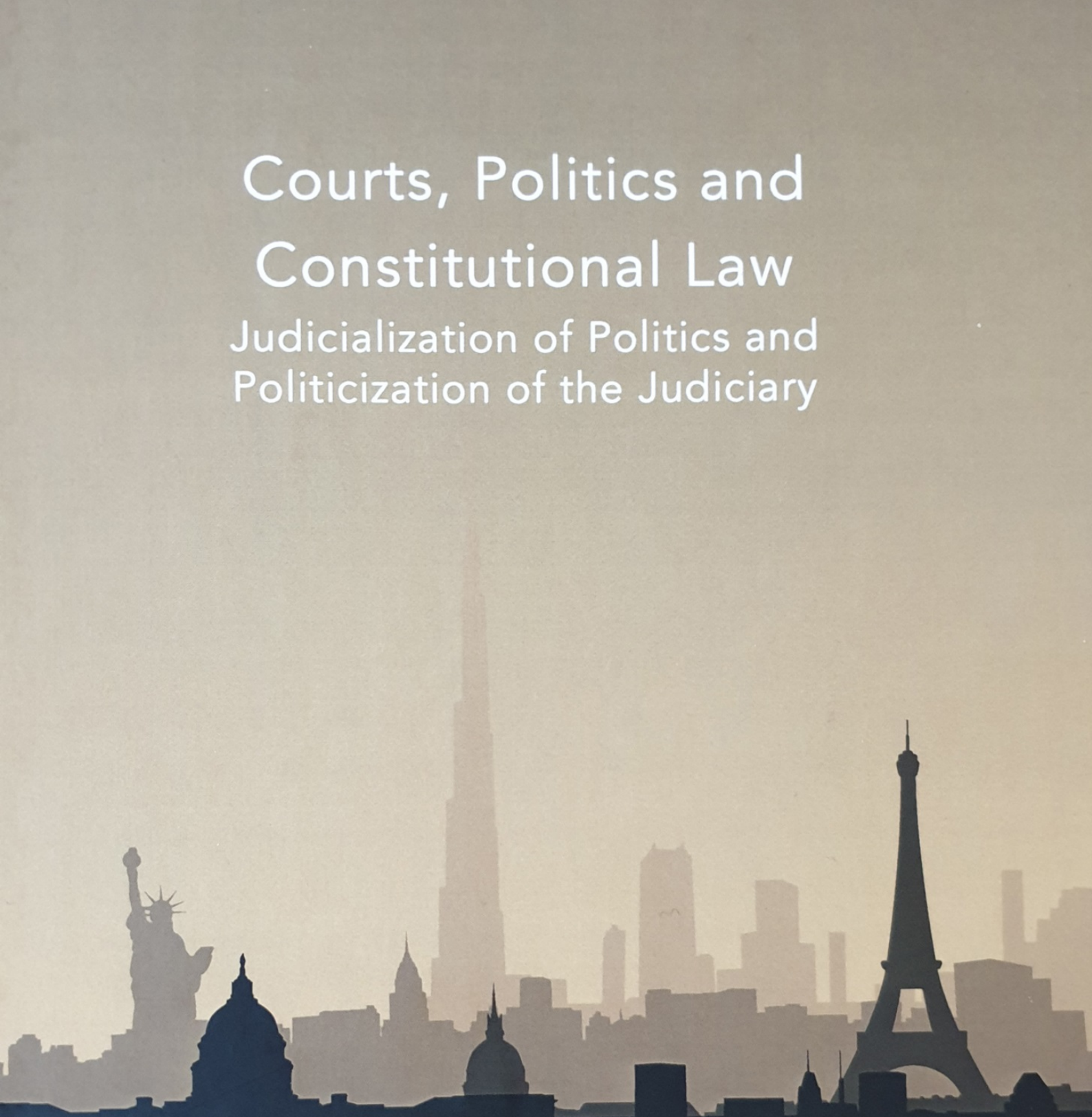
Courts, Politics and Constitutional Law

Judicialization of Politics and Politicization of the Judiciary



Comparative Constitutional Change

ROUTLEDGE

Democracy and courts beyond the ideological banality

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1.1 Introduction

In this chapter, I shall not induce arguments in order to prove that *today's liberal democracy* is the only right form of governance in the 21st century. It seems to me that after the *Habermas-Rawls debate* of the 1990s it would be a fruitless effort to point out new arguments in this direction, whether they be of a procedural or a substantial nature.[1] I shall not strive to prove the opposite either -that this is an exhausted political and value paradigm that ought to be forsaken, or at least significantly altered. An attempt at this would offer a certain intellectual temptation but would be futile without outlining a desirable alternate political model, such as contemporary societies have not, as of yet, discovered.

