

Pokol, Béla¹

A Sociological Analyses of the Power Structure of the EU

I. The ECHR as a Self-organizing Team of Registry Lawyers

Though the ECHR is formally not a part of the EU, it plays an important role in the power structure of this entity and in this way it is necessary to analyse it in order to understand this power-structure. In recent years, based on empirical studies and internal interviews, a number of studies have appeared that show the details of the internal functioning of the European Court of Human Rights (ECHR). For a long time, the operation of this type was only known to internal actors, but now recent studies have made it possible to understand how the Court works in general sociological contexts. This chapter deals with the characteristics that can be derived from investigations and interviews with regard to the independence of the ECHR judges. First, the details are described (1); then the general characteristics of the independence of the judges and the dilemmas around the judges' commitment to the case law of the ECHR are looked at in more detail (2). Finally, against the background of the general picture of the judges' independence, the problematic independence of the ECHR judges is assessed by highlighting which side of the functioning of the court most violates this independence (3).

I.1. Organizational framework

Each of the signatory states to the Convention may send a judge to the ECHR, and the 47 judges are divided into five sections. In the plenary meeting of the ECHR, the president and a deputy president are elected FROM the judges for each section. In addition, there are seven or eight judges in each section. According to their website, the decision making of the 47 ECHR judges is currently supported by 667 registry lawyers, including eleven Hungarians, of whom 270 lawyers help to decide individual cases. The ECHR judges do not have their own staff, and if one of them is appointed rapporteur by his/her head of department in one case, (s)he also receives employees from the centralized legal team and forms a team with them. This centralized decision-making apparatus is divided into 33 groups, which are installed alongside the five departments and are headed by the head of the department.² Since the applications are submitted in the national language and there is a separate team of

¹ DSc., Professor Emeritus at the Faculty of Law, Eötvös Loránd University, judge of the Constitutional Court of Hungary

² More specifically, the judge-rapporteur does not receive a specific legal assistant, but a whole group of lawyers from the relevant department, below junior registry lawyer, who is constantly checked by senior lawyers and the written draft is corrected, and ultimately everyone can be from the head of department be taught in relation to the designs. In an interview, one of the department heads described this as follows: "I Manage the entire thing, it's a well-oiled machine. [...] Clearly the most experienced lawyers who have an indefinite contract [...] handle the hardest case [...] and supervise younger lawyers who begin with the simplest cases and handle correspondence. It's a system of hierarchy and supervision, especially for newcomers. In our jargon we call the permanent lawyers 'A lawyers' and 'B lawyers' those who are on a fixed-term contract." (cit. Mathilde Cohen: Judges or Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights. In: Fernanda Nicola/Bill Davis (eds.): EU Law Stories. Contextual and Critical Histories of European Jurisprudence. Cambridge University Press 2017. 63. p.

employees for each language area that leads each case through the decision-making process, most of the 33 groups bring lawyers together from one language area. There is a strict hierarchy within the decision-making groups of permanent legal staff, and in the bottom rows there are the temporary employees with a one-year term that can be extended by up to four years. However, if one of them is found to be co-optable by the permanent head of the legal team, (s)he can belong to the permanent registry lawyers, where (s)he can then spend up to 30-35 years.

In addition to the judge who has been appointed rapporteur for a case, the responsible department head appoints a member of the legal team. They review the progress of the case and each phase of the editorial process, and the hierarchy reviews the draft created by the junior staff before the rapporteur, changes it, and then forwards it to the rapporteur. Before it is completed, it must go through the above-mentioned supervisor of the junior assistant lawyer and the amendments of the rapporteur may only be included in the draft by the consent of the registry lawyers. So when it comes to a more determined rapporteur sticking to his/her ideas, there is an ongoing struggle between the judge and the registry lawyer hierarchy. The resulting draft decision will then be forwarded to one of the ECHR's decision-making bodies and, if it includes a rejection, it will be distributed to a three-member council.³ However, if the decision is substantive and positive, it will be forwarded to the section's seven-member chamber.

There is, however, another review by another permanent legal staff before a case is brought before a judicial decision-making chamber, and this is the opportunity for the *jurisconsult* and his/her legal team to intervene. This position of *jurisconsult* was established in 2005 to protect the relevant ECHR case law and to ensure that individual drafts are always made in the light of this case law. As a former *jurisconsult*, *Vincent Berger*, who held this office between 2006 and 2013, writes that the appointment of *jurisconsult* is decided by the central ECHR management team, which is composed of the President of the ECHR and the five heads of department, and (s)he then examines the draft of every single case. In case of discrepancy, his/her legal team requests the judge rapporteur and the decision-making staff to end the discrepancy. If the deviation from the case law is significant, his/her weekly briefing contains, as a kind of public reprimand, the name of the “perpetrator” and the case for all judges and registry lawyers to warn everyone of such a deviation.⁴ Based on interviews with judges and legal staff of the ECHR, ECHR researcher *Mathilde Cohen* has already found that if the rapporteur insists on a solution to his/her draft despite repeated warnings in one case and expects a positive decision in his/her chamber on the contested draft, at the suggestion of the *jurisconsultus* staff, the case is ultimately taken away from the judge-rapporteur and the chamber and assigned to another judge-rapporteur or another chamber.⁵ However, this is only

³ It should be noted that the first decision on applications received by the ECHR is the admission or rejection, which is entirely decided by the legal staff of the permanent staff and then the rejection is formally signed by a judge as a sole judge, and this has become even more common in published in the past under the names of committees of three section judges. The number of these has been tens of thousands since the turn of the millennium, e.g. 33,067 applications were rejected in 2009, and 983 went to the boards to make a factual decision. See Andrew Tickell: Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a ‘Bureaucratic Rational’ Construction of the Admissibility Decision-Making of the European Court of Human Rights. *German Law Review* (Vol 12.) 2011. 1799. p.

⁴ “A regular, always confidential, task: he writes a weekly flash jurisprudence intended only judges and Registry lawyers and devoted to developments in sections during the past week. With particular emphasis on the “value added” case law, it intends not only inform, but above all contribute to the treatment of chamber business by alerting those who are responsible for their preparation (lawyers, registrars and judges rapporteurs) and their outcome (members of judgment formation of the Court)” Vincent Berger: *Jurisconsult of the Court* (2006-2013). online: www.berger-avocat.eu/echr/jurisconsult.html

⁵ “The jurisconsult has the authority to intervene at any time in the opinions-drafting process if a departure is spotted. Several options are available. The jurisconsult can initiate a discussion with the lawyer and the reporting

conceivable for the most persistent judges, since the *jurisconsult* stands far above the individual judges and their decision-making bodies and is one of the most important decision-makers in the more important decision-making forum of the ECHR, the *Grand Chamber*. Here (s)he represents the entire permanent EGMR-team of registry lawyers. (S)he is also the joint manager of several independent departments (e.g. the research and library department, the jurisprudence department, etc.).⁶ However, his/her greatest strength is that (s)he protects the ECHR's case law from individual judges and their decision-making bodies under the umbrella of the "*Case Conflict Prevention Group*" of the President of the ECHR and the section presidents, and thus confrontation with the legal team of *jurisconsult* by each judge and his/her decision-making body would be a confrontation with the central supervision of the ECHR as a whole. Although a warning from the *jurisconsultus* to a draft case in principle only promotes an open account of the reasons for the deviation, and a justification for this deviation can be given that in principle it only promotes an open debate.⁷ The above-mentioned sanctioning powers of the *jurisconsult* and the possibility to take the case away – or possibly suggest a referral to the Grand Chamber – encourage the potentially opposing judge not to raise any objections if the warning of the *jurisconsult* reaches a level. In the summary by Mathilde Cohen, the *jurisconsult* can be seen as the "Grand Inquisitor" of the ECHR: "I like to think of the *jurisconsult* as the ECHR's 'Grand Inquisitor'". The *jurisconsult* and his delegates receive and review all draft opinions. They can intervene at any time in the writing of any opinions. During their weekly meetings, one of the lawyers may declare, "Hey, I'm reading something that fails to support 'the party line', as we used to say it during the Soviet time, that is, contrary to orthodoxy."⁸

However, there is another level of control over the judges of the ECHR, namely, the linguistic control of draft decisions and final decisions, but also of individual dissent. This also means an additional review of the content, since the linguistic corrections by the mother-tongue inspectors, in accordance with the language and the concepts of the established case law, also cause significant changes to the finished drafts and the published text of the final decisions. Above all, the senior layer of the staff of the language department not only has a mother tongue background, but also a law degree. In this way, they can control judges and their decision-making bodies and chambers, both linguistically and from the point of view of human rights law.⁹ Language tests on the decisions are taken twice, first after the draft decisions have been drawn up and then again by the linguist lawyers, including the text of the dissenting opinion, to the text of the decisions made. Such a linguist lawyer, attached to the ECHR, stated in his interview that there are explicit linguistic precedents in Strasbourg that include binding terminology, and regular terminology meetings are held by linguist lawyers to maintain them. This terminology is compulsory and applies to all judges and legal staff. If one of the judges violates this – perhaps because (s)he deliberately wanted to add another

judge responsible for the case, alerting them to the discrepancy. They can include a note on the problematic case in their weekly e-mail to judges and registry members banking on the naming-shaming effect. Should these actions fail to elicit the desired response, more drastic means can be employed, such as withdrawing the case from the panel and reassigning it to a different one." Mathilde Cohen: *Judges or Hostages?* 68. p.

⁶ "Besides that tasks, the *jurisconsult* is the head of a direction that brings together several sectors: The Registry of the Grand Chamber, [...] the Research and Library Division [...] The Case Law Information and Publication Division [...] The Just Satisfaction Division". (Vincent Berger, see above)

⁷ In an interview, a *jurisconsultus* lawyer described his review of the draft decisions as follows: „Thus a member of the *jurisconsult*'s team pointed out that "my role [...] too is to say, with my team. "Beware, if you depart from precedent, you must explain why." One may very well have good reasons, but it must be transparently, and really good reasons must be given." Cites Mathilde Cohen: *Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort*. *The American Journal of Comparative Law* (Vol. 62.) 2014, 970-971.p.

⁸ Mathilde Cohen: *Ex Ante Versus Ex Post...* 970. p.

⁹ Mathilde Cohen: *On the linguistic design of multinational courts: The French capture*. *I-CON*. 2016, 1-20 p.

normative meaning to the decision – this will be relentlessly remedied during the linguistic correction phase.¹⁰

Regarding the linguistic vulnerability of judges, it should be noted that the two official languages of the ECHR, English and French, do not only mean the official and widely used language versions, but one that has become a simplified but special “Strasbourgian” language system that has been developing over many years. These so-called language versions (“Conventional English” and “Conventional French”), which have been expanded with special terminology, represent the two working languages that are used in everyday decision-making processes.¹¹ And this can only be learned through a two-year intensive language course, even for lawyers who work continuously in Strasbourg. Regardless of how well a judge from the member state who has been seconded to the ECHR for nine years speaks either or both languages, for several years (s)he is unable to carry out decision-making processes without support and is, therefore, vulnerable to the senior legal staff. However, the real situation in Strasbourg is worse, and since one of the two official languages is sufficient to appoint ECHR judges, the seven judges in a section’s decision-making chambers can often only communicate at meetings with the help of an interpreter, because half of them knows one and the other half only knows the other language. These linguistic restrictions, along with the others, mean that in many cases judges are, in fact, just a disguise to cover up the decision making of the permanent legal staff (registry lawyers); on the one hand, due to the restrictions of extremely strong precedents, and on the other hand, due to language weaknesses.

The almost complete vulnerability of ECHR judges to the ECHR’s permanent legal staff (registrar, deputy registrar, department registrar and deputy department registrar) and to the centralized registry lawyers they oversee and are under permanent hierarchical subordination can be demonstrated even more clearly in their situation in comparison to the European Court of Justice in Luxembourg. As we will see, judges are also vulnerable to permanent staff, but this results in a higher level of judicial independence for judges involved in decisions. (See the analyses in the next chapter.)

1.2. The independence of the judges, their loyalty to the Convention on Human Rights and their case law

Since the Enlightenment, the basic principle of the judiciary – the formula for the independence of judges – has been that the judge is independent and is only subject to the law. As a result, there must be no other instance between the judge and the law applied by him/her that affects the decision. The linguistic meaning of the law determines the norm of the decision, and if this does not happen immediately due to its openness, the judge can authentically decide based on the methods of interpretation used in the legal system and the legal dogmatic concepts of each branch of the law. If there is any objection to the judgment of the court, the appeal process can be repeated before a higher instance. This can eliminate the prejudices or misinterpretations that still occur in the first instance and, at the same time, ensure the independence of the judges. This initial situation began to change in the early 20th century, and, by then, decades of experience since the Enlightenment made it clear that

¹⁰ “ECHR translator *Martin Weston* thus writes that there are „linguistic precedents” at the Strasbourg court. There, translators hold periodic „terminology meetings” to discuss and settle upon standardized translations for given words and expressions. These translation constrains are very much present in the mind of those, judges and non-judicial personnel, drafting opinions.” Mathilde Cohen: *On the linguistic design...* 15. p

¹¹ “A senior registry lawyer explains that the new recruits must be trained in those idioms: ‘we have our style [...] for two years, we are taught that style,’ so there is a Convention English and a Convention French, a registry lawyer way of drafting.” Mathilde Cohen: *On the linguistic design...* 19.p.

something else under the law's general provisions should still be binding judges in their considerations and interpretation of the law. It has gradually become common in European countries for judges to be bound by interpretations developed and determined by Supreme Courts, and if this is ignored in their judgment, their judgments in appellate cases will become annulled by the higher courts. Henceforth, the legal text and the case law of the Supreme Courts have jointly defined what the law is in a country, and the judges take the legal text into account in their decisions based on legal dogmatic concepts and together with the case law of the Supreme Courts.¹² Since then, legal compliance and the relevant legal dogmatics have also been considered as a legal restriction to the independence of the judiciary in addition to compliance with the law. However, this did not change the fact that the judge's decision could not be influenced by a binding body, and the judgment of a judge can only be corrected by appeal. The appeal has, of course, been supplemented by various additional review procedures over the past hundred years, and not the entire trial is repeated, only a few legal issues are re-examined, or the Constitutional Courts can decide on the basis of a constitutional complaint if a court decision violates a fundamental right. However, they do not affect the judge's decision in his/her own proceedings and (s)he can make his/her judgment without the instructions of an outside person.

Violation of the independence described above is the most fundamental violation of the rule of law. So let us look at how the ECHR decision-making mechanisms described in the introduction relate to this and whether or not they affect the independence of individual judges.

1.3. The exclusivity of the ECHR case law for judges: loss of independence

The general picture of the judges' independence outlined above is supplemented in the case of stable legal codes that may remain in place for centuries, such as the French Civil Code of 1804 or the German Civil Code of 1900. Despite the unchangeability of the legal text, this can be supplemented by the fact that the changes in times are followed by a gradual reinterpretation of the existing case law brought about by the judges and the introduction of a new case law standard in addition to the legal text. There is a hierarchy between the listed intellectual layers of law (the legal text, the case law and the legal dogmatics) and in addition to the priority of the current legal text, judges' case law can be changed more easily, which can be supported by new legal dogmatic constructions created by legal scholars over time. Therefore, the binding nature of groups of the Supreme Courts' case law norms are only relative, and when the new generations of judges come or new judges are appointed with a change in the democratic political majority, the existing case law is gradually changed and the old case law is replaced by new one added to the codes. However, this presupposes that the newly appointed or elected judges within the judiciary are independent and that the binding nature of the case law remains only relative and the possible rapid exchange of the existing case law cannot be prevented. Judicial independence, therefore, means not only protection from outside, against political power, but also against the internal hierarchy of the judiciary and protection against older groups of judges who want to preserve the old case law forever. If a closed judiciary and its self-cooptation order are created, then the rule of the established case law against a change of law and dogmatics can be realized, which can only react to the change of times with arrogant rejection and with the argument of the supremacy of law over democratic politics. The closed judiciary actually identifies the supremacy of law with its own

¹² See the description of the combined effect of legislative acts and the case law of Supreme Court on the decision making of the courts and on their judgments: McCormick, D. Neil/Robert Summers (eds.): *Interpreting Statutes. A Comparative Study*. Dartmouth. Aldershot. 1991.

power and this is declared as the “rule of law”. In case of an extreme escalation of tensions, society and its political order can only respond to such a situation to restore the primacy of law and legislation and the subordinate jurisdiction of the judiciary with a revolutionary swing. In this way, the individual judges are freed from the rule of the closed and hierarchical judiciary and the independence of the individual judges is realized again.

The general picture of the relationship between the independence of judges and existing case law also provides a good background for understanding the situation of the ECHR judges. The investigations show that the case law has been absolute and individual judges and their decision-making chambers have been extremely bound to this case law, and the ECHR judges have lost their independence in an extreme way, especially since the turn of the millennium. The starting point for this is the fact that the decision-making staff were separated from the judges and were organized in a separate hierarchical central system. In this way, the rapporteur can only act from a subordinate position in order to prepare a draft decision based on an independent judicial judgment. “His/her” supporters are embedded in a hierarchical order that is independent of him/her, and even if new ECHR judges grow up over time to understand the existing case law and to examine possible intellectual alternatives to a provision of the Convention on Human Rights, (s)he will still be opposed to the closed hierarchical EGMR legal team that dominates decision making. The “Grand Inquisitor” (*jurisconsult*) has joined this already existing position of subordination since 2005. With his/her own legal team, (s)he has extensive powers to intervene in every phase of each case and ultimately force individual judges and decision-making chambers of the ECHR to change. All of this not only abolishes the judges’ independence, but gives full control over the ECHR’s decision-making mechanism for an established case law, and the Convention only becomes a distant reference because judges can only consider it in the light of the case law.

In fact, the ECHR’s decision-making mechanism is increasingly characterized by the rule of the closed group of the permanent registry lawyers, who could also ensure their permanent self-reproduction by training new lawyers, monitoring their loyalty and then including the selected ones. Therefore, for the most part, the ECHR judges, selected and seconded by the member states, can only hide this decision structure, but have only a minimal influence on decisions. In fact, they only obscure the hierarchy of the permanent legal team, including the dominance of the registrar, the deputy registrars, the departmental registrars and the deputy departmental registrars. If an ECHR judge identifies with the leaders of the dominant legal team over the years, (s)he may even be section president, but the remaining years of his/her nine-year term leave him/her with little opportunity to influence the ECHR’s juristocratic oligarchy and jurisprudence.

The signatory states to the ECHR can, therefore, only state that their powers due to the closed ECHR juristocracy are being annulled and despite their right to choose the ECHR judges based on the democratic public opinion of each member state to influence human rights jurisdiction in the face of changing European circumstances, this is not put into practice. Research has also shown that, over the years, this closed juristocratic oligarchy in Strasbourg has not only interpreted the Convention in its jurisdiction, but expanded it in many ways to bring the entire legal system of the signatory states under its control. In analysing the case law of the European Court of Human Rights, *Julian Arato* has previously shown two methods of how the judges’ competences, which were originally very wide, were further separated from the Convention. In doing so, they have been expanded so that they are the most distant from what the signatory states originally intended with the commitment.

In view of this expansion, it is not the ECHR judges that actually rule on the cases put before them, but a closed juristocratic oligarchy, and in particular, this fact violates the sovereignty of the signatory states to the Convention. Over the next few years, Europe’s self-defence against migration pressures, which are already reaching millions, will be at the heart

of the Strasbourg Court's rulings. If the ECHR does not interpret human rights standards by focusing on the rights of the European citizens and protecting the European civilisation from other civilisations, but interprets immigration as the rights of all people, then its pre-existing distortions – i.e. violation of the foundations of judicial independence, as we have seen – will continue to increase, and its operation can be questioned in the most fundamental way. One step towards creating a new pan-European court of justice perhaps should be to modify the protection of human rights, which was set up after the end of the Second World War and, instead of the human rights, to put the protection of the rights of European citizens at the centre. In the meantime, however, the most important tasks of the improvement are already visible for today's ECHR. First, the decision-making autonomy of the ECHR judges must be at least as high as that of the Luxembourg judges, and, for this purpose, the centralized decision-making apparatus in Strasbourg must be abolished and each judge must be able to do the preparatory work instead. In addition, the powers of *jurisconsult*, in whom the extreme ties to the Strasbourg case law are realized, and the influence of his/her apparatus should be radically abolished in every decision-making process.

These are the most direct violations of the judicial independence and the abolition of these are the requirements for the minimum standards of rule of law.¹³ In the long run, however, a number of additional negative experiences in building today's protection of human rights from the rights of European citizens could be a warning sign in the direction of the right structure to avoid today's distortions.

II. The decision-making mechanism of the Court of Justice of the European Union

In the previous chapter, I analysed the functioning of the Strasbourg Court of Human Rights (ECHR). One of the aims of this chapter is to compare the judges in Luxembourg with the situation of ECHR judges. I would like to examine to what extent the Court of Justice of the European Union (CJEU) differs from the situation diagnosed in Strasbourg and whether the Luxembourg decisions are real court decisions and whether the judges are mere puppets of a permanent legal staff or not. When I analyse the situation of the EU Supreme Court in more details, I also look at its power functions, which were actually achieved during its work and make some suggestions at the end of the chapter to remove the distortions in its functions.

II.1. Organizational and operational data

The Court of Justice of the European Union (CJEU) has had two internal courts since 1989 to deal with the decision-making burden more quickly and, in addition, a second internal court (known as the General Court) has been set up to deal with competitive law cases. I will

¹³ In an interview with David Thor Björgvinsson (Davíð Þór Björgvinsson), an earlier judge of ECtHR, he had critics on researchers not to address the problems of independence of judges from a theoretical point of view: "You enter into an institution filled with hundreds of people who at least some of them, have been working there for decades. These are the people in the Registry. They have all the institutional knowledge, so you are very much dependent on them, when it comes to the way in which the European Court of Human Rights operates on a daily basis. This is not just with regard to practical matters, but also on technical expertise, and even judicial decision-making. [...] Some judges have very strong views on their judicial independence, while others are less concerned about the role of the Registry and its influence of the judicial decision-making. This has caused some tensions within the Court and is an issue which academics have failed to address from a theoretical point of view." Graham Butler: Interview with David Thor Björgvinsson: A Political Decision Disguised as Legal Argument? Opinion 2/13 and the European Union Accession to the European Convention on Human Rights. Utrecht Journal of International and European Law. (Vol. 81.) 2015, No. 31.

refer to these two courts as the European Court of Justice (ECJ) and as the General Court.

The ECJ and the General Court are composed of one judge from each signatory state, and the term of each of these can be extended by six years. In addition to the 27 judges, nine advocates-general (*avocat générale*) from the French legal tradition take part in the decision-making of the cases. (There are no advocates general at the General Court.) Although the latter have no right to vote in the judges' chambers, the advocate general's independent opinion essentially determines the content of the decision in all important cases.¹⁴ Here in Luxembourg, each judge and advocate general has his/her own staff (cabinet) with three (the last four) legal staff (*référéndaires*) selected by the individual judge and the advocate general and employed as an employee. So if a judge is appointed rapporteur by the President of the Court of Justice, (s)he will have more control over the draft decision through his/her subordinate staff and will not be as vulnerable to the permanent legal staff as we have seen in the case of the ECHR judges. (The advocates general are appointed by the First Advocate General to provide an opinion on each case.) Again, there is the registrar who oversees and directs the permanent legal team, but for the most part controls only the economic management and information tools of the entire Court and no control about the cabinets involved in the decision of the individual cases. Here the vulnerability of individual judges is greater due to the linguistic restrictions. In Luxembourg alone, French is the internal working language of both courts, and individual judges draw up their draft decisions and statements in French. Since French has largely been relegated to the English language in general for the past seventy years, the judges appointed by each member state travel to Luxembourg with much less language experience and it is more difficult to get cabinet personnel trained of true French from the member states. (*Mathilde Cohen* calls this "*the French capture*").¹⁵ Since a specific legal jargon and a closed terminology for the uniform linguistic expression of draft decisions and judicial statements have also developed here in Luxembourg, only a judge and the cabinet staff who have long used this legal jargon can effectively enter the decision-making process. As a result, this barrier of the language mostly does not allow individual judges to choose their own cabinet staff and maintain their independence, and for this reason there is a tendency to adopt those who are familiar with the functioning of Luxembourg judges, and that means a forced takeover of already practiced employees also.¹⁶ Although such transferred employees cannot be controlled by an external legal team independent of the judge, in contrast to ECHR judges, a judge with a stronger personality in Luxembourg can retain a certain degree of decision-making sovereignty in this way. It should also be noted that the constant corrections of the legal-linguistic departments in the draft decisions and then in the adopted decisions also mean strong control here, and this goes beyond mere linguistic control and often means a rewriting of content before the adopted decisions are published.¹⁷

An additional decision-making control over individual judges and their decision-

¹⁴ In contrast with the judge positions available to each member state, in the case of Advocates General, only six large states (UK, Germany, France, Italy, Spain and Poland) have such positions and the other three have switched from the other member states. However, the Lisbon Treaty provided for an increase to 11, and Poland was then given a permanent sixth post as Advocate General. See László Blutman: European Union law in practice. HVG-ORAC. Budapest. 2014, p. 74. p. However, with regard to the total number of Advocates General, only nine employees were hired until 2017, see Karen McAuliffe: Behind the Scene at the Court of Justice. Drafting EU Law Stories. In: Fernanda Nicola / Bill Davis (eds.): EU Law Stories. Contextual and Critical Histories of European Jurisprudence. Cambridge University Press 2017. 44.

¹⁵ Mathilde Cohen: On the linguistic design of multinational courts: The French capture. I-CON. 2016, 1-20 p.

¹⁶ "When new judges or advocates general come to the Court, they generally bring their own staff with them, although they sometimes keep at least one *référéndaire* from the institution itself as 'it is useful to have at least one member of cabinet who knows and understands how the institution works". McAuliffe: Behind the Scene... 46.

¹⁷ See Karen McAuliffe: Behind the Scene at the Court of Justice... 35-57. p.

making chambers in Luxembourg is the involvement of the advocate general in the decision-making process. Although the advocate general has not been appointed for simpler cases since 2004, this is the case in most important cases and, together with the President of the Court's decision on the person of the rapporteur, the First Advocate General also appoints the advocate general to the specific case. After his/her appointment, both the rapporteur and the advocate-general report to their own cabinet on the drafting of the draft decision and the opinion in the case of the advocate-general. However, the rapporteur can only begin drafting his/her decision after the advocate general has done his/her job and has submitted his/her opinion, which has been published in the internal system of the court. *Mathilde Cohen* describes the role of the advocate general in a way that the intervention of the *jurisconsult*, which has already been outlined in the case of the ECHR, and in her opinion, the role of the advocate general in influencing the decision is somewhat similar.¹⁸ However, it should be noted that although the opinion of the advocate general plays an important role in the decision in Luxembourg, the majority of the Chamber can take a different position. Thus, the independence of judges in Luxembourg is not affected as much as it was created in Strasbourg due to the apparatus of the *jurisconsultus* and the registry lawyers.

According to the European Parliament and Council rules 2015/2422, which amended the Statute of the Court of Justice of the European Union (CJEU), the number of judges of the court was doubled by 2019.¹⁹ At the ECJ, the judges are appointed for a three-year term in five chambers, chaired by a president, who is elected by the General Assembly from among the judges of the ECJ on the proposal of the President of the Court. In these chambers, the General Assembly elects three-member councils and one chairperson for an annual rotation, and if it is a routine matter and no new legal issue arises, this is not discussed by the five-member council, but only by the three-member council. In the ECJ, however, most cases are decided in five-member councils.

II.2. The question of the independence of the judges and the objectivity at decision-making

The independence of the judges and the impartiality of decisions are strengthened when cases are passed on to the chambers and to one of the judges as rapporteurs through a certain degree of automation. In this regard, there is a big difference between the ECJ and the General Court, and while the President of the ECJ can freely decide who will the rapporteur be and who should deal with the draft ruling in the case, the General Court has had automation in this area in recent years. By restricting the discretion of the President of the General Court, the cases are here automatically forwarded to each chamber. It is true that the decision of the President of the Chamber on the person of the rapporteur is more or less approved formally by the President of the General Court. However, since the case was referenced to a particular chamber through the mechanism of random case assignment, the possible distortion of this personal choice only disturbs the objectivity of the decision, but

¹⁸ See Mathilde Cohen: *Ex Ante versus Ex Post...* 971. p.

¹⁹ With regard to the case burden, 739 cases were registered in 2017, which also exceeded the peak of 2015 (713). This increase was also increased due to preliminary design requests, which totalled 533 requests, 13% more than in 2016. However, the number of infringement procedures against member states has also increased. In 2017, 41 such cases were initiated, compared to only 31 in 2016. The court's number of appeals to the ECJ in 2017 was only 141, compared to a higher number in 2015, 206. The total number of cases closed by the ECJ in 2017 was 699 versus 704 in 2016. The preliminary ruling before the ECJ averaged 15.7 months in 2017 compared to 16 months in 2016, the appeal process averaged 17.1 months, compared to only 12.9 months in 2016. This increase was due to the large number of very complex competitive processes. See the report by the President of the ECJ, Koen Lenaerts: *The Court of Justice in 2017: Changes and Activity*. In: *Annual Report Judicial Activity*. Court of Justice of the European Union. Luxembourg. 2018. 8-19. p.

does not remove it. In contrast, within the ECJ, the appointment of a judge through an arbitrary decision by the president can be the greatest problem both in terms of a higher degree of judicial independence and in terms of the objectivity of decisions. Because the President of the Court of Justice (CJEU) is free to rule in this area, the President's rejection of a former rapporteur's decision in the future may adversely affect that judge in later cases, and it can be assumed that the President will avoid this judge with the arbitrary choice of rapporteur. This distorted situation is all the more problematic, since between the two courts of the Court of Justice of the European Union – the ECJ and the General Court – the ECJ has a higher hierarchical level and important cases come from there and the decisions of the General Court can be appealed to the ECJ. Two further problems exacerbate this distortion, particularly within the ECJ.

One of them is described by the “revolving door” analogy, and the important thing is that while the ECJ should be the neutral arbitrator in the dispute between the EU Commission and the governments of the member states, it has a close exchange of staff between the permanent apparatus of the ECJ and individual judges/advocates-general and the Commission's Legal Department in Brussels. Dozens of Commission lawyers will regularly switch from the Commission to the staff of the ECJ, but also to the legal staff of the General Court, and they will return to the Commission's legal department in a few years.²⁰ For the ECJ, more than ten percent of legal staff came from the Commission's legal department in the 1990s, but that number is still over 30 percent at the General Court. In addition, some of the *référéndaires* return to the Commission's Legal Department after their years at the ECJ and the General Court, and many only work in either of these courts when their work at the Commission is suspended. Thus, the Commission can always count on built-in “friendly” lawyers in the judicial system of the ECJ or the General Court, and in more important cases, judges with an employee on their staff who is a member of this “friendly lawyers network” from Brussels and when they are appointed as rapporteurs this situation could cause serious distortions. The most common way for the Commission to get inside information from built-in former Commission staff is to find out which decision-making preferences prevail in cyclically changing judicial chambers and new judges and which judge or rapporteur would be favourable to the Commission.²¹ The most common party to litigation before these courts is the Commission, which is either suing a member state or is sued for a measure. Therefore, the independence of the judiciary in Luxembourg and the objectivity of decision-making are often questioned by a “revolving door”-like association.

