significant moment of tension between the ECJ and the Italian Constitutional Court with regard to the protection of fundamental rights (para V).

2. The Theory of Multilevel Constitutionalism

Traditionally, nation states are governed by Constitutions, as Constitutions represent a legal tool that guarantees individual and collective freedoms, while at the same time limiting and legitimizing the political power. Over time, constitutional systems have become more complicated because of the diversity of sources, interpreters, values, and interests that have gained importance in every legal system. The European Union (EU) does not help solve this increasing complication, instead it contributes to it. This is confirmed by the fact that the European integration process has constantly tested traditional categories, which has resulting in giving rise to new forms of political and constitutional organization.[24]

In the EU, the concept of constitutionalism has expanded past traditional boundaries and developed a new meaning.[25] Essentially, the EU changed the elliptical orbit of the constitutional theory that previously revolved around the States in favour of new systemic actors as a form of adaptation to the EU legal and administrative model. This new model does not exclusively focus on a single instance or source of power, but instead focuses on the participation of various sources.[26] This is contrary to what happens in other more traditional constitutional frameworks because the EU's decision-making process includes the participation of a number of subnational, national, and supranational actors. This shift is

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23 On the Charter, see generally, see LENARTS (2012), p 375; PALMISANO (2014); PEERS, HARVEY, KENNER AND WARD (2014), VRIES, BERNITZ AND WEATHERILL (2015).
24 BALAGUER CALLEJÓN (2010), p. 245.
25 See generally LENAERTS AND NUFFEL (1999); WEILER (1999); and CRAIG (2001), p. 125.
26 OLIVEIRA (2014), p. 109.

seen best by two changes that characterize the decision-making process of the EU. First, despite national governments retaining significant powers in EU legal framework, they no longer enjoy any forms of monopolies. Instead, decision-making powers and responsibilities are shared with a number of institutions – including the Commission, the Parliament and the European Court of Justice (ECJ). Second, decision-making is influenced by secondary public and private actors, whose aim is to protect and promote a wide range of interests. In light of the above, in regard to changes in the decision-making process, one may define the EU as a 'governance without government' [27] and as a consequence, a definition of EU constitutionalism may be 'stateless constitutionalism'.[28]

Given that the EU is not a State and does not want to be a superstate, the question has arisen about how constitutionalism might be conceptualized in a post-national dimension. By studying this new form of constitutionalism and seeing it as the result of the plurality of political communities and the dialogue between national and European constitutionalism, Ingolf Pernice developed the theory of multilevel constitutionalism.[29]

From a general point of view, this theory aims at describing and understanding the process of establishing new structures of government complementary to existing forms of self-organisation of the people or society. It is a theoretical approach that focuses on how the EU can be conceptualised in light of the relation between the EU itself and its citizens.[30]

More specifically, it is based on a contractual approach on how political institutions are established and organised by the people or society of a certain country or territory. On this basis, five are the key elements and understandings of multilevel constitutionalism: *a*) a postnational concept of Constitution;[31] *b*) the European Constitution-making as a process driven by the citizens; *c*) the peculiar relation between the constitution of the EU and national constitutions;[32] *d*) the multiple identities of the citizens of the Union; and *e)* the EU as the Union of the European Citizens.[33]

27 See HOOGHE AND MARKS (2001), p. 4.
28 Cfr. OLIVEIRA (2018).
29 See PERNICE (1998); PERNICE (2004); PERNICE (2015), and the documents cited below.
30 PERNICE (2002), p. 2.
31 *Ibid* 4, Pernice (2009), p. 17, Pernice clarifies that 'what distinguishes this "postnational" concept from the "classical" idea of constitution is twofold: First, it is not exclusive, not comprising the entirety of powers and public authority exercised within a determined territory or society. This allows conceptualising federal systems as systems based upon some sort of power-sharing among interrelated levels of public authority, each being based upon its "constitution". Second, it is not based upon the pre-existence of a state, the (pre-defined) people of which – as the "constitution-making power" – gives this state a constitution. Instead, as Peter Häberle rightly puts it in his seminal "European Constitutional Theory", in the present times of the "constitutional state" there is not more state than the constitution "constitutes". And it may constitute political units of another kind or reach as well.' In this regard, see also PERNICE (1999), p. 703.
32 *Ibid* 5: 'Autonomous in their origin, both constitutional levels strongly depend on each other.'
33 *Ibid* 6. According to Pernice, the process of European integration 'can be conceptualized as a process of "multilevel constitutionalism", in which the allocation of powers shared by the national and

Focusing on the role played by citizens, Pernice highlights that both a vertical and a horizontal dimension must be taken into account of what may be called the EU-constitutional network. Vertically, the citizens are regarded as being both the basis and origin for democratic legitimacy and the focal point of any kind of policy at all levels. Therefore, multilevel constitutionalism looks at the various levels of government as formally autonomous components of a substantially unitary constitutional entity.[34] The horizontal dimension instead concerns mutual recognition.[35]

For what concerns the issues regarding the relation between the EU and the Member States, Pernice clarifies as follows:

> Talking about a multilevel structure and the vertical and horizontal dimensions of multilevel constitutionalism seems to imply the subordination of the 'lower' level of constitutional law to the 'higher' levels and, consequently, a hierarchy between European and national law. Such a hierarchy would certainly comply with a monistic normative model such as described in the legal theory of Hans Kelsen. Yet, insofar as European and national law are understood as formally autonomous systems each of which is based originally on the will of the people or citizens united under their constitution respectively, such hierarchy does not follow as a theoretical necessity. Instead of monism there is constitutional pluralism, instead of hierarchy and supremacy of federal law there is functional primacy, based upon mutual consideration, recognition and cooperation between the courts.[36]

Thus, Pernice’s theory is based on the idea that the EU Constitution and the Member States' Constitutions form a complex constitutional system (*Verfassungsverbund*)[37] that creates a 'process of reflexivity.'[38] In light of this, European constitutionalism can be regarded as a form of dialogue between the Constitutions of the Member States, linked by a constitutional *acquis* provided by the norms set in the EU Treaties.

Following this theoretical approach, the EU construction is best understood as a complex system where a number of constitutional authorities coexist. The interaction between European rules and national ones represent the fulcrum of the system, which makes it possible to identify the traditional functions of constitutionalism. These functions are the establishment, organization, sharing, and limitation of powers.

European levels of government is continuosly reorganised and re-shifted, while all public authority - national or European - draws its legitimacy from the same citizens.'

34 PERNICE (2009), p. 29-30.

35 *Ibid* 30.

36 *Ibid* 33-34.

37 *Ibid*.

38 POIARES MADURO (2006), p. 292.

3. An Alternative Approach to the Protection of Fundamental Rights in the EU: The Theory of Interconstitutionality

Despite its innovative features, Pernice's theory has been criticized by some. One of the most striking forms of criticism to the theory of multilevel constitutionalism was made by Daniel J. Elazar,[39] who challenged the term 'level.' No matter what Pernice says, this term would convey a hierarchical connotation, making it incompatible with the purpose of defining European constitutionalism. According to Elazar, a term that expresses a hierarchical relationship –, a relationship based on commands and obedience that presupposes the existence of a supreme decision-making authority – cannot describe the process of European integration. In fact, the relationship between EU law and national laws challenges the hierarchical conception of law, as neither supreme authorities nor ultimate seat of sovereignty can be identified easily.

Neil Walker too had the chance to underline that:

> To some at least, the idea of 'levels' continues to imply a notion of hierarchy – of higher and lower – rather than simply one of dispersed parts, and this hint of subservience to 'the higher level' can reinforce the anxiety not only of the defenders of state constitutionalism but of all who are wary of conceiving of supranational or transnational constitutionalism in 'top-down' regional or global terms.[40]

In turn, Luigi D'Andrea finds that the theory of multilevel constitutionalism lacks any innovative feature. This is due to the fact he believes that by highlighting the division of public powers in levels – that is, by referring to a hierarchy – this theory ends up reproducing the national constitutional structure.[41] For this reason, he explains European constitutionalism by starting from the intuition of Antonio Ruggeri, who developed the concept of 'inter-level constitutionalism' or 'inter-constitutional order'. By using these expressions, Antonio Ruggeri emphasized that every material constitution encompasses the fundamental principle of openness to other bills of rights, which must easily integrate with each other. Likewise, different Constitutions of the same constellation can offer effective competition for the full protection of fundamental rights[42].

Francisco de Lucas Pires introduced in the legal doctrine a term similar to the formula used by Antonio Ruggeri to describe the European legal order. Using the term 'interconstitutionality', he underlined that "when it comes to the development of the

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39 ELAZAR (1998).

40 WALKER (2009), p. 146.

41 See D'ANDREA (2009).

42 See RUGGERI (2001), p. 544; RUGEERI (2009), p. 1-30; RUGEERI (2013), p. 1-18.

European constitutional history, the osmosis and the harmonization of the principles of the constitutional jurisprudence on a pan-European scale are more important than the creation of a true common law". Specifically, "it is meaningful to place emphasis on a theory of interconstitutionality rather than on a new constitutionalism". This means that the focus must be on "the finding and then on the exploitation of an adequate correlation between the different constitutions"[43].

In this regard, José Joaquim Gomes Canotilho devoted himself to the development of the theory of interconstitutionality[44]. He argued that the European constitutionalism is best understood by focusing on the existence of a network of constitutions[45] that possess different sources and forms of legitimacy, all coexisting in the same political space. As it is renowned, the principle of primacy, as established by the ECJ in *Costa v ENEL*,[46] does not imply a hierarchical relationship between the European legal system and the national ones. This is because constitutional authorities of the Member States are not subject to the EU's constitutional authority. Thus, the Member States have restricted their sovereign powers' in certain fields and EU law prevails over national law not because it is superior, but because it has the material competence to regulate the actual case.[47]

Thus, the general tendency to look at constitutionalism through the glasses of national theories must be abandoned, as the EU does not replicate the logic of the nation state on a larger scale. European constitutionalism aggregates EU primary law as well as the Constitutions of the Member States.

4. The Inter-jusfundamental Protection in the EU

Then, considering the network-style nature of European Constitutionalism, one should try to highlight the inter-normative conflicts deriving from the peculiar nature of this

43 LUCAS PIRES (1997), p. 17-18.

44 See GOMES CANOTILHO (2002) and GOMES CANOTILHO (2008).

45 See in this regard OIST AND VAN DE KERCHOVE (2002), p. 1-596, MAGRASSI (2011), p. 393-422, OLIVEIRA (2016), p. 715. The concept of *réseau* is used to describe and interpret the evolution of legal systems. Ost and van de Kerchove defined the transformation currently undergone by the global legal model as a passage from the Kelsenian pyramid – vertically and hierarchically structured – to a structure having a pluralistic, horizontal, and interactive nature. By doing this, the judicial network model – in line with the concept of pluralism as derived from the mutual interrelationship between national, supranational, and international legal systems – changes the traditional idea of hierarchically organized legal sources. In addition, the concept of *réseau* is considered not only for studying the relationship between the sources of law but also in regard to transnational administrative organizations. This helps explain the dynamics of the judiciary in the European legal system, in which sources and organization mutually combine and influence each other. That being said, José Joaquim Gomes Canotilho proposed to comprehend, through the theory of interconstitutionality, the dynamics underlying the interconstitutional relations. These dynamics are characterized by searching for solutions concerning the preferential application of rules from different legal systems, including the ones on fundamental rights.

46 See Case 6/64 *Costa v ENEL* EU:C:1964:66.

47 See FREITAS DO AMARAL AND PIÇARRA (2009), p. 17.

framework, which seem to have grown in importance due to the progressive increase in the transfer of sovereignty and competences from the Member States to the EU. Apparent incompatibilities are more complex than ever precisely due to the growing complexity of shared powers and the different national and European protection standards. Adding to the complexity, the finally acknowledged binding nature of the Charter has also increased the inter-normative conflicts among fundamental rights.

The EU as a legal system, which protects fundamental rights, has been strengthened by the adoption of the Charter, as it represents a significant step towards the construction of the European constitutionalism, despite the increase of the constitutional conflicts stemming from the collision of national laws and the European legal order. As the result of the ECJ's case law concerning the nature of fundamental rights as general principles of EU law, the fundamental rights proclaimed in the Charter have not weakened the pre-existing fundamental rights *acquis* due to appeals to the constitutional traditions common to the Member States and the ECHR.

However, it is not an easy task for lawyers and judges, as a class of interpreters, to bring order to a number of instruments of legal protection of fundamental rights that seems to be in competition one with each other in the framework of the EU's inter-constitutional legal order. For what concerns the scope of the rights guaranteed under the Charter, one should consider that under its Article 51(1), the provisions of the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. Additionally, pursuant to Article 51(2), the Charter does not establish any new powers or tasks for the Union, nor modifies powers and tasks defined by the Treaties. This is in consonance with what is provided under Article 6(1) of the TEU, which states that the provisions of the Charter do not extend the competences of the Union as defined in the Treaties. Thus, it is self-evident that the scope of the fundamental rights guaranteed under the Charter is intimately related to the system of competences of the EU.[48] Consequently, if the EU is competent in a given area or the Member States have implemented EU law, the applicable standard of fundamental rights is the one set by the EU.

Furthermore, Article 53 and Article 52(3) of the Charter are also fundamental tools in understanding how different sources of law are intertwined in the existing fundamental

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48 On the connection between competence and fundamental rights see Case C-299/95 *Kremzow* EU:C:1997:254, para 19, where the ECJ held as follows: 'where national legislation is concerned with a situation which [...] does not fall within the field of application of Community law, the Court cannot, in a reference for a preliminary ruling, give the interpretative guidance necessary for the national court to determine whether that national legislation is in conformity with the fundamental rights whose observance the Court ensures, such as those deriving in particular from the Convention.' See also Case C-309/96 *Annibaldi* EU:C:1997:631, para 13, and Joined cases 60 and 61/84 *Cinéthèque* EU:C:1985:329, para 26).

rights system. While Article 53 recalls both the ECHR and national constitutions as instruments of protection of fundamental rights in their respective field of application,[49] Article 52(3) specifies that in so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same, provided that EU law may provide a more extensive protection.

This conflict resolution rule seems to imply the application of the provisions setting the highest possible degree of protection, as it aims to ensure the most favourable treatment to individuals. More specifically, the ECHR must be regarded as the threshold by which the protection guaranteed by the Charter cannot fall below[50]. For what concerns national legal systems, the Charter prevails only in cases where national constitutions, within the scope of EU law, ensures a lower level of protection. As a consequence, fundamental rights guaranteed by national constitutions must be regarded as parameters of validity of legal acts adopted in areas of shared competence between the EU and the Member States[51].

Nevertheless, this awareness does not lead to forms of 'subversion of the primacy of EU law.'[52] Given that fundamental rights guaranteed by national legal systems form part of the list of general principles of EU law, when the ECJ holds that national law ensures a higher standard of protection in the actual case, that is the standard one has to comply with, consistently with Article 53 of the Charter. Thus, in the context of the protection of fundamental rights in an inter-constitutional framework – or, as Gomes Canotilho says, in an inter-jusfundamental framework –, the principle of primacy is also reaffirmed.

5. The *Taricco* Saga and the Search of a Theory on the Protection of Fundamental Rights in the EU

In light of the above, one can say that the framework of inter-jusfundamental protection in the EU legal system presupposes a constant relationship between all fundamental rights provisions that is foreseen on national constitutions, the Charter, and the ECHR. However, the issue is that there is no hierarchy that can be taken into account, as there is no supremacy in decision-making authority. This means that neither the ECJ has the

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49 In this regard, one should remember what the ECJ held in Case C-399/11 *Melloni* EU:C:2013:107, paras 59-60: 'by virtue of the principle of primacy of EU law [...] rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State [...] Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.

50 See LENAERTS (2012), p. 394.

51 See SILVEIRA (2014), p. 179-209.

52 See LENAERTS (2012), p. 398.

power to rule on national matters, nor the national courts are authorized not to apply the EU norms when they are obliged. Considering the duty of sincere cooperation – as provided under Article 4(3) of the TEU – all Member States and the EU must respect and assist each other in carrying out the tasks deriving from the Treaties. Thus, in a context of interconstitutionality, the protection of fundamental rights must be weighted in respect of a close dialogue between the ECJ and the national courts in order to make it possible to achieve the highest level of protection in the actual cases.

Nevertheless, the identification of the highest level of protection may not be so simple, as the protection of fundamental rights may depend on the different sensibility of national interpreters.[53] This is why the request for a preliminary ruling plays a key role in giving effectiveness to EU law, as it allows a horizontal dialogue aimed at ensuring both the correct application of EU law and an effective judicial protection of fundamental rights.

It is an undeniable fact that the ECJ and the national courts have started to cooperate together on the protection of fundamental rights. However, the attainment of the highest level of protection still raises some issues. As a matter of fact, the ECJ seems to be reluctant to make use of Article 53 of the Charter. For instance, in *Åkerberg Fransson*, the ECJ did not refer to Article 53 of the Charter. The only hint one may find is the following:

> national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.[54]

In light of this, it might get difficult to determine when and how Article 53 of the Charter applies, as it might require a previous comparative analysis, which might prove quite difficult to conduct. Even when the ECJ expressly mentioned Article 53 of the Charter and related it to the highest standard of fundamental rights protection – as in *Melloni* –, they did not solve the main issue. On the one hand, it seems that the Court imposed on national judges a form of self-restraint rather than pursuing an open, horizontal dialogue between the sources of protection of the fundamental rights, which is the opposite of what the theory of interconstitutionality stands for. On the other hand, thanks to the *erga omnes* effect in the ECJ's decisions, it should be noted that when the ECJ considers a national norm as the one which offers the highest standard of protection for a concrete case, that national norm should be regarded as the benchmark for all the Member States of the EU. That is why the ECJ holds a great responsibility: besides the duty of guaranteeing the primacy, unity and effectiveness

53 See SILVEIRA (2014), p. 202-203.
54 See *Åkerberg Fransson* (n 11) para 29.

of EU law, the Court also has to take into consideration the national constitutional orders in order to maintain the balance of the European inter-judicial integration, which is undoubtedly a difficult task.