Within this chapter, I shall try to do three things:

(a) present my views on the main internal contradiction of the contemporary democratic paradigms, as well as on how the changing social environment influences this contradiction;

(b) outline the role of the Court in maintaining the contemporary democratic systems of the Western type in a relative balance and what are (in my opinion) the expectations in that respect;

(c) appeal for extreme caution when it comes to disempowerment and especially 'disenchantment'[2] of the Court.

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1 I am inclined to agree that the two theories are close on the axis of procedurality/substantial- ity, as far as John Rawls' *Theory of Justice* justly claims to have the characteristics of a procedural theory, while Jurgen Habermas' *Discourse Ethics* is not at all deprived of presumptive substantial footing.

2 I shall use the word *disenchantment* in the way Max Weber uses die German word *Entzau- berung* - meaning 'the breaking of a magic spell', i.e. a process of lifting the delusive enchantment and the illusions as to the origins, the pattern of development, or the meaning of a certain social phenomenon.

1.2 Court and separation of powers - Some banal remarks

The ideological banality requires that we present the Court not only as an important democratic institution, but as one of the most important democratic institutions. The grounds for this are just as banal as the thesis itself - without the Court, there is no way to create a system of mutually controlling authorities (or groups thereof) which guarantees that the democratic order will not be replaced by a dictatorship and, what is more important, without which individual freedom would be in danger. The Court is seldom regarded simply as one of the bodies that participate in the separation of powers. It is believed, by definition, that the court's rulings possess a very high degree of *legitimacy* as ones grounded entirely on law and justice and are thus denuded of any influence by individual or collective interests related to the political conjuncture, which is typical for the decisions of the other two branches of power.

In fact neither John Locke, nor Charles Louis de Montesquieu whom we often point out as the fathers of the theory of separation of powers, grant the Court such a place in the general balance of powers as we do today, often referring to them. As we know, Locke only bestows upon the judiciary peripheral attention, and doesn't consider it necessary to explicitly place it in the balance of powers,[3] whereas Montesquieu, while pointing it out as one of the three powers, adds that it is not a power in the strict sense of the word.[4] Regardless of the differences, they both accentuate the authorities that are involved in the creation of general rules of conduct (the Parliament or the *King in Parliament).*

The French Revolution continues this tradition by sanctioning Rousseau's view that the law is an expression of the general will. However, two of the other central theses in Rousseau's theory are forsaken - first, that the general will is not necessarily the will of the majority (according to him, the criterion is not quantitative at all - even the unanimous will of all may not be the general will), and second, that it can only be formed directly by the sovereign people, which means that it certainly cannot be reached through political representation.[5] The practice

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3 In point of fact, we ought to note that Locke appreciates the significance of the function of justice. In the chapter named 'The purposes of political society and government', he points out that the three things which are lacking in the state of nature are 'an established, setded, known law, received and accepted by common consent', 'a known and impartial judge', and 'a power to back up and support a correct sentence, and to enforce it properly'. J. Locke, Two Treatises of Government, Create Space Independent Publishing Platform, 2013, II Treatise, Ch. IX.

4 'Of the three powers above mentioned, the judiciary is in some measure next to nothing'. (Original French version: 'Des trois puissances dont nous avons parl£, celle de juger est en quelque fafon nulle'.) C. Montesquieu, De PEsprit des Lois, Paris, Librairie de Lecointe, 1832L. XI, Ch. VI.

5 Rousseau considers the general will to be the will of a politically organized community, which he refers to with the interchangeable terms nation, state, sovereign, or the body politic. The criterion whether there is a general will is not quantitative at all, but whether the will is directed towards the common interest (intirit commun). Who decides whether something is in the common interest, and how, is a matter of complicated sophistic reasoning in Rousseau's theory.

of the French Revolution (especially during the Jacobin period) results in both forsaken dieses losing their popularity but does not affect the legitimizing force of the thesis of the law as an expression of the general will.

In die I9th century in the Western world a common understanding of democracy was gradually built. Despite the numerous interpretations democracy is considered a 's***ystem of political representation***' whereby the common will is in the Parliament's possession and the Court is called upon to apply the laws correctly.