The ground tilts towards EU institutions, including the Commission in the Luxembourg decision-making process, while judges and judicial councils should, in principle, be isolated from them as neutral arbitrators in disputes between the EU and the member states. The ongoing internal insider information and the close relationship between the Commission and the Luxembourg judiciary make the equality of arms between the member states, which are suing for EU measures, largely illusory. Their disadvantage is exacerbated by the fact that

²⁰ „Abundant literature in law, economics and political science has voiced concern that revolving doors can lead to regulatory capture. As the Commission frequently appears before the Court, those *référéndaires* who were seconded from the Commission or those who wish to join the Commission may have the tendency to side with the Commission.” Angeal Huyue Zhang: *The Faceless Court*. University of Pennsylvania Journal of International Law. (Vol. 38.) 2016. No. 1. 101. p.

²¹ See Angela Huyue Zhang: „Another consequence of the revolving door is that it allows the Commission to conduct intelligence surveillance on the Court. As Court membership is fluid and the preference of individual judges varies, the revolving door makes it possible for the Commission to keep pace with its changing landscape. Commissions secondees can sharpen their litigation tactics, for instance, by learning how to present arguments that can best persuade particular judges and *référéndaires* at the Court. [...] The Legal Service of the Commission, which employs more than 200 lawyers, is a powerhouse that specializes in litigation before the Court.” op. cit. 102. p.

the Luxembourgish courts, which originate from the French tradition, completely hide internal dilemmas and decision alternatives from the public and do not allow judges to add dissenting opinions and parallel arguments to decisions. Contrary to the vast amount of inside information provided by the Commission's Legal Department, member states' lawyers who have litigation with the Commission are unsure about arguments that judges can adequately influence. In addition, there is the French "language trap" of the Luxembourg judges due to their internal working language, and although applications from the Member States can be submitted in all the 23 official EU languages, the internal decision-making processes use only the French one. In addition to the few western member states (France, Belgium and Luxembourg), the knowledge and use of the French language in legal circles is minimal, as English has replaced all previous world languages in recent decades. For most EU member states, this language disadvantage is, therefore, limited to the narrowest possible group of lawyers from which to choose a cyclically dispatched judge and send him/her to Luxembourg, and the judges have difficulty finding a lawyer in their own country who, in addition to EU law, also knows the French language. The French court jargon used in the terms and formulas of Luxembourg jurisprudence have developed over decades and can only be mastered after a long language course even for those who speak French well.²² This then forces almost all judges from the member states to select their legal staff from EU legal departments. The Luxembourg judiciary is thus isolated from the member states, but works almost in symbiosis with the EU bodies, with the Commission in particular.

A further distortion can also exacerbate the above distortions within the ECJ, which violates the independence of judges and questions the objectivity of the Luxembourg judiciary. This was described by *Hjalte Rasmussen* in 2007, stating that the judges from the old member states marginalize the judges sent by the new member states that have joined since 2004 and the latter are mostly excluded from deciding on more important cases. After the President has appointed the rapporteur, the weekly general assembly of judges, on the rapporteur's suggestion, decides which formation to form in a case: whether the three-member chamber, the five-member chamber or, in more important cases, the 15-member grand chamber. In addition to the President and Vice-President of the Court of Justice, the Grand Chamber is dominated by the group of judges from the old member states, while the ECJ's rules of procedure in principle provide for rotation, at least more recently.²³ In his 2013 study, *Tomas Dumbrovsky* confirmed this statement by saying that if a judge from the new member states adapts to the preferences of the old judges, one of them could exceptionally join the inner circle after a while. In his description, the dominant group of judges developed in such a way that the President of the Court of that time set up an informal decision-making body after 2005, consisting of the old judges at the head of the five chambers, to ensure that the decisions of the chambers were based on his preferences. On the other hand, those who belong to the dominant inner circle have a permanent information advantage over other judges who miss these weekly sessions.²⁴

Another consequence of the consolidation of the dominant group of internal judges is that the presidents of the five chambers sit next to the president and the vice-president of the Court in the 15-member Grand Chamber, which decides on really important cases and thus on

²² See Mathilde Cohen: On the linguistic design of multinational courts: The French capture. I-CON 2016, 1-20 p.

²³ Hjalte Rasmussen: Present and Future European Judicial Problems after Enlargement and the Post-2005 ideological Revolt. *Common Modern Law Review* (Vol. 44.) 1661-1687. p.

²⁴ Tomas Dumbrovsky: The European Court of Justice after the Enlargement: An Emerging Inner Circle of Judges. EUSA Twelfth Biennial Conference, Boston. 2013. 2.p. According to Dumbrovsky's data analyses, there were no new national judges among them, despite the five rotating presidencies of the Council after 2004, after two three-year terms.

the most basic jurisprudence. If you take all the old judges with you, the safe majority of them are usually able to make decisions beyond doubt. As of 2005, the new member state judges were scattered and separated in the various chambers at the suggestion of the President of the Court, so that they could not be organized against the old judges in larger cases.²⁵ Dumbrovsky even showed that some judges in Central and Eastern Europe brought some nuances to the arguments of the elderly by emphasising national defence against the previously unshakable pro-European dominance of federal EU. Internal interviews said it was the first Polish judge and the Czech judge and it applied to the Estonian judge, but in principle this did not mean a renewal of the decision-making practice of the EU courts.

Overall, therefore, although the situation in Luxembourg is better than that of the Strasbourg judges, there is some degree of objectivity of judicial decisions in the judiciary of the ECJ. However, the situation in Luxembourg is not reassuring due to the major decisions of the Grand Chamber, the so-called “revolving door problem”, and the role of this internal judge clique in the old member states.

II.3. The European Court of Justice in the power dynamics of the Union

Of the two EU courts in Luxembourg, the ECJ is important not only because of its ordinary judiciary, but also because to a certain extent, it plays the role of the constitutional court through its interpretation of the treaties and its case law is indirectly at the centre of EU law. Let us take a closer look at them.

Although after the failure of its 2003 constitutional draft, despite the encouragement of some political circles, the European Union failed to unite the member states in one federal state, even the most Eurosceptic member states benefit from the economic concentration and thus they are encouraged to accept the expansive interpretations of the ECJ on the Treaties. In this way, the ECJ’s interpretations of the Treaties are the *de facto* highest normative level of the EU and this activity can be regarded as the constitutional adjudication of the Union, even if the Union has not become a federal state due to the afore-mentioned failure and the treaties do not mean a constitution. This *de facto* situation has existed for decades, and since the amendments to the treaties to repeal the ECJ’s interpretations are often almost impossible due to the requirement of unanimity, the ECJ has so far unconditionally limited the laws of the member states through constant expansive interpretations of EU-competences. This enlargement can, in principle, be stopped by the constitutional courts of each member state on the basis of constitutional identity or by *ultra vires*, in particular because of the reservations by the decisions of member states’ constitutional courts on the Lisbon Treaty, which declared that the binding force of EU law to the member states was limited.²⁶ It is rarely realized, but in 2012 the Czech Constitutional Court rejected an ECJ decision regarding the Czech Republic because of its constitutional identity, and implementation of that decision in the Czech Republic was prohibited. Then there were similar cases again in 2016 in Denmark and again in 2020 in Germany. However, these occurrences are rare, and despite the basic possibility, no other similar invalidation has yet occurred in other cases.

However, it should be seen that the scale of mass migration in recent years and the militant denominations of Muslim communities already numbering millions – e.g. the Salafi

²⁵ Dumbrovsky also showed in absolute numbers that between 2004 and 2012 the most influential old judges in the inner circle received at least twice as many rapporteur positions as judges in the new member states, and this was clearly more unequal in really important cases. See Dumbrovsky, 28. p.

²⁶ See the analyses of constitutional judge, Zs. András Varga: The Role of Constitutional Courts in the safeguard of constitutional identity. (Az alkotmánybíróságok szerepe a nemzeti/alkotmányos önazonosság védelmében.) *Iustus Aequum Salutare* 2018/2. sz.

fanatics – create such civil war situations in the metropolises that can help those in a number of Western European countries to power the government who want to break this current radically. This changed political situation in Europe and the change of mood can, in the future, also alter the attitude of the constitutional courts of the member states in order to take advantage of this possibility of resistance to EU law. It is only worth mentioning that the ECJ did not address this problem, and, following the increase in the influx of millions of migrants in 2015, at the request of an Eritrean youth migrant girl, in April 2018 the Luxembourg judges decided that the girl who had a family at home (her parents and three brothers) has a right under EU law to bring their family to the Netherlands for family reunification purposes, and the Dutch authorities' decision to refuse to do so was considered against EU law. It should be noted that the ECJ's migration-friendly decisions in recent decades have largely required the admission of hundreds of thousands of migrants from non-EU countries to EU countries for the purpose of family reunification. However, several countries have attempted to interpret this in such a way that if a minor is recognized as a refugee wanting to stay in the country, (s)he can only ask for family reunification before (s)he reaches adulthood. After adulthood, however, this need for family reunification no longer exists, namely, (s)he is no longer in need of family help. However, in April 2018, the ECJ ruled that the possibility of family reunification should be expanded, and despite reaching adulthood, a migrant could apply for the admission of his/her parents and siblings to the Netherlands under EU law.²⁷ Due to a similar situation in Germany, the local press pointed out that the German authorities also examined this decision of the ECJ and presented figures from last year that 90,000 migrants, mainly Muslim minors, came without parents in 2017. Based on the family of five from this Eritrean girl, the ECJ ordered the admission of another fifty thousand migrants only for Germany and only for 2017. However, this will be reinforced by the years 2015 and 2016 with more than one and a half million Islamic people. This means tens of thousands of similar minors among them and together with their families, the number exceeds hundreds of thousands who stayed at home.²⁸ Therefore, as a case law, this decision could increase millions of new migrant groups across the Union in the coming years, even if the EU border agency, Frontex and the member states manage to stop further influxes of migrants.

This raises the problem that, despite the fact that political change has been taking place at the level of millions of European citizens and they are becoming a political force that wants to curb migration in more and more European countries, the European Court of Justice above them can block government actions for European self-defence. In such situations, it is very likely that, at least in some EU countries, the limited possibility to invalidate EU acts within a member state on the basis of constitutional identity or *ultra vires* will be brought to life in the coming years. In this way, the “constitutional adjudication” of the ECJ can be reduced to whatever would have resulted from the international law-character of the Union: a mere international interpretation activity under the control of the constitutional courts of the signatory states.

The fact that this possibility is not just theoretical speculation has been shown by the consequences of several ECJ decisions around 2007, which more than usually exceeded the EU's responsibilities to the disadvantage of the member states, provoking explicit proposals from the member states to reject the implementation of these decisions. One of them was the the ECJ's so-called *Laval decision*, which was based on the four fundamental freedoms of the Union (free movement of people (labour), capital, goods and services), and it intervened in the area of labour law and trade union issues, which are after the EU treaties expressly a

²⁷ See the decision C-550/16 of Chamber of ECJ <https://eur-lex.europa.eu/legal-inhalt/en>

²⁸ See the information from the weekly „Zeit”: „Insgesamt haben nach Abgaben der Bundesregierung im vergangenen Jahr 89.207 Minderjährige einen Asylantrag in Deutschland gestellt, darunter 9084, die ohne Begleitung ihrer Eltern oder anderer Erwachsener eingereist sind.” Die Zeit 2018, 12 April.

matter for the member states.²⁹ With this, the ECJ, relying on market freedom, brought the supervision of the fundamentally different areas of labour law and advocacy in each member state under its control and started to lay down the foundation of a single EU regulation. This put aside the trade union powers that have been fought for in the individual member states for centuries, which clearly violated the division of powers in the EU treaties, and suggested the rejection of such ECJ decisions, which, without political consultation, imposed a serious political dilemma onto the member states. *Fritz Scharpf*, a renowned expert on EU political mechanisms and a German political scientist, suggested that after the rejection of this ECJ decision, the member states must have the power of regulation concerning these issues in EU legislation. That is, the negotiating mechanisms of EU regulations and directives should be decided and such EU law can only be created with will of majority.³⁰ Flooding European societies with millions of Muslim migrants, also through the decisions of Luxembourg judges, while leading to landslide electoral shifts in the member states to prevent this, threatens the foundations of European civilisation far beyond the otherwise important labour struggles. It is, therefore, likely that the resistance recommended by *Fritz Scharpf* will become reality after a good decade, and the declaration of principle already made by most EU constitutional courts on the basis of constitutional identity and *ultra vires* can lead to concrete decisions in the coming years.

In connection with this anticipation, there is a fundamental structural problem of the European Union that makes it even more urgent to take this step. The basic problem can be understood if one takes the nature of a semi-federal state of the EU as a starting point. Originally an international treaty, the Common Market of 1957 was brought to quasi-federation by the decisions of the ECJ from 1962-64 (*Van Geld en Loos* and *Costa v Ennel*), which declared the supremacy of Community law over the legal systems of the member states, and thus the Treaty of Rome was made a quasi-constitution. In particular, however, later on, the EU treaties were radically modified and expanded by the case law of the ECJ, and this community thus moved towards a half-realized European United States. However, the failure of the EU constitution in 2005 and the profound global banking and financial crisis of 2008 led to the deepest pessimism among hundreds of millions of European citizens about all transnational formations, and in a number of European countries the parliamentary majority became more Eurosceptic. This has only been exacerbated by the influx of several million Islamic migrant masses since 2015, an influx that was received amicably by the EU elite or at least rated as neutral. Therefore, no effective measures have been taken to stop migration according to the will of the electorate. Eurosceptic political forces have thus increased across the member states and in some places have gained the majority. However, this cannot be reflected at EU level due to the structural peculiarities of the EU institutions. This is because the ECJ has been pushing for European integration towards the Federation from the start. In cooperation with the ECJ, the other EU institution, the Commission, first of all, which is independent of the member states and is in most cases against them, is the main bastion of federal efforts within the EU. Although the intergovernmental institutions that safeguard the

²⁹ C-341/05 *Laval und Partneri Ltd v. Svenska Byggnadsarbetarförbundet and Others*.

³⁰ “Die Regierung könnte erklären: Wir halten diese EuGH-Urteil für nicht gedeckt durch die politische Willensbildung in Europa. Dieses Urteil ist reines Richterrecht, das nie politisch akzeptiert wurde. Wir akzeptieren jedoch ein Votum des Ministerrats falls dieser das Urteil bestätigt. Das heißt, man müsste nicht nur der nationalen Widerstand deklarieren, sondern auch die europäische Politik anrufen und fragen: “Habt ihr das wirklich gewollt, was die Richter hier machen? Wenn eine qualifizierte Mehrheit der Länder Ja sagt, dann werden wir weiterhin das Europarecht vollziehen”. Das wäre aus meiner Sicht die einzige Strategie, mit der man nicht die generelle Unterstützung für die europäische Integration aufkündigen müsste und trotzdem Widerstand leisten können gegen diese zu weit gehende richterliche Interpretation von Verträgen, die vor mehr als 50 Jahren geschlossen wurden.” Cornelia Girnd: Der einzige Weg ist, dem EuGH nicht zu folgen. Interview mit Fritz Scharpf. Mitbestimmung, 7-8/2008. 23. p.

sovereignty of the member states (the Council of Heads of State and Government and the Council of Ministers) were encouraged by the more Eurosceptic member states, they could not act effectively against the tandem between the ECJ and the Commission in defining the Union.

Due to the unanimity of the EU treaties, which constitute the quasi-constitution of the quasi-federation of the EU, this standstill has been resolved for decades, so that the European Parliament has no possibility of changing the foundations of the Union, and also the Council of Heads of State and Government or the Council of Ministers have only minimal scope in this area. In contrast, the ECJ, which interprets the quasi-constitution of the Union with an exclusive monopoly, realizes a constant constitutional specification of all EU policies through its case law. Constitutional historian *Dieter Grimm* called this situation the over-constitutionalization of EU politics in his book of 2016; Grimm is a former German constitutional judge and a great critic of this phenomenon.³¹ In addition to this deadlock, this is also made possible by the nature of the EU treaties, which not only provide an operational framework for EU institutions (which could then be filled in by specific political processes), but also a number of abstract political goals for important EU responsibilities. But even the basis for it – the four EU freedoms as basic goals of the entire Union – is so extensive that by an activist interpretation of the ECJ, they can almost completely define all living conditions in the member states. In fact, the free movement of people (labour), goods, capital and services across the Union indirectly affects all regulations in all member states, and in recent decades, the ECJ has not hesitated to interpret the full EU law of the Treaty and thus the formation of the internal political will of the EU is redesigned to the specifications of the Treaty by the ECJ. It always receives great help against the intergovernmental institutions from the Commission, which is pushing the Union towards federalism, and from the permanent Eurocratic bureaucracy of tens of thousands in Brussels. On the one hand, the Commission enforces the case law of the ECJ in dozens of infringement proceedings against the member states before the ECJ – and forces the member states to do so. On the other hand, the drafts of EU legal regulations and directives, most of which were created by its own apparatus, will merely codify the relevant case law that was adopted by the ECJ and from then on, the case law becomes effective not only as case law of the ECJ, but as complete, directly applicable EU law.³² As a result, it can be concluded from the analyses that the ECJ, which is actually behind the public, is the dominant force in the European Union as a whole and that the Council of Heads of State and Government, which in principle is the head of the EU, is not able to control the ECJ. In most cases, when drafting regulations and guidelines, the Council of Ministers only codifies the case law of the ECJ, which the Commission and its apparatus have included in their draft regulations and guidelines.

However, this stalemate between the federative forces of the EU and the sometimes strong intergovernmental institutions of the member states has a high price for the Union. This is because the Union has come under the control of a leader that, due to the nature of judicial decisions, can only look back. Any change that occurs worldwide or concerning the EU – about which a government of a real state is able to process operational information and react to it at lightning speed and even declare a state of emergency – the ECJ, as the highest guide of the EU, can only resort to an action plan that has developed in the Union over the years. In analogy, this situation could, perhaps, be portrayed if we look into the captain's cabin of a

³¹ See Dieter Grimm: *Europa ja – aber welches? Zur Verfassung der europäischen Demokratie*. C. H. Beck Verlag, 2016.

³² For details see Fabio Wasserfallen: *The Judiciary as Legislator? How the European Court of Justice shapes Policy-Making in the European Union*. Paper presented at the Annual Meeting of the Swiss Political Science. St. Gallen, January 8-9, 2009; Michael Blauberg/Susanne K. Schmidt: *The European Court of Justice and its political impact*. *West European Politics*, (Vol. 40.) 2017, No. 4. 907-918 p.

giant ocean liner and see that the captain and his first officer are discussing what to do in a windowless room, poring over an old map. Meanwhile the iceberg is approaching. In other words, the current governance structure of the Union makes it difficult for any member state to withdraw and take action against certain EU measures, while the ECJ's case law extends the powers of the EU to bring it closer to a federation, whether it is what EU citizens like or not. However, this only creates a back and forth for the entire Union. As long as the more or less orderly relationships of the world allow for this uncontrollability, these operating conditions need not be changed significantly by the EU in order to survive. In the meantime, this situation can remain latent. But if conditions are disrupted, as demonstrated by the migration of millions of migrants to Europe in 2015, this shows the Union's non-viability.

II.4. Encouragement towards a more Ideal Situation

Proposals to end the EU stalemate due to the dominance of the European Court of Justice cannot be taken up here, and since there is no uniform European consciousness beyond the national communities and there is no European public sphere or genuine European party system, it would be another dead end to go in the direction of a single European state. However, the consequent descent of today's Union into the initial integration of a single market would only be a politically realistic alternative if there were massively more dramatic problems than there are today. However, from the analysis above, there are some obvious reform proposals to reduce the distortions of the European Union – which is focused on the ECJ and therefore led by top level judges – and I would like to outline this in the last part of this chapter.

Six changes could improve the current situation of the stagnating EU governance at the EU headquarters, but especially in the case of the hierarchically higher ECJ. From a democratic perspective, these changes could help in terms of publicising the decision-making mechanism of the EU judiciary and also concerning the problems of the EU institutions – in particular the Commission – in their legal disputes with the member states. One of the main distortions is that both the President of the ECJ and the President of the General Court can have a strong influence on the decisions of the judicial chambers not only as a neutral administrator of judicial administration, but also through a number of powers. This applies, in particular, to the President of the ECJ, who can be regarded as the actual head of the entire EU Juristocracy due to the hierarchical relationship between the two courts and due to the fact that important decisions fall within the jurisdiction of the ECJ. We would, therefore, be closer to driving the Union's leadership towards democracy if we could reduce the President's influence on court decisions. The aim is to abolish the powers of the Presidents of the ECJ and the General Court in order not to be able to appoint judges longer to the chambers of the ECJ and the General Court and instead to introduce random mechanisms for the distribution of judges.

Another suggestion to increase the openness of decision-making processes in the judiciary instead of today's secrecy can be requested because case law, which goes beyond *ad hoc* effects during the process, represents a “constitutional specification” of the Treaties. In addition, political disputes and struggles between the Union's institutions – the Commission in particular – and the member states are resolved through these judicial decisions (through rule-of-law rather than democratic struggles). Publicity would thus be a minimum here, so that at least the alternatives that exist and are discussed in court decision-making processes could be published and thus, in addition to majority decisions, divergent opinions and parallel arguments of divergent judges should be publicly published at the end of the decision-making processes. This would bring equality of arms closer to the most common parties in the EU

judiciary, the Commission *vis-à-vis* the member states, and would enable any party to better anticipate legal dilemmas and prevailing argumentation patterns and alternatives for the future. However, this equality of arms can only be achieved if the “revolving door” mentioned above could also be closed between the legal department of the Commission and the legal staff of the two main courts of the Union. To this end, it would be necessary to include the rule of conflict of interest into the procedural rules of the courts.

In the end, it seems to be a technical problem, but perhaps the most radical change would be to replace the courts’ French internal working language with English. This would allow the selection of judges from a much broader base of member states, but also the convening of legal staff from home lawyers. Above all, however, it seems sensible to adopt a proposal that was published several years ago in order to prevent the EU Court of Justice from extending its powers beyond the Treaties, and it would, therefore, be important to set up a court of competence over both Union courts.

II.5. Establishing a Court of Competence

In 2002, *Ulrich Gollt* and his co-author *Markus Wissenner* were prompted by the increasing criticism of ECJ judgments that go beyond the treaties to prepare a proposal for a court of competence to control the CJEU.³³ With some changes, this proposal can be accepted here and it should be assumed that the European Union is not a federal state, but only a certain international legal entity. It follows that the ECJ, which does the application of the Treaties on which this formation is based, is a court of international law. Therefore, this body can only act as an international court that is closely linked to the text of the treaty and cannot act with the freedom of interpretation of a constitutional court in order to break away from it. The creation of new standards or a new principle with a radiant effect on a new area by interpreting more abstract provisions and principles of the Treaties thus goes beyond the function of this court and represents an unauthorized usurpation of the contract-changing function of the member states and an infringement of jurisdiction would, therefore, be the annulment of such decisions.³⁴ The review done by this court would obviously affect the decisions of the higher European Court of Justice in the case of the two-tier European Court of Justice and would only secondarily challenge the decisions of the General Court (which can be challenged at the European Court of Justice anyway), but, in principle, the review could also be done in the subordinate General Court if the question of exceeding the division of jurisdiction happened to arise in the EU Treaty.

The first question in the case of a Court of Competence is how to determine the sufficient number of member states that should form a coalition that would be large enough to challenge an ECJ judicial decision. In order to initiate this procedure, it is not appropriate to prescribe a threshold that is too high, since a higher threshold within the court of competence would obviously be required only for an actual annulment decision. For example, based on seats in the European Parliament, at least 15% of the common seats of the contesting member states in the European Parliament could be required to introduce such a procedure, and at least three member states should be involved. The decision to annul the judgment under appeal

³³ See Ulrich Goll/Markus Kenntner: Brauchen wir ein europäischer Kompetenzgericht? Vorschläge zur Sicherung der mitgliedstaatlichen Zuständigkeiten. In: Europäische Zeitschrift für Wirtschaftsrecht. 2002. No-3. 101-106. p.

³⁴ Martin Höpner has set a six-point scale in order to separate such excesses from legitimate interpretations of the contract (clarification of provisions and possible gaps) see Martin Höpner: Von der Lückenfüllung zur Vertragsumsdeutung. Ein Vorschlag zur Unterscheidung von Stufen der Rechtsfortbildung durch den Europäischen Gerichtshof (EuGH). Zeitschrift für Public Policy, Recht und Management. 2010. Heft 1. 165-185. p.

would only be possible with a majority decision of 27 judges, whereby all judges in the member states would have the same right to vote. Such a structure and a low threshold to initiate proceedings would make it likely that such infringement proceedings were initiated more than once a year. The judges of the Court of Competence could be elected by the majority of each member state's parliament under the constitutional judge or the judge of the Supreme Courts where there is no such court, and the judge could hold this office in parallel until the end of their term at home. It would be foreseeable that in the event of the establishment of such a Court of Competence, the weight of power in relation to the Union *vis-à-vis* the member states would be fundamentally shifted towards the member states, as determined at the beginning of the European integration in the Treaty of Rome in 1957.

II.6. The Distribution of the Judges of the ECJ and the General Court in Chambers, and the Appointment of Chamber Presidents

The independence of the judges and the expected neutrality of the decisions of the judicial chambers can only be guaranteed in the judiciary if the court presidents cannot have any significant influence on the content of the court decisions through administrative functions. This is a principle of the rule of law, but it does not exist in the two EU courts, from which the EU's rule of law should otherwise be protected. The Presidents of the ECJ and the General Court have the power to propose that the judges be distributed to the chambers, which is only a formal decision by the General Assembly. This is regulated in Article 16 of the Statute for the CJEU, in Article 50 for the General Court, in Article 11 of the Rules of Procedure of the CJEU and in Article 13 for the General Court. Likewise, the presidents of the established chambers are elected by the general assembly on the proposal of the ECJ President and the President of the General Court, proposals that sociologically mean the actual decisions. In this way, the two Presidents' position of power and their actual influence on court decisions are further increased. In view of the rule of law, it is, therefore, proposed to abolish it and instead to assign judges to each chamber by random mechanisms and to use the same method of selecting presiding judges by changing the two articles of the statute as follows: "The judges of the ECJ will be drawn by lot distributed into the chambers, and the presidents of the chambers are selected by lot from the judges in each chamber. The distribution into chambers, including the term of office of the chairman of the chambers, takes three years. Then a new distribution follows." The same applies to the General Court by amending Article 50 of the Articles of Association.

II.7. The Appointment of the Rapporteur

The two Presidents of the ECJ and the General Court also determine the selection of the rapporteur for the examination of each application, which in many respects determines the direction of the judicial council's decision. One difference, however, is that the President of the General Court is somewhat more restricted and can only select a judicial council based on the selection criteria laid down in the General Court's preliminary ruling and then appoint a rapporteur from among its members.³⁵ However, the President of the ECJ has no limits and is

³⁵ "The court shall determine the criteria by which the boards are assigned to the cases. (Article 25)" After receipt of the procedural document, the president of the court will refer the case to a council as soon as possible. The President of the Chamber proposes the Judge Rapporteur to the President of the Court for each case assigned to the Chamber. The appointment is decided by the president of the court." (Rules of Procedure of the General Court, Art. 26 Par. 1 and 2)

free to choose a rapporteur at any time. Then again, it is the ECJ that is hierarchically superior to the General Court and that decides on all important questions for the Union.³⁶ In both cases, it is suggested that a more random selection mechanism be established in accordance with the rule of law and that the rapporteur, instead of being selected by the President, should be chosen by lot as soon as possible after the request has been submitted to the President.

II.8. Enabling Dissents and Parallel Arguments

The judgments of the courts of the European Union, in particular the hierarchically higher ECJ, have the consequence that the EU treaties with a predominant effect on legal disputes are concretized and later become an interpretation of the Treaties at the highest level. Furthermore, as seen, their normative content mostly becomes the content of the Commission's proposals for the regulations and directives that are secondary EU laws. Therefore, these decisions are not in the least simple judicial decisions; on the contrary, they can be considered as the "constitutional specifications" of the quasi-constitution of the Union and also as the essential determinants of EU law. Since among the double basic contracts, the TEU and the TFEU, the former mostly only defines broadly formulated principles – the broadest is the mere declaration of the four fundamental freedoms – the ECJ, which interprets this, essentially enjoys complete freedom in concretising this quasi-Constitution. This specification can actually not be changed by any other EU institution because of the unanimity. Therefore, the formation of the EU's political will has been juristocratized to the utmost. Political issues are decided here in the form of court decisions rather than in the form of democratic struggles, and to ensure that at least the minimum of democracy is achieved, it should be possible to dissent and furnish parallel arguments in order to make decision alternatives that arise during these court decisions and it should be possible for judges to disclose these in public. In a system of rule of law, the publicity of dissent and parallel arguments is a minimum of democracy, and this is why this should be suggested here.³⁷

This possibility is not declaratively prohibited by the provisions on the EU's highest courts in the TEU, the TFEU, the statutes and the rules of procedure, in which they are listed, but there is simply no information about them. Therefore, this should not be changed, but supplemented. The most appropriate way to do this is to add a new paragraph to Articles 36 to 37 of the Statute of the Court of Justice of the European Union on the reasoning and delivery of judgments as follows: "A judge who has voted against the judgment can have one dissent and express the reasons for this in a separate opinion. A judge who voted for a judgement but had reasons other than the majority can declare them in parallel." (Article 36 paragraph 2) "The dissenting opinion and the parallel reasoning attached to the judgment must be signed by the judge and read to the public at the time the judgement is pronounced after the majority decision has been issued." (Article 37 paragraph 2).

³⁶ "The President of the Court of Justice appoints the judge-rapporteur responsible for the case as soon as possible after submitting the procedural document." (ECJ Rules of Procedure, Art. 15 (1))

³⁷ With other considerations, Marcus Höreth is also trying to improve the most important courts in the European Union by allowing dissents and parallel applications. He would therefore like to make the future deviation of these courts more flexible compared to established case law, since not only would the (undeniable) rationalism of established case law be preserved, but also the various alternatives would serve as models for the future. See Höreth, Marcus: Richter contra Richter: Sondervoten beim EuGH als Alternative zum "Court Curbing". Der Staat (Vol. 50.) 2011. Heft 2. 191-226. p.