In this regard, the so-called *Taricco* saga perfectly illustrates this challenge. As it is renowned, the *Tribunale di Cuneo* referred some questions to the ECJ, as the Italian legislation on limitation period did not allow for the extension of the limitation period with regard to crimes as the ones at stake – having formed and organized a conspiracy to commit various offenses in relation to VAT. As this could compromise the effective prosecution of the alleged crimes, the referring court stayed the proceedings, considering that the national legislation could have introduced a *de facto* VAT exemption, which was not laid down in EU law. At the same time, this could have granted impunity to natural persons and undertakings who allegedly had committed those crimes.

The ECJ pointed out that pursuant to Article 4(3) of the TEU, Member States are not only under a general obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on their territory, but must also fight against tax evasion. Furthermore, Article 325 TFEU obliges Member States to counter illegal activities affecting the financial interests of the EU through effective deterrent measures and, in particular, obliges them to take the same measures to counter fraud affecting the financial interests of the EU as they take to counter fraud affecting their own interests. Subsequently, the ECJ held that a national legislation which lays down absolute limitation periods was liable to have an adverse effect on fulfillment of the Member States' obligations as if that national rule prevented the imposition of effective and dissuasive penalties in a significant number of cases or provided for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned and not in respect of those affecting the financial interests of the EU. Thus, it was up to the national court to verify that in the actual case and, where appropriate, to disapply national law.[55]

It must be pointed out that according to the ECJ, the disapplication of national rules on limitation period does not amount to an infringement of the fundamental rights of the accused, as it would not modify the substance of tax offences at the time when it was committed.[56]

This judgment raised some concerns among Italian scholars and judges, as many of them believed the ruling amounted to a patent violation of the principle of legality in criminal matters – as provided for under Article 25(2) of the Italian Constitution. Within this context, the Italian Constitutional Court (ICC) referred some questions to the ECJ.[57]

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55 See Case C-105/14 Taricco EU:C:2015:555, paras 36, 37 and 58.
56 ibid paras 55-56
57 See Italian Constitutional Court, order n 24 of 26 January 2017 ECLI:IT:COST:2017:24.

The point is that, in the Italian legal system, the national legislation on limitation period has always been regarded as having substantive nature, which links it to the principle of legality of criminal offences. Hence, the ICC considered that the Italian Constitution guaranteed a level of protection of fundamental rights, which was higher than the one guaranteed by EU law. Consequently, the ICC contended that Article 4(2) of the TEU (constitutional identity) and Article 53 of the Charter (highest level of protection of fundamental rights) allowed Italian courts to oppose the enforcement of the *Taricco* ruling.

Indeed, the main problem concerning *Taricco* is that the ECJ did not tackle the issue of how national courts should protect the fundamental rights belonging to the persons charged with VAT fraud. In fact, while the protection of the EU's financial interests enjoyed absolute priority in the judgment, the ECJ only stated that fundamental rights should be protected by national courts somehow, without providing much explication[58].

In the so-called *Taricco II* judgment, the ECJ provided an interpretation that seemed to be consistent with the theory of interconstitutionality. In short, the ECJ recalled the requirements of foreseeability, precision and non-retroactivity of the criminal law enshrined in the Charter (Article 49), the constitutional traditions of Member States, and the ECHR, underlying that the obligation to ensure the effective collection of the EU's resources could not run counter to the principle that offences and penalties must be defined by law.[59] As a result, the ECJ concluded that national courts did not have to ignore the national legislation on limitation period, if the disapplication of the legislation would entail a breach of the principle of legality of criminal offences.[60]

Therefore, one can say that *Taricco II* partially reviewed *Melloni*, as the Member States now enjoy a wider range of discretion when it comes to determine and guarantee the highest standard of protection under national law. In other words, national courts may invoke their national constitutional law in order to avoid EU law when the protection of fundamental rights is at stake. Nevertheless, this does not amount to an exception to the primacy, the unity and the effectiveness of EU law. Considering a possible clash between the EU's financial interests and the protection of fundamental rights and considering the network-style relations between the national Constitutions and the EU Treaties, all the relevant provisions must be taken into consideration by the ECJ in order to achieve a balance between the objectives of the EU integration and the protection of fundamental rights.

Thus, *Taricco II* is an example of how the ECJ may assure the protection of fundamental rights in the EU within an inter-constitutional framework. In this regard, the role played by the ICC must also be highlighted. In fact, by referring to the ECJ, the ICC

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58 *Taricco* (n 55) para 53.
59 Case C-42/17 *M.A.S. and M.B.* EU:C:2017:936 paras 52-57.
60 ibid para 62.

chose to act in a cooperative manner, providing an example of how the relations between national (constitutional) courts and the ECJ should cooperate when it comes to the complex relations between national Constitutions and EU law. The ECJ and the ICC faced together an intriguing situation concerning inter-normative conflicts, showing that it is possible to develop a very promising model of fundamental rights protection, in which the standards of fundamental rights protection spreading from different legal sources may interact with each other in order to manage the highest level of protection of fundamental rights.

6. Conclusion

As observed by Miguel Poiares Maduro, the form of constitutionalism resulting from European integration is not the product of a constituent moment, but instead it is the product of a gradual legal and political development, generally carried out taking into account national constitutional sources.[61] This is why European constitutionalism does not only seek to preserve the identity of different national legal systems, but also seeks to promote the simultaneous interaction between them, without resorting to imposition[62]. Therefore, the secret to a successful European Union depends on its ability to deepen its own constitutionalism without replacing the constitutional authorities of the Member States[63]. This is the core of plural constitutionalism, which can also be viewed from the perspective provided by the theory of interconstitutionality.

Within a framework of plural constitutionalism, the difficulties arise when interpreting and applying rules adopted under an inter-constitutional methodology. In other words, within the EU inter-constitutional framework, the task of interpreting and applying fundamental rights is a complicated one. This is why national courts rely on the support of the ECJ, which must carry out a genuine inter-jusfundamental interpretation[64]. In this regard, reference for a preliminary ruling is the institutional mechanism that makes it possible to promote horizontal cooperation between national courts and the ECJ. This pushes national courts to raise questions to the ECJ whenever a doubt arises in regard to EU law, making it possible to guarantee effective legal protection to individuals[65].

It is precisely the ownership of rights – and, in particular, the ownership of the fundamental ones – that leads to affirm the essentially constitutional nature of the EU legal order, as subsequently recognized by the ECJ itself.[66] Yet, one must consider that the

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61 POIARES MADURO (n 31), p. 344.

62 *Ibid* 290.

63 *Ibid* 338.

64 See GUSMAI (2014), p. 17.

65 See Case C-224/01 *Köbler* EU:C:2003:513.

66 In Case 294/83 *Parti Ècologiste Les Verts* EU:C:1986:166 the Court held that 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them

measure of the success of the European integration project as just outlined, rests on its effectiveness and on its ability to ensure effective protection to the rights of individuals as subjects of the supranational legal order.

From this point of view, one cannot deny the peculiar nature of the relationship between the EU and the Member States when it comes to the protection of fundamental rights. By viewing this topic from a perspective that does not prefer the theory of multilevel constitutionalism, one can properly consider a symbiotic dimension to the extent that it is possible to identify a situation of mutual dependence. This leads to the enrichment of all the involved subjects. If one cannot deny that the Constitutional Courts of the Member States pushed the ECJ to acknowledge the need to protect fundamental rights in the supranational order, it is equally undeniable that the ECJ gradually became a court ready to call on the Member States to protect these rights in light of what is provided under EU law.

Ultimately, the interpretation and application of fundamental rights in the EU would be threatened should national courts decide to solve the issue of interjusfundamentality – which falls within the scope of EU law – only in light of its own national legal and constitutional order. This would prevent European citizens from obtaining the higher standard of protection applicable to the actual case. It is clear from the foregoing that disparities in the protection of fundamental rights between Member States that the legal equality of European citizens could be undermined and, ultimately, the survival of any form

are in conformity with the basic constitutional charter, the Treaty' (para 23) One may also consider the opinion delivered by the Court with regard to the creation of the European Economic Area (Avis 1/91 *Accord EEE-I* EU:C:1991:490), where the ECJ highlighted that "the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law" (para 21). As a general rule, it seems possible to affirm that in the international system, truly constitutional legal systems have come to existence, which are characterized not only by the adoption of new forms of constitutions but also by the renovation from the ground up of the already existing constitutional orders (see TEUBNER (2012), TOMUSCHAT (2001)). In this regard, one must consider statements made by the ECJ in Case 26/62 *Van Gend en Loos* EU:C:1963:1 and *Costa v ENEL* (n 33). These judgements represent two milestones in the ECJ's case law because the Court affirmed the principle of direct effect and the principle of primacy of supranational law. However, there is another aspect that should be considered. In *Van Gend en Loos*, the ECJ stressed that the European Economic Community (EEC) constituted a new legal order of international law whose subjects comprised not only Member States, but also their nationals. In *Costa v ENEL*, the ECJ acknowledged that by creating the EEC, the Member States had limited their sovereign rights, albeit within limited fields, and had thus created a body of law which bounded both their nationals and themselves. Recognizing the nationals of the Member States as subjects of the supranational legal order was in sharp contrast with the tendency to consider individuals subjects of international law (see SPERDUTI (1950), CLAPHAM (2010), GAJA (2010). Therefore, the question arises what the Court meant in *Van Gend en Loos* when it called the former EEC a new legal order. It is quite unlikely that the ECJ had already foreseen the subsequent developments of the European integration process by looking at the topic not only from an economic point of view but also – and most importantly – from a political and constitutional one. However, one cannot deny the programmatic value of the statements made by the Court with regard to the nationals of the Member States as subjects of the new legal order. In fact, being subjects of a legal order implies the ownership of rights, including fundamental ones. In light of this, one can say that the ECJ took a stand in favour of integration that was strong and different from that previously achieved within other international organizations. In this regard, see CORTESE (2014), p. 301-339.

of legal Union. Indeed, it is self-evident that the coexistence of twenty-eight Member States and a Union raises problems when seeking a political balance between the various components. However, it is said coexistence that determines the wealth of the European Union in terms of the protection of rights because of the comparison between the various – national and supranational – entities that are likely to facilitate the identification of the most appropriate solution to the problem. Because of the scope and reach of the ECJ's case law, this phenomenon pushes towards the same standard of protection, which – in light of Article 52(3) and Article 53 of the Charter – should be the maximum standard of protection. Therefore, one has to underline the centrality of a constant inter-judicial dialogue[67] in order to support the inter-constitutional architecture of the fundamental rights protection within the EU.

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67 See OLIVEIRA (2016), p. 8-22.

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The Fundamental Rights in Data Protection - A transnational problem with different approaches: a comparative study

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Abstract:

This research work focuses on the thematic of the fundamental rights and human rights affected and/or protected in data protection regulations. Today we cannot deny the influence of the internet in our daily lives. As a global phenomenon, the internet and more recently social media influence how we relate to the world, and how the world sees us. Our technological footprint is increasingly relevant in how we relate to what surrounds us, the information we leave with our online navigation is precious for marketeers, companies, banks and even employers. As we understand that this is a transnational problem, we will analyse two different points of view — the European and the American — and understand why there is not a transnational protection for our data, and therefore for our privacy.

Keywords:
Data Protection, Human Rights, Fundamental Rights, Right to Privacy

1. Introduction

Privacy is a growing preoccupation on our society. As we will acknowledge, right to privacy is protected on an international level in different and relevant Human Rights instruments. The concept of privacy emerged in 1890, in the US, as a concept directly associated with the liberal understanding of freedom. It is important to highlight that the right to privacy emerged on a first stage as a protection from State's intromission within the home and correspondence, but then it developed to a larger range due to the development of communication and ultimately, the expansion and

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growing influence of the internet in the ways we lead our lives, privately and publicly.[2]

We can understand that protection of privacy in inherently related to our culture. As such, the concept of privacy differs between legal systems, as John Dowdell (under the influence of Professor James Q. Whitman) puts it "on the two sides of the Atlantic there are two different cultures of privacy, which are home to different intuitive sensibilities"[3].

As there is no uniformisation of the understanding of what should be protected or not, on the limit, one's information can be available online in the United States, but not available in Europe. These restrictions in the name of privacy can also mean restrictions on the right to information. There is a fine line between these two concepts, that is highlighted by the blooming of the information era and fast spreading of information.

This is a transnational problem with two different understandings. The first understanding is related to the core of the right to privacy — is it legitimate, from a Human Rights point of view, that the protection mechanisms are so different that can put at risk the core of the right to privacy?

The second understanding is related to the effects that two different concepts of privacy, as they will be emphasized during this study, can damage one's privacy right within one system while the same right is protected when integrated into a different legal and judicial framework.

We will analyse the different mechanisms that exist in the European and American legal systems and understand how they protect privacy as it is understood at a fundamental level, while trying to conceive a solution of protection that respects both views and, ultimately, not disregarding the legal cultures.

2. Privacy as a Human Right

Privacy was, first, consecrated within the 1948 UN Declaration of Human Rights in its Article 12. This article introduces a privacy concept related to arbitrary interference «with his privacy, family, home or correspondence». It also contemplates «the right to the protection of the law against such interference or

[2] MOREIRA, GOMES (2013), p. 386-387
[3] DOWDELL (2017), p.314

attacks». This is a concept that arises directly from the first concept of privacy written by Warren and Brandeis in the USA, in 1890.[4]

Parallel provisions were enshrined within the International Covenant on Civil and Political Rights, in its Article 17, on what it is now the most important disposition on privacy at an international level. This was the first legal international instrument to pose a legally binding obligation for the States. As all first generation Human Rights, the right to privacy is, at its core, a duty of omission by the State. When the interference is needed, it is necessary that the legislation specifies the exact circumstances in which they shall be permitted.[5]

Therefore, it must be ensured a right to protection from this arbitrary interference to personal honour and reputation and States are obliged to provide national law to that end — the second paragraph of Article 17.[6] Also, it is the Human Rights Committee's understanding that the right to privacy, in all facets mentioned, should be protected from interferences from private actors, such as natural or legal persons.[7]

In what concerns to its content, the right to privacy can be divided into subcategories, such as identity, integrity, intimacy, autonomy, communication and sexuality that add to an understanding of privacy *strictu sensu,* that is the respect of the individual sphere that does not fall under any other subcategory.[8]

Later, the right to privacy was introduced in other international treaties and declarations. In 1989, the Convention on the Rights of the Child conceived it with a specific orientation towards protecting the children. Article 16 has the same wording of Article 17 of the International Covenant on Civil and Political Rights, obliging the States to provide the same kind of protection specifically applied to children.

The same happened in 1990, with the approval of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, contemplating the right to privacy on Article 14.

Although these instruments are approved and promoted by the United Nations, not all the members are bound by them. That is why there are so many specific treaties shedding protection to different groups (the migrants' convention, the children's convention, etc).

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[4] MOREIRA, GOMES (2013), pp.386-387
[5] UN Human Rights Committee (HRC),1988
[6] UN Human Rights Committee (HRC),1988
[7] MOREIRA, GOMES (2013), pp.387-388
[8] MOREIRA, GOMES (2013), p.388

The regional Human Rights' treaties arrive as a contribution to tackle this issue — these are legally binding. The members of regional conventions must fulfil and guarantee the rights within their judicial systems and are under the review of the Courts and/or Commissions created to protect the rights of those conventions.

3. Privacy as a Fundamental Right - The different conceptions and the protection mechanisms

The protection of privacy is notably different within the European legal system and inside the American system.

In Europe, although freedom of the press is important and relevant, it does not prevail above the privacy of individuals. Recalling the teaching of John Dowdell, as well as in America privacy is an issue of liberty, in Europe, it is considered a matter of dignity.

In the same logic, we can affirm that Americans are more tolerant to injuries to private interests of individuals, to sustain a maximally free press, as Europeans are more tolerant to government surveillance and access to their homes. We can understand a higher confidence in the government in Europe, in detriment of confidence in the market, which Americans face as trustworthy.[9]

3.1 In European System

Within the European Union *legal acquis*, right to privacy is an autonomous fundamental right, under Article 8 of the Charter of Fundamental Rights of the European Union. This article lays down the principles for the correct treatment of data, also legitimising secondary legislation on the matter.

The content of Article 8 of the Charter was inspired by the Article 8 of the European Convention on Human Rights, but also by Convention 108 of the Council of Europe — the Convention for the Protection of Individuals regarding Automatic Process of Personal Data, which was signed by all the EU Member-States. It has, on its basis, Article 16 of TFEU and Article 39 of TEU that establish that every individual should be protected on what concerns to the processing of their personal data and

[9] DOWDELL (2017), pp.315-316

that the institutions and organisations of the EU are bound by this provision and should develop legislation to that end.[10]

Article 8 of the ECHR features the right for the respect of a private life. However, it does not define privacy as a concept. Private life is wider than the right to privacy because it concerns a sphere within which everyone can freely pursue the development and fulfilment of its personality.

The article also establishes the limitations on which these rights can be interfered with. The limitation test — to evaluate if article 8(1) can be surpassed — includes three criteria. First, the interference must be in accordance with the law, then it must pursue one or more legitimate aims and lastly, it must be «necessary for a democratic society to achieve those aims».

Article 8 also imposes a positive obligation on the signatory states. The states are obliged to act and take active steps onto ensuring the enjoyment of rights protected by the Convention.

As to secondary legislation, legitimised by Article 8, the first Directive on data protection dates to 1995 (Directive 95/46/EC). Its Article 1 defines a right to privacy that must be ensured to protect natural person's fundamental rights and freedoms.

This document was, in fact, a milestone in the history of personal data. By this Directive, member-states were forced to regulate data protection by the same standard. This meant that personal information was protected at the same level in every member-state making it easier to circulate data within a growing single market on a rising flow of cross-border data. Directive 95/46/EC brought the solution for a fundamental rights problem that was emerging with the transference of personal data in the European Union.[11]

With the evolution of technology, the need emerged to strengthen what was previously defined. Consequently, an EU data protection reform was promoted in 2012 and adopted in April 2016. Now, we are before an online emerging single market with a massive circulation of data, and consequently more danger of violation of fundamental rights.

The General Data Protection Regulation (Regulation (EU) 2016/679) — that will entry into force in May 2018 — is one of the results of the rethinking of the European Data Protection System. It was also adopted a new Directive for data

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[10] CASTRO (2013), pp. 120-121
[11] CASTRO (2013), p.121

protection for treatment in police and criminal matters (Directive (EU) 2016/680). This new instrument will ensure that the data of victims, witnesses and suspects of crimes are duly protected in the context of a criminal investigation or law enforcement action. It also introduces harmonised laws that will facilitate cross-border cooperation of police or prosecutors aiming to a more efficient combat of crime and terrorism across Europe.[12]

The new General Regulation on Data Protection provides a stronger control by the individuals of their personal data, listing a series of rights that reinforce their position from data controllers and processors. The regulation also comprehends a series of principles that should feature in data treatment procedures, such as data minimisation and legality on the treatment.