In continental Europe the question of the Court's significance in the system of democratic separation of powers is being rediscovered within the ***debate for the constitutional courts***.[6] The authority of a professional body, which is, by default, stripped of any claim to political representation, to repeal laws, poses a challenge to the traditional democratic thinking.[7] The result is an obvious paradox - a complicatedly formed collegium of experts rule on behalf of the constitutional legislator, thus controlling the ordinary legislator that creates laws on behalf of the people by whom the latter was elected.

The crisis of the parliamentary models between the two world wars gave new topics for consideration. It turned out that the rapid expansion of voting rights in combination with economic insecurity and social disappointments might give birth to ***anxious majorities with*** very low loyalty to the established democratic traditions. Consequently, different types of ***techniques for limiting the omnipotence of the majority*** were developed and refined in the post-war years. In my opinion the existing mechanisms for restraint of the majority that deserve to be considered can be reduced to the following three groups - ***procedures, bodies of various professional elites, and normative ideology*;**

Why am I even addressing this topic today? In my opinion there are at least three reasons.

First, the rapid development of information and communication technologies in the last decades is beginning to reflect on fundamental constellations in Western societies and cause a crisis of certain fine mechanisms for ensuring the reproduction, or at least a smooth evolution, of the social structures - education, media, cultural environment, a slower accumulation of material wealth etc. Indeed, principles in public law do not traditionally rise via network but are rather hierarchically imposed.[8] But the networks can have a strong destructive charge. It

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6 This debate really is rather continental, since in the English-speaking world, the matter was put to discussion much earlier - for example, by A. Hamilton, J. Madison 8c J. Jay, *The Federalist Papers*, New York, Bantam Classics, 1982, p. 78.

7 This is one of the dimensions of the debate between Hans Kelsen and Carl Schmitt regarding who the guardian of the Constitution is. In the last several years, interest in the two scholars, and especially for this debate, is renewed. See for example, L. Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*, Cambridge, Cambridge University Press, 2015.

8 I have developed arguments in favour of this thesis in my article 'Legal Principles in Public Law', published in M. Belov (Ed.), *Rule of Law at the Beginning of the Twenty-First Century*, Den Haag, Eleven International Publishing, 2018, pp. 5-8.

is known that in chimpanzees, the young males, coordinated in a network take the authority of the aged Alpha male away. It is a fact that hierarchy is then reestablished - a new hierarchy replaces the temporary network that brought down the old hierarchy. If we follow that logic we may assume that the information and communication networks are unlikely to create new principles in public law but may seriously question the existing ones.

Second, the concept that the world is moving toward a unipolar value and political model of a Western type that flourished 30 years ago has withered, and today exists only in the form of a carefully preserved herbarium. This inevitably leads to the expectation of a new opposition of values and political models, such as a whole new generation do not remember. Furthermore, it is a generation that doesn't have the same sense of order and hierarchy as for instance mine, and that of my parents, do. Thus appear visible difficulties for people who are entering a politically active age to discern between true and false, disputable and indisputable, relatable and non-relatable.

And third, the network communication practices, combined with the lack of obvious rightness of the Western value model, breathe new life into the expectations of a new (similar to that of last century) ***crisis of the parliamentary systems*** and to the sympathies for those who offer radical solutions and a firm hand. The signals for this are numerous. The decay of the traditional left-right parties and the success of leaders of the populist type are only the tip of the iceberg. This tendency is significantly facilitated by mass consumer culture, which creates superficial and easily alterable tastes, and by the Internet culture of denial and encapsulation in relatively small groups of similarly thinking people.

1.3 The majority principle vs individual freedom

Whatever definition of ***democracy*** we may give, there is no way to avoid the statement that it is ***governance based on majority support.*** Every denial of this statement not only leads to a lexical paradox, but problematizes many of the basic parameters of contemporary Western political models (e.g. universal suffrage with a secret ballot and the constituting of the main governing bodies through elections). Along with this, it is impossible to deny that today's understanding of democracy is in a sustainable connection with ***the concept of individual freedom.*** And not individual freedom as a right of participation in the settling of public matters (as it was, according to Benjamin Constant,[9] considered in Antiquity, as well as by later authors like Rousseau) but as a protected personal perimeter of conscience and conduct -

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9 See Benjamin Constant, *De la Liberte des Anciens Comparee a Celle des Modemes*, Paris, Mille ct Une Nuits, 2010.

including being protected from the State and the moods of the majority that define public policy.