II.9. The Declaration of a Conflict of Interest vis-à-vis the Legal Departments of EU Institutions

The “revolving door problem” mentioned above, the merger between Luxembourgish legal staff and the legal departments of the EU institutions, systematically disadvantages the objective judgements of the courts of the Union, so it is one of the important tasks in this area to remedy this and to declare the conflict of interests between the jobs in EU-institutions and the ECJ legal staff. In the case of the ECJ, the addition of Rule 20 of its Rules of Procedure appears appropriate, and in the case of the General Court Rule 39 of its Rules of Procedure, which mentions officials and other servants. In both cases it must be stipulated that a person who has been employed by an EU institution for three years cannot be a member of the legal staff of the Union courts. This addition will likely close the “revolving door” and give equality of arms a greater chance of litigation between the Union and the member states.

II.10. Changeover from French to English

We have seen the counter-selective impact of the internal French working language of the Luxembourg judges as a result of the fact that French, which is used only in this way, is only slightly used in most EU countries and is undoubtedly overshadowed by English. For the member states, the number of available judges can, therefore, only be selected on a very narrow basis, but they also find it difficult to recruit their legal staff from their own member states, and they have to get it spontaneously from the legal department of the EU Commission. However, this is the typical EU institution that turns out to be the most frequent complainant in legal disputes against the member states and this situation gives the Union an advantage and disadvantages the member states. *Mathilde Cohen* calls this “*the French capture*” and suggests using the much more common English as the internal working language instead of French, and I would like to repeat this in complete agreement.

Based on the consideration of the four-level system of the rules for the Luxembourg judiciary – Article 19 TEU (Treaty on European Union), Article 251-281 TFEU (Treaty on the Functioning of the European Union), or the statute specifying it and the rules of procedure adopted on this basis, it can be stated for both the ECJ and the General Court that (in particular in the rules of procedure) there is a lot of talk about the use of the language of the court, but these rules only apply to external judicial contacts and it is not about the internal working language. This was originally provided for in secondary EU law, in Article 6 of Regulation (EEC) No. 1/58, and entrusted to the rules of procedure of every EU institution, but ultimately no such institution has formally laid it down, only in practice, and the use of the French working language was fixed. It can, therefore, be proposed to change this by replacing and incorporating what the ECJ and the General Court did not do in this area in its rules of procedure (in the case of the ECJ rules of procedure 38 / b. And Article 46 / b in Case of the General Court) that the internal working language in the court decision-making processes is exclusively English.

III. The Power Structure of the EU Juristocracy

The European Council, composed of the heads of state or government of the member states, appears to be the Union’s most powerful body, and the Commission, led by its President, is the permanent decision-maker. The European Parliament, which is not a real

legislator, appears only in public due to the low turnout in its election as a mere noisy politicising forum. In contrast, the European Court of Justice, which acts behind the public, reaches only a fraction of the political publicity in the EU member states with its decisions and is only occasionally observed by political journalists, publicists and social scientists.

However, some studies and books have shown for years that the European Union – and its predecessor, the European Community – has built an internal power structure that, even at the level of formal institutionalisation, has concentrated unlimited power on the Union’s Supreme Court (ECJ). There is no appeal and no possibility to change the decisions of the Court of Justice, and since these decisions also lead to a binding interpretation of the EU Treaties in the event of conflict, until the member states can change them through intergovernmental bodies, the ECJ will remain a supreme power over the entire Union without any counterbalance whatsoever. Then again, changing the EU’s founding treaties requires unanimity, and this is almost out of the question in everyday political processes and can only be achieved with a series of clever compromises after decades of preparation. As a result, this structure of power has spontaneously placed the European Court of Justice in a power role that goes beyond its already broad remit and which has made the democratic organization in the Union even more juristocratic than it is possible in the member states by the most powerful constitutional courts. The pinnacle of this unrestricted role is that, pursuant to Article 281 of the Treaty on the Functioning of the European Union (TFEU), the rules on the Court of Justice of the European Union can only be changed at the request of the Court itself or with its consent. So while in the case of the state constitution, which has a strong juristocratic power structure, rules can usually be changed against the will of the Constitutional Courts, this is impossible in the case of the Union. This justifies describing the power structure of the Union and thus the role of the EU Supreme Court as a *superjuristocracy*, which has completed the transition to juristocracy that has already taken place in many countries.³⁸

III.1. The Tandem of Power between the Commission and the Court of Justice

We have seen above the formal institutional structure of the Union and the formal links between the various governing bodies. However, the spontaneous dynamism which placed the ECJ above the other Union governing bodies due to its factual unrestricted nature, was associated with the division of the various camps along the Union’s internal political divide. Indeed, the Court’s consistently distinctive integration support has promoted a stable alliance with the Commission and its many thousands of apparatuses, since it has had a federal bias from the start. To understand the growing merger between the Commission and the Court of Justice, it is worth considering the shift in the focus of the power structure of European integration as a whole in recent decades.

In contrast to the first decades after its foundation in 1957, the weight of the Commission *vis-à-vis* the Council of Ministers, which brings the member states together, has increased since the 1980s. The first chairman of the commission, *Walter Hallstein* (1958-1967), was confronted with the French President *Charles de Gaulle* from the beginning, who spoke out against integration as a whole and refused to subject nation states to bureaucracy in Brussels. The unanimity requirement of the decision-making mechanism then reduced the power of the Commission to a minimum, and this weak role continued until 1985 when the dominant European powers behind *Jacques Delors* from France agreed with the member states to tolerate the greater power role of the Commission and this compromise was fixed in

³⁸ See the analysis of Alec Sweet Stones on the juristocratic nature of EU: “The European Court of Justice and the Judicialization of EU Governance”. Yale Law School, Faculty Scholarship Series. 2010. Paper 70. 53 p.

the Single European Act in 1986. The golden age of the Commission was during the Delors period (1985-1995), but then the Treaty of Amsterdam of 1993 increased the weight of majority decisions in the decision-making procedures between member states and the increasingly regular meetings of Heads of State and Government reduced the Commission's powers regarding the setting of strategic targets. In addition, the Commission resigned in 1995 due to internal corruption and the resignation of its president *Jacques Santer*. Since then, the Commission Presidents have been able to act only under the dominance of large member states, both on the level of daily political decisions and in connection with the now almost monthly meetings of the heads of state and government where strategic decisions concerning all relevant topics are made. (Oztas/Kreppel 2017: 5-6.) This loss of power over intergovernmental forums has, over the past few decades, caused the Commission to promote the federalization of the EU using the ECJ's procedures. In fact, in most cases the Commission does not have to turn to the Court of Justice as an independent arbitrator, but as a loyal ally without any risk. A number of studies have shown, based on empirical analysis, how the power tandem between the Commission and the Court of Justice works, acting in a coordinated manner towards the member states and, through their combined powers, making them mutually stronger.³⁹ This coordination then developed specific political-legal strategies of tandem power to break the more resilient member states and some of their policies. (Schmidt 2000; Dederek, 2014; Höpner 2014; Schreienmacher 2014.)

The cooperation and then an almost tandem-like merger between the two actors in the Union resulted from the interdependence of their positions of power, which despite all their strengths characterize their powers. Despite its irrefutable interpretations of the treaties and arbitrary interpretations of secondary law, the ECJ can constantly be faced with the fact that if a decision happens to go against national interests, the parliaments, governments and courts of the member states simply ignore such a decision by leaving it only on paper but not acting accordingly. However, the Commission is empowered to initiate proceedings to compel reluctant member states to comply with the judgments of the Court of Justice. By initiating infringement proceedings, the Commission can bring a member state that has infringed the Court back to the Court. If it finds that a member state has violated the infringement procedure decision, the ECJ can impose billions in fines on the member state. The decisions of the ECJ regarding the interpretation of the Treaties or the interpretation of certain provisions of secondary EU law are made primarily on the initiative of the Commission or in a preliminary ruling procedure through applications from the national courts,⁴⁰ almost always by a small step to expand the relevant competence of the EU and to limit national jurisdiction. On the other hand, the Commission's need for the Court is less clear, but it has been shown over the years that it will be an easier task for the Commission to break the resistance of the Council, the intergovernmental body representing the member states by the support of ECJ, and in most cases it would not be possible without it. As can be seen, the powers of the Commission have risen to the level of the Council since the reduction of unanimity and the

³⁹ See Buket, Oztas/Kreppel, Amie (2017): Power or Luck? Understanding the Character of European Commission Agenda Setting Influence. Paper presented for the Midwest Political Science Association Annual Conference. Chicago. 2017, 04 6-9, 5-6. p.

⁴⁰ According to Björn Schreienmacher, the tandem cooperation between the Commission and the Court of Justice in many cases is as follows: „Diesem Gedankengang folgt auch die Beobachtung, dass die Kommission Gesetzesvorschläge mit Vertragsverletzungsverfahren gegen Mitgliedstaaten vorbereitet, die für die Annahme dieser Gesetze im Rat als Schlüsselstaaten gelten können. Diese Länder werden gerichtlich zu Integration bzw. Liberalisierung gezwungen. Ein anschließender Kommissionsvorschlag zur Kodifizierung dieser Urteile bietet den betroffenen Regierungen dann die Aussicht auf eine gleichmäßige und gesetzlich präziserte Anwendung des neuen Rechts in allen Mitgliedstaaten.“ Björn Schreienmacher: Vom EuGH zur Richtlinie – wie die EU-Mitgliedstaaten über die Kodifizierung europäischer Rechtsprechung entscheiden. Transtate Working papers 2014. No. 183. Bremen. 22 p.

transition to majority voting in the 1980s, but it has often been insurmountable to push the blocking minority aside in the Council. The EU Court of Justice can help here, and in recent decades, the Commission has consistently advocated the ever increasing integration of the Union against the member states. In many cases it is sufficient for the Commission to show the possibility of opening infringement proceedings against a reluctant member state. Member states can have no doubts about the decision of the Court of Justice in an ECJ procedure, because the empirical studies show that the Commission has a 93% chance of winning before the ECJ.⁴¹ That this “absolute success” of the Commission has been before the Court for decades is also evident from a study by *Harm Schepel* and *Erhard Blankenburg* in 2001, which analysed the decisions of the 1990s by examining the relationship between the Commissioners and the ECJ and they compared this relationship to a kangaroo boy sitting on his mother’s lap: “Its success rate is so high as to make the ECJ look like a kangaroo court – being the baby in the pouch of the mother, it has to follow wherever the Commission goes.” (Schepel/Blankenburg 2001: 18.) Thus, in most cases, a blocking minority of the member states can be cleared out of the way with the help of the Court of Justice and the Commission can achieve the adoption of its proposal in the Council, despite the initial resistance of the majority of the member states. In recent years, a variety of regulations and guidelines have been created in this way.

However, the mere tactical initiation of an infringement procedure in order to carry out an internal legal transformation required by the Commission is often sufficient to ensure that a member state (and even several other member states!) comply with the Commission’s request so that the ECJ does not do so at the request of the Commission. A more comprehensive decision by the ECJ would probably require an even more extensive change. This effect is described by *Michael Blauberger* as follows: “Um schwer vorhersehbarer und politisch kaum korrigierbarer Rechtsprechung vorzubeugen, kann es aus dieser Perspektive politisch ratsam sein, sich auf Kompromisse mit möglichen Klägerinnen einzulassen und nationale Politik *vorauseilend und umfassend* zu reformieren. Dies kann auch politische Reformen in Mitgliedstaaten einschließen, die noch gar nicht in einen konkreten Streitfall vor dem EuGH verwickelt waren, sich aber indirekt betroffen sehen.” (Blauberger 2013: 184.)

However, if, despite this pressure, the Commission is unable to implement its proposal for a regulation or directive because of opposition from the member states in the Council, it can achieve its goal again by relying on another jurisdiction of the Court. There is then the possibility that what the Council could not achieve in the form of the creation of a secondary right, could be achieved by the ECJ in a court decision that results directly from the interpretation of the Treaties.⁴² This only requires intended applications by the Commission to the ECJ related to a judicial phase of an infringement procedure, many of which are still ongoing or the Commission can permanently enter the preliminary ruling process by the courts of the member states with proposed decisions, and, in this way, it can finally be determined of legal norms that could not be implemented as a regulation or directive due to

⁴¹ See Schmidt K Susane (2000): Only an Agenda Setter? The European Commission’s Power over the Council of Ministers. *European Union Politics*. Vol.1. No. 1. 37-61. p.; Dederke, Julian (2014): Bahnliberalisierung in der Europäischen Union. Die Rolle der EuGH als politischer und politisch restringierter Akteur bei der Transformation staatsnaher Sektoren. *Papers on International Political Economy*, No. 20. 28. p.; Höpner, Martin (2014): Wie der Europäische Gerichtshof und die Kommission Liberalisierung durchsetzen. Befunde aus MPiFG-Forschungsgruppe zur Politische Ökonomie der europäischen Integration. Max Planck Institut für Gesellschaftsforschung. MPIfG Discussin Paper. Vol. 14. No.8. Schreienmacher 2014, 22.

⁴² “The preliminary reference procedure in Article 267 Treaty on the Functioning of the European Union (TFEU) is, in this regard, the epicentre of EU judicial politics. It and the enforcement procedure accounted in 2009 for 87.8 % of the judgements delivered by the Court with it accounting for 49.9% (European Court of Justice 2010:87).” Damian Chalmers/Mariana Chaves: The Reference Points of EU Judicial Politics. 2011. LEQS Paper, No. 43/2011. 31p.

the resistance of the Council.⁴³

It has to be added that a tandem-like collaboration between the two bodies has also developed beyond what was said above. With hundreds of judgments a year, the Court of Justice sets standards in each of its proceedings for innumerable aspects of the economic and social life of the member states, which result from certain principles and declarations of the Treaties. Although these decisions and the standards set out therein are only formally established between the parties involved in a particular procedure, under the pressure of the Commission and other EU bodies, these case decisions are considered a general norm for the whole Union and should be followed by everyone. Although this conversion of individual decisions into general norms contradicts the formal power structure of the Union, since the Court of Justice is only a law enforcement agency and it is not compatible with the principle of democracy, which is a fundamental principle of the Union, the transformation under the pressure of integration-promoting forces has become commonplace. The Commission also enforces these decisions as generally binding by initiating infringement proceedings in the event of opposition. More importantly, however, it uses the Court's numerous case laws to codify the content of regulations and directives in its proposals to the Council.⁴⁴ In this way, the case decisions formally become the "laws" of the Union, and thus the Court not only plays the role of a constitutional court that interprets the Treaty, but also becomes an effective player in EU legislation.

III.2. Is there a possibility of resistance in case of a Eurosceptic EP election result?

After the EP elections in 2024, the federal forces in the Union's power structure are likely to weaken, although the extent of this weakening is at best questionable. In preparation for this, considerations are already being made about a possible reform of the Union and the possible liberation of the member states, which have so far been put under pressure by federal forces. In view of the realisation of these possibilities, it is worth considering first the existing forms of resistance (1) and then the existing mechanisms for building the internal political will of the Commission (2).

III.2.1. A Historical Background of the Resistance of the Member States

For an overview of the resistance of the nation-states defending their sovereignty, it is worth reviewing existing forms of resistance and their success against the pressure of the Union's federal agents before realising the possible scope of the growth of resistance in the case of a more sovereignty-friendly majority of EP 2024. Andreas Hofmann gives a good summary in a recently published study (Hofmann 2018).

⁴³ In wording of the authors: "Enforcement procedures against member states are preceded by lengthy Commission-Member State negotiations with only a small proportion (in 20009 about 4%) reaching judgment. It is thus an arena of dispute settlement of last resort with the Commission winning 92.7% of the cases in 2005-2009." Damian Chalmers/Mariana Chaves: *The Reference Points of EU Judicial Politics*. 2011. LEQS Paper, No. 43/2011. 4p. According to Andreas Hofmann, there was the same ratio even in the '90s.: "Only about 10% of infringement proceedings reach the Court, with a judgement rendered in less than 4%." Andreas Hofmann: *Influencing Policy Production in the European Union: The European Commission before the Court of Justice*. Paper presented at the EUSA Eleventh Biennial International Conference. Los Angeles. 22-25 April 2009. 5. p.

⁴⁴ In a broader sense, this also means that democratic-political decisions within the Union are replaced by processes disguised as legal decisions, so that there is a shift towards democracy rather than democracy. László Blutman has already pointed this out in the Hungarian-language European legal literature, see László Blutman: *The law of the European Union in practice*. HVG-ORAC book publisher. Budapest. 2014. 85. p.

So far, open resistance to EU acts that go beyond the EU treaties, including the decisions of the European Court of Justice on which they are based, has rarely occurred, and in addition to the decision of the Czech Constitutional Court in 2012, which has repeatedly been used as an example in debates, the Danish top judges made this resistance in 2016.⁴⁵ At the time, the Danish judges not only stood up openly against a norm of EU law, but also explained that in future it will in each case decide in front of them whether Danish law or contradictory EU law have priority under the Danish constitutional order. In addition to the rarity of such an open confrontation, the undeclared opposition was far more common, but mostly did not appear in the ECJ's regular annual reports or in the media about the EU. This type of resistance has been known since the 1980s, but has increased in particular in recent years. *Andreas Hofmann* has examined this in his empirical analysis and, for a better understanding, he has taken the distinction between *Michael Madsen*, *Pola Cebulak* and *Mich Wiebusch*, a trio of authors, who examine the resistance to decisions of international courts in a broader dimension, to separate the degree of contradiction. Accordingly, in the event of a confrontation, he differentiated between the resistance, which only pushes back and limits the scope of the decision (*pushback*), and the resistance, which rejects the entire controversial norm (*backlash*). The latter, more radical confrontation after an outrageous EU court ruling mostly appears only in academic circles as a scientific opinion,⁴⁶ but in the case of a government or the courts of a member state in question, the more covert forms of pushback confrontation appear.

On the part of the governments of the member states, this more hidden resistance appears in their neglect of the legal changes ordered by the Court of Justice in infringement proceedings, and it also appears in the obstruction of the national courts with regard to the preliminary decision of the ECJ concerning the member states.⁴⁷ In the event of non-compliance with the obligation laid down in repeated infringement proceedings, the Maastricht Treaty in 1992 introduced the possibility of a fine, which the Court of Justice has been able to impose at the request of the Commission and which has been applicable since 1997. If a member state has already reached this stage against the Court's decision, it is already approaching the level of open resistance and, according to EU statistics, the Commission has imposed 86 such fines between 1997 and 2016, which represents 9% of all infringement procedures carried out during that period (962). The extent of the final opposition is also evident from the fact that in 33 cases the reluctant member state had to do so and could not be persuaded to comply with the mandatory legislative change previously

⁴⁵ There were 2,900 such infringement proceedings pending in 2009 alone, but in most cases the Commission can agree to the member state concerned under different pressures and compromises before being brought before the Court of Justice, and only a hundred of them have given a judgment in this case. Year. See Damian Chalmers/Mariana Chaves: *The Reference Points of EU Judicial Politics*. 2011. LEQS Paper, No. 43/2011. 6. p.

⁴⁶ Björn Schreienmacher distinguishes between the following versions, of which the case law of the Court of Justice is included in a Commission proposal to be codified by the Council: "Für die im Vorfeld von Gesetzgebung ergangenen relevanten EuGH-Entscheidungen steht zur Disposition, ob sie für die Anwendung europäischer Recht in Gesetzesform gebracht, sprich: kodifiziert, werden sollen, und wenn ja, in welcher Weise. Die Möglichkeiten reichen von der wortgetreuen Übernahme bis zur abstrahierenden Umformulierung. Unterschiedlich kann etwa mit dem Sachbezug des Urteils belassen, oder diese – und damit auch die Integration und Liberalisierung – auf neue Zusammenhänge ausweiten. Letzlich kann eine Kodifizierung auch umgangen werden, indem speziell die Sachverhalte des relevanten Richterrechts aus dem Anwendungsbereich des Gesetzes ausgenommen werden." Björn Schreienmacher: *Vom EuGH zur Richtlinie – wie die Eu-Mitgliedstaaten über die Kodifizierung europäischer Rechtsprechung entscheiden*. *Transtate Working papers* 2014. No. 183. Bremen. 2. p.

⁴⁷ This was the so-called *Ajos case*, in which the Danish supreme judges overturned the norm prohibiting age discrimination based on a ruling by the Court in 2005, on the grounds that this norm did not exist even when the Danish Accession Act was adopted existed. For an analysis see Ran Hirschl: *Opting out of Global Constitutionalism*. *Law & Ethics of Human Rights*. (Vol 12) 218 No.1. 30. p.

ordered by the Court, even under the threat of a heavy fine. The Court subsequently imposed a final fine on 31 cases.⁴⁸

However, the breadth of this lesser resistance is reflected in the fact that, between 2003 and 2016, in 461 cases between 2003 and 2016, the Commission had to send a formal notification letter to the member states convicted by the Court of Justice to warn that the infringement procedure would resume if they postponed enforcement. The final solution to the confrontation is that the ultimately resilient member states will implement the standards established by the Court of Justice as EU law into national law in addition to paying the fine, but in some cases resistance will continue. The member state concerned pays part of the fine by declaring that it will implement the necessary change in the law, but essentially retains its previous right. The Commission, on the other hand, sees the obligation as ‘fulfilled’: “Closer analysis of the aftermath of the cases in which ECJ issued a penalty for non-compliance with previous judgments indicate that even financial penalties do not guarantee that the underlying implementation problem is remedied. Ian Kilbey shows that the Commission has developed creative means of ‘face-saving’ in order to close cases after some penalties have been paid and some efforts towards compliance undertaken, even though the problem persists.” (Hofmann 2018: 12.)

Another tool in the hands of national governments to avoid the ever-increasing powers of the EU is to design their laws that a member state keeps the preliminary rulings available to its courts to a minimum. It is clear that if global foundations that promote federalism and the staff of their NGOs can run “awareness courses” in law schools and training centres in one member state to regard the ECJ’s condemnation of the member states as a “shame”, then, the number of such preliminary rulings will increase in this member state. In the case of such practice by Italian judges, who sent a relatively large number of such preliminary requests to the CJEU, the empirical investigation shows that in the extensive judicial area, the judge’s poor reputation is caused by his participation in repeated preliminary ruling procedures and the reputation of the National Supreme Judicial Forum is repeatedly destroyed and that has a deterrent effect: “When a few iconoclastic judges did challenge these practices for motives with judicial empowerment, they often incurred reputational costs and remained marginalized.” (Pavone 2018: 8.) In addition, judicial officials and, under their influence, central judicial administration have the ability to contain such “sensitising” influences in this area, and there is scope for litigation rules to influence the environment for preliminary rulings. Research into the practice of Danish government officials has shown that they have made efforts to reduce the preliminary ruling process. They wanted to achieve this in order to maintain the integrity of the national legal system: “It could be hostility towards judicial review of legislation more generally, which has been attested to judges in majoritarian democracies, such as the UK and the Scandinavia. Marlene Wind has moreover reported that Danish government officials discourage Danish judges from sending references to the CJEU.” (Hofmann 2018: 15.) But member state governments also go in this direction when they implement a restructuring measure following an infringement procedure or follow a reference to a preliminary ruling by a court, which is, however, only tailored to the circumstances of the case and leaves the general restructuring.

In addition to the national governments, there is also resistance at the level of the national courts against the expansive case law of the ECJ. Although the open confrontation of the Danish Supreme Court in 2016 cannot be seen as a general pattern, there are also more concealed confrontations in other courts. This covert opposition usually manifests itself in the fact that the courts of a particular member state may follow the interpretation of EU law given

⁴⁸ In his study, Hofmann describes this type of reference for a preliminary decision as a “national informant”: “The Commission has limited capacity to follow up on implementation and often relies on national “whistle-blowers”. (Hofmann 2018: 10.)

in individual cases, but they do not accept such as requests for a comprehensive doctrinal change. Already in 2002, Lisa Conant showed that if there is no institutional structure in the ideological and media environment of judges in a certain member state that constantly alarms the public about the decision of the CJEU in order to promote comprehensive implementation, then measures will probably only be taken in a specific case, but the broader scope is not taken into account: “*Conant* like *Rosenberg*, argued that in the absence of supportive political pressure following the development of innovative legal doctrines, national authorities will respond by isolating the effects of single judgments, applying them only to the case at hand while ignoring their wider ramification – that is, denying the intermediate authority and “*erga omnes*” effect. (Hofmann 2018: 18.) In particular, if there already exists a legal doctrine that has for many years been developed in a particular member state that is against a doctrine in the decision of the Court of Justice, it is expected that this technique of resistance will be used by the judiciary and the contrary doctrine of the Court will not adopted besides its application in some individual cases. Of course, there are major differences in the implementation of EU law by the courts of the member states in this area, while EU law should always take precedence in the everyday life of the member states. In Denmark, for example, domestic law completely excludes the application of relevant EU health standards in judicial practice, while in Spain the judicial application of law in this area is thoroughly based on it. (Hofmann 2018: 23.)

III.2.2. Internal Decision-making in the Commission

It is worth dividing this topic into two and consider the times before 2014 and the time since President Juncker separately, since President Juncker also passed a reform in this area when he took office. (The time of the *von der Leyen* Commission is too short to enable a research in 2020.)

For decades, the commissioning and preparation of Commission proposals began in a decentralized way, from bottom to top, from the Directorate-General apparatus and with the coordination of the apparatus between the Directorates-General. If issues remained open, the decision lay with the chiefs of staff of the Commissioners concerned, possibly the Commissioners themselves, and the compromise proposal went to a meeting of the College of Commissioners and appeared as a proposal of the Commission and was then presented to the Council and Parliament in the EU legislative framework.⁴⁹ In this system, decision-making was essentially organized by the Commission apparatus, led by senior officials from the major Directorates-General, and by the Commissioners and their cabinets. In addition, the compromises of apparatus between the Directorates-General was generally so seamless that 87% of the Commission’s final decisions as a Commission proposal between 2004 and 2008 did not go to the College for discussion, but were already taken at this administrative level.⁵⁰ In practice, this system meant that the Commission’s apparatus, which had grown to be of many thousands and was organized in Directorates-General under the direction of the Directors-General and the General Secretariat, was largely independent in guiding this important part of EU decision-making. The commissioners, who often travelled from home to

⁴⁹ “Until the end of 2016, the Commission had sent 86 such cases to the Court, which correspond to about 9 percent of infringement cases ruled on by the CJEU from 1997 to 2016 (962). The CJEU ruled on 33 of these (the rest were withdrawn before a judgment) issuing financial penalties in 31.” (Hofmann 2018:11.)

⁵⁰ For details see Miriam Hartlapp: Internal Dynamics: Position Formation in the EU Commission. WZB Paper. 2008. 2-6. p. And Buket Oztas/Amie Kreppel: Power or Luck? Understanding the Character of European Commission Agenda Setting Influence. Paper presented for the Midwest Political Science Association Annual Conference. Chicago, April 6-9. 2017.

Brussels for only a few days, could at most reject some suggestions from the apparatus, but could not make their own proposal. So they were not really able to initiate positive decisions and get involved in making decisions. This autonomous apparatus decision-making system, which violates the rule of law and democratic principles, has also tried to demonstrate a kind of democracy in recent years. In fact, the research has shown that the heads of this decision-making system have been using the Eurobarometer more and more recently to demonstrate the popularity of their proposals. For example, while in the early 1980s no specific opinion polls existed to assess the popularity of a proposed measure, the number of such polls exceeded 20 each year after the turn of the millennium and the number of directorates-general increased, one of which commissioned such a survey prior to the major drafts.⁵¹ These surveys not only increased legitimacy but also served as weapons to protect the position of the Directorate General of the draft from those who had contested its draft, and so this democratic addition also initiated will-fighting struggles between the directorates-general as party-like struggles.

This is what the era with President Juncker has changed since 2014 and has continued since. The reform consisted of several elements, the final effect of which was to centralize the Commission with 27 Commissioners under the President of the Commission and to freeze the decision-making process in the Directorates-General, which would ultimately involve the Commissioners and their personal cabinets more closely. The *Joint Teams*, headed by the heads of the General Secretariat and the Vice-Presidents of the Commission, dominate in this new situation, and they discuss and approve proposals from the outset.

The increasing role of vice-presidents *vis-à-vis* the ordinary commissioners and their subordination to the presidents put an end to the Presidency of the Commission “*primus inter pares*” and created a more central system around the President. Although there had been Vice-Presidents in the past, they had only a symbolic title with no real functions and, like the other Commissioners, they only had contact with the Directorates General in their respective departments. However, the Vice Presidents no longer have their own resorts, and the Commissioners’ resorts that are under their leadership in the “*Joint Team*” belong to him/her, as do the Commissioners in his/her *Joint Team*. The aim of the reform was not only to create a more central unity among the college of commissioners, but also to break the closure of the previously closed directorates-general and to subject them to a uniform decision-making process by the Commission. Or, according to Brussels’ terminology, the reform aimed at “de-siloisation”, i.e. the freeing of the apparatus from separate “silos” (tanks).⁵² This meant that the Juncker reform even created the post of First Vice President over the four Vice Presidents, and that, as an extension of the President, it gained control and administration over the entire Commission, of course under the President. With the help of the First Vice President, the President almost doubled in overseeing the activities of the 32,000-strong apparatus, which was organized into 40 directorates-general.

In addition to the system of commissioners in the centralized Joint Teams headed by the First Vice-President and the four Vice-Presidents, the Commission has unified around the President as the reform has given the Secretary-General and his/her extensive staff even more powers over each Directorate-General and cabinet Commissioners have been transferred. The

⁵¹ “Empirical evidence on coordination at the political level suggests that only 13.2% of all Commission proposals between 2004 and 2008 were actually negotiated in the College. In other words, a rather large share of legislative proposals was already agreed among the services prior to the political level.” Miriam Hartlapp/Julia Metz/Chrisitan Rauh: The agenda setting by the European Commission: the result of balanced or biased aggregation of positions? LSE. LEQOS Paper No. 21/2010. London. 20. p.

⁵² “This gives rise to the expectation that looser coupling will lead to reduced siloization and more intensive interdepartmental cooperation.” Kristina Ophrey: Post-Lisbon Policy Making in the European Commission. Juncker’s Politics of (Re-)Structuring Infra-Commission Policy Formulation Processes. ARENA Working Paper 6/2018. 5. p.

extended powers of the Secretary General actually meant that the power of the President of the Commission could almost triple beyond that of the First Vice President. The Secretary General, Juncker's most confidential person, was given the right to obtain an authorisation or consultation concerning all relevant activities of the Directorates-General. The weight of the Secretary-General and the Secretariat-General was also increased by the fact that the Vice-Presidents, from whom the committees were headed, did not have their own apparatus and Directorate-General, and, in this way, they could only control the Directorates-General of the Commissioners through the Secretariat-General. At the Commissioner level, subordination to the Joint Committee indirectly led to extensive subordination to the Secretaries General and the Secretariat General. Perhaps this change can be represented by analogy as a replacement of a decentralized government structure based on ministers and their ministries with a centralized government of the chancellor type, in which everything serves to subdue ministries and their ministers and give direct control and direction to the prime minister. (Russack 2017.)