One of the innovations of this regulation is the clarification of the right to be forgotten in Article 17. The Right to be Forgotten is, as understood by some[13], the strongest online privacy protection mechanism to date.

The current discussion around the right to be forgotten, as it is now understood by the regulation, started with the European Court of Justice's decision in the *Costeja v. Google* case.[14] Although the decision is a threshold in the history of the right to be forgotten, this protection mechanism has been in practice in some European Countries for a few years.

In the UK, the Rehabilitation of Offenders Act of 1974, introduces the practice of, after a certain period, criminal convictions and other similar information would not be regarded when obtaining insurance or seeking employment. Le droit d'oubli was recognised in French Law in 2010, 4 years before European Court of Justice decided that Mr Costeja had the right to be forgotten by Google. [15]

In the case of Mr Costeja, the prejudicial question sent to the court concerned the Directive 95/65/EC and its definition of the data controller. Ultimately, this decision influenced the clarified Right to be Erased (Right to be forgotten) that is laid out in Article 17 of the new General Data Protection Regulation, in the sense that it would be applicable to online data, and that search engines, like Google, are

[12] HUMAN RIGHTS EDUCATION FOR LEGAL PROFESSIONALS (2017)
[13] DOWDELL (2017), pp. 315-316
[14] Judgment of 14 May 2014, *Costeja v. Google*, C-131/12, EU:C:2014:317
[15] DOWDELL (2017), p. 315

considered data controllers and as such must comply with the duties established in the Regulation.[16]

The protection of personal data established in this new regulation is stronger than the previous mechanism defined by Directive 95/65/EC. Joining this clearer and easy-to-access right to be forgotten, other groups of rights were established with intend to protect the fundamental rights of the data subject.

Beginning in May, the data subject can access to the data that the controller, rectify it, if needed, limit their treatment, ask for transmission of its data to another controller, all adding to the right to ask for their erasure.[17]

3.2 In American System

The embryonic history of the United States of America reveals a tradition wary of the centralised power. This distrust, that gave rise to a reactionary origin, is enshrined in the roots of the American legal system. Although the word Privacy is absent from the Declaration of Independence of the United States, from the Constitution and from the Bill of Rights, we can find hints of the concept of privacy within the several amendments to the Constitution.[18]

The Fourth Amendment, prohibiting «unreasonable searches or seizures», indicates the understanding of the government as the primary enemy of privacy. On the other hand, the First Amendment introduces the right to a free press, strongly opposing to punishing the dissemination of truthful information relevant to the public interest.

Privacy is posed into question when the definition of public interest is not directly defined by the law. In fact, there are no privacy laws in force in the United States, therefore, case law prevails in the matter.

The right to privacy is a construction-built case by case.

When the Fourth Amendment was put into question in the case *Katz v. US* (1967), it was the first time it was considered that government wiretapping was a violation of privacy, fitting onto the logic of the protection from searches and seizures by the government. The Amendment requires that the privacy of an individual can

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[16] DOWDELL (2017), p. 319
[17] These rights are contemplated in Articles 15, 16, 17, 18, 19 and 20 of the new General Regulation on Data Protection (Regulation (EU) 2016/679 of the Parliament and Council of Europe).
[18] DOWDELL (2017), p. 326

only be violated by the government if there is a probable cause of a crime, that should be supported by a court issued a warrant or a grand jury subpoena. The limit to the government's action is this expectation of privacy, that must be reasonable, in the sense that society, in general, should recognise it as such.[19] Although this was a great development on privacy protection, it also shows us limits on the Fourth Amendment regarding data protection. On the same case, the Court clarified that the Amendment only cover those places, things and conducts in which a person has «legitimate expectation of privacy». In the situation of data protection, we are before information that was voluntarily relinquished to a certain entity and therefore, there should not be any expectation of privacy. Despite being the current understanding of the courts, the «third-party doctrine» is not accepted without resistance.[20]

Another dimension of privacy was found in the case *NAACP v. Alabama* (1958) in which the Court recognised the right to associational privacy under the First Amendment. [21]

In *Griswold v. Connecticut* (1965), another privacy right was created having as basis the First, Third, Fourth, Fifth and Nine Amendments. Here, the Court invalidated a Connecticut Law prohibiting «contraceptives and the practice of medical professionals assisting anyone in acquiring contraceptives», stating that the reproductive autonomy in a marriage is a «right to privacy older than the Bill of Rights». This privacy was given to unmarried couples later in 1972 in *Eisenstadt v. Baird*, and the right of privacy in intimate relations was cemented then.[22]

As Professor James Whitman wisely points out, the American privacy is understood as liberty from the government, therefore we can find, within the Supreme Court, inconsistent case law when on First Amendment's protection of freedom of the press is faced with the plaintiff's privacy. If the government is involved, institutions tend to shift in favour of privacy.[23]

Protection of privacy in the United States is not regulated by any law or act. The notion of privacy expands and contract over time, as a reaction to the realities and views that change daily. We can organise privacy rights in the US into two categories: one regulated by the government and the other under common-law.

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[19] DOWDELL (2017), p. 329
[20] DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2015), p.10
[21] DOWDELL (2017), p. 329
[22] DOWDELL (2017), p. 330
[23] As we can see in *Florida Star v. JBF* and *Hanlon v. Berger,* WERRO (2009), pp. 296 ff.

The protection of data in the United States is not regulated by a general law. Instead, this regulation is provided by a miscellany of Federal and State laws and regulations that can overlap each other, and sometimes contradict one another. Adding to these laws and regulations, Federal Agencies developed several guidelines and "best practice" rules, but these do not have the force of law.

The Privacy Act of 1974 presents itself as the best analogue to a European data protection law. This act regulates comprehensively personal data processing, but it only applies to federal government and its agencies, including law enforcement agencies. This legislation regulates the collection, use and disclosure of all types of personal information.[24]

The behaviour of the federal government and agencies is regulated by the principle of transparency — the agencies should adopt "rules of conduct" that bind their staff —, and the principle of proportionality, according to this principle the information on an individual should only be maintained if necessary and relevant to accomplish a purpose of the agency which treats it.[25]

The Privacy Act also establishes rights for the data subjects. The individuals have the right to access to their records, the right to request their correction and to sue the government for violation a right included in this Act.[26]

Admitting the merits of this act it is also important to refer that the document has severe limitations in general, but also relating to law enforcement agencies, reducing the effective protection a low standard for data subjects. The records held by courts, non-agency government entities and even private entities are not protected by this Act.[27]

4. Conclusive Remarks - the current relation between US-EU on data protection or is a transnational solution an option?

The analysis of the protection of fundamental rights in data protection policies cannot be concluded without a look at the current state of relations between the US and EU in what concerns to data protection.

[24] DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2015), p.10
[25] DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2015), p. 11
[26] DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2015), p. 11
[27] DIRECTORATE-GENERAL FOR INTERNAL POLICIES (2015), pp.11-13

The new GDPR will impose more limitation on international transfers of data. Relating to the concrete case of the transfers of data to the US, under the previous Directive, the European Commission emitted a decision (in 2000)[28] allowing free transfers for United States' companies if they upheld the Safe Harbour Privacy Principles and Frequently Asked Questions issued by the Department of Commerce of the United States.[29] However, in 2016, the EC emitted the «adequacy decision», invalidating the Safe Harbour framework and announcing the «EU-US Privacy Shield» operational since 1 August 2016.[30]

The «EU-US Privacy Shield» presents a group of principles and requirements that were introduced in the European Court of Justice's decision on the *Schrems* case[31]. The new elements introduced by these new requirements comprehend stricter obligations on Privacy Shield certified-companies, that will, among others, limit data retention, limit sharing amongst third parties outside the framework, improve the monitoring by the US Department of Commerce and increase the possibility for EU citizens to obtain redress.[32]

This EC decision from 2016 already foresees what will happen after 25 May 2018 with the entry into force of the GDPR:

> *«As of 25 May 2018, the General Data Protection Regulation (GDPR) will apply to the processing of personal data (i) in the context of the activities of an establishment of a controller or processor in the Union (even where the processing takes place in the United States), or (ii) of data subjects who are in the Union by a controller or processor not established in the Union where the processing activities are related to (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the monitoring*

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[28] Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441) (Text with EEA relevance) (2000/520/EC), available at: http://data.europa.eu/eli/dec/2000/520/2000-08-25

[29] CASTRO (2013), p.121

[30] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) (Text with EEA relevance), available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1519144492459&uri=CELEX:32016D1250

[31] Judgement of 6 October 2015, *Schrems*, C-362/14, EU:C:2015:650

[32] COM (2017) 611, 18 October 2017, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1519142569392&uri=CELEX:52017DC0611

of their behaviour as far as their behaviour takes place within the Union. See Article 3(1), (2) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)»,[33]

This means that the extraterritorial scope of the GDPR will directly affect EU's relations with US' tech companies aiming to maintain a high standard of privacy protection for EU citizens.

The challenge grew in January 2018 when President Trump issued the Executive Order "Enhancing Public Safety in the Interior of the United States"[34], excluding non-American citizens from the protection of the Privacy Act. Some of EU representatives reacted negatively to this action, asking the European Commission to suspend the EU-US Privacy Shield.[35]

Another bump to data protection in the US was President Trump's decision to repeal Federal Communications Commission's privacy protections for internet users. This action took down a landmark policy from the Obama administration. This policy would have (it would entry into force later 2017) banned Internet providers from collecting, storing, sharing and selling certain types of customer information (web browsing history, app usage history, location details, etc) without the user's consent.

Are there grounds to build a transnational solution?

As we understand for current efforts, it is possible to conjugate both concepts of privacy, although very different in the basis, both judicial systems understand privacy needs to be respected at a fundamental level.

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[33] Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) (Text with EEA relevance), note 16.

[34] Executive Order "Enhancing Public Safety in the Interior of the United States" https://www.whitehouse.gov/presidential-actions/executive-order-enhancing-public-safety-interior-united-states/

[35] Tweet by Jan Phillip Albrecht, Green MEP from Germany, 26 January 2018, available at: https://twitter.com/JanAlbrecht/status/824553962678390784?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.wired.co.uk%2Farticle%2Ftrump-privacy-shield-data

Privacy is a Human Right and should be assured to every individual at the same standard in every situation, on these grounds it is important to open the conversation on what is the best path to achieve a transnational solution.

Several proposals are on the table:

Some consider that a right to be forgotten should be implemented in the American system. The issues of this implementation could affect the development and running of tech companies, therefore, strong voices from Silicon Valley are raising. Techcrunch (a highly recognised blog on the technological field) recognises the merit of the right to be forgotten but refers to its impotency, considering the current working of the internet, and especially social media. They argue that all the social media platforms provide us with the possibility to delete posts, however, once the information spreads it is almost impossible to delete it because it will be automatically archived. The obstacles to the implementation of a right to be forgotten in the United States do not stop with the lobbying by the companies in Silicon Valley[36], they continue with the articulation needed with the First Amendment. When protecting freedom of speech and of the press, the First Amendment also establishes that «Congress shall not make no law… abridging» these rights. These are, as we saw, to the Americans, at a higher level than an individual's dignity. Therefore, we comprehend the voices that tell us that a right to be forgotten in the United States is impossible to uphold.[37]

Some academics assume that the solution should be developed in the basis of a «comprehensive multilateral agreement» under which, the different signatories, would define shared principles and standards for privacy protection, solving the online data protection problem. David Cole and Federico Fabbrini discuss a worldwide charter of privacy principles, while Ian Brown and others go further, considering an international agreement of cooperation between States, that could be able to reach non-democratic states. In this ambitious framework, they consider an agreement that would gather foreign intelligence, allowing a rapid implementation and legitimacy for justified intelligence-gathering.[38]

All the solutions featured need the political will to work. We can conclude that the different cultures and consequently different concepts of privacy are not the main obstacle to protect data and therefore the fundamental right to privacy of individuals.

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[36] In 2013, Google paid D.C. lobbyists 15.8 million dollars to influence legislation.

[37] DOWDELL (2017), p. 335

[38] SCHULHOFER (2015), pp. 8-9

As we understood the stance on this matter is changing quickly, and we will have to wait for its closure.

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Fundamental rights protection in European legal space Milestones from the jurisprudence of the Court of Justice of European Union and the European Court of Human Rights

Daka Marija[1]

Abstract

The paper provides general insight into the historical development, the institutional context of human rights protection, the protection mechanisms, as well as the overall relationship between the European Union and the Council of Europe, more specifically the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR). The paper analyses some of the well-known cases of the two courts which could be considered as - some of - the milestones in the fundamental rights protection of the two courts and aims to draw some conclusions as to correlation of the two European organisations.

Introduction

In the European context, contemporary human rights systems are the culmination of philosophical ideas underpinning political struggles against absolutism in the eighteenth and nineteenth centuries. The theories of Locke, Voltaire, Rousseau, Montesquieu, Paine and Kant all contributed to a political movement dedicated to the fulfilment of freedom and equality of individuals. [2] Bringing that protection to the regional level, there are two key organisation that have a pioneering role in human rights protection

The Council of Europe (CoE) and the European Union (EU) have run parallel for most of their existence, each within its very own field of activity and each forging different paths of integration.[3] However there is at least one common thing in their mandates and that is the

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2 DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS
The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union systems of human rights protection 2011 in http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/432755/IPOL-AFCO_ET(2011)432755_EN.pdf (10.08.2017)

3 MARINA KOLB, 2013,The European Union and the Council of Europe, Palgrave studies in European union Politics

protection of individual human rights on supranational or international level. Both the CJEU and ECtHR are overburdened, 'victims of their own success.[4]

To analyse the institutional context of human rights protection, the protection mechanisms, and the convergence and divergence as well as the overall relationship between the European Union and Council of Europe, more specifically the Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) is a significant undertaking which requires extensive and more in depth research. The relevance of answering these questions is – *inter alia* – underlined by the CJEU's Opinion 2/13 on the EU's accession to ECHR where the CJEU concluded that the draft revised agreement on the accession of the European Union to the ECHR is incompatible with EU law[5] therefore it is left to the jurisprudence to define the complex relationship between the two instances.

The emergence of the Council of Europe – a quick historical overview

In the aftermath of the Second World War, a variety of movements militating actively in favour of European unity emerged in Western Europe. Hence the decision to establish, in November 1947, an International Committee of the Movements for European Unity which was considered as the main movement.
The Liaison Committee of the Movements for European Unity was set up on 20 July 1947. The aim pursued by the Committee was to organise more effectively the efforts and activities of its constituent movements, therefore the Liaison Committee was replaced with an International Committee of the Movements for European Unity (ICMEU). The ICMEU decided to recruit leading European figures capable of giving life to the concept of European unity.[6] The Congress for Europe met in The Hague in May 1948. The participants adopted three Resolutions, on the political level, the European Movement adopted the proposed establishment of a Parliamentary Assembly as its main goal. Accordingly, following intensive

4HELFER R. Laurence : Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime in The European Journal of International Law Vol. 19 no. 1 c EJIL 2008
5 OPINION 2/13 OF THE COURT (Full Court) 18 December 2014 http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2165044 Analysis on the 2 / 13 opinion: MOHAY, Ágoston, 2015, Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case note Pécs Journal of International and European Law - 2015/I
6CVCE, European Navigator, Étienne Deschamps (2016) in https://www.cvce.eu/en/unit-content/-/unit/04bfa990-86bc-402f-a633-11f39c9247c4/f475986b-4348-415a-8147-404517bacc2e (18.10.2017)

negotiations, it promoted the establishment of the Council of Europe (CoE), whose Statute was signed in London on 5 May 1949. The idea of a Charter and a Court of Human Rights, already considered by various participants at the Hague Congress, quickly gained ground. As a result, on 4 November 1950, in Rome, representatives of the member states of the Council of Europe signed the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provided for the establishment of a judicial system designed to ensure the implementation of and compliance with that Convention.[7] However, the Convention did not enter into force until 3 September 1953. The Convention was supported by a two-tiered review mechanism, for it depended both on the European Commission of Human Rights and on the European Court of Human Rights. It was on 12 July 1954 that the European Commission of Human Rights held its inaugural session.[8] The CoE currently consists of 47 Contracting States.

Under the auspices of CoE numerous key treaties have been adopted such as the European Social Charter (ESC, 1961, revised 1999, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment (ECPT, 1987), European Charter for Regional or Minority Languages (ECRML, 1992), Framework Convention for the Protection of National Minorities (FCNM, 1995), as well as the Convention on Action Against Trafficking in Human Beings (2008). In my point of view still for general human rights protection the probably most important European international law benchmark of human rights is the European Convention on Human Rights (ECHR, 1950) and its protocols which can be considered as having leading role and utmost importance, therefore the paper will concentrate on the ECHR. When it comes to modifications, the ECHR has been complemented by a number of protocols[9]; the ratification of protocols among Contracting Parties varies. However it is important to underline the existence of Protocol no. 13 which regulates the ban on the death penalty in all circumstances, including for crimes committed in times of war and imminent threat of war[10] and ratification of which is a prerequisite for joining the CoE.

Generally speaking, the ECHR and its protocols safeguard a wide range of civil, political, and social rights. The scope of its application in the jurisdictional terms has evolved during the past decades. There are certain circumstances under which the ECHR can be applied even beyond the physical borders of a Contracting State but less likely in cases of international

7 Ibid.

8 Ibid.

9The full list of protocols can be found here: https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/3

10 https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/187

organizations.[11] However the question of extraterritorial application could be subject to separate research.

When it comes to the categorization of the rights enshrined in ECHR and EU, it can be concluded that they can be divided and categorized –*inter alia*- as follows: The distinction between absolute rights i.e. those which have to be respected ultimately e.g. right to life safeguarded by both Article 2 of the ECHR and Charter of Fundamental Rights. There are also rights, which can be subject to simple limitations clause such as the right to family life enshrined in Article 8 of ECHR and Article 9 of the Charter of Fundamental Rights.