In my opinion, today's concept of democracy can be expressed like this: ***governance founded on elections, which is, for the sake of protecting individual freedom****, restrained by procedures*, *bodies of professional elites, and a normative ideology.* In other words, my thesis is that contemporary liberal democracy contains a fundamental *contradiction* - it is based on the idea of the people's rule (i.e. the collectivist concept of the leading role of the arithmetical majorities), and together with this it suggests a strong individualistic distrust in the decisions of these majorities and therefore restrains them through procedures, bodies, and normative ideology. The verbalization of this contradiction is not a novelty. Quite the contrary; in the last decades different explanations that deny or extenuate this contradiction have been proposed, as well as a great number of ideas and even techniques for overcoming it. But in essence this contradiction exists.

As previously noted, in my opinion, there are three groups of restraints to the majority's decisions that historically were formed and developed. *The procedures* underwent a long evolution - from direct restrictions on suffrage and the vast legislative powers of bodies constituted without elections, to the limitations on the subject and the special procedure for holding of referenda. In order to illustrate the significance of this group of restraints, I will give an example of the prohibition on holding a referendum on matters of the state budget and taxation rates that exist in many countries, Bulgaria included.[10] The obvious reason for the existence of such stipulations is the fear that the majority will probably vote in favor of both - increasing the state budget and decreasing taxes.

The second group of restraints are the *bodies with high requirements for professional competence and professional prestige* that have considerable powers and weight in public life, disproportionate to their representativeness. Typical examples of such bodies are the governing councils of national banks (and, with equal reason, that of the European Central Bank (ECB), audit offices, stock market supervision commissions, and of course, the constitutional courts.

Beyond any doubt the Court plays a key role in every one of the three restraints on majority. Whatever the differences between the procedures that limit the omnipotence of the majority, the final ruling on their compliance with the Constitution or any other high standard, as well as

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10 Article 9, para 2 of the Direct Citizen Participation in State and Local Government Act: 'The following shall not be subject to a national referendum: 1. issues which fall within the competence of the Grand National Assembly; 2. issues referred to in Article 84 (4), (6),'(7), (8), (10), (12), (16), and (17); Articles 91 and 91a; Article 103 (2); Article 130 (3); Article 132a, and Article 147 (1) of the Constitution; 3. issues pertaining to the amount of taxes, charges, and labour as well as public insurance payments and contributions; 4. Issues related to the state budget; 5. issues pertaining to the rules of internal procedure and operation of the National Assembly'.

the ruling on their own legal correctness are, in the majority of cases, submitted to the Court. The Court is a bright example of a body with great authority, which is mainly formed on a professional principle (the elections of judges are relatively rare and by default apply only to judgeships in the lower courts).

But the most important thing is that the Court is the main keeper and protector of the *normative ideology*. In my opinion *normative ideology* is a system of interrelated moral assertions which are regarded as general legal principles, can serve as a point of reference of the Court's interpretation of a legal case, and, in certain (politically sensitive) cases, are used for justification of legal validity (e.g. the ***Radbruch formula*** and its influence on the rulings of the German Federal Constitutional Court).[11] Another attestation to the importance of the Court's normative ideology is the fact that certain authors place it in the center of their theories on law. According to Alf Ross, for example, legal science is an empirical science and one of the two types of social facts that it examines is namely the normative ideology of the judges.

It is precisely on the field of normative ideology that the Court carries the greatest weight in protecting the individual freedom. After World War II (and to some extent as a result thereof), *human rights* were asserted as a leading normative ideology. Its adoption happened gradually and naturally, and today, it continues to be considered generally correct and important for the mass conscience. But should we consider human rights an ideology impossible to abandon? I am not convinced.[12] There are at least four things that evoke concern.

First, the concept of individual freedom, which lies in the foundation of human rights, was put to the test by *the rise of terrorism* in the context of the tension between *liberty* and *security*. After the 9/11 attacks the question of restricting freedom (and therefore certain rights) for the sake of security was persistently posed. For the time being, the ideology of human rights withstands the test, but this can easily change in the event of new challenges.

Second, there are no serious prospects of *the technological revolution* slowing down or becoming predictable to a greater degree. The permanent changes in the way of living and in the labor market, the rapid changes in the physical environment, in day-to-day communication, and in leisure time, create a favorable environment for *new anxious majorities*. The situation is very similar to the anxiety of man upon the decline of the Middle Ages described by Erich Fromm - one gains economic and spiritual freedom but loses *security* which was previously

11 This matter is considered in the wonderful book by Robert Alexy, *The Argument from Injustice (A Reply to Legal Positivism),* Oxford, Oxford University Press, 2002.