As far as the Directorate-General's apparatus is concerned, the reform was aimed to end its former full autonomy and the bipartisan struggles of the Commission and, instead, limit it to processing mere information without independent political roleplay. As a result, its previous role as initiator in developing individual design proposals and reaching compromises with other directorates-generals has been removed without the involvement of Commissioners. Since 2014, a draft proposal has only been possible in the Joint Teams, and only after its approval can the draft begin in the Directorate-General's apparatus, which is appointed by the responsible Vice-President through the General Secretariat. This has made it possible for the drafts not only to contain the preferences of the apparatus of the approving Directorate-General, for which the other directorates-general are late to compromise, but also from the outset at the political level of the commissioners (or at least the chiefs of staff) and draft proposals are drawn up in front of the permanent presence of the directorates.

Overall, the impact of the Juncker reform, inherited from the post-2019 EP elections, has broken the multi-decade-long power of tens of thousands of Brussels' bureaucrats and is a good prerequisite for a nation-state-friendly commission in the future to try to revamp federalist priorities. However, this can only be limited in terms of ultimate success if we see that the Union's power structure does not really focus on the Commission or the European Council of Heads of State or Government, but on the European Court of Justice, which is the highest juristocratic authority of the EU. It would be worth considering how this supreme power would be affected if the Court's tandem counterpart in the future focused on protecting the powers of the member states, rather than pursuing federalist priorities. There is still time until 2024 when the next EP elections come.

IV. The NGO Base of the EU Juristocracy

According to the analysis mentioned above, the EU's power structure is largely based on judicial decisions and although the democratic component of the European Parliament can influence this structure, it has little real control over the development of the Union. In addition, the democratic majority of the member states in the intergovernmental bodies of the Union (the Council of Ministers and the European Council) have only a limited influence on the political decision-making process of the EU. The question arises concerning this machinery, which has been freed from democratic control, to what extent it moves on its own – driven by the internal interests of the apparatus and the world views of its leading groups – and to what extent the dominant groups of society can influence it beyond the existing meagre path of democratic control. Regarding the latter, it is important to emphasize that a self-

moving machine of power cannot survive alone for long if it does not build continuous channels of mediation with the dominant groups of society that have money, an influence on the media, and other sources of power. In a power system based on purely military power, this can happen for a short time even under the conditions of today's social development, but the spiritual atmosphere of societies in Western civilisation no longer allows this.

From this point of view, there are number of empirical studies that have shown the connections that exists between the legal system of the Union and these dominant groups in recent years. Let us first consider such links to the European Human Rights Justice (ECHR), which is formally outside the Union, but is actually an essential part of the EU legal system. We will then move closer to the Union's internal institutions and, after a general overview, look at the forms of NGOs and other lobbying that affect the work of the Commission, and then look at the influential organizations around the European Parliament, the Council of Ministers and COREPER. The European Court of Justice's influence through NGOs and lobby organizations will then be briefly examined.

IV.1. Juristocratic Power Groups for the Decision-making of ECHR

As soon as we see that the ECHR's decision-making mechanism is essentially based on the self-organizing legal staff of the registry lawyers, which is largely obscured by the chambers of judges who have been sent by the signatories to the convention for a term of nine years – as the second chapter's analysis has demonstrated – next, it is important to look at how the members of this staff intertwine with the underlying power groups that want to influence the decisions of the ECHR and also with the employees of their NGO networks. Unfortunately, no such information can be found, and only in the case of some ECHR judges can evidence of such links with global NGO networks be shown, demonstrating that a systematic merger is also likely here. For example, Bulgarian ECHR judge *Jonko Grozev* was a senior member of the Soros Open Society organization before his election. More recently, *Darian Pavli*, an ECHR judge dispatched from Albania, was the local chair of the Albanian Open Society preceding his entry into Strasbourg. Yet another example is a former Hungarian ECHR judge, *András Sajó* from the Central European University (CEU), who had a senior position in an organization of the Soros Foundation before receiving his Strasbourg position. However, these are only sporadic data that do not mainly relate to the high-ranking members of the underlying human rights apparatus (registrar, deputy registrar, etc.) who actually influence the decisions of the ECHR. In contrast, the interrelation of certain points in the internal power machinery of the European Union with foundation leaders and NGO officials who want to influence them can be seen in documents published by *WikiLeaks*. e. g. a list of 226 MEPs connected to the Soros network, with addresses, cell phone numbers, etc. In addition, the President, the Vice-Presidents of the Commission, and individual Commissioners can also maintain intensive and regular contact with the leading representatives of the NGO foundations as it is documented by media coverage. For example, when George Soros visited Brussels in the first half of 2018, he not only met President Juncker, but the first Vice-President Timmermans announced to journalists that he had had years of contact with the Soros network management and he had always spoken to Soros himself about the fate of Europe in the past and will continue to do so. (It is only little known that during this trip to Brussels, Soros met with other Vice-Presidents of the Commission and several commissioners for a working lunch, according to news and photos in the media.)

On the basis of this information, it is certain that similar links must also exist with regard to the ECHR legal staff. This is made possible by the enormous size of the NGO base, which is built on the submission phase of the applications, and by the NGO activities, which

almost force the condemned state to implement the decisions of the ECHR through media lashing. There are already empirical studies for this activity by NGO networks, so let us take a look at them first.

Two researchers from the University of Strasbourg, *Gaetan Cliquennois* and *Brice Champetier*, conducted a thorough study in 2016 on how ECHR decisions are initiated by NGO networks in an organized manner, and hundreds, sometimes thousands, of cases are submitted by the same NGO lawyer on behalf of various petitioners, and an organized media campaign strengthens the effects of such actions. (Cliquennois/Champetier 2016.) For the sake of accuracy, the researchers focused only on NGO activities organized by Russian subsidiaries of foreign, mainly American, foundations. In recent years, these foundations, including the most active ones in the Soros network, have been present in a number of Central and Eastern European countries, so the description of the Russian situation also provides general information in this area.

The influencing of Russian politics and its prompting it in certain directions through decisions of the ECHR was made possible by the direct complaint of the citizens against their own state on the basis of Protocol No. 11 in 1998 and, with the help of subsidiaries of American foundations, it has started to exercise this influence. These subsidiaries settled here at the beginning of the 1990s, but in the past few years this has been a particular focus since Russia's relations with the United States have become increasingly tense. As a result, these US-Russian NGO networks are sending more and more applications to Strasbourg, and, in the meantime, general convictions have become possible beyond individual cases. Due to the *pilot judgment process* and their huge media presentation on Russia, this country constantly appears in the world press as a "state of terror" and as a real "lator state". The two researchers point out that for the most part, the Russian problems that have been condemned by ECHR decisions (e.g. in the Russian prison sphere or in the area of press freedom) are not problems specific to Russia; on the contrary, similar problems are most often present in western countries as well, albeit to a lesser extent, and yet they will not be leaked and sent to Strasbourg and, above all, will not result in the same global condemnation as in the case of Russia. Taken together, the dumping of US-Russian NGO networks against Russia over the years has not primarily helped to protect the rights of the people and organizations involved, but to combat overarching political goals through human rights disputes as a new Cold War: "To put it differently, the point is to show that the new cold war dynamics revolves around an instrumentalization of the European system of human rights, which work far from new, is extremely problematic." (Cliquennois/Champetier 2016: 94.)

With regard to the size of the US-Russian NGO base, we can see that behind every large NGO centre here, without exception, the central organization of the Soros network, the *Open Society*, but often also other Soros network organizations such as a *Helsinki Committee* organization is established in each country. In addition, the *MacArthur Foundation* is usually one of the founders and donors, but there is also an organization of the *Norwegian Foundation* that has been closely associated with them for years. For example, the *Memorial Human Rights Center*, founded in Moscow in 1991 (founded and financed by the Open Society, the MacArthur Foundation and the Norwegian Helsinki Committee, among others) has been doing dozens of filings with the ECHR. Between 2000 and 2014, 101 applications were submitted together with this NGO centre, of which 87 received a positive decision. The *European Human Rights Advocacy Center* (EHRAC) was also founded by the Open Society, the MacArthur Foundation and other affiliates they had previously founded, and 93% of EHRAC is being funded by them ever since. In 2015, EHRAC was interested in 310 currently pending submissions to the ECHR. The *International Protection Center* (IPC), which is largely established and financed by the above-mentioned foundations, has been in operation since 1994 and has been under the Russian office of the *International Commission of Jurists*

(ICJ) in several European countries since 1999. Its profile and potential have been increased by the fact that it has received advisory status from the United Nations and the Council of Europe. On average, it sends 30 applications to the ECHR every year, but it also disseminates human rights ideology in educational centres and teaches the details and tricks of human rights disputes to lawyers from various legal organizations. The *Stitching Russian Justice Initiative* (SRJI) was founded in Moscow in 2001 by the above-mentioned foundations and their organizations, and has submitted 300 requests to the ECHR for the North Caucasus region in recent years. It also submitted thousands of complaints to the ECHR in Chechen cases, in controversial Russian-administered cases in South Ossetia, but also in cases of joint attacks in Georgia and Russia. This NGO network also includes the *Association of Russian Human Rights Lawyers*, the *Moscow Helsinki Group*, the *Open Russia NGO* and the Dutch-based *Russian Justice Initiative* (the latter, despite its name, is mainly funded by the Soros Network). Finally, within the framework of the Open Society Foundation (OSJI) judicial initiative in Russia, the Soros network has been active under its own name in the area of ECHR applications for many years and includes a number of important cases.

Taken together, these overseas-funded American-Russian NGOs are the originators of a significant portion of the thousands of ECHR filings against Russia each year, although some of them are disguised in the form of individual law firms. Another empirical study in this area shows that Russia has the highest rate of NGO submissions to the ECHR. If we look at this number together, it is even higher, and together with the submissions from individual human rights lawyers trained by NGOs, it could mean the majority.⁵³ In addition, of the tens of thousands of ECHR petitions per year, only two to four percent are accepted for a substantive decision and the rest are rejected, and the vast majority of this small accepted part are mostly submitted as applications by NGOs. According to Strasbourg practice, however, if the application has been accepted, then it will definitely be judged positively.⁵⁴ The coexistence of the admission with a largely positive decision, therefore, makes the work of the ECHR legal staff particularly important, even if it is formally covered by the decision of an individual judge.⁵⁵

Taken together, the picture shows that the self-organizing human rights apparatus in Strasbourg and the NGO network, which are largely supported and maintained by some American foundation networks, make the decisions of the ECHR together. Even if not so polarized, this depiction can, perhaps, be applied to other Central and Eastern European countries as well.

The importance of the merging of the ECHR base and the NGO networks and the creation of fundamentally comprehensive political efforts against individual states due to the

⁵³ “Lloyd Mayer, in a study of ECHR cases involving NGO representation between 2000 and 2009 from all Coe member states found that, by far, Russian cases were most likely to involve NGOs as representatives, applicants, or interveners: during those years approximately 19 percent of decisions concerning Russia involved NGOs, while on average across the Coe only 4 percent of all ECHR decisions involved NGOs. In reality, this undercounts the number of instance (such as those assisted by the International Protection Centre), NGOs will delegate their clients’ cases to individual lawyers, and thus an NGO name never appears in the records. It also does not reflect the additional influence that NGOs exert on cases by training individual independent lawyers on how to submit successful cases to the ECHR.” Lisa McIntosh Sundstrom: *Russian NGOs and the European Court of Human Rights*. *Human Rights Quarterly*. (Vol. 36) 2014. 849. p.

⁵⁴ “The large proportion of NGO involved decisions and the fact that most initial applications are underrepresented by NGOs or lawyers, suggests that, at least on the face of things, NGO involvement in case applications leads to increased success for applicants in having their cases admissible [...] an winning them (much less arduous, since nearly all cases admitted to the Court are ruled in favour of the applicant).” Lisa McIntosh Sundstrom: *Russian NGOs and the European Court of Human Rights*. *Human Rights Quarterly*. (Vol. 36) 2014. 849. p.

⁵⁵ See Van den Eynde: *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights*. *Netherlands Quarterly of Human Rights*. 2013. No. 2. 292. p.

ECHR's condemnation was particularly emphasized by the so-called pilot judgement procedure. The introduction of pilot judgement procedures radically expanded the scope of the ECHR to force individual states' legal systems to change, and, since then, human rights theorists have written about the "constitutionalization" of the human rights system (which is one of the main pieces of evidence for constitutionalization in international law). The procedure should be adopted in Protocol 14 with the signatories to the Convention on Human Rights, referring to the large number of cases that have of course been realized in "*repeat player strategies*" through the tactic of thousands of applications from NGO networks by US Eastern European foundations. However, in the end, the pilot judgement procedure was left out of the editorial board's opposition. Through the decision of the Committee of Ministers of the European Council (Res (2004) 3) to interpret Article 46 of the Convention, the ECHR was able to do this itself without additional provisions. In a subsequent recommendation (Rec (2004) 6), the member states were informed that although the member states were only bound by the ECHR's decision against them, if a member state had already been convicted by the ECHR in a similar case, other member states can voluntarily decide in such cases that, based on the decision of the ECHR, they will also change their problematic domestic law. As this is the core of the pilot judgment process, the ECHR made its decision in the first pilot judgment process in 2004 with reference to these decisions. The bottom line is that if there are a large number of cases before the ECHR, it is enough to highlight one of them as a lead case and suspend the others to identify the legal issue at stake, and (what in this process is really important!) in addition to solving the case, the respective state is obliged to remedy this legal problem in the specified directions by changing the legal provisions. When this is done, the other suspended cases will be closed with the declaration of acceptance of the change by the ECHR. It is also important that the ECHR continuously informs the competent bodies of the Council of Europe throughout the pilot decision-making process and provides information about compliance with the requirements by the member state. (Szemesi 2013: 56.) The Strasbourg-judges were enthusiastically celebrated with this self-made expansion of power in the institutions and in the circles of human rights lawyers, but among the critical voices is the position of *Judge Zagrebelsky*, who was involved in the decision and did not agree with it. He described the specificity of the pilot judgement procedures and the general normative requirements as a transition to a political area and he believed that this procedure was rejected in the debate over the text of Protocol 14 and that the ECHR nevertheless set it up arbitrarily.⁵⁶ Despite this criticism, human rights foundations that pursue overarching political goals and the NGOs they pursue have increasingly taken the path of "process politicisation" by the ECHR. This has led to a political instrumentalization of individual human rights violations and a purely power-based selection at the ECHR.

The mass filings of NGOs – mostly by searching for and acting on behalf of interested parties or by entering into the procedure with an *amicus curiae statement* as a third party – postpone existing procedures before the ECHR and promote the decision-making mechanism of the ECHR in certain directions. In addition, NGOs are actively involved in implementing the decisions of the ECHR for which they have already fought in the process. Cliquennois and Champetier provide data on this in relation to Russia, and if one reads about it, one gets similar experiences regarding the situation in Hungary, which shows the more general validity of their analysis. After the ECHR has condemned and ordered the attacked state to redesign its legal system and organization in certain directions, the Council of Ministers of the Council of

⁵⁶ "Judge Zagrebelsky in a partly dissenting opinion in *Hutten-Czapska*, argued against the use of ordering general measures in the operative part of the Court's judgement. He took the position that the Court went "outside its own sphere of competence" and entered "the realm of politics". He pointed to the fact that the pilot procedure was not included in Protocol 14." Antoine Buyse: The Pilot Judgement Procedure at the Court of Human Rights: Possibilities and Challenges. *Nomiko Vima* (Greek Law Journal) 2009. November 12. p.

Europe monitors the implementation. Since the pilot judgments, this has meant not only fixing individual violations, but also implementing extensive internal reforms, so that US-Russian NGOs have taken control of them as a new activity in order to achieve broad media coverage. They monitor the progress of the required legal and organizational changes on the spot and are constantly bombarded with entries to Strasbourg, in which the inadequacy, slowness, etc. of the changes are explained.⁵⁷ This control and condemnation by NGOs is then always on the front pages of the friendly world press and as an attacked state, as a “Lator State”, as a “Mafia State” and so on. Their image is weighted in the international public, which weakens the ability of the respective state to act. This is the real goal, since it can create international isolation for the attacked state. According to the Strasbourg authors, such an instrumental use of the human rights mechanism for comprehensive political purposes would mostly not help to protect individual rights, but would only worsen their situation by creating a new type of Cold War: “What we find is that NGOs/private donors (largely echoing and influencing EU/US foreign policy) make strategic use of the ECHR system and litigation before the ECtHR, and that such instrumentalization of human rights, far from being conducive to a better protection of rights, actually tends to foster the opposite”. (Cliquennois/Champetier 2016: 94.)

IV.2. The Influence of NGOs on EU institutions

The two main axes of the Union’s decision-making mechanism are the decisions of the European Court of Justice and the expenditure of the regulation and directive resulting from the co-decision of the EP and the Council (or less often the Council alone) and the expenditure can only start on the basis of the Commission proposal. (The European Council of Heads of State and Government, which decides on strategic issues, is above the current decision-making machinery and is not directly accessible to NGOs and lobbies anyway, so it is now ignored.) The role of the Commission is the same in both decision-making directions. It initiates infringement proceedings against member states before the ECJ and, with additional requests for decisions, intervenes in the preliminary ruling procedures initiated by the courts of the member states before the ECJ. In this way, the activities of lobbies and NGOs at EU level mainly aim to influence the Commission’s decision-making. With the expansion of the co-decision powers of the EP, however, NGOs and lobby organizations have also emerged in this direction. For NGOs that use public and media reporting as a resource, EP public hearings and friendly MP presentations are also important. It is, therefore, a priority to put as many MEPs on your contact list as possible and to organize safe support (see the 226 MEPs mentioned above that were found on the Soros list by *WikiLeaks*). Because of EP’s co-decision rights, MEPs are also important for non-public lobbying and NGO activities, and they are trying to win individual MEPs as lobbyists, as some scandalous public announcements have shown.⁵⁸ A total of five thousand organized interest groups or NGOs are represented in Brussels – of which 3,500 are capitalist interest groups and one and a half thousand NGOs, but many of them are one-person lobbyists who are, therefore, less efficient

⁵⁷ “Lastly, NGOs have been associated since 2006 to the execution of judgements delivered by the ECtHR. During the supervision process in which national states indicate to the Committee of Ministers the measures planned and or taken in an ‘action plan’ to comply with the final judgement, NGOs and national institutions prompting and protecting human rights can submit communications to the Committee of Ministers denouncing the failure of a state to execute a judgement.” Clinquennois/Champetier (2016): *The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War?* European Journal (Vol. 22.) No.1. 98. p.

⁵⁸ Ernst Strasser, MEP, former Austrian Home Secretary (and also a Romanian and a Slovenian MEP) spoke in a video published by British journalists about five lobbying tasks for a salary of half a million euros.

than larger-scale NGOs.⁵⁹ An example of the latter is the Open Society European Policy Institute (OSEPI) in Brussels, which nominates 19 people on its website. Therefore, the total number of Lobbyists in Brussels is increased to 20 to 30,000.⁶⁰

In addition to this path of influence in Brussels, it is important for NGOs and capital-intensive lobby organizations to develop a degree of influence at the level of the member states in order to promote decisions in Brussels or Luxembourg.⁶¹ In addition, it is important for NGOs at member state level to set up a machinery for influencing, as national courts can send requests for preliminary rulings to the Court of Justice (ECJ) in addition to the Commission, which can extend EU law in certain directions. It is, therefore, important for NGO networks to be able to change the reluctance of courts in this area in the member states and to feel that judges are “heroes of progress” if they can be at the centre of the preliminary rulings activities. As the example of Hungary has shown in recent years, judges who have been trained by the largest NGO networks in law schools, can “be sensitized” in order to intensify such activities. But in the same way, the education of future generations of lawyers in universities by the staff of NGO networks can change, so that lawyers can undertake such activities with greater determination in the future. Since the Soros Open Society network works in all Central and Eastern European countries – grouped together under common umbrella organizations – without exception, it probably exists in other countries as well, although unfortunately no empirical studies can be found for this.

IV.2.1. The Commission’s Base of NGOs and Lobbies

Initially (1957-87) in the age of unanimity, the Commission had little autonomy in decision-making, so lobbying in Brussels was minimal and associations or interest groups tried to do that in the capitals of the first six founding states and then in some of the acceding countries in order to influence decision-making processes. Only the majority decision mechanisms of the *Single European Act* in 1987 increased the importance of the Commission and a larger proportion of the lobbyist subsidiaries started to settle in Brussels. The Maastricht Treaty of 1993, then the Amsterdam Treaty of 1999, and finally the Lisbon Treaty of 2009 further increased the decision-making powers of the majority in the EU, including co-decision with the EP, and in parallel, the number of lobby groups has increased by several hundred and grew to 7,700 in 2016, which were registered in the Transparency Register in Brussels.⁶²

NGOs and lobbyists are trying to direct their decisions to the Directorates-General of

⁵⁹ See Henry Hauser: European Lobbying Post-Lisbon: An Economic Analysis. Berkeley Journal of International Law. (Vol. 29.) 2011. No. 2. 686. p.

⁶⁰ For a detailed description of the lobbying work with current data and representations, see Cerstin Gammelin/Raimund Löw: Europas Strippenzieher: Wer in Brüssel wirklich registert. ECON. Berlin. 2014.

⁶¹ For the possibility of making a change of direction between the multilevel decision-making influences (“venue shopping”), see Christian Kaunert/Sarah Lénard/Ulrike Hoffmann: Venue Shopping and the Role of Non-governmental Organizations in the Development of the European Union Asylum Policy. Comparative Migration Studies (CMS) Vol. 1. 2013. No. 1. 179-200.p.

⁶² For changes in this sphere see: „Watson charts moderate growth from 400 EU interest groups in 1970 to 800 in 1991, but doubling to over 1600 in 1994”. Henry Hauser: European Lobbying Post-Lisbon: An Economic Analysis. Berkeley Journal of International Law. (Vol. 29.) 2011. No. 2. 690. p. For the last years see as follows: “Overall, beginning of 2016, the Transparency Register contained a total of around 7700 registered entities. Chart 1 shows that the largest sub-set contains the private sector-lobbying activities (‘direct lobbying’) with a total of around 4000 firms and another ca. 1000 consultancies or law firms lobbying on behalf of other firms (‘indirect lobbying’). Another 2000 NGOs are as well registered in the database. The remaining part of the Register is small and contains think tank, academic institutions and small number of organizations representing local, regional and municipal or religious authorities.” Konstantinos Dellis/David Sondermann: Lobbying in Europe: ner firm-élevel evidence. European Central Bank Working Paper Series. No.2071/2017. 7. p.

the Commission, as Commission decisions and the Directorates-General below are responsible for drawing up the Commission's decisions. Each NGO or corporate lobby organization thus builds permanent links to the Directorates-General, which is responsible for the topic of their work. However, since more than one Directorates-General is involved in most of the Commission's decisions, the NGO networks and lobby organizations with a really large Brussels apparatus and resources have mostly developed stable contacts with several Directorates-Generals. One form of this is that their people participate in the advisory councils set up by the Commission. But even before the really outstanding decisions are made, even the leading politicians or top managers of an NGO network are directly involved in influencing the Commission, as George Soros' trip to Brussels in spring 2018 showed when supporting Article 7 – Procedure of the EP against Hungary was on the agenda, initiated by the Commission.

However, the ongoing influencing of decisions is organized at a lower level, as a 2013 study on the success of NGOs to support migrants shows. (Kaunert/Lénard/Hoffmann 2013.) The date is also useful because the numbers in this study apply to periods prior to mass migration in 2015, when these issues were not as controversial and, therefore, NGO activities in this area have not yet been disguised. The authors are following the development of two guidelines on asylum and migration (from 2004 to 2011) to assess the degree of influence of NGOs that support migrants. In these matters, the EU was only empowered by the Treaty of 1999, and this was only expanded by the Lisbon Treaty of 2009, or EP was included as a co-decision maker. The transfer of competences to the EU in 1999 even placed the settlement of the migration question in the third pillar and at the centre of the Council of Ministers of the member states. By 2004, the Commission's monopoly on proposals had not even entered into force. The member states did not have to fear the excessive influence of the migrant-friendly EP and the Commission, and the focus was on the intergovernmental Council of the Member States.⁶³ Nevertheless, NGOs in Brussels have already been able to include some of their proposals in the final directive (Council Directive 2004 / 83 / EC). The increased activity of NGOs at both the EU and member state levels has resulted in these organizations being able to increase grants and increase the benefits and rights of migrants (e.g. the number of additional family members who are allowed to join the refugee in the name of family reunification). Based on their suggestions, an amended guideline was then drawn up in 2011.⁶⁴

In the first case, the opportunities for NGOs were even more limited in 2004 and only the Council could be influenced, as the home affairs ministers of the member states were fairly closely linked from home. However, they were able to submit some of their proposals through the Brussels Office of the Council and the Directorates-General of the Commission concerning the first settlement of the migrant issue at that time. In particular, the *European Council for Refugees and Exiles* (ECRE), an umbrella organization for asylum, founded in 1974, has been a successful lobby organization on this matter, and its proposals have been reflected in the formal proposal for a directive that was finally put forward by the Commission: "With regard to goal achievement, at the drafting stage, ECRE was fairly

⁶³ "In addition, venue-shopping to the EU-level enabled Interior ministries to largely exclude 'migrant friendly' actors such as the European Commission and the European Parliament from the decision-making process." (Kaunert/Lénard/Hoffmann 2013, 182. p.)

⁶⁴ This directive further raised asylum standard in the EU by introducing several changes, including the clarification of various concepts through the incorporation of recent case-law of the Court of Justice and of the European Court of Human Rights, measures to better take into account gender-related issues and children's interests in asylum assessment processes, the approximation of the rights granted to refugees and beneficiaries of subsidiary protection relating to health care and employment, as well as the extension of the period of validity of residence permits issued to beneficiaries of subsidiary protection in some circumstances." (Kaunert/Lénard/Hoffmann 2013: 188.)

successful. Its recommendations and the Commission's proposal for the Qualification Directive especially concur on the general provisions and the chapter that defines the qualification criteria for international protection, such as the provisions concerning non-states actor persecution." (Kaunert/Lénard/Hoffmann 2013: 190.) But only about a third of the NGO proposal was included in the final Council directive, these authors mourned in their study, and, therefore, NGO pressure aimed to change the directive that omitted their proposals. This was the case in 2011 when they were given a greater chance after the changes to the new 2009 basic contract, which were favourable for NGOs. At this point in time, eight migrant support NGO networks were already engaged, five of which were involved in the Commission's draft decision, and were later in the co-decision phase of the EP and then before the Council.⁶⁵ In the case of the Commission, they have been most successful – in essence, their proposals made up most of the Commission proposal – but only half of their proposals were included in the directive which was finally adopted by the Council and EP.

If this picture has a general validity – which is also demonstrated by the other analyses, even if not with so much detail – then, in addition to codifying the case law of the ECJ through the Commission's proposals, the NGO networks and lobby organizations are the key factors for the creation of the EU-law in Brussels.

IV.2.2 The Organization of NGO Influence around the EP

When approaching lobbying and NGO organizations around the EP, it is important to emphasize that, unlike the other EU institutions, it is not only important to influence decision-making here, but also to maintain close contact with MPs and group leaderships of the EP, as this can reach the European public and a public hearing of an EP committee can ensure a friendlier attitude of the MPs through stable contact or at least reduce hostile feelings. The actual decision on certain topics is mostly made later and not in the EP phase, but lobbyists and NGOs with large resources and organizations try not only to influence the decision-makers, but also the actors who have a lasting influence on the EP public. This underscores the importance of the Soros network's list of 226 MPs, published by *WikiLeaks*, and even if it does not have such a large and strong EP presence, the other NGO networks also have groups of friends and their lists. Due to the nature of the matter, this is more important of the two competitors – lobbies and NGOs – for the NGO networks, because the extensive EP publicity for NGOs clearly brings about a reinforcement. On the other hand, lobbying is inherently a way of secret background influence, but it is also possible to build a separate NGO wing of the disguised lobby organization here and, this way, such lobbies can also appear in the public relations of EP.

The participation of NGOs in specific EU decisions is continuously reflected in the process of establishing regulations and directives, which were decided by the Council and EP in co-decision procedures. This means a "legislative process" in the EU, in which the Commission has the monopoly to submit proposals and to submit their proposals to the Council and the EP simultaneously in the form of drafts. (The EP can only influence it by way of presenting an initiative to the current work plan of the Commission for the next year with the majority of its members and proposes to the Commission a draft regulation or a draft

⁶⁵ "In the case of the recast Qualification Directive, total eight pro-migrant groups were involved in the lobbying of the EU institutions. Five groups tried to influence the drafting of the proposal by the European Commission – AI Europe, the CCOEMA network, ECRE, the Women's Lobby (EWL) and the Red Cross. At the decision-making stage, the European Parliament and the Council were lobbied by the CCOEMA network, ECRE, Terre des Hommes, EWL, Asylum Aid and the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, as well as Red Cross." (Kaunert/Lénard/Hoffmann 2013: 191.)

directive on a subject that is not covered by the original work plan of the Commission.) If the EP receives the Commission's draft, the responsible EP committee appoints a rapporteur for the draft resolution, and each EP fraction nominates its shadow rapporteur. Influence begins at this level, and it is up to NGOs and lobby organizations in the sector affected by the project to determine who should or should not be the rapporteur for the project. In addition to the search for public influence, the position of the EP on a draft is most often determined by the internal dominant positions of the relevant EP committee, in which, in addition to the president, the shadow rapporteurs of the large groups and the narrow circle of the group coordinators responsible for the committee play an important role.

The political groups appoint a political group coordinator for all EP committees from among their members, from whom the position of the group's leadership in ongoing decision-making is conveyed to the committee concerned, so that the group coordinators monitor the work of the committee in addition to the individual shadow rapporteur. In addition, according to the descriptions, the drafts received by the committee are first discussed in some committees by the group's coordinators and are included in the selection of the rapporteur, although this is the prerogative of the committee chairman. However, the shadow rapporteur is chosen by each political group coordinator on behalf of the political group from among the political group members of the committee. (Neuhold 2001.)