Speaking of limitations, the Convention itself allows certain limitations, there are no limitations included in the Charter, but other sources of primary and also secondary norms do include limitation which I will analyse in the third chapter of this research. The ECtHR has also developed set of such criterions; Article 15 of the Convention contains derogations clause, prescribing the possibility of derogation in time of emergency.[12]

The doctrine of margin of appreciation as understood by the ECtHR means « *latitude of deference or error which the Strasbourg organs will allow to national legislative, executive, administrative and judicial bodies*».[13] Basically it can be summed up as justified derogation from the set of obligations set up by the Strasbourg court.

This occurred through an opinion of the European Commission of Human Rights—in a *Cyprus* case—to permit the United Kingdom, under Article 15, to derogate from its obligations in a time of public emergency.[14] The margin of appreciation could be seen as a tool that constitutes the main European Court of Human Rights' (ECtHR) tool to accommodate diversity.[15]

The emergence of the role of the European Union in protecting human rights

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11 « Although Strasbourg Court has taken a broad view of a state s responsibilty under the Convention trough its development of the concept of jurisdiction in Article 1 of the European Convention, it has not used this notion to ecompass examination of the actions of international organizations » WHITE, Robin CA: The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?

12 Read more on ECHR Article 15 related case law: http://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf (27.02.2018)

13 YOUROW, H.C 1996, The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence p 13., Martinus Nijhoff, Dordrecht,

14 VAN DIJK, P. et al. (ed.s) 2006 Theory and Practice of the European Convention on Human Rights (Fourth Edition) Intersentia, Antwerpen

15 BREMS E. 2003, "The Margin of Appreciation Doctrine of the European Court of Human Rights: Accommodating Diversity Within Europe" in D. P. Forsythe and P. C. McMahon (eds), Human Rights and Diversity : Area Studies Revisited, University of Nebraska Press

Given the fact that the European Communities and afterwards the European Union were founded on an economic basis and the idea of a common market and the four freedoms, the founding treaties did not contain any provisions on human rights protection *expressis verbis*. This was also confirmed by the ECtHR Bosphorus judgement that will be analysed in the following paragraph.[16]

However, there was some indication on human rights protection, such as the treaty establishing the European Economic Community in 1957 (Rome Treaty)[17], which contained a provision on non-discrimination based on nationality (Article 7), on equal pay for men and women (Article 119), and on the protection of persons and protection of rights (Article 220). These provisions did have human rights connotations.

Speaking in chronological order, we have to note that it took about 30 years to incorporate provisions relating to human rights protection in the Maastricht Treaty. In that 30-year gap it was the Court of Justice of the European Union (CJEU), which filled that gap with its autonomous interpretation on human rights issues. Despite the extensive efforts made by the CJEU over the past decades, it is important not to forget that the CJEU is not a solely human rights court.

The main elements of the CJEU's approach on subject matter can be found in following cases. In the case of Erich Stauder v City of Ulm - Sozialamt[18] the CJEU concluded that the fundamental human rights and in my point of view also their protection derives from general principles of the community law and enjoys protection by the court.[19] In the case of Van Gend en Loos the CJEU concluded that the Treaty establishing the EEC produces direct effect and creates individual rights[20], which have to be respected by member states. The doctrine of supremacy was established by the judgement Costa v Enel.[21] The importance of these cases – in my opinion- are two-fold. First of all it concluded that the European Union has an autonomous legal system and these cases could be understood as a first step towards the protection of fundamental rights by the CJEU itself. In the seventies the CJEU further crystalized its approach by the judgements of **Internationale Handelsgesellschaft** where the Court clarified that the respect for fundamental rights forms an integral part of the general principles and that protection is inspired and derives from the constitutional

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16 Bosphorus case ibid, para 73 « While the founding treaties of the European Communities did not contain express provisions for the protection of human rights. »

17 THE TREATY OF ROME 25 March 1957 http://ec.europa.eu/archives/emu_history/documents/treaties/rometreaty2.pdf

18 Erich Stauder v City of Ulm - Sozialamt. - Reference for a preliminary ruling: Verwaltungsgericht Stuttgart - Germany. - Case 29-69. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61969CJ0029&from=EN#I2

19 Ibid para 2 and 7

20 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. 26-62 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0026

21 Costa v Enel 6-64l http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61964CJ0006

traditions common to the member states.[22] In the case of J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft the CJEU underlined that the Court is bound to draw inspiration from constitutional traditions as well as fundamental rights can be based on international agreements to which the Member States are contracting parties.[23] In the case of Rutili the CJEU even took one step further specifying the Convention for the Protection of Human Rights and Fundamental Freedoms as such an international agreement.[24]

These cases clearly demonstrate the emergence of the fundamental rights issue in the jurisprudence of CJEU starting from the seventies.

However in the abovementioned 30-year gap there have been some soft law attempts in the field of human rights protection such as the Declaration on European Identity in 1973 made at the Copenhagen European Summit which enshrines the principles of democracy, rule of law, social justice and respect for human rights[25] as well as the Joint Declaration on Fundamental Rights[26] by the European Parliament, Council and European Commission.

Speaking of the Maastricht Treaty, Article F explicitly states that the EU is obliged to «respect fundamental rights, as guaranteed by the European Convention on Human
Rights and as they result from the constitutional traditions common to the Member
States as general principles of Community law » Through the provisions of the Amsterdam Treaty the EU has become even more committed to respecting and protecting human rights. The amended Article F stated that the «Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.»[27] In addition the protection mechanism was also set up by provisions Article F.1 «serious and persistent breach by a Member State of principles mentioned» may lead to «suspend certain of the rights deriving from the application of this Treaty» What is more there were specific provisions introduced from the area of data protection, freedom of movement, asylum and migration etc.

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22 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel. 11-70 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61970CJ0011
23 J. Nold, Kohlen- und Baustoffgroßhandlung v Ruhrkohle Aktiengesellschaft. 4-73
http://curia.europa.eu/juris/showPdf.jsf;jsessionid=9ea7d0f130d5fb199c57ce1440aab71ff93350ecab8b.e34KaxiLc3eQc40LaxqMbN4PaNeTe0?text=&docid=88495&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=74164
24 Roland Rutili v Ministre de l'intérieur. 36-75, Para 32 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61975CJ0036&from=ES
25 The Copenhagen Summit Conference http://ec.europa.eu/dorie/fileDownload.do;jsessionid=1KGyQ1tKtTpNjBQwQh6cwgC2yLn7BJMymvTrDq5s2rD3JYR9RfGQ!243197488?docId=203013&cardId=203013
26 http://www.europarl.europa.eu/charter/docs/pdf/jointdecl_04_77_en_en.pdf
27 Treaty of Amsterdam

Although even currently the EU does not have a general legislative competence in the area of human rights what is in line with Charter of Fundamental Rights Article 51.[28] We can still find a solid basis for human rights protection in Article 2 of Treaty on European Union (TEU), Article 2 states that « ... The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. »[29]

The importance of the Article 2 is underlined by the provisions of Article 6 while Article 7 sets in place a control mechanism for the protection by stating that upon clear risk of a serious breach by a Member State there is a control mechanism which can be called upon [30] which ultimately leads to restriction of the rights of a Member State.

The other current key pillar in fundamental rights protection within the EU is the Charter of Fundamental Rights. In my point of view the attempts to safeguard human rights which were previously protected by the CJEU on ad hoc basis based on the general principles was given a clear legitimacy given the fact that the Charter is legally binding. In other words the Charter sets in stone all the human rights protection that was granted by the CJEU before Charter's existence. Therefore the Charter underlines the importance of human rights protection on more direct level. However, the Charter obliges Member States only when 'implementing' EU Law, which clearly decreases the scope of protection.

Furthermore, there are other provisions within primary law which might be relevant such as Articles 18 and 19,on non-discrimination and citizenship of the Union of the Treaty on Functioning of EU. Articles prohibit any discrimination on grounds of nationality and refer to combatting discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[31] And control mechanism for the implementation of the bans.

The EU's considerable impact on fundamental rights also follows from the breadth of EU internal market freedoms and EU Citizenship.[32] Internal market freedoms may mirror particular human rights, for example, the right to non-discrimination protected by Article 21 of the Charter is essential to the effective functioning of the internal

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28 According to Article 51: The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers. Charter of Fundamental Rights [C 364/21] http://www.europarl.europa.eu/charter/pdf/text_en.pdf

29 Consolidated version of the Treaty of the European Union [C 115/13] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0013:0045:en:PDF

30 Ibid, TEU Article 7.

31 Treaty on Functioning of the European Union TFEU http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT [C 326]

32 The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union systems of human rights protection p 58.

market. In some cases, market freedoms can reinforce human rights, such as when the internal market freedoms protect commercial speech or cross-border movement.[33]

If one takes into account all of the above, one will easily come to the following conclusion: fundamental rights exist in a parallel way as both non-written principles (as confirmed by [Article 6 (3) TEU] and as rights enshrined in the Charter. This raises -*inter alia*- the question of the relationship of these parallel systems of fundamental rights. Should they be regarded as autonomous systems of fundamental rights existing irrespective of each other, each with its own system of application? Or should unwritten principles be considered as subsidiary sources, only to be referenced in the absence of written provisions in the Charter?[34] So far even the CJEU has not given any guidance regarding the question.

As referring to the categorization and division of the human rights within the EU regulation it is important to mention the set of those rights which have pose a limited positive role on the EU in safeguarding those rights. Examples for certain limitations –as said above- are the following: Article 9 of the Charter guarantees the right to marry and right to found a family, however it shall be guaranteed in accordance with the national Laws.[35] The same goes for Article 35, which guarantees health care stating that everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices.[36] When it comes to unjustified dismissal, Article 30 of Charter notes that, every worker has the right to protection against unjustified dismissal, in accordance with Community aw and national laws and practices.[37] These examples clearly specify the margin of appreciation of a certain member state when implementing the EU law. On the other hand, the CJEU itself has also applied the concept of margin of appreciation. However it has a relatively different perspective on the margin of appreciation concept. While it is possible to find some common elements on the use of the same technique by both courts, CJEU case law reveals the existence of some distinct features on the margin of appreciation concept in EU law, for example the impact on the scope of the margin of appreciation of factors such as the existence or absence of a European consensus in the field, or the degree of harmonisation provided by EU law on the level at which Member States must protect the fundamental right concerned.[38]

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33 Ibid

34 MOHAY, Ágoston, 2016. The complex relationship of EU law and international law, with special regard to the European Convention on Human Rights, PANSTWO I PRAWO 71:(6) pp. 25-43.

35 Charter of Fundamental Rights Article 9 [C 364/21]

36 Charter of Fundamental Rights Article 35 [C 364/21]

37 Charter of Fundamental Rights Article 30 [C 364/21]

38 PARRAS, Francisco Javier Mena, 2015, From Strasbourg to Luxembourg? Transposing the margin of appreciation concept into EU law in http://www.philodroit.be/IMG/pdf/fm_transposing_the_margin_of_appreciation_concept_into_eu_law_-_2015-7.pdf (05.01.2018)

Some extracts from the courts' dialogue

The concrete interaction between the Strasbourg and Luxemburg courts can be touched upon in the case of Bosphorus Airways. According to some authors the case represents the modern restatement of the position of the Strasbourg Court on the supervision of fundamental rights within the Community legal order.[39]

The state of the facts was the following: Bosphorus Airways was an airline company that leased two aircrafts from Yugoslav Airlines (JAT). The lease entered into force before the passing of UN SC resolution designed to address the armed conflict and human rights violations taking place there, which was implemented by the EEC regulation. On aircraft was seized on Ireland airport before its take-off.

The company has sought judicial review of the Minister's decision to impound the aircraft, the decision was considered *ultra vires*, and therefore the order was quashed. The decision was appealed on the Supreme Court; a preliminary reference to the ECJ was made. The ECJ held that the interference in the concrete case was appropriate and justified for the purposes of EC Regulation. Bosphorus Airways took the case to ECtHR where the Court had the possibility to touch upon the relationship and compatibility of two courts. The Court concluded that the Convention did not prevent the Contracting Parties from transferring sovereign powers to an international organisation for the purposes of cooperation in certain fields of activity[40], this also means that Contrasting States remain responsible under the Convention for all actions and omissions of their bodies under their domestic law or under their international legal obligations. Furthermore the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards.[41] In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner, which can be considered at least equivalent to that for which the Convention provides.[42] By “equivalent” the Court means “comparable”; any requirement that the organisation's protection be “identical” could run counter to the interest of international

39 Robin CA White, Ibid
40 Ibid, para 152.
41 Ibid, para 154.
42 Ibid, para 154.

cooperation pursued. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.[43] Although the judgement gave some guidance on the issue, still it has left some questions unanswered which I will point out in my conclusion.

As the flipside of the coin the case M.S.S. v Belgium and Greece[44] could be brought up. The case in essence considers the compatibility of Dublin II regulation with the ECHR.[45] The state of the facts is the following: The applicant, an Afghan asylum seeker who fled Kabul in 2008, entered the European Union through Greece where he was detained for a week. After his release he travelled on to Belgium where he applied for asylum. The Belgium Aliens Office decided not to allow the applicant to stay and issued an order directing him to leave the country.[46] The reasons given for the order were that -according to the Dublin Regulation-, Belgium was not responsible for examining the asylum application; Greece was held to be the responsible Member State. Therefore the Belgian authorities transferred him there in June 2009 where he faced detention in insalubrious conditions before living on the streets without any material support. When the applicant tried to leave Greece, he was arrested at Athens Airport in possession of a false Bulgarian identity card.[47] The applicant was convicted and sentenced to suspended imprisonment. The applicant claimed that Article 2 (the right to life), Article 3 (prohibition of inhuman or degrading treatment or punishment) and Article 13 (the right to an effective remedy) was violated by Belgian and Greek authorities.

The ECtHR had again the possibility to have its say on the conformity of European Union Law with the ECHR. The Court started with stating the obvious recalling that the fundamental rights, as guaranteed by the Convention, are part of European Union law.[48] To simplify, one of the questions to be answered by the Court was whether the "Dublin" asylum regulation is in conformity with the ECHR, namely confirming the risk of a violation of Article 3 of the Convention because of the deficiencies in the asylum procedure and the conditions of detention and reception in Greece.[49] When elaborating on the merits, the Court confirmed that the States must have particular regard to Article 3 of the Convention, which

43 Ibid para 156.
44 CASE OF M.S.S. v. Belgium and Greece (Application no. 30696/09) http://hudoc.echr.coe.int/eng?i=001-103050
45 For furher asylum law related caselaw regarding Dublin regulation see cases: T.I. v. The United Kingdom, K.R.S. v. the United Kingdom
46 Para 9.-23.
47 Ibid para 43.
48 Ibid para 57.
49 Ibid, para 145.

enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct.[50] The ECtHR concluded that the applicant's right under Article 3 of Convention was violated; the facts were specified in details. (E.g. no clean sheets insufficient hygiene products etc.) Furthermore, the Court found that the obligation to provide accommodation and decent material conditions to asylum-seekers entered into positive law as the Greek authorities are bound to comply with their own legislation, which transposes Community law, (Council Directive 2003/9/EC) laying down minimum standards for the reception of asylum-seekers in the member States.[51] The Court found the Community law standards in terms of asylum procedure are satisfactory, stating that it contains a number of guarantees designed to protect asylum-seekers from removal back to the countries from which they have fled.[52] However in practice, there are shortcomings in access to the asylum procedure and in the examination of applications for asylum.[53]

Referring to the equivalent protection passage, the Court concluded that under the Dublin Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country (i.e. Greece) was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations; therefore the presumption of equivalent protection does not apply in this case.[54] The Court went even further stating that the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.[55] The Court therefore concluded that the applicant's transfer by Belgium to Greece gave rise to a violation of Article 3 of the Convention.[56] This case clearly shows that –at the end- the ECtHR as final instance is the minimum standard setter and acts as the human rights watchdog even for the EU regulation and polices. However in the light of Opinion 2/13 of the CJEU this relationship can only be an indirect and informal one as the ECtHR cannot formally impose external control.

50 Ibid, para 218.
51 Ibid, para 250.
52 Ibid,para 299.
53 Ibid, para 301.
54 Ibid, para 340.
55 Ibid, para 353.
56 Ibid, para 360.

Conclusion

It can be concluded that generally the interactions between the case-law of the CJEU and the ECtHR can be seen in a positive light. However the multiplicity of sources of human rights is a source of complexity. Often the engagement across systems lacks transparency and may simply amount to superficial cross-citation rather than genuine engagement.[57]

Legally, the ECHR sets the pan-European minimum standard, so if EU standards fall short of this, this is problematic. As stated above, ECHR provides a minimum standard, EU law may and should offer a higher degree of rights protection than the ECHR in some areas. Hence, positive divergence can arise, resulting chiefly from the different functions the protection mechanisms are designed to fulfil: the ECHR may present an international minimum standard as opposed to the quasi-constitutional standard of the EU.[58]

In contrast, in many other fields strong cross-fertilisation and cross-references between the EU and international protection standards occurs. This interaction is ambivalent in that it may lead to progressive or retrogressive outcomes and opportunities (see Annex 6 on Detention of Migrants and Annex 7 on Refugee Protection).[59]

On the one hand, each court has hung a Damocles sword over the other court. On the other hand they uphold their respective work and increasingly depend on each other.[60]

The range of instruments may contribute to a dangerous complacency about human rights. A further example of such complacency may emerge if one system becomes too deferential to another. As the case of *Bosphorus* shows, the overlapping authority of human rights systems leads to potential clashes in the interpretation of rights. In order to avoid such clashes, systems develop accommodation strategies, which may be too deferential.[61]

The more the ECJ aligns itself on Starsbourg, the more it reduces the risk of being disavowed by the ECourtHR. Conversely, the less the ECourtHR puts Luxembourg under pressure, the more it reduces the risk of being sidelined by the ECJ.[62]

Interaction between human rights systems is so pervasive that the development of constructive human rights pluralism is urgently required[63] but it is also important to ensure that overlapping systems do not converge on the minimum standard. On the other hand

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57 DIRECTORATE GENERAL FOR INTERNAL POLICIES POLICY DEPARTMENT C: CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union systems of human rights protection (2011) p 129. In http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/432755/IPOL-AFCO_ET(2011)432755_EN.pdf (09.27.2017)

58 Ibid,p. 128.

59 Ibid

60 SCHEEK, Laurent 2005: The relationship between the European Courts and Integration trough Human Rights,p. 870, Max-Planck Institut fur auslandisches offentliches Recht und Volkerrecht.