12 See Manuel Castells, *Rupture: The Crisis of Liberal Democracy*, Cambridge, Polity Press, 2019.

given by one's belonging to a certain economic and spiritual community.[13] Today man is more liberated in terms of lifestyle and information, but many authors point out that he is increasingly isolated and depersonalized in a world of shaken values and hierarchies, of informational chaos, and of growing economic uncertainty.

Third, although the *migration crisis in Europe* may not be a separate factor, it exposed and radicalized a part of the fears of Europeans. The global communication networks made drawing comparisons possible and led many people to an important conclusion - within the limits of one generation, achieving a better life is much more realistic by changing the country rather than by replacing the government. But from the point of view of the citizens of the host countries, at least two problems emerged. The first one is the fear that migrants would undermine the established way of living (through consummation or importing foreign culture, i.e. values). The second one is how to use liberal democracy not as a means of inclusion in public life but as grounds for exclusion thereof.

And last but not least - the *question of the EU Hite*. Bizarre as may be, it is exactly the Brussels 6lite who are probably based on die most meritocratic patterns of selection and advancement that have surprisingly disproportionally low degree of legitimacy. Ivan Krastev gives a remarkable two-reasons explanation of that phenomenon.[14] On the one hand, he refers to Michael Young, according to whom an entirely meritocracy-based society would be a terrible combination of egoistic and arrogant winners and anxious and desperate losers.[15] On the other hand, most Europeans feel that this international elite are not connected to a specific place, that in the event of a crisis, they will grab their families and leave and will fulfill themselves equally well anywhere in Europe or in the world. The legal elite are traditionally *national*, due to the fact that historically national legal systems were closed systems. But the legal systems of the EU member states are quickly changing and becoming increasingly open. Wouldn't this raise the question of the confidence in the Court in the future?

1.4 Can the courts save liberal democracy?

Will the Court prove equal to these challenges? Not only are the expectations that the Court is capable of settling political matters while keeping its role of an unbiased arbiter undiminished, but expectations have been visibly growing in the last decades. One of the best examples in this

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13 According to Erich Fromm, by the end of the Middle Ages, man gradually becomes doubly free: on the one hand, he is liberated from the medieval feudal and corporative system and gains opportunities for freer economic activity; on the other hand, thanks to the Reformation, he is also released from the burdensome spiritual authority. As a result of the latter two though, he is also free from the bonds that ensure him belonging in the community and guarantee economic and spiritual security. Erich Fromm, *Escape from Freedom*, Oxford, Farrar & Rinehart, 1941, Ch. 3.

14 Ivan Krastev, *After Europe*, Philadelphia, PA, University of Pennsylvania Press, 2017, pp. 86-93.

15 Michael Young, *The Rise of Meritocracy 1870-2033: An Essay on Education and Society*, Oxford, Thames and Hudson, 1958.

regard is the development of the debate about the primacy of the European Union law over the law of the member states.

As is known, within *closed legal systems* the question of legal validity could be easily resolved from a formal point of view. In continental closed legal systems the paradigm of legal validity even possesses a geometrical clarity. Following Hans Kelsen we may assert that every norm in a legal system is legally valid inasmuch as it was created by a person (or a body) who has been empowered to do so by a legal norm that stands higher in the normative hierarchy, and was created following a procedure and based on grounds also specified in the latter norm. Thus the norms that the decrees of the executive bodies contain draw their legal validity from the norms stipulated in laws which, in turn, do so from the norms of the Constitution. The question of what gives legal validity to the constitutional norms has different possible answers. Regardless of whether we refer to Kelsen's Basic norm hypothesis, to Hart's rule of recognition, to the more complicated circular models of Raz, or to something else, the legal validity of the Constitution is after all, a matter of fact, not of norm. In simpler terms, the Constitution is valid because it is respected as a result of a tacit or explicit consensus.

The matter of legal validity becomes complicated within the *open legal systems.* In the hierarchy within the legal systems of the EU member states, two more type of norms are included - those of public international law, and those of EU law. In many member states, the correlation between the norms of the national law and of public international law is stipulated on a constitutional level. For instance, as per the Bulgarian Constitution, international treaties which have been ratified in accordance with the constitutional procedure, have been promulgated, and have come into force with respect to the Republic of Bulgaria, shall be part of the national legislation and shall have primacy over any conflicting provision thereof (Article 5, para 4). It is beyond doubt that these norms have a primacy over the norms of the national laws but hierarchically stand beneath the constitutional norms.