The rapporteur usually proposes amendments and additions to certain points in the draft, and then when discussing it with the committee, the final position of the committee as a whole will be achieved in the light of the solution proposed by the shadow rapporteurs or additional changes by means of a communique. Relevant NGOs and lobby organizations are present at all points in this decision-making process, and they mostly try to smuggle their suggestions into the decision, in particular by contacting the rapporteur and shadow rapporteurs, as well as trying to provide information on the (adverse) impact of certain points in the draft and propose alternative solutions that they believe are more supported by "professional" information.

If the EP adopts its position on the draft, it will be forwarded to the Council, which has already contested the draft received from the Commission. At this point, the Council will comment on the changes to the EP. If there is a contradiction, the Council's position on the draft will be sent back to the EP, where there will be a second reading as before and then repeated again before the Council. If the differences between the EP and the Council persist, a joint conciliation committee will be set up before third reading, in which the representatives of the Council and the EP, with an equal number of participants, will form the common position. In order to give an indication of the frequency of the three readings, the year 2006 was mentioned when in 103 such co-decision procedures between the EP and the Council, in 58 cases a co-decision at first reading, in 35 cases at second reading and only in 10 cases a co-decision took place at third reading, for which a joint arbitration board would have to be set up. (Lehmann 2009: 60.)

This decision-making mechanism involves people from NGOs and lobby organizations at all points in the process. Statistics recorded 70,000 officially recorded contacts between MPs and NGOs and lobby organizations in 2006, and this means one hundred contacts per year for each MP on average. Of course, this means that there may be many hundreds of contacts between rapporteurs, shadow rapporteurs on key drafts, committee chairs and committee group coordinators, while there are few contacts for ordinary MEPs.

The EP, like the entire EU decision-making apparatus, is trying to replace and demonstrate its lower legitimacy base and closer proximity to society than national parliaments by allowing a large number of NGOs and lobby organizations to get involved in the decision-making process. In addition, the technical knowledge and information required by the EP, which decides in a wide range of areas, can be gathered by the lobby organizations

that would otherwise like to provide it. It is true that the information processing of the materials they provide gives an image that is chosen according to their interests and is, therefore, biased. However, if the MPs examine this together with information from the competing lobbies, these distortions can in principle be mutually corrected. This justifies the trend not only to strengthen the organization of NGOs and lobbies in the EU, including the EP, but also to build new NGOs in part from the Union itself through a range of funding channels. EU donations in 1994, for example, promoted the creation of a *Platform of European Social* NGOs, an umbrella organization that has since been used to mediate the mutual influence between the social NGOs it brings together and the EU institutions in Brussels (Cullen 2017). This has, of course, led to criticism from less generous EU-funded NGOs that these NGOs set up by the Commission themselves have no real social basis and that they can only take a critical stance on the legitimacy of the Commission and the EP and them.⁶⁶ Without ending this debate, it should be noted that the EP parliamentary groups' debate on NGO funding shows that although NGOs do exist in all policy areas and that their political objectives are pursued jointly with the EU institutions, EU-backed NGOs tend to be in the left hemisphere rather than in the conservative political camp. This may also be strengthened by the fact that in 2015, for example, a quarter of the EU's donations of EUR 610 million went to the 28 most important NGO networks at three migration organizations.⁶⁷ This impression was further reinforced by the attitude of the Greens and the Left to hide EU NGO funding data in a corresponding debate in the EP in 2017: "In a vote today the EPP group rejected attempts to keep NGO financing a secret. Hiding behind calls for transparency in this House, the Greens and the Left in the European Parliament wanted to prevent shedding light on the use of EU taxpayers' money in funding NGOs, in a report by Sven Giegold on transparency accountability and integrity in the EU. The Greens and the Left in the European Parliament are hypocritical when they call for all-encompassing transparency from MEPs and interest groups, but deny transparency in the financing of non-governmental organizations. (Press-Release 2017). The debate between the EP's left and right groups on EU funding for NGOs also shows that some of the NGOs that have been specifically set up and funded by some Commission Directorates-Generals do not actually use this money to operate out of the field, but to use it in the EP and to influence the Council and COREPER. And this means, according to the debate, that left-wing NGOs are financed by the Liberals and the Greens, and on the other hand, that right-wing and conservative groups are calling for such funding to be banned.⁶⁸

⁶⁶ "However, EU social NGOs have been characterized as elite focused with weak link to grass root constituents and have on this basis discounted as significant agents in closing gap between European citizens and EU policy makers. Scholars also point to the EU funding and project support these NGOs receive as evidence of their co-optation and inability to maintain independence from EU policy imperatives. EU NGOs have also been categorized as lacking the critical distance required to mobilize for a radical shift in EU policy and of participation in consensus-oriented processes devoid of substantive opportunities for deliberation." Pauline Cullen: *The Platform of European Social NGOs: ideology, division and coalition*. *Journal of Political Ideologies*. (Vol. 15.) 2017 No. 3. 318. p.

⁶⁷ "The three largest beneficiaries of these commitments are the Danish Refugee Council, which accounted for 8.4%, Red Barnet Forening (7.5%) and the Norwegian Refugee Council (7.3%)." Roderick Ackerman/Elsa Perreau/Malin Carlberg: *Democratic accountability and budgetary control of non-governmental organizations funded by the EU budget*. Directorate-General for Internal Policies. 2016. 18. p.

⁶⁸ "The budgetary control committee is discussing German MEP Markus Pieper's draft report on EU financing of NGOs, in which he calls for funding restrictions on organizations which 'disseminate untruth' or use EU funds to lobby Parliament or the Council of the EU. At a recent closed-door meeting in Strasbourg of the MEPs working on the draft resolution, he faced pushback from Green and Socialist MEPs. "We will as Greens try to 'kill' this report as soon as possible." Belgium's Bart Saes told *Brussels Influence* describing it as "direct attack on NGOs without any proofs of the lack of their transparency." Harry Cooper/Quentin Aries: *Commission sides with Greens on NGO funding – How to lobby (and how not to)*. Politico 4/21/2017.

IV.2.3. Opportunities to Influence the Council and COREPER

Alongside the Commission and the EP, the Council, which is made up of various ministerial formations, there is a third main institution in the ongoing decision-making process of the EU. There were about twenty such formations per cycle in the 1990s, but that number has been decreasing since the turn of the millennium and there are now nine such formations in the Council's framework. Formally, the responsible ministers of the member states to Brussels decide in the Council, but in most cases a compromise is reached on the proposal submitted by the Commission in the preparatory process, and also in the case of the co-decision procedure with the EP, and, in this case, the Council of Ministers signs the decision only without separate discussion and it is announced as a regulation or guideline. The decision-making forums before the Council consist of a three-tier hierarchy that culminates in COREPER, the permanent representative of each member state in Brussels, under which there is a mediation forum for lower-level representatives and at the lowest level there are work committees of employees (*attaché*), of which the Commission's proposals are processed at first level, and the first instance tries to reach compromises between the member states. (Saurugger 2009: 105-110; Hayes-Renshaw 2009: 84-86.) The number of working committees is 250, which further divides the main themes of the ten Council formations. This concerns the *attachés*, who are either specialized experts who are permanently seconded to Brussels or only officials from the ministries of the member states who attend the meetings in Brussels. However, this Council machinery in Brussels is not a single operating system since the governments of each member state have different EU decision-making models at home, and this also applies to their departments in Brussels within this three-tier hierarchy.

In principle, the home organization of the political will formation of the member states with regard to EU policy can be divided into three main models. Some countries (France, Denmark, Greece, Sweden and formerly Great Britain) have developed the centralized model, in which a separate general secretariat or supreme body has been set up, and this body organizes meetings of the internal EU departments of the various ministries involved in the project to discuss EU drafts and develop a common national position. Due to ongoing drafts and multiple discussions about individual drafts, the French SGAE (*Secrétariat général des affaires européennes*), for example, occasionally holds ten such sessions parallel in this model, and this happens almost continuously throughout the year. (Saurugger 2009: 109.) In contrast, this system is decentralized in most member states, with a department specialising in EU affairs in each ministry largely developing its own position. Finally, there is the mixed system, in which there is a certain degree of centralization and fragmented will formation in relation to EU policies.⁶⁹

These three models give different roles to the Brussels departments of the respective member states and thus to different lobbies and NGOs. In the centralized model, the position of the member state is already established at home, and this only has to be represented in the working committees in Brussels, in COREPER and in the Council itself, and it follows that

⁶⁹ The Central and Eastern European countries that joined in 2004 largely developed a variant of the mixed model and are generally more centralized in this area than most of the old member states. But Slovenia, for example, turned more to a decentralized model, while Poland turned to a more central model: "In Central and Eastern European states there has been a pronounced tendency towards the emergence of distinct 'EU core executives' who are separated from the rest of the administration. This is particularly due to the fact that negotiating accession and ensuring legal transportation of the entire *acquis* needed to be coordinated efficiently. [...] However, differences emerged even before accession. Thus while Slovenian EU affairs structures turned increasingly polycentric, the Polish government experienced a major shift towards a much more centralized approach in 2000 which included reinforced central and hierarchical coordination mechanisms." Sabine Saurugger: COREPER and the National Governments. In.: Davis Cohen/Jeremy Richardson (eds.): Lobbying the European Union: Institutions, Actors and Issues. Oxford University Press. Oxford. 2009. 110. p.

there is no longer any autonomous education of the member states' bureaucrats in Brussels.⁷⁰ This also means the closure of these bureaucrats in Brussels for lobby organizations and NGOs, because lobbying for EU positions in the case of a member state with such a model can only be successful in its capital. Large trade unions, chambers of employers and industry associations, but NGOs interested in cultural affairs etc. lobby in Paris, London, Copenhagen etc. for draft regulations and guidelines that are important to them. Due to the partially centralized feature, which is also available in the mixed model, the neocorporatist mediation system set up here in Germany and Austria is most heavily involved in lobby and NGO networks in EU capitals.

The largest participation of lobbyists and NGOs based in Brussels in council decisions is in the member states in which the decentralized model only defines the position of the member states in the relevant EU ministries, since this is only done at the official level without a uniform national political consultation. There is, therefore, still room to influence this and to change the original secret position, and it is important to know that there is a decentralized model in most member states. However, the common position of the analyses in this regard is that it is much more difficult for the Council than for the Commission and the EP to successfully lobby and influence NGOs. (See Saurugger 2009; Hayes-Renshaw 2009.) One of the reasons for this is that the *attachés* here, the permanent representatives and their deputies for all the drafts received have access to the apparatus of the responsible ministry at home, from which they can receive all the information and therefore do not constantly receive information as the Commission or the EP, MPs are absent and so they do not depend so much on the specific information from lobby organizations.⁷¹ The other reason is the constant replacement of *attachés* and the appointed permanent representative and their deputy by changing government, which means that the existing personal relationships, which are more important for lobbying and the influence of NGOs, are always interrupted at short intervals and they have to always be built from the beginning.

Despite these difficulties, in addition to the capitals of the member states, the organization of constant pressure from NGOs and lobbying also exists in Brussels towards the Council's preparation for decisions, in particular towards the 250 working committees. Most of the Council's decisions are already taken in the decision-making forums, and, in many cases, the final agreement is reached in the working committees, which the Council ministers no longer vote on, but only sign the decisions.

IV.2.4. Ways to Influence the European Court of Justice

It is important to see that strategic legal disputes between lobbyists and NGOs as well as their interference in the legal disputes of others through *amicus curiae brief* in the proceedings before the ECJ are made very difficult due to the fact that the pilot judgement process is not allowed as it is in the case of the ECHR in Strasbourg. Influence on decision-making and the enforcement of legal changes in the member states through ECJ procedures and circumvention of the member states' laws are, therefore, only possible in an indirect way.

⁷⁰ It was one of the consequences of the fact that in such a centralized model the position of the member state was agreed at home at the political level, which was only communicated to the permanent representations of that state in Brussels and one had to act accordingly. The minister traveling to Brussels has only a mere formal signature role, which is why some British ministers, for example, often did not travel to complete this formality.

⁷¹ "Compared with the Commission and Parliament, the Council requires less information from private actors because it has greater opportunities to obtain information from national and local governments." Henry Hauser: European Lobbying Post-Lisbon: An EconoHauser, mic Analysis. Berkeley Journal of International Law. (Vol. 29.) 2011. No. 2. 698. p.

Such detours do exist, however.

The main method of influencing NGOs and lobbyists is to initiate preliminary rulings before the courts of the member states, which are encouraged in the directions set out in their proposals. This means that it is not the NGOs and lobby departments based in Brussels that are affected by the ECJ, but their subsidiaries in the member states.⁷² The tactic is to use certain parts of EU law as the legal basis in an action before a court in a member state and to ask the court to send a preliminary ruling to Luxembourg to interpret the aspect that is important to them. Courts have discretion, but if influential NGO networks in a particular country have “sensitized” some of the judiciary to law schools, training centres, or already during legal education, it is likely that more judges will tend to comply with preliminary rulings. However, this can only be effective if an NGO network is able to build up specialized legal staff (lawyers and university lawyers), since only a large number of carefully planned legal disputes are really sufficient to bring about the desired legal changes through legal disputes. And a “repeat player” can only work effectively with large resources and specialized legal knowledge. Although there is no possibility of an American class action or the Strasbourg pilot judgement in Luxembourg, the NGO lawyers can split the case into aspects so that every NGO lawyer bombards the same topic from different sides in their legal proceedings with their submissions and so ultimately the desired answer can be obtained through a preliminary ruling procedure in Luxembourg.⁷³

The other way to combat the EU’s judicial decision in favour of NGOs and lobby organizations is to use the Commission’s machinery by working to open infringement proceedings against a member state to force the member state to change its legal policy. However, it is also possible that they will provide the Commission with information on their opinion on the ongoing proceedings before the ECJ, and this will direct this process in a certain direction. While in the previous way the branches of NGOs in the member states will take the lead, the influence of the Commission in Brussels is exercised by the local branches in Brussels. However, for a particularly important decision by the Commission, the main personalities of NGO networks can go to Brussels to force the decision. In the event of the decision to introduce the famous Article 7 against Hungary, George Soros personally visited the most important people of the EU leadership in Brussels in early 2018. In simpler cases, however, it is enough to mobilize stable links in the desired direction between the lower leaders of NGOs and the Directorates-General, the EP Secretariats and the General Secretariat of the Council.

In summary, the influence of NGOs and lobbyists on the Court of Justice in Luxembourg shows that there are only indirect options here. In contrast to the possible direct involvement of other Union institutions, the ECJ in Luxembourg can only be influenced by the courts of the member states or the Commission. If we compare this indirect possibility of influence with the direct NGO influence on the functioning of the ECHR in Strasbourg outside the narrow Union, which largely supplements the EU power machinery, and we recall the common decision-making machinery of the almost symbiotic-like, intertwined ECHR and its NGO base, then the ECJ judgment from a few years ago, which despite the provisions of

⁷² Within the European Court of Justice, the Court of Justice (ECJ) has monopolized the right to a preliminary ruling as the main instrument for the judicial development of EU law, and this cannot be decided by the General Court, although the EU treaties do not provide for it.

⁷³ “Litigants also bring multiple suits simultaneously, with slightly different strategic effects. The ECJ has long had the habit of joining cases, where multiple referrals come before it with the same fact pattern concerning the same EU law or action. The trends towards joining cases has increased significantly over time. [...] Sending multiple references signals to the ECJ the saliency of the issue to private litigants and also maximizes the immediate applicability of a legal change.” Margaret McCown: Interest Groups and the European Court of Justice. In.: Davis Cohen/Jeremy Richardson (eds.): Lobbying the European Union: Institutions, Actors and Issues. Oxford University Press. Oxford. 2009. 97. p.

the Treaty refused to bring the Union as a whole and its decision-making mechanisms under the ECHR, becomes particularly important. This would have placed the remaining areas of democratic political influence under the hierarchical human rights apparatus of Strasbourg and the NGO base, and we would now see the completion of the EU's legal policy, but not with Luxembourg but with the centre in Strasbourg and as we have seen the situation here is worse.⁷⁴

V. EU Scholarship: A criticism

In the years around the turn of the millennium, I discussed the structure and models of European integration in two studies,⁷⁵ and while studying the relevant literature, I always felt that these were mostly descriptions for the EU staff in Brussels or for the people who want to be the members of this comprehensive organization in the future, and from these descriptions the various positions of the huge organization into which they will enter and where they have their place and their function in it are represented. In short, I could not regard them as scientific literature, but rather like uncritical propaganda writings. Based on my previous extensive research, I was aware of the motivations for planning European integration that some European power groups started at the beginning of the 20th century, and the resistance that this effort created in the elites of each country and I studied the background practices and strategies against these plans.⁷⁶ In contrast, writings on the history of the European Union and textbooks in the universities largely detail all phases of the history of integration, as well as successive contracts and expansions, of how the long-awaited state of peaceful development and the prosperity of European states was realized after a long period of being constantly at war with each other, and consequently how the United States of Europe is gradually being realized due to the will of all European citizens. Likewise, integration as a fundamentally coherent legal system across the member states only unfolds as a story that has been advanced by courageous court decisions in Luxembourg. The court decisions with almost *coup* effect between 1962 and 1964 on the direct effect and the primacy of Community law over domestic law were mostly mentioned only as a side event and as self-evident. Only enthusiastic descriptions but no critical analysis has been found in the official textbooks on the EU concerning other similar decisions of the European Court of Justice, from which European integration has been transformed from an international organization into a semi-federal state. Despite all opposition from the founding states and their peoples (see the rejection of the European constitution in referendums after the turn of the millennium) they are only described in the writings of European studies as the content of EU standards, but the deeper legal and sociological aspects have already been carefully removed.

Fortunately, however, in the course of my current analyses, I have found writings in recent years that illuminate this lack of problematic "science" for European studies with a specialist literature. This new research may have taken place in recent years because secret material about the treaties and negotiations that have led to European integration has been

⁷⁴ Of course, it should be noted that this positive assessment is only a legal assessment by an external observer and does not release the Luxembourg judges from criticism of an open violation of their judicial obligations. This apparent departure from the Treaty has generally been a feature of the Luxembourg judges, as our analysis to date has shown, and deserves general criticism. It should only be emphasized here that in this case, exceptionally, this generally negative type of assessment also had an advantageous legal policy effect.

⁷⁵ See Béla Pokol: EU accession and Hungarian Parliamentarism. (i. e. Az uniós csatlakozás és a magyar parlamentarizmus.) Pol. Tud. Szemle 1998/12. 21-37.p.

⁷⁶ See in particular the relevant monographs by the international historian of political economy Kees van der Pijl: The Making an Atlantic Ruling Class. London. Verso 1984, and the Global Rivalries from the Cold War to Iraq. Pluto Press 2006.

published over the past few decades, and with the death of key players in the history of integration, their private archives have become largely accessible in recent times. Some of the participants who were still alive could already speak and give researchers interviews about the “intimate” details. At the same time, the descriptions of the history of European integration as a “salvation story” have lost credibility due to the global economic crisis in 2008 and the catastrophic mismanagement of Islamic mass migration in 2015. The 2008 financial crisis that shook the world and the inability to defend itself against the influx of millions of Islamic migrants to Europe have shocked a significant number of elites in the EU member states with the dangers of the disappearance of all European civilisation. In this change, the “courageous” judges, cosmopolitan heads of state and leading legal politicians, who were formerly viewed as “heroes” in the era of optimistic ideas of Europe, now appear to many as gravediggers of Europe, whose actions destroyed the sovereignty of the nation states and their internal cohesion were undermined by secret practices and covert machinations. In this way, while in the past, more serious criticisms of EU court decisions and treaty changes that promoted federalism could successfully be presented to the public as the “stupid nationalism of the mentally limited” or “backward adherence to the ideas of old sovereignty”, these criticisms can find greater support in the face of these dramatic new experiences.

The new critical scientific research on European integration that has developed in recent years has been particularly important to me from three academic circles. The most fundamental redesign of European studies ratings comes from a Danish group of historians whose members have followed this path since the turn of the millennium, but their research has been particularly accelerated by the opening of relevant archives after 2010. The central figures and organizers of the research here are *Morten Rasmussen*, *Anne Boerger*, *Rebekka Byberg*, *Vera Fritz* and *Jonas Petersen*, but their research continues in close unity with the research of the American *Bill Davies*, the Dutch *Karin van Leeuwen* and *Karen Alter*.⁷⁷ After the turn of the millennium, another group formed among French political scientists and sociologists, which, in contrast to their Danish colleagues, did not concentrate on the entire history of integration, but specifically on the organization of academic circles for European law and European studies based on the theory of *Pierre Bourdieu*. Bourdieu describes the development of individual academic disciplines and their access to teaching as university subjects and thus to university departments and professorships as an ongoing struggle that can always be led to success by charismatic university organizers, clever tacticians and legitimizing ideologies. In recent decades, the new academic and university organization of European studies and European law has created a good area for the application of this theory. In this way, political scientists like *Antoine Vauchez*, *Julie Bailleux*, *Michael Madsen* and others have been researching since the turn of the millennium to find out how the discipline for European law and European studies did this. From this, it can be deduced to what extent the new organization of the EU studies as an academic discipline was due to the internal work of professors in the relevant branches of science or rather can be seen as an external creation by the power groups of the European Community, which actually created their “own” academic discipline.

The third grouping in this area is a German political science research department within the Max Planck Research Network. The group’s great old man, *Fritz Scharpf*, has been analyzing and critically demonstrating the monetarist neoliberalism of European integration since the late 1980s and the fragmentation of the social network and state aid system that has

⁷⁷ The research team’s research into the development and change in EU science up to the mid-1990s was well summarized in *Rebekka Byberg*’s dissertation, which was written under control of Rasmussen, see *Rebekka Birkebo Byberg: Academic Allies. The Key Transnational Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993*. Kobenhavns University, Det Humanist Faculty. PhD thesis. 2017. 142 p.

arisen in many Western member states over decades in the name of market equality. However, his pioneering work has been continued since the turn of the millennium by an entire team of researchers from the Max Planck Research Network. In recent years, dozens of studies and monographs have been published as a critical strand of European integration research, with the studies by *Martin Höpner*, *Susanne Schmidt* and *Björn Schreienmacher* being the most productive and usable. Also well connected externally with this group is the renowned constitutional historian and former German constitutional judge *Dieter Grimm*, who has analysed and criticized the doctrines and plans for a unified federal Europe in several monographs since the 1990s. The following analysis of this chapter on ECJ case law and the EU's juristocratic power structure has largely been derived from the results of this critical research. In this chapter, I will primarily use the analyses that exposed the structures of the instrumental framework for academic discipline of European studies and European law. Based on their analyses, these academic disciplines, controlled by the Brussels and Luxembourg juristocracy, serve to legitimize and support the steps towards federalism and the constitutional basis, rather than to analyse them with a really neutral attitude.

V.1. The Initial State of Opposition between Federalists and Sovereignists

The resumption of the post-war period and the controlled integration of Germany – which was occupied and divided by the Americans – into European integration, as well as the creation of a larger market framework that was necessary for economic prosperity in a comprehensive European area led to the following dilemma: whether the United States of Europe should be created based on the US federal model, or rather a loose confederation of states would suffice. The strong national identities and the lack of a uniform supranational identity took the federation quickly off the agenda, and the 1950 Paris negotiations on the coal and steel community rejected the ideas created of some smaller, cosmopolitan intellectual groups to build certain federal-style community institutions. Proponents of these minority opinions did not disappear from the Community institutions, however, and persuaded some leaders of the High Authority – the highest governing body of the Community for Coal and Steel – to accept an interpretation, although this form of European integration was established under international law due to its structure, and it no longer corresponds to international law, but represents a specific legal system that reflects the characteristics of a real federal state rather than a mere international organization. Consequently, the provisions of the treaties establishing the Community must not be interpreted strictly according to the methods of interpreting international law, but as the domestic law of a real state, emphasising the overriding principles and normative objectives and perceiving the treaty as a constitution.

In particular, *Michel Gaudet*, head of the legal department of the leading community institution, continuously advocated this turnaround, and the leadership of the High Authority convened a comprehensive conference in Stresa in mid-1957 to discuss this by meeting the most renowned professors of international law. (Byberg 2017: 15.) The conference was a complete failure for those who advocated the stronger federal integration model, as senior international law professors considered it impossible for the European Community, an international legal organization, to act as a state. This ended the federalization debate within the Coal and Steel Community, but the same circles raised the issue again in the 1957 Rome Treaty negotiations, even though they were unable to advance the treaty towards the Federation.

The man of continuity was *Michel Gaudet* in the new and wider European integration community, who from the beginning of 1958 until his retirement in 1969 was the head of the Commission's Legal Department, which succeeded the former High Authority. The

possibility for the Commission to force individual member states through the Luxembourg court to implement certain measures made it clear to Gaudet that the urgent constitutional law of the Treaty would be a great opportunity for the Commission to carry out its tasks more effectively, and that would give the community federal characteristics. In order to bring the member states more strictly under Community law, a constitutionalized interpretation of the founding treaties would be far more effective than treating them merely as international treaties. The main task of the Commission's Legal Service was continuously to consult the European Court of Justice, make applications and guide its decisions in a specific direction with the official opinion of the Commission, and so Gaudet was at the centre of the struggle regarding federalization and constitutionalization of the basic treaties. He was already in a better position in this fight than under the previous leadership of the Coal and Steel Community, as the first President of the Commission, *Walter Hallstein*, now fully supported Gaudet's plans and gave him a free hand in shaping the content of the requests and gave Commission opinions before the Court.

The breakthrough in the reinterpretation of the Community's international treaties and their interpretation as a quasi-constitution was made possible by the Dutch constitutional changes in the 1950s (1953 and 1956). These have greatly expanded the longstanding monistic conception of international law and domestic law in Dutch international legal circles and not only monistically expressed the direct internal effect of an international contract signed by the Dutch state, but also the possibility of taking a monistic view of international law to apply to later rules. Contributing to this was the strong acceptance of the idea of federal Europe by the Dutch political elite in the post-war years, but also the fact that in Dutch parliamentarianism, the independence of the government from the parliament – with an interesting interpretation of the separation of powers – enabled the government's international treaties without recognizing and enforcing parliamentary ratification.⁷⁸ This has created an extremely monistic position in the field of international law, which has also been involved in everyday political debates. This extremely monistic position of the Dutch constitution helped the legal department of the Commission in Brussels push the Luxembourg court towards the constitutional law of the Community treaty. Due to the monopoly of the member states in the implementation of Community law, the Commission, in accordance with international law, was only able to force the member states to implement Community law through infringement proceedings, which the Brussels officials have found to be inadequate over the years.⁷⁹

It should be noted that in addition to the constitutionalization of the basic treaties that Gaudet advocated in the Commission's Legal Service, the other alternative was to incorporate Community law into the regulations of the member states through harmonization of laws, by bringing member state laws and regulations closer to Community law. This was the dominant trend among the majority of comparative university lawyers in the emerging associations of

⁷⁸ For internal Dutch political debates on the possibility of international law entering into force in the early 1950s without ratification, see Carla Hoetink / Karin van Leeuwen: Dilemmas of Democracy. Early Post-war Debates on European Integration in the Netherlands. In Joris Gijsenbergh (ed.): *Creative Crises in Democracy*. Peter Lang. Brussels 2012. 183-213. According to the authors' analysis, because of the protocols of the early parliamentary debates, the desire for a federal European state in the dominant Dutch parties was so strong that the Council of Europe, its parliamentary assembly and its committee of ministers already wanted to reinterpret it as a newly founded federal European state.

⁷⁹ See Morten Rasmussen: Revolutionizing European Law: A history of the *Van Gend en Loos* judgment. *International Journal of Constitutional Law* (Vol. 12.) 2014. Issue 1. (136-163) 142. p. In einem späteren Teil seiner Analyse argumentiert Rasmussen, dass die Verhandlungsprotokolle zur Festlegung des Vertrags von Rom zeigen, dass die Verhandlungsführer des Vertrags zusätzlich zum Vertragsverletzungsverfahren die Möglichkeit des Zwangs durch Vorabentscheidungen abgelehnt haben: „Likewise, the analysis of the EEC Treaty negotiations suggests that the elements in the *Van Gend en Loos* judgement, most importantly the use of the preliminary reference system as an alternative enforcement mechanism, contradict the original design of the EEC Treaty.” (op. cit. 146. p.)

European Studies in 1958. However, Gaudet and the leadership of the Commission found that this was too slow, since they did not see the solution as slowly bringing the member states closer together, but instead created a centralized European area by completely destroying the autonomy of the member states. The excessive trust of the professors of European studies in the legislation of the member states was seen as flawed by them, and was also attributed to the fact that the national courts at that point initiated preliminary rulings to the European Court of Justice only sporadically. Gaudet, therefore, also tried to put the self-assertive character and the direct effect of the Community Treaty under the Dutch constitution at the centre of the European legal conference of 1963, which was already planned in The Hague, since it puts the emphasis on national courts instead of national legislation. In this way, the European Court of Justice could also be placed at the centre of EC decision-making. (Rasmussen 2014: 144.) In the case of *Bosch* (Case 13/61) from 1961, a preliminary ruling by a Dutch court in The Hague gave Gaudet and the Commission the opportunity to press the constitutionalization of the Community Treaty. However, its current version at that time was rejected by the Court.⁸⁰

The turning point in this area was then created by a double exchange within the seven-member European Court of Justice in 1962, and this exchange shifted the balance towards accepting what was urged by Gaudet. As can be seen today after the publication of the ECJ's internal decision-making process, the decision by *Van Gend en Loos*, which constituted a "judge coup" (or from another point of view: a joyful revolution), was given by the judges of the Court with a hit of 4:3. And there were the new judges among the four supporting judges, namely the French *Robert Lecourt* and the Italian *Alberto Trabucchi*. Before his appointment, Lecourt was a notorious federalist and a member of the Jean Monnet socialist circle. It was, therefore, a surprise that he was appointed judge by the Eurosceptic and conservative President *de Gaulle* and Prime Minister *Michel Debré*. He replaced *Jacques Rueff* in the Luxembourg Court of Justice, who was an economist with narrow economic prospects, and so he was not convinced to accept the concept of constitutionalization of the basic treaties based on Gaudet's proposal. Although *Nicola Catalano*, who was replaced by Trabucchi, was also a determined federalist and, therefore, suited Gaudet's aspirations, his deepest opposition to the other Italian judge, *Rino Rossi*, made his participation in every decision a permanent personal duel and they could not be on one platform. In contrast, Trabucchi saw eye to eye with his Italian colleague immediately after he entered, and followed Trabucchi's position in the *Van Gend en Loos* case, as can be seen in Trabucchi's note on the case. (Personal circumstances and their contradictions were revealed in an interview by Trabucchi's employee, who was also a Catalano employee before the exchange.)