61 Ibid, p.129

62 SCHEEK Laurent 2005, Ibid. p.870 and 871.

63 Ibid, p. 44.

CJEU and ECtHR have identified the core concepts and elements lying behind the constitutionalization of their respective legal systems.[64] What is the source of the constitutionalization of human rights systems? Is it constitutional tradition, heritage, common sense or something else? This could be the target of a separate analysis, although it is closely linked to the subject matter.

On an institutional level the CoE and EU partly occupy the same policy and their relationship is a contentious one. On paper, they like to picture themselves as complementary partners that reinforce each other and consequently improve human rights protection in Europe. Yet, the inflicted principles of complementarity and cooperation seem to remain empty claims. Where regional actors are assertive in applying their own human rights standards, there is a risk of fragmentation of international law, including international human rights law.[65]

As stated by Quinn[66], human rights are too important in the construction of Europe to justify one body (the EU) trying reinvent the wheel. Likewise, they are too important for the other body (the Council of Europe) to stand on the past and not to recognize that the future is constantly being made.

The coherence of two systems is of utmost importance for the effective protection of human rights in Europe, and for the time being this will continue to depend essentially on the judicial forums involved in safeguarding these rights and freedoms.[67]

64 ARCARI, Maurizio and NINATTI, Stefania, 2017, Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights' Case Law, ICL Journal 2017 1:11-41

65 The Evolution of Fundamental Rights Charters and Case Law: A Comparison of the United Nations, Council of Europe and European Union systems of human rights protection p 130.

66 Kolb M.,2013 Conclusion. In: The European Union and the Council of Europe. Palgrave Studies in European Union Politics. Palgrave Macmillan, London

67 MOHAY, The complex relationship of EU law and international law, with special regard to the European Convention on Human Rights Ibid, p.43.

International human rights treaties and the conventionality control in Brazil

Ingo Wolfgang Sarlet[*1]

1. Preliminary Considerations:

Among the problems that are in this more enlarged context, and which is precisely the object of this study, the relationship between the Brazilian Federal Constitution of 1988 (henceforth only CF), the internal legal order (national) as a whole and the rights provided in the International Treaties - ratified by Brazil - assumes increasing relevance, gradually resulting in the incorporation of what is usually called a 'control of conventionality' of internal normative acts, i.e., a control of compatibility between national legislation and the parameters laid down by International Treaties[2].

As the Brazilian experience and the evolution already before the promulgation of the Federal Constitution of 1988 (CF) show it, there were - with few exceptions, generally in the field of international law - greater receptivity on the part of the legal community regarding the subject, either from the point of view of their dogmatic treatment, but especially in judicial practice.

With the advent of CF it was to be expected a twist in this area, since, in a pioneering way in the Brazilian law, the constituent, in line with the most recent developments, made it appear in the constitutional text the principle of prevalence of human rights in international relations (article 4th, II), as well as the stated in paragraph 2nd of article 5th, that the rights expressly positivized in the constitutional text do not exclude others arising from the regime and principles of CF but also encompass the rights of the International Treaties of which Brazil is part.

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[1] We thank Professor, Juris Doctor (PUCRS), CATARINE ACIOLI for her valuable assistance in researching and selecting the jurisprudence referred to in the last chapter of this paper.

[2] MAZZUOLI, Valerio de Oliveira, *O Controle Jurisdicional de Convencionalidade das Leis* (The Jurisdictional Control of Conventionality of Laws), 4ª ed., São Paulo: RT, 2016.

Thereby, the open normative-textuality of the constitutional catalog of rights, before (at least verbatim) restricted to rights deriving from the principles and the constitutional regime, was extended to include, in the so-called block of constitutionality, the rights enshrined in the sphere of the International Human Rights Law.

It was not, however, what happened, at least not for most of the first two decades of CF. If, on the one hand, in the field of legal literature began to be more responsive, growing the number of authors to take care of the subject and even to defend a strengthened legal force, in the condition of materially fundamental rights and with constitutional hierarchy of human rights treaties, the same not found in the judicial sphere. In fact, despite the acceptance of such an understanding in isolated decisions by judges and courts, including the Superior Court of Justice (TSJ)[3], in general concerning, at the time, the so controversial arrest of the unfaithful trustee (best unfaithful bailee)[4] the Supreme Court (STF)[5], urged to speak again on the subject, opted to maintain its position prior to 1988, in the sense of parity between treaties (including human rights) and ordinary legislation.

It is possible to affirm that a new phase of the debate, academic and jurisprudential, began with the promulgation of Constitutional Amendment 45, of December 08, 2004 (hereinafter EC 45), by means of which the inclusion of a § 3rd in article 5th, concerning the incorporation of international human rights treaties into domestic law. According to this provision, "international treaties and conventions on human rights that are approved in each House of the National Congress in two rounds, for three fifths of the votes of the respective members, shall be equivalent to constitutional amendments". This has led to a series of perplexities, related to both formal (procedural) and material issues, including the legal force of human rights treaties in the domestic sphere.

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[3] The Superior Court of Justice (acronym, STJ) acts as guardian of the uniformity and authority of national law and exercises the powers of a review court (third instance) in relation to decisions of the ordinary courts of the common state and federal courts.

[4] Note: The translation of "depositário infiel" has been translated "unfaithful trustee", however "trustee" is never used in English to describe the status of one who hold third-party goods to the order of a court or some other public body and therefore has semi-public status; and in the nearest Portuguese legal concept to "trust" is "fideicomisso", although it is limited to succession, so the equivalent term is "fiduciário" (fiduciary) not "depositário" (bailee). If you search for the use of the - unfaithful trustee, in English legal texts you do not encounter anything like the Brazilian concept of "depositário infiel", which is "aquele que não restitui o depósito voluntário ou necessário, quando exigido" (who does not return the voluntary or necessary deposit, when required). So, the best correspondence in English is the "unfaithful bailee", for the first time appearing in the Supreme Court of Oklahoma in the Seidenbach's case v. A. E. Little Co., 261 P. 175 (Okla. 1927), Filed: October 11th, 1927 (available online at https://www.courtlistener.com/opinion/4067282/seidenbachs-v-a-e-little-co/?). In this context, we translate "depositário infiel" by the unfaithful bailee, we could also use the unfaithful receiver, or unfaithful receiver pending lite, but we would need to clarify the concepts further.

[5] The Brazilian Supreme Federal Court (acronym STF) formed based on the model of the US Supreme Court, exercises majority and primary functions of a Constitutional Court, but cumulated with other jurisdictional competences as criminal suits by origin, among others.

At this point, once incorporated and in force § 3rd of article 5th of the FC, the STF also had the opportunity to take up the subject by revising the previous position (which guarantees the same hierarchy of ordinary laws to human rights treaties), recognizing the prevalence of human rights treaties in relation at least to internal infra-constitutional law, all to be examined more slowly in sequence. But also, here the terrain follows fertile in what it says with the various issues that involve this - in Brazil - still new modality of judicial control of the normative acts and even acts of the public power in general. In the STF itself, especially when examining the subsequent decisions to its leading case, there are some inconsistencies and partly different movements, even if from a quantitative point of view - which is already indeed a significant breakthrough - too few decisions invoking human rights treaties and also decisions of international courts are increasing.

Another noteworthy aspect, still in the preliminary seat, is the lack of clarity and a more solid position and policy on the part of the STF, particularly as to the criteria (the How) to carry out such control and to resolve conflicts between the treaties and the internal order , does not allow (and even does not stimulate and much less bind) ordinary instances to carry out conventional control. In addition, they remain open, although already discussed in the doctrine, relevant issues that involve both the parameter and the object of the control of conventionality, their scope, the criteria for the solution of conflicts, as the effects of decisions, that without Talk about problems related to the control initiative and the competent bodies to the same. Thus, given the breadth of the central problem and its related aspects and considering the primary and directive role of the STF also in this matter.

The objective to which we propose is, once revisited the subject of the normative force of the human rights treaties in the order Legal-Constitutional Brazilian, present some central questions linked to the control of conventionality. Subsequently, in the sequence, to inventory and analyze the fundamental decisions of our Supreme Court in which the human rights treaties they were somehow weighed in their reasons and culminating in a final synthesis. It should be noted, moreover, that we will be here facing only the so-called internal control of conventionality, that is, that carried out by the national courts in relation to federal (domestic) law and not the designated external control, Carried out by the International Tribunals on compliance, by the States which ratified the Treaties and submitted to their jurisdiction, of the parameters laid down by the international law of human rights, limiting us to judged by the STF.

2 – The legal value of human rights treaties in the Brazilian constitutional order and the so-called control of conventionality

The Constitutional Amendment No. 45 (EC 45), which dealt with the reform of the judiciary, added – as already stressed – a § 3 ° to art. 5th of CF. This precept eventually inserted in the constitutional text a standard (in this case, a procedural-type rule), with the form of incorporation into the internal law of human rights treaties, which, interpreted in harmony with art. 5 °, § 2 °, can be understood as ensuring – in principle and in being adopted such a procedure – the condition of formally and materially fundamental rights to the rights enshrined in the international convention's plan.

From this, the normative status of the treaties ratified by Brazil was also re-discussed before the insertion of this new procedure, since until then the settlements were incorporated into the internal law employing approval by a simple majority by the National Congress using the formal instrument called the Legislative decree agreements.

It is to be noted, in this context, that since the enactment of the CF, the Brazilian majority doctrine was already advocating the understanding that the human rights treaties, once ratified, would have all hierarchy equivalent to that of the original constitution, in Terms of article 5, § 2 of CF, for the simple fact that fundamental rights are always rights of constitutional matrix and the aforementioned device has on the recognition and integration of other fundamental rights not contemplated in the catalogue Constitutional rights already defined by the constituent[6].

Thus, as Flávia Piovesan affirms, in the case of the treaties incorporated by the more rigorous rite provided for in article 5th, § 3rd, of the CF, would it be only (?) reinforcing - at the formal level - its material constitutional hierarchy right from article 5th, § 2rd, of the Federal Constitution) that - according to the author and the dominant doctrine - guaranteed to all international human rights treaties ratified by Brazil[7]. Of any luck, despite the already old and insistent election of the majority doctrine, the STF, although it has worthily (and in fact it was a significant advance) consecrated the supra-legal hierarchy of human rights treaties in domestic law, It was reserved the prerogative to continue to control the constitutionality of the agreements in general, but also of the human rights treaties, refuting, by a majority, the thesis of parity between human rights treaties and CF, no matter, for this purpose , whether or not the deals approved by the Rite of § 3rd of article 5th.

In any case, it deserves applause that the STF has reviewed its previous doctrine, which only ensured the human rights treaties of ordinary law, equating them with any and all

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[6] See, for all, PIOVESAN, Flávia, Direitos Humanos e o Direito Constitucional Internacional, 17th. Ed., São Paulo: Saraiva, 2017.
[7] See, PIOVESAN, Flávia, *Reforma do Judiciário e Direitos Humanos*, *op. cit.*, p. 72.

other international pacts. In fact, seeking to reconcile the prominent role attributed by CF to human rights treaties with the supremacy of the Constitution, the STF ended up migrating to the thesis of the supra-legal hierarchy of such agreements, including and especially those that approved before EC 45. The problem of such an understanding, for now consolidated even though not in a unison way, is that even if the supra-legal hierarchy has represented a considerable advance in relation to the prevalent understanding, it is that which follows by relegating human rights Enshrined in the international treaties to a secondary position in the face of the fundamental rights of CF, since the STF, as well-appointed, ended-in the matter of human rights treaties-creating a "duplicity of legal regimes".[8] Thus, in the light of the preceding and a summary form, it is necessary to distinguish between the dominant position in the doctrine, a criticism of the STF, arguing that human rights treaties have a value equivalent to that of the CF and constitute a constitutional block with it position adopted by the Supreme Court of Brazil.

To prevail its current orientation, for the STF are three possibilities in terms of the legal force of the Treaties in the domestic order: a) Hierarchy equivalent to constitutional amendment, in the case of human rights treaties incorporated by observance of the rite established by § 3rd of article 5th of CF; b) supra-legal hierarchy, applicable to human rights treaties ratified by the conventional system, by means of a legislative decree approved with a simple majority, prior to EC 45; c) hierarchy of ordinary law, which is still the position adopted in relation to the other treaties, which do not incorporate the international system of recognition and protection of human rights. Thus, some general considerations concerning state of the art in Brazil woven with regard to the problem of the hierarchy of human rights treaties according to the doctrine and jurisprudence, is prepared the ground for, in the next item, we face, even in Summary character, some of the aspects that relate to the so-called control of conventionality and their respective assumptions and limits.

Irrespective of the position adopted for a constitutional hierarchy of all human rights treaties ratified by Brazil, it is possible to affirm that both the Treaties incorporated by the Rite provided for in paragraph 3rd of art. 5th of the CF, as well as the other treaties, approved until the advent of constitutional Amendment 45/2004 and the simplified procedure of legislative decrees and which have supra-legal hierarchy, they must, by virtue of their superior authority in relation to the remainder of the Internal regulations, the possibility (and even the duty) of benchmarking the compatibility between such normative acts and the treaties which are superior to them.

This, as already mentioned, be evidenced in the STF decision on the prescription - by means of a "paralyzing" effect - of the effectiveness of any legal hypothesis providing for the civil arrest of the unfaithful bailee, whether created before the treaty was approved or

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[8] See, for all, MAZZUOLI, Valerio, Curso de Direito Internacional Público, op. cit., p. 386.

introduced later, in spite of the maintenance, in the constitutional text, of the hypothesis of such modality of civil prison.[9] Thus, without going into the specific subject of the civil prison and the decision of the STF on the question, what matters is the observation that for the first time the highest Brazilian Court has denominated, in Brazil, a control of conventionality.

The adopted terminology, in turn, seeks to highlight the distinction between the control of constitutionality, because independently of its constitutional hierarchy, it is a matter of affirming that the treaties (here referred to by the term conventions) operate as a parameter for the control of other normative acts which are hierarchically inferior to them. As for the parameter of a control of conventionality in the domestic legal order, a first question - by itself not immune to dissent - concerns which international treaties can serve as a parameter for a control of conventionality at the internal level, since it is evident that for the defenders of parity between treaties and CF, all agreements integrate with the same legal dignity the "constitutionality block", in order to be simultaneously parameters of the control of constitutionality and the control of conventionality.

But although this is a long-standing position, we will take as its starting point the current orientation of the Supreme Court, which as a guardian of the CF, which holds the last word also in this field. Still, it would be possible to advocate a differentiated treatment, depending on the nature of the human rights treaty or even by its way of incorporation, which, incidentally, corresponds to the current understanding of the STF. However, the distinction between treaties ratified before the promulgation of EC 45 and adopted by a simple majority and the agreements incorporated by the rite provided for in article 5th, § 3rd, CF, although implying a treatment in a different way, does not prevent all treaties of human rights ratified by Brazil, are, by virtue of their hierarchy superior to the domestic infra-constitutional norm, parameter for the control of conventionality. Such control, as in the case of constitutionality control (judicial review), is - according to the STF's orientation - mainly due to the superior normative hierarchy assured to the human rights treaties, when, according to the model defended by the defenders of a constitutionalism of multiple levels, there is no hierarchy between the internal and the international order, but the need for a harmonization that does not presuppose the supremacy of one or the other. In the same way, it does not seem correct, barring better judgement, to distinguish, for the purposes of conventionality control, only part of the human rights treaties, seeking to define conventions (still more for the use here discussed) that the agreements should then incorporated by the rite of Article 5th, § 3rd, of the CF, whereas a simple majority could approve other human rights treaties.

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9 See. especially the vote of Justice Gilmar Mendes in RE 466.343, Opinion, Justice Cezar Peluso, published in the DJ on 05.06.2009.

What really becomes relevant is that the difference between treaties with status equivalent to those of a constitutional amendment and the other agreements endowed with supra-legal hierarchy, in terms of the orientation printed by the STF, lies in the fact that the former become part of the "block of constitutionality", operating as a parameter of both a constitutionality control and a conventionality control.

The highest difficulty in these cases (now only the Convention on the Rights of Persons with Disabilities, its Optional Protocol, and the Marrakesh Convention) will be to verify, in the circumstances, the existence of a possible conflict between the adopted treaty and the " stony clauses " of the original version, a situation in which, if the STF position prevails in the sense that the conflict between agreement and constitution resolved in principle in favor of the second, it may result in the declaration of unconstitutionality of the international treaty (in fact, of the text approved by the National Congress). However, this hypothesis has not yet been subject to appraisal by the STF and, if it occurs, it will isolated, mainly because the CF is lavish in fundamental rights and has consecrated - expressly and/or implicitly - virtually all the rights enshrined in the primary international documents, but also by the fact that one has to resort to the "technique of interpretation according to the constitution" which, barring better judgement, it will further limit that possibility, even if it cannot withdraw immediately. In addition, regarding the treaties approved by the qualified rite of § 3rs of article 5th of the CF, the differential lies in the fact that, because they are part of the "constitutionality block", they operate as a parameter of constitutionality control (judicial review) by "concentrated and diffuse basis", all constitutional actions and resources that guarantees access to the Supreme Court, which ultimately decides on the compatibility of internal infra-constitutional law and even of treaties (whether they have a supra-legal hierarchy or just legal) with the CF.

As for the treaties which, according to the STF (except for the divergent position of the dominant doctrine) have a supra-legal hierarchy, some alternatives can already envisage in what concerns the control of the compatibility between acts of the public power - in particular, regulatory acts - internal, as well as of the constitutionality control of the treaties themselves: a) incompatibility between domestic (infra-constitutional) legislation and the agreement approved by the National Congress, but simultaneously compatible with the CF; b) incompatibility between internal rules and treaties, but also nonconformity with CF; c) compatibility with the agreement but nonconformity with CF.

The frame summarily presented reveals that the double regime created by the STF for human rights treaties, but mainly because the STF asserts its competence to carry out the control (diffused and concentrated) of constitutionality of the agreement, makes the question even more complicated, besides putting the control of conventionality, at least in principle, in a subaltern condition to the own control of constitutionality. In any case, this should not

serve as an excuse for the ordinary Judges and Courts to renounce the control of convention, since it is in its nature, a real power/duty attributed to the Judiciary, either in a diffuse control or by via an abstract and concentrated control, as proposed by Valério Mazzuoli[10] and Luiz Guilherme Marinoni[11], matter that we do not intend to develop here. That control of conventionality is not, on the other hand, a purely judicial control is also to underline, and perhaps it may merit some additional attention as a plausible hypothesis.