The question of EU law is more complicated still. As is known, the principle of EU law primacy is not explicitly stipulated in the primary EU law. It is deduced from the practice of the Court of Justice of the European Union (CJEU), established with the widely known ruling in the Case 6/64 *Costa v. Enel* (1964) and developed with a number of later rulings. An attempt was made to explicitly stipulate this principle in the founding treaties (Article 1-6 of the Draft Treaty Establishing a Constitution for Europe)[16] but it didn't succeed. In the following Treaty of Lisbon the primacy of the EU law principle was abandoned and was only timidly mentioned

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16 Article 1-6 of the Draft Treaty Establishing a Constitution for Europe: 'The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States'.

in one of the annexed declarations.[17] Even though from a dogmatic point of view it is obvious that a body which does not have the power to amend the Constitution, has still less power to delegate to another body the creation of norms which would hierarchically stand above the Constitution, the principle of EU law primacy formulated by the CJEU is not often openly contested. Logic requires us to ask ourselves why that is.

In my opinion the reason is rooted in the fact that the national political elites who do not share the principle of EU law primacy (if they did, this principle would have simply been stipulated in the Lisbon Treaty) have to overcome not the standpoints of other political elites, but ***rulings of the Court.*** This raises at least two types of problems. On the one hand, the meddling of politicians in 'the purely legal work of the Court' contradicts the established concept of the separation of powers. On the other hand, the rulings of the Court are ***a priori*** assumed immune political conjuncture and are based solely on law, equity, and justice. There is hardly a doubt that the rulings of the CJEU, which establish and champion the primacy principle, are by far more politically justified than they are legally grounded. They express an obvious ***political necessity*** - to compensate for the deficiency of political will for a stronger integration. Nevertheless, albeit founded on a political logic, these are ***Court rulings*** and therefore enjoy a high level of legitimacy. Thus the national political elites found themselves in a difficult situation - opposing the fading legitimacy of representative democracy to the constant legitimacy of law, equity, and justice.

As witnessed, the national political elites found a way to counterbalance this. The formulation of the ***principle of national constitutional identity*** (first in the Draft Treaty Establishing a Constitution for Europe, and then in the Lisbon Treaty)[18] transformed the debate from one between politicians and a Court into one between courts. Thus, within this debate, the argument for greater legitimacy became invalid, since it would be too unconvincing to claim that the rulings of the ***Court in Luxembourg*** have a higher level of legitimacy compared to the ***Court in Karlsruhe.***[19]

What does this example demonstrate? At first glance the Court also draws its legitimacy from reason and justice, just as the bodies constituted through political representation do. But if

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17 Declaration concerning primacy: 'The Conference recalls that, in accordance with well setded case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law'.

18 Article 4, para 2 of the consolidated version of the Treaty on European Union (after the Lisbon Treaty): 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'.

19 The majority of contemporary authors refer to this debate as a *Judicial Dialogue*. See Martin Belov, *Bulgarian Constitutional Identity*, Sofia, Sibi, 2017, p. 24 etc. (in Bulgarian). Like all notions, this one is conceptual. In this case, it is loaded with expectation for a rational conversation, a common search for acceptable decisions, and willingness for mutual compromises without which the development of the EU would be impossible.

we follow Jouvenel's logic there are certain fine distinctions in the source of legitimacy.[20] The legitimacy of the politically constituted bodies is based mainly on arguments of the '***because***' type, i.e. arguments related to the manner of constituting these bodies (case in point, '***because*** they were elected by the people'), whereas the legitimacy of the courts is much more based on arguments of the '*in order to***'** type, i.e. related to the purposes these bodies were created for (case in point, '*in order to* apply the law accurately and bring equity and justice').

In view of the emerging new crisis of the parliamentary models, the significance of the Court as a keeper and protector of the normative ideology of human rights is growing and will probably continue to grow. But we ought to ask our selves whether the Court that was unable to oppose the political rise of any of the totalitarian ideologies of the 20th century would be able to do so at the beginning of the 21st century. That, we do not know, but it is certain that, in order for the Court to do so, it would take more than effort. It would take *magic.*

The 18th century definitely disenchanted the State and put it on rational footing. The end of the 19th and the beginning of the 20th century disenchanted the man and reduced him to an evolved primate with a class conscience and an Oedipus complex. We should not allow the 21st century to *disenchant the Court.* And it is precisely upon those of us who teach in Faculties of Law that a part of this great responsibility falls. Without necessarily turning law school into Harry Potter's Hogwarts, we must be conscious of the fact that we are among those who are responsible for keeping the magic of the Court alive.

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