Of the seven judges, *Charles-Léon Hammes* from Luxembourg was the rapporteur for the revolutionary *Van Gend* case, who in his draft decision rejected the constitutional concept of the Commission and Gaudet with *Otto Riese* from Germany and *André Donner* from the Netherlands. The two new judges Lecourt and Trabucchi accepted this and were supported by two old judges, *Louis Delvaux* from Belgium and *Rino Rossi*, whereby the four judges formed a majority and the constitutionalization of the basic treaties and the direct effect of EC law were declared. (Rasmussen 2014: 155).⁸¹ It is true that, as a precaution, this decision did not

⁸⁰ "The legal service also made clear its general position on the direct effect – or self-executing nature – of treaty norms. It argued that the EEC Treaty was not a traditional international treaty, but had features of constitutional law, and independent institutions the decisions of which create obligations directly for citizens. As a consequence, the treaty had a presumption in favour of being self-executing. *This point was not taken up by the ECJ*". (Highlighted by myself – P,B) Morten Rasmussen: Revolutionizing European Law: A history of the *Van Gend en Loos* judgement. *International Journal of Constitutional Law* (Vol. 12.) 2014. Issue 1.145. p.

⁸¹ In addition to the four federalists among the seven judges, one of the two advocates-general at the time was undoubtedly a federalist and a constitutional beehive. She was Maurice Lagrange, who stood out in her academic writing before taking office for the following reason: "In academic writings and before the ECJ, advocate-

use the phrase “constitutional law of the basic treaties” in the reasoning of the decision – this was only done in a decision in 1986 – but they made it clear that they have decided against the concept of international law and its limitations and Community law has been declared autonomous. It has the nature of the *sui generis* legal system, which made it possible, in addition to certain specific provisions in the text of the basic treaties, to derive other norms from the general objectives and values of the community. Three of the six member states at the time – Germany, Belgium and the Netherlands – commented on the preliminary ruling by Van Gend en Loos and on the opinion of the Commission, and Gaudet and rejected its coming into immediate effect.⁸²

Although the French did not comment on the decision in this proceeding, a year ago they did comment on the limited jurisdiction of the European Court of Justice for the application of Community law by the European Court of Justice in the *Bosch case* on this issue. This opinion is worth remembering as it shows well what the situation was up till then and what role the Court would have played in European integration if the 4:3 ratio in Van Gend’s decision had had the opposite sign: “The French position in the Bosch case was remarkably clear. The French administration believed the system of preliminary reference should not be used for circumventing the political process at the European level nor interfere in the application of European law in the member states. The ECJ should merely interpret European law at the general and theoretical level, whereas national courts which held the ‘*pleines compétences sur les faits et les moyens*’, should apply European law in the concrete cases.” (Rasmussen 2014: 155). If the opinions of the Belgians in the Netherlands are also analysed, further problems can be identified in this decision. They even complained that the application and the Commission’s opinion submitted to them referred to the direct effect of the Dutch constitution, but the European Court of Justice is not empowered to interpret the constitution of the member states, but to derive their decisions from the Community Treaty. (Rasmussen 2014: 155). This definitely shows that the world is changing, and the position of the Dutch government in 1962 was already in conflict with its federalist-friendly predecessors, who had enforced previous Dutch constitutional changes, which first led to the Van Gend en Loos decision and then to the semi-federal, Luxembourg case law that has been constructed since.

V.2. The Organization of Transnational Academic Circles for European Studies

The ground-breaking Van Gend decision was followed by enthusiastic celebrations from some French, Dutch, Belgian and Italian lawyers and politicians who had long wanted this in their plans for federalism, but also started the ongoing debate and criticism from member states and national sovereign defenders. Those in power around the Commission’s legal department, especially Michel Gaudet, who had been pushing for a breakthrough for many years, were aware that the vast majority of member states’ legal elites were against the new ECJ doctrine and that the Court of Justice and the Commission supported

general Maurice Lagrange likewise endorsed European law as partly constitutional and closer to federal than to international law.” (Byberg, 23. p.)

⁸² In the Van Gend case and earlier in the Bosch case, it was clear that four of the six Member States were against the trend reversal at that time – the Netherlands, Germany and Belgium in the Van Gend case and France in the Bosch case – and in the subsequent case Costa. The Italians submitted a dismissive statement to ENEL. Thus, only Luxembourg, the small country, was the only member state that did not object to the turnaround at the national level, and this puzzles why the member states tolerated this “*judge coup*”, which was not supported by their own legal elites. In Rasmussen’s words: “In existing research on European law, it has been a key puzzle why national governments accepted this fundamental transformation of the European legal order.” (Rasmussen, 157. p.)

constitutionalization and gradual federalization of the community would have to win at least some of the legal elites. However, Gaudet very much remembered the fiasco in Stresa in the mid-1950s experienced by the leaders of the Coal and Steel Community, and he knew that international law professors were at risk of the ECJ's reinterpretation of the European Community from an international entity to a federal state. Only the creation of supranational academic circles for European law and in European studies can create the legal basis for the semi-federalist European Community and, through it, the gradual influx of legal circles within nations could be created, from which the missing legal basis can be made up, because without it, a reversal can take place at any time.

Gaudet, with his abundant financial resources, started this mission in two directions. On the one hand, he wanted to bring the federation-friendly legal associations to the supranational level with an umbrella organization that had already been established in their country by the more cosmopolitan circles of the French (1954) and then the Italians (1958), and he wanted this umbrella organization to work closely with the commission's lawyers in Brussels and the judges in Luxembourg. According to him, on the way to a federal Europe, these cosmopolitan sections of the legal elite should be feared the least. On the other hand, he started funding a new supranational journal for European law from Commission funds and saw the dissemination of this journal in the legal and academic community in the member states to solve the problem of the lack of an academic basis and a supportive background to the plan to federalize Europe. In addition to Gaudet's efforts, the plan for a third supranational academic background for European studies emerged in 1948 with the establishment of the Coal and Steel Community, and that was the plan for the European University. Finally, the European University Institute was founded 24 years later and after many attempts in 1972 in Florence. Although not a real university, but only a university institute, this could include many doctoral thesis programs, and it later took on much of the supranational federalist ideas developed by Gaudet and his allies in 1958. Let us now take a look at the path of these three institutions.

V.2.1. FIDE as a Background for European Integration

The *Association des Juristes Européens* (AJE), founded in 1958, followed the example of the Italian *Associazione Italiana dei Giuristi Europei* (AIGE), which deliberately tried to unite the more cosmopolitan lawyers with a university background who rejected the nation-state organization. The judges of the European Court of Justice who had federalist ideas were already active in them, and alongside them, *Michel Gaudet* from the Commission – or earlier from the High Authority – was always there, and when the Italian organization was founded, he already recognized the possibility to organize them as the background of federalist plans against the legal groups that favoured the nation-states. He then encouraged the creation of a similar body in the other member states using the Commission's legal services. Immediately after the Italian, the Belgian organization (*Association Belge pour le Droit Européen*) was founded, and similar associations were founded in Luxembourg in 1959 and in the Netherlands in 1960, in which the then Dutch court president, *Andreas Donner*, took part together with the former Dutch judge, *Jos Serrarens*. Only the German section was missing, which was no coincidence, since it seemed difficult to integrate the German professors that propagated the international character of Community law with other organizations in the member states that sought the opposite direction; indeed, a common umbrella organization of all member states with such setup did not seem feasible. Finally, under pressure from German Commission President *Walter Hallstein*, the German Foreign Minister persuaded the Minister of Justice to speed up the establishment of the organization, and in the spring of 1961, the

missing *Scientific Society for European Law* – WGE – was founded. This enabled the establishment of an umbrella organization for all member states, which was organized by the Belgian organization at the opening congress in Brussels in autumn 1961. The FIDE (*Fédération Internationale pour le Droit Européen*) and its member organizations have already been able to provide an academic background and background information on constitutional law and the federalization of the European Community against the majority of international law conceptions of Community law by the legal community of the member states.

The beginning was marked by a harmonious cooperation with federalist European FIDE lawyers who were looking for future-oriented test cases for the judges in Luxembourg, positively disseminating the decisions of the Luxembourg judges and encouraging the national judges to initiate preliminary rulings in Luxembourg. For example, the groundbreaking *Van Gend en Loose* case came from the Netherlands, and the Dutch affiliate FIDE also contributed to the preparation of the application. In the same way, hundreds of participants, including almost all of the Luxembourg judges, declared in a joint statement after *Van Gend en Loos*' decision at the 1963 FIDE Congress that Community law, in addition to having direct effect, also took precedence over the legal systems of the member states should have in the event of a conflict. The Court was still cautious in the *Van Gend* judgement, but declared it in the 1964 *Costa v ENEL* judgement with the support of this FIDE statement. However, with the recent breakthrough of the Court towards federal structures, some affiliates disagreed, and this eventually led to a rift.

The first major divide was caused by the debate about extending direct effects beyond regulations to directives. This was one of the topics of discussion at the FIDE conference in Paris in 1965, and it was already overshadowed by the fact that the French, with the announcement of the “*empty chair policy*”, were withdrawing from the intergovernmental institutions of the Community and were only represented at a lower official level (in the case of Council and COREPER). This has led to a stalemate among believers who have called for the constitutional law of the treaty and a move towards federalization, and possibly also due to the fact that the declaration of direct effect on the directives met with resistance at the FIDE Congress in Paris. The majority rejected this, while a minority accepted it in a milder version. Accordingly, although a directive cannot be directly invoked in a dispute between citizens (horizontal effect), in the event of a dispute against the state, the direct effect of the directive and its direct application by the courts must be recognized. The conference participants were unable to make a joint statement on the issue due to disagreement, and the compromise solution was to send a committee to deal with the issue, including the former President of the Court and current judge *Andreas Donner*. This committee then drew up a general principle of law based on the spirit of Community law – the principle of *effet util* – and, in a position otherwise completely rejected by the FIDE Congress, found that this principle is the direct application of directives by the judges in the member states Disputes justified in front of them.⁸³

One of the implications of this *coup*-like resolution for the entire FIDE Congress was that the contradictions within FIDE became definitive, and, for example, the previously estimated plan to establish a permanent secretariat and thus a supranational FIDE centre was rejected. In the years that followed, between 1970 and 1974, the Court interpreted this resolution as support for at least some academic circles and explained the direct effect of the guidelines with a series of decisions, starting with the degree decision. This abolished the sharp distinction between the regulation and the directives created by the treaty and made the

⁸³ “However, a special FIDE commission, for instance with Ophül and ECJ judge Andreas Donner was established, and it found that directives could in fact have direct effect based on the principle of effectiveness (*effet util*) of European law.” (Byberg op. cit. 80. p.)

entire law of the member states directly subordinate to Community law. Contrary to previous leniency by member states at the time of the Van Gend judgement, the Court of Justice now met with more resistance and the French State Council decided in 1978, on the basis of Article 189 of the Treaty, in the case of Cohn Bendit, that directives had no direct effect, and rejected the Court's case law. The French legislature went even further by negotiating a law – the Aurillac amendment – and it was passed by the National Assembly. This change would have prevented judges from pushing aside national law based on the directives and was required to disregard this directive. The amendment ultimately failed in political debates before the Senate, so it did not enter into force. However, the submission of the amendment to the Court has already made it clear that its unhindered progress could lead to a revolt in the parliaments over the years. Therefore, on the eve of the French legislative debate, shocked by the decision of the State Council, he withdrew from the degree decision in 1979 and retained the direct effect of the directives only against the member states, but withdrew them from individuals.

The internal disintegration of FIDE and the lack of unified support from the Commission and the Court of Justice have cooled hopes of using FIDE as a supranational legal elite against the legal elites of the member states. With regard to FIDE, the plan for a cosmopolitan lawyer organization, which the federalist circles of Europe had been hoping for since the early 1960s, was abandoned, and with Gaudet's resignation in 1969, the new head of the Commission's legal department had discontinued the use of FIDE as a legal background elite. (Byberg 2017: 92-93.) However, Luxembourg judges still continued to participate in FIDE congresses for many years after this, both at home and at joint congresses of the umbrella organization. Even so, this no longer meant the close connection between FIDE and the Brussels lawyers and the Commission that it had had in the years around its foundation.

V.2.2. The Creation of a Transnational Journal for European Studies

In order to overcome hostility to the constitutionalization of Community law and to federalization, FIDE and its affiliates seemed to give little support in their annual congresses and declarations for the federalist elites of the member states. Given the nature of the academic community, this appeared to be possible only through the continuous writing of journal articles, the distribution of these within the legal elites of the member states, and thus the positive presentation of the progress of federalization and constitutionalization by Luxembourgish judges. Existing and established journals for international law and comparative law were in the hands of the “enemy”, so that the writing and publication of studies and case law analyses to the taste of the elite of civil servants and lawyers from Brussels-Luxembourg only seemed possible through the addition of new European study journals. Some of them have emerged since the early 1960s, but they were French, German, or Italian, and only English, which became a common world language, provided the opportunity to play a truly supranational, cosmopolitan academic role in European studies. After their founding, Gaudet and some Luxembourgish judges also worked in the editorial offices of the journals for European studies for narrower language areas.⁸⁴ The main plan,

⁸⁴ After the founding of the *Italian Rivista di diritto europeo* in 1961, Donner, the then president of the Luxembourg court, and Pierre Pescatore, who later became a Luxembourg judge for twenty years, were members of the editorial team. After the founding of the French-speaking *Cahier de droit européen* in 1965, Pescatore and Gaudet were members of the editorial team, and the *Revue trimestrielle de droit européen* began in 1966 with Gaudet and Donner, and only the *German European law* of 1966 lacked the lawyers of Brussels and Luxembourg and the editorial membership here was restricted exclusively to the Germans. (Byberg 2017: 102.)

however, was to create an English-language magazine. In addition to the world language primacy of English, this was also an anticipation of future English accession, but it even contributed to the fact that American law professors could be involved via the English language. This, in turn, spontaneously transfers the analysis of European integration into the field of American federal experience, according to the idea to which relocation was one of the main goals of the magazine.

Gaudet's plans ultimately failed due to the English-language magazine because the Commission considered it too expensive to finance a magazine. His old colleague, *Ivo Samkalden* from the Netherlands, an international lawyer and a leading fighter for European federalism, as a professor at the European Institute at the University of Leiden (and at the time of the parliamentary majority of the Dutch Labor Party as the current Minister of Justice between 1956-58 and 1965), was able to found the desired journal, the *Common Market Law Review* (CML Rev), in 1963. Van Gend en Loos' decision, which represented a breakthrough in Community law towards federalism and caused enormous resistance, had been published a few months before the magazine was launched and later in the new journal, a study was published by the enthusiastic publishers Samkalden and his partner *Dennis Thompson*. They even preceded the radical justification for the *Costa v ENEL* decision, which was issued just a year later, and found that the Community legal order and the European Economic Community itself are special legal orders and that judicial interpretation in this area must use special methods of interpretation to achieve the political goals of the treaty.⁸⁵ The enthusiastic celebration of the breakthrough of the Luxembourg judges, and even sometimes the anticipation of the breakthrough, was then regularly featured in the CML Rev. Furthermore, authors of critical studies of Luxembourg jurisprudence could always count on the hardest attack by authors and editors here.

The nature of the mere academic veil in the case of the magazine can also be measured by the fact that in the first ten years after it had been founded (1963-74), a quarter of all articles were written by Commission lawyers, which was actually the power word of Brussels bureaucracy, but were cited as an academic opinion. In addition, such plans were boldly and honestly discussed in the articles here, which the majority of the Luxembourg judges have avoided in their decisions. For example, while Luxembourg jurisprudence had ceased to describe Community law, which is separate from international law, as a "special legal system", the articles of the CML Rev wrote without hesitation that this European Community law constitutes a constitutional law over the laws of the member states. But *Pierre Pescatore*, a Luxembourg judge (also in the sense that he became a candidate from the Grand Duchy of Luxembourg from 1967 to 1985) who most firmly believed in federal development, wrote this in his 1970 article, and he declared in his article here that the European Community can be seen as a kind of federalism. (Byberg 2017: 105.)

Since Michel Gaudet's resignation in 1969, CML Rev has been away from the Commission lawyer in Brussels for a while and was provisionally mainly organized around Luxembourgish judges. However, the connections were also restored in Brussels from 1974, when *Claus-Dieter Ehlermann* succeeded Gaudet. Ehlermann, a younger man who had previously pursued a university career, was even more agile than Gaudet in using the magazine as an academic background for the Brussels plans. He had even taken positions in

⁸⁵ "The editors Samkalden and Thompson provided an enthusiastic support of the ruling in the first editorial, where they stated that the European Economic Community had a 'special character' and that 'unique' methods had to be employed in order to meet the political objective of the Treaty. Thus, the editorial anticipated the definition of European law as 'special and original', as proclaimed in the ECJ's ruling in *Costa v ENEL*, where the primacy doctrine was established, affirming that in contrast with ordinary international treaties, the EEC treaty had created its own legal system, which was an integral part of the legal system of the member states". (Byberg 2017:104).

other European study journals that were more in the languages of some member states and he tried to include them in supporting the federalist efforts of the Commission and the case law of the Court of Justice. This was all the easier, as it became common in the early 1970s that the publishers of friendly journals for European studies and European law met regularly in the Commission's Legal Department in Brussels, as the Brussels equivalent of the Central Editors' Meetings from the Soviet era in Eastern Europe. (Byberg 2017: 107.) At these meetings, Ehlermann also distributed the Commission's opinions on the current preliminary ruling procedures, which dealt with important questions, and asked the editors-in-chief to write kindly about them in the next issue of their journal.

The intensified contact with the lawyers in Brussels alongside the judges of the Court of Justice in Luxembourg was now important to them, since the resistance within the member states to the expansionism of the Luxembourg judges had increased since the early 1970s. But in response, the lawyers-bureaucrats in the guise of CML Rev and other magazines struck hard at the "insurgents" in their articles. A campaign was launched within the Italian courts at this point to avoid preliminary rulings and avoid the Court, but a study by CML Rev, *Cesare Mastrapieri*, member of the Commission's Legal Department, called this heresy. However, the really tough fight against the pressure of the expansive Luxembourg jurisprudence on a federal Europe was started by German constitutional judges in the late 1960s. After the Luxembourg decisions, which led to an increasing subordination of the member states, and this case law was codified by the Community regulations and directives, a discussion in Germany began at the conferences with the participation of the judges and law professors that fundamental constitutional rights take precedence over Community law and are not subject to subordination. In response to and to suppress this, Luxembourg judges, in a preliminary ruling initiated by a German court, ruled that there are no exceptions and that even the most general principles of the member states' constitutions cannot be an excuse to ignore the case law of the Court of Justice (Case 11/70, *Internationale Gesellschaft*). Added to this was Grad's decision to declare the direct effect of directives and to strengthen this doctrine through case law between 1970-1974, which, in some countries, provoked the most elementary opposition from judges and constitutional judges towards Luxembourg judges. In retrospect, this hard pressure was traced back to the time when the court under President *Pierre Lecourt* (1967-76) was superactivist, since neither before nor after such aggressive violations did the text of the treaties go beyond the norm, and the Luxembourg judges used a more cautious, disguised wording.

The setback did not lag behind, and in 1974, the German constitutional judges stated in their so-called *Solange ruling* that as long as the Community Treaty does not contain a catalogue of fundamental rights that is similar to the German constitution, German courts have the right to refuse to comply with Community acts. The CML Rev studies then predicted the collapse of the community for years and described the position of German constitutional judges as unacceptable. However, the German constitutional judges did not give in and in 1986, in their decision on the Greens – in the so-called *Solange II decision* – they reiterated the control of the German constitutional courts over Community acts, including Luxembourg court decisions. The change in their reasoning meant that they now recognized the constitutional nature of the community treaties, but insisted that the German *Grundgesetz* (Fundamental Law) still had priority due to the lack of a catalogue of fundamental rights and, in future, Community law will be controlled by the constitutional judges and will be used in the event of a conflict to declare a ban on its use in Germany. The Luxembourgish judge *Pierre Pescatore* – the most determined supporter of European federalism and constitutionalization in the Luxembourg court – criticized this and was probably right when he wrote that the German constitutional judges actually defended their state's independence from the Community, and they argued with the lack of fundamental rights only as a disguise

of the real reason. Since then, the possibility of a confrontation with EU law and Luxembourg judges has been claimed by almost all European constitutional courts, and the possibility of a confrontation was explained beyond the emphasis on fundamental rights with regard to constitutional identity and *ultra vires*. That said, Pescatore really raised this point because the real aim here was to defend the sovereignty of the member states. However, just as the Luxembourg judges had previously given pseudo-arguments about their “*coup*” on the *status quo* in 1962-64, the contradiction of German constitutional judges with pseudo-arguments was raised.⁸⁶ The German constitutional judges later rejected the adoption of the constitutional character of the EU treaties and, in their decision on the Lisbon treaties of 2009, declared them to be international treaties, and the European Union was again qualified as an international organization.

CML Rev has always fought hard against these confrontations, and the position of the ECJ and the Commission has been supported with academic writings by the editorial team publishing counter-studies and relentless critical reviews of lawyers in Brussels and Luxembourg. In addition, an editor from Luxembourg judges was brought in to ensure the effectiveness of this method. *David O’Keeffe*, an employee of the Luxembourg judge O’Higgins, became one of the editors of CML Rev. from 1985 onwards. From then on, he was not only responsible for the content of studies and analyses on Luxembourg jurisprudence, but he also acted as a moderator. When one of the Luxembourg judges expressed dissatisfaction with a published article, he immediately took steps to prevent such a matter.⁸⁷ CML Rev, as the academic foundation of European law, therefore pushed a particularly biased and tendentious theoretical background into the foundations of the emerging European studies community, but a number of studies later maintained a critical line against the further efforts of constitutional law in Brussels and Luxembourg. In the first decades after her departure in 1963, her almost all-Schreberling position alongside the Luxembourg judges and Brussels lawyers changed from the 1980s, despite all the control of O’Keeffe, and some really scientific writings appeared here. It may sound like a surprise today, but *Koen Lenaerts*, judge in Luxembourg since 2003 and President of the Court since 2015, published a study in CLM Rev in 1986 in which he advocated the international nature of the EC treaties. Such “blasphemy” would previously have been unthinkable there.⁸⁸ So this magazine, which was created especially for partisan purposes, played the role controlled by Brussels-Luxembourg longer than FIDE, but from the mid-1980s it also became a real academic forum.

The theoretical foundations of the academic community of European studies and European law have since reflected this partisan basis, perhaps unnoticed by most of its practitioners. This partisan justification and the biased theoretical background can be best

⁸⁶ The honesty and frank reasoning with which Pescatore defended his federal position, which often goes far beyond the other judges, also gave him the adjective “*stormtrooper*”, but his strong criticism on the German constitutional judges showed the causes of this. See Bill Davies: *Internationale Handelsgesellschaft and the Miscalculation at the Inception of the ECJ’s Human Rights Jurisprudence*. In: Bill Davies/Fernanda Nicola eds.: *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*. Cambridge University Press. 2017, 157-178. p.

⁸⁷ “In 1985, he was invited to become an editor, as his position at the ECJ would also enable him to provide a more up-to-date case law section in the journal. However, he would also serve as the link between the ECJ and the *CLM Rev*. in other ways, as he could report when judges were displeased with articles. In 1990, he wrote to the associate editor Alison McDonnell that a specific article had been severely criticized by persons at the court, and that „we should be more careful about our screening.” (Byberg 2017: 111.)

⁸⁸ “A noteworthy exception is Koen Lenaerts, at the time professor of European law and private international law at the University of Leuven, ECJ judge 2003-2015, and president of the ECJ since 2015, who insisted that the European Communities were institution of public international law, because of their creation by treaty. The fact that the content – as interpreted according to object and purpose – could appear to be functional equivalent of a constitution, was irrelevant in that respect”. (Byberg 2017: 114.)

understood if we consciously turn to the third foundation of the organization of the cosmopolitan academic community, which is transcended at the transnational level as opposed to the academic communities in the member states. As indicated in the introductory lines of this chapter, this is represented by the European University Institute (EUI) in Florence, which was founded in 1972 after 24 years of planning and trials.

V.2.3. Federalist University Institute over Academic Circles in the Member States

Max Kohnstamm was the former general secretary of the Steel and Coal Community and deputy chairman of the Monnet committee in the 1950s and became its director after the University Institute in Florence had been founded in 1972. In addition to securing links with the Brussels elite, the activities within the institute were no longer connected to him, but mainly to *Mauro Cappelletti*, who was the first professor that Kohnstamm appointed to the EUI's legal department. (The other three departments were the Department of History, Politics, and Social Sciences and European Studies.) Cappelletti was a professor of comparative law at the University of Florence for many years and organized a group of university lawyers around him to sharply oppose the positivist tendencies of comparative law. He saw the comparison as a means of organizing separate European societies and states in an increasingly unified state. Just like in the Middle Ages and at the beginning of the early modern period, the countries were only separated by formal state borders and, in fact, they implemented a uniform European culture and the law of *ius commune*. He was actually a real scientific activist trying to transform social reality in a certain direction and he was looking for scientific information only for that purpose. In his struggle against the circles of comparative university lawyers of purely scholarly interest – in his value judgement “positivistic” – he came into contact with American legal realists and, as a result, he also received a professorship in Stanford in 1970 while maintaining his professorship in Florence. He then got in touch with the EUI and became a professor and, from a political activist in comparative law, he turned to be an organizer of the theoretical foundations of European law.

When he became more familiar with European law and European integration on the basis of American experience, he immediately perceived the European Community as an emerging federal state and found it important to involve Stanford colleagues from America in presenting such a perspective. To this end, he organized a conference of several days at the EUI in 1977 entitled “*New Perspectives for a Common Law of Europe*”, at which he was able to invite both lawyers from the Brussels Commission, judges in Luxembourg and Strasbourg, and some famous American professors. This was the beginning of the monumental plan that was launched in the early 1980s, in which European integration as an emerging federation was presented in several major volumes. In these volumes, the increasing concentration and federalism that had occurred in the United States in the previous century were compared and paired in every aspect with the counterparts of European processes. Funding for the Brussels project was generous, but Cappelletti did not miss the Ford Foundation, which funded his earlier American research, where they enthusiastically received the promotion of European integration along the lines of the United States. Initially, the integration analysis in the light of American federalism was included in the name of the project, but, eventually, the finished volumes were published under the simpler name “*Integration by Law*”.⁸⁹

Cappelletti designed the research, gave the main impetus to present European integration as an approach to American federalism, and, with the involvement of American professors, ensured the dominance of federalist experience from the outset, but played only a

⁸⁹ In December 1977, ongoing research was titled “The Emergence of a New Common Law of Europe: Some Basic Developments and Instruments for Integration Considered in the Light of the US Federal Experience”.

minor role in real research management. After all, he also practiced comparative law only as an instrument for his political purposes, and, in his new area, it would have been difficult to cope with the enormous case law created by the Court of Justice in Luxembourg until the early 1980s and the internal complexity of the power structure in Brussels to master this mentality. So *Joseph Horowitz Weiler*, of South African descent, but with a degree from Western universities, came to him and applied for his doctoral thesis in 1978. His earlier studies on this subject showed Weiler's great willingness to understand European integration and European law, and his somewhat later study entitled "*The Community System: The Dual Character of Supranationalism*" earned him the greatest recognition among EUI leaders. Weiler later described his relationship with Cappelletti in his own words as the relationship between the "rabbi and his student", but, in fact, he was the one who taught European law to Cappelletti when he returned to the United States in 1982 to teach European law there. (Byberg 2017: 129.)

The main work "Integration through Law" was published between 1985 and 1988 in seven volumes with the participation of European professors for international law and European law, who are committed to federalism, as well as high-ranking lawyers from Brussels and American law professors, and contained a monumental representation with the image of federalist Europe and the quasi-constitutional character of its law. The EUI not only organized the production and publication of the monumental representation for academic communities, but also built up the cosmopolitan network of European studies and European lawyers with its doctoral training and extensive scholarship system from the abundant resources of Brussels and other friendly foundation funds. These fellows then disseminated the federalist representation of the European Community in the member states in the same way as the previous disseminators of Roman law who were trained in Italian medieval universities in Roman law. In addition, for many years, the EUI had organized dozens of conferences in Florence but also at various European universities to better integrate its developed European concept of Europe into science. The involvement of American professors in the cosmopolitan academic community of European law and European studies has also led to the establishment of a research line on European integration in the United States from which a young generation has grown. This is how *Anne-Marie Slaughter*, *Walter Mattli*, *Alec Sweet Stone* and *Karen Alter* took up the research field, and, most recently, it has had an impact on the collaboration with critical European scientists.

However, the last crown for Weiler's work would have been the success of the European constitutional preparatory work started in 2002, in which EUI professors and researchers played a central role alongside the civil servant lawyers based in Brussels. Although the failure of the European constitution by rejecting the Dutch and French referenda has removed the federalist plans from the political agenda, but as *Alexander Somek* from Austria wrote in a study in 2012, the failure in the political field in the academic circles they created led to it to use the reformed legal concepts in the federalist spirit.⁹⁰ In this way, the concept of a multilevel constitution of federalism was also used for the European Union, and the EU was portrayed as a federation with the member states. At their conferences, comparative constitutional products, which were merely academic *de lege ferenda opinions*, were adopted as the "true European constitution", the upper layer of multi-level

⁹⁰ See the wording of Somek: "Since nobody appear to believe any longer in a change of the world order by political means, scholarship is increasingly taking comfort from the academic equivalent of practical change, namely the re-description of social realities, If the world cannot be changed, you imagine it changed and pretend the work of your imagination to amount to the real. [...] The most ludicrous form of the re-description is the application of constitutional vocabulary to international law." Alexander Somek: Administration without Sovereignty. In Petra Dobner – Martin Loughlin (ed.): The Twilight of Constitutionalism? Oxford University Press 2010. 286. p.

constitutionalism. The previous concept of international law was also rejected and they began to call this law as “international constitutional law”. This sometimes led to the later condemnation of the true state constitutions as a “violation of European constitutionality”.