The Legislative Branch, when considering a bill, should always find the compatibility of the legislation with the CF, must also take as parameter international treaties, which, moreover, does not apply only to human rights treaties. One cannot forget, at this moment, that domestic legislation incompatible with a treaty ratified by Brazil, which is in effect at supra-national level is a violation of the deal, leaving the legislature to operate preventively also in this area. Likewise, the Chief Executive should veto a law approved by the Legislative when it detects violation of an international treaty, even if a veto justified by the possible unconstitutionality of the statute is not taken care of here, except in the case of an agreement approved by Article 5 § 3rd, of the Federal Constitution, where, at least as we have suggested, the treaty - even in accordance with the STF's understanding - integrates, at least in general, the Brazilian constitutional block. In any case, we take care of a topic that deserves development through specialized doctrine, and that can shed more light on the subject of what we have been able to (and even try to) do here.

Another important topic that presented here illustrates the effects of the control of conventionality (and of the respective and eventual declaration of unconventionality) on the legal and internal infra-legal regulations. In this context, the Supreme Court has already ruled on the recognition of what it has designated (especially on the occasion of the vote by Justice Gilmar Mendes, cited above) of a paralyzing effect, which prevents the adoption of supervening legislation to the contrary and removes the application of a previous incompatible law with the treaty. If the example of what happens in the control of constitutionality can declare the nullity of the law based on an international treaty (a more plausible hypothesis when dealing with a settlement with status equivalent to constitutional amendment), therefore, if it is the case of affectation of the sphere of the validity or only of the effectiveness of normative acts assessed on the basis of international treaties, is also a topic to be explored in the literature and subject to the practice of the Courts' decision-making practice. For now, however, to the lack of more examples available in the jurisprudence of the STF - except for the decision on the public arrest of the unfaithful bailee - it is to be hoped that the doctrine, attentive to the problem, can construct suitable alternatives.

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[10] See, MAZZUOLI, Valério de Oliveira. Curso de Direito Internacional Público, op. cit., p. 394 e ss.
[11] See, MARINONI, Luiz Guilherme, op. cit. p. 1187 e ss.

In the case pointed out by Valério Mazzuoli, there is a need to perform a two-fold control of the vertical material compatibility of rules of domestic law, in the sense that, in the case of an internal norm subsequent to the ratification of the treaty, the declaration of its opposition to the agreement, either in the diffuse control or in the concentrated control, implies loss of its validity due to material defect, as well as the consequent loss of effectiveness. However, if the human rights treaty ratified by Brazil after the rule of domestic law enters into force, the declaration of unconventionality will cause its immediate revocation. The author also makes a distinction between the loss of validity and the validity of the rule of domestic law, noting that there are situations in which this rule is formally and materially compatible with the Constitution (the first way of vertical compatibility) and, therefore, in force, but incompatible with the human rights treaty, which makes it invalid through the realization of the dual vertical harmony of material, and results, in its view, in a more complete kind of control of the validity of legal norms[12].

Luiz Guilherme Marinoni, in spite of highlighting, according to the dominant line in the Federal Supreme Court, the super-legality of human rights treaties that not approved in the manner of § 3rd of art. 5th of the Federal Constitution of 1988, accompanies Mazuolli's understanding of the invalidation effects of the decision declaring the unconventionality of the rules of domestic law conflicting with this kind of international treaty[13].

Differently, for André de Carvalho Ramos, the "true" (our quotation marks) control of conventionality only occurs at the international level (that is, in the sphere of so-called external control), whose interpretation must be followed by the national bodies through a Dialogue of Courts. However, regarding the effects of the decision recognizing the violation of the international human rights treaty, Ramos acknowledges the invalidation effect of the decision in the control of national convention, noting, however, that - according to the STF - the human rights treaties approved by the rite provided for in art. 5th, § 3rd of the CF are now part of the restricted constitutionality block[14].

Thus, it is possible - except for the personal position to affirm the existence of an external and internal control of conventionality and the criticism of the twofold model adopted by the Supreme Court - accompanying in the substantial the authors mentioned, that eventual incompatibility between the internal regulations, in whole or in part, implies the declaration of its invalidity and consequent inapplicability. In any case, given the fact that, in matters of conventional control, both doctrine and Brazilian jurisprudence are at a stage that can be (still) called embryonic, it is clear that a more detailed and reliable balance of the

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[12] See, MAZZUOLI, Valério de Oliveira. *O controle jurisdicional de convencionalidade das leis*. 4 ed. São Paulo: Editora Revista dos Tribunais, 2016, p. 160 e ss..

[13] See, MARINONI, Luiz Guilherme. Controle de Convencionalidade, in: SARLET, Ingo W., MARINONI, Luiz Guilherme e MITIDIERO, Daniel. *Curso de Direito Constitucional*. 4ª ed., São Paulo: Editora Revista dos Tribunais, 2015, p. 1334-1335.

[14] Cf. RAMOS, André de Carvalho. *Curso de Direitos Humanos*. São Paulo: Saraiva, 2014, p. 386-403.

primary material and procedural for the time being is quite reckless. On the other hand, in recent years several cases can be identified in which the Brazilian Judiciary, here represented by the STF, has - in some way - ended up doing a control of conventionality, although it is possible to criticize the fundamentals or the outcome of the trial.

4 – Presentation and brief analysis of some cases judged by the STF

In the case of internal control, carried out by the Brazilian courts, although there are isolated decisions of the High Courts invoking human rights treaties, the main issue brought to the Judiciary, which eventually resulted in a change in the dominant jurisprudence of the Supreme Court (whose decision-making practice prioritized) in this matter, especially about the hierarchy of treaties in domestic law, was, as already mentioned, recognition of the unlawfulness of the possible civil arrest of the unfaithful bailee, whether created by statute for specific situations or in the case of typical deposit agreements or even in the case of judicial bailees.

The primary (and first) case, already mentioned when analyzing the problem of the hierarchy of treaties, was Extraordinary Appeal 466.343-1, Rapporteur Justice Cezar Peluso, Full Court, on 03/12/2008, at which time, the despite the fact that it acknowledged that the cases of imprisonment of the unfaithful bailee provided for in the legislation on collateral security (and their counterparts) would already be unconstitutional for breach of the principle of proportionality, has been accepted as the guarantor of the winning position by Justice Gilmar Mendes affirmed the supra-legal hierarchy of all human rights treaties ratified until the promulgation of Constitutional Amendment 45/2004, which inserted the already mentioned § 3rd in article 5th of the CF, after a minority of three Justices who underwrote the thesis of the parity between treaties human rights and the CF. As a consequence, it decided that the treaties would have a paralyzing effect, not only implying the non-application of any previous legal hypothesis but also blocking the creation of new premises of imprisonment of the unfaithful bailee. Also, in subsequent judgments, the Supreme Court eventually excluded even the possibility of determining the arrest of the unfaithful judicial bailee, prescribing - by decision with binding effect - entirely any chance of legislative creation of hypothesis of local detention of unfaithful bailee.

A second relevant case, which generated a significant criticism by journalism professionals on the need for a specific higher diploma enabling the exercise of journalism, the STF, in a judgment by a majority of votes held on June 17, 2009, under the terms of opinion of Justice Gilmar Mendes Rapporteur, upheld Extraordinary Appeal 511961, in the sense that the norm contained in article 4th, item V, of Decree-Law 972/1969, which determines the compulsory submission of a diploma of higher education registered in the

Ministry of Education for the exercise of the profession of journalist, was not approved by the CF, in addition to violating Article 13 of the American Convention on Human Rights, as it represents an unreasonable limitation on the right to freedom of expression and, as a consequence affect the unconditional and useful exercise of journalistic freedom, including reference to the precedents of the Commission on Human Rights and the Inter-American Court in this regard sense.

In criminal matters, there are several cases in which the Supreme Court ended up, in some way, using the human rights treaties parameter to mark their decisions. On 01.09.2010, by a majority vote of the Rapporteur, Justice Ayres Britto, the Plenary of the STF decided to partially grant the order under Habeas Corpus 97256, filed by the Public Defender of the Union in the face of a decision issued by the Superior Court of Justice, to remove the prohibition contained in article 44 of Law 11.343 / 2006 regarding the substitution of custodial sentences for rights-restricting sentences in drug trafficking offenses. In his reasoning, the Rapporteur used as a parameter the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which allows for the incidence of substitution of deprivation of liberty in such cases, as well as emphasizing that this international treaty incorporated by Brazil through Decree 154 of 26 / 07/1991, which resulted, therefore, in the recognition of its prevalence (given its supra-legal hierarchy) in the face of Federal Law 11.343/2006, the law that typifies and regulates the process involving trafficking and consumption in Brazil. Also in the criminal sphere, the STF, on November 22, 2011, in Action on Extradition 1223, reported by Justice Celso de Mello, unanimously of the 2nd Group, denied an extradition request based on an extradition treaty between Brazil and Ecuador, recognizing the fundamental guarantee of double jeopardy laid down in Article 14 7 of the International Covenant on Civil and Political Rights, by virtue of its supra-legal hierarchy, as an insurmountable obstacle to the institution of criminal prosecution in Brazil against naturalized Brazilians, who committed a common crime before their naturalization, except drug trafficking, and has already been convicted or acquitted, with finality, for the same offense abroad.

A controversial subject, and concerning which there has been intense doctrinal controversy, but also jurisprudence, it says with the recognition or not of a right-guarantee of the double degree (right to appeal with the opportunity to have the former decision completely reversed or modified) of jurisdiction in Brazilian domestic law, especially in the face of the inexistence of express constitutional provision to respect. It should note that, in general, the STF was refusing recognition of a right to a double degree of jurisdiction, or I understand that it does not assume the condition of absolute right and may be subject to restriction by the need to reconcile its incidence with the peculiarities of domestic law. However, taking up the topic and despite a series of previous decisions in a different sense,

the STF on September 12, 2013 by majority vote and in the scope of a Criminal Suit 470 (better known as the "Mensalão" judgment) understood that the fundamental guarantee provided for in Article 8th of the American Declaration of Human Rights (Pact of San José) applies to proceedings that initially commenced in higher courts and that the court itself could make the review of the matter from the handling of the appeal provided for in the Rules of Procedure of the Court.

Important judgemend - again in criminal matters - concerns the so-called "custody hearing" (actually a presentation hearing)[15] which is a procedure initially created by the São Paulo Court of Appeals, through Appointment 03/2015, as a form of to comply with the provisions of the Pact of San Jose - Article 7, 5, in which it establishes that any person detained must be present without delay to a judge. In this case, the STF, on 08/20/2015, by majority vote and in the opinion of Justice Luiz Fux, met, in part, the request in Direct Action of Unconstitutionality 5240, dismissing it as unfounded[16]. In examining constitutionality, the Supreme Court also analyzed the conventionality of the aforementioned normative act in the face of the American Convention on Human Rights, since its article 7th, 5, provides the necessary basis for validating the aforementioned normative act, in addition to understanding that there is no violation of the constitutional rules that involve legislative competence in matters criminal procedure. It should emphasized that the case of the so-called custody hearing, in addition to having been the subject of an affirmative decision of the Supreme Court in terms of constitutionality and convention control, illustrates the possibility (controversial in the eyes of those who believe that the measure would lack regulation legal) granted to the Judiciary in order to comply with the requirements established in International Conventions, within the scope of its administrative and procedural jurisdiction, due to the rule of immediate applicability of civil and political rights and guarantees, as also affirmed by the CF in relation to rights fundamentally in general (Article 5th, paragraph 1rt), especially that it is not in this case correctly to "legislate" on process and procedure, but rather to implement, in logistic and operational terms, a concrete measure that already derives from internal legal obligation , notably because the National Congress has approved, without reservation, the American Convention of Right s at the point in question.

Also worthy of mention are cases judged by the STF, which had as a parameter the Convention on the Rights of Persons with Disabilities, which, having been approved by the National Congress observing the rite of § 3rd of Article 5th of the Constitution, has a hierarchy equivalent to that of a constitutional amendment and thus integrates the constitutionality block, converting and directly dialoguing whit the control of

[15] Here in the broader sense than that of the United States Law of determination of custody allocations.
[16] The direct action of unconstitutionality is an instrument to declare the unconstitutionality of law or federal norms, with respect to the current Constitution (see: https://bit.ly/2GMeJNn, permanent link).

constitutionality and the control of conventionality. In the first instance, the STF, by means of the judgment of the Ordinary Appeal on Security Mandate 32732, reported by Justice Celso de Mello, 2nd Group, judged on June 3, 2014, was unanimously settled that the Brazilian Public Administration has legitimacy to offer differentiated treatment to persons with disabilities in access to public positions, and must follow objective criteria to define the general areas that will meet this specific quota, so that the Government must implement compensatory mechanisms designed to correct the grave social disadvantages that affect vulnerable people in order to provide them with a higher degree of inclusion and to enable their active participation in equitable and fair conditions in the economic, social and cultural life of the country.

The second most recent case, decided on June 9, 20169 (ADI 5357), reported by Justice Edson Fachin, declared constitutional the norms contained in the Statute of the Person with Disability (Law 13,146/2015), which establishes the obligation for private schools to promote the insertion of persons with disabilities into regular education and to provide for the necessary adaptation measures without the financial burden being passed on through school fees (tuition, annuities or inscriptions).

4 – Final remarks

From all of the preceding, it is possible to show that, about the value attributed to international human rights treaties, Brazil recorded essential advances under the aegis of the CF. This is due both to the express recognition that human rights treaties are part of the catalog of fundamental rights and guarantees of the Constitution (Article 5, § 2), an innovative prediction of the Brazilian constitutional trajectory and ratification in the first half of the 1990s (although belatedly) of the leading international treaties of a general nature, as is the case of the two International Covenants of the United Nations both of 1966, as well as of the American Convention of Human Rights of 1969. Besides this, the affirmation of the prevalence of human rights within the framework of the fundamental principles governing Brazil's international relations (article 4th) demonstrates that the constituent project was to open up to the global (and regional) system for the protection of human rights

Particularly relevant, as already pointed out, is that the STF itself revised its understanding (2008) and assigned a supra-legal hierarchy to human rights treaties in general, except those approved by the rite of article 5th, paragraph 3rd, of the CF, which will then have authority equivalent to constitutional amendments.

Since then, both the STF and even other Courts have gradually used international treaties to motivate their decisions in several relevant cases, although in general, as the examples already mentioned, account has not been taken of domestic law (as occurred

in the case of the civil prison), but instead, the treaties used as interpretative and justification parameters, all within the scope of what called a control of the convention of laws. Of course you do not forget condemnations suffered by Brazil by the Inter-American Court of Human Rights, nor is it overlooked that the theory and practice of conventional control is still far from being assimilated, resulting in a routine performance by the actors of the judicial scene, but also, within the scope of the respective attributions and in the plan of a control of a political nature, by the legislator and the Executive Branch.

In the same way, it remains problematic, at least in our eyes and expressive doctrine, that the solution carried out by the STF in defending two modalities of normative force of the treaties. Distinguishing between those who approved as equivalent to constitutional amendments, and agreements (which are the overwhelming majority) that merely passed by Congress by a simple majority, which have the supra-legal hierarchy and not considered as parameters of the constitutionality control, but only of conventionality. In addition, although many issues continue to challenge an adequate reflection and solution, the fact is that the balance that can make in this field, mainly through a comparison with the picture verified in the first twenty years of the CF, is confident and suggests further improvement and consecration in terms both quantitative and qualitative of the control of conventionality and respect for the decisions of the International Courts by Brazil.

Italian Constitutional Court and social rights in times of crisis: in search of a balance between principles and values of contemporary constitutionalism

Giovanni Guiglia

I. The difficult role of the Court in times of economic crisis.

In periods of economic and financial crises, the effectiveness of social rights, as "costly rights"[1], has been jeopardized. Indeed, several states have adopted severe austerity measures aimed at curbing public spending, in accordance with their domestic[2] and international duties[3] to balance revenues and expenditures. For instance, European Union (EU) law demands balanced domestic budgets to EU member states to target economic stability. The required measures are capable of affecting social rights of people at large but tend to hit harsher on the most vulnerable groups and individuals. For this reason, common judges, and in particular national Constitutional Courts are engaged in a difficult interpretative activity to justify austerity measures[4], striking a balance between conflicting interests, values and principles.

Italian membership to the EU and its acting on the global market entail a multi-layered institutional and regulatory set-up. In this context, it emerges the contradiction between an existing system of domestic social and welfare policies, on the one hand, and the substantive transfer of decisions on economic and financial policies, on the other hand, now even outside the EU legal and institutional framework.

The Italian Constitutional Court (also "the Court") cannot avoid guaranteeing constitutionally established social rights, although compressed and qualified by the

[1] HOLMES, SUNSTEIN (1999), especially p. 87 ff.
[2] GIANNITI (2011); LIPPOLIS *et alii* (2011); BILANCIA (2012); BRANCASI (2012), pp. 108-111; CABRAS (2012) pp. 111-115; CIOLLI (2012); ID. (2014); CORONIDI (2012); DICKMANN (2012); LUCIANI (2012); PEREZ (2012), p. 929 ff.; AAVV (2014); GIUPPONI (2014), pp. 51-78; MORRONE (2014); GAMBINO (2015); MARCHESE (2015); BELLETTI (2016); CARLASSARE (2016).
[3] See, *ex plurimis*, BESSELINK, REESTMAN (2012); BONVICINI, BRUGNOLI (2012); POIARES MADURO, DE WITTE, KUMM (2012); ROSSI (2012); DONATI (2013); BARATTA (2014); PISANESCHI (2014).
[4] CONTIADES (2013); ABBIATE (2014), p. 515 ff.; COCCHI (2014); DONATI (2014); FABBRINI (2014); FASONE (2014); FONTANA (2014); ROMAN (2014); BRANCATI (2015); FARAGUNA (2016); MARCHESE (2016), p. 32 ff.

principles of "graduality"[5] and "balance" of interests[6], so that they do not remain completely defenseless vis-à-vis externally decided austerity measures that are likely to impact on the welfare state.

The Court, during the current crisis, has received an increasing number of cases of judicial review ("question of constitutional legitimacy") regarding measures affecting the socio-economic rights of different groups of people (pensioners, non-contracted public servants, magistrates and, in general, contributors). Its decisions have not always been crystal clear, and doubts remain regarding the actual share of "sacrifices" that they entailed and about their suspect politicization, especially when references are made to the economic crisis or to elements of political economy as arguments to "save" rules that would otherwise have been declared as unconstitutional.

In some cases, the Court has condoned measures that restricted social rights, as means to reduce costs; in others, the decisions have had a "centralizing" function and limited the autonomy of the competent territorial authorities, arguing for the need of lower spending and greater efficiency. Moreover, in other cases, the Court has also modulated the effects of its decisions in order to limit their impact on the country's economy. Overall, some findings have generated doubts about the impartiality of the Court[7]. This concern does not regard its role of formal guardian of constitutional values and principles[8], but it is about that of concrete adjudicator of socio-political conflicts[9].

However, it cannot be ignored that all constitutional courts, at least those of western countries, are today asked to play a very difficult game when they adjudicate on the constitutional legitimacy of legislative measures that negatively affect social rights. Indeed, they might be considered co-responsible for the social inclusion and the well-being of people and the society.

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[5] The principle of "gradual realization" or "graduality" of the Italian constitutional theory corresponds to that of "progressive realization" in international human rights law. It reflects the idea that socio-economic rights require steps of a legislative, economic and technical nature to be realized. Social rights need the allocation of available resources and, although recognized in the Constitution and international legal sources, they cannot be fully realized and enjoyed immediately, but "gradually" or "progressively" but their core content.

[6] BOGNETTI (1993), p. 46 ff.; LUCIANI (1995), p. 97 ff.

[7] MIDIRI (2011), p. 2235 ff.; BENVENUTI (2012), p. 375 ff.; ID. (2013), p. 969 ff.; SALAZAR (2013).

[8] It is not possible here to offer an answer to the question about the correct definition of *principle* and to specify its differences with the concept of *value*; see, *ex multis*, BALDASSARRE (1991); D'ATENA (1997); GUASTINI (1998), p. 641 ff.; DI BLASI (1999); BONCINELLI (2007), p. 61 ff.; FERRAJOLI (2007); LONGO (2007); SCACCIA (2011); MEZZETTI (2015); ID. (2016), p. 21 ff.

[9] COLAPIETRO (1996), p. 3.

The Italian Constitutional Court, when defending social rights, relies on its function of "centralized" judicial review(er), resorting to a rich list of the constitutionally codified rights, not just of a social nature, and to its fundamental principles: mainly that of human (and social) dignity[10], supported by the «fundamental axiological couple»[11], namely the principles of solidarity and equality (Articles 2 and 3 Const.).

This does not mean, however, that these principles must be interpreted and balanced only following the case law of the Italian Constitutional Court. Conversely, this interpretative activity should look at findings that have been developed by international judges and bodies. Indeed, the principles enshrined in the Italian Constitution are now largely in line with the principles and values of international and EU law[12].

The Court in compliance with the Italian constitutional system and with the internationalist principles on which it is based (Articles 10, 11 and 117, para 1 Const.) appears to be progressively (but not without hesitation) more willing to employ protective standards, principles and values originating either outside the domestic legal framework or by dialoguing with other European jurisdictions. This is the so-called «Constitutional pluralism»[13].

Considering the still-ongoing economic and financial crisis, this paper intends to show the trends of the Italian constitutional case law dealing with social rights, while highlighting its underlying principles and values. This analysis can be useful to identify similarities and differences of the Court's findings with those of other national, regional and international legal orders and their respective jurisprudence. For this reason, in the concluding section of this paper, the analysis will refer to the interpretative approach of the European Committee of Social Rights (ECSR) – the monitoring body of the European Social Charter - and its decisions held during the

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[10] BARTOLOMEI (1987); RUGGERI, SPADARO (1992), p. 221 ff.; BOGNETTI (2005), p. 85 ff.; SACCO (2005), p. 583 ff.; CECCHERINI (2006); BELLOCCI, PASSAGLIA (2007); LUTHER (2007), p. 185 ff.; PIROZZOLI (2007); ID. (2012); SILVESTRI (2007); VINCENTI (2009); DI CIOMMO (2010); DRIGO (2011); ID. (2017), p. 6 ff.; MONACO (2011), p. 45 ff.; RUGGERI (2011); RUOTOLO (2012); DALY (2013); PICIOCCHI (2013); SPERTI (2013); DÜWELL (2014); BARAK (2015); POLITI (2018).

[11] RUGGERI (2015), p. 784 ff.

[12] SILVESTRI (2006), p. 15 ff.; AKANDJI-KOMBÉ (2014), p. 301 ff.; MANZINI, LOLLINI (2015), p. 8 ff.

[13] MACCORMICK (1999); WALKER (2002); ID. (2008); ID. (2016); KRISCH (2010); ID. (2013); STONE SWEET (2012); ID. (2013); AVBELJ, KOMAREK (2012); POIARES MADURO (2003); ID. (2007); ID. (2012); BUSTOS GISBERT (2012); GOLDONI (2012); JAKLIC (2014); BAQUERO CRUZ (2016); CRIADO AGUILERA (2016); WILKINSON (2017).

current economic crisis[14]. They demonstrate that the ECSR has adopted the same principles that the Italian Constitutional Court also employed in its judgements.

I am convinced that the «times of crisis» are critical and significant "hermeneutic times"[15] of legal principles[16] and values, that is when their concrete interpretation is much needed. It is inevitable that different interpreters (including, law-makers, courts or international bodies) are likely to guarantee different degrees of protection for socio-economic rights. The case law of the ECSR, when recalled by the Constitutional Court, can contribute to complement and enhance the constitutional standards. Indeed, the latter are of an "elastic"[17] nature and must be interpreted in the light of international law, to which the European Social Charter belongs.

II. The case law of the Italian Constitutional Court on social rights in time of economic crisis.

This analysis starts from that right which is arguably the most acclaimed symbol of the Welfare State, and undoubtedly the most expensive, at least in Italy: the right to health. The right to health is recognized in Article 32 of the Italian Constitution as individual right and common interest, and as guaranteeing free health care for the indigent[18].

The Judgement No. 354/2008[19] seems to provide a clear account of the Constitutional Court's approach to the right to health from a social angle. This recalls previous rulings of the 90's[20], including Judgment No. 309/1999, and illustrates the continuing tension between the right to health as a social claim to get healthcare

[14] See, *ex multis*, NIVARD (2014); GUIGLIA (2016).
[15] See ALEXY (1986), p. 473 ff.; MENGONI (1996), p. 98 f. In several judgments, the Constitutional Court has emphasized the importance of the systematic interpretation of the constitutional text; in times of economic crisis this has been reaffirmed, for instance with the Judgment No. 264 of 2012. In this ruling, the Court highlighted the need for a systematic interpretation of the Constitution concerning the protection of rights and other competing constitutional principles and values, to balance potentially clashing claims stemming from the Constitutional text.
[16] ZAGREBELSKY (2004), p. 96 ff.
[17] BARTOLE (1997), p. 17.
[14] See, *ex multis*, LUCIANI (1991), p. 4 ff.; COCCONI (1998); BALDUZZI, DI GASPARE (2002); MORANA (2002); SIMONCINI, LONGO (2006); TRIPODINA (2008), BOTTARI, ROSSI (2013).
[19] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2008/0354s-08.html.
[20] See, *ex plurimis*, the Judgments of Constitutional Court No. 455/1990; No. 267/1998; No. 509/2000; No. 252/2001; No. 432/2005; AAVV (1993); COLAPIETRO (1996); SALAZAR (2000); DE FIORES (2005).

services, which is dependent on the allocation of available resources, and the protection of human dignity, which conversely requires that financial and budgetary considerations cannot affect the minimum core of the right to health as the inviolable core of human dignity/ as inextricably linked to the preservation of human dignity. (No. 4. of the *Considerato in diritto*)[21].

Moreover, he Judgment No. 248 of 2011 also confirms the previous trend of constitutional case law, recalling in particular the decision No. 455 of 1990. The Court, in the midst of the economic crisis, reaffirms that «[the] right to health care is "financially conditioned" because "the need to ensure a universal and comprehensive health care system clashes with limited financial resources that are capable to be allocated annually to this sector, as they are part of the activity of strategic planning of welfare and social interventions"» (No. 6.1. of the *Considerato in diritto*)[22].

Financial constraints and retrogressive measures taken by central and regional legislative powers should, however be respectful of the core of social rights. Judgment No. 10 of 2010 is particularly significant in this respect as it recalls that, «As a result of the 2001 Constitutional Amendments / Reform of the Title V, Part II of the Constitution which re-allocated legislative competences between the state and the regions, the State "determines of the basic level of benefits relating to civil and social entitlements to be guaranteed throughout the national territory" (Article 117 (2) (m) Const.). This State's exclusive competence refers to the establishment of the structural and qualitative levels of benefits which, regarding the fulfillment of civil and social rights, must be guaranteed, in a general nature, to all persons entitled to it.». Thus, it is evident that, despite the crisis, the Court recognizes that the State has «such cross-cutting competence to guarantee that everyone in the national territory can enjoy of essential levels of those rights / services, preventing regional laws from limiting or affecting them.» (No. 6.3. of the *Considerato in diritto*)[23].

Considering these leading decisions, the Italian Constitutional Court shows to consistently embrace the theory of the essential and "irreducible" core content of fundamental rights, that are necessary to respect people's human and social dignity, as of Article 2 Const. At the same time, it should be noted that while acknowledging that social rights are conditioned by the economic development of the country, the

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[21] See *Consulta OnLine*: http://www.giurcost.org/decisioni/1999/0309s-99.html.
[22] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2011/0248s-11.html. See, *ex multis*, the Judgment of Constitutional Court No. 111/2005.
[23] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2010/0010s-10.html. See BELLETTI (2012), p. 191 ff.

Court draws the state's attention to its duties, vis-à-vis the broad legislative powers of the Regions, evocating the article 117 (2) (m) Const., which, as said, guarantees the enjoyment of the benefits of all rights, civil and social, so as not to undermine their essential content.

It seems significant to mention another applicable Judgement, which this time reveals the commitment of the Court to limit health spending by the regions. Even if the 2001 constitutional reform allowed the regions to provide, in the presence of virtuous budgets, better standards and additional health services in their territory, Judgment No. 104 of 2013 stated that a «contested [regional] rule, which bring about further expenditures on the regional budget to ensure an additional level of medical assistance [...] , violates the principle of containment of public health expenditure, as a principle of coordination of public finances, and ultimately Article. 117, para 3, Const.» (No. 4.2. of the *Considerato in diritto*)[24].

It is therefore significant that the Court, in view of the economic crisis, and implicitly in the light of Italy's international and EU-related obligations, balanced the interests and the constitutional principles at stake. In the above case, it did so by favoring the austerity policies adopted by the State through very detailed state measures, that include precise prescriptions on the use of regional resources. This seems justified by a kind of superiority of the principle of national co-ordination of public finance over the autonomous regional deliberations. Although regions are recognized with financial autonomy as of Article 119 Const., they are nevertheless subject to the new rules of budgetary balance introduced by the revised Article 81 Const. (Law no. 1/2012 amending constitution)[25]. The latter was clearly inspired by international obligations about public spending containment and debt reduction (so-called «Fiscal Compact») which are binding on Italy[26].

The revised Article 81 Const.[27] provides that: «The State shall ensure the balance between revenue and expenditure in the national budget, taking into account the adverse and favorable phases of the economic cycle. [...] The content of the budget law, and the fundamental rules and the criteria adopted to ensure balance between revenue and expenditure and the sustainability of general government debt shall be established by legislation approved by an absolute majority of the Members

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[24] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2013/0104s-13.html.
[25] GROPPI (2012).
[26] BOGGERO, ANNICHINO (2014).
[27] BELLOCCI, FULGENZI, NEVOLA (2011).

of each House in compliance with the principles established with a constitutional law.».

The budgets cuts of local authorities, especially the municipalities and provinces, which are abundantly carried out in times of crisis, have not, however, undermined an essential principle that regulates the relations between central state and the regions, that is that the allocation of functions to these bodies must necessarily be accompanied by adequate financial resources for the exercise of those functions. The contrary would violate Articles 117, 119 and 97 Const.

The Judgments No. 188 of 2015[28] and No. 10 of 2016[29] are interesting in this regard because they recognize that the sharp reduction of financial allocation for services that cannot be interrupted and in areas of considerable social relevance is obviously unreasonable because of the absence of proportionate measures that can somehow justify it. Austerity measures which determine the lack of adequate funding of local services which are necessary for the enjoyment of social rights violate Art. 3 (1) Const., which enshrines the principle of formal equality, as well as the principle of substantial equality referred to in the second paragraph of Art. 3 Const.

The aforementioned Judgments that were served in 2015 and 2016 play a central role for the financial autonomy of local (sub-regional) authorities (municipalities and provinces), as they require the Regions to ensure the appropriateness of the resources allocated to local authorities to provide services of social relevance to the citizen.

However, it is also true that, to limit public spending, the regional autonomy is appreciably limited: at least temporarily, they cannot use the resources that they have, even when their budgets are in balance (see Judgment No. 104 of 2013).

The Judgments No. 193 of 2012 and No. 70 and No. 178 of 2015 are also relevant in this respect as they are not only concerned with the autonomy of the territorial authorities, but they went on to establish that (see no. 4.2. of the *Considerato in diritto*)[30] the measures of fiscal balance and those aimed at the containment of expenditure must be transitory.

Following the revision of art. 81 Const., which took place during the economic crisis, the jurisprudence of the Constitutional Court about social rights was further

[28] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0188s-15.html.
[29] See the Judgment of Constitutional Court No. 10 of 2016, Nos. 6.1., 6.2., 6.3. of the *Considerato in diritto*. For further details, see *Consulta OnLine*: http://www.giurcost.org/decisioni/2016/0010s-16.html.
[30] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2012/0193s-12.html.

refined the Judgment No. 10 of 2015[31] which has been much discussed because it ruled out of so-called “Robin Hood Tax”, but it did so without retroactive effect. This lack of retroactivity was meant to guarantee the respect of the highest principles of solidarity (Article 2) and equality (Article 3. Indeed, «the overall consequences of a retroactive judgement, in a period of persistent economic and financial crisis, could have resulted in more problems, that is the unreasonable redistribution of the wealth to the benefit of the wealthy, and to the detriment of the most vulnerable with irreparable harm on the needs of social solidarity, in violation of Articles 2 and 3 Const. » This regardless, the decision of the Court was intended to avoid that a budgetary imbalance «could have prevented Italy from meeting its obligations under EU and international law (No. 8. of the *Considerato in diritto*). Therefore, the Court seems to coordinate the general principle of retroactivity in Article 136 with the criterion of proportionality. Indeed, the principle of proportionality would be compromised by the retroactivity of such a judgement because of the severe financial consequences as of art. 81 Const. In other words, the Court is balancing the principle of budget balance, now contained in the new article of the Constitution, and the general principle of retroactivity resulting from art. 136 Const. in addition, the arguments used by the constitutional court suggest that the budgetary balance has become a supreme principle, also capable of justifying restrictions of rights, particularly social rights.

The finding of the Court’s Judgment No. 70 of 2015[32] are in stark contrast with those of the previously mentioned decision. On that occasion, the Court declared the unconstitutionality of an act (Decree-Law no. 201 of 2011, known as “Save Italy” which prevented the automatic increase of those pensions that were three times higher the minimum value recognized by the National Institute for Social Security (INPS) in 2012 and 2013. This decision was taken regardless of its economic consequences: an expected a loss of earnings for state budget of around 17.6 billion euros in 2015 and 4.4 billion in 2016.

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[31] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0010s-15.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S10_2015_en.pdf, in English.

[32] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0070s-15.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S70_2015_en.pdf, in English. For further details, see ANZON DEMMIG (2015); BARBERA (2015), p. 2 ff.; CECCANTI (2015); LIETO (2015); MORRONE (2015).

In this case, the Court did not consider that financial arguments were of such a paramount importance to rule out any conflicting interest, and operated a scrutiny under the principles of reasonableness and proportionality (No. 10. of the *Considerato in diritto*). The Court thus sets limits to the discretion of the legislative powers by weighting its choices with the above mentioned constitutional parameters, without referring to the irreducible core of the social rights involved.

In the Judgment No. 70 of 2015, the Court also considers the principle of graduation. In line with a previous Judgment, No. 316 of 2010[33], the Court essentially demonstrated not to be concerned about the economic consequences of his decision. In the light of the principle of graduation, the Court considered the non-temporary differentiated treatment of certain retirement benefits, as a consequence of the legislator's choices, no longer tolerable, and thus radically unconstitutional.

There is thus an "unequal" balance[34] between the interests involved (social security rights vs. budget balance), which can be appreciated because of the "graduality test", that the norms under the strict scrutiny of the Court did not manage to pass.

Some Scholars have argued that that the mentioned ruling did not realized a "technical balance" between social rights and the new art. 81 Const. On the contrary, the Court would have resorted to the criterion of "hierarchy" between constitutional rights and principles. In other words, the constitutional judges would have drawn a hierarchy of values according to which the right to social security (Article 38 Const.) is given precedence over the requirements of balance of the public budget (Art. 81 Const.)[35].

The financial effects of the ruling on the state budget were, however, partially limited to the maximum amount of 2.8 billion euros thanks to the enactment of the so-called "*Decreto Renzi*", Decree-Law no. 65 of 2015, converted into Law no. 109 of 2015. This act was also appealed against before the Constitutional Court for violation

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33 See *Consulta OnLine*: http://www.giurcost.org/decisioni/2010/0316s-10.html.

34 With this wording, the Italian constitutional doctrine refers to the resolution of clashes between constitutional principles / norms that have not the same "value". Although it is necessary because neither of them can be neglected, it is not a "real" activity of balancing, as it does not take place between principles of equal value in the constitutional edifice. For instance, as for it concerns us, the "end / goal" of realizing social rights is arguably superior to that of systemic economic efficiency, and for that reason the former can be qualified by the latter (but only to a certain extent).

35 MORRONE (2015), p. 4 ff.

of the provisions of the Judgment No. 70 of 2015 and hence art. 136 Const., the latter of which established that the legislator must respect any constitutional judgment.