However, the need to tame the political use of the academic cloak has, after some time, reached this transnationally embedded academic community of European studies, as we have seen at FIDE and CML Rev. Joseph Weiler, whose intellectual capacities and research are by far greater than that of Cappelletti, after the successful completion of his summarising volumes, from the 1980s had become increasingly bothered by the fact that a significant number of the people in his project were basically political activists with no serious scientific qualities. They lacked any critical attitude towards their intellectual products. For example, when the editors of CML Rev. 1989 asked him what to do with a critical study of jurisprudence by the Luxembourg judges (“maybe it should be rejected?”), he replied that it was necessary to publish because of the critical tone, since the problem with the articles in the magazine was that they had no criticism of the case law of the Court. But he also rejected the overly politicising nature of the EUI itself as a leading professor in the 1990s and benevolently took it for granted that Cappelletti’s overly personal “idealism” and his love of human rights ideals had a somewhat more normative attitude than necessary. It was at the expense of science, but also at the expense of democracy, because Cappelletti did not trust the “dirty and repulsive intrigues” of democratic politics, but thought noble goals were achievable along the way of human rights.⁹¹

V.3. Epilogue

Before we close this chapter, we should remind the reader of the final result in relation to European studies and European law, which were established by European cosmopolitanism over the member state scientific organization and which had a decisive influence on the socialisation of the EU legal elite today. The German professor *Martin Höpner*, together with his research team, examined the special selection and pre-socialisation of Luxembourg judges (and their staff) and found that from the outset, the EU legal community had developed a specific internal activist ethos for the lawyer wanting to enter any EU position. Only those lawyers could hope for success and a permanent work position, who adopted this activist ethos and the associated conception of European law. And a Luxembourg judge can only be one who has spent many years in these circles of European lawyers, and who has been socialized into this activist ethos. The general legal ethos traditionally advocates the preservation of the existing one and the lawyer is always trained to resist any change of the existing law and to be persuaded only by specific arguments to do so. In contrast, the European lawyer is transformed by the afore-mentioned ethos into taking it as a norm to constantly seek situations leading to structural changes towards an ever closer European integration. In addition, as a member of the avant-garde of the legal elite, (s)he values this as the basis of his/her identity. Instead of general neutral legal thinking, it is normal for European lawyers to think in relation to the values that represent visions and to force the existing constitutional states in this direction. The Luxembourg judges and their staff, as well as the members of the Brussels legal elite, were socialized by this missionary European legal milieu, but if this is not enough, only those can take a career who can fully adopt this activist ethos propagating an ever closer European concentration. In Höpner’s words: „In einer ersten Stufe geht es dabei um eine Akt der Vorprägung und der Selbstselektion. Richter am EuGH

⁹¹ According to the wording of Weilers: “Weiler attributed this to Cappelletti’s personal idealism, which made him believes in convergence of legal system and the higher law of human rights rather than the messy and oft ugly vicissitudes of democratic politics.” (Byberg 2017: 120.)

wird nur, wer – in welcher Funktion auch immer – Teilnehmer des europarechtlichen Diskurses ist. Dieser Diskurs beherbergt einige Eigenarten, die ein spezifisches Vorverständnis von den Aufgaben und Funktionen des Europarechts transportieren und von denen die Richter bereits vor ihrem Eintritt in das Luxemburger Gericht geprägt ist. Dabei, so meine These, handelt es sich um Spuren einer rechtspolitischen Agenda, der an anderer Stelle in Reinform zu begegnen ist: in jener „monistischen“ Linie des progressiven Völkerrechts, die nach Einhegung nationaler Souveränität in einen verbindlichen übernationalen Rechtsrahmen strebt.“ (Höpner 2014: 11.)

The extreme visionary activism of Pescatore, Gaudet and then the Capelletian – that Weiler retrospectively criticizes on his way towards academic neutrality even if it is his legacy up till this day – has penetrated the European legal and European study communities and is now difficult to eradicate from these communities. The level of EU science is itself a problem in reforming the European Union, and reforming that science is perhaps the least expected when these reforms are launched. The problematic emergence of the European academic community as a whole, as shown above, answers the partisan and biased leadership of the institutions it has examined (the Court of Justice and the Commission) as well as the constitutionalization of European law and the institutional systems that were originally enshrined in international law. In this way, the European Court of Justice was freed from the barriers of international law, and constitutional rectification enabled the freest interpretation of the judges of the Court of Justice and the leaders of the Brussels elite. Indeed, the increasingly expansive doctrines that developed in “EU science” were, in fact, mostly the works of EU jurisprudence itself. Knowing this background, *Anja Wiesbrok*’s testimony, for example, can be understood as proof that the writings are understood of European law professors and the jurisprudence of the ECJ as well as their constitutionalization and presentation, in this way, are mutually reinforced and legitimized in the studies.⁹² In many ways, this EUI “scholarship” system was simply the propaganda of Luxembourg judges and was only launched on the orders of the Luxembourg and Brussels lawyer elites in the magazines and conferences they grew and funded.

VI. Legitimacy Problems of the EU Juristocracy

The European Union is an international legal formation that was created by an international treaty and not as a state, but its permanent existence over the member states united by the treaty means a superior machine of power that in many ways determines the exercise of power and decisions within the states. In particular, by including EU citizenship in the Basic Treaty in addition to the citizenship of each country, the EU made a big step towards transforming it into a real state and it is increasingly becoming a semi-federal state. As we have seen in the previous chapters, this has been the most important issue of power struggle within the political elites of the member states from the beginning. This raises the question of what arguments justify and legitimize this machinery of power over the member states. Are there any such arguments in the ongoing debates about the functioning of the EU, and in theoretical considerations about the nature of the Union? The answers can determine

⁹² “Legal scholars have played a dual role in promoting the constitutional paradigm of an ever-expanding scope of directly enforceable residence and movement rights in the EU. First, by presenting the expansion of free movement rights as an inevitable outcome of the EU constitutional order based on directly enforceable rights, scholar have played a significant role in legitimizing the jurisprudence of the Court in the face of initial resistance from the member states. Second, legal scholars have been an important source for the Court of Justice in developing its case law in its area.” *Anja Wiesbrok: The self-perpetuating of EU constitutionalism in the area of free movement of persons: Virtuous or vicious cycle? Global Constitutionalism 2013 Issue 1. 125. p.*

the direction in which the EU must change its organizational structure in order to be legitimate in front of more than half a billion citizens.

Theoretical considerations regarding the necessity of legitimizing states and their exercise of power did not emerge with some authors of state theory until the beginning of the 20th century, but justifications can be found, for example, in the early Roman Republic without explicit theoretical considerations. At that time, Agrippa's famous story attempted to justify the structure of rule, including the dominance of the patricians, in the withdrawal of plebeians who were dissatisfied with patrician rule, and explained the role of certain Roman social groups in this regard before the plebeians, and justified this with an analogy to the functions of important parts of the body. In the same way, any more stable state power in the course of civilisations had a way of justifying the assumption of power, such as the assertion of the divine nature of the pharaoh, of the emperor, or the justification of the power delegated by the gods as can be seen in the ceremony of papal anointing of the earthly ruler in the Christian Middle Ages. In the same way, Lenin's theory at the beginning of communist rule of the Soviet empire presented the legitimacy of the avant-garde that led to communism as a fulfilment of historical necessity.⁹³

However, the question arises as why this EU formation, which was created through international treaties and continually modified through treaty changes, has to be justified by special legitimacy efforts at all? It was created by democratic states so that its democratic legitimation also radiates this formation. This was certainly not a problem for the European Economic Community after it was founded in 1957, since after the Treaty of Rome was created by the member states, all decision-making powers were in the hands of the Council of Ministers, which represented the governments of the member states. Although the Commission has been chosen independently by the heads of state or government of the member states, this body only has the right of initiative over the actual decisions of the Council of Ministers, and does not take decisions, although it has a monopoly in this regard and the Council can only decide what the Commission proposed. In principle, however, the Commission and the EU power machinery do not have their own decision-making powers over the intergovernmental mechanism, so they did not have to be legitimized separately. The liberation of the European Community and then the European Union from full competence of the member states was only achieved through a series of rulings by the European Court of Justice, and the ECJ proclaimed in 1962, then in 1964, the decisions of *Van Gend en Loos* and *Costa v. Ennel* the direct effect of Community law in the member states in addition to their national law and its precedence over national law in the event of a conflict between them. Since the Treaty of Rome did not include an accountability mechanism for the Court of Justice and there was no lifting mechanism against this "*judicial coup*", the Community and then the European Union that replaced it began to act as an independent decision maker.

It quickly became clear that the European Community and then the European Union's power structure, which exercised considerable decision-making autonomy, freed itself from and deviated from the democratic legitimacy of the governments of the member states. Since the modern form of legitimation developed in Europe and it became widespread in many parts of the world states that justification of state power can only be achieved through the election of millions of citizens, the debate on this topic has been termed a "*democratic deficit*". This debate, of course, too benevolently obscures the fact that no democratic deficit should have arisen in the power structure created by the Treaty of Rome, since it was originally driven by the interstate machinery of the member states and was legitimized "from home". The deliberate wording of the democratic deficit in the debate on the European Community, however, was more to transform the parliamentary assembly, which was originally referred to

⁹³ For a more detailed analysis of the question of the legitimation of states, see my book *Political Theory*, in chapter VI. Béla Pokol: *Political Theory. Trilogy of Social Sciences III*. Vol. 2006. 91-102. p.

as a delegate from the national parliaments, from a mere consultative to a real parliament. In the 1960s, MEPs confidently renamed themselves here and also achieved direct elections and the name of the European Parliament in the new founding treaties. However, this has not changed the fact that, beyond the peoples and national identities of the individual countries, there is no single European people and no single European identity and, therefore, parties at European level that gradually emerge from national parties are only loose formations.

The debates on the democratic deficit, therefore, only mask the deeper struggle, since a significant proportion of the political elites in the member states believe that there is no deficit here, but should only push back the power groups that want to transform the EU into a federal state and restore the original Treaty of Rome, namely to put the exclusivity of the intergovernmental structure created by the Treaty in the centre of the EU. In contrast, the federalist supporters want to make the European Parliament the main power and convert today's Commission into a government or make it dependent on the majority of EP. The long-term processes that have led to Euroscepticism show that the power of intergovernmental forces will increase in both the EP and the Commission, depending in part on how the balance of power changes after the EP elections in May 2024, but the ECJ will remain intact and the standoff is unlikely to be resolved. (It is, therefore, worth mentioning in brackets that due to the existence of this supreme judicial power, it is right to call the EU's power structure a juristocracy!) Therefore, in addition to call attention to the democratic deficit, let us also consider the other theoretical considerations regarding the legitimacy of the EU.

The answers to this question can be divided into four main trends. According to one answer, the EU institutions themselves largely only create abstract EU law, which is interpreted by the European Court of Justice, but the application of state sanctions is carried out by the member states and their courts, so that no legitimation at EU level is required (1). The other admits the need for legitimacy because of the legal power of EU institutions, but gives legitimacy to EU institutions as a neutral arbiter over selfish power struggles between member states, who deserves recognition as the defender of neutral justice over the member states. The highest power of the ECJ also protects individual EU citizens from their own state, and, in this way, this juristocracy is legitimized as an administrator of justice (2). A third line of legitimation reinterprets the justification for democratic elections and extends it as a mere input legitimation with output legitimation. The content of the output legitimation relates to the welfare growth created by the Union, to legal solutions to disputes between European countries instead of war, and so on, and instead of a democratic deficit, it emphasizes the output side as justification (3). Finally, the fourth argument for legitimizing the power of the EU institutions considers the future vision at the beginning of European integration, which has shown European integration as the land of promise for European citizens (4).

VI.1. A Juristocratic Confederation together with a Number of Democratic Member States as a Solution to the Problem of Legitimation

In a critical study, *Willimam Scheuerman* examined the idea of *Hauke Brunkhorst* and *Jürgen Habermas*, which arose after the failure of the European constitution in 2003 and which dealt with the possibility of global governance without a global state, taking into account the possible legitimation of the EU. (Scheuerman 2011: 75-104.) After Scheuerman's reconstruction, Habermas basically only followed Brunkhorst's analyses of the EU, which, in turn, was based on Kelsen's theory of the world legal revolution from the early 1950s. Scheuerman's reconstruction creates a specific EU legitimation basis for Habermas and Brunkhorst, from which he distances himself, but the structure of this issue of legitimation is clearly visible in his explanation.

The essence of this legitimation is that Brunkhorts and Habermas separate the individual government functions, and while the state administration and law enforcement function remains at the level of the member states (which must be legitimized!), only the legislative function will take place without direct compulsion at the EU level transfer. The latter essentially means that the fundamental treaties are specified by the European Court of Justice and, based on this specification, only the abstract EU law is created by the Commission, the Council and the co-decision EP. In this way, the EU is only an abstract legal apparatus, the law of which is applied in practice at the level of the member states and ultimately enforced under state pressure.

In this presentation, legitimation only requires the constitutional judgments of the European Court of Justice as the centre of legal machinery at EU level, while the executive decisions and ultimately the coercive measures of the member states, which are subject to EU law, require democratic legitimacy and they undoubtedly have this legitimation. Brunkhorst and, in his footsteps, Habermas even readily recognize that the creation of EU law, which is shaped by the consensus of the member states at EU level, does not constitute statehood. In his opinion, the search for a federal state should be a misguided adherence to an old tradition of thought.⁹⁴ In today's intertwined globalized world, world government or regional governance like the EU no longer require statehood and sovereignty because, at their discretion, these concepts are only partially valid, which is no longer appropriate in a fully globalized world. These concepts have been partially reinterpreted and partially rejected by them, and, in recent years, at the discretion of the Western world, three-tier governance has been established that radiates from there around the world.⁹⁵ The world government is regulated by the United Nations and specialized world organizations, such as the WTO or the World Labor Organization, the ILO, etc., which bring about comprehensive human rights standards and their industry-specific standards. In this context, regional organizations like the EU form additional standards, which means that the human rights standards are specified at this level. However, in addition to the member states (at least in the EU), individual citizens and legal entities are recipients of EU standards and EU rights, about which they can hold their nation states also accountable. At this level, however, this does not require an organization with statehood, but a "confederation of states" that has been known in the past is sufficient. Ultimately, the lowest level belongs to the (nation) states and they have the remaining elements of sovereignty, but this level is under the control of the higher levels.

In William Scheuerman's criticism, however, it is clear that this picture is idealized and a number of tensions are hidden. The assumption that a constitution without a state (only in a loose confederation) is possible, contradicts the obvious tendency that if the member states disobey, the entire EU system can be put into question without a coercive apparatus. (Scheuerman 2011: 82-96.) Ultimately, this type of liberation of the EU from statehood (= the monopoly for the use of force) and thus from legitimation means nothing more than the uncertain floating of decades in the state of semi-statehood and this is presented here as a final solution. But if past prosperity and peaceful global economic conditions disappear (as they now appear), this could drag the bottom out from under it. So this explanation only shifts the answer to the problem of legitimation.

⁹⁴ Scheuerman ironically points out that even before the fall of the draft European constitution to implement federalization in 2005, Habermas was the main proponent of EU statehood in referendums. (Scheuerman 2017: 88.)

⁹⁵ See Hauke Brunkhorst: Legitimationskrise der Weltgesellschaft. Global Rule of Law, Global Constitutionalism. In: Mathias Albert /Rudolf Stichweh (Hg.): Weltstaat und Weltstaatlichkeit. Springer Verlag 2007. 63-107. p. and Jürgen Habermas: The Divided West. Cambridge. Polity Press 2006.

VI.2. Exposing and Justifying the EU's Juristocratic Character

Jürgen Neyer follows Brunkhorst and Habermas in that he also regards the search for the EU's democratic legitimation as a bad question and answer, but he does not claim that the EU does not need legitimation without a violent apparatus, but only the member states that use coercive means. In his view, the EU has a high level of legitimacy, but has so far been searched in the wrong direction. The title of a study on the subject, "*Justice not Democracy*", summarizes its position.⁹⁶ In this context, he argues that ensuring justice in the relations between member states and beyond guarantees the rights of individual EU citizens against their own state through EU courts and this is a specific basis for the legitimacy of the EU. Neyer is not concerned with the parliamentary elections in relation to the legitimacy of the EU, which must be debated here, because there is no such thing as European people; instead, there are at least twenty national communities, represented by national parliaments in a way that is never accessible to the European Parliament, but the abolition of dominance between weaker and stronger member states and the decision of the European Court of Justice in their disputes turn power disputes into legal justifications. The arguments under the EU treaties and secondary EU law and in the EU replace the earlier power decisions with legal justice decisions. Likewise, the fact that EU law entitles citizens to legal protection against their own state means that the citizens of the member states can demand a justification for the EU member state measures that restrict their freedom. And if this justification is insufficient, the EU court enforces the right of EU citizens to actual justification by annulling the state measure.

This is the basis for the legitimation of the EU, which Jürgen Neyer describes with a basic formula as "right to justification": "It is justice, not democracy, which is the appropriate concept for questioning and explaining the legitimacy of the EU. [...] In contrast to democracy, the notion of justice is not tied to the nation-state, but can be applied in all contexts and to all political situations, be the global economic structures, domestic election procedures or the EU. [...] It relaxes the national-state focus inherent in the language of democracy and opens the way for reflecting about new means to facilitate legitimate governance. It is a critique of methodological nationalism and asks for new solutions to new problems." (Neyer 2011: 14.)⁹⁷ The right to justification as a legitimizing principle essentially means that any measure restricting an individual or a private organization in the EU (both at member state and EU level) must be justified and that justification can be challenged before an EU court. And if the Court considers this to be insufficient, it declares it to be incompatible with EU law and ultimately imposes it by imposing a penalty (in the final stage of the infringement procedure).⁹⁸

With this shift in focus, Neyer places the European Court of Justice at the centre of the

⁹⁶ See Jürgen Neyer: Justice, not democracy. Legitimacy in the European Union. In: Forst Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 14-35. p.

⁹⁷ The articulation of the democratic deficit as a manifestation of "methodological nationalism" sounds innocent to the Hungarian ears, but it should be pointed out that the adjective of nationalism among Germans (especially in German intellectual life!) Has been synonymous with "Nazi" for decades. Although all topics are saturated with emphasis, this is above average in Jürgen Neyer's German intellectual environment, and the assessment as "methodological nationalism" essentially implicitly expresses the need for a moral judgment regarding the opposing debaters.

⁹⁸ See it in the wording of Neyers: "The idea of justice as a right to justification has the important strength that it is both empirically and normatively sound. It is established on the assumption that we have a human right to demand and receive justification from all those individuals or organizations, which restrict our freedom. This does not necessarily imply that no limitations of our freedom are legitimate, but only holds that the legitimacy of any such intervention depends on the reasons that are given to explain it." (Neyer 2011: 18.)

EU's power structure, and this is in line with the real power structure that we have examined so far. Accordingly, effective EU law results from the case law of the European Court of Justice, in which the treaties are freely and fundamentally interpreted against the will of the founding states, which is essentially the constitutional adjudication of this Court. As a further effect of its case law, the Commission largely codifies the case law of the Court of Justice with its monopoly on the proposal of regulations and directives and submits it to the Council for adoption. The member states could only act unanimously to amend the Court's decisions on the interpretation of the treaties, which is practically impossible due to conflicts of interest. Not only for this practical reason, but also formally, Luxembourg judges are insured against the questioning of this decision-making structure, which secures their highest power position, since the existing situation is also formally anchored in the basic contracts. Under Article 281 TFEU, the Council and the EP have the right to rule on an amendment to the Statute of the Court of Justice of the European Union under the co-decision procedure, but they can do so on a proposal from the Commission if the Court agrees.⁹⁹ Otherwise, they can rule on a proposal from the Court in this area, in which case the approval of the Commission is required before a decision can be made. In other words, the Court of Justice is indispensable for changing its decision-making mechanism, and, in this way, it is formally elevated to the role of the highest EU power because it is essentially free as it has been in the EU's founding treaties for over sixty years of uncontrolled interpretation. That is why the EU, at its deepest foundation, is not based on the principle of democracy but on juristocracy. This means that the functioning of European societies and the changing of details in power struggles with legal or disguised arguments will ultimately always be decided by the Court.

Thus, with regard to the main power role of the Court of Justice, one has to agree with Neyer, but it has to be critically asked whether this structure of juristocracy is actually the embodiment of justice or whether it is just a disguise of power struggles in which the dominant power groups fight while the masses of millions of Europeans are pushed back. This brings to the fore the dominant social groups, which may not have been in power through the elections, but have the resources of the intellectual and media sectors, and can, therefore, assert their interests behind juristocracy. I do not want to repeat the analysis of previous chapters on NGO networks established by some wealthy global foundations behind the ECHR and the EU institutions, so I will only refer to them. The narrative taken seriously by Neyer, according to which EU citizens have only been given the right and freedom to act against their own states by the Court of Justice and the ECHR, is already evident in the above-mentioned decisions of the “*judicial coup*” of 1962-64 (*van Gend and Costa v Ennel*) in which this emerged as an argument. In this narrative, member states' rights were granted directly to citizens, and this was portrayed as a radical extension of rights. However, this obscures the much more important point that, instead of a system of member state leadership that has been created and cyclically replaced by citizens in their parliamentary elections, an elite of judges not elected by them begins to make decisions about them, as well as the fact that their centuries-old national communities and nation states have started going down on the path of putrefaction.

For me, this one-sided, wrong argument gives rise to the argument that is often heard,

⁹⁹ Article 281 TFEU “The provisions of the Statute for a Court of Justice of the European Union, with the exception of Title I and Article 64, may be amended by the European Parliament and the Council in accordance with the ordinary legislative procedure. The European Parliament and the Council act either at the request of the Court of Justice and after consulting the Commission, or on a proposal from the Commission and after consulting the Court of Justice.” The text does write a consultation that leaves open whether the involvement of the Court of Justice means a right of consent or just a simple request for comment, but if at least once would result from an internal shift in power – e.g. after the EP elections in 2024 a binding interpretation by the Court of Justice to rule on the case when the Commission and a majority of the EP would confront the Court of Justice over its interpretation.

and which has defended the trend within states in recent decades for constitutional courts to extend constitutional rights at the expense of legal rights, that constitutional judges only give new fundamental rights to citizens, and whoever goes against it can only be bad! In fact, what elevates an activist constitutional court from a simple level of legislative law to a constitutional jurisdiction by referring to a constitutional principle, has once been removed from the scope of legally changing rights and the legislature will no longer have it from now on. In other words, it empties the scope of citizens' democracy and gives them a constitutional right, while, at the same time, takes away the democratic stipulation. Of course, this essential moment is missing in the narrative, and Neyer uses this narrative even if he legitimizes juristocracy rather than democracy.

VI.3. Democratic but Relativized Legitimation: Input Legitimation versus Output Legitimation

In addition to the suppression of the legitimation principle of democracy mentioned above, there were lines of argument that wanted to keep this legitimation, but only in a weakened form.

In addition to the democratic legitimation in the member states, in which the state power depends on millions of citizens, the leaders of the highest power of the EU, the European Court of Justice and the Commission do not depend in any way (as the former) or only indirectly (as the latter) on elected bodies. Although the Council has democratic legitimacy with the ministers of the member states, its decision-making powers are limited because the Commission has a monopoly on proposals before taking a decision. The problem of EU legitimacy was, therefore, primarily raised as a democratic deficit.¹⁰⁰ This was changed for the first time by *Fritz Scharpf's* distinction from the conceptual apparatus of systems theory in the 1990s, which reformulated the concept of democratic legitimation as input legitimation and also considered output legitimation as possible.¹⁰¹ With this enlargement, it has become possible that the EU's power decisions can only be linked in a fragmentary way to democratic legitimacy, but that its arguments for prosperity and economic growth can be justified in front of millions of people. This expansion was already evident in the 1970s in analyses of the legitimacy of today's western democracies as a supplement to true legitimation, which was represented with the category of *diffuse mass loyalty*, which is, however, only brainwashing and distraction by public affairs in the consumer society. This is to say that only a lower level of satisfaction and acceptance is created, but not the level of recognition that legitimation requires. But in this reformulation, this negativity has already disappeared here and, as two members of an equivalent pair, the input and output legitimation stand side by side.¹⁰²

¹⁰⁰ An exception to this is Andrew Moravcsik, who despite a dozen critical studies describes the structure of the EU as a model of democratic empowerment. See Moravcsik: In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union. *JCMS* (Vol. 40.) 2002 No. 4. 603-624. p.

¹⁰¹ See after several explanations, e.g. B. Fritz Scharpf: Problems-Solving Effectiveness and Democratic Accountability in the EU. Max Planck Institute für Gesellschaftsforschung. Working Papers Serie 2003. No 1.

¹⁰² Claus Offe started criticizing diffuse mass loyalty instead of legitimation in the early 1970s and for me there was the key in Eastern Europe to formulate that in the early 1980s in the case of Kádár Hungary (the so called "goulash communism") after the former tougher Stalinism, in which legitimation by the future of communism had already been given up, *legitimation by consumption* formed the basis of legitimacy. Even if the level of domestic consumption did not reach the level of the West, but its continued small increases since the 1960s – and especially with reference to the plight of the other surrounding socialist countries – this was widely recognized. (Since this part was removed from my first article in *Valóság* in Hungarian on this subject in 1981, I could only publish it as an article in the university magazine in German. See in Hungarian: Béla Pokol: Stabilitás és legitimáció. *Valóság* 1983 No. 1 13-22; and in German "Stability and legitimation. The reinterpretation of legitimation in Western sociology." *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös*

In this way, however, they not only extended the proof of the legitimacy and worthiness of the recognition of the existing state power to the achievements created by power (welfare, consumption, etc.), but also limited the question of legitimation to the legitimation of the current state power. This narrowing becomes visible only if we focus on the fact that the legitimation debate originally dealt with whether the divine origin of state power and the consecration of the current new king through papal anointing or another Christian rite of the ruling dynasty were sufficient to do so to justify. Or, as it spread after Rousseau in the late 1700s and especially in the 1800s, only state power derived from the people can be considered legitimate. The elections were only a technical means of doing this, but in Hungary, for example, this democratic legitimation was literally not accepted by *Margit Schlachta's* Legitimacy Party even after 1945. (In contrast to the two, the legitimacy of the Communist Leninist *avant-garde* for the legitimate leadership of society proclaimed the power of a state leadership that understood and applied the scientific laws of society and did not require popular elections!)

Since the turn of the millennium, the explanation of the power structure of the EU with this dual legitimation concept – input/output – has become common practice, and even if there are problems with democratic legitimation on the input side, this can be corrected accordingly with the performance legitimation on the output side. This was refined by a study by *Vivien Schmidt* from 2013, which introduced the *throughput legitimation* in addition to the two – by dividing the output side into two. These are indicators of the quality of the governance process – efficiency, accountability, openness, transparency, inclusion of the ruled people, etc. – and it summarizes these indicators as a third side of legitimation.¹⁰³ In my opinion, however, this only answers the success of a particular EU government (the Commission) in front of hundreds of millions of people as a subordinate question, but it does not answer the way in which the Union is managed and how it is identified. This superficial nature comes to the fore when a major global economic crisis or other global catastrophe suddenly pulls the soil out of the previously appropriate level of economic governance and welfare. It then becomes clear to what extent the masses regard the power over them as worthy of recognition in addition to everyday problem solving, and to what extent they feel strong in their identity with them so that they themselves can endure great difficulties. On the other hand, their tolerance was previously only for everyday comfort and what they thought about a state power worthy of recognition was suppressed.

The global economic crisis that began in 2008 and has yet to be seen to end – and economic analyses are constantly predicting even more serious phases in this area – as well as the already visible outlines of Europe's demographic breakdown and the EU's sluggishness against the influx of millions of Muslims, the previous level of diffuse mass loyalty to the EU has been resolved in recent years. Especially since the governments of the member states have already started to tackle these problems due to increasing mass dissatisfaction, and it is the EU elite in Brussels and Luxembourg that is blocking this due to their previous political practice and case law. This raises the question of legitimacy and the question is "Who authorized them to paralyse the governments that we have elected with a parliamentary majority?!". On the one hand, the positive results of the Union will disappear and on the other hand, it will be irrelevant that the Brussels elite will otherwise discuss the plans with thousands of self-created NGOs and that the expenditure of the Commission and some of its Directorates-

Nominatae. Sectio Iuridica. 26. tom. 1984. 173-179. p. But in my analysis, it was clear that it is not legitimation, but an addition to their lack.

¹⁰³ "Throughput legitimation builds upon yet another term from system theory, and is judged in terms of the efficacy, accountability and transparency of the EU's governance processes along with their inclusiveness and openness to consultations with the people." Vivien A. Schmidt: Democracy and Legitimacy in the European Union Revisited. Input, Output and "Throughput". Political Studies (Vol. 61.) 2013 No 1-2. 2-22. p.

General will be transparent. As was the case with Kadarism in Hungary, it only lasted while this one-party system without real elections managed to make itself bearable by a so-called legitimation through consumption.

VI.4. The Legitimation of the EU “by” the Future and its Eventual Decay

Joseph Weiler was not satisfied with the reinterpretation of democratic legitimation as the devalued input legitimation and the expansion of output legitimation did not meet his theoretical needs. Although he had been a star professor of the Brussels-Luxembourg lawyer-elite working towards a federal Europe since the early 1980s, and he had been a key player in the academic backing of the tandem between the Court and the Commission, and for several decades he had been moving towards a pan-European federation, following the failures that the EU suffered in this area, he pointed out with the utmost sincerity the internal contradictions and the baselessness of the entire project, which he had previously helped. After the failure of the draft European Constitution of 2005, in which Weiler had played an important role before the failure with the EUI lawyers in Florence, and the impact of the global financial crisis of 2008 on Europe, he considered the cause of the failure in several studies. As a young EUI researcher, he was involved in the creation, support and research of an increasing level of European integration with this institute from the second half of the 1970s, and he found that in the years after the millennium, the entire milieu of the EU aspirations had changed. The earlier milieu, which characterized the founding of the French and Italian associations for European law in the mid-1950s (mainly with members who had been socialist and communist partisans against the German occupation in the Second World War), was filled with the belief of a united Europe as a Promised Land. He saw this milieu as gone and this change has shown him that this is not just about the “democratic deficit” and that the output legitimacy that has been developed to cure it and express the EU’s welfare benefits was more like the “bread and circus” method to please the crowds in dying Rome.

Except for a few smaller groups and countries, an ever closer European integration has not been called into question up till then. What caused this change and what has changed so far that the original ideal is no longer effective? – asked Weiler. His answer arose from the fact that post-war European integration promised to end the gruelling war between peoples and the highest level of hostility and hatred that had lasted for many years, and it proclaimed a prosperity perspective instead of deprivation and hunger. For the European elites, this was the land of promise, and everything that was wrong in their daily lives meant exceeding it and reaching almost earthly paradise. With a view to Soviet ideology, Weiler saw the power of the Bolshevik avant-garde, which was legitimized by the future of communism, but also in the fascist Italian and German states, he saw the legitimation with the visions of the future in front of enchanted masses.¹⁰⁴ In a vision of a wonderful future state, he even demonstrated legitimacy in the great European states of the 19th century. With this justification through future visions, these states have achieved widespread recognition. Against this background, in his opinion, democratic legitimacy was accepted for states only from the middle of the 20th century, but was only accepted by the European economic community, which was created without a state organization and whose goals found the greatest support among the peoples and elites of the then Western European member states and the legitimation was spontaneously restored through future visions. Legitimation through the future ensured that the broad masses regarded the march towards ever closer integration as commendable. But

¹⁰⁴ Naturally, he emphasizes that, in contrast to the visions of communism and fascism, which led to terrible consequences, the vision of European integration was incomparably nobler and he did not want to exempt the two terrible systems. (Weiler 2012: 256.)

when the goals were largely achieved, the hatred between the French and the Germans disappeared and the prosperity rose to unimaginable heights and the needy were also granted social benefits etc., this condition was obvious to the new generations, and the legitimation through which visions of the future have lost their appeal. In addition, the discrepancy between the promised ideal state and the distortions of everyday reality leaves only feelings of disillusionment and deception. The global crisis of 2008 and the stagnation of prosperity that had plagued the masses for years had completed the reversal of earlier positive relations with the EU. The rapid rise in Euroscepticism is only a superficial sign that it is really the deeper legitimation crisis of the entire integration project.