In addition, the Judgment No. 178 of 2015[36] has recently contributed to clarify the concept of the “temporary measures” that are taken in times of crisis. Indeed, therein the Court declared constitutionally unlawful a legislation that determined, because of the economic crisis, a prolonged suspension of the procedures of collective bargaining (trade union freedom: Article 39 Const.). What brought the Court to a declaration of non-compliance with the constitution was the long-lasting nature of the suspensive effects of the collective bargaining procedures, as they «modify the bargaining dynamics whereas the collective contract are assigned a central role» (No. 17. of the *Considerato in diritto*).

It is worth noting that the Court has considered legitimate the prevalence of the interest of budgetary balance (art. 81 Const.) over the enjoyment of trade union rights (art. 39 Const.) in so far as the measures were temporary, necessary because of the circumstances, non-discriminatorily applied to all public servants and grounded on the principle of solidarity. Moreover, unlike in the Judgment No. 10 of 2015, the Court adopted the technique of «supervened unconstitutionality» to reduce the financial impact of its findings in the Judgment No. 178 of 2015. This means that the declaration of unconstitutionality does not fully rule out a norm, but the Court identifies the “moment”, following the entry into force of the law, from which the latter stops having normative force.

This methodology was first adopted by the Court in the 1980s. In the Judgement No. 178/2015 the Court fixed the effects of unconstitutionality from the moment when the judgment was published, with the consequence of arriving at the same concrete result of Judgment No. 10 of 2015, namely to exclude the retroactivity of the ruling.

III. Conclusions.

At this point, we can draw some conclusions.

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[36] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0178s-15.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S178_2015_en.pdf, in English.

The Court, despite the revision of art. 81 Const., has demonstrated in these years to still considering its two main arguments that are able to limit the legislative discretion and that were often employed in a complementary manner:

• the theory of the protection of the "essential core" of fundamental rights, to ensure the respect of human dignity as of Art. 2 Const. (individual and social dignity) and Art. 117 (2) (m) Const. (related to the essential levels of services to guarantee civil and social rights);

• the theory of balance[37]of constitutional principles and interests, which must, however, respect the essential core of the (human /fundamental) rights and be compliant with the constitutional principles, including: equality (art. 3 Const.); solidarity (art. 2 Const.); and proportionality (see Judgment No. 70 of 2015).

In any case, from the list of judgements that were above mentioned, it can be said that the Constitutional Court, rather than guaranteeing the observance of each individual constitutional right, tends to give priority to the overall functioning of the constitutional system, which is composed by rights and principles, also of supranational and international origin and in which its decisions are meant to produce effects.

Furthermore, the case law of the Italian Constitutional Court, vis-à-vis the progressive legislative erosion of the Welfare State which has taken place over the last decades, does not take a straightforward stance, as it operates the above "balance" on a case-by-case basis. These balances can be qualified both as «equal» or «unequal», both in one sense and in the other, among economic interests, strengthened by the crisis and supported by the new art. 81 Const. and international instruments that imposed it, and social rights, anchored to the constitutional principles of equality (Article 3) and solidarity (Article 2). "Unequal balance" does not mean that the ultimate goal of progressively and fully achieving human rights must always be detrimental for the goal of economic efficiency, as the latter cannot be unreasonably limited. According to the constitutional judges, indeed, «All fundamental rights protected by the Constitution mutually complement each other and therefore it is not possible to identify absolute hierarchies [...] The Italian Constitution, like other contemporary democratic and pluralist Constitutions, requires a continuous and mutual balance between fundamental principles and rights, without claiming

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[37] SCHLINK (1976), p. 192 ff. The Author identifies in the method of the balance the dogmatic one of the fundamental rights. See, *ex multis*, ALEINIKOFF (1987); MORRONE (2008); STONE SWEET, MATHEWS (2008); URBINA (2017).

absoluteness for any of them [...] Correct balances, that are dynamic and not fixed in advance, –are to be identified by the legislator with norms and by the Constitutional Court during the judicial review- pursuant to the criteria of proportionality and reasonableness, without infringing the essential core of fundamental rights» (Judgment No. 85 of 2013, no. 9. of the *Considerato in diritto*)[38].

In pluralist legal systems like the Italian one, in case of constitutional clash between norms or values, the solution to be sought should not excessively limit either one or the other, but bearing in mind articles 2 and 3 of the Constitution, it must strike a reasonable balance between clashing needs and principles.

Once again, in Judgment No. 275 of 2016, the Court had to adjudicate on the relationships between budgetary balance of the revised Art 81 Const., the financial autonomy of local authorities, and the core content of the right to receive social benefits, including the right to study and to provide school transport service for disabled people. The Court held that «It is the protection of inviolable rights that must be a condition for budgetary choices, while the need of budgetary balance cannot be a condition to provide those services that are needed for the fulfilment of rights. » (No. 11. of the *Considerato in diritto*)[39]. Such a pronouncement does not contradict, however, the previous case law; rather, it confirms that legislative powers cannot ignore the minimum and essential level of the rights to benefits that derive from social rights, which should not be financially conditioned[40].

The contribution of the constitutional jurisprudence, anchored to the paradigm of human dignity and the full development of human beings, has precisely consisted in affirming the prevalence of the core content of social rights over the preservation of scarce of financial resources.

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[38] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2013/0085s-13.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/85-2013.pdf, in English.

[39] For further details, see *Consulta OnLine*: http://www.giurcost.org/decisioni/2016/0275s-16.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/2016_275_EN.pdf, in English.

[40] See Judgment, No. 275 of 2016, No. 11. of the *Considerato in diritto*: «It is also not possible to accept the argument that a violation of Art. 81 would arise if the contested provision was not to establish a limit to the financial allocation in the national budget. Even without considering that the absolute core of minimum guarantees that give effect to the right to study and education of disabled pupils, once identified through legislation, cannot be subject to absolute and general financial constraints, it is entirely evident that the supposed violation of Article 81 of the Constitution is the result of a misunderstood conception of the concept of budgetary balance, Indeed, [...] It is the guarantee of inviolable rights that must be a condition for budgetary "manoeuvres", whilst the need of budgetary balance cannot be the condition to provide such services.».

The actual "common feature" of this inevitable fluctuating case law is arguably the undisputed constitutional commitment to safeguarding human dignity, which requires the enjoyment of the «essential core» of human rights also in times of crisis. There is no doubt that, whether the struggle for budgetary balance led to the enactment of austerity measures that are capable of violating the essential core of the social rights which is connected with the inviolable human dignity, there would be an evident case of unreasonable exercise of legislative discretion.

Another case of this swinging case law on social rights is represented by the recent Judgment No. 250 of 2017 on the so-called «Renzi Decree», with the latter issued to avoid the financially detrimental effects of the mentioned Judgment No. 70 of 2015. A statement, issued by the Court it on the day of the decision, leaves no doubt about this: «The Constitutional Court rejected the allegations of non-compliance with the Constitution of the Decree-Law No. 65 of 2015 [«Renzi Decree»] about the adjustments of retirement benefits, as the Decree was intended to "implement the principles set out in the Judgment of the Constitutional Court No. 70 of 2015". The Court held that - unlike the "Save Italy" Decree which had been ruled out in 2015- the new and temporary regulations provided for by Decree-Law no. 65 of 2015 realizes a reasonable balance between the rights of retired people and the needs of public finances.»[41].

Considering this domestic case law in times of crisis, It should be recommendable for the Court to make use of the interpretative standards of international bodies in this regard Among them, the jurisprudence of the European Committee of Social Rights (ECSR) proves particularly useful, as therein the principle of non-retrogression[42] of rights, even during times of crisis, protects from situation of multiple vulnerabilities, without using arguments based exclusively on the "minimal" core content of social rights.

The principle of non-retrogression (i.e. the prohibition of legislative setbacks on social rights) can be derived from the obligation to progressively fully realize the rights recognized by the European Social Charter (ESC), as indicated in Art. 12 § 3 on the right to social security and in the Preamble ESC. The ECSR, while does impose an

[41] For detailed argumentation, see *Consulta OnLine*: http://www.giurcost.org/decisioni/2017/0250s-17.html, in Italian, and: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_250_2017_EN.pdf, in English.
[42] For a detailed description of the principle, see HACHEZ (2008), pp. 15-29 and pp. 63-67; ID. (2012), pp. 6-18. See, particularly, MARGUENAUD, MOULY (2013).

absolute ban to adopt retrogressive measures, when they are needed because of the shortage of available economic resources, requires the states to give evidence that the measures were necessary and based on an in-depth examination of the possible alternatives, and that no less afflictive measures on the most vulnerable people could be adopted[43].

These procedural obligations were meant to prevent that terms and conditions to receive international loans could become an easy justification for states to avoid democratic decision-making processes in the development of anti-crisis measures.

Briefly, the ECSR considers that austerity measures decided by the States are inappropriate if it is possible to demonstrate that, in order to achieve the same savings targets (e.g. to reduce the sovereign debt of the state), less afflictive measures (for the realization of social rights) could have been used

The ECSR has also highlighted that states, when they adopt a series of anti-crisis retrogressive measures, they should always concretely weight their «cumulative effects» to prevent that their joint effect could lead to «a significant degradation of people's well-being and living conditions». In doing so, it prevented that the shortage of economic resources, due to the crisis, could justify a disproportionate reduction of the standards of social rights, from which the preservation of people's dignity depends[44].

This interpretative approach can bring significant consequences at national level because it requires to identify that retrogressive measure, among those which achieve the same economic and financial result, which is less detrimental on (non-core elements of constitutionally protected) social rights. After all, it is nothing more than a more careful application of the principles of proportionality and reasonableness in case of austerity measures.

It is also worth mentioning a few recent judgements of the Italian Constitutional Court which, although not dealing with social rights, may in some way be in line with the above ECSR's approach. The Judgments No. 23 and No. 272 of

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[43] The HUDOC database provides access to the Decisions and Conclusions of the ECSR: Decisions adopted by the Committee in the framework of the Collective Complaints procedure and follow-up of the decisions by the Committee of Ministers; Conclusions adopted by the Committee in the framework of the Reporting System and follow-up of the Conclusions by the Committee of Ministers. See http://hudoc.esc.coe.int/eng/#. For the insights on the Decisions of the ECSR of which he treats, see: MOLA (2012); ID. (2013); DELIYANNI-DIMITRAKOU (2013); ID. (2013); GUIGLIA (2013); ID. (2017); NIVARD (2012); ID. (2013) ID. (2014); HACHEZ (2014); MELLADO, JIMENA QUESADA, SALCEDO BELTRÁN (2014), pp. 13-48 and pp. 97-238.

[44] See, particularly, the Decision on the merits of 7 December 2012, Complaint No. 76/2012, *Federation of employed pensioners of Greece (IKA-ETAM) v. Greece*, §§ 78-82.

2015[45], recalling what had been argued in the Judgment No. 1 of 2014 (No. 3.1. of the *Considerato in diritto*), held that «The proportionality test which is used by this Court, common to several other European constitutional courts, and by the EU Court of Justice, often together with that of reasonableness, consists in the assessment of whether a law [...], is necessary and appropriate to attain the legitimate goals that it pursues. *This means that, the measures identified by a certain norm, among other applicable solutions, have the least restrictive effects on rights, and they do so without establishing disproportionate burdens to pursue the targeted goals*»[46] (emphasis added).

At this point, my concluding remarks bring me some "classical" reflections about the interpretation of values and principles by judges, including constitutional judges[47], especially when they enhance the protection of human dignity.

The recognition of inviolable rights and the human dignity, as the fundamental and immutable principle of every society, grounded a sort of «universal legality»[48]. This has led to a certain detachment of national law from its historical dimension and politics. Hence, domestic law, as the result of political negotiation, tends to become an overall less prescriptive normative framework, and seems to shift to a "principle-based law»[49], grounded on underlying shared values[50]at regional or universal level, to be interpreted and spelled out by courts and tribunals within their legitimate margin of appreciation.

The contemporary constitutional state, as it has developed in a "multi-level" normative framework, seems to entrust the courts with the responsibility to implement principles and values and engage other internal institutions in a creative elaboration of law.

Proportionality[51] and reasonableness[52], as criteria to assess the concrete adequacy of norms to settled facts, and human dignity, which signifies that everyone

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[45] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2015/0023s-15.html; http://www.giurcost.org/decisioni/ 2015/0272s-15.html.
[46] See *Consulta OnLine*: http://www.giurcost.org/decisioni/2014/0001s-14.html.
[47] See, *ex multis*, RUGGERI (1998); CORTE COSTITUZIONALE (2006); SCACCIA (2017).
[48] CIARAMELLI (2007), p. 96.
[49] ZAGREBELSKY (1992), p. 147 ff. See, particularly, ALEXY (1992), pp. 117-136; (MENGONI (1996), p. 95 ff.
[50] «[T]he express inclusion of ethical values in modern constitutions, which gave them the shape of binding principles prevailing over all other sources of law, destabilized the theoretical basis of formalism in legal science.»: SCACCIA (2017), p. 177.
[51] STONE SWEET, MATHEWS (2008); ID. (2009); BARAK (2010); ID. (2012); HUSCROFT, MILLER, WEBBER (2014); JACKSON (2015); JACKSON, TUSHNET (2017); URBINA (2017); YOUNG (2017).

has the same worth and value as right-holder, seem more suitable to be handled by Courts than by the legislative powers. Moreover, subsidiarity, as it undisputedly regulates the relationship between authority and freedom, and as a dynamic organizing criterion of public functions, considerably contributes to overcome the formerly strict criterion of separation of powers.

It is undeniable that the achievement of the reference-values of the states and the international community, which can be summarized as "the protection of human rights", often take place at the expenses of the principle of "certainty of law", if not even "the rule of law".

So, It can be stated that whereas practitioners / legal positivists consider that individual rights are "the children" of law, legal theorists who works on values and principles tend to subordinate enacted law to the compliance with fundamental rights, sometimes affecting the certainty of law and its effects.

Against this background, the increasing difficulties for the domestic legislative powers - especially for the Italian ones - to strike balances between different values, in the presence of several social groups with ethical and religious differences, have led to the enactment of weak, elastic, and ambiguous norms. For this reason, the legislative powers have increasingly delegated the courts to resolve the clashes of interests outside any political representation. We can indeed agree that in our legal system, precisely because of deep divisions of an ethical and anthropological nature, the function to adapt the law to the social context and its values is tendentially left to the concrete interpreters, including courts.

As the legislative powers tend not to clearly regulate very ethical and sensitive matters, its normative activity, still very copious, can arguably suffer a "delegitimizing effect". Therefore, this inability to translate into law the constitutional value of human dignity as guiding principle to regulate constitutional conflicts of interests, requires the courts, including the constitutional courts to step in.

The absence of predefined value-related hierarchies at constitutional level and the general impossibility of using values to resolve judicial cases have led the judges to justify their decisions with a detailed analysis of the concrete circumstances of the

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[52] Reasonableness is a «*higher-order* value», see McCormick (2005), pp.178, 179; Alexy (2009); Bongiovanni, Sartor, Valentini (2009). See, *ex multis*, Lavagna (1973); Sandulli (1975); Bin (1992); AAVV (1994); Paladin (1997); Ruggeri (2000); Scaccia (2000); Morrone (2001), Id. (2009); La Torre, Spadaro (2002); D'Avack, Riccobono (2004); D'Andrea (2005); Cerri (2007); Modugno (2007); Celotto (2010); Pennicino (2012); Cartabia (2013); Fierro, Porchia, Randazzo (2013); Barsotti (2016), p. 74 ff.

case. Thus, the “factual circumstances” become the criterion for weighing abstract values, when they are balanced with other values. This means that a certain value becomes concrete and measurable through the “mediation of the fact”. However, this work of “weighing” the value and ascribing to it a normative content, vis-à-vis antagonistic values, presents high margins of arbitrariness. Nicolai Hartmann observes that, inevitably, «It is neither a “knowledge” in the proper sense, nor an objective grasping where the grasped object remains far-away from the grasper. It is more like to be grasped. The approach is not contemplative, it is emotional, and what comes from the contact has an emotional explanation. It is to take a stand on something through an emotional move»[53].

When adequate norms and stable hierarchical orders are missing, values can be subject to interpretative manipulation, and the resulting priorities can be the consequences of subjective preferences, intuitions, emotions rather than logic reasoning and demonstrations. Authoritative scholarship held that “the denial of an objective hierarchy results in the need of a subjective hierarchy[54]. Therefore, the judge, under the pressure of potential justice denials, acts as legislator in the concrete case.

Against this backdrop, the judicial creation of law through the use of values and principles should not be stigmatized, but rather considered as the inevitable consequence of the inaction of legislative powers, as well as being justified by the constitutional clauses that are elastic and open towards the European and international normative framework. This phenomenon is undeniably useful, and evident in the above-mentioned case law of the Italian Constitutional Court during the economic-financial crisis. However, this might affect essential foundational features of the legal systems of civil law: a collective decision-making, democratically deliberated, which is converted into general and abstract law. There is no doubt, in fact, that even in a civil law system, like the Italian one, for the reasons which were put forward above, it is emerging the idea - not only among scholars - that law should be assisted by a rational interpretative activity of levelling political contrasts and by higher moral values. This activity should arguably be performed by the courts, and in particular by the Constitutional or supreme courts. However, even constitutional judges are not completely “ethically” neutral, regardless of their political views.

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[53] HARTMANN (1972), pp. 147 ff., especially p. 149. Italian translation by Remo Cantoni.
[54] FINNIS (2011), pp. 92 and 450; SCACCIA (2017), p. 185.

Therefore, it seems to me that it is worth invoking a classic maxim of Roman law, which should be complied with, both in presence and in the absence of legislative interventions and in spite of the crises or, perhaps, precisely to prevent other, systemic, even more serious crises. In conclusion: *unicuique suum tribuere*.

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This books collects a number of papers presented during the international conference "Constitutionalism in a Plural World", held in November of 2017 at the Porto Faculty of Law of the Portuguese Catholic University.

The purpose of the conference was to incite discussion on foundational concepts of constitutional law as well as its future prospects in a globalized, multicultural and technological contemporary society. The papers gathered here demonstrate the wide range of topics covered during the event, including: constitutional amendment, popular will, democracy and party politics, free-trade agreements, multilevel protection of fundamental rights, data protection or constitutional courts.

Given the undeniable constant evolutionary and transformative dynamic of constitutional law, we hope this book contributes to a better understanding of the challenges ahead.

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