What way out does Weiler see in his diagnosis? We have to stop here because he has two writings for this problem from 2011 and 2012, and there is a big shift in the latter compared to the previous one. The first was given by him as a guest professor at the *Herti School of Governance* in a lecture and is available online as a study. The second was published a year later, which, in addition to an important insert, means the earlier one. The first lecture ends with a pessimistic statement that future legitimizations always are like this, and that the land of promise is necessarily only fragmentary, and is, therefore, always followed by a sober disillusionment. If it could, democratic legitimacy would help, but it has been lacking in the EU's historical past. In Weiler's words, "Democracy was not part of the original DNA of European integration." (Weiler 2011: 18.)

However, in his 2012 publication, there was a major change that put the issue of legitimacy from Weiler in a completely different perspective. In the insertion here, he emphasizes the role of the European Court of Justice in the constitutionalization of the originally international community law and the institutions of the community (and later the EU). He points out that he does not want to criticize this and has pushed integration in the right direction, but that it has led to the overestimation of the unsuitable EU institutions (the Commission, the Council, COREPER and the EP). These organizations are only caricatures of true democracy, but the Luxembourg decisions of 1962-64 on the direct effect and the primacy of Community law over the law of the member states have constitutionally constituted these bodies for which task they were actually not suitable: "But can that level of democratic representation and accountability, seen through the lens of normative political theory, truly justify the immense power of direct governance which the combined doctrines of direct effect and supremacy placed in the hands of the then Community institutions? Surely posing the question is to give the answer. In some deep unintended sense, the Court was giving its normative imprimatur to a caricature of democracy, not the thing itself." (Weiler 2012: 265.)

Although Weiler expresses himself vaguely – he half criticizes, half defends the Luxembourg judges – he sees the causes of the lack of legitimacy and the current fate of the EU as well as the growing scepticism about European integration in the decisions of the European Court of Justice in 1962-64, which started the constitutionalization and the federalization of European integration. The EU cannot do justice to this, and even the global crisis and other crises (e.g. millions of migrants) question its successes so far, not to mention the future increase in wealth and security in question. The suffocation of legitimation by the future has given us no chance for decades to restore the old belief. This raises the question of how Weiler sees a way out after genuinely acknowledging the failure of the EU's constitutionalization and federalization project. Taken into consideration that for decades, he was the chief professor and then director of the EUI, which helped the lawyers in Brussels and the judges in Luxembourg, and acted as editor-in-chief of several European legal journals, one could almost regard his proposals as expressions of genuine repentance. In comparison, he now sees a way back to the return to nation states: "It will be national parliaments, national judiciaries, and national media and, yes, national governments, who will have to lend their

‘legitimacy’ to a solution which inevitably involve yet a higher degree of integration. It will be an entirely European phenomenon at what will have to be a decisive moment in the evolution of the European construct, the importance, even primacy of the national communities as the deepest source of ‘legitimacy’ in the integration project will be affirmed yet again.” (Weiler 2012: 268.)

Weiler’s recognition that the “revolution” of the European Court of Justice in 1962 and the over-stretching of the entire institutional system of the EU towards federalization have caused the entire legitimacy crisis can be clarified by the fact that today’s dead end means an intermediate phase, i.e. the EU is a mixture of the semi-federation and the half-blocked, partially oppressed nation-state member states, and the dead end can only be removed by an eruption in either direction. Fragmented national identities and the lack of a single European people and identity only make this a realistic direction for the restoration of the sovereign nation-state, and the last sentences of Weiler’s writings suggest this. He wants to achieve this by returning to nation states and letting them be the main protagonists who sincerely determine to create a federal Europe instead of only the Courts doing this. In contrast, it should be emphasized that if we have truly learned from the EU’s failure to date, we must use the return to the 1962 situation and to European integration at the level of a European Economic Community. This is the only way to ensure that the EU will be fully functional again through intergovernmental mechanisms, and thus the democratic legitimacy that the member states are realising “from home” will also eliminate the crisis of legitimacy here.

References

Ackerman, Roderick/Elsa Perreau/Malin Carlberg: Democratic accountability a budgetary control of non-governmental organizations funded by the EU budget. Directorate–General for Internal Policies 2016. 130. p.

Agostini, Nicolas (2015): Demystifying Human Rights Protection in Asia. International Federation for Human Rights. FIFH Paper No. 669. Paris. 2015.

Alter, Karen (2008): Delegating to International Courts: Self-Binding vs. Other-Binding Delegation. *Law and Contemporary Problems* (Vol. 71.) Winter. 38-76. p.

Alter, Karen (2012): The Global Spread of European Style of International Courts. *West European Politics* 2012. No. 1. 35-154. p.

Arato, Julian: Constitutional Transformation in the ECTHR: Strasbourg’s Expansive Recourse to External Rules of International law. *Brook. J. Int’L Law* 2012 (Vol. 37.) 351-353. p.

Arato, Julian: Treaty Interpretation and Constitutional Transformation: Informal Change in International Organization. *The Yale Journal of International Law* (Vol. 38.) 2013. 319-339. p.

Berger, Vincent: Jurisconsult of the Court (2006-2013). In www.berger-avocat.eu/echr/jurisconsult.html

Bignami, Francesca (2013): Rethinking the Legal Foundation of the European Constitutional Order: The Lessons of the New Historical Research. *American University International Law Review* (Vol. 28.) 2013. 1311-1335. p.

Blauberger, Michael (2013): Minimalistische Reaktion oder vorausseilende Reform? Der nationale Umgang mit der Rechtsprechung des EuGH. *Österreichische Zeitschrift für Politikwissenschaft*. (Vol. 42.) 2013. Heft 2. 182-196. p.

- Blauberg, Michael/Susanne K. Schmidt: The European Court of Justice and its political impact. *West European Politics* (Vol 40.) 2017. No. 4. 907-918 p.
- Boulanger, Christian (2002): Europeanization through Judicial Activism? In: Wojciech Sadurski/A. Czernota/M. Krygier (eds): *Spreading Democracy and the Rule of Law?* Springer Verlag. Dordrecht 2006. 263-280. p.
- Böckenförde, Markus et al (eds.) (2016): *Judicial Review System in West Africa. A Comparative Analysis.* International IDEA Edition. Stockholm. 2016.
- Butler, Graham: Interview with David Thór Björgvinsson: A Political Decision Disguised as Legal Argument? *Opinion 2/13 and the European Union Accession to the European Convention on Human Rights.* *Utrecht Journal of International and European Law.* (Vol. 81.) 2015. No. 31.
- Buyse, Antoine (2009): The Pilot Judgement Procedure at the Court of Human Rights: Possibilities and Challenges. *Nomiko Vima* (Greek Law Journal) November 2, 2009. 16. p.
- Byberg, Rebeka Birkebo (2017): *Academic Allies. The Key Transnational Institutions of the Academic Discipline of European Law and Their Role in the Development of the Constitutional Practice 1961-1993.* Kobenhavns Universitet, Det Humanistiske Fakultet. PhD Thesis.
- Chalmers, Damian/Mariana Chaves (2011): The Reference Points of EU Judicial Politics. *LEQS Paper No. 43/2011.* 31. p.
- Cichowski, Rachel A. (2007): *The European Court and Civil Society: Litigation, Mobilization and Governance.* Cambridge University Press.
- Clinquenois, Gaetan/Brice Champetier (2016): The Economic, Judicial and Political Influence Exerted by Private Foundations on Cases Taken by NGOs to the European Court of Human Rights: Inklings of a New Cold War? *European Journal* (Vol. 22.) No. 1. 92-126. p.
- Cohen David (2007): EU Lobbying: Empirical and Theoretical Studies. *Journal of European Public Policy* (Vol 14.) 2007. No. 3. 333-345. p.
- Cohen, Mathilde (2014): Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort. *The American Journal of Comparative Law* (Vol. 62.) 2014. 970-971. p.
- Cohen, Mathilde (2016): On the linguistic design of multinational courts: The French capture. *I-CON.* 2016. 1-20. p.
- Cohen, Mathilde Cohen (2017): Judges or Hostages? Sitting at the Court of Justice of the European Union and the European Court of Human Rights. In: Fernanda Nicola/Bill Davis (eds.): *EU Law Stories. Contextual and Critical Histories of European Jurisprudence.* Cambridge University Press 2017. 58-80. p.
- Cooper Harry/Quentin Aries (2017): Commission sides with Greens on NGO funding – How to lobby (and how not to). *Politico* 4/21/2017.
- Cullen, Pauline (2017): The Platform of European Social NGOs: ideology, division and coalition. *Journal of Political Ideologies* (Vol. 15.) 2017 No. 3. 317-331. p.
- Davies Bill (2012): Pushing Back: What Happens When Member States Resist the European Court of Justice? A Multi-Modal Approach to the History of European Law. *Contemporary European History* (Vol. 21) 2012. Issue 3. 417-435. p.

- Davies, Bill/Fernanda G. Nicola (2016): Symposium: Foreign Law in Constitutional Courts. *The American Journal of Comparative Law* (Vol. 64) 797-800. p.
- Dederke, Julian (2014): Bahnliberalisierung in der Europäischen Union. Die Rolle des EuGH als politischer und politisch restringierter Akteur bei der Transformation staatsnaher Sektoren. *Papers on International Political Economy*. Freie Universität Berlin. 2014. No. 20. 28. p.
- Dellis, Konstantinos/David Sondermann (2017): Lobbying in Europe: ner firm-level evidence. *European Central Bank Working Paper Series*. No.2071/2017. 22. p.
- Dodson, Michael J./Jackson, D. W. (2000): *Democratic Transition in Central America: Justice Reform and the Civic Culture*. (Internet)
- Dumbrovsky, Tomas (2013): *The European Court of Justice after the Enlargement: An Emerging Inner Circle of Judges*. EUSA Twelfth Biennial Conference, Boston. 2013.
- Dyzenhaus, David (2012): Constitutionalism in an old key: Legality and constituent power. *Global Constitutionalism* (Vol. 1.) 2012. No. 2. 234. p.
- Eriksen, Erik Oddvar (2011): Democratic legitimacy beyond borders. Government without a state. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): *Political Legitimacy and Democracy in Transnational Perspective*. Arena. Oslo. 2011. 245-279. p.
- Feldman, Noam (2005): Imposed Constitutionalism. *Connecticut Law Review* (Vol. 37) 2005. 851-865. p.
- Flamini, Roland (2012): *Judicial Reach: The Ever-Expanding European Court of Justice*. *World Affairs Journal*. 2012. Issue November-December.
- Follesdal, Andreas (2015): *Legitimacy Theories of the European Union*. ARENA – Centre for European Studies, University of Oslo. Working Papers 4/15. 37. p.
- Forst, Rainer (2011): Justice and Democracy. Comment on Jürgen Neyer. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): *Political Legitimacy and Democracy in Transnational Perspective*. Arena. Oslo. 2011. 37-42. p.
- Fossum, John Erik (2011): The constitutional dimension. Comment on Glyn Morgan. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): *Political Legitimacy and Democracy in Transnational Perspective*. Arena. Oslo. 2011. 235- 243. p.
- Gammelmin, Cerstin/Raimund Löw: *Europas Strippenzieher* (2014): Wer in Brüssel wirklich regiert. ECON. Berlin. 2014
- Gardbaum, Stephen (2015): Are Strong Constitutional Courts Always a Good Thing for New Democracy? *Columbia Journal of Transnational Law* (Vol.53) 2015. No. 1. 285-320. p.
- Girnd, Cornelia (2008): Der einzige Weg ist, dem EuGH nicht zu folgen. Interview mit Fritz Scharpf. *Mitbestimmung* 7-8/2008. 19-23. p.
- Goll, Ulrich/Markus Kenntner (2002): Brauchen wir ein europäischer Kompetenzgericht? Vorschläge zur Sicherung der mitgliedstaatlichen Zuständigkeiten. *Europäische Zeitschrift für Wirtschaftsrecht* 2002. No 3. 101-106. p.
- Gotev, Georg (2018): Macron's party neck-and-neck with far right in 2019 EU election. *Euroactiv.com* September 14, 2018.
- Gotev, Georg (2018): Salvini sees populist-conservative coalition guiding the new EU Commission. *Euroactiv.com* September 12, 2018.

- Graetz, Michael J. (2012): Critical Legal Histories Revisited: A Response. Law and Society (Vol. 37.) 2012. Issue 1. 200-215. p.
- Grimm, Dieter: Europa ja – aber welches? Zur Verfassung der europäischen Demokratie. C. H. Beck Verlag. 2016.
- Guilhot, Nicolas (2007): Reforming the World. George Soros, Global Capitalism and the Philanthropic Management of the Social Sciences. Critical Sociology 2007. No. 3. 447-477. p.
- Hartlapp, Miriam (2008): Internal Dynamics: Position Formation in the EU Commission. WZB Paper. 2008. 25. p.
- Hartlapp, Miriam/Julia Metz/Chrisitan Rauh (2010): The agenda setting by the European Commission: the result of balanced or biased aggregation of positions? LSE. LEQOS Paper No. 21/2010. London. 29. p.
- Hathaway, Oona H.: Rationalism and Revisionism in International Law. Harvard Law Review (Vol 119.) No. 3. 1404-1443. p.
- Hauser, Henry (2011): European Lobbying Post-Lisbon: An Economic Analysis. Berkeley Journal of International Law (Vol. 29.) 2011. No. 2. 680-709. p.
- Haverland, Markus/Minou de Ruiter/Steven Van de Walle (2018): Agenda Setting by the European Commission. Seeking public opinion? Journal of European Public Policy. (Vol. 25.) 2018. No. 3. 327-345. p.
- Hirschl, Ran (2004): Towards Juristocracy. The Origins and Consequences of the New Constitutionalism. Harvard University Press.
- Hitzel-Cassagnes, Tanja (2011): Transnationalism beyond the statist paradigm. Comment on Volker Röben. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 167-177. p.
- Hoetink, Karla/Karin van Leeuwen: Dilemmas of Democracy. Early Postwar Debates on European Integration in the Netherlands. In Joris Gijsenbergh (ed.): Creative Crises in Democracy. Peter Lang. Brussel 2012. 183-213. p.
- Hofmann, Andreas (2009): Influencing Policy Production in the European Union: The European Commission Before the European Court of Justice. Paper presented at the EUSA Eleventh Biennial International Conference. Los Angeles. April 22-25, 2009.
- Hofmann, Andreas (2018): Resistance against the Court of Justice of the European Union. International Journal of Law in Context (Vol. 14.) 2018. No. 2. 2-25. p.
- Höpner, Martin (2010): Von der Lückenfüllung zur Vertragsumsdeutung. Ein Vorschlag zur Unterscheidung von Stufen der Rechtsfortbildung durch den Europäischen Gerichtshof (EuGH). Zeitschrift für Public Policy, Recht und Management 2010. Heft 1. 165-185. p.
- Höpner, Martin (2014): Wie der Europäische Gerichtshof und die Kommission Liberalisierung durchsetzen. Befunde aus der MPiFG-Forschungsgruppe zur Politische Ökonomie der europäischen Integration. Max Planck Institut für Gesellschaftsforschung. MPiFG Discussion Paper 14/8. 2014.
- Höreth, Marcus: Richter contra Richter: Sondervoten beim EuGH als Alternative zum "Court Curbing". Der Staat (Vol. 50.) 2011. Heft 2. 191-226. p.
- Hsieh, Pasha L. (2017): The RCEP, New Regionalism and the Global South. IILJ Working paper 2017/4. (MegaReg Series) New York University School of Law. New York.

- Jackson, Vicki C. (2007): *Transnational Challenges to Constitutional Law: Convergence, Resistance and Engagement*. *Federal Law Review* (Vol. 35.) 2007. 164. p.
- Jongh, Maurits de/Tom Theuns (2017): *Democratic Legitimacy, Desirability and Deficit in EU Governance*. *Journal of Contemporary European Research*. (Vol. 13.) 2017. Issue 3. 1283-1300. p.
- Joerges, Christian (2011): *How will constitutionalism and the idea of law-mediated legitimacy survive in postnational constellations? Comment on Stefan Kadelbach*. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): *Political Legitimacy and Democracy in Transnational Perspective*. Arena. Oslo. 2011. 135-144. p.
- Judge, David/ D. Earnshaw (2003): *The European Parliament*. Palgrave Macmillan. New York.
- Kadelbach, Stefan (2011): *Legitimacy, supranationalism and international organizations*. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): *Political Legitimacy and Democracy in Transnational Perspective*. Arena. Oslo. 2011. 113-134. p.
- Kaunert, Christian /Sarah Lénard/Ulrike Hoffmann (2013): *Venue Shopping and the Role of Non-governmental Organizations in the Development of the European Union Asylum Policy*. *Comparative Migration Studies (CMS)* Vol. 1. 2013. No. 1. 179-200. p.
- Kugler, Maurice/Rosenthal H. (1998): *Checks and Balances: An Assessment of the Institutional Separation of Political Powers in Colombia*. (Internet)
- Lánczos Petra: *Nyelvpolitika és nyelvi sokszínűség az Európai Unióban*. Doktori értekezés. Pázmány Péter Katolikus Egyetem, Jog- és Államtudományi Doktori Iskola. 2012.
- Lang, Andrei (2016): *Autonomie "über alles": Eine Kritik des Achmea-Urteils des EuGH*. *Juwissblog* (16. März 2018)
- Leach, Philip (2013): *No longer offering fine mantras to a parched child? The European Court's developing approach to remedies*. In: Follesdal, Andreas/ Birgit Peters/Geir Ulfstein (eds.): *Constituting Europe. The European Court of Human Rights in a National, European and Global Context*. Cambridge University Press. 2013. 142-180. p.
- Lehmann, Wilhelm (2009): *The European Parliament*. In.: Davis Cohen/Jeremy Richardson (eds.): *Lobbying the European Union: Institutions, Actors and Issues*. Oxford University Press. Oxford. 2009. 39-69. p.
- Lenaerts, Koen (2018): *The Court of Justice in 2017: Changes and Activity*. In: *Annual Report Judicial Activity*. Court of Justice of the European Union. Luxembourg. 2018. 8-19. p.
- Leone Alexander J.(2005): *Compliance with New International Law: A Study of Venice Commission Opinion No. 363/2005 on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*. *The Geo. Wash. Int'l Law Review* (Vol. 41.) 2009. 299-326. p.
- Leuwen, Karin van (2012): *On Democratic Concerns and Legal Tradition: The Dutch 1953 and 1956 Constitutional Reform 'Towards' Europe*. *Contemporary European History* (Vol. 21) 2012. Issue 3. 357-374. p.
- List, Heike (2011): *Finding a zoo for European polecats, lions and foxes. Contexts of democratic empowerment*. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): *Political Legitimacy and Democracy in Transnational Perspective*. Arena. Oslo. 2011. 204-215. p.
- Lord, Christopher (2011): *Power without arbitrariness? Some reflections on attempts to use indirect legitimacy to justify the EU as a 'restrained yet capable' form of political power*. In:

- Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 181-201. p.
- Martinsen, Franciska (2011): The process of legitimation as a large scale experiment. Comment on Erik Oddvar Erikson. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 281-288. p.
- Mazey, Sonia/J. Richardson (1993): Lobbying in the European Community. Oxford University Press. New York.
- McAuliffe, Karen: Behind the Scene at the Court of Justice. Drafting EU Law Stories. In: Fernanda Nicola/Bill Davis (eds.): EU Law Stories. Contextual and Critical Histories of European Jurisprudence. Cambridge University Press 2017. 40-57. p.
- McCown, Margaret (2009): Interest Groups and the European Court of Justice. In: Davis Cohen/Jeremy Richardson (eds.): Lobbying the European Union: Institutions, Actors and Issues. Oxford University Press. Oxford. 2009. 89-104 p.
- McCormick, D. Neil/Robert Summers (eds.): Interpreting Statutes. A Comparative Study. Dartmouth. Aldershot. 1991.
- Moravcsik, Andrew (2002): In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union. *JCMS* (Vol. 40.) 2002 No. 4. 603-624. p.
- Morgan, Glyn (2011): How desirable is further European integration? In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 217-234. p.
- Nardella, Carlo (2017): The Symbolic Legitimation of the European Union: Patterns and Problems. *Sociologica* 2017. Fasciolo 1. 2-18. p.
- Neuhold, Chritine (2001): The Role of European Parliament Committees in the EU Policy-Making Process. Renner Institute Wien, 27 p.
- Neyer, Jürgen (2011) Justice, not democracy. Legitimacy in the European Union. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 14-35. p.
- Nicola, Fernanda G. (2017): Luxembourg Style With or Without the UK. *Fordham International Law Journal* (Vol 40.) 2017 Issue 5. 1505-1534. p.
- Niesen, Peter (2011): Two kinds of transnational democracy. Comment on William E, Scheuerman. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 105-111. p.
- Nullmeier, Frank/Tanja Pritzlaff (2011): The great chain of legitimacy. Justifying transnational democracy. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 43-62. p.
- Ohlin, David (2015): The Assault on International Law. Oxford Univ. Press. Oouendo, Ángel R. (2017): The Politicization of Human Rights within the Inter-American System and Beyond. *International Law and Politics* (Vol. 50) 2017. No. 1. 2-73. p.
- Ophey, Kristina (2018): Post-Lisbon Policy Making in the European Commission. Juncker's Politics of (Re-)Structuring Infra-Commission Policy Formulation Processes. ARENA Working Paper 6/2018. 16. p.

- Oztaş, Buket/Amie Kreppel (2017): Power or Luck? Understanding the Character of European Commission Agenda Setting Influence. Paper presented for the Midwest Political Science Association Annual Conference. Chicago, April 6-9, 2017.
- Pavone, Tommaso (2018): Revisiting Judicial Empowerment in the European Union: Limits of Empowerment, Logics of Resistance. *Journal of Law & Courts* 2018. Fall, 2-44. p.
- Pedone, Luiz (1995): The Judiciary as an Obstacle to Democracy in Latin-America. (Internet)
- Pijl, Kees van der (1984): *The Making of an Atlantic Ruling Class*. London. Verso 1984.
- Pijl, Kees van der (2006): *Global Rivalries from the Cold War to Iraq*. Pluto Press 2006.
- Pokol Béla (1983): Stabilitás és legitimáció. *Valóság* 1983. 1. 13-22. p.
- Pokol Béla (1984): Stabilität und Legitimation. Die Umdeutungen der Legitimation in der westlichen Soziologie. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae. Sectio Iuridica*. 26. tom 1984. 173-179. p.
- Pollack, Mark A. (2016): Learning from EU Law Stories. The European Court and Its Interlocutors Revisited. In: Bill Davies/Fernanda Nicola eds. (2016): *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*. Cambridge University Press. 211- 240. p.
- Posner, Eric A. (2017): Some Comments on Beth Simmons's Mobilizing for Human Rights. *International Law and Politics* (Vol. 44.) 2017. No. 3. 819-831.p.
- Press Release (2017): EPP Group deplores attempts to keep NGO financing secret. (EPP Group in the European Parliament. September 14, 2017.
- Rasmussen, Hjalte (2007): Present and Future European Judicial Problems after Enlargement and the Post-2005 ideological Revolt. *Common Modern Law Review* (Vol. 44.) 1661-1687. p.
- Rasmussen, Morten (2013): Rewriting the History of European Public Law: The New Contribution of Historians. *American University International Law Review* (Vol. 28.) 2013. 1187-1221. p.
- Rasmussen, Morten (2014): Revolutionizing European Law: A history of the Van Gend en Loos judgment. *International Journal of Constitutional Law* (Vol. 12.) 2014. Issue 1. 136-163. p.
- Riegner Michael (2010): The Two Faces of the Internationalized pouvoir constituent: Independence and Constitution-Making under External Influence in Kosovo. *Goettingen Journal of International Law* (Vol. 37.) No. 3. 1035-1062. p.
- Röber, Volker (2011): Political legitimacy and democracy in transnational perspective. 'Democracy and or beyond the state'. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): *Political Legitimacy and Democracy in Transnational Perspective*. Arena. Oslo. 2011. 145-166. p.
- Russack, Sophia (2017): How is Juncker's last-chance Commission faring at mid-term? *European Policy Analysis* 2017. No 4. 1-11. p.
- Sandholtz Wayne (2016): A New Age of International Courts. *Tulsa Law Review* (Vol. 51.) 2016. Issue 2. 471-485. p.
- Saurugger, Sabine (2009): COREPER and the National Governments. In: Davis Cohen/Jeremy Richardson (eds.): *Lobbying the European Union: Institutions, Actors and Issues*. Oxford University Press. Oxford. 2009. 105-127. p.

- Scheingold, Stuart (1998): The Struggle to Politicize Legal Practice. A Case Study of Left Activist Lawyering in Seattle. In: Austin Sarat/S. Scheingold (eds.): Cause Lawyering. Oxford University Press. 1998. 118-150. p.
- Schepel, Harm/Erhard Blankenburg (2001): Mobilizing the European Court of Justice. In: Graine de Burca/Joseph H. H. Weiler (eds.): The European Court of Justice. Oxford University Press. 2001. 9-42. p.
- Scheuerman, William E. (2011): Postnational democracies without postnational states? Some sceptical reflections. In: Forst, Rainer/Rainer Schmalz-Bruns (eds.): Political Legitimacy and Democracy in Transnational Perspective. Arena. Oslo. 2011. 75-104. p.
- Schmidt, Vivien A. (2013): Democracy and Legitimacy in the European Union Revisited. Input, Output and „Throughput”. Political Studies (Vol. 61.) 2013. No 1. 2-22. p.
- Schmidt, K. Susanne (2000): Only an Agenda Setter? The European Commission's Power over the Council of Ministers. European Union Politics (Vol 1.) 2000. No. 1. 37-61. p.
- Schreienmacher, Björn (2014): Vom EuGH zur Richtlinie – wie die EU-Mitgliedstaaten über die Kodifizierung europäischer Rechtsprechung entscheiden. Transtate Working papers 2014. No. 183. Bremen. 22. p.
- Scott-Smith, Giles (2012): Expanding the Diffusion of US Jurisprudence – the Netherlands as a ‘Beachhead’ of US Foundations in the 1960s. In: John Krieger/Helke Rausch (eds.): American Foundations and the Production of the World Order in the Twentieth Century. Göttingen. Vandenhoeck & Rupprecht. 2012. 210-231. p.
- Slaughter, Anne-Marie (2004): The New Global Order, 2004.
- Somek, Alexander (2012): Administration without Sovereignty. In. Petra Dobner- Martin Loughlin (ed.): The Twilight of Constitutionalism? Oxford University Press 2010. 286. p.
- Springer, Alexander P. (1998): Political Justice? Assessing the Role of Colombian Courts. (Internet)
- Stone-Sweet, Alec (2010): The European Court of Justice and the Judicialization of EU Governance. Yale Law School, Faculty Scholarship Series. 2010. Paper 70. 53. p.
- Sundstrom, Lisa McIntosh (2014): Russian NGOs and the European Court of Human Rights. Human Rights Quarterly (Vol. 36.) 2014. 844-868. p.
- Szemesi Sándor (2013) Az emberi jogok európai örék új fegyvere: a *pilot judgement* eljárás a strasbourgi bíróság gyakorlatában. Jog - Állam - Politika 2013/ 4. 47-64. p.
- Tamm Ditlev (2013): The History of the Court of Justice of the European Union since its Origin. In.: The Court of Justice and the Construction of Europe. The Hague. Asser Press. 2013. 9-34. p.
- Teitel, Rudi/Rober Howse (2009): Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order. N. Y. U. Journal of International Law and Politics (Vol. 41.) 2009. 292-294. p.
- Terris, Daniel et al (2007): The International Judge: An Introduction to the Men and Women Who Decide the World's Cases. 2007.
- Tickell, Andrew: Dismantling the Iron-Cage: the Discursive Persistence and Legal Failure of a „Bureaucratic Rational” Construction of the Admissibility Decision-Making of the European Court of Human Rights. German Law Review (Vol 12.) 2011. 1799. p.

Van den Eynde, Laura. (2013): An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs before the European Court of Human Rights. *Netherlands Quarterly of Human Rights* 2013. No. 2. 271- 313. p.

Volk, Christian (2012): Why Global Constitutionalism Does not Live up to its Promises. *Goettingen Journal of International Law* (Vol. 2.) 2012 No. 2. 559-560. p.

Wahl, Rainer (2010): In Defence of 'Constitution'. In: Petra Dobner/Martin Loughlin (eds.): *The Twilight of Constitutionalism?* Oxford Univ. Press 2010. 240. p.

Waldron, Jeremy (2004b): Can there be a Democratic Jurisprudence? (Draft of March 2004 for Analytical Legal Philosophy Conference. NYU School of Law)

Wasserfallen, Fabio: The Judiciary as Legislator? How the European Court of Justice shapes Policy-Making in the European Union. Paper presented at the Annual Meeting of the Swiss Political Science. St. Gallen, January 8-9, 2009.

Water, Melissa A. (2007): Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties. *Columbia Law Review* (Vol. 107.) 2007. No. 2. 628. p.

Weiler, J. H. H. (2011): On the Political and Legal DNA of the Union and the Current European Crisis. (Lecteur at the Hertie School of Governance. 2011. 17. p. (Internet)

Weiler, J. H. H. (2012): Europe in Crisis – On 'Political Messianism', 'Legitimacy' and the 'Rule of Law'. *Singapore Journal of Legal Studies* 2012. 248-268. p.

Wiesbrok, Anja, (2013): The self-perpetuating of EU constitutionalism in the area of free movement of persons: Virtuous or vicious cycle? *Global Constitutionalism* 2013 Issue 1. 125-150. p.

Wilson, Bruce W/Handberg R. (1998): Opening Pandora's Box: The Unanticipated Political Consequences of Costa Rican Legal Reform. (Internet).

Wilson, Bruce M/Gaal, M./Handberg R. (2001): Comparing Activist National Courts: Hungary and Costa Rica. (Internet)

Zhang, Angela Huyue (2016): The Faceless Court. *University of Pennsylvania Journal of International Law* (Vol. 38.) 2016. No. 1. 71-119. p.